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Editorial

We are thrilled to bring you this eleventh volume of *Constitutional Court Review (CCR)*. The volume emerges from CCR’s first virtual conference in December 2020, which attempted to create an oasis of intellectual community in a time of social and academic isolation.

*CCR* is the project of many colleagues, collaborators and institutions. Five editors formed the Volume-Specific Editorial Committee (VSEC). The VSEC is charged with putting together and running the conference and then guiding the edition into print. Each VSEC editor is then specifically responsible for a set of articles, including a final proof-read of these articles. The VSEC works within the broader lively *CCR* editorial body. We are deeply grateful to all the *CCR* editors for the hard work and incisive engagement. Every article in this edition has been through a rigorous review process, which stems from extensive editorial engagement and robust peer review. Thank you to all of our editors for their perspicuous work, and to our anonymous peer reviewers for their careful and insightful reviews. We are grateful to our Editor-in-Chief, Stu Woolman, whose inspired vision created *CCR* and who is tirelessly committed to ensuring the high quality of the journal. A deepfelt thank you, too, to David Bilchitz, for extensive support and unstinting counsel throughout this process.

We are so grateful to the Konrad Adenauer Stiftung (KAS) who have provided generous assistance to *CCR* since its inception. KAS has supported us with the production costs of the journal. This is greatly appreciated, not least because it enables emerging academics to publish their work. We are especially grateful to the outgoing Resident Representative for South Africa, Henning Suhr and project manager, Nancy Msibi, for their continued support of the journal.

*CCR XI* has been enriched through the relationship with our publisher. We are deeply grateful to Jane Burnett, Publishing Editor of NISC, for her endless patience and proficiency in producing this edition of our journal, and to the NISC copyediting team for their meticulous attention under significant time pressures. We also thank Mike Schramm, Managing Director of NISC, for great support of the journal and efforts in extending its global reputation and footprint. Thank you for providing *CCR* with our publishing home.

*CCR*’s lifeblood is our authors. This edition features an outstanding range of articles from established academics, practitioners and young scholars, all of whom are vital for *CCR*’s ongoing relevance and success. Thank you for dynamic conference presentations, openness to engagement and working to tight deadlines.

And finally, we are indebted to our readers. We hope that you will find the articles in *CCR XI* provocative in all the best ways!

*Constitutional Court Review XI – Volume-Specific Editorial Committee*

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Nompumelelo Seme – Advocate, Johannesburg Bar
There is no Right to Property: Clarifying the Purpose of the Property Clause

THOMAS COGGIN

ABSTRACT: In this article, I call for greater clarity on the meaning of constitutional property in the Constitutional Court’s section-25 jurisprudence. I also urge the Court to provide more deliberate and substantive reasons for the grounds on which entitlements before the Court should enjoy constitutional protection. In its section-25 jurisprudence the Court either skims over the meaning of the word, or it treats the entitlement as self-evident. This lack of precision leads to a ‘wide-open-gates’ policy that has two negative consequences. First, in failing to articulate why an entitlement should enjoy constitutional protection, the Court moves the jurisprudence of section 25, the property clause, away from the purpose of the clause. Through an historical reading of the making of section 25, and a comparison with section 28 of the Interim Constitution, I argue that the property clause holds a transformative purpose. However, due to the wide berth accorded by the Court to the definition and scope of constitutional property, the transformative nature of the property clause remains largely underexplored. Second, in condoning an entrenchment of existing interests that cling to the property clause to resist legislative reform, the Court’s approach has the potential to stultify the legislative regulation of property and interests deemed to be ‘property’. Because it becomes so easy to tie an interest to property, the clause is put to work defending interests not envisaged at its inception. I conclude by arguing that the failure to provide sufficient scope and clarity to the meaning of property hinders the ability of the property clause to enact reform. This is especially concerning in a context in which land and resource inequality in South Africa pivots off property; in which livelihoods are marginalised through property’s shadow; and in which the legitimacy of the property clause remains an issue given the epistemicide of indigenous land and resource governance systems and knowledge enacted through colonisation.

KEYWORDS: constitutional property, property jurisprudence, section 25, social function of property

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I INTRODUCTION

The title of this article may suggest to some that it is an anti-property critique. That reading would be a mistake: this article is intended to jolt the reader into requiring and articulating from South African jurisprudence far greater conceptual clarity of what we mean by ‘property’ under the property clause, section 25 of the Constitution. I argue in this article that our constitutional property jurisprudence takes the meaning of ‘property’ in section 25 for granted, treating it as self-evident or self-explanatory. Taken to its extreme, section 25 is referenced as incorporating a right to property. However, this ‘right to property’ is positioned incorrectly in the popular imagination, importing private law notions of absolute dominium in which property rights are treated largely as inviolable. In fact, a right to property is as much about not having a right to property. The right to property is not a self-evident fait accompli, but it is rather dependent on the purpose of the constitutional clause, and whether this purpose renders an interest capable of constitutional protection.

I therefore argue for a more deliberate reading of why entitlements should enjoy constitutional property protection. In this article I refer to these constitutional entitlements as ‘constitutional property’. My central thesis is that this first component of section 25 has not received enough mileage in section-25 jurisprudence. The Constitutional Court either skims over the question, or treats an entitlement as self-evident. This ‘wide-open gates’ policy of allowing any entitlement that can be linked to property in terms of a tenuous legal fiction to enjoy constitutional protection has two negative consequences. First, the failure to give the entitlement substantive legal content moves the Court away from the purpose of the property clause. Part I of this article, is to validate ‘constitutional property’ as holding a social function. Second, allowing any entitlement to receive constitutional protection potentially makes it that much more difficult for Parliament to exercise its regulatory powers given that an aggrieved party may seek the protection of the property clause to push back against the regulation of property. Because it becomes so easy to tie an interest to property, the property clause is put to work defending interests not envisaged at its inception. It is as though the Court is unaware of how property can produce and further entrench wealth inequality. This is contradictory considering the Court’s approach in housing cases in which it pushes back against proprietied interests in favour of housing rights. In turn, the Court’s housing jurisprudence reveals a social function of property, but this is curiously absent in the Court’s property jurisprudence.

There are four components to the article. First, my historical reading traces the arc of section 25 from its political underpinnings in section 28 of the Interim Constitution (‘section 28 IC’) to its incorporation in section 25 of the Final Constitution. I draw on this historical reading to argue that the purpose of the property clause is to promote the social function of property. Second, I trace a range of cases in which the Constitutional Court ostensibly dealt with the meaning and purpose of section 25. I put forward a number of reasons why the failure to give constitutional property any substantive content in these cases is problematic. Third, I explore the debate around limiting a property entitlement at the threshold stage of section 25, versus the justification stage later on in the inquiry. Finally, I provide a number of concluding thoughts on the negative consequences of this ‘wide-open-gates’ policy.
II  A HISTORY OF THE CONSTITUTIONAL PROPERTY CLAUSE: DEVELOPING THE SOCIAL FUNCTION OF PROPERTY

In this part, I trace the history of the property clause in the Final Constitution. I employ this history as a way of understanding the intentions of our founding ‘parents’. This process is useful in understanding the tensions at play at the time section 25 was drafted, and how we can begin the process of clarifying the purpose of section 25.¹ My argument throughout this article is that the Court’s property jurisprudence reveals little about the purpose of the clause, and what it was and still is intended to achieve. It would appear section 25 is wielded by many as a bludgeon, either to insist that the property clause is sacrosanct and an inviolable check against the state regulation of property interests;² or that the clause lacks legitimacy and thus its transformative potential will remain limited or merely an illusion.³ Both positions have value, but neither position seems particularly interested in working the property clause as it currently stands. Accordingly, I explore how our collective praxis thus far has not provided section 25 with sufficient oxygen to perform the purpose envisaged by its drafters.

Although this ‘purpose’ is contested and subject to change over time, as a starting point the Court should position itself relative to the making of the clause, The Court should interpret the intention of section 25 in light of the history that informed its development, which reveals an evolution from a position in which property rights are explicitly protected to one in which property is positioned relative to its social function. This reading of section 25 as embodying a social function of property – does not mean that property entitlements do

¹ H Klug ‘Decolonisation, Compensation and Constitutionalism: Land, Wealth and the Sustainability of Constitutionalism in Post-Apartheid South Africa’ (2018) 34 South African Journal on Human Rights 469. Klug conducts a similar historical exercise in his article; and, based partly on this historical reading, concludes that the property clause is not a hindrance to land reform in particular.

² For example, South African Institute of Race Relations NPC (IRR) ‘Submission to the Ad Hoc Committee to Initiate and Introduce Legislation Amending Section 25 of the Constitution of the Republic of South Africa, 1996, regarding the Draft Constitution Eighteenth Amendment Bill of 2021’ (13 August 2021) 34, available at https://bit.ly/3AlU7Ci. (“The IRR is opposed to any amendment to the Property Clause of the Constitution because it believes that state power viz. private property must be limited as much as possible, and because land reform is best achieved through facilitating the open market. Quoting the work of the Fraser Institute in Canada, the submission notes that ‘the countries which do the best in upholding private property rights and limiting state power are the “most free”, in the economic sense.’”)³

³ This position is perhaps best represented through the decolonial critique of constitutional rights. Further exploration of this pressing critique is needed relative especially to the popular and institutional legitimacy of the property clause, and as interpreted against the broader backdrop of the notion of a ‘post’-apartheid South Africa. This is especially relevant for property considering how colonisation was, to use the language of the property clause, fundamentally an arbitrary deprivation of property, and that ‘actual arrangements of… land and property ownership [and] spatial segregation… were all left untouched in the new constitutional dispensation.’ JM Modiri ‘Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence’ (2018) 34 South African Journal on Human Rights 300. I believe that opening the discussion to the purpose of the clause may lend itself to highlighting the erasure of indigenous resource governance systems through the colonial imposition of settler law, and the need to reinscribe land with a just meaning. However, I acknowledge the limits of my argument in that working within section 25 may achieve little in ‘the recovery and restoration of full, integral and comprehensive sovereignty to the indigenous peoples conquered in the unjust wars of colonisation’ which is otherwise ‘consigned to oblivion.’ MB Ramose ‘In Memoriam: Sovereignty and the “New” South Africa’ (2007) 16 Griffith Law Review 310. See also M B Ramose ‘Towards a Post-Conquest South Africa: beyond the Constitution of 1996’ (2018) 34 South African Journal on Human Rights 326; M Lepuru ‘The Youth of Our Time, Constitution and the Future of “South Africa” (2021) Alternate Horizons 1; E Zitzke ‘A Decolonial Critique of Private Law and Human Rights’ (2018) 34 South African Journal on Human Rights 492.
not enjoy constitutional protection from arbitrary deprivation by the state (which includes expropriation without the awarding of just and equitable compensation). Rather, it means that such protection is not a primary concern of the clause; its primary purpose is, where necessary, to mediate the exercise of property rights in favour of a broader public interest.

A From a right to land, to a right to property

To trace this arc, I conducted archival research at the South African Historical Papers Archive at the University of the Witwatersrand. An ANC proposal for a new clause on land rights to be included in the draft Bill of Rights revealed no property clause, but instead in a clause entitled ‘Land and the Environment’, it included a Right to Land. This right to land was grounded in the productive use of land, and obligated legislation providing for stable and secure tenure.

The existing system of property rights was positioned as ‘the country’s primary asset, the basis of life’s necessities, and a finite resource’. The proposal is significant in the way it positioned a reconfiguration of the current system of property, which appeared to be understood as a significant legal basis upon which the entire system of apartheid and colonialism existed. Indeed, like other colonised countries, South African land has been parcelled up as a project of enclosure by its white settler community. In the process, territory is reinscribed with new meaning, one bound up in the dominium of property. Property becomes a ‘cultural force’, cloaked in a perception of ‘clarity and certainty’ over what was ostensibly a ‘disordered and ambiguous world’. Thus, the system of property was far from regarded as an ‘innocent’ legal assemblage, and undoing apartheid and colonialism required an undoing of property. Although not explicitly stated, we can read a social function of property in these clauses and understand it as one such method of ‘undoing’ property: the equitable and shared distribution of finite resources, a privileging of use over title and, in place of a blunt right-to-property outlook, a legal system designed to provide stable and secure tenure.

Helena Alviar Garcia provides some background to the meaning of the social function of property in a chapter on Comparative Constitutional Law in Latin America. She quotes cases from the Colombian Constitutional Court that consider the social function of property as enshrined in the Colombian Constitution:

In addition to including the social and ecological functions of property… Article 58 also establishes that the state has the duty of promoting associative and collective forms of property… ‘The social function is, on the one hand, the meaning of moderating and restricting the scope of property rights, while on the other hand, it involves other types of property. [T]here is no doubt that in the Constitution individualistic theory is discarded and its exercise is given a highly social content,


5 Ibid Article 11 (6): ‘Legislation shall provide that the system of administration, ownership, occupation, use and transfer of land is equitable, directed at the provision of adequate housing for the whole population, promotes productive use of land and provides for stable and secure tenure.’

6 Ibid Article 11(2).

which allows the law to impose limitations, in order for it to serve the community interests and social solidarity.  

This view of property formed a backdrop to the negotiations for a new Constitution in South Africa, as part of both the Congress for a Democratic South Africa (CODESA) and the Multiparty Negotiation Forum (MPNF). CODESA I took place in December 1991 and CODESA II in May 1992, after which negotiations broke down. The negotiations resumed in March 1993 amidst major violence in South Africa’s cities. The Multiparty Planning Conference met on the 4 and 5 of March 1993, laying the foundations for the Multiparty Negotiating Forum on the 1 and 2 of April 1993.

Three versions of the draft Interim Constitution were produced as part of the MPNF – the first on 21 July 1993; the second on 6 August; the third on 20 August; and the final on 18 November 1993. This paved the way for South Africa’s first democratic election on 27 April 1994, and its transition to a democracy. Property as outlined in the second and third drafts reflected the final position in section 28 of the Interim Constitution. Both drafts provided for a positive entitlement to acquire, hold, and dispose of rights in property, for the expropriation of property, and for a somewhat complicated land restoration clause. Section 28 kept this positive entitlement, but added a subclause prohibiting deprivation unless in accordance with a law, and it dropped the land restoration clause altogether. Land restitution was instead placed in chapter 8 of the Interim Constitution, delinked from the property clause.

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9 Compare this position to that of the National Party which, as Chaskalson has argued, ensured maximum protection for existing property rights in a future democratic South Africa: ‘To the extent that the National Party could control the future, white South Africans were not going to be deprived of their property by a democratic state. Even in the grave whites would be able to keep their property safe from an ANC government.’ M Chaskalson ‘Stumbling towards Section 28: Negotiations over the Protection of Property Rights in the Interim Constitution’ (1995) 11 South African Journal on Human Rights 222, 224. See also M Chaskalson ‘The Property Clause: Section 28 of the Constitution’ (1994) 10 South African Journal on Human Rights 131.

10 Draft Constitution, 6 August 1993, section 29(3): ‘Nothing in this section shall preclude measures aimed at restoring rights in land to or compensating persons who have been dispossessed of rights in land as a consequence of any racially discriminatory policy, where such restoration or compensation is feasible.’

11 Section 28 of the Interim Constitution Act 200 of 1993 was entitled ‘Property’, and provided as follows: (1) ‘Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights; (2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law; (3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected.’
Section 25 of the Final Constitution is different. Part of my intrigue with how the Court has treated the purpose of the property clause lies in just how different it is to section 28 IC. That difference is not merely textual; those textual differences reveal a far deeper meaning about what the property clause is intended to achieve. I suggest three substantive differences below: 12

First, section 28(1) IC provided that ‘[e]very person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights.’ This positive entitlement to acquire, hold, and dispose of property rights stands in stark contrast to the current design of section 25 of the final Constitution, which simply contains no positive entitlements. I go into this distinction later in the article, including arguments that the distinction makes no difference. However, I argue that it does make a difference, not because it is so difficult or unwise to define property so definitively,13 but because a hesitancy to enter this terrain in the Court’s jurisprudence has negative consequences for the clause as a whole, including both its purpose and how it is used by litigants to advance their interests.

Second, the expropriation subclause is similar to the final subclause, but it is now followed by and connected to six other subsections which oblige the state to redress land inequality in South Africa. This change is significant in the message and tone behind section 25. The integration of the land reform clause with the property clause reflects a far more reform-oriented view of property: section 25 is as much about protecting against arbitrary deprivation of property as it is about creating a positive obligation on the state to facilitate land reform – if not even more so. After all, there are six clauses that speak to property reform in South Africa, and only three clauses which protect existing property rights. More so, the land reform entitlements in the Interim Constitution were much weaker than they are in the final Constitution. A person or a community deprived of a right in land could claim restitution in section 121 of the Interim Constitution, but only from the state.14 Section 25 specifically mandates the restitution of the property, or equitable redress, and does not position this right as applicable only against the state. Clearly, section 28 IC was structured quite deliberately to not disrupt the property status quo too radically.

Third, section 25 contains an internal limitation that is peculiar in how it doubles up on section 36 of the Constitution, and how it is obviated by the Court’s proportionality standard of review under arbitrary deprivation. This limitation is contained in section 25(8) FC; and

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12 T Ngcukaitobi *Land Matters: South Africa’s Failed Land Reforms and the Road Ahead* (2021) 95–104, who argues that ‘[s]everal provisions in the Interim Constitution severely limited the ability of the state to achieve expansive changes to apartheid’s configuration of landownership: these included the right to hold property, the use of expropriation solely for public purposes, and the exclusion of land from the general property clause.’ See also Bradley Slade ‘“Public Purpose or Public Interest” and Third Party Transfers’ (2014) 17 Potchefstroomse Elektroniese Regblad/Potchefstroom Electronic Law Journal 167, 183–186, who undertakes a comparison of expropriation subclauses in the Final and the Interim Constitutions (and also provides interesting insight into previous expropriation laws applying during the Republic, Union, and colonial/settler administrations).

13 *First National Bank of South Africa t/a Wesbank v Commissioner for the South African Revenue Services & Another; First National Bank of South Africa Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) (‘FNB’) at para 51.

14 Section 121(2) IC: ‘A person or a community shall be entitled to claim restitution of a right in land from the state if— (a) Such person or community was dispossessed of such right at any time after a date to be fixed by the Act referred to in subsection (1); and (b) Such dispossess was effected under or for the purpose of furthering the object of a law which would have been inconsistent with the prohibition of racial discrimination contained in section 8(2), had that section been in operation at the time of such dispossess.’
provides that ‘[n]o provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provision of this section is in accordance with the provisions of s 36(1).’ It is beyond the scope of this article to reflect more fully on the significance of section 25(8), suffice to suggest that its inclusion may point to the property clause as embodying the social function of property, and a reminder that property rights are not absolute; that they are as much subject to the limitations clause as any other right, if not ‘more’ so given the specific mention of section 36 in the property clause. The ‘hurdle’ of a limitations clause is to be welcomed, not because it makes the regulation of property more difficult, but because it normalises the limitation of property.

B  From a right to property, back to a right to land?

My three arguments above are bolstered by examining the history specifically of section 25, and how it came about. Of particular interest in this process was a collection of papers belonging to the National Land Committee (‘NLC’), described in a 2003 submission to Parliament’s Portfolio Committee on Agriculture and Land Affairs as a collection of land rights NGOs whose main objective involved the ‘struggle for the transformation of land ownership’ and who sought to bring about ‘people centred rural development’. The papers in the archive demonstrate a strong interest in how section 25 was drafted, and provide a window into some of the tensions that existed. I draw on these papers as a way of animating the discussion around the structure of section 25.

I begin with a memorandum drafted in January 1996 by the National Director of the NLC, Brendan Pearce, to the NLC affiliates. At this point, section 28 IC had been in effect since November 1993. In this memorandum, the NLC indicated its opposition to including a property clause at all in the final constitution because ‘such a step merely reinforces the highly skewed and unjust distribution of land, which is the result of dispossession effected through colonialism and apartheid.’ The memorandum goes on further to illustrate the bone of contention between the political parties in the Constitutional Assembly. The National Party (NP) and the Democratic Party (DP) were ‘adamant that present property rights be entrenched’ in the Constitution, ‘though in agreement with the general spirit of land reform.’ The African National Congress (ANC) and the Pan Africanist Congress (PAC) were ‘insistent that a property clause should not stand in the way of effective land reform that the state ought to pursue through legal and financial measures.’

15 In presenting these arguments around the internal limitation in section 25(8), I echo Klug’s arguments that ‘this section has, to date, never been relied upon politically, by the legislature or the executive, nor has it been subject to judicial interpretation by the courts; it is time that it is applied.’ Klug (note 1 above) at 490.


17 B Pearce, ‘The NLC argues in favour of the scrapping of the Property Clause from the Constitution’ (16 January 1996) 1, available at the Wits Historical Papers Archive, AG2735 TRAC.

18 Pearce Ibid at 3. Included in the papers is the Pan African Congress’ final submission on the right to property, dated 30 January 1996. In this submission, signed in part by the current Minister of Public Works and Infrastructure, Patricia de Lille, the PAC advocates for a “broad” principle that “land belongs to the nation and cannot be owned by individuals”; in this regard, it advocated for expropriation with compensation only for improvements on the land, and that “legitimately acquired private property” could be regulated by legislation.
Two months later, in March 1996, Brendan Pearce sent out another memorandum to the NLC affiliates. In this memorandum, Pearce reflected on the success of the NLCs efforts in bringing the debate around the property clause into the public arena, and that the ANC felt extreme pressure from the NLCs campaign.19 His memorandum indicates the kind of tensions at play at that moment, and his reflection on the debate in the public arena is supported by other documents in the archive. However, the memorandum importantly includes a draft of a proposed section 25, and it is clear from the message of Pearce’s memorandum that the present state of the clause lay at the intersection of intense negotiation between the ANC and the NP. There are three points of interest.

First, the clause begins with a statement that ‘[e]veryone has the right to have equitable access to land’, and that the state must take steps to realise this right.20 Note how the right to land was completely absent in section 28 IC. Its re-emergence in a draft of section 25 suggests a discomfort with section 28 IC, and that protecting the right to acquire, hold and dispose of property did not mean the same as the right to land. Second, subsection 2 of the proposed clause stated that ‘[t]he institution of property shall be respected’ and that the ‘nature, use, content and limits shall be determined by law.’21 Again, here we witness the social function of property, an affirmation of a pluralist or progressive view that the institution of property is not a system innate to our being but rather a system to be regulated for the broader public interest.22 Third, subsection 5 of the proposed clause contained many of the current considerations for calculating just and equitable compensation in the event of expropriation, but it included one factor not currently covered by section 25(3) – ‘the ability of the state to pay [compensation].’23

or left to the common law. See RK Sizani & P de Lille, ‘Final Submission of the PAC on the Right to Property’ (30 January 1996), available at the Wits Historical Papers Archive, AG2735 TRAC.

19 B Pearce, ‘RE: Property Clause Campaign latest update’ (11 March 1996), available at the Wits Historical Papers Archive, AG2735 TRAC.

20 Ibid. ‘Everyone has the right to have equitable access to land. The state must take reasonable and progressive legislative and other measures to secure this access.’

21 Ibid.


23 The full subclause reads as follows: ‘(5) When a court decides the amount of compensation, timing or manner by which payment must be made, the court must determine an equitable balance between the public interest, which includes land reform, and the interests of those affected, having regard to all factors, including – (a) the
There is no right to property: clarifying the purpose of the property clause

Handwritten next to this proviso are the words, ‘bargaining chip’. It is unclear who wrote this, but it again points to the social function of property; that even a lack of resources should not prevent the state from fulfilling its duty to enact land reform; and that factors such as the market-related value of property will not stand in the way of this programme. Of course, the suggestion that this factor was being used as a bargaining chip or a ‘stick’ implies that the negotiator was not that committed to the idea; but in wielding the stick in the first place they arguably were committed enough to achieving the desired ‘carrot’ received in exchange. That ‘carrot’ is a clause committed to the social function of property.

It was off the back of these initial discussions that in early April 1996, the Constitutional Assembly held a *bosberaad* to iron out details of the 5th Working Draft of the Constitution. On 22 April 1996, Jennie Samson, the Legislation Monitor of the NLC, sent out an update to NLC affiliates outlining how the property clause had developed since.24 Attached to the memorandum was also a current draft of the clause. This draft begins to look more like section 25. It removed entirely the subclause providing that the institution of property must be protected.25 The phrase ‘the ability of the state to pay [compensation]’ was removed from subclause 3 outlining factors to be considered in determining compensation, and the phrase ‘just and equitable’ was now inserted into the clause.26

Four days later, another version of the property clause was circulated to NLC affiliates. Two important aspects are worthy of mention: First, subclause 3 was again amended, this time removing the final factor for determining compensation – that of the nation’s commitment to land and natural resource reform. The reason for this removal was that it was covered in subclause 4 under the notion of ‘public interest’, and so including it as a factor in determining a just and equitable balance between the public interest and the interests of those affected would seem to encompass a ‘doubling-up’.

Second, subclause 8 remained in place, which provided that ‘no provision of this section may unreasonably impede the state from taking reasonable legislative and other measures to achieve land reform [and in order to] redress the results of past racial discrimination.’27

I highlight this latter point as, in the memorandum from Jennie Samson discussed above, she notes that as part of organised business’ lobbying of the ANC during ‘bi-laterals’, they sought to subject subclause 8 to the limitations clause – which is the current position in section 25. In a subsequent memorandum on 8 May 1996, Samson expressed disappointment

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24 J Samson ‘Property Clause’ (22 April 1996), available at the Wits Historical Papers Archive AG2735 TRAC.
25 Ibid at 6. Instead, the clause elevated the deprivation clause, providing that ‘[n]o one may be deprived of property except in accordance with law of general application, and no such law may permit arbitrary deprivation of property. This provision does not preclude reasonable measures to regulate property.’
26 Ibid. The full subclause reads as follows: ‘(3) The amount, timing and manner of compensation must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant factors including – (a) the current use of the property; (b) the history of the acquisition and use of the property (c) the market value of the property; (d) the extent of state investment and subsidy in the acquisition and beneficial improvement of the property; (e) the purpose of the expropriation; (f) the nation’s commitment to land reform, and to reforms to bring about equitable access to water.’
27 B Pearce, ‘Fax Sheets: This is the latest draft of the property clause with last amendments in brackets’ (26 April 1996), available at the Wits Historical Papers Archive AG27325 TRAC.
that subclause 8 was made subject to the limitations clause – it was always viewed as ‘the safety valve for the entire property clause.’\textsuperscript{28} However, as noted above, there is underexplored value in section 25(8) and its invocation to limit property rights within the broader framework of section 36.

Although some may view the final clause as a compromise between two competing visions for the property clause, the evolution from section 28 IC to section 25 reveals something more transformative.\textsuperscript{29} Both clauses were the product of negotiation, and the kind of tensions and debates visible in public discourse today are by no means new. In fact, they were a core component of a push to remedy the defects of section 28 IC in favour of a far stronger clause in section 25, one far more concerned with land and resource reform than the protection of existing property entitlements. In failing to develop and use the purpose of the property clause – in every domain, be it executive, legislative, or judicial; national, provincial, or local; and civil society, including public interest litigation – we have forsaken the transformative genesis of the clause, embodying it would seem a hesitancy or fear to use the clause.

\section*{III THE WIDE-OPEN GATES OF CONSTITUTIONAL PROPERTY}

In this part, I lay out how constitutional property is presented in our jurisprudence.\textsuperscript{30} There exists a lack of conceptual clarity in our constitutional jurisprudence as to the meaning of property and what the property clause is intended to achieve. The Constitutional Court has not given this question sufficient mileage in constitutional property clauses, and its ‘wide-open gates’ approach in respect of constitutional property serves not to enjoin a project of resource reform, but rather to solidify a private law mould in which any entitlement that can be tied tangentially to property is protected under section 25. The net effect is twofold. Firstly, it moves our jurisprudence away from the purpose of the property clause. The Court either skims over why the entitlement enjoys constitutional protection, or it treats the entitlement to property as self-evident. However, as I demonstrate with reference to case law, this fails to give these entitlements any kind of substantive content, a much-needed ingredient for a clause that is heavily contested.

Secondly, the Court’s approach opens an avenue for legal challenges that make the public regulation of property and interests deemed property that much more difficult. This argument leads me to suggest that the property clause is being used as something it was never intended as. In each of the cases I survey below, the party claiming constitutional property is reacting against a move by the legislature to regulate that entitlement in the public interest. The party is allowed to do so because the Court is willing to let any entitlement through the gates of

\begin{itemize}
\item \textsuperscript{28} J Samson ‘Property Clause Update’ (10 May 1996), available at the Wits Historical Papers Archive AG2735 TRAC.
\item \textsuperscript{29} J Dugard reaches a similar conclusion about the transformative potential of section 25. In her examination of legislation and case law relevant to the other components of section 25, including subsection (6) on advancing tenure security and subsection (7) on restitution, she notes with regard to the latter that in ‘general, the courts and especially the Constitutional Court have pursued substantively transformative interpretations of the legal frameworks governing restitution.’ J Dugard ‘Unpacking Section 25: What, If Any, Are the Legal Barriers to Transformative Land Reform?’ (2009) 9 Constitutional Court Review 9 135, 158.
\item \textsuperscript{30} As a term, ‘constitutional property’ denotes the ‘legitimacy of restrictive state powers, exercised in the public interest, that may conflict with absolute (or even strong) protection of private property.’ AJ Van der Walt The Constitutional Property Clause: A Comparative Analysis of Section 25 of the South African Constitution of 1996 (1997) 101.
\end{itemize}
constitutional property and only then is willing to limit the entitlement. This does not mean that the Court is incorrect to let the entitlement through, but the approach does not permit much space for the Court to pause and reflect on the invocation of the property clause by these interests for the long-term purpose and vision of the clause. In this regard, it may be worth considering the words of Baleka Mbete, who was an active observer of the negotiations around both section 28 IC and section 25:

I had no appetite for the property clause inserted in the Interim Constitution given our history of dispossession and deprivation. I held the view that there should not be a property clause in the Final Constitution. My firm view was that the property clause unduly protected capital and prevented the state from taking appropriate steps in the reform, restitution and redistribution of land.

This part is presented chronologically. I begin at the First Certification of the Constitution judgment handed down in 1994, and end with South African Diamond Producers’ Organisation v Department of Minerals and Energy (SADPO) in 2017. We witness little development in the Court’s jurisprudence about the purpose of the clause over this 23-year period. Either it is taken for granted that the entitlement is constitutional property, or the Court skims over the issue, often noting how difficult it is to define property.

A A political hot potato? Constitutional property under the Interim Constitution

This position first emerged in the First Certification judgment, where the Constitutional Court established the precedent through which it would read property. Two objections were levelled against the formulation of section 25: first, that it did not protect a positive entitlement to acquire, hold and dispose of property, and second that the provisions governing expropriation and the payment of compensation were inadequate. To some degree, the Court was stuck here given the dominium-centric approach in section 28 IC. The Final Constitution could only be certified in line with the Constitutional Principles (‘CP’) set out in Schedule 4 of the Interim Constitution. Constitutional Principle II required ‘due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution’, which included section 28 IC and its positive entitlement to acquire and hold rights in property. The objection that section 25 did not comply with section 28 IC was therefore not per se unwarranted: indeed, section 28 IC and section 25 read very differently regarding the purpose of property law. It is arguable, then, that the Court was cautious in the meaning it ascribed to property under section 25, and it said as much in the beginning of the judgment when it acknowledged that ‘[w]e may however be called upon in future and in the context of a concrete dispute to deal with constitutional provisions we have had to construe in the abstract for the purposes of the certification process.’

In certifying section 25, the Court was not so abstract in its approach as it was indefinable: property is everything and nothing at all. After briefly covering an array of constitutions which span both negative and positive protections of property, it concluded that ‘no universally

[33] Ibid at para 71.
[34] Ibid at para 3.
recognised formulation of the right to property exists.\textsuperscript{35} To avoid the impasse between section 25 and section 28 IC, the Court decreed that ‘[t]he provision contained in, which is a negative formulation, appears to be widely accepted as an appropriate formulation of the right to property.’\textsuperscript{36} This may be so, but this entails problematic consequences for clarifying the purpose of the property clause. A positive formulation means something very different to a negative formulation, especially so in a Bill of Rights full of actual positive claims (such as a right of access to adequate housing in section 26). But, moreover, is there even a negative formulation of the right to property, or is there merely a positive entitlement against arbitrary deprivation of property and a positive entitlement against expropriation without just and equitable compensation? As such – and bearing in mind how controversial the issue is – could the Court really make a claim that a negative formulation is ‘widely accepted’ as an appropriate formulation of the right to property?

Van der Walt considered this argument in 1997 and, while labelling it as ‘technically ingenious’, dismissed it for two reasons.\textsuperscript{37} His first argument was that the distinction between a negative and positive formulation is in practice inconsequential if we compare South Africa’s approach to other jurisdictions that deal with similar distinctions. He predominantly maintained his focus on the German Constitutional Court and their interpretation of Article 14 of the \textit{Grundgesetz}, which contains both a positive guarantee of existing property, and a negative formulation against uncompensated expropriation.\textsuperscript{38} He noted that the German courts position this negative component of Article 14 as encompassing a positive entitlement, and that the positive component of Article 14 has a separate, different meaning.\textsuperscript{39} This latter meaning is to protect the \textit{institution} of property, whereas the former meaning is to protect individual entitlements to property. His second argument is that it would make no sense why section 25 would not protect a right to property, especially since ‘the right to a clean and healthy environment and the right to housing are entrenched in the bill of rights.’\textsuperscript{40} For these two reasons, he proceeded on the presumption that section 25 embodies a ‘property guarantee’ and was not merely a property clause, and that the right is both one \textit{in the Bill of Rights} for the purposes of section 36(1), but also was a right \textit{entrenched in the Bill of Rights} as meant in section 36(2).\textsuperscript{41}

My argument in this article is not that the property clause fails to protect property entitlements. But classifying section 25 as embodying a right to property and, in the process, assuming that every propertied entitlement before a court enjoys constitutional protection deprives the clause of its substance. There is no clear direction regarding the purpose of the

\textsuperscript{35} Ibid at para 72.
\textsuperscript{36} Ibid.
\textsuperscript{37} Van der Walt (note 30 above) at 23–28.
\textsuperscript{38} Article 14(1) \textit{Grundgesetz} (trans.): Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws. Article 14(3) \textit{Grundgesetz} (trans.): Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute concerning the amount of compensation, recourse may be had to the ordinary courts.
\textsuperscript{39} Van der Walt (note 30 above) at 24.
\textsuperscript{40} Ibid at 23.
\textsuperscript{41} Ibid at 26.
There is no right to property: clarifying the purpose of the property clause

It is probable that the Court’s sense of caution was because it was acutely cognisant of how political the issue was at the time, and that a compromised solution would necessitate this ‘wide-open-gates’ articulation of section 25. Since then, however, the Court has not fared much better in giving its conception of ‘property’ greater clarity. It offers ‘glimpses’ into the meaning of section 25 before retreating into a position of deference, saying no more than it perceives necessary. Consider, for example, how the Court in *Transvaal Agricultural Union v Minister of Land Affairs* faced a challenge to the Restitution of Land Rights Act (RLRA).\(^{42}\) Decided a few months after *First Certification*, the applicant in this case challenged provisions of the RLRA partly on the basis that they infringed their members’ rights to acquire, hold, and dispose of rights in property in terms of section 28 IC, which prevailed at the relevant time. On the one hand, the Court found that it was clear from sections 121, 122 and 123 of the Interim Constitution (which provided for land restitution) that ‘existing rights of ownership do not have precedence over claims for restitution’ and that the conflicting interests between claimants and current registered owners ‘are to be resolved on a basis that is just and equitable’.\(^{43}\) But then, when drilling down to the sections in question – subsections 11(7) and (8) of the RLRA, which are intended to maintain the status quo of the parties pending the determination of the claim for restitution – the Court backtracked, declaring that it is ‘not clear that these status quo provisions’ infringe section 28 IC and that it is ‘not desirable to say more in regard to the argument’.\(^{44}\) The Court continued that the ‘restitution of land rights is a complex process’ and that ‘Parliament is given a discretion by the Constitution to decide how this process is to be carried out.’\(^{45}\) In other words, it appeared that the Court was treading a fine line between upsetting the traditional status quo in which property rights were a root cause of inequality, and affirming the need for land restitution.

As with the *First Certification* judgment, one can accept that the Court here was in its institutional infancy and was dealing with a political ‘hot potato.’ But, again, treading this line between the two interests revealed a hesitancy in giving substantive content to the property clause, and it planted the seed for future indecision as to the meaning of property and the kind of entitlements protected by section 25 FC.

In fact, the Court seems to adopt an unexpressed sigh of relief when it can skip through the question of the constitutional interpretation of ‘property’, and head straight to considerations of subsections 25(1) and (2) FC. This is either because the entitlement was so ‘obviously’ property for the purposes of section 25 FC, or because this was common cause between the parties. In *Harksen v Lane*, for example, there was simply no question that Jeanette Harksen’s assets constituted property worthy of protection under section 28 IC,\(^{46}\) which was relevant as the application for referral of the matter to the Court was made prior to the coming into force of section 25 FC on 4 February 1997. Instead, the property angle in the case turned on whether section 21 of the Insolvency Act 24 of 1936 constituted an uncompensated expropriation of assets belonging in title to the spouse of an insolvent estate. The Court ruled that it did not,

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\(^{42}\) *Act 22 of 1994; Transvaal Agricultural Union v Minister of Land Affairs & Another* [1996] ZACC 22, 1997 (2) SA 621 (CC).

\(^{43}\) Ibid at para 33.

\(^{44}\) Ibid at para 35.

\(^{45}\) Ibid at para 36.

\(^{46}\) *Harksen v Lane* [1997] ZACC 12, 1998 (1) SA 300 (CC).
and that the Insolvency Act constituted merely a deprivation of Harksen’s property as the
taking was not permanent.\textsuperscript{47} It may be obvious that Harksen’s assets embody constitutional
property but because this assumption was made, we do not have a sense of why these interests
should have been afforded constitutional protection nor the incidences of ownership that
should be afforded protection. The former is an important exercise because it reveals why
we should afford any one entitlement constitutional protection (as opposed to, for example,
common law or legislative protection); the latter is important because it aids in the subsequent
steps of the process, such as whether we are dealing with a deprivation or simple government
regulation of a propertied entitlement.

\textbf{B Setting the groundwork for everything and nothing at all: \textit{FNB}}

The above cases concerned the Interim Constitution. Four years later, after the Final
Constitution had come into force on 7 February 1997, the Constitutional Court in \textit{First
National Bank v South African Revenue Services (FNB)}\textsuperscript{48} finally had the opportunity to
articulate the substantive vision behind section 25. In \textit{FNB}, the Court set out ‘the framework
for all future constitutional property cases\textsuperscript{49} and, in doing so, the Court had the opportunity
to provide an unambiguous articulation of what section 25 might want to achieve in the
reformation of land law and policy\textsuperscript{50}

Although the Court spent much of its effort clarifying the tests it would use for determining
the lawfulness of a subsection 25(1) deprivation, it nevertheless considered the meaning of
property. In spite of that, the Court continued to frame this meaning with a potential for
ambiguity. It held that whether an entitlement is entitled to constitutional protection will
depend on the facts of a particular case. The Court began its interpretation by noting that
‘[c]onstitutional property clauses are notoriously different to interpret’ but that, fortunately,
it had at its disposal a considerable body of work produced by South African scholars in the
field.\textsuperscript{51} It cited a body of work in footnote 79 written predominantly in the early to mid-1990s
in South Africa. The works spanned an array of jurisprudential outlooks on property law and
which considered the meaning of property in both an historical context and in a comparative
law setting. Before continuing with my analysis of \textit{FNB}, I set out some of these outlooks to
demonstrate why there are diverse interpretations of property and its moral value.

Carole Lewis advocated for a specific inclusion of the Right to Property in the Constitution
because, she argued in quoting Nozick, ‘[f]reedom requires private property, and freedom for
all requires private property for all. Nothing less will do.’\textsuperscript{52} She accepted there were notional
difficulties in realising this right for everyone, not least that it would continue to entrench
wealth inequality brought about through land ownership vested in the hands of a few.\textsuperscript{53}

\textsuperscript{47} Ibid at para 35.
\textsuperscript{48} \textit{FNB} (note 13 above).
\textsuperscript{49} Ts Roux ‘The “Arbitrary Deprivation” Vortex: Constitutional Property Law After \textit{FNB’} in S Woolman &
\textsuperscript{50} I focus on land here given that it is the historical and contemporary contestation over this particular resource
that shapes much of the discourse on section 25. However, I fully accept that the section protects a diversity of
claims to multiple resources that go beyond land and incidences of ownership in relation thereto.
\textsuperscript{51} \textit{FNB} (note 13 above) at para 47.
\textsuperscript{52} C Lewis ‘The Right to Private Property in a New Political Dispensation in South Africa’ (1992) 8 South African
Journal on Human Rights 389, 418.
\textsuperscript{53} Ibid at 418.
However, drawing on the work of Stephen Munzer, she was insistent that these difficulties could be overcome through a pluralist set of ‘irreducible principles that sometimes conflict’; and, when they do, certain priority rules are employed to solve some but not all. These principles – utility, efficiency, justice, and equality – would work as follows: the first two principles would be important in the distribution of private property, although would not necessarily favour a strictly equal distribution. A jurisprudential valuation would first lie in how utility is maximised in the use and possession of resource, and secondly how individual welfare is maximised in the use, possession, and transfer of the property. These principles would justify certain claims on different types of property. Lewis demonstrated this through examples: state-owned property needed for the stockpiling of resources in the eventuality of natural disaster, or private property in the form of ‘intimate articles’ needed as a basis for personality.

Lewis argued that where a court is faced with competing conceptions of utility and individual welfare, principles of justice and equality would qualify this analysis by invoking a ‘basic needs and capabilities’ philosophy. The argument portended that because people ‘have vastly different talents and needs’ property is only one factor in determining equal moral worth (along with personality, health and friendships). This basic-needs-and-capabilities philosophy arises firstly from the principle that everyone should have a minimum amount of property (‘justice’) – that which is necessary for a decent human life taking into account certain basic human needs, such as food, clothing, shelter and health care. Where some have so much property that inequalities of wealth exist (‘equality’), this is remedied through ‘considerable government intervention in the form of welfare distribution’ which ‘does not require equal treatment for all’ but rather a Rawlsian ‘fair equality of opportunity.’

Lewis clearly believed that a right to property could achieve a level of reformation similar to the envisaged aspirations as the housing right. Her articulation of property was not radically disruptive of the existing status quo, but nevertheless articulated a situation in which slow and incremental reform could take place. A very broad conception of ‘property’ was central to this argument, in which very few (if any) entitlements would not enjoy the privilege of constitutional property protection. For example, at the end of her piece she considered that ‘[s]quatters, labour tenants and those who lay claim to land on the basis of a historical right are examples of people who might be regarded as having property rights warranting protection.’ Lewis argued that it was through the express recognition of the right to property that this could take place, not because (in response to her critics) this would mummify existing property rights but because it would leave room for the conception of property to ‘develop and change to meet the different needs of society from time to time.’

Van der Walt would not appear to have disagreed with Lewis, but nevertheless situated an articulation of the property clause within a broader rights-based value system, suggesting that

55 Ibid at 419–420.
56 Ibid at 420.
57 Ibid at 421.
58 Ibid at 421–422.
59 Ibid at 424.
60 Ibid at 423–425.
61 Ibid at 430.
62 Ibid.
some entitlements might not enjoy constitutional property protection. He argued that ‘property is not protected by the property clause in the sense that every entitlement that is recognised or protected by private law is guaranteed against or insulated from state interference… Existing entitlements can be changed, restricted, and subjected to new or stricter controls, limitations and levies without compensation, if the change is justified by the public interest.’63 At the same time, there is no reason why property interests not recognised or protected by private law could be ‘acknowledged and protected by the property clause.’64 The determinant, however, as to whether an entitlement enjoys protection is by reference to the ‘fundamental purpose’ of the Constitution and the Bill of Rights more broadly, and the property clause more particularly.65 This purpose, he argued earlier on in his book, was not ‘logical or self-evident’, but rather required a ‘just and equitable balance between existing, private property interests and the public interest in the transformation of the current property regime.’66 Achieving this balance entailed two components: first, purposively reading, understanding, interpreting and applying the property clause ‘with due regard for the tensions between the individual and society, between the privileged and the underprivileged, between the haves and the have-nots, between the powerful and the powerless’; and, secondly, to do so in a way that is not ‘influenced unwittingly’ by ‘unsuitable, private-law presuppositions.’67

Van der Walt’s position on property would appear to de-emphasise the inviolability of the property clause. Although he understood the property clause to protect propertied entitlements, his link between the individual entitlement and social responsibility entailed consideration of what the property system ‘should look like and what it should do in view of the spirit, purport and objects of the Bill of Rights’68 — which Michelman and Marais summarise as a recognition not of ‘current holdings as an independent end but rather protection as a means to the end of a society based on human dignity, equality, and freedom for all.’69 Thus, it would seem that Van der Walt would have erred on the side of caution, preferring to recognise an entitlement as constitutional property and thereafter limiting its protection at later stages of the inquiry, notably under subsection 25(1). I return to this argument at the end of this article.

The Court in FNB adopted this Van der Waltian view of property, and it is explicit that it will follow a case-by-case approach to the determination of constitutional property and whether a specific entitlement enjoys protection under section 25.70 On the face of it, this approach offers the court room to recognise a diversity of propertied entitlements. This is an important goal in a context where private law conceptions of property dominate, working to erase in the process marginalised claims to resource governance through, for example, indigenous claims to land, informal land tenure security, or claims of access to adequate housing. But this generous approach must be articulated in reference to the purpose of the property clause, and within a clearer cogency on the nature of the entitlement and the consequences of granting the entitlement access to the ‘wide open gates’ of constitutional property.

63 Van der Walt (note 30 above) at 70.
64 Ibid.
65 Ibid at 71.
66 Ibid at 7–8.
67 Ibid at 13.
69 FI Michelman & E Marais ‘A Constitutional Vision for Property: Shoprite Checkers and Beyond’ in Muller et al (note 8 above) at 130.
70 FNB (note 13 above) at para 51.
This twinned argument takes its cue from Theunis Roux’s point about the arbitrary deprivation vortex.\(^{71}\) His critique focuses on the arbitrary deprivation test set out in \textit{FNB}: specifically, he argues that the test, which oscillates between rationality and proportionality, allows the Court discretion ‘to adjust the level of review to fit the circumstances of the case.’\(^{72}\) This allows the Court in some cases to be deferential towards the State in regulating property interests, and to provide adequate protection in other cases where ‘the state overzealously regulates property in pursuit of questionable goals.’\(^{73}\) But one problem Roux highlights in this case-specific approach is that it does not provide sufficient guidance to the state \textit{in advance} of the regulatory measure: ‘Fact-specific tests like these are good for courts but bad for rule-setting.’\(^{74}\)

Another problem he highlights is that consolidating the inquiry within the arbitrary deprivation stage leads to a vortex, which he defines as ‘a system, occupation, pursuit, etc, viewed as swallowing up or engrossing those who approach it.’\(^{75}\) The other stages of the \textit{FNB} inquiry, including deprivation,\(^{76}\) the distinction between deprivation and expropriation,\(^{77}\) and the applicability of the section 36 limitations clause\(^{78}\) to section 25 are all subsumed in the vortex of the arbitrary deprivation inquiry. So, too, is constitutional property. This not only fails to clarify ‘why certain types of property are more constitutionally valued than others’, but also de-emphasises ‘the importance of these considerations at the first stage of the constitutional inquiry.’\(^{79}\) Roux does not seem to regard this latter consequence as particularly problematic, however, partly because it opens the door for an easier rejection of property interest at play, and partly because this consideration would be factored into the vortex of arbitrary deprivation.\(^{80}\)

My argument is not only that in respect of constitutional property has Roux’s vortex thesis come to bear, but that the wide-open gates afforded to constitutional property protection is, in fact, problematic. The Court’s case-specific approach to ‘constitutional property’ fails to give the purpose of section 25 substantive meaning, and in the process, it further entrenches the private law static approach it ostensibly moves away from. By defining property so broadly, the Court does not engender or promote a project of resource reform in South Africa, even though this may be its intention in conferring a wide berth on the definition of the property that the Constitution will protect. In fact, it holds the potential to condone an entrenchment of existing interests that cling to private law conceptions of property law to resist legislative reform. Consequently, regulatory authority may be made that much more ‘distant’, placing an onus on the state that may serve to dissuade the regulation of interests deemed property – even where such regulation may be necessary in redressing inequality in South Africa.\(^{81}\) As the

\(^{71}\) Roux (note 49 above) at 274.
\(^{72}\) Ibid.
\(^{73}\) Ibid.
\(^{74}\) Ibid at 275.
\(^{76}\) Ibid at 276.
\(^{77}\) Ibid.
\(^{78}\) Ibid at 278–280.
\(^{79}\) Ibid at 274–275.
\(^{80}\) Ibid at 275–276.
\(^{81}\) J Robbie & E Van der Sijde ‘Assembling a Sustainable System: Exploring the Systemic Constitutional Approach to Property in the Context of Sustainability’ (2020) 66 Loyola Law Review 553, 590 make a similar argument: ‘If the effect of the constitutional protection of an entitlement as ‘property’ is to shield it from legitimate State control, the effect is a skewed concept that unjustifiably prioritizes private interests above the public interest.’
cases demonstrate below, it is this legislation that is challenged before the Court, and the prior entitlements that are affected by the regulatory change are readily accepted as constitutional property.

There are two reasons why the Court falls into this trap: firstly, because it adopts a self-evident, ‘you-know-property-when-you-see-it’ approach to property, and secondly because it is unclear or unwilling to specify why an entitlement is being afforded constitutional protection. In both cases, it proceeds on the assumption that the entitlement is ‘constitutional property’ and, if these entitlements are limited (which they often are), then this occurs at the arbitrary deprivation stage of the inquiry.82 I now move to considering both of these reasons in turn through a chronological examination of selected case law implicating constitutional property.

C Property as self-evident

We see this property-as-self-evident approach clearly in FNB. This case concerned a bank’s ownership of two vehicles – one in terms of a lease agreement, and one in terms of an instalment sale agreement with reservation of ownership remaining with the bank until payment of the final instalment. Both vehicles were impounded by the Commissioner for the South African Revenue Services exercising a lien in terms of s 114 of the Customs and Excise Act 91 of 1964 for unpaid customs and excise duties.83 The Commissioner put forward the argument that FNB’s ownership of the vehicles were not protected by section 25, and that this ownership was merely a contractual device which, together with other clauses in the contracts, were designed merely to protect the Bank.84 In making this argument, it appears the Commissioner relied on the object of ownership, which did not encompass the full effects of ownership but rather a form of security for the value extended to the parties concerned. It relied on a judgment of the European Court of Human Rights (‘ECHR’) to make this argument, in which the ECHR argued that ‘it is apparent that whoever sells goods subject to retention of title is not interested so much in maintaining the link of ownership with the goods themselves as in receiving the purchase price’ (my emphasis).85 A secondary argument relied upon by the Commissioner is that FNB did not use the property and, as such, could not claim constitutional protection under section 25.

The Court’s self-evidentiary approach to property is apparent in the way it dealt with both arguments, and its net effect is an imbalance between individual entitlement and social obligation, thereby working against Van der Walt’s articulation of property. The Court

See also EJ Marais ‘Narrowing the meaning of “deprivation” under the property clause? A critical analysis of the implications of the Constitutional Court’s Diamond Producers judgment for constitutional property protection’ (2018) 34 South African Journal on Human Rights 167, 174, who argues in the context of conceptual severance (see discussion in part IV below) that a court should guard against limiting possibilities for the regulation of property interests: this, he argues, ‘holds serious threats for transformative contexts, like South Africa, because it can be (ab)used either to insulate existing property interests from state intervention or to subject the state to endless compensation claims.’

82 EJ Marais ‘Expanding the Contours of the Constitutional Property Concept’ (2016) 3 Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg 576, 586 for why this approach is to be welcomed, as well as my discussion of Marais’ arguments below.

83 FNB (note 13 above) at paras 1–10.

84 Ibid at para 53.

approached an entitlement assuming it would enjoy constitutional protection, and either proceeded on the assumption without stating its basis, or it evaded the assumption by preferring the individual entitlement over the social obligation. In *FNB*, the Court preferred the latter, arguing in response to the Commissioner’s argument that ‘neither the subjective interest of the owner in the thing owned, nor the economic value of the right of ownership’ determine whether the interest constitutes property for purposes of section 25. It went on to say that a ‘speculator has no less a right of ownership in goods purchased exclusively for resale merely because she has no subjective interest in them but sees them only as objects that will produce on resale.’ Both these statements reveal a highly dominium-centric view of property: what Carol Rose would understand as ‘discolouring’ the inherent characteristics of owned object in which the system of private property ‘quite unabashedly refers to property in the language of domination, that ultimate form of objectification… To be sure, there is a transaction of sorts in this reduction to dominium, but it is a pretty one-sided one, in which the perspective of the claimed thing is entirely ignored.’

But these are the exact kind of considerations the Court should draw on when determining whether an entitlement enjoys constitutional protection. This is predominantly because such considerations elevate the inquiry from above the narrow confines of the individual entitlement, and towards positioning the inquiry within the ‘social obligation’ Van der Walt speaks of. The *FNB* Court’s statement in favour of speculation does not bode well in a capitalist economy built partly on land speculation despite a glaring gap in access to land and housing. But, even beyond this, it ignores the rest of section 25, which provides specific clues about the purpose of the clause. Although concerned with the determination of just and equitable compensation in instances of expropriation, section 25(3) speaks specifically about the current and the historical use of the property, which suggests an approach to property lending itself more to resource productivity and less to resource speculation. Section 25(3) speaks also of the market value of the property, but section 25 (3) situates this within considerations of what is just and equitable. The Court is accordingly incorrect to suggest that the subjective interest of the owner in the thing, or its economic value, play no part in whether an entitlement enjoys constitutional protection. This is not to argue that FNB’s reservation of ownership should not enjoy constitutional protection, but it is a call for greater conceptual clarity as to why its entitlements should be allowed beyond the threshold of section 25 in light of this balance between individual entitlements and social obligation. By treating the entitlement as self-evident, the Court evades clarifying the purpose of the property clause and, in the process, entrenches a private law orientation to the property clause in which every entitlement positioned by an applicant as constitutional property is afforded this privilege.

It is perplexing why the Court adopts this self-evident approach to property, especially because in setting out the section-25 ‘test’ in paragraph 46, it positioned the first part of the test as an explicit inquiry into whether the entitlement amounts to property for the purpose of section 25. Clearly, the court in *FNB* foresaw the possibility that an entitlement might

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86 Ibid at para 56.
87 Ibid.
89 *FNB* (note 13 above) at para 56.
90 Ibid at para 46: ‘The following questions arise: (a) Does that which is taken away from FNB by the operation of section 114 amount to “property” for the purpose of section 25? (b) Has there been a deprivation of such property by the Commissioner? (c) If there has, is such deprivation consistent with the provisions of section 25(1)? (d) If
not be classified as constitutional property, thus ending the inquiry as that first stage. But it has never done this. More often than not, this is in practice not an issue, predominantly because whether the entitlement enjoys protection is resolved at the third stage of the inquiry – by asking whether the deprivation of the entitlement is consistent with the provisions of section 25(1). However, as I demonstrate further in this piece, this conceptual distortion does not provide a fully substantiated view of the entitlement as understood in relation to the purpose of the clause.

D But, why is it Constitutional property?

The second approach – an unwillingness or lack of clarity in specifying why an entitlement is being afforded constitutional protection – is clearly visible in Law Society, where the Court is asked to consider whether legislative amendments to the Road Accident Fund Act (‘RAF Act’)
91 constituted an infringement of the ‘right to property under section 25(1) of the Constitution’.92 In this case, the applicants – who included members of the Law Society of South Africa, many of whom practised in the area of road accident litigation – challenged an amendment to the RAF Act that allowed a third party in common law to claim compensation from the Fund in respect of loss or damage suffered by the victim of a road accident. Such compensation, for example, could be in the form of loss of income or support, which was especially relevant when the victim was deceased and had been a breadwinner in the family. Prior to the amendment, however, the liability of the Fund to a third party was unlimited. The amendment consequently limited the obligations of the Fund to the following: calculating the costs of medical and healthcare services based on a national tariff; calculating compensation for loss of earning or of support based on a set maximum annual income, regardless of actual loss; and, limiting non-pecuniary loss to instances of ‘serious injury’, paid once off in a lump sum and as determined by a medical practitioner based on a prescribed method.93

The question before the Court for the purposes of this article were: are the subsequent losses, as a result of these amendments, protected under section 25 of the Constitution? The applicants argued they were, while the Court’s approach is an instance of it sidestepping the issue. The applicants argued that these entitlements were part of ‘a “bundle of rights and assets” or “rights with a monetary value” or “new property” all of which the constitutional clause protects.’94 The respondents’ argument appeared muddled, and conflated deprivation with whether the entitlements are property, but it did include the assertion ‘that one’s earning capacity does not constitute property protected under section 25 [because] earning capacity is an element of security of the person protected under section 12.’95

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91 Act 56 of 1996.
93 Ibid at para 27.
94 Ibid at para 81.
95 Ibid at para 82. Section 12(1) of the Constitution protects the right to freedom and security of the person, and it includes rights (a) not to be deprived of freedom arbitrarily or without just cause, (b) not to be detained without trial, (c) to be free from all forms of violence from either public or private sources, (d) not to be tortured in any
In response to these arguments, Moseneke DCJ fell back on a familiar refrain that defining property is difficult and that “[h]appily, in this case, given the conclusion I reach, it is unnecessary to resolve the debate whether a claim for loss of earning capacity or for loss of support constitutes “property.” Nevertheless, he assumed without deciding that a claim for loss of earning capacity or of support would constitute ‘property’, but because he had already found the amendment to be rational, it could not be considered an arbitrary deprivation of property.

Undoubtedly, it is difficult for the Court to consider the entitlement in relation to the purpose of section 25 of the Constitution. If the Court was explicit in its argument that the entitlements do not embody constitutional property, it would need to argue why so, which may cause problems in later cases in which it is faced with similar entitlements. It is easier to ‘answer’ this question indirectly by focusing instead on the lawfulness of a deprivation as the dispute concentrates on the narrower effect of the relevant law rather than the purpose or ambit of the property clause. But as the question of constitutional property remains vexed, this conceptual distortion neither aides our jurisprudence, nor does it invite consideration of how other components of the Bill of Rights protect monied entitlements. Perhaps the respondents in Law Society had a valid argument when they suggested that the loss of earning capacity should be protected by section 12? Instead, because it becomes so easy to tie an interest to property, the property clause is put to work protecting interests that are or maybe protected best elsewhere in the Bill of Rights. In the process, the meaning and transformative potential of the property clause is diluted, and the ‘wide open gate’ into section 25 serves not to open up avenues towards resource reform, but rather to protect entrenched interests within a private law mould.

Two years later, in National Credit Regulator v Opperman, the Court continued its case-by-case approach to defining constitutional property. In this case, the Court was faced with a claim grounded in unjustified enrichment. The respondent, Mr Opperman, lent his friend a sum of R7-million for property development in Cape Town, concluded through three written loan agreements. At the time of the agreement, however, Mr Opperman had not registered as a credit provider in terms of the National Credit Act (‘NCA’), and so the credit agreement was regarded as unlawful in terms of s 89(5) of the NCA. It found that it was ‘logical and realistic’ to protect the claim under constitutional property because such claims, despite being a personal right, have ‘become important in modern-day society and property should not be so narrowly interpreted as to diminish the worth of the protection given by section 25.’

way, and (e) not to be treated or punished in a cruel, inhuman or degrading way. There is a second component of the right too, which includes the right to bodily and psychological integrity.

96 Law Society ibid at paras 83–84.
97 Ibid at para 85.
98 Note Van der Walt (note 22 above) at 37, who argues that ‘a liberal modern constitution can provide adequate grounds for the protection of core non-property rights on their own terms; they do not have to be protected under the rubric of property.’
99 National Credit Regulator v Opperman & Others [2012] ZACC 29, 2013 (2) SA 1 (CC) (‘Opperman’).
100 Ibid at para 4.
101 Act 34 of 2005. Section 89(5) provides that if a credit agreement is unlawful in terms of the NCA, a court is required to order that (a) the credit agreement is void as from the date it is entered into; that (b) the credit provider must return any money paid by the consumer together with interest, and that (c) any purported rights of the credit provider are either cancelled or forfeited to the state, if a court determines the consumer was unjustly enriched.
102 Opperman (note 99 above) at para 63.
part, it was not difficult for the Court to arrive at this conclusion as it was common cause between the parties that the claim was for property under section 25. But the Court and litigants allowing these entitlements so willingly through the gates of section 25 do so at the peril of the property clause.

Classifying the entitlement in Opperman as ‘property’ may have been correct, but saying it is so because it is ‘logical and realistic’ or because such entitlements are ‘important’ in modern-day society say very little about the purpose of the clause. The effect of this approach is not to avoid diminishing the worth of section 25, but instead depoliticises the purpose of the clause. Consider an argument positioned by Frank Michelman in which he reflects on the purpose of protecting property as a constitutional right in the American Bill of Rights. Michelman begins his piece by outlining an argument penned a week before delivering his paper at the Washington and Lee School of Law in 1981 and published in the New York Times. In this piece, the author – William Safire – responds negatively to a decision of the Michigan Supreme Court in which it upheld a decision by the Detroit City Council to acquire properties by eminent domain for resale to General Motors, who would use the site for a manufacturing plant. Safire’s argued that the decision struck at the heart of ‘the sanctity of private property’ – ‘as if “property” or “ownership” comprised a talismanic limit – self-defining, general, and absolute – on the means by which popular government may pursue public goals.’ Michelman’s argued that this view – far from protecting property entitlements – served in fact to empty property of content. Judges, he argued, have the important role of supplying this content, with the fundamental goal of resolving the tension that lies at the heart of defining ‘property’: the protection of governmental regulation of interests on the one hand, and the protection of rights in property on the other. This means that it is a mistake to see property as something lying beyond the reach of political action. The Court in Opperman would not disagree with this articulation and, as I demonstrated in my discussion above of the housing right, was perfectly happy to explain why it was limiting propertied entitlements in pursuit of broader public interests. What the Opperman Court did not achieve, however, was an articulation of why property is to be valued for the purposes of section 25. This approach, per Michelman, would regard ‘property an “essential component of individual competence in social and political life,” as a “material foundation” for “self-determination and self-expression” [and] as “an indispensable ingredient in the constitution of the individual as a participant in the life of the society, including not least the society’s processes for collectively regulating the conditions of an ineluctably social existence.”

If we transpose this thinking to the facts of Opperman, we begin to see why the entitlement should enjoy constitutional protection. Much turns on the fact that Opperman was not a formal credit provider, but instead was simply a friend lending money to another friend. His entitlement to restitution on the basis of unjustified enrichment would be different to that of a traditional credit provider. The latter’s entitlement should not enjoy constitutional protection under section 25 because the purpose of the legislation is to regulate credit providers. Extending

103 Ibid at para 59.
105 Ibid at 1096–1097.
106 Ibid at 1098.
107 Ibid at 1109.
108 Ibid at 1112.
109 Ibid at 1112.
these entitlements to credit providers may have the effect of frustrating the purpose of the legislation, and the net effect of treating Opperman and other credit providers as holding the same entitlement to constitutional protection of property as rendered the entirety of s 89(5)(c) of the NCA unconstitutional. Opperman may be entitled to the protection because he fell into what was essentially a drafting error. It is this error – rather than the nature of the entitlement – that rendered his interest capable of constitutional property protection. The manner in which the Court treated Opperman’s entitlement in the same way as it treated any other credit provider meant that it left little space to consider the respondent’s proposal to remedy the clause, which was to read in a discretion on the part of a court to distinguish ‘between credit providers who intentionally exploit consumers and those who fail to register because of ignorance, and therefore lend money to a friend on an ad hoc basis.’

The argument I have positioned above is essentially to enjoin the Court to consider at the first stage of the inquiry what it is ‘that the constitutional property clauses are meant to serve’? The Constitutional Court has up to this point been reticent to consider this question, and their hesitancy to do so is illuminated by the Supreme Court of Appeal’s more deliberate account in Minister of Minerals and Energy v Agri SA (SCA) of why the right to mine under the Mineral and Petroleum Resources Development Act (‘MPRDA’) should not be considered constitutional property. This is another case in which constitutional protection was assumed as being applicable to the entitlement in question. In this case, the extinguishment of the right to coal in, under, and in respect of two properties in Mpumalanga was challenged as invoking an uncompensated expropriation. The extinguishment occurred because the original holder of the right failed to convert its ‘old order’ rights under the previous 1991 Minerals Act 50 to ‘new order’ rights in terms of the MPRDA. The applicants in the case – who had been ceded the rights to ground their interest in this test case – argued that the extinguishment constituted an expropriation because the transfer which occurred was an original acquisition, as opposed to a derivative form of acquisition of ownership. In other words, it did not matter whether the state acquired these rights; what mattered was that the MPRDA extinguished the rights which, in the process, vested in the state. The respondents’ argument was that state acquisition was indeed a hallmark of expropriation but that the state had not acquired these rights; there had merely been a deprivation.

The SCA judgment could have been more explicit in grounding its reasoning on constitutional property. Rather, it approached the issue by effectively arguing there could be no expropriation if the right to mine was never the property of the rights-holder to begin with. The SCA conducted an extensive overview of mining rights legislation in South Africa, 110 Justice Cameron’s view in his dissenting judgment – that the NCA is the product of ‘dismal drafting’ – suggests that this particular provision of the Act was never intended to apply in the way it did against the likes of Mr Opperman. Cameron J’s remedy would have been to declare the provision ‘constitutionally void for vagueness,’ to ‘acknowledge the drafting error, and to leave Parliament to correct it.’ Opperman (note 99 above) at paras 104–105.

111 Ibid at para 76.
112 Michelman (note 104 above) at 1114.
115 Ibid at para 17.
116 Ibid at para 16.
beginning with pre-Union proclamations in the Cape Colony in 1813,\footnote{117} and included pre-Union statutes,\footnote{118} an apartheid-era statute,\footnote{119} and a pre-democracy statute in the form of the 1991 Act. The 1991 Act altered the position of mineral rights over the 150 years preceding it in that its genesis ‘was a policy of privatisation and deregulation announced by the government of the day in 1987.’\footnote{120} Nevertheless, through a close reading of the 1991 Act the SCA found the ‘exercise of mineral rights was still closely regulated,’\footnote{121} leading to its conclusion based on a cumulative reading of legislation preceding the MPRDA that ‘[u]nderpinning the development of varying forms of mineral rights over the years has been the basic philosophy that the right to mine is under the suzerainty of the State and its exercise is allocated from time to time, as the State deems appropriate’ (my emphasis).\footnote{122}

Despite this (admirable) jurisprudential search through the history of mineral rights, the SCA, as with the Constitutional Court, finds it difficult to declare that mineral rights are beyond the purview of section 25, even though this is effectively what the SCA was arguing. It achieved this not only by positioning the issue as primarily one of expropriation (rather than constitutional property), but also by skipping over constitutional property and denying the applicants relief on the basis that there has been no deprivation.\footnote{123} Their reason for denying this relief was because the old order rights were never extinguished during the two-year conversion period; instead, ‘they were entitled, but not obliged – they were free to allow the right to lapse if they wished – to lodge the right for conversion in terms of item 6(2) and the Minister was obliged to convert the right into a prospecting right under the MPRDA.’\footnote{124} In other words, there was no deprivation.

But the SCA was however correct to hone the case on the nature of the mineral rights, and that it was necessary first to consider this question and thereafter to compare the position of the holders of mineral rights before and after the MPRDA.\footnote{125} Its analyses of the former

\footnote{117} Ibid at para 36. The SCA drew attention to section 4 of Sir John Cradock’s Proclamation on Conversion of Loan Places to Quitrent Tenure of 6 August 1813, which stated that ‘Government reserves no other rights but those on mines of precious stones, gold, or silver; as also the right of making and repairing public roads, and raising materials for that purpose on the premises: Other mines of iron, lead, copper, tin, coal, slate or limestone belong to the proprietor.’

\footnote{118} Agri SA (SCA) (note 114 above) at para 53. The SCA referred to section 123 of the South Africa Act, 1909, which provided that ‘All rights in and to mines and minerals, and all rights in connection with the searching for, working for, or disposing of minerals or precious stones, which at the establishment of the Union are vested in the Government of any of the Colonies, shall on such establishment vest in the Governor-General-in-Council.’

\footnote{119} Ibid at para 56. The SCA referred to section 2(1) of the Mining Rights Act 20 of 1967, which provided that mining title was defined as ‘any right to mine granted or acquitted under this Act’, contemplating that ‘all mineral rights would flow from a statutory grant or be acquired by virtue of statutory provisions.’

\footnote{120} Ibid at para 62.

\footnote{121} Ibid at para 66.

\footnote{122} Ibid at para 69.

\footnote{123} Agri SA (SCA) at para 85: ‘It seems to me that the key issue is not whether, as a result of the exercise of the power to allocate the right to mine, that right was placed in the hands of persons in the private sector, which is inevitable unless the mines are nationalised. It is rather whether the right vested in the State, along with the power to allocate the right to others, or whether it vested in individuals arising from their ownership of land or some other private source. In my view it was the former. That being so the MPRDA is merely the latest in a long line of legislation and statutory instruments in South Africa that affirms the principle that the right to mine is controlled by the State, and allocated to those who wish to exercise it’ (my emphasis).

\footnote{124} Ibid at para 77.

\footnote{125} Ibid at para 76.
question certainly assisted its answer to the latter question, but it could have reached a stronger crescendo had it grounded its judgment on the reason why the entitlement should enjoy section 25 protection.

The Constitutional Court decided that mineral rights were constitutional property because they have ‘economic value’ and because although the state could regulate the exploitation of minerals it ‘could only compel exploitation by expropriation against payment of compensation’\(^{126}\) – which, it would appear, suggests the mineral rights would ordinarily have been considered as constitutional property. But neither reason is convincing and they reveal little about why the entitlement should enjoy constitutional protection as understood in relation to the purpose of section 25. Glaring questions remain about why the entitlement should enjoy constitutional protection: If such rights were the product of the 1991 legislative framework that was indeed characterised by deregulation and privatisation, then is it an entitlement that should enjoy constitutional protection in a democratic era of economic redress? If mineral rights vest within the custodianship of the state, and if section 24(5)(a) of the Constitution itself defines public interest as bringing about equitable access to South Africa’s natural resources, then should we really be giving private mineral rights holders access to section 25? If we problematise the current ownership of mineral resources as skewed in favour of South Africa’s white minority – as the Constitutional Court does in the first paragraph of Agri SA (CC) – then why should section 25 protect mineral rights if its constitutional protection is to further entrench those rights? Is it the function of the property clause to entrench these interests, or is its function to enact resource reform? And, if indeed the state ‘is a facilitator or a conduit through which broader and equitable access to mineral and petroleum resources can be realised’\(^{127}\), then is treating the entitlement as constitutional property the best way to give effect to this aim?

The Court does not answer these questions and, as a result, it fails to give content to the purpose of section 25. These questions are policy-oriented, and they require the Court to enter terrain it is probably uncomfortable in, but they are nevertheless necessary in providing South African society with broader direction for the property clause.

E Some clarity: Shoprite

The Court began to move towards giving the property clause some direction in Shoprite, a case concerning the constitutionality of ss 71(2) and 71(5) of the Eastern Cape Liquor Act 10 of 2003.\(^{128}\) Shoprite, a nationwide grocery store, could under a previous regulatory framework hold a licence to sell wine with food in its grocery stores. The Act changed this: there was a period of five years after the commencement of the Act during which holders of this licence were entitled to apply for registration to sell different kinds of liquor, but in separate premises. If the holder did not apply for this registration, the previous licence would lapse ten years after the commencement of the Act.\(^{129}\) Shoprite argued that this change of regulatory regime amounted to an arbitrary deprivation of property. However, instead of proceeding directly to the question of deprivation, and skimming over whether such licences were constitutional property, the court honed the case on this exact issue, and all three judgments presented a deep

\(^{126}\) Ibid at paras 33–46.

\(^{127}\) Agri SA (CC) at para 68.

\(^{128}\) Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape & Others [2015] ZACC 23, 2015 (6) SA 125 (CC) (‘Shoprite’).

\(^{129}\) Ibid at para 2.
analysis of the purpose of section 25. The main judgment, per Froneman J, and the dissenting, per Madlanga J, found that the entitlement should be protected as constitutional property, whereas the concurring judgment, per Moseneke J, found otherwise.

The main judgment evoked a purposive interpretation of the property clause, one leaning towards a progressive or pluralist interpretation of property and grounded explicitly in the recognition that the Court must ‘determine what kind of property deserves protection under the property clause.’ Froneman considers the function of holding property which, he argues, is the attainment of ‘socially-situated individual self-fulfilment.’ The purpose of the property clause is thus ‘not primarily to advance economic wealth maximisation or the satisfaction of individual preferences, but to secure living a life of dignity in recognition of the dignity of others.’ Froneman noted further than entitlements which enjoyed protection in the past would not necessarily enjoy protection in the future.

Swemmer provides a strong critique of justice Froneman’s judgment. Firstly, she argues that Froneman J conflates an individual’s subjective interest in constitutional property with an objective consideration of the purpose behind the clause. This occurred when Froneman J denouncing a subjective approach, then claiming to adopt an objective approach, but tacitly relying on the subjective approach in his outcome that a grocer’s wine licence embodies constitutional property. Froneman’s reliance on other rights (such as the right to freedom of trade, occupation, or profession, and the right to dignity) to achieve this outcome serves not to inform a principled, objective approach to the determination of constitutional property, but rather to force Shoprite’s interest into the property clause without meaningfully expanding upon why it should be considered constitutional property. Swemmer positions Froneman’s ‘socially-situated individual self-fulfilment’ as the embodiment of Froneman’s subjective approach; by prefacing individual self-fulfilment, this approach serves to disregard the dicta that ‘the subjective interest of neither the property holder nor the economic value can determine whether something should be characterised as constitutional property.

Secondly, Swemmer argues that Justice Froneman’s use of constitutional rights to inform the property clause has the potential to dilute these rights rather than ensuring they act in concert with one another. Her argument is not anti-purposive. On the contrary, she offers a cautionary argument around purposive interpretation and argues, for example, that extending the right to freedom to freedom of trade, occupation or profession to a juristic entity ‘ignores the purpose of that right’ which at its core ‘is the facilitation of transformation and not mere commercial gain.’ In the process, then, it would seem that rather than providing further clarity on the property clause, Justice Froneman’s judgment ends up diluting the purpose of other rights.

130 Ibid at para 50.
131 Ibid at para 50.
132 Ibid at para 50.
133 Ibid at para 51.
135 Ibid at 287–290.
136 Ibid at 288.
137 Ibid at 288, referring to FNB (note 13 above) at para 56.
138 Ibid at 292.
The dissenting judgment per Madlanga J struck an essentialist tone around the purpose of the property clause. Referring explicitly to section 25 as the right to property, Madlanga J argued that the right inheres ‘as a self-standing unit’, that is ‘worthy of protection as a stand-alone right.’ Madlanga took issue with the manner in which Froneman J connected section 25 to other rights in the Constitution, arguing that this did not correlate with prior jurisprudence of the Court, and that this approach ‘waters down the potency of the right to property to the point where it does little more than ride on the coat-tails of rights such as human dignity and freedom of trade, occupation and profession.’ Because the licence granted its holder an entitlement to sell wine, the wine licence was ‘something in hand’, and so could be considered constitutional property. Additionally, the licence endured definitely, could only be suspended or cancelled under circumscribed grounds, and moreover held a transferrable and objective commercial value.

The contribution of both judgments to section-25 jurisprudence should not be downplayed, principally because both provide avenues for content to the purpose of the property clause. Their divergent interpretations of the purpose of the property clause should serve to animate further decisions, although Froneman’s progressive or pluralist approach is to be preferred for three reasons. Firstly, it strikes a chord with the Van der Waltian approach the Court articulated in FNB, pushing back against property as a self-standing or self-affirming right. While there is an attempt to provide content through this purposive approach, Swemmer’s critique is apt that this process must be carefully orchestrated. Secondly, by examining other rights within property, the approach serves to awaken experiences of property in the law. No longer is property law left relatively undisturbed in its slumber of abstract rights and duties, divided uncontroversially according to a series of boundaries and permissions, but instead it is embraced for its complexity of narrative, a lived legal institution that reflects everyday life rather than imagines it. And, thirdly, Justice Froneman’s approach (and not

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140 *Shoprite* (note 128 above) at para 139.

141 Ibid at para 139.

142 Ibid at para 143.

143 Ibid at para 143.


145 These complexities – which Dana & Shoked might refer to as Property’s Edges – are not about denying the quest for certainty that tends to inhere in either essentialist or progressive/pluralist approaches to property, but rather that property law’s ‘imagination’ can be artificial or reductive of how entitlements actually operate, and that entitlements may vary across any one single property: ‘Whether they emphasize the thing owned, the
his interpretation given Swemmer’s critique) offers up innumerable opportunities for further development of other rights as influenced by rights in property. Specifically, there remains significant space to develop the meaning of property in the unique circumstances of both a contemporary South African urban and spatial environment, and a Bill of Rights framework that recognises a panoply of spatially-oriented rights, such as the right to an environment, the right to freedom of movement, and the right to security of the person.¹⁴⁶ The realisation and the experience of these rights in everyday space is shaped by rights in property, and so the power dynamics that inhere in property relations can and where necessary must inform the interpretation of other rights.

For the purposes of this article, however, I find Justice Moseneke’s judgment to be the most useful in clarifying the reasons why a court would refuse an applicant’s interest access to constitutional property. As far as I am aware, his is the only judgment in the Court’s jurisprudential history that would deny an applicant access to section 25. His reasoning for doing so, however, is less about illuminating the purpose of the property clause, and more so because it is difficult to define property.¹⁴⁷ Nevertheless, his judgment provides valuable inroads into considering the policy-oriented consequences of adopting a wide-open-gates approach to defining constitutional property. Broadly stated, Moseneke J provides four considerations about why a court should be hesitant in granting constitutional protection to every entitlement.

His main consideration is whether the entitlement in question is simply a function of state largesse, and that this example of largesse does not deserve protection. As Moseneke J noted, Shoprite’s ‘real grievance is not that it lost the licences and the ability to conduct a liquor business but that it may no longer pursue a business strategy and model that it prefers and cherishes.’¹⁴⁸ This does not necessarily mean that entitlements grounded in state largesse would not enjoy protection, but whether the entitlement deserves protection ‘must be seen through the lenses of our history and constitutional scheme.’¹⁴⁹ Justice Moseneke’s case-specific consideration – of whether liquor licences deserve constitutional protection – demonstrates that he is effectively arguing for a more deferential approach at this stage of the property inquiry, one that would consider the policy objectives of the legislation first and foremost in deciding whether the entitlement constitutes property. He argues that the legislative framework at play in Shoprite is designed to control regulation over the access to use of a dangerous substance; that this is important because alcohol has negative socio-economic consequences and indirect effects on health; that although there are economic benefits of trading in liquor, such licence holders are ‘often powerful and influential companies’ and that recognising a licence as constitutional property creates a strong entitlement in the hands of the licence holder; and that this, in turn,

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¹⁴⁷ Shoprite (note 128 above) at para 94.
¹⁴⁸ Ibid at para 103.
¹⁴⁹ Ibid at para 115.
would ‘tip the scales and arguably diminish the ability of the legislature to effectively regulate an industry where regulation is of paramount importance.’150

His second consideration, linked to the first, is whether recognising the entitlement would make legislative regulation impossible.151 A licence, he argues, is ‘a bare permission to do something that would otherwise be unlawful’, issued to ‘overcome a statutory prohibition’, subject to ‘administrative withdrawal and change’, and is never ‘absolute, often conditional and frequently time-bound.’152 The licence holder may at some point in the future ‘cease to be suitable to hold the licence’, and it cannot transfer the licence.153 Moseneke J suggests in the process that the property clause is not intended to make state regulation of commercial interests difficult or impossible, and although he does not close the door entirely to section 25, his words offer a strong caution for the Court’s wide-open-gates policy to classifying any entitlement as constitutional property.

Justice Moseneke does not offer much detail for what can be understood as his third and fourth considerations, nevertheless they opened the door for future decisions to consider these questions. His third consideration was whether the right vested in the titleholder; if it did, it would more likely be considered constitutional property. Because the liquor licence in Shoprite did not vest in the holder and was derived from state largesse, it could not be considered constitutional property. Froneman J in his majority judgment disagreed, finding it retrogressive to treat the vesting of an entitlement as indicative of constitutional property.154 Froneman J compares this position to pre-constitutional jurisprudence, which meant that only limited interests were recognised in the common law, allowing for greater abuse by the state of similar entitlements.155 While it is unfortunate that Moseneke J does not engage substantively with this argument, his dissent nevertheless opens up the question of the extent to which vesting should be determinative of constitutional property and what consequences may arise.

His fourth consideration is that the ‘wider the definition of property, the tighter our understanding of deprivation and arbitrariness will have to be.’156 Again, Moseneke does not offer much here, except to suggest that the wide-open-gates policy would place too much institutional pressure on the Court’s test for arbitrary deprivation. In the process, he identifies the Court’s approach since FNB, which is essentially to decide the question of constitutional property through the prism of arbitrary deprivation. My article offers two reasons why this is problematic, but it would be interesting for the Court to consider this question too if indeed that is the approach adopted.

His fifth consideration comes through at numerous points in the judgment, and that is to question why the property clause has to perform the same inquiry as that of administrative justice. He notes that because South African law can ‘boast of administrative justice protections that are truly expansive and meant to police and curb executive excesses’ that our ‘jurisprudence need not convert every conceivable interest, with or without commercial value, as a few other

150 Ibid at para 120.
151 Ibid at para 124.
152 Ibid at para 122.
153 Ibid at para 122.
154 Ibid at para 59.
155 Ibid at fn 94. Froneman, J refers to Natal Bottle Store-Keepers and Off-Sales Licenses Association v Liquor Licensing Board for Area 31 & Others 1965 (2) SA 11 (D) at 16H–17A.
156 Shoprite (note 128 above) at para 125.
jurisdictions have done, into protectable property.' Justice Moseneke’s arguments here offer up a crucial question for the Court to consider: why is it that entitlements are offered access to section 25 so readily when alternative avenues may exist? – avenues, in fact, which may be more constitutionally in line with questions of state regulation. But his arguments also suggest that the purpose of the property clause has been diluted by allowing every entitlement into section 25. It has become a constitutional space in which commercial interests seek solace and, although in practice the same result may be achieved were the Court to decide the matter in administrative law, the Court is perhaps not being true to the social function of property when it allows these interests through the gates of section 25.

F The sad case of SADPO

The case of SADPO was handed down two years after Justice Moseneke’s concurring judgment in Shoprite. In this case, the applicant – the South African Diamond Producers Organisation, representing the interests of the diamond producers’ industry – issued a challenge to the constitutionality of s 20A of the Diamonds Act 56 of 1986. Section 20A(1) provided that no licensee may be assisted by a non-licensee during the viewing, purchasing, or selling of unpolished diamonds. The business practice prior to the amendment was that non-licensed experts – often representing foreign buyers of unpolished diamonds – assisted licensed purchasers. It seems that the net effect of this business practice was essentially to provide foreign buyers with deeper pockets an unfair advantage over local buyers. As the Court noted in its summary of the facts: ‘Non-licensed “experts”, who attended on behalf of prospective foreign buyers, “assisted” the licensed purchasers. The experts were themselves often from abroad. The ultimate sale was concluded between the producer or licensed dealer and the South African licensed purchaser … the result was that a prospective foreign purchaser was already lined up, should the decision be made that parcels purchased be exported and sold on.’

The respondent’s argument was that the amendment was intended to curtail this practice. This was to ensure the local beneficiation of South African diamonds; to tighten the regulation of the diamond industry and to eliminate illegal activities that were occurred in the diamond trade; and to comply with the Kimberley Process Certification Scheme. Illegal transactions are a concern in the global diamond industry, and a tightly controlled verification process reveals

157 Ibid at para 115. See also para 94: ‘It is needless, I think, to characterise Shoprite’s grocer’s wine licence as constitutional property. The same outcome may be arrived at without deciding the difficult and fluid question whether it is property. It should suffice to test the challenged provisions for rationality. In that event, one simply asks whether the provisions pursue a legitimate government purpose, and if so, whether the statutory means resorted to are arbitrary or reveal naked preference or another illogical or irrational trait.’ And see para 128: ‘Courts, as some foreign jurisdictions have done, would tend to throw the protection wide if there were no other effective remedies. Administrative law in this country provides ample redress against arbitrary executive decisions on whether to grant, renew, cancel, or alter a liquor licence… This, in my view, is a powerful consideration in an enquiry whether our Constitution requires us to extend the meaning of property to liquor licences.’ See also Noko’s critique of the judgment, which concludes that ‘commercial licences which are essential for the practice of one’s trade must instead be protection under the most specific right which is the right to freedom of trade, occupation and profession’ or, in the case of juristic persons, ‘through the rule of law and the principle of legality.’ KK Noko ‘A Critical Analysis of the Constitutional Concept of Property in light of the judgment in Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape 2015 (6) SA 1025 (CC)’ (MA thesis, University of Kwazulu-Natal, 2018).

158 SADPO (note 32 above).

159 Ibid at para 8.
an important government purpose in maintaining oversight over the diamond supply chain, and in ascertaining the origin of diamonds.\textsuperscript{160} As Justice Khampepe noted herself, ‘[t]he more involvement unlicensed persons are permitted to have in the process of buying, selling and exporting unpolished diamonds, the greater the risk of illegal transactions going unnoticed.’\textsuperscript{161}

Somewhat predictably, SADPO argued that the business practice embodied constitutional property worthy of protection. But rather than following its admirable approaches under \textit{Shoprite}, the Constitutional Court confined \textit{Shoprite} to a footnote and defaulted back to its previous \textit{modus operandi} of failing to explain why this business practice should constitute property. SADPO’s argument was that its members had been deprived of the right to realise the full market value of the diamonds they own; this formed part of their \textit{ius disponendi} (right to alienate their property).\textsuperscript{162} It also argued that additionally, dealers had been deprived of their right to receive full market value for their diamonds when selling, as they can only market to local licensees.\textsuperscript{163}

Note how SADPO was not claiming its ownership of diamonds and the ownership of the licences as the issue. It was essentially claiming that its business practice — of having unlicensed persons acting informally as agents for foreign buyers and, consequently, receiving a larger price for the diamonds — was protected as part of its \textit{ius disponendi}. The Court did not consider whether a) this practice would indeed form part of the \textit{ius disponendi}, or b) even if it were, why the constitutional property clause should protect the practice. Instead, the Court considered two approaches at its disposal. The one approach would be to enquire what was taken away, which they specified as 30 per cent of the previous market value; secondly, what the entitlement to engage in business in a particular way had been, and, thirdly, whether these interests embodied constitutional property. The second approach would be to ‘proceed on the basis that “property” in issue is the diamonds and the licences’, and then to consider at the arbitrary deprivation stage whether the interest is worthy of constitutional protection.\textsuperscript{164}

The Court chose the latter approach, moving back to its pre-\textit{Shoprite} position. However, in doing so, the Court mischaracterised the nature of the claim: not even the applicants were arguing that the ownership of the diamonds or licences was at issue. Indeed, these entitlements were not the problem: the amendment did not deprive anyone of the freedom either to purchase diamonds, or to apply for a licence to do so. The amendment simply circumscribed the manner in which unpolished diamonds were viewed, purchased, and sold. Nevertheless, the Court declared that ‘the “property” at issue here is the ownership of the diamonds, and the licences (assuming the licences are property). That ownership brings with it certain rights and entitlements.’\textsuperscript{165}

Even if we assume that the ownership of unpolished diamonds means you are entitled to constitutional protection with regard to the way in which you go about viewing and purchasing or selling them, that still does not tell us \textit{why} the clause should provide this protection. Why is it that section 25 is allowed to protect business practices that the legislature has determined may be connected to illegal practices in the diamond industry? Why is it that the clause is

\textsuperscript{160} For example, A Moodie ‘African Nations Work Together to Rid Supply Chains of Conflict Materials’ \textit{Guardian} (14 September 2015).
\textsuperscript{161} SADPO (note 32 above) at para 79.
\textsuperscript{162} Ibid at para 20.
\textsuperscript{163} Ibid at para 20.
\textsuperscript{164} Ibid at para 38.
\textsuperscript{165} Ibid at para 39.
allowed to protect someone’s intention to extract the highest price for the goods that they sell? Is this simply a power the law gives you – a legal position which no one else is under a duty to honour if they regard the price as too high? Is it the purpose of the clause to protect this power? By letting the entitlement in, the Court not only conflates the legal relationships at play, but it moves constitutional property jurisprudence a great distance away from the purpose of the property clause.

The most unfortunate aspect of SADPO, however, is that the Court highlighted the absurdity of the applicant’s claim. It did so at the end of the judgment when it considered whether SADPO’s members were arbitrarily deprived of their property. Justice Khampepe noted:

What SADPO seeks to protect is their members’ interest in conducting their business in terms of their licences according to a particular preferred strategy. There can be no deprivation in a change of regulation that alters the strategies licensees are entitled to pursue in the course of conducting licensed activities. Favourable business conditions, including favourable regulatory conditions, are transient circumstances, subject to inevitable changes. It cannot be that every time a government decision or regulation makes a particular business strategy unlawful, persons who preferred to conduct their business in accordance with that strategy have been deprived of property.166

Khampepe J is correct but, in allowing SADPO’s entitlement through the gates of constitutional property, the Court does exactly what it cautions against, and the net effect may be to stultify the regulation of interests deemed property because these entitlements are sure to be put through the golden ring of section 25.

IV THRESHOLD OR JUSTIFICATION?

Justice Khampepe’s treatment of the entitlement within the justification stage of the judgment in SADPO may, however, be explained through Marais’ analysis of the Shoprite decision,167 and his analysis of the SADPO decision.168 In this section, I consider Marais’ arguments as they reveal strong reasons for the approach the Court adopted. It is the approach I critique in the article, namely, to limit the property entitlement in the justification rather than the threshold stage of the section 25 inquiry.

In his discussion of Shoprite, Marais addresses a similar issue to this article, namely which entitlements should be accorded constitutional protection. He argues, however, that the ‘real difficulty lies not in establishing which interests should enjoy constitutional protection, but rather to determine the level of protection they should be afforded.’169 Marais would perhaps caution against my approach because it has the potential to exclude entitlements from constitutional protection at the threshold stage, rather than at the justification stage.170

Marais’ argument is persuasive, and courts would need to exercise caution were they to refuse access to the entitlement at the threshold stage. There is a tension at play here: on the one hand, disregarding the entitlement at the threshold stage may ‘result in the exclusion

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166 Ibid at paras 60–61.
167 Marais (note 82 above).
169 Marais (note 82 above) at 586.
170 Ibid at 583.
of certain valuable interests from constitutional protection without permitting a court to conduct a substantive balancing between the protection of the individual holder and the public interest.\footnote{171} But, on the other hand, subsuming the threshold question into the justification stage serves to obfuscate and dilute the claim which, in process, fails to give clarity and meaning to the purpose of the property clause.

Marais further explains the Court’s approach in \textit{SADPO} as a welcome rejection of a conceptual severance approach to the protection of property. The notion of conceptual severance emerges from the work of Margaret Radin, a US property law scholar who coined the term to describe a strategy by US Supreme Court justices to read a substantive regulation of property entitlements as a taking whereas, in fact, the regulation ‘may not go that far’. Instead, a plaintiff arguing conceptual severance isolates certain entitlements or ‘strands’ of ownership affected, and then ‘hypothetically or conceptually construes those strands in the aggregate as a separate whole thing.’\footnote{172} In other words, this strategy ‘consists of delineating a property interest consisting of just what the government action has removed from the owner, and then asserting that that particular whole thing has been permanently taken.’\footnote{173} So, rather than treating the owner’s land parcel as a whole, it severs entitlements and treats these entitlements as the whole, even though the effect of the regulation diminishes physically, temporally, or functionally only a certain level of ownership.\footnote{174}

While I also regard conceptual severance as inappropriate to the interpretation of constitutional property, the \textit{SADPO} Court in my view does not reject the notion. Instead, in its inattention to the actual entitlement before it in relation to the purpose of the property clause, it potentially embraces conceptual severance. A conceptual severance approach would focus on the \textit{ius disponendi}, and thereafter would elevate the right by treating it as the sum of the entitlement. This is what the \textit{SADPO} Court achieved: by leapfrogging the question of the \textit{ius disponendi} through the mischaracterisation of the claimed entitlement as ownership of the diamonds and of the licences, the claimed entitlement (the \textit{ius disponendi}) is sucked into Roux’s vortex and, although the Court ends up rejecting the entitlement at the justification stage, the net effect is to elevate the claimed entitlement to constitutional property. Whilst a \textit{ius disponendi} could, of course, be protected by the property clause, the legislation being challenged did not target the ownership of diamonds or licences; rather, it targeted only the manner in which licencees operated in the marketplace. By unquestioningly subsuming this business practice as a component of ownership, without interrogating whether it is the purpose of the property clause to protect the business practice, the Court in fact drew closer to an approach embodying conceptual severance, elevating the business practice and, as Marais warns, exacerbating ‘the extent of the interference’ and frustrating ‘the state’s attempts to regulate property by subjecting those regulations to unaffordable compensation claims.’\footnote{175}

\footnote{171} Ibid at 587. Marais’ arguments around South Africa’s ‘history of forced dispossession and disregard of indigenous land rights’ is especially apt here: ‘it serves no purpose to limit the range of interests that may qualify for constitutional property protection.’


\footnote{173} Ibid at 1676.


\footnote{175} Marais (note 82 above) at 592.
Accordingly, I argue that at a minimum we should regard the ‘threshold’ question less as an actual threshold issue but one of justification. After all, whether an entitlement enjoys constitutional protection goes to the core of the property clause. A court must be explicit about the scope of the entitlement it is letting through the ‘wide open gates’ of section 25, and must ideally be specific about the reasons for doing so in relation to the property clause. A failure to do so does not necessarily mean the entitlement is lost in Roux’s famed vortex, but as highlighted in this article, the current approach serves to dilute the purpose of the property clause and, consequently, may stultify legislative regulation of property and interests deemed property.

V CONCLUSION

In conclusion, my analysis of selected Constitutional Court case law has revealed that the Court does not give sufficient mileage to the purpose of the property clause as mediated through the meaning of constitutional property. I provide four concluding thoughts about why this is problematic.

First, in giving constitutional property such an obtuse definition, the effect is not to transform the ownership of resources in South Africa, but instead it continues to privilege the law’s validation of entrenched, private law-oriented interests. In the process, this prefaces an individualist mode of entitlement, one that goes against understanding the property clause as embodying a social function of property. Rather, the approach lends itself to a dominium-centric understanding of property law, encapsulated in the inviolable view that section 25 encapsulates a right to property. Far from protecting existing entitlements in property, this view serves rather to continue excluding the non-propertied from gaining entitlements in property. This becomes especially problematic in the contemporary urban and spatial environment in which property law becomes a dominant assemblage through which inequality manifests. Capital on both a global and local level is tied in with propertied entitlements, and the Court failing to sufficiently question why these interests should enjoy constitutional property entails somewhat of a complicity on the part of the Court in shoring up that inequality. It is perplexing why the Court is unable or unwilling to subject constitutional property with such scrutiny when confronted with a challenge based on section 25, especially when it has proven itself adept in challenges to property based on other areas of the Constitution, notably section 26.

176 Marais’ argument ibid at 583–586 in which he draws on Radin’s differentiation between personal property and fungible property to argue that certain types of property could enjoy greater constitutional protection than other types of property: ‘personal property, which permits property holders to achieve a greater level of self-fulfilment as moral agents in the social sphere, enjoys stronger constitutional protection than fungible property. However, despite the fact that fungible property enjoys a lower level of protection because it is aimed at increasing one’s wealth, it is still regarded as constitutional property’. Ibid at 585, referring to M Radin ‘Property and Personhood’ (1982) 34 Stanford Law Review 957.

177 For example, Justice Sachs captured the Court’s position regarding housing rights in Port Elizabeth Municipality v Various Occupiers [2004] ZACC 7, 2005 (1) SA 217 (CC) at para 15, signifying a decisive shift away from a dominium-centric view of property rights and towards validating a social function of property: ‘There are three salient features of the way the Constitution approaches the interrelationship between land, hunger, homelessness and respect for property rights. In the first place, the rights of the dispossessed in relation to land are not generally delineated in unqualified terms as rights intended to be immediately self-enforcing. For the main part they presuppose the adoption of legislative and other measures to strengthen existing rights of tenure, open up access to land and progressively provide adequate housing. Thus, the Constitution is strongly supportive of orderly land reform, but does not purport to effect transfer of title by constitutional fiat. Nor does it sanction arbitrary seizure
Second, in failing to give meaning to the purpose of the clause, the Court endorses a particular narrative of property law in South Africa. Such narrative primes an individualist view of resource ownership, but it is not clear whether such narrative is universally held. South African property law continues to be defined by its Roman-Dutch law origins. As a system foisted upon the South African legal system through colonial conquest, we must consider the kind of resource governance and knowledge systems erased in the process of colonial conquest. Did our multiple legal cultures in existence prior to the import of colonial law hold an affinity for individualist entitlement or dominium? Alternatively, can we trace similarities in the experiences of the Kluane First Nation in Canada who have had to rethink their relationship between people and things as more parasitical than symbiotic in order to benefit from Canada’s dominium-centric land restitution process? How we view our relationship to resources is seminal to our use of such resources – it takes us beyond the human and into a realm of semiosis. As Eduardo Kohn argues in his book, How Forests Think, recognising how we inhabit an ‘ever-emerging world beyond the human’ serves to challenge the idea that we are ‘the exceptional kinds of beings that we believe we are.’ What would the property clause say? More so, what would its neighbour in the Bill of Rights say – section 24 of the Constitution, the environmental right? Viewing our relationship to things as symbiotic is arguably an important and necessary component of the social function of property. An unquestioning approach to property lends itself, in fact, to an inefficient and unsustainable manner of resource use, one premised on immediate and individualised gratification rather than inter- and intragenerational equity in resource distribution and use.

Third, viewing property as an individualist entitlement obscures how many people relate to resource use in South Africa in their everyday lives. Our current system of property law is a construct in which we delineate access using various material and symbolic assemblages – lines on cadastral maps; words in a title deed; walls, gates, signs, and locks. To be sure, we make real this construct in our everyday lives, and the construct is often necessary as a way of governing the use of resources. But the increasing difficulty of attaining access to these resources – land, in

of land, whether by the state or by landless people. The rights involved in section 26(3) are defensive rather than affirmative. The land-owner cannot simply say: this is my land, I can do with it what I want, and then send in the bulldozers or sledgehammers.’ Stuart Wilson has demonstrated how section 26 of the Constitution has meant ownership rights are often treated as subservient to housing rights. See S Wilson ‘Breaking the Tie: Evictions from Private Land, Homelessness and a New Normality’ (2009) 126 South African Law Journal 270. See also Wilson (note 22 above) at 11: ‘In South Africa, some of the most basic structures of property law have undergone substantial alteration since the end of apartheid, and that these alterations have created spaces in which ordinary people have begun to reshape the terms on which they access land, tenure, and credit.’

178 P Nadasdy, ‘Property and Aboriginal Land Claims in the Canadian Subarctic: some theoretical considerations’ (2008) 104 American Anthropologist 247, 258: ‘Just to engage in land claim negotiations, [Kluane First Nation] people have had to learn a very different way of thinking about land and animals, a way of thinking that to this day many Kluane people continue to regard with disapproval. Despite this, many of them have put aside their discomfort with the idea of ‘owning’ land and animals, electing to participate in the land claim process because they see it as the only realistic chance they have to preserve their way of life against increasing encroachment by Euro-Canadians.’


180 Robbie & Van der Sijde (note 81 above) at 592–603, who position the regulation of property within sustainable development: not only in terms of environmental sustainability, but ‘the continuation of the legitimacy of the property system within the broader constitutional legal system… the need for real transformation remains evident; without actual social and economic transformation that provides tangible benefits to the poor and marginalised, the system [of property law] will become increasingly unstable and lose any claim to legitimacy.’ Ibid at 591.
particular – means that, of necessity, many people begin to move beyond those systems which constrain their participation.\textsuperscript{181} The proliferation of informal settlements globally demonstrates this very point – where do you live if you simply cannot afford to play in the construct? Conceptualising constitutional property so broadly obscures from view these fundamental questions of resource access. It obscures from view the interests of the non-propertied, who are relegated to the literal, metaphoric, and aesthetic margins of our cities. Property law is revealed in the process as a tool of control, characterised by binary of insiders and outsiders, and the definition of constitutional property becomes the preserve of the insiders.\textsuperscript{182}

The above points echo Tshepo Madlingozi’s argument raised in an essay on the property clause, which amplifies the decolonial critique of the Bill of Rights as this halcyon imaginary of a new society.

The enduring marginalization of \textit{Ukhunta/Botho} and African jurisprudences is symptomatic of the fact that African lifeways, their epistemologies and systems of social ordering (misnamed ‘customary law’) are still deemed inferior in the “new South Africa”. A constitution cannot be regarded as decolonizing if it does not [sic] reflect the living philosophy and mores of the majority of its citizens; if instead of being a ‘mirror of society,’ it continues to be experienced by most of its subjects as a petrifying and alienating deity… The crucial point here is that the marginalisation of “non-western” grammars of dignity and cosmologies often means that land restitution claimants often experience epistemic, cultural and spiritual violence during processes that are supposed to redress and remember them.\textsuperscript{183}

Madlingozi’s argument raises a significant issue around the legitimacy of the property clause. My article does not address whether this legitimacy was ever there in the first place, but it does highlight the pressing need to address the purpose of the clause as a bare minimum, lest its legitimacy be further eroded. What is this purpose?

\textsuperscript{181} We see these examples beyond property law as well. I offer two in this footnote: the first deals with urban governance, and follows research conducted by Caroline Wanjiku Kihato on the experiences of migrant women in Johannesburg. She argues that understanding our relationships in everyday space as conditioned by the state or civil society ‘misses other forms of sociality organised around informal, temporary and ephemeral institutions.’ Kihato recognises these institutions as ‘alternative registers of sociality’, activated ‘when individuals negotiate socio-economic and political forces in the city’, and which complicate or challenge ingrained assumptions of urban governance. CW Kihato, ‘The City from its Margins: Rethinking Urban governance through the Everyday Lives of Migrant Women in Johannesburg’ in E Pieterse & A Simone (eds) \textit{Rogue Urbanism} (2013) 325, 329. The second example deals with the rules of pedestrianism and its relationship with formal law. As Nicholas Blomley argues in his book, \textit{Rights of Passage}, ‘[p]edestrianism is clearly a form of legal practice and knowledge, but it is also distinct, eschewing a rights frame in favour of an attention to placement and flow. Thus, perhaps it is better to think of it as a particular legal knowledge, with its own networks, logic and internal truth.’ See N Blomley \textit{Rights of Passage: Sidewalks and the Regulation of Public Flow} (2011) 4.


\textsuperscript{183} T Madlingozi ‘The Proposed Amendment to the South African Constitution: Finishing the Unfinished Business of Decolonisation?’ \textit{Critical Legal Thinking} (6 April 2018), available at https://bit.ly/2YtT71J. Lungisile Ntsebeza offers a more technical critique of section 25 as a whole and in the context of land reform: ‘The starting point in [the debate on land reform] should be whether a comprehensive land redistribution programme in South African can take place if it ignores colonial conquest, land dispossession and the fact that commercial farming triumphed as a result of the naked exploitation of African labour. Above all, the debate would have to engage with the fundamental proposition in this chapter, namely, that ther is a contradiction between the protection of private property rights to land and a commitment to fundamental land redistribution.’ See L Ntsebeza ‘Land Redistribution in South Africa: the Property Clause Revisited’ in L Ntsebeza & R Hall (ed) \textit{The Land Question in South Africa: The Challenge of Transformation and Redistribution} (2007) 107, 129.
The final point in my article relates to one of the consequences of failing to clarify this purpose and allowing almost any entitlement through the ‘wide-open gates’ of the property clause. All the cases surveyed in this article involved a fundamental interest on the part of capital, and were a response to regulatory moves on the part of the state. By defining constitutional property so broadly, the Court has widened the avenue through which these regulatory moves are challenged. As was held by Moseneke J in Shoprite, the Court should consider closing the avenue off in a more principled manner, one that is cognisant of the purpose of the property clause. This opportunity may arise should large credit providers decide to challenge an amendment to the National Credit Act 34 of 2005. Coetzee and Brits note how the amendment will, ‘subject to strict requirements, provide debt relief to over-indebted persons who earn a relatively low monthly gross income and who owe a rather small amount of unsecured debts. One of the remedial measures that the application of the measure to a consumer’s financial circumstances could result in is the extinguishing (discharge) of qualifying unsecured debt.’

Coetzee and Brits state that it is not necessary for ‘present purposes’ to investigate the question of whether such interests on the part of credit providers constitute property, and that whether such parties would enjoy the full benefits of section 25 would be decided under arbitrary deprivation. However, if we consider that the reason the legislature enacted the change was to reform a part of South African insolvency law – ‘which heavily subscribes to the advantage-of-creditors principle’ – then we have to ask why we allow such parties access to section 25, and what doing so reveals about the purpose of the entitlement and the legitimacy of the constitutional property clause.

All four of my concluding thoughts above point to one critical question that the law must address: what is our narrative of property? It is uncontroversial to claim that this narrative, at least on the face of the Court’s jurisprudence, is not a simplistic and reductive ‘right to property’. But it is imperative for a far deeper and more deliberate engagement in our collective praxis as to the purpose of the property clause: partly given significant land and resource inequality globally and in South Africa that pivots off property; partly given the many livelihoods marginalised through property’s shadow; partly in light of the use of the property clause to entrench existing propertied interests, potentially stultifying the state’s power to regulate commercial interests in favour of a public interest; and partly given the epistemicide of indigenous land and resource governance systems and knowledge enacted through colonisation, the significance of which largely remains under-researched and underexplored.

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185 Coetzee & Brits ibid at 18.
Rethinking Property: Towards a Values-Based Approach to Property Relations in South Africa

MANDISA SHANDU & MICHAEL CLARK

ABSTRACT: In recent decades, there has been growing dissatisfaction with the dominant theories of property law systems, founded on notions of exclusion and individualism, these systems have increasingly become associated with an unsustainable and inequitable distribution of resources. This inequitable distribution has largely been attributed to these property law systems that offer wholly disproportionate protection to the rights and interests of property owners while providing little to no recognition or protection for wider social, environmental and humanitarian concerns. These constructions of property overemphasise a single set of values – values that are largely economic, exclusionary and exploitative. Through an analysis of public land, particularly municipal land, we advocate for a rethinking of current property law relations to prioritise a more varied set of values, including social, ecological, emotional and humanist values, with the ultimate aim of realising a more social conception of property law. This is urgently required in the South African context, where access to land, tenure security and housing was historically dictated by colonialism and apartheid, and which remains influenced by deep-seated inequality. We consider possible avenues for rethinking the property law system including the social function approach to property, the social-obligation property theory and the potentially transformative constitutional property clause. We make suggestions about how to give effect to a wider range of values in our assumptions about property law and, particularly the constitutional right of access to land on an equitable basis.

KEYWORDS: affordable housing, constitutional law, land reform, property theory

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I INTRODUCTION

On 29 February 2020, over 300 activists from across Cape Town, affiliated with the social movement Reclaim the City, peacefully occupied the Rondebosch Golf Club. Like many other recreational clubs in Cape Town, the club is situated on well-located land owned by the City of Cape Town (the City).1 The activists staged the symbolic occupation of the golf course to protest the City’s failure to redistribute well-located public land for the development of affordable housing, which they have argued is critical to redressing spatial apartheid and combatting a debilitating housing affordability crisis. For activists the significant size – approximately 46 hectares or the equivalent of a small suburb – and the prime location of the golf course close to the best hospitals, top performing schools, police stations and transport nodes (including taxi and train routes) meant that the site was ideal for the development of social or affordable housing.2 They argued that the use of land as a recreational space rather than for the delivery of affordable housing constituted ‘an inefficient, exclusive and unsustainable use of public land’ and illustrated a failure on the part of the City to manage scarce public land in a manner that served the broader interests and social needs of Cape Town’s residents.3 As Reclaim the City noted in a statement on the day, the occupation was part of a broader call for accountability – calling on the City to build ‘a more inclusive city, one piece of land at a time’.4

Almost thirty years after the end of apartheid, Cape Town remains one of the most spatially divided and unequal cities in the world with residential settlement patterns segregated along race and class lines. As with other South African cities and towns, Cape Town continues to grapple with undoing the legacy of an ‘urban economic logic that systematically favoured white urban areas at the cost of black urban and peri-urban areas’.5

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1 This was the second time that activists had occupied the space, with the previous symbolic occupation occurring on Human Rights Day the previous year. Reclaim the City ‘Reclaim Rondebosch Golf Course for Affordable Housing’ Press Statement (29 February 2020), available at https://jmp.sh/cyW6qPK. See also T Wahinjira ‘Activists Occupy Rondebosch Golf Course, Demand Land Redistribution’ Ground Up (29 February 2020); Sowetan Staff Writer ‘Reclaim the City Activists Occupy Rondebosch Golf Course Over Housing’ Sowetan (29 February 2020); L Nowicki ‘Rondebosch golf Club: City of Cape Town Accused of “Subsidising the Wealthy Elite”’ Times Live (24 January 2020); and T Knight ‘Activists Occupy Rondebosch Golf Club, Celebrate “Reclaim the Land Day”’ Daily Maverick (22 March 2019).

2 Reclaim the City (note 1 above) at 1–2. The City raised a variety of technical reasons as to why the land could not be developed for affordable housing, including that a portion of the land falls below the hundred-year flood-line. However, in schematic plans published in a research report in 2019, Ndifuna Ukwazi advised that the land that fell outside the flood-line could still be developed to produce more than 2 500 housing units on the site in spite of these technical challenges, leaving wetlands intact and avoiding the floodplain entirely (of these 2 500 units, 1 433 would be cross-subsidised affordable housing, providing homes to roughly 2 400 people who could otherwise not afford to live close to decent social amenities). Ndifuna Ukwazi City Leases: Cape Town’s Failure to Redistribute Land (March 2019) 10–11.

3 Reclaim the City (note 1 above) at 1.

4 Ibid.

As a result, a fragmented experience of the City persists: the majority of Black people in urban areas (a substantial majority of whom are low income earners, poor or unemployed) live in densely populated, peripheral townships and informal settlements where economic opportunities, access to transport facilities and social amenities are few; while the well-located residential areas of Cape Town, where economic opportunities, transport facilities and social amenities are plentiful, are inhabited predominantly by White households (who are generally wealthier) and are significantly less densely populated.

While this spatial inequality has its historical origin in the colonial and apartheid eras, it has been exacerbated since the end of apartheid. At the heart of the entrenched spatial inequality in South African cities and towns is the structural resistance to redistributing land, including public land, for purposes that would directly begin to address the legacies of colonial and apartheid era planning. The Western Cape High Court recently noted the imperative to use well-located public land to ‘urgently address apartheid’s shameful and divisive legacy of spatial injustice and manifest inequality’ in Adonisi v Minister for Transport and Public Works: Western Cape; Minister of Human Settlements v Premier of the Western Cape Province. The centrality of land – particularly well-located land – as a tool in any programme to dismantle the apartheid city cannot be overstated. Land provides the ‘physical sub-stratum for all human activity’. Land holds immeasurable socio-economic importance; it provides the location for residential shelter and economic activity. Land accordingly ‘justifies particularly sensitive treatment of the property relations it encompasses.’ However, despite the central importance of land as a tool for livelihood and redress, it can hardly be disputed that spatial apartheid and the resultant ‘state-induced inequality’ brought about by limited access to land continues to shape urban
society today. The ‘landless class’ that was created through legislated processes that deprived Black people of their rights to title remains landless. Today, informal settlements are ‘the most visible manifestation of inequitable land access in urban areas’ and represent perpetual land deprivation, in part, as a result of the government’s failure to intervene in public and private land markets to redistribute and allocate land. According to data from Statistics South Africa’s General Household Survey, 14 per cent of South Africa’s households (approximately one in seven) live in informal settlements, and this figure is higher in metropolitan areas, where approximately one in every five households live in an informal settlement.

This is the context of Reclaim the City’s campaign to respond to persistent land deprivation and spatial inequality by building ‘an inclusive city, one parcel of land at a time’, and shifting prevailing land uses towards more just uses, including the redistribution and use of urban land for affordable housing. Central to Reclaim the City’s campaign was challenging the Rondebosch golf Club lease, which, like many other leases over public land, has its origin in colonial-era spatial planning. The first long-term lease over this property was concluded in 1937 for the exclusive use of the golf club’s paying members (after which the lease was renewed every decade). The communities living in the area around the golf course were part of 27 895

17 These figures are based on estimates from South Africa’s 2011 Census Data and given the insecure tenure arrangements in informal settlements and the fluidity of residence in these areas, the number is likely to be significantly higher. See H Selebalo & D Webster Monitoring the Right of Access to Adequate Housing in South Africa Studies in Poverty and Inequality Institute Working Paper No 16 (2017) 33, available at http://www.spii.org.za/wp-content/uploads/2018/02/Right-to-Housing_2017.pdf.
19 Reclaim the City (note 1 above) at 1.
20 City of Cape Town Immovable Property Adjudication Committee Report of the Immovable Property Adjudication Committee to Council: Authorisation to Commence with a Public Participation Process in respect of the Proposed Granting of Rights to Use, Control or Manage Various Portions of Erven in Klipfontein Road, Sybrand Park, Mowbray, known as Rondebosch Golf Course (4 December 2019, copies on file with the authors). In South Africa, as in many other parts of the world, large tracts of land designated to a particular land use (such as golf courses), or imposing infrastructure (such as train tracks or highways) were intentionally used by the state to create physical barriers to segregate people of different background or socio-economic categories. See, for example, J Jacobs The Death and Life of Great American Cities (1961) 257–269. In the South African context, the apartheid state used similar mechanisms to divide people along racial lines. The Rondebosch Golf Club acts as such a barrier by separating various residential areas. In effect, this means that every time the City renewed the lease, it perpetuated racial and class divisions rather than dismantling these divisions.
Black families that were forcibly removed after the area was declared a White-only area in terms of the Group Areas Act 36 of 1966. However, despite the transformative potential of the land, it is not the only public land that has been reserved for the recreational purposes of a few paying members of a private club. The Rondebosch Golf Club borders another similarly sized exclusive golf course – the King David Mowbray Golf Course – which also leases City-owned land at a nominal amount. In fact, Cape Town has 24 golf courses and driving ranges (of which ten are on public land) and 35 bowling greens (of which 26 are on public land). Yet, despite widespread landlessness and tenure vulnerability among Black families and vocal calls for more equitable use of public land, the City proposed renewing the lease to the Rondebosch Golf Club for a further ten-year period at a nominal rental based on the City’s sporting and recreational tariff – at the time that the City published a notice of the lease renewal this tariff was R1 058 a year. Effectively, this meant that the City planned to allow the club to lease public land the size of a small suburb for the exclusive use of its paying members at a cost of R88.17 a month. What made the City’s plans to renew this lease particularly distasteful was the historical context of land dispossession and the ongoing social and economic context of a land and housing crisis. It also demonstrated a persistent failure to break from the past and prioritise the redistribution of land in areas that will advance spatial, racial, and economic societal restructuring.

Where a person lives matters – it determines a person’s access to opportunities and the quality of services. While we focus on the City of Cape Town as an example, the issue of spatial inequality, and spatial mismatch is ‘evident across the majority of South Africa’s metropolitan municipalities’. Many peripheral areas in Cape Town have limited access to basic services, performance in schools in these areas is generally unsatisfactory, gang violence is rife, substance abuse is more common, and social amenities such as hospitals and clinics are not easily accessible. People living in these areas spend a disproportionate component of their income and time on unsafe and unreliable transport – up to 45 per cent of their income,

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21 U Dhupelia-Mesthrie & K Benson ‘An Open Letter to the City of Cape Town: Land Restitution and the Rondebosch Golf Club’ Mail & Guardian (9 March 2020) (Who also point out that the Rondebosch Golf Club supported apartheid by objecting to the Black River area being suggested as a possible Chinese group area in 1955).

22 Ndifuna Ukwazi (note 2 above) at 4.

23 For the City’s public advertisement or the lease and report justifying the lease, see ‘Lease: Various Erven at Klipfontein Road, Sybrand Park – Mowbray’ Cape Argus (7 February 2020); and City of Cape Town Immovable Property Adjudication Committee Report (note 20 above). For the City’s tariff rental on properties reserved for sporting and recreational activities, see City of Cape Town 2019/2020 Budget Annexure 6: Tariffs, Fees and Charges Book, Economic Opportunity and Asset Management – Property Management (May 2019) at 6.2, available at http://resource.capetown.gov.za/documentcentre/Documents/Financial%20documents/Ann6_2019-20_Property%20Management.pdf. The annual tariff amount of R1 058 applied irrespective of the size of the leased land. In response to a public outcry over the Rondebosch Golf Club rental amount, the City reviewed and amended the rental amount it charges golf courses upward to R11 500 a year. However, the new sporting tariff remains incredibly low and, more importantly, does not address the City’s failure to redistribute public land.

24 It should be noted that the City of Cape Town is not the only municipality that has come under criticism for leasing out well-located public land for nominal amounts to golf clubs or other recreational activities. R Davis ‘In the Rough: Golf Courses may be SA’s Most Wasteful Luxury’ Daily Maverick (11 October 2020), available at https://www.dailymaverick.co.za/article/2020-10-11-in-the-rough-golf-courses-may-be-sas-most-wasteful-luxury/; K Harrisberg ‘Teed Off: COVID feeds S. African Housing Crisis, Golf Courses Feel the Heat’ Thomson Reuters Foundation News (19 February 2021), available at https://news.trust.org/item/20210218225919-dw6tc.

25 Budlender & Royston (note 7 above) at 20.
well over the global average of 5–10 per cent.\textsuperscript{26} Critically, research shows that there is a direct relationship between where people live in South African cities and the likelihood that they will find and sustain employment opportunities.\textsuperscript{27} Living on the urban periphery in South Africa therefore ends up trapping the poor and working class in a cycle of structural poverty as ‘living on the periphery leads to poverty, while poverty ensures living on the periphery’.\textsuperscript{28}  

The approach taken by the City highlighted further contemporary drivers of land and spatial inequality in Cape Town; namely the city’s acute housing affordability crisis\textsuperscript{29} and the pace and location of state-subsidised housing delivery. With regard to the affordability crisis, the government’s inability to regulate land and property markets has resulted in stubbornly high rents and property prices that have excluded most families, especially impoverished people and low-income earners (and disproportionately affected Black households). The average property value for a home in Cape Town in 2016 was R1 513 254 (the highest in South Africa), a price that less than five per cent of households are able to afford.\textsuperscript{30} Internationally, Cape Town was forecast to lead the annual price growth for residential properties for 2021 globally, matched only by Shanghai,\textsuperscript{31} and in 2019, the city registered the seventeenth highest year-on-year property inflation in the world at 9.1 per cent (higher than any other city in Africa).\textsuperscript{32} The effect of property inflation is even more worrying when broken down by market share as property prices in middle-priced and lower-priced markets continue to increase, thus pricing households in the lower income earning categories out of the market.\textsuperscript{33} In practical terms, this has meant that the number of available affordable housing units in Cape Town has actually decreased in recent years.\textsuperscript{34} 

According to figures based on the 2011 Census Data (that have been adjusted for inflation), 75 per cent of households in Cape Town earn less than R18 000 a month (the figure rises to 92 per cent for Black households), and most people cannot afford to pay more than R3 000 a month in rent or R281 000 to own a home.\textsuperscript{35} This puts rent and homeownership in well-located

\textsuperscript{26} City of Cape Town \textit{Transport Development Index} (2016).  
\textsuperscript{28} Budlender & Royston (note 7 above) at 2. See also the \textit{High Level Panel Report} (note 15 above) at 81.  
\textsuperscript{33} First National Bank (FNB) \textit{Cape Town Sub-Regional House Prices} (August 2019) 1, available at https://www.fnb.co.za/downloads/economics/reports/2019/CapeTownSub-RegionalHousePricesAug.pdf; and CAHF (note 29 above) at 45.  
\textsuperscript{34} CAHF (note 29 above) at 45.  
\textsuperscript{35} Ndifuna Ukwazi \textit{Inclusionary Housing: Measuring Access to Residential Development by Race and Class} Ndifuna Ukwazi Working Paper (November 2018), available at: https://jumpshare.com/v/KRiwYLKmkqEQGzFyBi7. These figures have been adjusted for inflation and the City of Cape Town itself has published similar figures in \textit{Draft Human Settlements Strategy} (2020). In 2019, Stats SA found that the median income of a South African
areas close to Cape Town’s economic nodes out of reach for most middle-class South Africans, let alone the poor or working-class. All of this points to a housing crisis that affects hundreds of thousands of families in Cape Town who have been forced to live in undignified conditions in peripheral townships and informal settlements because the state – at all levels – has failed to satisfy the need for housing or redistribute well-located land.\textsuperscript{36} As former Deputy Chief Justice Dikgang Moseneke lamented:

[S]tatistics on land redistribution show very little movement away from apartheid patterns of the use and ownership of land… Sadly, urban homelessness persists. Apartheid spatial patterns remain. People in informal settlements run the risk of mass evictions such as in Lwandle in Cape Town or Cato Crest in KwaZulu-Natal … [W]e cannot talk about transformation or social justice and cohesion when urban and rural land injustice dominates the lives of the majority of our citizens.\textsuperscript{37}

Added to this, another key driver of spatial inequality is that the provision of state-subsidised housing has also done little to ease the City’s housing crisis and redress entrenched spatial inequality, with state-subsidised housing delivery failing to keep pace with the considerable backlog. In 2019, the Western Cape provincial housing backlog stood at over 600 000 families, of which 365 000 were in the City of Cape Town alone.\textsuperscript{38} These figures only refer to the families that have registered for fully state-subsidised homes. Approximately 75 per cent of

\begin{itemize}
  \item The economic fall-out brought about by the COVID-19 pandemic has exacerbated existing social and spatial inequalities and has increased the need for well-located affordable housing. In many respects, the economic burden following the pandemic has, and will continue to be, disproportionately borne by the poor and working class. According to the South African National Income Dynamics Study – Coronavirus Rapid Mobile Survey (NIDS-CRAM), the economic impact of the COVID-19 pandemic led to significantly higher rates of unemployment, diminished incomes and higher rates of hunger. Between February and April 2020, three million South Africans lost their jobs, and a further 1.5 million lost their income (through being furloughed). This represents an 18 per cent decline in employment, with the number of employed persons dropping from 17 million in February to only 14 million in April. The vast majority of these job losses were concentrated among already disadvantaged groups, including those in the informal economy, women, the youth and less educated. Women were particularly hard hit, accounting for up to two million of the three million job losses. See NIDS-CRAM \textit{Overview and Findings: NIDS-CRAM Synthesis Report Wave 1} (2020) 3, available at https://www.cramsurvey.org. Concerningly, the losses could be long-lasting and potentially even permanent as none of those who lost jobs and only half of those that were furloughed were reabsorbed into the economy. The economic impact of the COVID-19 pandemic was also unevenly distributed spatially – with people in rural, peri-urban as well as people living on the outskirts of cities in townships or informal settlements being disproportionately negatively affected by losses in jobs and income-generating activities. In fact, according to the second wave of the NIDS-CRAM survey people living in peri-urban areas were twice as likely to be unemployed than people living in the suburbs. See NIDS-CRAM \textit{Synthesis Report Wave 2} (2020) 1, 4, available at https://cramsurvey.org/wp-content/uploads/2020/09/1-SpaulD-et-al-NIDS-CRAM-Wave-2-Synthesis-Findings.pdf. Also see I Turok ‘Four Lessons to Learn from the State’s Management of COVID-hit Townships’ \textit{Business Day} (4 October 2020), available at https://www.businesslive.co.za/bd/opinion/2020-10-04-ivan-turok-four-lessons-to-learn-from-states-management-of-covid-hit-townships/.
  \item These are the state’s own figures. Q Qukulu ‘About 600 000 Cape Residents on Housing Waiting List, Says Human Settlements MEC’ \textit{Cape Talk} (11 July 2020); S Fischer ‘City of CT Committed to Tackling Backlog’ \textit{Eye Witness News} (September 2018).
\end{itemize}
the population of Cape Town qualify for some form of housing assistance.\textsuperscript{39} In the 2018/2019 financial year, the City delivered and upgraded only 5,692 homes.\textsuperscript{40} The overwhelming scale of the need means that the City itself believes that it will be over 70 years before it can eradicate the ‘housing backlog’.\textsuperscript{41} Moreover, post-apartheid housing policy has prioritised the provision of state-subsidised housing through the development of larger-scale housing projects in peripheral areas where land usually costs significantly less than in areas close to economic nodes. This approach has ‘rendered housing provision highly bureaucratic, non-participatory, and expensive, as well as a significant source of corruption and fraud’.\textsuperscript{42} It has also had the consequence of reproducing spatial inequality and social exclusion by creating ‘poverty traps’ on the outskirts of the city far from economic opportunities and social amenities.\textsuperscript{43}

It is in the context of this layered land and housing crisis that the proposed renewal of the lease to Rondebosch golf Club led to a fierce public outcry from activists, landless people, civil society organisations, and experts in the fields of economics, history, law, and spatial planning. In fact, the City received at least 1,827 individual objections urging it not to renew the lease but to use the public land to promote spatial transformation and much needed social restructuring.\textsuperscript{44}

Perhaps most significantly, the proposed lease renewal re-ignited serious questions about the role of public land in addressing long-standing inequalities in access to land and well-located affordable housing; and the need to tackle spatial injustice in South African cities. Central to these questions is the City’s role as owner and custodian of public land, and the obligations that this position creates. On the one hand, the City is an owner that assumes exclusive rights to use, control and dispose of public land as it sees fit. On the other hand, the City is a custodian holding public land on behalf of the people – and a public entity with constitutional and legislative obligations to promote access to a more equitable city for all its residents. We found this dual role interesting, and the more we reflected, we recognised that this role sat uncomfortably with reigning property rights systems. For us, the Rondebosch Golf Course lease (and others like it) illustrates how existing conceptions of property law influence and inhibit broader societal values from being taken into account in decisions about property – particularly land. We therefore set out to investigate the possibilities of alternate property regimes that would allow for a broader set of values to be considered.

While we primarily investigate public land at the municipal level, many of the arguments we develop about the need to re-consider the value-system that underpins property are equally applicable to private property relations. We have chosen to focus here on public municipally-owned land for three central reasons. First, the public nature and importance of municipal land clearly illustrates the critical need for alternative means to give expression to the needs and interests of society in decisions about property – thereby laying the groundwork for rethinking property relations. Second, state-owned land, which constitutes approximately 18 per cent of

\textsuperscript{39} Ndifuna Ukwazi (note 35 above).
\textsuperscript{40} City of Cape Town ‘Annexure 4.1: Corporate Scorecard – Quarter 4 2020 Amendments’ 2019/2020 Adjusted Budget (May 2020) 1.
\textsuperscript{41} City of Cape Town Municipal Spatial Development Framework (25 April 2018) 220.
\textsuperscript{43} Budlender & Royston (note 7 above) at 2.
\textsuperscript{44} The City’s press statement on the public participation process is available at https://jumpshare.com/v/W4P8i539I9g7K11pG31Q.
the land that has been accounted for according to a 2013 land audit,\textsuperscript{45} presents an enormous opportunity to address land reform. The vast amounts of state-owned land could be viewed as readily accessible for land redistribution purposes, in that activating further potentially more onerous mechanisms would be required to achieve similar redistributive outcomes with private land (such as the acquisition or expropriation of private land). Third, and importantly in recent years, scholars have argued that the public and private values that inform notions of ‘public’ and ‘private’ property are not always neatly distinguishable from one another.\textsuperscript{46} In fact, many of the public and private values related to property tend to blend into each other with notions of private property informing how decisions are made by government officials in respect of public land, including, for example, how land is valued, held or disposed of by the state as owner. These scholars suggest that the public and private values underpinning property systems should therefore be seen as symbiotic rather than antagonistic.\textsuperscript{47}

It is against this setting that we contend that the failures of capitalism, deep inequalities in wealth and income, the worsening consequences of the climate crisis and other environmental concerns, among other considerations, necessitate an urgent reconceptualisation of property rights in the South African context. This reconceptualisation is driven by a need to develop a values-based property law system that gives expression to social values, prioritises basic needs, gives effect to ecological concerns, and recognises deep emotional connection and identity in property systems, rather than a system that is weighted disproportionately in favour of economic terms simply because these can more easily used to express economic value. We propose that scholars and practitioners should urgently consider alternative ways of analysing property relations and rights and find innovative ways to give meaningful expression to an alternative set of values that have, historically, been excluded or diminished in the property law system.

This article is structured as follows. Part II is an overview of the theoretical framework for rethinking property. Here, we provide an overview of the dominant property systems as well as alternative views on property theories. Part III explores promising alternatives that offer potential opportunity for the construction of a preliminary framework that takes cognisance

\textsuperscript{45} Department of Rural Development and Land Reform \textit{Land Audit} (2013) 6, available at https://static.pmg.org.za/140515state_land_audit.pdf (The Department found that 14 per cent of the audited land in South Africa is registered state land owned by national, provincial and local spheres of government as well as parastatals. Another 4 per cent is recently surveyed state land).


\textsuperscript{47} Alexander ibid.
of broader social, ecological,\textsuperscript{48} emotional\textsuperscript{49} and needs-based values.\textsuperscript{50} Part IV discusses how a measure of land justice can be achieved through land serving a societal function. This section raises some concerns with the legislative and policy framework that governs municipal land and considers the ‘rethinking’ required to shift from an absolutist model of ownership, that elevates an economic perspective of property relations, towards a values-based approach to property relations – with a focus on public land as the property object. Finally, in part V we set out our conclusions and proposals to give practical meaning to ‘rethinking property’.

II RETHINKING PROPERTY: A THEORETICAL FRAMEWORK

Property law has long been an underexplored field of comparative study.\textsuperscript{51} One of the main reasons for this is the belief among property law scholars that property law systems differ radically from one jurisdiction to another, limiting the potential usefulness of comparison.\textsuperscript{52} In some jurisdictions this has led to a rich development of property law, but it has also led to a certain level of calcification or stagnation of property law systems as these systems are not as rigorously reassessed as other areas of law often are. In particular, the central tenets of various

\begin{itemize}
\item \textsuperscript{48} By ‘ecological values’ we mean considerations that recognise the important inter-related benefits, interests or sets of relationships that people may have in connection with a property object, a natural resource or the environment. These values flow from a description of property law which deems property or natural resources to be more than economic commodities that an individual owner can solely make decisions about, but as resources that impact on a much wider range of interests beyond the owner. For example, the preservation of rainforests (for the protection of natural resources, as well as their central role in staving off the climate crisis) or the environmental impact of a mine on neighbouring communities. These values are central to the ‘web of interests theory of property’, which is discussed in detail in part IIA of this article (see the sources referenced in this part).
\item \textsuperscript{49} By ‘emotional values’ we mean considerations which recognise the important role that a person’s relationship to property may have to that person’s identity, dignity, emotional state and ability to participate in society as a fulfilled person. A significant historical, sacred, personal or even symbolic connection to property – to the extent that the connection to property becomes an extension of identity or important for the self-development of a person or community – can create a deep emotional connection to property. These are the types of values that Margaret Jane Radin seeks to give effect to in her body of work on the personhood perspective of property, which is discussed in detail in part IIC of this article (see the references cited in this part).
\item \textsuperscript{50} Di Robilant ‘Property: A Bundle of Sticks or a Tree?’ (2013) 66 Vanderbilt Law Review 869, 875.
\item \textsuperscript{52} Merryman (note 51 above) at 916; Di Robilant (note 50 above) at 870–871. As noted above, South African property law scholars are a notable exception.
\end{itemize}
property law systems have remained largely unchanged for multiple decades, and in some instances, centuries.

The lack of change in property law systems has contributed to the dominance of two primary theories of property relations that can be found in most countries that have implemented Western systems of law today.\(^{53}\) The first theory views property as absolute *dominium* or ownership.\(^{54}\) This was traditionally considered as the reigning theory in the South African system but has since been regarded by some as an historical overstatement.\(^{55}\) In terms of this conceptualisation of property, ownership is an absolute right that can be enforced against any person and, at its core, is based on exclusion.\(^{56}\) Put differently, this concept provides that an owner has absolute power to exclude others from entitlements over a property object or resource. This concept of absoluteness of property is widely attributed to William Blackstone’s identification of the right to property as the ‘sole and despotic dominion which one man claims and exercises over the external things of the world in total exclusion of the right of any other individual in the universe’.\(^{57}\) This notion of property views ownership as distinctive in nature from other lesser property rights.

On the other hand, the theory favoured in the United States is the concept of the ‘bundle of sticks’. This concept, which was introduced in the US by jurist Wesley Hohfeld, and

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\(^{55}\) While the South African property law system is primarily based on Roman Dutch common law, it has also been influenced by English common law. L Nydam & AW g Raath ‘Celebrating the Common Law Rights of Man – A Note on Blackstone’s Work on Natural Law and Natural Rights’ (2009) 34(2) *Journal for Juridical Science* 118, 131. On the traditional approach to the absoluteness of ownership, see DP Visser ‘The “Absoluteness” of Ownership: The South African Common Law in Perspective’ (1985) *Acta Juridica* 39, 39–52. For more recent reflections on how this approach to property and ownership have shifted, see Van der Walt (note 9 above ) at 267–269; Van der Walt (note 54 above) at 171; Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government [2009] ZACC 24, 2009 6 SA 391 (CC) at para 33; G Pienaar ‘The Effect of the Original Acquisition of Ownership of Immovable Property on Existing Limited Real Rights’ (2015) 18(5) *Potchefstroom Electronic Law Journal* 1480, 1483–1487; and Van der Walt (2014)(note 51 above)(for a description on how the constitutional property system has the potential to alter the conception of absoluteness).

\(^{56}\) Van der Walt (2014)(note 51 above) at 23 argues that the notion that exclusion is at the heart of the property system is a fundamental element of property law for property scholars who are referred to as ‘information theorists’ or, as Lovett refers to them, ‘information or formal exclusion theorists’ such as HE Smith and TW Merrill, among others. See JA Lovett ‘Progressive Property in Action: The Land Reform (Scotland) Act 2003’ (2011) 89 *Nebraska Law Review* 739, 746. According to Van der Walt the information theorists’ conception of property ‘pivots on the right to exclude because and to the extent that exclusion consolidates a large number of powers in one property owner which sends a simple message to non-owners, namely, to keep off’. Van der Walt (2014)(note 51 above) at 23, who cites JB Baron ‘The Contested Commitments to Property’ (2010) 61 *Hastings Law Journal* 917, 936–940.

\(^{57}\) Williams (note 54 above) at 281; Di Robilant (note 50 above) at 877. For an analysis of Blackstone’s impact on the South African property system, see Nydam & Raath (note 55 above). Even during Blackstone’s period, the English government exercised extensive regulatory powers over property – suggesting that the idea and application of absolute control is largely fictitious. This raises import questions about why absolutist notions have been so enduring. For a detailed discussion of these questions, see Williams (note 54 above).
later fleshed out by the legal realists,\textsuperscript{58} characterises property as a bundle of entitlements regulating the relationships between different parties in relation to a particular property object or resource.\textsuperscript{59} The metaphor supposes that the various entitlements can be retained by the owner or distributed among different persons as a bundle of sticks could be. The entitlements or sticks are malleable and capable of being changed over time. This implies that the state, courts and private actors may reshape the bundle, add or remove sticks, or alter the shape of individual sticks.\textsuperscript{60} Central to the theory is the recognition that a property system is primarily about the relationships among people and only secondarily or incidentally about a property object.

Both of the reigning theories of property are based on notions of exclusion,\textsuperscript{61} and individualism,\textsuperscript{62} in which a single owner has the right or entitlement to make certain decisions, and are premised on the idea that these systems are the most efficient way to allocate or distribute resources or property objects.\textsuperscript{63} In many respects, these notions of property are also premised on tacit assumptions about the ability of the market to distribute property or resources to the actor who would be most capable of deriving value from it.\textsuperscript{64}

While these notions have existed for long periods of time, they have been criticised for being overly simplified. In recent decades there has been a growing dissatisfaction with both theories as the property law systems bolstered by them have increasingly become associated with an unsustainable and inequitable distribution of resources,\textsuperscript{65} harmful environmental and ecological consequences,\textsuperscript{66} and an inability to incorporate societal or social concerns into

\textsuperscript{58} W Hohfeld Restatement of Property (1936). See also AL Corbin ‘Taxation of Seats on the Stock Exchange’ (1922) 31 Yale Law Journal 29, 429 (who notes that ‘[p]roperty has ceased to describe any res, or object of sense, at all and has become merely a bundle of legal relations-rights, powers, privileges and immunities’); TC Grey ‘The Disintegration of Property’ in J Roland Pennock & JW Chapman (eds) Nomos: Property (1980) 69.


\textsuperscript{60} Di Robilant ibid.

\textsuperscript{61} Van der Walt (2014)(note 51 above) at 23; Baron (note 56 above) at 936–940; S Viljoen ‘Property and “Human Flourishing”: A Reassessment in the Housing Framework’ (2019) 22 Potchefstroom Electronic Law Journal 1, 5 n 39.

\textsuperscript{62} Van der Walt (2014)(note 51 above) at 23. For an analysis of the linkages between reigning notions of property and ‘possessive individualism’, see Williams (note 54 above). See also Viljoen (note 61 above) at 5.

\textsuperscript{63} An often unexpressed assumption that underlies the reigning theories of property is that communal ownership will promote overuse, underproduction and the eventual destruction of a property object or resource. This assumption stems largely from the work of Garret Hardin and Harold Densetz (G Hardin Tragedy of the Commons (1968) and H Densetz Towards a Theory of Property Rights (1967)). For a criticism of these assumptions, see GS Alexander (note 46 above) at 1286–1287.

\textsuperscript{64} Williams (note 54 above) at 300, who notes: ‘The most sophisticated proponents of strong property rights today typically articulate their defence of property on the grounds that strong property rights structure social relations in the best way possible; they not only protect the liberty and autonomy of owners, they also best serve redistributive goals by strengthening a market whose rising tide will raise all ships (unlike more direct redistributive measures, which will impede the functioning of the market, and by so doing will ultimately hurt their intended beneficiaries).’


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decisions about property, among other concerns. In other words, there has been broader acknowledgment that existing property law systems (which are constructed around notions of exclusion and individualism) offer a wholly disproportionate protection to the rights and interests of individual property owners when compared to the protection of wider social, environmental and humanitarian concerns. These challenges have highlighted the need for a different conception of property law that is able to give effect to a more wide-ranging set of values.

Many of the criticisms levelled against the reigning notions of property relate to the intimate relationship between these models and conceptions of economic value. The dominant models of property emphasise individualism (which promotes ease of regulatory control), exclusive rights, efficient use (which is closely aligned to notions of ‘the market’ as an equitable distributor of resources), and the idea that compensation should occur when a person has been deprived of a property right. The assumptions underpinning these models of property are therefore closely aligned to an economic logic in which the economic value of property is the dominant ‘language’ of reigning property systems. In essence, this means that both the ownership-based and ‘bundle of sticks’ models are easily given expression through economic values – i.e., property rights as understood by these models can be measured, attributed an economic or financial value, and traded in terms of existing markets.

The critiques of existing property law systems have, in recent decades, given rise to a proliferation of property law theories that have sought to give effect to a more nuanced and varied set of values in the context of property relations. These alternative views have been developed in a variety of different fields, including environmental, humanist, legal and developmental perspectives, and describe property as a ‘web of interconnected interests’, as a continuum of land rights, as an essential component of personhood, and as nested or layered communal property systems that must prioritise social needs. These alternative views are discussed in detail below.

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68 This is also evident in the social-obligation or progressive property theorists’ approach to the property system, which recognises that the property system should ‘reflect their concerns with human flourishing; respect for human dignity; virtue; freedom; and democratic governance’ (Van der Walt (2014)(note 51 above) at 21, where he refers to Baron (note 56 above) at 927–932). See also Alexander (note 46 above) at 1257–1296; EM Peñalver ‘Land Virtues’ (2009) 94 Cornell Law Review 821–888; J Purdy ‘A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debate’ (2005) 72 University of Chicago Law Review 1237–1298; and JW Singer ‘Democratic Estates: Property Law in a Free and Democratic Society’ (2009) 94 Cornell Law Review 1009–1062. For a description of the multifaceted private and public values inherent in the American property law system, see Alexander (note 46 above).

69 Both Williams and Alexander have shown how the absolutist and bundle of sticks approaches to property are closely tied with notions of market liberalism at the core of the law-and-economics approach to property which Locke’s writings has been interpreted to support. Williams (note 54 above); Alexander (note 46 above).

70 For a broad-based discussion of some of these alternative theories, see Williams (note 54 above) at 295–308.
A Property as a ‘web of interconnected interests’

The notion of property as a web of interconnected interests has its origins in the environmental and ecological perspective of property that is motivated by concerns over the effects of existing property law systems on the environment, ecology and society at large. This perspective rejects dominant notions of property law for an ‘over-emphasis on the economic and exploitative nature of property at the expense of obligations and responsibilities to other people and the environment’. The critique of existing property systems, and particularly the ‘bundle of sticks’ approach, is premised on a failure of these systems to recognise the importance of the person-thing or person-natural resource relationship.

For proponents of this perspective, property law systems should give effect to ‘the interconnectedness between people, between people and their physical environment, and between objects [and resources] in the physical environment’. While the reigning notions of property recognise (to differing extents) that property involves human relationships vis-a-vis a property object or resource, the web approach to property goes further by giving recognition to the connections ‘between person-person relationships and person-thing relationships’. The connections between these parties and the object, as well as the connections between the parties to each other, are represented by a ‘number of interwoven strands representing a concept in human-land relations’. Arnold describes the metaphor of the web of property as follows:

[A] web of property interests in land leased to a tenant would contemplate not just the landlord-tenant relationship nor just the owner-land relationship, but the ways that the owner is connected to the land, the tenant, the government, neighbours, utility easement holders and so on.

The web of interests approach acknowledges that different types of property are often treated differently in the law, and therefore, there cannot be a one-size-fits-all approach to property. It is also based on the belief that the distinctiveness or unique characteristics of the property object or natural resource play a central role in determining how the legal relationships interact with that property. Importantly, this approach also acknowledges that a property object or resource lies at the heart of the web and may be subject to multiple overlapping sets of rights held by different individuals, groups or social entities. This feature of the web approach is informed by a ‘nature-orientated’ approach to property, in terms of which the particular features of land and natural resources should define the nature and scope of the property rights over it. To this end, the property as a web of interconnected interests approach views

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72 Barry & Augustinus (note 71 above) at 11. See also Arnold (note 66 above) at 318.
73 This does not mean that proponents of the web metaphor support an ownership-based model of property law; they unequivocally do not. Their position is that the ‘bundle of sticks’ metaphor has rendered objects or natural resources invisible – and by extension our interdependence on the natural world. For example, see Arnold (note 66 above) at 331.
74 Barry & Augustinus (note 71 above) at 11.
75 Arnold (note 66 above) at 332–333.
76 Barry & Augustinus (note 71 above) at 11; Arnold (note 66 above) at 333–334.
77 Arnold (note 66 above) at 334.
78 Ibid at 281 and 331–332.
79 Ibid at 318.
land and resources as more than economic commodities that an individual owner can solely make decisions about, but rather as resources that impact on a much wider range of interests beyond the owner.

B Property as a continuum of land rights

The continuum of land rights has been described as a theory, a metaphor, an advocacy tool or an ‘aspirational tool’. In terms of this approach, property – and land rights in particular – has been reconceptualised as a continuum of land rights by development and tenure professionals who have advocated for alternatives to private titling of property, which they believe entrenches existing assumptions about property and over-prioritises economic value. The continuum approach tries to break free from the binaries that are usually attached to land tenure and property. Rather than viewing land rights as ‘formal/informal, legal/extra-legal, secure/insecure, de facto/de jure’, the continuum approach recognises that property includes ‘a wide and complex spectrum of appropriate, legitimate tenure arrangements [that] exist between these extremities’. In other words,

[the rights along the continuum may be documented or undocumented, formal as well as informal, for individuals and groups, including pastoralists and residents of slums and other settlements that may be legal or not legal. The rights do not lie along a single line and they may overlap.]

The premise of the continuum is that land rights fall along a continuum ranging from informal land rights (that are generally weaker) to formal land rights (that are generally stronger). There are various dimensions that contribute to the strength of the land rights people hold, including economic tenure (based on a person’s ability to pay for their tenure rights, for example paying rental in terms of a lease agreement or making mortgage payments), legal tenure (based on a legal recognition of tenure, for example a title deed), and social tenure (based on notions of acceptance, recognition and protection that flow from social relationships with families, neighbours and communities). The ultimate tenure security that a person has is dependent on the interaction between these different forms of economic, legal and social recognition.

The continuum of land rights approach to property therefore also recognises that property relations are often more complex than what the existing legal framework provides for and seeks to give some form of recognition to the realities under which people live, even if this means giving effect to informal and potentially even extra-legal forms of tenure.

C Property as personhood

Various scholars have drawn on feminist legal theory and Native American tenure systems to propose the personhood theory of property – in terms of which human-object relationships are ‘socially mediated’ and property relations are ‘human-centric’. In a series of articles, Margaret

80 Ibid at 333–334.
81 Barry & Augustinus (note 71 above).
82 Ibid at 13.
84 GLTN ibid; Barry & Augustinus ibid at 11.
85 Barry & Augustinus (note 71 above) at 12–13. The personhood theory of property has been largely developed by the influential scholar Margaret Jane Radin. MJ Radin ‘Property and Personhood’ (1982) 34 Stanford Law
Jane Radin offers a sustained analysis of the personhood perspective of property.\(^{86}\) In terms of the personhood approach, a person’s being, development, fulfilment and ability to flourish requires one to have control over certain things in one’s external environment.\(^{87}\) As Radin notes, ‘self-constitution takes place in relation to an environment, both of things and people’.\(^{88}\)

The personhood approach proposes that people’s relationships to property objects fall somewhere along a continuum.\(^{89}\) On the one end of the continuum, property objects may be ‘personal property’, which implies that these objects are closely tied up with, or even constitutive of, the identity of a person either as an individual or as a group, or to which a person has deep emotional connections (for example, a wedding ring).\(^{90}\) Personal property is property to which a person has an important connection that ‘contributes to the holder’s self-development, [and] enables her to participate in society as a fulfilled person’.\(^{91}\) Radin argues that the strength of a person’s relationship to a property object can be measured by the degree of pain they would suffer if the property object were lost.\(^{92}\) On the other end of the continuum, property objects may be fungible, these are objects which can be easily replaced and that hold little or no emotional value to the people who possess them.\(^{93}\) A particular object may fall on different points of the fungible-constitutive continuum at different points in time, and depending on who possesses it (for example, a ring could be a fungible object or commodity to a jeweller, but could constitute personal property intricately tied to the personhood of the owner).\(^{94}\)

At the heart of Radin’s theory is the notion that the specific connection that a person has to a property object is central to determining how much protection to afford the person’s interest in the property object. Radin believes that personal property deserves a higher degree of protection than fungible property, because the depth and constitutive nature of the connection to personal property is more important from a moral perspective.\(^{95}\) In making these claims,
Radin relies on the vision of human flourishing by drawing on particular values that she argues are implicitly shared by our society.\(^{96}\)

The personhood approach therefore offers a useful paradigm for comparing and justifying decisions when property interests are in conflict. If a dispute arises where one person has a deep emotional connection to a property object – so that the object is an extension of their identity – while another person only has a fungible or commercial interest in the object, the relative importance of the personhood interest may, in certain circumstances, create ‘a priority claim over curtailment of merely fungible interests of others’.\(^{97}\) For example, Radin argues that this approach provides a rationale that would, in some circumstances, allow a tenant or unlawful occupier’s non-commercial personal use interest in their home (a personhood interest) to trump their landlord’s commercial interest in the return on the property through collecting rent (a fungible interest).\(^{98}\)

Radin’s personhood approach to property also provides for the possibility that the ‘personhood dichotomy in property’ can be viewed as ‘the source of a distributive mandate’.\(^{99}\) In essence, this argument asserts that states ‘should make it possible for all citizens to have whatever property is necessary for personhood’ and ‘rearrange property rights so that the fungible property of some people does not overwhelm the opportunities of the rest to constitute themselves in property’.\(^{100}\)

The personhood approach to property relations therefore acknowledges that a person’s relationship to property may have an important role in a person’s identity, dignity, emotional state and ability to participate in society as a fulfilled person, thereby recognising that property

\(^{96}\) For example, Radin (1982)(note 85 above) at 987 suggests that our society currently values a home (‘There is both a positive sense that people are bound up with their homes and a normative sense that this is not fetishistic’). See also Van der Walt & Viljoen (note 46 above) at 1056. Schnably (note 87 above) critiques this aspect of Radin’s conception of human flourishing founded on shared societal values, on the basis that no such consensus exists – and uses the example of a home to illustrate his point. For Schnably, there is no shared normative value attached to a home as a home can mean different things to different people. As Schnably states, the home can also be ‘a place of domination and resistance, conflict and discord, as [often as it can be] the centre of a “healthy life”’ (Schnably (note 86 above) at 367).

\(^{97}\) Radin (1986)(note 85 above) at 365; Van der Walt & Viljoen (note 46 above) at 1056.

\(^{98}\) Radin ibid; Van der Walt & Viljoen ibid. The personhood theory of property also offers a potentially useful justification for some of the jurisprudence that the Constitutional Court has developed in its consideration of the balancing of landowners’ right to property and unlawful occupiers’ right of access to adequate housing. Some cases where a personhood view of property might be visible include President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd [2005] ZACC 5, 2005 (5) SA 3 (CC) (‘Modderklip’); PE Municipality (note 14 above); and City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another [2011] ZACC 33, 2012 (2) SA 104 (CC) (‘Blue Moonlight’). A full investigation of the usefulness of the personhood theory as a means of understanding this jurisprudence falls outside the scope of this article.

\(^{99}\) Radin (1982)(note 85 above) at 990. See also Williams (note 54 above) at 300–304, for a brief analysis of Radin’s distributive arguments.

\(^{100}\) Radin (1982)(note 85 above) at 990; Williams (note 54 above) at 301. Radin’s conception of the distributive mandate of the personhood approach to property is closely aligned with the notions of the redistributive importance of property articulated by the social-obligation or progressive property law scholars (although the basis for the distributive mandate in their case lies in social obligation norms, which suggest that redistribution may be necessary for the sake of both the property holder and others). See the discussion of social obligation theory and the social function of property in part IV of this article. See also Alexander (note 67 above) at 768 (‘Hence, human flourishing requires distributive justice, the ultimate objective of which is to give people what they need in order to develop the capabilities necessary for living the well-lived life’); Singer (note 67 above); and Peñalver (note 68 above). In the South African context, see Van der Walt (2014)(note 51 above) at 41.
may have deep emotional value. The personhood perspective of property also recognises that land and notions of a ‘home’ could, in circumstances where a person or community have established a deep personal or symbolic connection with the land as a component of their personal and collective identity and the dispossession of land causes human suffering beyond the material or economic value that the land holds,\textsuperscript{101} deserve additional protection. Conversely, in circumstances where a person has not established a personal connection with land or where land has purely commercial value, such fungible land may be redistributed to allow others to establish their own personal connection with it.\textsuperscript{102} In the South African context, where access to land, tenure security and housing was historically dictated by colonialism and apartheid and remains influenced by deeply entrenched inequality, land is understandably deeply emotive and intimately tied with many people’s human dignity.\textsuperscript{103}

D Communal property as a ‘nested’ or ‘layered’ system that prioritises need

In recent years, scholars have turned to indigenous, pre-colonial African communal property systems for guidance on how to avoid the shortcomings of the Western conceptions of property relations.\textsuperscript{104} Okoth-Ogendo describes communal property practices in markedly different terms to historical assumptions about entirely collective ownership. He rejects the notion that communal tenure is necessarily ‘communal’ in nature – with ‘collective’ ownership vesting in a whole group and decisions made by the community as a whole. Instead he argues that social relations create ‘reciprocal rights and obligations that bind together, and vest power in community members over land’.\textsuperscript{105} In other words, in order to determine who is granted access to, or control over land, one has to consider the rights and obligations that emerge from the relationships between people.\textsuperscript{106} This approach to communal land tenure is based on the fact that land relations in terms of customary law are relational – that is, they are about the relationships between people as they relate to a piece of land as opposed to the powers or entitlements over land of individual owners.

\textsuperscript{101} Radin (1982)(note 86 above) at 959; Barry & Augustinus (note 71 above) at 12–13.

\textsuperscript{102} The degree or protection, or need for redistribution, would depend on the type of property and the way in which it is used or valued by the holder. In the German context, see R Lubens ‘The Social Obligation of Property Ownership: A Comparison of German and U.S. Law’ (2007) 24 Arizona Journal of International and Comparative Law 389, 389–449.

\textsuperscript{103} C Walker Land Marked, Land Claims and Restitution (2008), who notes that ‘land is emotional’. See also Barry & Augustinus (note 71 above) at 13.


Towards a Values-Based approach To property relations in South Africa

Cousins articulates a similar notion of communal tenure as inclusive and ‘socially embedded’.\(^{107}\) According to him, ‘land tenure was [and is] both “communal” and “individual”’ and can be seen as a ‘system of complementary interests held simultaneously’ by different people.\(^{108}\) In other words, communal tenure systems are based on an idea that individuals and families hold relative rights to the same residential and agricultural land. These relative rights may even overlap.\(^{109}\) These individuals and families must negotiate access to common resources such as land for grazing, forests or rivers. Communal property systems are therefore ‘nested’ or ‘layered’ with different people or groups holding varying degrees of rights and interests over land and resources.\(^{110}\) For this reason, communal tenure practices require decision-making about land to take place at various levels and with various people or groups, including individuals, households, kinship networks and wider communities.

Mnisi-Weeks and Claassens argue that communal property systems are based on ‘social cohesion’ and ‘mutual support’ in terms of which relational rights are negotiated to ensure that the ‘basic needs’ of households in the community are met.\(^{111}\) They argue that these ‘vernacular values that prioritise need could be instruments for realising socio-economic rights’.\(^{112}\)

E Dissatisfaction with the dominant notions of property

Although the abovementioned theories on property vary widely, have their origins in distinct fields and are informed by varied societal concerns, when viewed together they advance a singular idea. The current constructions of property are limited due to property’s overemphasis of a single set of values – values that are largely economic, exclusionary and exploitative. Each of these theories aims to realise a more social conception of property law by arguing for current property law systems to be radically restructured to make room for a more varied set of values, including social, ecological, emotional and needs-based values. In short, these theories advocate that property should serve a social function.\(^{113}\)

Critically, these alternative approaches to property are premised on the assumption that property rights are not only externally limited through state regulation or the interests of others, but also internally limited by their social function.\(^{114}\) In terms of these approaches, property owners cannot simply do with their property as they please. Instead, property rights are inextricably linked with social obligations that rights holders owe to society and may even require a measure of self-sacrifice.\(^{115}\)

A key challenge to these theories is that the alternative value set – societal, ecological, emotional or needs-based values – are incorporeal and therefore harder to be demonstrated

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\(^{107}\) Cousins ‘Characterising “Communal” Tenure’ in Claassens & Cousins (note 105 above) 109, 110.

\(^{108}\) Ibid at 110–111.

\(^{109}\) Okoth-Ogendo (note 105 above) at 129.


\(^{111}\) Ibid at 824.

\(^{112}\) See the full discussion of property as social function below in part III.

\(^{113}\) Alexander (note 46 above) at 160; Viljoen (note 61 above) at 4 and 7.

\(^{114}\) Singer (2000)(note 67 above); Alexander (note 46 above) 748; Williams (note 54 above) 296–300; and Viljoen (note 61 above) at 4, 7.
than existing property interests (which, as argued above, generally hold clearly articulated economic value). For example, one might argue that it is difficult to place a measurable value on the improvement in the quality of life of a person who has been able to gain access to land that is more conveniently located for the purposes of housing or employment opportunities, or the ongoing emotional turmoil, harm and loss suffered as a result of the legacy of apartheid forced removals and displacement.

While scholars have therefore advocated for a more nuanced values-based approach to property and articulated a set of values that could form the backbone of such a values-based approach, conceptions of property have remained largely unchanged. In the South African context, the most significant developments in constitutional property law during the post-apartheid period seem to have been less about the inherent nature of property and more about the negotiation or balancing of constitutional property rights with various conflicting rights in particular, through a series of cases aimed at interpreting and giving effect to the right of access to adequate housing, as well as the rights to life, human dignity, equality, freedom of assembly and freedom of movement. While each of these cases is intrinsically about property, property law scholars and litigators have chosen to view these cases primarily as a negotiation or balancing of competing rights, rather than challenging deep-seated tensions in South African conceptions of the property system. Property law scholars argue that these cases point to a more modest role or status for property in the broader constitutional scheme – and that the work of challenging the property system can, and should, be done primarily with reference to other non-property rights. Put differently, property rights have a more limited

116 For a detailed discussion of these developments and the potential implications that they have for the status of property rights in the broader constitutional scheme, see Van der Walt (2014)(note 51 above); and Van der Walt & Viljoen (note 46 above).

117 For case law illustrative of this approach, see Modderklip (note 98 above); PE Municipality (note 14 above); Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others [2008] ZACC 8, 2008 (3) 208 (CC)(‘Olivia Road’); and Blue Moonlight (note 98 above). See also Van der Walt (2014)(note 51 above).

118 For case law illustrative of this approach, see Victoria & Alfred Waterfront (Pty) Ltd & Another v Police Commissioner of the Western Cape & Others [2003] ZAWCHC 75, [2004] 1 All SA 579 (C)(‘Victoria & Alfred Waterfront’).


120 Scholars like Van der Walt and Viljoen at points argue that these cases are not so much about property rights per se, but rather about defining the space where adjudication should be regulated by property rights. See Van der Walt (2014)(note 51 above); Van der Walt & Viljoen (note 46 above). On the other hand, some scholars believe that these cases have fundamentally altered property rights. See, for example, S Wilson ‘Breaking the Tie: Evictions, Homelessness and the New Normality’ (2009) 126(2) South African Law Journal 270, 270–290.

121 Van der Walt (2014)(note 51 above); Van der Walt & Viljoen (note 46 above).

122 Van der Walt (2014)(note 51 above); Van der Walt & Viljoen (note 46 above). Van der Walt compellingly argues that considering property disputes of this nature primarily from the perspective of property is not necessary from a normative perspective and has the potential to further strengthen the centrality of property rights. Van der Walt (2014)(note 51 above) at 42 (‘there is no compelling reason why non-property legal objectives such as life, liberty, human dignity or equality have to be pursued through the protection of property rights and at least some ground for believing that the pursuit of property objectives might actually frustrate the pursuit of those personhood- or human-flourishing securing objectives’). Similarly, he argues elsewhere that presumptive power in property may inadvertently uphold absolutist or ownership paradigm of property. See Van der Walt (2009) (note 51 above) at 50–51.
role to play in these kinds of disputes (potentially even to play a more traditional protective role for property).\textsuperscript{124} While this approach also presents a potentially powerful challenge to reigning notions of property that are based on absolutism and exclusion,\textsuperscript{125} it does not adequately deal with the property system itself and the societal values that the dominant theories of property continue to entrench because the negotiation or balancing approach depends on a countervailing right that can be leveraged against property interests in order to expose the social or political values that underlie the property system. Those who are unable to establish countervailing rights are therefore precluded from challenging the property system. In this respect, our arguments are like those of Moon, who argues that these kinds of property disputes should be seen against the backdrop of the state-created system of property and the distribution of property inherent in it.\textsuperscript{126} As he writes (in relation to the Canadian case of Committee for the Commonwealth of Canada v Canada):\textsuperscript{127}

This approach, of treating the distribution of property rights as a potential constitutional wrong, shifts the focus of judicial review from discrete state acts, and even discrete private acts, to the state created system of property rights. The injustice the courts are striking at when they grant an individual (or the general public) access to privately owned property is an imbalance in communicative power, an unfair distribution of communicative resources, and the consequent restriction on the individual’s opportunity to communicate … The wrong at issue is not so much the exclusion of communicative access by the private owner, but rather the system of property rights which makes the exclusion of access from a particular property so significant. The wrong is systemic rather than the discrete act of a particular actor who invades or restricts an individual’s freedom of expression.\textsuperscript{128}

In our opinion, the reliance on countervailing rights to challenge the values that underpin the property system is too focused on the ‘discrete act’ rather than the ‘systemic wrong’ and has, to a degree, insulated property rights from more intensive scrutiny and protected the property system from more vigorous interrogation in relation to the societal values that the system protects and entrenches. This is particularly the case in the context of South Africa’s colonial and apartheid history of dispossession, which has effectively stripped a significant segment of the population of potential countervailing rights that could be used to challenge the property system – at least in so far as access, use or occupation of land is concerned.

Former Deputy Chief Justice Moseneke suggested a similar argument in late 2014, when he observed:

One would have expected that a matter so pressing as land use, occupation or ownership would pre-dominate the list of disputes in the post-conflict contestation… It may be that the property and restitution provisions of section 25 of the Constitution have been hopelessly underworked.\textsuperscript{129}

Therefore, because the majority of contestations about property law have not grappled with how South Africa’s property law system – with a focus on land – should be re-imagined under

\textsuperscript{124} Van der Walt (2014)(note 51 above); Van der Walt & Viljoen (note 46 above).
\textsuperscript{125} A more limited role or status for property in the constitutional scheme challenges many of the information theorists’ beliefs that all rights flow from the right to property.
\textsuperscript{128} Moon (note 126 above) at 367.
\textsuperscript{129} Moseneke (note 37 above).
the democratic dispensation, we advance arguments that the principles underlying the property law system ought to shift and align with the reality of South Africa’s historical, constitutional and political context.\(^{130}\) The slow development of this aspect of the constitutional property order is especially concerning given the central role that the dispossession and denial of land and property rights played in the mechanics and enforcement of the apartheid project.

The discussion above has emphasised the need to rethink property by considering alternative ways of analysing property relations and rights and exploring innovative ways to give meaningful expression to an alternative set of values that has, historically, been excluded or diminished in property law systems. To this end, we believe that an approach which relies on countervailing rights to challenge the property related considerations fails to consider the system, the societal values that are upheld by the system, and the nature and extent of the shift that is required. In what follows, we discuss the possible avenues for a reconceptualisation that would give effect to these concerns.

III RETHINKING PROPERTY: POSSIBLE AVENUES

Despite the proliferation of potential alternative property models that have been put forward by scholars, no definitive alternative has yet emerged that offers a coherent framework for the incorporation of a values-based approach to property that takes cognisance of broader social, ecological and emotional values.\(^{131}\) However, there are some promising alternatives that offer an opportunity for the construction of a preliminary framework but require detailed exploration.

A Social function of property: property as a tree

A promising alternative that offers a rigorous framework to incorporate a pluralist value system is the social function of property theory.\(^{132}\) This theory stems largely from French jurist León Duguit who popularised the notion in Buenos Aires in 1911.\(^{133}\) Since then, the concept has been imported, to varying degrees, into legal systems in Latin America, including Mexico, Colombia, Brazil and Chile, and has also been influential in the development of the social-obligation theory of property (or progressive property theory) in the United States.\(^{134}\)

The central tenet of this model is that property is not a right but rather a social function.\(^{135}\) This means that owners are under a social obligation to put their property into the service of the community or put it into production.\(^{136}\) For Duguit, this means that the state should only

\(^{130}\) We do not suggest that judges and property scholars have not been careful to locate property disputes within their appropriate historical and systemic contexts. There are ample decisions where this is the case, most notably PE Municipality (note 14 above), Blue Moonlight (note 98 above), Modderklip (note 98 above), and Victoria & Albert Waterfront (note 118 above). See Van der Walt & Viljoen (note 46 above) at 1059–1072 (who consider, in-depth, how a contextual reading in the PE Municipality (note 14 above) case shifted the proper space for property and housing rights).

\(^{131}\) Di Robilant (note 50 above) at 875.


\(^{133}\) Foster & Bonilla (note 132 above) at 1004; Viljoen (note 61 above) at 4.

\(^{134}\) Foster & Bonilla ibid.

\(^{135}\) Duguit (note 132 above) at 236.

\(^{136}\) Ibid at 240; Alexander (note 46 above) at 1270; Viljoen (note 61 above) at 5.
protect property when it fulfils its social functions. When a property owner acts in a manner that is inconsistent with the social functions of the property, the state can intervene to encourage or punish non-cooperative owners using mechanisms like taxation or expropriation. This suggests that the state has both negative and positive obligations in relation to property.

The notion of the social function flows from the recognition that property relations are essentially entrenched in greater social structures. From this perspective, private property is firmly located in the public. This has led property law theorist, Alexander, to draw correlations and connections between the values associated with private property (including individual security, personal security and self-determination) and fundamental public values (including equality, inclusiveness, community, participation and self-constitution) to show that these values are not at odds with each other but instead, are often mutually reinforcing.

According to some proponents of the social function of property, the theory also implies a version of distributive justice as it is premised on each person requiring access to certain forms of property to enable them to live a life with purpose. For instance, Alexander notes that ‘the social obligation norm can be the basis for social transformation’. Alexander centres the notion of ‘human flourishing’ and argues that in order to achieve this, property owners must: provide from their surplus, and in ways that are appropriate to them as property owners, to the communities to which they belong … those benefits that the community reasonably regards as necessary for development of the capabilities essential to human flourishing.

The social function of property theory is closely aligned with the tree concept of property proposed by French and Italian jurists before the Second World War. While there are no express historical linkages between Diguit and these jurists, their theoretical underpinnings share many similarities. This concept of the tree has been described as follows:

The tree concept views property as a tree with a trunk—representing the core entitlement that distinguishes property from other rights—and many branches—representing many resource-specific bundles of entitlements. The trunk of the tree is the owner’s entitlement to control the use of a resource, mindful of property’s ‘social function’. For the theorists of the tree model, the social function of property evokes a plurality of values: equitable distribution of resources, participatory management of resources, and productive efficiency. The branches of the property tree are the multiple resource-specific property regimes present in modern legal systems: family property, agricultural property, affordable-housing property, industrial property, etc.

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137 Foster & Bonilla (note 132 above) at 1005; Viljoen ibid at 5.
138 Foster & Bonilla ibid at 1005. This approach is therefore tangentially linked to notions of the right to property as an economic, social and cultural right in international law. See, for example, C Krause ‘The Right to Property’ in A Eide, C Krause & A Rosas (eds) Economic, Social and Cultural Rights (1995) 143, 143–158.
139 Viljoen (note 61 above) at 7.
140 Alexander (note 46 above). See also Viljoen (note 61 above) at 7.
141 Many of the United States-based scholars who have relied on Diguit’s idea of the social function of property, ascribe to the Aristotelian notion that the purpose of property is to enable human flourishing. Alexander (note 46 above); Alexander (note 67 above); Singer (2000)(note 67 above).
142 Alexander (note 67 above) at 782.
144 Di Robilant (note 50 above).
145 Ibid at 872.
The tree concept was developed by French and Italian jurists to challenge the rise of fascism in Italy by incorporating ideas of collectivism into property law, while simultaneously offering protection to individual owners’ autonomous control of certain property entitlements.\(^{146}\)

The challenge for the tree theorists was to find a ‘new equilibrium between the individual and the social element of property’.\(^{147}\) Their proposed solution: to make the social function central to the property model by incorporating the social elements of property not only into the branches, but also into the trunk of the tree. Owners are thus required to exercise their use-control entitlements while remaining mindful of the property’s social function. For tree theorists, the recognition and incorporation of the social elements of property were not in conflict with existing concepts of property. As Barassi notes:

> At no point in history, not even in Roman law, was property absolute. The idea of a social interest, parallel to the interest of the individual owner, has always been there.\(^{148}\)

The appeal of the tree model of property lies in its delicate fusion of an owner’s control and use of a resource and the social function of property, coupled with the recognition of a plurality of values in property relations, including equitable distribution of resources, participation management of resources and productive efficiency of resources. Proponents of the tree concept’s recognition of a multiplicity of social values (while still clearly articulating what these values were) was an important break from previous attempts at incorporating social values into property relation, which were hampered by being ‘hopelessly evasive about the meaning and content of the social element of property’.\(^{149}\)

In this respect, the tree concept offers a potential blueprint for understanding the potential advantages and pitfalls for a values-based conception of property law.\(^{150}\) In particular, it suggests that any notion of a values-based property system should be founded on clearly articulated values.

### B Harnessing the Constitution

The Constitution is unambiguously ‘transformative’\(^{151}\) and offers enormous potential to give expression to a values-based approach to property. It aims to give effect to the large-scale

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146 Ibid at 900 (“The theorists of the tree concept of property sought to resist and to offer an alternative to the theory of ‘Fascist property’”).

147 Di Robilant (note 50 above) at 907.


149 Di Robilant (note 50 above) at 909.

150 While it is important to be wary of importing unsuitable or incomparable ideas from a foreign context into our law, the context within which the tree theorists developed their theories share similarities with contemporary South Africa. The rise of fascism in Italy, while undoubtedly influenced by similar movements throughout Europe, was also a consequence of the crisis of liberalism. Growing discontent among a large urban proletariat was fuelled by inequality, and particularly inequalities in the distribution of land in the wake of the agrarian crisis in the late 1800s. In many respects, South Africa is facing similar challenges. The country is characterised by extreme income and wealth inequality and significant lack of access to land and affordable housing. The dissatisfaction with the enduring nature of these challenges almost 30 years after the end of apartheid has led to fierce debates in the public domain about property and the need for land redistribution.

transformation of South African society; from a divisive, apartheid past, to an egalitarian society founded on human dignity, equality and social justice.\textsuperscript{152} Albertyn and Goldblatt argue that this transformative mandate envisages:

a complete reconstruction of the state and society, including redistribution of power and resources along egalitarian lines. [And] the eradication of systemic forms of domination and material disadvantages based on race, gender, class and other grounds of inequality. It also entails the development of opportunities which allow people to realise their full human potential within positive social relationships.\textsuperscript{153}

The Constitution contains various transformative commitments, including the attainment of social justice and substantive equality,\textsuperscript{154} the infiltration of human rights norms into the private sphere,\textsuperscript{155} and the fostering of a ‘culture of justification’.\textsuperscript{156} In order to achieve the objective of substantive equality and social justice, the Constitution compels a contextual re-examination of existing power structures and social relationships, as well as an engagement with social vulnerability and disadvantage.\textsuperscript{157} The realisation of the collective good, through redistributive justice and the dismantling of social vulnerability, lies at the heart of the transformative mandate.\textsuperscript{158} Legal commentators have justified this constitutional interpretation by relying on the constitutionally enshrined right to equality,\textsuperscript{159} as well as the justiciable nature of socio-economic rights.\textsuperscript{160} The Constitution also seeks to introduce public law norms into private relationships and structures.\textsuperscript{161} This is due to the fact that the private sphere harbours significant substantive inequality, by creating and sustaining imbalances in private power.\textsuperscript{162} This mandate flows directly from the horizontal application of the Bill of Rights.\textsuperscript{163}

The Constitution’s social transformation mandate is particularly apparent in the constitutional property clause, section 25 of the Constitution, which both protects property rights against unconstitutional state action (section 25(1)–(3) prohibit arbitrary deprivation of property rights and govern compensation in cases of expropriation) and entrenches an explicit commitment to radical land reform (sections 25(4)–(9) make provision for land restitution, land redistribution and the strengthening of insecure land rights)\textsuperscript{164}. By including...
both protective and distributional elements, the property clause is self-aware of the historical and constitutional context in which it operates and the centrality of land redistribution and reform mechanisms in achieving ‘the transformational goal of addressing centuries of racial and economic discrimination’. The construction of the property clause itself therefore already brings us closer to a values-based approach to property by recognising the right of an owner to govern how property objects or resources should be used, while simultaneously acknowledging the broader social need for the redistribution of property along egalitarian lines.

Yet the mechanisms contained in sections 25(4)–(9) of the Constitution have only been considered by the Constitutional Court and Supreme Court of Appeal in a handful of cases. Only in recent years are we seeing these issues coming before the courts, largely due to decades of inertia on the part of the state to prioritise land reform and spatial restructuring, especially in the urban landscape.

Some Constitutional Court cases have, however, alluded to a values-based approach to property relations – largely in obiter statements. These assertions have yet to translate into impactful change (this is possibly due to the specific facts and issues raised in these cases, and as suggested above, that these cases were not concerned with the provisions in the property clause relative to the property system and advancing redistribution, restitution and tenure security as constitutional mandated programmes for land reform). Some of these cases are discussed briefly below.

In First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance (‘FNB’), the Court emphasised that ‘the protection of property as an individual right is not absolute but subject to societal considerations’ and affirmed that ‘property should also serve the public good.’

These notions were expanded on in the Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape (‘Shoprite’), where the Court found:

The fundamental values of dignity, equality and freedom necessitate a conception of property that allows, on the one hand, for individual self-fulfilment in the holding of property, and, on the other, the recognition that the holding of property also carries with it a social obligation not to harm the public good. The function that the protection of holding property must thus, broadly, serve is the attainment of this socially situated individual self-fulfilment.

above) at 10–11; and Van der Walt & Viljoen (note 46 above) at 1043–1054.

165 PE Municipality (note 14 above) at paras 15–23; Viljoen (note 61 above) at 11; Van der Walt & Viljoen (note 46 above)(the description of PE Municipality).


167 For a description of s 25 of the Constitution’s protective and reform imperatives, see Van der Walt & Viljoen (note 46 above).


170 Ibid at para 50 (our emphasis).
In *Agri South Africa v Minister for Minerals and Energy* (‘*Agri SA*’), the Court said:

This brings to the fore the obligation imposed by section 25 not to over-emphasise private property rights at the expense of the state’s social responsibilities. It must always be remembered that our history does not permit a near-absolute status to be given to individual property rights.

In *Daniels v Scribante*, the Court rooted its findings in a context-laden and values-based approach by carefully considering the legacy of land dispossession brought about by colonialism and apartheid, and expressly linking access to land and housing with the protection and advancement of human dignity. For the Court, the legislation in question, the Extension of Security of Tenure Act 62 of 1997 (ESTA), not only gives effect to section 25(6) of the Constitution, it also plays an important role in responding to the particularly deplorable history of land dispossession in South Africa. As the Court stated:

An indispensable pivot to [the right to tenure security] is the right to human dignity. There can be no true security of tenure under conditions devoid of human dignity.

Finally, in *Port Elizabeth Municipality v Various Occupiers* (‘*PE Municipality*’), the Court, in a nuanced judgment that sought to give effect to conflicting land rights with reference to the historical context of discriminatory land law, stated that the ‘starting and ending point of the analysis [of giving effect to section 25] must be to affirm the values of human dignity, equality and freedom’ and that the Constitution contemplated an ‘orderly opening-up or restoration of secure property rights for those denied access to or deprived of them in the past.’ These statements from the Constitutional Court hint at a more socially orientated approach to property and leave ample room for the adoption of a values-based approach to property.

As noted above, the most significant developments in property law during the democratic dispensation seem to have been less about the nature of property law and more about the negotiation or balancing of the constitutional right to property with various conflicting rights – in particular the right of access to adequate housing contained in section 26 of the Constitution. However, viewing these cases primarily as a dispute over conflicting rights obscures how they have resulted in a fundamentally different property system – in terms of which ownership and real property rights are no longer sacrosanct but may, in certain circumstances, be required to give way to the rights of others or broader societal interests.

This brief analysis suggests that an alternative conceptualisation of property is possible within the South African constitutional framework, which, through its transformative aspirations not only accommodates, but also mandates considerations about the social function of land as a property object.

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171 *Agri South Africa v Minister for Minerals and Energy* [2013] ZACC 9, 2013 (4) SA 1 (CC) (‘*Agri SA*’).
172 Ibid at para 62.
173 *Daniels v Scribante & Another* [2017] ZACC 13; 2017 (4) SA 341 (CC) (‘*Daniels*’).
174 Ibid at paras 13–22.
175 Ibid at para 4.
176 *PE Municipality* (note 14 above) at para 15.
177 Ibid.
178 For example, see *Modderklip* (note 98 above); *PE Municipality* (note 14 above); *Olivia Road* (note 117 above); and *Blue Moonlight* (note 98 above).
179 For a discussion of how eviction law and the right of access to housing have impacted on the property rights, see Wilson (note 121 above); and S Wilson, J Dugard & M Clark ‘Conflict Management in an Era of Urbanisation: Twenty Years of Housing Rights in the Constitutional Court’ (2015) 31(3) *South African Journal on Human Rights* 472, 503. See also Alexander (note 46 above).
Although the values attached to public land might appear to be different to those of private land, in practice, public land is often treated in a manner that is informed by private law notions of property with the consequence that public land, in effect becomes quasi-private land. For example, decisions about public land are guided by the dominant theories of property where exclusion is a driving principle, certain public land is governed by private property contractual arrangements with private parties over long periods (such as long-term leases over municipal land) and public land continues to be steeped in an economic or market-related approach to land which entails: priming the market value of land (over social, historical and related societal values and functions);\(^\text{180}\) the holding of public land by state actors for speculative purposes; treating and trading public land as a financial commodity; and in the context of municipally owned land, regulating municipal land in terms of legislation and policies concerning the fiscal and financial affairs of local government which favours a market-centric ideological lens in relation to the use public land.\(^\text{181}\) This creates barriers to truly accessing and using public land in a manner that would prioritise the social functions of public land. A different approach would thus offer an opportunity to embrace and find meaningful ways to measure and incorporate a plurality of values in decision-making about the uses of public land, and ultimately ‘protect non-property rights and values in their own right’.\(^\text{182}\)

### IV THE SOCIAL FUNCTION OF PUBLIC LAND

#### A Public land needs to serve a social function

As noted above, Cape Town is facing an acute affordable housing crisis, in terms of which a vast majority of impoverished and low-income earning families remain excluded from accessing urban land and property markets. This social exclusion is manifested in deep and enduring spatial inequalities. The City has primarily attributed this enduring spatial injustice to a lack of available well-located land that could be used for affordable housing.\(^\text{183}\) The City is not wrong when it says that suitable land is scarce in central or well-located areas – it is expensive to buy and will only become more so in the future. However, the City has not unlocked the vast tracts of land it owns in well-located areas, of which a large proportion are unused or under-utilised given their potential to be used to redress spatial inequality.\(^\text{184}\) By unlocking and releasing well-located state land for the development of affordable housing, the City could alleviate the

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\(^{180}\) The Western Cape Provincial Government’s decision to dispose of public land, the Tafelberg Property in Sea Point Cape Town, the subject property in Adonis (note 8 above), is an example of the state disposing of public land to the highest bidder in order to generate revenue on the basis of the highest market value, as opposed to centering other societal functions needs for the land – in this case, the development of affordable housing in a well-located area as a means to advance spatial justice.

\(^{181}\) For example, the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA), discussed more fully in part IVB below.

\(^{182}\) Van der Walt (2014)(note 51 above) at 31.

\(^{183}\) For example, see P Grobbelaar ‘Cape Town Land Shortage Hurts Housing’ Property 24 (6 July 2011), available at www.property24.com/articles/cape-town-land-shortage-hurts-housing/13767.

\(^{184}\) According to the City’s own policies it owns 87 000 pieces of land, and while not all that land is well-located or suited for the development of affordable housing, a significant portion of this land will be well-located and suited for housing development. See City of Cape Town Management of Certain of the City of Cape Town’s Immovable Property Policy (26 August 2010) Ref No C54/08/10, cl 5.2. See also, generally, Ndifuna Ukwazi (note 2 above) at 1.
housing affordability crisis and contribute to reversing the enduring legacy of spatial apartheid in the city. 185

Rather than utilising the public land it holds to address these key social needs, the City has continued to dispose of large parcels of valuable public land it owns by selling or leasing this land to private entities without considering how current land uses perpetuate inequality, and often without including a condition for land to be used to achieve a social function such as building affordable housing. 186 The City’s management of public land has come under the spotlight when activist organisation Ndifuna Ukwazi published a research report that investigated the City’s practice of disposing of municipally owned land through medium to long term leases. (While this research report was primarily focused on the City’s practice of leasing out public land, many findings apply equally to disposals in the form of sales). 187

The report delivers several concerning findings. First, many parcels of leased public land in well-located areas are unused or under-utilised given their social function potential. 188 This is due to the fact that much of this public land is being leased out to private organisations or companies for their exclusive use (or for the use of only a few people who are ordinarily required to pay a fee to access the public land), thereby turning public land into quasi-private land. 189 This land includes parking lots, bowling greens with waning memberships, and golf courses that provide enjoyment to a few patrons. 190 The report notes that this is an ‘inefficient, exclusive and unsustainable use of well-located public land’. 191

Second, the renewals of these leases, without critical reflection on the impact of each renewal, has the effect of entrenching and exacerbating spatial inequality. 192 The majority of these leases find their origins in apartheid and colonial spatial planning – which often intentionally sought to prevent Black families from accessing the City. 193 Urban land use specialist, Jane Jacobs, has written about the way in which large tracts of land designated to a particular land use or imposing infrastructure (like train tracks or highways) can function as borders or physical barriers to segregate people. She warns that these ‘borders divide up cities into pieces’ and ‘can

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185 Ndifuna Ukwazi (note 2 above); and M Clark ‘Cape Town’s Course of Injustice: Subsidising the Rich to Exclude the Poor’ Daily Maverick (28 January 2020). This is in line with the recommendations to alleviate poverty and inequality in the context of urban land rights issued by the High Level Panel on the Assessment of Key Legislation and Acceleration of Fundamental Change and the Mandela Initiative. See High Level Panel Report (note 15 above); and M Clark & LR Circolia ‘Informalisation, Urban Poverty and Spatial Inequality’ Mandela Initiative Brief (2018).

186 The City’s Property Management Department has encouraged private organisations to rent public land at particularly low rates, see City of Cape Town Applying to Buy or Lease Municipal Land (August 2019) available at https://resource.capetown.gov.za/documentcentre/Documents/Procedures,%20guidelines%20and%20regulations/PropertyManagement_Applying%20to%20buy%20or%20lease%20land.pdf.

187 Ndifuna Ukwazi (note 2 above) at 3–5.

188 Ibid.

189 We argue that the extensive powers granted to lessees over public land and the long lease periods (that regularly extend to multiple successive 10 year cycles) create a situation that is the reverse to what Van der Walt (note 51 above) at 28–29 and fn 37 calls ‘quasi-public’ land – that is land that is privately owned but accessible to the public like factories and shopping malls. In the case of long-term rights being granted over public land, the public nature of the land is diminished (at least for the duration of the granting of the rights).

190 Ndifuna Ukwazi (note 2 above) at 3–5. See also N Budlender ‘We Need Bowling Greens and Golf Courses for Affordable Housing’ Ground Up (12 March 2018); Clark (note 185 above).

191 Ndifuna Ukwazi (note 2 above) at 3.

192 Ibid at 3–5.

193 Ibid at 4–5.
tear a city to tatters’. Large tracts of land dedicated to a single, exclusionary purpose – like playing golf – have the same effect. Spatial regulation was integral to the implementation of colonialism and apartheid, with the executive, law-makers and law-enforcers all collaborating to deny, or forcibly remove, Black people from all parts the city, especially well-located urban areas. In this context, the colonial and apartheid state apparatus frequently used public land to implement racial and economic segregation and exclusion. As such, parcels of public land that have been subject to multiple successive long-term leases act as barriers that discourage passage through them. Many parcels of leased public land are in former White Group Areas that are yet to be ‘desegregated’. These parcels of land therefore offer the City a vital opportunity to promote spatial redress through the redistribution of land.

Third, the leasing of public land is often poorly managed by the City. The report points out that according to the City’s own reports, money is frequently being lost through the poor administration of leases over public land and that uncertainty about who is responsible for managing its lease contracts continues. The City’s inadequate management is further evidenced by the fact that the leasing of public land continues to occur without seeming to follow rational guidelines. There is a level of arbitrariness to leasing decisions. For example, the same sporting rental tariff is often applied to a sports and recreational facility irrespective of the size of the land. At the same time, even the City’s leases for other public purposes seem sporadically determined – with rental amounts varying dramatically.

Ultimately, the report highlights a deeply concerning approach from the City in relation to how it views its own property. The City’s approach to its own land seems entirely driven by ownership conceptions of property, that emphasise the absolutist, individualist and exclusionary powers of a property owner and conceives of public land primarily as an economic ‘asset’ that has financial value. In adopting this approach, the City has failed to prioritise the social function of public land by utilising this land for essential public purposes, such as redressing spatial inequality or developing affordable housing. This failure to use well-located public land in a way that promotes the social function of the land, the report argues, is a significant missed opportunity.

194 Jacobs (note 20 above) at 257–269. See also A Heckscher Alive in the City (1974); and WD Solecki & JM Welch ‘Urban Parks: Green Spaces or Green Walls?’ (1995) 32(2) Landscape and Urban Planning 94.
195 Ndifuna Ukwazi (note 2 above) at 4.
196 Ibid at 3–5.
197 City of Cape Town Asset and Facilities Portfolio Committee Report (June 2018). See also Ndifuna Ukwazi (note 2 above) at 5.
198 For instance, in October 2020, the City proposed two municipal properties for lease in the Cape Argus. The first was a small 373m² piece of land in Scarborough that the City proposed to lease out for parking, storage and gardening purposes for a period of 10 years at a monthly rental of R750. The second, a massive 1.39-hectare piece of land in the prime neighbourhood of Constantia that the City proposed to lease out for horse grazing and gardening purposes for a period of 10 years at a monthly rental of R3000. The City claimed that both rental amounts were ‘based on market value’. See ‘Portion Erf 754, Hill Top Street, Scarborough to the owner of Erf 68, Scarborough, Jorge Durke or his successors-in-title’ Cape Argus (9 October 2020) at 15; and ‘Portion of Erf 9507 Constantia to AE, PJ, and TM Buchanan or their successors-in-title or to consider alternative proposals’ Cape Argus (9 October 2020) at 15.
199 Ndifuna Ukwazi (note 2 above).
200 While the City itself has acknowledged its approach to the management of public land is misguided, it has been slow to embrace a more socially orientated approach. For example, in 2016, the former Deputy Mayor of Cape Town Ian Neilson, committed to rationalising the use of City-owned land. As he noted: ‘The issue is not one of focusing only on golf courses. It is essential that more intensive land use takes place within the urban core area,
Concerningly, these disposals have taken place despite a constitutional injunction to use land to redress spatial inequality, as articulated in the section-25(5) duty on the City to take ‘reasonable legislative and other measures within available resources to foster conditions which enable citizens to gain access to land on an equitable basis’, and legislative obligations not to dispose of parcels of public land that are needed to provide the minimum level of basic municipal services (which includes affordable housing).

The City’s conception of its role as owner of public land is perhaps best illustrated by an example. On 7 May 2021, the City published a notice in the Cape Argus newspaper inviting interested parties to comment and/or object to its plans to transfer, by way of long-term lease, approximately 8 478m$^2$ of City-owned land in the centre of the City to the City’s Human Settlements Department, to be leased at a rental of R150 per year for the development of social housing. According to the notice, the public land which has been used as parking lot, would be rented out for a 30-year period. The purpose of the lease was to use the site for the development of social housing – a use of public land that aligns with conceptions of the social function of property and the use of public land to serve a public purpose (especially in the context of a housing crisis). However, rather than justifying its use of public land for this social function purpose, the City’s rationale for the lease was couched in entirely economic or market-related terms. In its support of the lease, the City said that the land was ‘not required for the provision of a minimum level of basic municipal services’, would allow for the ‘development potential of the site to be maximised’ and that the parking on the site (which would be retained) would ‘generate revenue’; and in describing the main benefits that would flow from the lease the City noted that it would be able to ‘convert unused land into rateable property’ and that the site would ‘catalyse economic growth’. The City’s inability to recognise that leasing this public land to the Human Settlements Department for the development of social housing was fulfilling an important social function and giving effect to ‘community value’ (as is required by asset management legislation), and its narrow focus rather than ongoing expansion of the city footprint due to expansion at the edges of the city’. See J Harvey ‘Golf Clubs have Plan B’ Southern Suburbs Tatler (28 April 2016), available at https://www.southernsuburbstatler.co.za/news/golf-clubs-have-plan-b-5152016. Recently, the City also announced that it plans to proactively assess the public land for its potential usefulness for the development of state-subsidised housing, although many questions remain about how the City plans to implement these plans in practice given its bureaucratic difficulties in managing public land. See City of Cape Town Draft Human Settlements Strategy (2020).

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201 The Western Cape Division of the High Court has recently affirmed that the state has an obligation to redress the spatial legacy of apartheid. See Adonisi (note 8 above).

202 See the discussion on the MFMA in part IVB.

203 ‘Proposed Transfer: Erf 14888 Woodstock Cape Town’ Cape Argus (7 May 2021) 17.

204 It should be noted that the City’s plans to use the public land for the development of social housing were an about turn. Only a couple of months earlier, in October 2020, the City had advertised its plans to lease the same piece of public land to a private company, Growthpoint Properties Ltd, for its exclusive use as a parking lot at a hefty rental. See ‘Renewal of Lease: City Land, Portion of Erf 14888 Cape Town Situated at Newmarket Street, Cape Town to Growthpoint Properties Ltd and its Successors in Title for Parking Purposes’ Cape Argus (23 October 2020); and Ndifuna Ukwazi ‘City to Lease Out Newmarket Street Parking Lot Despite Promises to Use it for Affordable Housing’ Press Release (15 December 2020), available at https://jumpshare.com/v/sVBdtEpj7H12udGLhK5o. After objections from civil society groups like Ndifuna Ukwazi, the City decided to alter its plans for the site.

205 ‘Proposed Transfer: Erf 14888 Woodstock Cape Town’ (note 203 above) at 17.

206 Ibid at 17.

207 Refer below to the discussion on the MFMA in part IVB.
on the lease from a purely economic perspective, suggests that the City conceives of its role as owner of public land primarily through economic terms.

This indicates that the City’s notions of ownership – that conceive of ownership in absolutist, exclusionary terms – are so deeply entrenched that its decision-making with regard to the conclusion and renewal of these leases is not guided by the principles underlying the obligations imposed upon it, or the imperative to use public land for a societal purposes, in spite of public calls for publicly leased land to be valued and accordingly used differently. An emerging question to give effect to a values-based approach is whether decision-makers can be made to confront a broader set of societal values that support the potential for public land to be unlocked, redistributed and used as property that is necessary for the ‘development of the capabilities essential to human flourishing’ \(^\text{209}\) and serve a broader social function in response to the section-25(5) obligation to broaden access to land by making it available on an equitable basis, as opposed to entrenching an unequal state of affairs and benefitting the interest of a few through exercising of the power to exclude. A values-based approach that is rooted in South Africa’s historical and socio-economic context and recognises the significance of public land to advance social restructuring and land reform is required to guide the way in which public land is used. The broader social, ecological, emotional and needs-based values to which we refer, and how these might be realised and incorporated into the existing property system, are discussed in part IVC below.

**B  The Local Government: Municipal Finance Management Act**

An immediate challenge in responding to the emerging question (about whether decision-makers can be made to confront a broader set of societal values) is overcoming the dominance of the explicit economic logic that is supported by the reigning notions of property and ownership. This challenge is compounded by the fact that the legislation and policy framework that governs the lease of municipal land primarily focusses on treating land and property as an economic asset that must be used either efficiently or viewed primarily in economic terms. The framework for the management of municipal property is set out in various laws and policies, with the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA) (and the regulations promulgated thereunder) being the primary piece of legislation. \(^\text{210}\)

The MFMA is national legislation that aims to regulate and secure the sound and sustainable management of the fiscal and financial affairs of local government, and sets out the requirements for the management of a municipality’s assets, including immovable property. \(^\text{211}\) In particular, section 14 of the MFMA (read together with the Municipal Asset Transfer Regulations (MATR)) \(^\text{212}\) regulates the disposal of a municipality’s capital assets, which are defined to include its immovable assets. Section 14(1) and (2) of the MFMA provide that a municipality may not transfer ownership as a result of a sale or otherwise permanently dispose of immovable property unless two conditions have been met. \(^\text{213}\) The municipal council has

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\(^{208}\) See the many expert submissions objecting to the Rondebosch Golf Course lease (copies on file with the authors).

\(^{209}\) Alexander (note 143 above) at 458–459.

\(^{210}\) Others include the property by-law and policy instruments such as the City of Cape Town ’Management of Certain of the City of Cape Town’s Immovable Property Policy’ (August 2010).

\(^{211}\) MFMA s 2(b).

\(^{212}\) Municipal Asset Transfer Regulations, GNR 878 Government Gazette No. 31346 (22 August 2008).

\(^{213}\) MFMA ss 14(1) and (2).
decided ‘on reasonable grounds’ that the land ‘is not needed to provide the minimum level of basic municipal services’; and the municipal council has ‘considered the fair market value’ and ‘the economic and community value to be received in exchange for’ the piece of land. These provisions mean that the City can only dispose of property if the property is not needed for a minimum level of basic services and after the municipal council has considered both the fair market value and the economic and community value received in exchange for the piece of land. The requirements are reaffirmed by section 11 of the Management of Certain of the City of Cape Town’s Immovable Property Policy (the Immovable Property Policy).

The Municipal Asset Transfer Regulations govern the transfer and disposal of capital assets by municipalities and municipal entities. Regulation 7(1) provides that a ‘municipal council must, when considering any proposed transfer or disposal of a capital asset, take into account, inter alia, the interests of any affected organ of state, the municipality’s own strategic, legal and economic interests and the interests of the local community; and compliance with the legislative regime applicable to the proposed transfer or disposal.’

As the primary legislation regulating the disposal and transfer of municipally owned land, the provisions of the MFMA (and the MATR) cannot be regarded as a sufficient tool to facilitate access to municipally owned land on an equitable basis. It prioritises the treatment of municipal land in economic terms and is dislodged from the possibility of a values-based system described above. The MFMA simply requires that a municipality must establish that its immovable property, defined as a capital asset, is no longer required for the minimum level of basic municipal services.

According to the court, the ‘minimum level of basic municipal services’ is ‘inextricably linked to the requirement to uplift poor and disadvantaged communities that fall under the jurisdiction of local government’ (at para 43). Oranje Water therefore indicates that the provision of social or affordable housing constitutes ‘a minimum level of basic services’ in the context of Cape Town’s housing affordability crisis. Accordingly, well-located land that can be used for the development of social or affordable housing should not be disposed of by way of sale or should only be disposed of if such disposal is subject to a condition to develop affordable housing.

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214 In Oranje Water CC v Dawid Kruiper Local Municipality [2018] ZANC HC 42 (‘Oranje Water’), the Northern Cape High Court was asked to give meaning to the phrase ‘minimum level of basic services’ in the context of the functions and obligations of local government. In determining what this phrase means, the court at paras 37–43 analysed various pieces of legislation, including s 153 of the Constitution, the Local Government: Municipal Systems Act 117 of 1998 (‘the Systems Act’), the MFMA and the Housing Act 107 of 1997. As the court noted (at para 41):

   The legislative framework referred to above, supports such distinction. In this context parks and recreation are in fact a “municipal service” but do not fall under “basic municipal services”. In such context, “basic municipal services” includes the provision of water, sanitation, electricity, roads, storm water drainage and transport. I am fortified in this conclusion by the wording of s 14(2)(a) which is to the effect that the municipality decided that the asset is not needed “to provide the minimum level of basic municipal service.” (emphasis added) In my view “parks and recreation”, in a different and better time in our shared future may well come to be regarded as a minimum level of basic municipal service. However, in our present context of service delivery protests relating to the continued reality of the “bucket system” for sanitation and the lack of potable water, inter alia, being reported on a daily basis in communities all over our country, this is clearly not so.

According to the court, the ‘minimum level of basic municipal services’ is ‘inextricably linked to the requirement to uplift poor and disadvantaged communities that fall under the jurisdiction of local government’ (at para 43). Oranje Water therefore indicates that the provision of social or affordable housing constitutes ‘a minimum level of basic services’ in the context of Cape Town’s housing affordability crisis. Accordingly, well-located land that can be used for the development of social or affordable housing should not be disposed of by way of sale or should only be disposed of if such disposal is subject to a condition to develop affordable housing.

215 N Steyler & J de Visser Local Government Law of South Africa (2019) 12–22(8)(Argue that the requirement that the municipal council consider what is received in exchange for a capital asset requires a ‘holistic assessment’, in terms of which the fair market value is ‘weighted against the economic and community value that may be gained’ from the disposal. For Steytler and De Visser this provision means that the City can dispose of land or immovable property at less than market value if it is receiving an appropriate economic or community value.)

216 The Immovable Property Policy s 11.

217 MATR reg 7(1).

218 MFMA s 14(1).

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is necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment.\textsuperscript{219}

Notably, the requirement for the disposal of municipal land under the MFMA is not nearly as comprehensive as the requirements for the disposal of provincial and national owned land under the Government Immovable Asset Management Act 19 of 2007 (GIAMA). Section 5 of the GIAMA sets out principles of immovable asset management that have the potential to shape a social-function orientated use of parcels of land owned by provincial and national government. The first principle is that an immovable asset ‘becomes surplus to a user if it does not support its service delivery objectives at an efficient level and if it cannot be upgraded to that level’.\textsuperscript{220} The second is that when an immovable asset is acquired or disposed of, best value for money must be realised. Importantly, ‘best value for money’ is defined as the ‘optimisation of the return on investment in respect of an immovable asset in relation to functional, financial, economic and social return, wherever possible’.\textsuperscript{221} The third principle is that before disposing of an immovable asset, the relevant owner of the property and custodian must consider whether it can be used: (i) by another user or jointly by different users; (ii) in relation to the social development initiatives of government; and (iii) in relation to government’s socio-economic objectives, including land reform, black economic empowerment, poverty alleviation, job creation and the redistribution of wealth.\textsuperscript{222}

Together, these principles clearly anticipate that the national and provincial governments’ immovable assets must be used in pursuit of a social function – specifically fulfilling socio-economic objectives with land reform as a stated objective. These requirements are omitted from the legislation governing municipal land, including leased municipal land. For example, a municipality is not required to establish that its land has become surplus, and it is not required to consider whether its land can be used for redistributive and related purposes that might foster access to land on an equitable basis as contemplated by section 25(5) of the Constitution.

There is clearly a gap between the requirements for the disposal and transfer of municipal land on the one hand, and the possibilities of achieving values-based, redistributive land reform goals under the MFMA, on the other. Because municipal land is not tied to broader transformative goals, municipal land may be treated in the same way as any other capital assets that do not share the same social and historical significance as land – an aspect contemplated by the property as a web of interconnected interests approach. This approach views land, as more than an economic commodity over which one individual owner alone can make decisions without regard to the wider range of interests beyond the owner.\textsuperscript{223}

This gap is unfortunate because access to land, including municipal land, is central to the possibility of restructuring the apartheid city. It is true that not every parcel of well-located municipal land will be suitable for redistributive purposes through, for example, the provision of affordable housing. However, the legislative gap affirms a legislative orientation that favours the dominant ownership and economic value of land.

\textsuperscript{219} Systems Act s 1.
\textsuperscript{220} GIAMA s 5(1)(a). A ‘user’ is defined in s 1 of GIAMA as ‘a national or provincial department that uses or intends to use an immovable asset in support of its service delivery objectives’ and ‘surplus’ means ‘that the immovable asset no longer supports the service delivery objectives of a user’.
\textsuperscript{221} GIAMA s 1 (emphasis added).
\textsuperscript{222} GIAMA s 5(1)(f).
\textsuperscript{223} Arnold (note 66 above) at 333–334.
C Values versus valuations

As the brief analysis of the City of Cape Town’s practice of concluding long-term leases over public land illustrates, decisions about the acquisition, use, management and disposal of public land are primarily informed by an economic value system. In terms of this approach, the City views land first and foremost as a capital asset that has intrinsic economic value and has failed to recognise, and act on, the social value that public land holds. This seems to be the approach, even though these decisions are implemented by a public actor, namely the City and its officials. The dominance of this economic logic partially stems from the budgetary and public asset management legislation that applies at the municipal level.\(^\text{224}\) The legislative and policy framework governing municipal land management is constructed in a way that gives preference to the economic value system by treating public land in the same manner as other public assets, despite its unique potential to offer redress in the context of spatial inequality and land reform. The management system imposed by the legislative and policy framework views land as ‘assets’ that require sound financial management. While prudent financial management is important for good governance, the effect of the public finance management legislation has been to prioritise an economic value system over a variety of other (equally important) values.

The economic paradigm is also informed by the City administrators’ conception of public land in terms of the income it generates for the City or the costs it imposes on the City.\(^\text{225}\) The narrow focus on the economic income potential and costs of public property directly affects how public officials perceive opportunities in relation to how public land can be used. In addition, it limits the ability of officials to utilise public land practically to redress spatial inequality. An example that illustrates how this approach subtly colours the way officials view public land is the ongoing practice of attributing nominal values to, or undervaluing, public land on the City’s General Valuation Roll. In its General Valuation Roll, the City lists the public land it owns at values of R1 or R1 000 – values that clearly have no bearing on the economic value of these properties, not to mention the enormous social, environmental and land reform potential this land holds. For example, the City’s 2018 General Valuations Roll omits any reference to erf 10840 (a 32 662m\(^2\) property in Belville close to economic opportunities), whereas the 2016 General Valuations Roll provides a more accurate picture, valuing the erf at R15 065 000. Another example is erf 17007 (a vacant property of 7 342m\(^2\) that is in Belville directly adjacent to erf 10840) at a value of only R1 000. This practice means that the City might be completely unaware of the real economic value and potential of specific properties, and suggests that city officials seriously undervalue public land. In addition, it highlights the lack of imagination in relation to proactively identifying properties that could be utilised for public purposes. Another unintended consequence of this practice is a lack of recognition of the value of the land and an overemphasis of the costs associated with public land.

One need only look at the fact that public land falls primarily under the domain and management of the City’s Economic Opportunities and Asset Management Department to see how the City’s management of public land is premised on the ownership-based model of

\(^{224}\) See the discussion of this legislation at part IVB above

\(^{225}\) This paradigm is also reinforced by the public finance management legislation itself. For instance, the public participation requirements for disposing of public land by way of long-term lease or sale require a municipality to provide information about whether the municipality will receive any ‘proceeds’, ‘benefits’ or ‘gains’, or incur any ‘losses’ as a result of a disposal. See MATR reg 5(3)(b).
property and an economic value system. The mere fact that these two distinct management fields are grouped together highlights the intrinsic economic approach to asset management.

Reliance on an economic value system of land is closely linked to the concept of the market value of the property, which, in turn, is ‘strongly anchored by the philosophy of private ownership rights’. Market value may, at first glance, seem like an objective standard that some may even argue incorporates or takes into account certain social values, however, there are various issues with using this as a dominant approach for attributing value to public land. First, the notion of market value is directly linked to the ideas of a ‘functioning market’—made up of buyers and sellers that each attribute a certain economic value to a property object which ultimately determines the market value of the object. But market value only takes into account the factors that the majority of buyers and sellers deem relevant. In a deeply exclusionary market—like South Africa’s land and property market—this means that the factors that determine market value ignore a host of alternative values that the citizenry may place on public land and only prioritises the values of those who will be able to access and participate in the market. Second, some scholars have raised doubts about the appropriateness of using a market value determined in terms of real estate valuation theory in the context of public land or land earmarked for infrastructure projects. Mooya critically reflects on the limitations of the real estate valuation system by showing that the standard approach to real estate valuation is determined by transaction activity and is only suitable for highly competitive markets. He writes that in ‘thin or absent markets’, as is often the case in the context of public land which is rarely valued and transacted, a different framework or alternative value system is necessary.

The ideological lens through which municipalities apply the legislative and policy framework looms large here—as it informs how municipalities understand and interpret the legal and policy framework. The interpretation of the legislative and policy framework is to some extent affected by the political party that is in power in a particular municipality. In Cape Town, it is not difficult to see the influence of the ruling party, the Democratic Alliance (DA), with its neo-liberal and market-based economics in the City’s decisions about public land. In this context, it seems unsurprising that the City views land primarily as a capital asset that has intrinsic economic value and fails to recognise the social value public land holds even in instances where a contextual or purposive reading of the legal framework offers considerable opportunity for a different approach.

Perhaps the most surprising aspect of the City’s paradigm that prioritises economic value is that in the majority of leases the City also fails to realise the economic value the land could offer. This is most apparent in cases where prime state land is leased out at nominal amounts for land uses that are rarely the most efficient or effective use of land, such as the public land

227 Ibid at 383.
229 Mooya (note 228 above) at 128; De Vries & Voß (note 226 above) at 384.
230 De Vries & Voß (note 226 above) at 384, citing Mooya (note 228 above).
231 The DA’s outspoken resistance to the Eighteenth Constitutional Amendment (which allows for the expropriation of land without compensation in certain circumscribed instances), and criticism of the national government’s land reform programme, may also play a role in how the City approaches its obligations in terms of the legal and policy framework.
leased to the Rondebosch Golf Club. These examples are also a far cry from other economic based models such as leasing of public land in Hong Kong, where rental for leased property is used to fund a significant proportion of the city’s public infrastructure. In these cases, no apparent logic can be ascribed to the City other than a seeming desire to maintain the exclusionary status quo.

The City’s approach to public land is therefore premised on a single value system based on financial and economic factors that seem incompatible with alternative value systems based on social, ecological or societal needs. In elevating economic values above other values, the City has failed to recognise that its treatment of public land does not address pressing social needs in any meaningful way and has over the years led to the failure to act on commitments to use land for redistributive purposes. It has also failed to take account of who benefits from the City’s actions and who is excluded.

The primacy of economic values system is also directly linked to the ease with which economic value can be ascertained, measured and predicted. As De Vries and Voß note, ‘[e]conomic values gain meaning through a basic assumption that one can predict and measure the (financial) effects of choices in (economic) transactions.’ In contrast, social values are much more intangible and qualitative. There are higher margins of error assumed, and acting upon the values is much more based on shared acceptability and a shared idea of rightfulness.

Social values are often considered to be in direct opposition to economic logics. Where economic values are believed to be certain, measurable and predictable, social values are viewed as ‘highly dynamic and rather fluid, and most importantly … rely on interactions and reactions between the various types of subjects’. In other words, what an actor ‘values’ as relevant and important here and today may differ from what that same actor ‘values’ as relevant and important somewhere else and tomorrow ... social values are socially and politically shaped and constructed. They highly depend on time, location, context and framing.

This discomfort with understanding and giving effect to societal values lies at the root of the dissatisfaction with existing property law systems. The main challenge in shifting from a paradigm based on a single value system to one that incorporates multiple value systems is therefore to find ways to give expression to the varied set of intangible values – social, ecological, emotional and needs-based – into decisions about public land.

In recent years, various scholars have offered some suggestions about how to give effect to these alternative value systems. Moore argues that the best way to ensure that societal values are incorporated into decision-making about land management is to make social values measurable and manageable for public officials. In other words, developing analytical approaches to capture and measure a variety of social values. This can be done in three possible ways, each of which offers potential for a South African values-based property law system.

233 De Vries & Voß (note 226 above) at 390.
234 Ibid.
235 Ibid at 387.
236 Ibid.
First, alternative value systems can be translated into the dominant economic value system, for example, alternative values can be expressed in the ‘language’ of economics. An example of how this could occur in the context of public land is by considering the potential of the land or the potential impact of the intervention in relation to the land. This lens often enables practitioners to view social values in measurable economic terms. For instance, the socio-economic impact, quality of life improvement, or measurable social or ecological benefits of a land-use decision.238

Second, alternative value systems can be manifested by developing independent analytical tools that enable practitioners to measure, manage and incorporate them into decision-making processes about land. De Vries and Voß argue that there are many different examples of systems that have incorporated social values into land management decisions which fit alongside the existing economic logic of land management.239 The most compelling example they offer is land tenure security and the land rights continuum.240 For De Vries and Voß tenure security is a measurable value that is not solely dependent on economic values. Instead, it blends economic, legal and social values that combine to offer measurable ways to protect a wide array of different rights or interests in land.

Third, alternative value systems can be articulated and made visible through discussion, debate and negotiation between different disciplines involved in decision-making processes about land. De Vries and Voß believe that cross-disciplinary collaboration is essential to ensuring that different values are incorporated into decision-making about land. As they write:

Currently, integrating value systems using different logics requires an extensive blending of disciplines along with a reformulation of optimisation measures. If each discipline keeps advocating its own models as the most relevant, the resulting scenarios, predictions and recommendations for land-use interventions may remain difficult to reconcile and might even be mutually contradictory. However, if logics are combined in such a way that social scenarios and interactions are respected, one may reach a certain degree of reconciliation of value logics.241

Although some of this legislation attempts to incorporate various other measures of value (such as social value), the legislation does not set out clearly how this can be achieved or manifested – meaning that municipal entities are often unwilling or unable to grapple with how to give expression to these alternative value sets. For example, the need to determine whether land could be used by a different department to provide for minimum level of basic services and addressing social objectives.

V CONCLUSION: TOWARDS A VALUES-BASED APPROACH

This article has focused on the City of Cape Town, and the continued spatial inequality that has resulted from an inability to move towards a values-based approach, as well as the decision-making processes in that municipality. However, the examples and issues raised are illustrative of broader challenges and barriers that must be overcome across municipalities in South Africa that are similarly grappling with deepening wealth and income inequalities, and the inability to unlock and access land as a primary solution to addressing urban inequality. We argue that a different approach is required to ensure a property system that is not unfairly weighted in

238 De Vries & Voß (note 226 above).
239 Ibid at 389.
240 Ibid.
241 Ibid at 390.
favour of ownership and economic interests only, but that also gives appropriate recognition to the layered social, ecological and emotional values that should be inherent in the access and use of public land. We propose a multi-pronged approach towards beginning to achieve this.

First is the recognition that the Constitution’s redistributive and related land reform goals will ring hollow if the current absolute owner property system is not actively challenged, and ultimately disrupted by a broader values-based system that provides meaningful ways for the property rights system to give expression to social values, prioritise basic needs, give effect to ecological concerns, and recognise the emotional connection and identity in property systems. This is especially necessary in relation to land as a property object, and in light of South Africa’s socio-economic context.

Second, and in relation to municipal land as the public land example in this article, is rationalising pieces of legislation and related policy that have implications for the treatment, prioritisation and use of public land. We have argued that the narrow focus of viewing municipal land as a capital asset under the MFMA (and its regulations) limits the possibilities for municipal land to serve a societal function, such as affordable housing, and that this has the effect of maintaining an unequal status quo. The demands by housing activists for golf-courses on well-located parcels of public land to be redistributed is illustrative of the need to interrogate the systems and decision-making processes that protect and reproduce spatial inequality through, among other things, the economic value paradigm. An appropriate rationalisation would entail establishing a comprehensive set of principles to guide the use of public land so that decision makers are required to objectively consider broader values (that are informed and shaped by history and the current reality of unequal access to land), and to justify their decisions about a municipality’s immovable property portfolio against these principles.

Third is finding a common, inter-disciplinary language for a values-based approach with a view to establishing a mutually acceptable and recognisable paradigm that the different disciplines dealing with land can buy into. We note, for example, that this paradigm shift has been observed by the Constitutional Court in its recognition that ‘property should also serve the public good’. However, this has not necessarily translated into objective shifts in decision-making processes on the use of land, particularly public land. The rationale behind this is that the mutual approach may result in overcoming interdisciplinary differences and value systems, and promoting inter-disciplinary decision-making in the context of public land.

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242 This article has primarily investigated public land (at the municipal level). However, as noted elsewhere in this article, many of the arguments we develop about the need to re-consider the value system that underpins property are equally applicable to private property relations as a contribution to the constitutional goal, in terms of s 25 of the Constitution, to promote the redistribution of land through making both public and private land available on an equitable basis.

243 Reclaim the City (note 1 above) at 1.

244 Under the MFMA, or more appropriately, in terms of a new overarching legislative framework that gives effect to s 25(5) of the Constitution. The High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change was established by the Speakers’ Forum in December 2015 to, inter alia, ‘review legislation, assess implementation, identify gaps and propose action steps with a view to identifying laws that require strengthening, amending or change.’ One of the key findings in relation to land reform was that there is no ‘law on land redistribution to give full effect to s 25(5) of the Constitution’. See High Level Panel Report (note 15 above) at 223.

245 De Vries & Voß (note 226 above) at 389.

246 FNB (note 168 above) at para 49.
Compensation for Expropriation in South Africa, and International Law: The Leeway and the Limits

HEIN (HJ) LUBBE & ELMIEN (WJ) DU PLESSIS

ABSTRACT: The 2018 motion adopted by Parliament’s National Assembly to embark on a process to determine if the Constitution should be amended to make provision for ‘expropriation without compensation’ raised interesting legal questions. This article examines one of those questions, namely whether a Constitutional amendment that provides for ‘expropriation without compensation’ or ‘expropriation at nil compensation’ is in line with international law. The protection of private property has various roots in international law, such as traditional international law rules concerning the treatment of foreign nationals, and specifically the property they own in host countries. Another is international investment law, particularly Bilateral Investment Treaties (BITs), which greatly substitute the traditional international law rules in practice. In this regard, a constantly growing body of case law has developed and clarified major issues such as the conditions under which a state may lawfully expropriate property; the scope of measures affecting the enjoyment of property rights amounting to an expropriation; and the question of compensation or damages arising from expropriation. These will be addressed in the third part of this discussion. Lastly, property rights are to some extent protected by human rights law.

KEYWORDS: 18th Constitutional amendment bill, expropriation without compensation, just and equitable compensation

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I INTRODUCTION

In 2018, the National Assembly of Parliament adopted a motion to ‘review section 25 of the Constitution and other clauses’ and propose amendments to the Constitution if needed.¹ This emanated from the African National Congress’s (ANC’s) resolution at the 54th conference of the party to consider ‘expropriation without compensation’² as one of the mechanisms to give effect to land reform.³ Three years later, on 9 September 2021 the Constitutional Eighteenth Amendment Bill (B18-20921) was introduced into the National Assembly for consideration in November 2021.⁴ At the time this article was published, it seemed unlikely that the amendment would succeed although the question remains relevant also for the interpretation of section 25.⁵

During this process, many questions were raised about whether amending the Constitution to make provision for ‘expropriation without compensation’ aligned with international law. The question we seek to answer is set against this backdrop of discussions to amend the Constitution.

The expropriation of property by the South African government, and the question of compensation, is not exempt from the prescripts of international law. This is because the Constitution compels a court, tribunal or forum to consider international law when it interprets the property clause.⁶ The Constitution further compels the courts to follow an interpretation of legislation that gives effect to this constitutional provision that is consistent with international law.⁷ Due to these clear mandates, the discussion to follow will commence with an appreciation of the prominent place international law enjoys in the South African legal order. As a member state of the African Union and, having ratified regional instruments such as the African Charter on Human and Peoples’ Rights, South Africa also has to observe its obligations arising from these instruments. Although not mandated by the Constitution,
foreign law may also be included for consideration because, among other justifications, the Bill of Rights was heavily influenced by the constitutions of other countries.8

This article will examine whether a Constitutional amendment that provides for ‘expropriation without compensation’ or ‘expropriation at nil compensation’ is in line with international law. The question is also relevant in light of the inclusion and clarification in the Expropriation Bill9 that compensation can be nil. The protection of private property has various roots in international law, such as traditional international law rules concerning the treatment of foreign nationals, and specifically the property they own in host countries. These rules are colloquially referred to as the ‘international minimum standard’ and will be explored in the second part of this discussion. Another is international investment law, particularly Bilateral Investment Treaties (BITs), which greatly substitute the traditional international law rules in practice. In this regard, a constantly growing body of case law has developed and has clarified major issues such as the conditions under which a state may lawfully expropriate property; the scope of measures affecting the enjoyment of property rights amounting to an expropriation; and the question of compensation or damages arising from expropriation. These will be addressed in the third part of this article. Lastly, property rights are to some extent protected by human rights law. The argument that the right to own property is a fundamental human right, and that an encroachment on such a right entitles its owner to indemnification, will be considered in the last part of this article. Although there is no binding treaty governing the protection of property at the global level, it is protected by regional human rights treaties such as the African Charter on Human and Peoples’ Rights.10 The African Court on Human and Peoples’ Rights (ACtHPR) has not yet decided any case concerning property, and therefore this article makes recourse to other regional systems for guidance. These include the European Court of Human Rights (ECtHR), which is by far the most developed, and the Inter-American Court of Human Rights (IACtHR), which has handed down important judgments regarding the property rights of indigenous peoples.

What will hopefully transpire from this discussion is that, under international law, South Africa enjoys sovereignty, which allows the Republic to exercise its legislative, executive and judicial competencies within its territory and to the exclusion of others. This implies that South Africa is free to embark on its land reform initiatives within its National Development Plan, and to expropriate property as a means to achieve its goal. However, this must take place within the parameters of the applicable international, regional and domestic legal frameworks. The aim of this part of the article is to establish what these frameworks are, and in particular to understand what is required in terms of compensation. Ultimately, the article establishes that states enjoy a generous amount of discretion when it comes to the standard and method of compensation, but that a failure to consider compensation11 will fall short of what is regarded as lawful by all standards evaluated in this article. The acceptable standard seems to be ‘appropriate’ compensation, which can in some instances be less than market value and, in

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9 Expropriation Bill B23-2020 clause 12(3).
11 In other words, ‘expropriation without compensation’ where the duty to consider compensation is removed, but not ‘expropriation at nil’, where the duty remains, but the possibility that it may be R0 is clarified. See note 2 for explanation.
exceptional circumstances, ‘nil compensation’ could be justified after a due process has been followed and relevant criteria considered.

What follows deals mainly with international and regional laws that are binding on South Africa, as well as non-binding standards, systems and procedures within the domain of property rights, expropriation and forms of compensation. We draw attention to the non-binding standards because we are of the firm view that if the Republic wants to retain its rightful place in the family of nations, as the preamble to the Constitution requires, the government should handle the issue of expropriation and compensation in line with principles broadly adopted worldwide, even though they are not legally binding upon South Africa.

With a view to achieving this, we start by placing South Africa’s obligations to adhere to international law into context. Thereafter we discuss an interpretation of section 25 of the Constitution which will provide the context for the history of the 18th Constitutional Amendment that led to the final Constitutional Amendment Act. Once this is completed, we will delve into international law. The article will conclude by answering the question of whether such an amendment is in line with international law.

II THE PLACE OF INTERNATIONAL, REGIONAL AND FOREIGN LAW IN THE SOUTH AFRICAN LEGAL ORDER

Previous South African constitutions were silent on the place of international law in the South African legal order. This was attributable to the defensive role South Africa played as a result of its racial policies, especially when the National Party came to power in 1948, with apartheid as its official policy. International law condemned discrimination, racial segregation, oppression, human rights violations and violent conflict, which were the order of the day. Apartheid was ironically implemented even though South Africa played a prominent part in the creation of the United Nations (UN) in 1945, and the preamble to the Charter of the UN, written in part by General Smuts, which reaffirms ‘faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women’.

The 1993 and 1996 Constitutions remedied the above and ensured that, as the Constitutional Court in the *Glenister* case noted, international law was to occupy ‘a special place in our law which is carefully defined by the Constitution’. According to its preamble, the Constitution, as supreme law of the Republic, was adopted to build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations, among others. Reference to a ‘sovereign state’ and ‘family of nations’ indicate the Republic’s commitment to being a member of the UN, as well as other international organisations, and to abide by the rules and principles of international law.

International law is essentially made up of treaties reflecting the express agreement of states and custom, the latter which comprises those rules of international conduct to which states

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13 Ibid.
15 *Glenister v President of the Republic of South Africa & Others* [2011] ZACC 6, 2011 (3) 347 (CC) (‘*Glenister*’) at para 97.
16 Constitution s 2.
have given their tacit consent.\textsuperscript{17} To this end, section 231 of the Constitution determines that a treaty binds the Republic after it has been approved by Parliament,\textsuperscript{18} and becomes law in the Republic when it is enacted into law by national legislation.\textsuperscript{19} With regard to custom, section 232 of the Constitution determines that customary international law is to be applied directly as part of the common law in the Republic, unless it is inconsistent with the Constitution or an Act of Parliament. This section compels the court to establish what the relevant custom is in relation to the issue before the court, and to determine if the custom is consistent with the Constitution or an Act of Parliament.\textsuperscript{20} As will be established in this article,\textsuperscript{21} this does, however, not automatically entitle South Africa to invoke provisions of its domestic law as justification for failure to comply with an international obligation, especially not where peremptory norms such as the prohibition on discrimination are concerned.

As mentioned, section 39(1)(b) mandates a court, tribunal or forum to consider international law\textsuperscript{22} when the Bill of Rights is in question in the interpretation phase. The Constitutional Court in \textit{S v Makwanyane} held that, for the purpose of interpreting the Bill of Rights, public international law includes non-binding as well as binding law.

In the context of section 35(1) [section 39(1) of the 1996 Constitution], public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which Chapter Three [Chapter 2 of the 1996 Constitution] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions of Chapter Three [Chapter 2 of the 1996 Constitution].\textsuperscript{23}

This clearly denotes the Constitutional Court’s conviction that, by considering the rules and principles that are broadly adopted worldwide (legally binding or not), the Republic can benefit from the experiences of others to shape its own future as a responsible, forward-thinking and respected state in the family of nations. When interpreting any legislation, section 233 provides that any reasonable interpretation of the legislation that is consistent with international law must be preferred over any alternative interpretation that is inconsistent with international law. This position was confirmed by the Constitutional Court in, amongst others, \textit{S v Okah}.\textsuperscript{24}

Foreign law is not the same as international law. Foreign law is the law of an individual foreign country, whereas the legal rules that a group of foreign countries such as the European

\begin{footnotesize}
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\item[17] Statute of the International Court of Justice art 38(1). Also see Duggard et al (note 12 above) at 61–62.
\item[18] Constitution s 231(2).
\item[19] Ibid s 231(4).
\item[20] Duggard et al (note 12 above) at 67–68.
\item[21] See the discussion on the \textit{Campbell} case at part IIB4 below.
\item[22] The Constitutional Court in \textit{S v Makwanyane} [1995] ZACC 3, 1995 (3) SA 391 (CC) at para 35, as further confirmed in \textit{Glenister} (note 15 above) at para 39, that this provision included international laws that are binding as well as those that are not binding on South Africa.
\item[23] \textit{Makwanyane} (note 22 above) at para 35.
\end{itemize}
\end{footnotesize}
Union or African Union agree to abide by constitute international law. The use of foreign law by South African courts is specifically sanctioned by the Constitution in section 39(1)(c) but, unlike international law, the consideration of foreign law is permissive. The influence of foreign law may even extend beyond the role played by the introduction of foreign law via section 39(1)(c). Section section 39(2) also provides that ‘when interpreting any legislation, and when developing the common law or customary law,’ the courts ‘must promote the spirit, purpose and objects of the Bill of Rights’. A strict following of this provision virtually guarantees that jurisprudence will be developed and used to address legal issues that are not directly germane to the Bill of Rights. In *Carmichele v Minister of Safety and Security*, for example, the Constitutional Court invoked decisions of the European Court of Human Rights, among others, to develop a new rule of common law.

The admission of foreign law into a South African court is a factual question and evidence on any aspect of the foreign law is necessary. Several authors have explained why the Constitution authorises South African courts to consider foreign law as a source of law. For instance, Devenish explains that South Africa was considered to have too few local precedents ‘to resolve jurisprudential issues precipitated by the justiciability of provisions of the Bill of Rights’. Additionally, South Africa’s past as an *apartheid* state made it especially difficult to locate domestic jurisprudence to support the interpretation of the Constitution. The authorisation was also justified by the fact that the Bill of Rights was heavily influenced by the constitutions of other countries, including those of Canada, Germany and Namibia.

The consideration of international or foreign law for purposes of comparative interpretation by a South African court under section 39(1)(b) and (c) does, however, not make foreign law binding in South Africa. What must be enforced are rights contained in the Bill of Rights. In *S v Makwanyane*, the Constitutional Court stated ‘we can derive assistance from public international law and foreign case law, but we are in no way bound to follow it’. With regard to legislation giving effect to section 25, international law also fulfils the role of an interpretative aid under section 233 in respect of all forms of South African legislation, in the sense that a court must prefer any reasonable interpretation of legislation that is consistent with international law. The interpretative process could, however, result in international law rules and principles being adopted into the domestic law of South Africa.

In conclusion, international law played a prominent role in the struggle to abolish apartheid and dismantle its grip on South Africa. As a result, it occupies a special place in the South African legal system, since the transition to democracy as evidenced by various provisions of the Constitution. Given this, international law cannot be regarded as a completely separate or irrelevant legal system that the South African government can ignore to suit its political

28 Devenish (note 26 above) at 1, 202.
30 De Ville (note 8 above) at 241.
31 *Makwanyane* (note 22 above) at para 35. See also *Glenister* (note 15 above) at para 39.
interests. Instead, the government is required to seriously consider its international (and regional) commitments when it exercises its sovereignty. This is an international law principle that will be discussed more fully below.

To understand the amendment process and the final suggested wording, what follows is an oversight of how section 25 works. This will enable a more nuanced discussion on the leeway and limits in international law. The discussion will explain a single system of law as a framework in which section 25 should be understood, first, before moving to the contents of section 25.

III COMPENSATION FOR EXPROPRIATION

A The larger constitutional framework

The Constitution declares itself the supreme law of the Republic, calling for all law and conduct to be consistent with it. It therefore provides a framework for conversations around compensation for expropriation. By declaring it supreme law, the Constitution established one system of law, there to develop an ‘algorithm of post-apartheid South African law’. In this thinking, problems do not have quick fixes, and the answers are not simple or easy. Rather, every change should be approached tentatively and requires a great deal of reflection when things do not go according to plan. We are arguably at such a moment regarding compensation for expropriation, which forms part of the complexity of land reform.

The Constitution brought a single-system-of-law, shaped by it. It requires not only those existing rights be protected, but also certain reform measures. When it comes to transforming matters, the Constitution requires that the existing rights and the reforms promote the spirit, purport and objects of the Bill of Rights, in line with section 39(2). Existing rights can only be protected insofar as they are consistent with the Bill of Rights. If the protection of existing rights conflicts with reformation, then the Constitution requires balancing these rights. This is also true for property.

In *Port Elizabeth Municipality v Various Occupiers* the court noted:

In sum, the Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law. [...] The judicial function in these circumstances is [...] to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case.

This shows that protection of vested rights and transformation-orientated reforms do not have to stand opposite each other, but rather that respecting existing rights and promoting transformation are interlinked and ‘form part of one single legal constitutional goal’.

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33 Constitution s 2.
34 See part IIIB below. This is based on *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* [2000] ZACC 1, 2000 (2) SA 674 (CC) at para 44.
36 Ibid at 20, quoting *Pharmaceutical Manufacturers* (note 34 above) at para 44.
37 Van der Walt (note 35 above) at 21.
39 Ibid at para 23.
40 Van der Walt (note 35 above) at 22.
What is important about this understanding of property law is that vested rights are not protected by private law or new rights promoted by the Constitution. The private law notion of property (and therefore ownership) is part and parcel of this new constitutional concept of ‘property’.41 The law, such as pre-1994 legislation including the Expropriation Act 63 of 1975 and common law that protect vested rights are still valid, but only insofar as they are reconcilable with the Constitution.42

One of the effects of the Constitution on existing private property is that property rights that were acquired prior to the new constitutional dispensation may be subjected legitimately to new or more stringent restrictions under the Constitution, even to the extent that the scope and nature of the private right may be affected quite dramatically.43

This has important implications for the payment of compensation for expropriation and speaks to the dismantling of hierarchies of rights where ownership will always trump others. Property rights can be limited in circumstances also provided for in the Constitution to attain our constitutional goals. However, this also implies that any limitation of property rights must be carried out in terms of the Constitution.

The Constitution requires a move away from the common-law reasoning that ownership is the most complete real right a person can have in a thing, which requires as a rule full market value compensation at expropriation. The Constitution requires a goal-orientated approach with a purposive and contextual logic. The determination and the payment of compensation are regarded as part of a larger constitutional and democratic goal. Constitutional reasoning requires us to start with the Constitution and interpret the law, including the payment of compensation, through the lens of the Constitution. That lens is the constitutional compensation standard of ‘just and equitable’.

The bulk of justifications for the payment of compensation44 place ‘property’ in the centre of the inquiry, without focussing much on the competing claims. Despite the focus

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41 Ibid at 120.
42 Ibid at 121.
43 Ibid at 125.
44 This process of moving away from the pre-constitutional reasoning has been slow, and case law seems to be stuck in the pre-constitutional rationale for the payment of compensation. In Du Toit v Minister van Transport [2005] ZACC 9, 2006 (1) SA 297 (CC) at para 22 it was held that the expropriatee must be put in the same position he would have been in, but for the expropriation. In City of Cape Town v Helderberg Park Development (Pty) Ltd [2008] ZASCA 79, 2007 (1) SA 1 (SCA) at para 21 it was held that an owner may not be better or worse off because of the expropriation and that a monetary award must restore the status quo ante. Khumalo v Potgieter [2002] 2 All SA, 2002 (2) All SA 456 (LCC) at para 22 stated that compensation is paid to ensure that the expropriatee is justly and equitably compensated for his loss, while Hermanus v Department of Land Affairs: In Re Erven 3535 and 3536, Goodwood 2001 (1) SA 1030 (LCC) at para 15 ruled that the expropriatee is compensated for the loss of the property. This sentiment was echoed in Ex Parte Former Highlands Residents [2000] 2 All SA 26 (LCC) at paras 34–35 where it was found that the interest of the expropriatee requires full indemnity when expropriated, and therefore it is possible to pay more than market value. In Haakdoornbult Boerdery CC v Mphela [2008] ZACC 5, 2007 (5) SA 596 (SCA) at para 48 the court ruled that for compensation to be fair it must recompense. To the court, compensation must put the dispossessed, insofar as money can do it, in the same position the person would have been in had the land not been taken. This compensation might not always be equal to market value, but might be something more: ‘[b]ecause of important structural and politico-cultural reasons indigenous people suffer disproportionately when displaced and Western concepts of expropriation and compensation are not always suitable when dealing with community-held tribal land. A wider range of socially relevant factors should consequently be taken into account, such as resettlement costs and, in appropriate circumstances, solace for emotional distress.’ More recently, the court in Mhlanganisweni Community...
on recompensing the individual, the central principle should remain that the amount of compensation should reflect an equitable balance between the public interest and the interests of those affected. This balance must be established with reference to the relevant circumstances. It should focus on democratic ideals, rather than the property itself, and without disregarding the role that property rights can play in achieving democratic ideals. It requires a careful balancing of interests to determine what is just and equitable.

This requires looking at each case individually with regard to the individual property interest that might, or might not, stem from the pre-constitutional era and the constitutional framework with its legitimate reform efforts. A decision on what is just and equitable cannot be made in the abstract without due regard to the context of the expropriation. However, it should take into account the broader scheme of the Constitution.45 It is within this broader scheme that the specific rules operate. With this broader scheme and balancing competing interests in mind, the specific rules will be discussed next.

B Section 25

Section 25 of the Constitution (the ‘property clause’) protects holders of rights in property (section 25(1)–(3)) from arbitrary and unlawful state interference and initiates reformist imperatives (section 25(5)–(8)). In the one-system-of-law view, the two parts do not stand opposite each other, but form part of the same constitutional goal, and should be read together.

Section 25(1) requires that a deprivation occurs in terms of a law of general application and that no law may permit arbitrary deprivation.46 Deprivation does not require compensation. Section 25(2) allows for expropriation in terms of the law of general application, for a public purpose (or in the public interest, most notably reform interests) and subject to compensation.47

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45 Van der Walt (note 35 above) at 509.
47 Muller et al (note 46 above) at 647. Van der Walt (note 35 above) at chapter 4.
The reformist imperatives in section 25(5)-(8) allow the state to infringe on existing property rights. The power to infringe on private property rights (as warranted by section 25(1) and (2)) developed from a specific historical context in South Africa and seeks to redress past injustices. This historical context and redress should be kept in mind when interpreting the property clause.

1 What is property?

The Constitution itself does not define property. In the FNB case the courts regarded it ‘judicially unwise to attempt a comprehensive definition of property for purposes of section 25’. For purposes of the Constitution, the definition of property is therefore wide. This is now echoed in the Expropriation Bill that states that the definition of ‘property’ is ‘property contemplated in section 25 of the Constitution’. Where property is limited to land in the Bill, it is indicated as such. In terms of the Constitution, property should also be understood in its specific historical land social framework. The current conversation surrounding the amendment of the Constitution focuses mainly on land, presumably because the motion adopted by Parliament has a narrow focus on land. The article will therefore be mostly limited to land as property.

2 Deprivation

Section 25(1) prohibits the state from depriving property except in terms of a law of general application. No law may permit arbitrary deprivation of property. Deprivation involves ‘sacrifices that holders or private property rights may have to make without compensation’.

Deprivation refers to uncompensated, regulatory restrictions on the use, enjoyment and exploitation of property. This is the regulatory or the police power of the state. Most interferences will lead to some loss in the property’s value, and some interferences can even lead to substantial loss.

Deprivation will not attract compensation if it serves important public purposes in protecting public health and safety, when landowners are more or less equally affected and when the benefits are reciprocal. When deprivations are too burdensome on the property holder, either the Act authorising the deprivation or the act of deprivation itself may be declared unconstitutional. In South Africa, we do not compensate for a deprivation.

49 FNB (note 46 above) at para 51. See also Muller et al (note 46 above) at 617 for a more thorough discussion on this.
50 Expropriation Bill (note 9 above).
51 Reflect-all (note 46 above) at para 32.
52 See discussion at part IE.
54 Van der Walt (note 35 above) at 192. See also Muller et al (note 46 above) at 622.
55 Van der Walt ibid at 197.
56 Ibid.
The *AgriSA* case\(^{58}\) dealt with whether certain deprivations in rights in specific resources caused by a regime change amounted to an expropriation – a sort of no-person’s land between deprivation and expropriation. This will be discussed in detail in the next paragraph. The matter is important, because if an interference is characterised as deprivation and not an expropriation, then there is no duty to compensation and does not as such fall in the ambit of the international law analysis.

3  **Regime changes that are deprivations not expropriations: when certain forms of property are placed under the custodianship of the state**

An aspect that often comes under the spotlight, is whether a state must compensate property owners affected by regime changes in property. Regime changes often happen in the context of reforms. For instance, section 27(2) of the Constitution places a duty on the state to ensure access to water. Section 24 ensures a right to a healthy environment. Section 25(4) speaks of land reform and of other natural resources. There is therefore a duty on the state to fulfil these rights. Added to this is section 25(8) that states that sections 25(1)–(3) may not impede the state from fulfilling these obligations. One can therefore summarise that the reforms will be either reform of natural resources (for conservation and management), or for reasons of human dignity and equality (a distributive aspect).\(^{59}\) In South Africa, these regime changes took place mainly in the context of water\(^{60}\) and mineral rights.\(^{61}\) In these two instances the state promulgated new legislation that replaced the previous regime with a comprehensive and strict regulatory regime, transforming access to the resources from a right-based, to a regulation based system.\(^{62}\) The question that is relevant for purposes of this article is when such a regime change will be permissible in the (current) constitutional framework, and if and when compensation will be due. To answer this question, a quick overview of the water regime.\(^{63}\)

The Water Services Act 108 of 1997 and the National Water Act 36 of 1998 brought about institutional regime change in the water law. The Water Services Act sets up a regulatory framework with norms and standards for water service providers. In the preamble, the state is

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\(^{58}\) *Agri SA* (note 53 above).

\(^{59}\) Van der Walt (note 35 above).


\(^{62}\) Van der Walt (note 35 above).

\(^{63}\) Since this is discussed in detail in Van der Walt (note 35 above), it is only summarized here in order to explain how it works for purposes of this article.
the custodian of the nation’s water resources. However, the National Water Act had a much more significant impact on water rights, where the old system of water rights was replaced with a new regime. Before the Act, water rights were regulated by common law and the 1956 Water Act, where it was possible to hold private property rights (including ownership) of water. The 1956 Act also distinguished between private and public water. In both instances, but more so in the private ownership instance, landowners enjoyed privileged access to water resources. It is this inequality that the Water Act of 1998 tried to address by abolishing private ownership of water entirely and replacing it with use rights. This means that the acquisition, allocation and enjoyment of these rights are all subject to the Act and must be exercised in terms of the Act. Owners who were individually affected by this regime change are entitled in terms of section 22(6) to claim compensation for financial loss. In terms of property law, the question is whether such a regime change is a mere deprivation or if it amounts to a compensable expropriation. While the loss in section 22 is framed as compensation for financial loss, the question is whether this should be framed as compensation for expropriation. As will be shown later, the answer is probably no.

Section 24 of the Constitution places a similar obligation on the state regarding ‘secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development’. It is within this framework that the Mineral and Petroleum Resources Development Act 28 of 2002 was promulgated.

Mineral and mining rights have previously been held to be private property rights and, as such, protected by the Constitution. In 2002, the extensively regulated scheme based on private ownership was replaced by a licence-based regime. This implied that mineral and petroleum resources were declared to be part of the common heritage of all South Africans, and that the state is the custodian of the minerals to the benefit of all. It regulates, controls, and administers the issuing of these rights, but it does not reserve these rights for the state itself. The state also does not own the rights. However, some commentators think that the effect is an implicit reservation of these rights to the state.

The question in this regard is whether such a change is a deprivation or an expropriation of existing rights that can therefore be constitutionally challenged. The old system of private property holdings was replaced by a new system that recognised existing rights and interests and opened access to the same rights to others. It also subjected the new rights to more stringent regulation. In these cases, there are institutional changes, a shift of emphasis from private

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64 The Act therefore brought about an overarching regime change to achieve the policy goals of control over and access to the use of water, in order to fulfil the state’s constitutional obligation with regard to reform (in ss 25(8) and 27(1)(b)).
65 Constitution s 24(a)(iii). See Van der Walt (note 35 above) at 403.
67 Van der Walt (note 35 above) at 404.
68 Ibid.
70 Van der Walt (note 35 above) at 411.
property to state regulation that impact individual cases. The question is then raised as to whether a regime change on an institutional level is justified and legitimate.\(^{71}\)

Institutionally, the question is whether one can abolish a whole system of existing private rights and replace it with a state-controlled system of rights in terms of the Constitution. Since the latter authorises, even orders, transformation of the old system of inequality and injustice, in line with the constitutional goals of ensuring equal sustainable use of scarce natural resources, such a change will be permissible as long as it happens in a manner that the Constitution permits. This includes that the scheme must be ‘rationally legitimate and procedurally just’.\(^{72}\) The underlying policy reasons that act as justifications for such a change then come into focus. Viewed from a purely institutional level, the abolition of private property rights in a natural resource is not per definition unconstitutional if the reason for doing so is legitimate and convincing.\(^{73}\) This will not amount to an expropriation. The legitimacy of such a change will depend on procedural-fairness provisions and whether compensation is provided for individual losses. In summary, an institutional change of a specific property regime (such as minerals or water) might be constitutional if (1) there are sound and legitimate policy reasons for such a change, (2) the Constitution or a law authorises it and (3) if it is implemented in a way that does not conflict with the principles of natural justice or just administrative action. The effect of such a regime change is another inquiry.\(^{74}\)

Even if such a regime change is in line with the Constitution, it can still have disproportional effects on individuals. If the regulatory scheme unfairly places a disproportional burden on one individual or a small group of people, while not providing for some form of compensation (whether for damages or framed in terms of expropriation language), it will be unconstitutional in South Africa, since we do not compensate regulatory interferences.\(^{75}\) In line with the state’s normal regulatory powers, this regulation needs to be implemented for purposes of effecting control over scares and important or dangerous property or resources, and needs to be applied fairly and equally.\(^{76}\)

Legislation that results in a regime change of a particular resource (such as water) should therefore pass Constitutional muster as a deprivation that does not require compensation if it sets out and delineates the rights appropriately, enjoys a legitimate aim in line with legislation and the Constitution that does not conflict with the principles of natural justice or just administrative action, while it provides for the payment of compensation (financial loss or otherwise) if it affects individuals harshly. In this sense, it does not really trigger the duty to compensate under international law.

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\(^{71}\) Ibid. On the individual level this raises questions about the impact that such a regime change has on individual property rights that might be lost or weaker as a result of such a change. This is an important distinction, as Van der Walt (note 35 above) at 404 explains: ‘Constitutionally, the legitimacy and validity questions raised by the two issues are entirely different. Criticism of the institutional reform cannot be based on individual injustices, nor can criticism of individual injustices be based on rejection of the systemic, institutional reform.’

\(^{72}\) Ibid at 413.

\(^{73}\) Ibid at 416.

\(^{74}\) Ibid at 418.

\(^{75}\) Ibid at 419.

\(^{76}\) Ibid at 421.
4 Expropriation

Expropriation is an original acquisition method, meaning it is brought about by unilateral state action and does not require the owner’s cooperation or consent. It involves a loss of property for the former owner, whether it be total or partial, permanent or temporary. Expropriation, unlike deprivation, usually targets a specific property for the benefit of the public.\(^{77}\)

Expropriation mainly implies that the state acquires something.\(^{78}\) If it is carried out for a public purpose or in the public interest, the consequence is that compensation is due.\(^{79}\) What sets an expropriation apart from a mere deprivation (including a confiscation) is that compensation must be paid. Compensation must be ‘just and equitable’. Determining that which is ‘just and equitable’ is a contextual question that will depend on the facts relevant to a particular circumstance.

When it comes to evaluating the validity of an expropriation, it is important to distinguish between the validity of the expropriation and its consequences.\(^{80}\) An expropriation is valid if it is carried out in terms of authorising legislation and undertaken for a public purpose or in the public interest. The consequence is that compensation is due. It can be argued that this consequence, or duty to pay compensation, is an integral part of expropriation.\(^{81}\)

In the absence of authorising legislation, expropriation will not be valid. Since expropriation is such a great inference with rights, there needs to be an explicit authorisation for an expropriation and a clear indication of the public purpose that the expropriation aims to serve.

Nevertheless, the validity of the expropriation cannot be faulted purely if the compensation is not sufficient according to the owner. The validity of the expropriation can only be faulted if it is not authorised in legislation, if it does not comply with the procedures or if it is not in the public interest or for a public purpose. An owner who is dissatisfied with the amount of compensation is free to approach the court for relief in terms of section 25(2)(b) of the Constitution.

Expropriation is done in terms of a statute that authorises the expropriation, coupled with an Expropriation Act that sets out the procedures and method to calculate compensation. In land reform contexts, it is possible to transfer the land to a private beneficiary.\(^{82}\) In this context, the following legislative measures provide explicitly for expropriation for land reform and housing purposes:

- Sections 10, 10A and 12 of the Land Reform: Provision of Land and Assistance Act 126 of 1993;
- Section 26 of the Extension of Security of tenure Act 62 of 1997;

\(^{77}\) Ibid at 197.

\(^{78}\) This is also reflected in the definition of an expropriation in the Expropriation Bill of 2020 (note 9 above) which clarifies that expropriation means an acquisition of property by the state.

\(^{79}\) Slade (note 2 above).

\(^{80}\) Ibid.


\(^{82}\) In the land reform context, it is not clear whether the property must first transfer to the state (as in all other expropriations), and then the state transfers it to the beneficiary, or whether it is possible to transfer the property directly from one private person to another, provided that it is done in terms of legislation. The first is legally purer, while the latter will be more practical. See BV Slade ‘Public Purpose or Public Interest and Third Party Transfers’ (2014) 17 Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad 167–207; B Slade The Justification of Expropriation for Economic Development (LLD thesis, Stellenbosch University 2012).
Expropriation of property for land reform purposes, authorised by legislation, will be valid in terms of the Constitution’s requirements. However, section 25(8) specifically states that no provision in this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that the departure of the provisions of this section is in accordance with the provisions of section 36(1).

This means that, in cases of land reform, deprivations, expropriations and the determination of compensation (or the compensation requirement itself), will warrant a more tolerant review in terms of the provisions in section 25(8). For instance, a deprivation in terms of section 25(1) that might ordinarily be arbitrary, might be subject to lesser scrutiny. However, it must still be reasonable and justifiable in terms of section 36(1). This brings into focus the importance of section 36(1) and its interaction with section 25.

In terms of section 25(8), the state must be able to show that sections 25(1) and (2) indeed impede land reform. This might be challenging in light of the damning Special Investigation Unit report showing large scale corruption as well as the High-Level Panel report that explicitly states that sections 25(1) and (2) are not impediments and various other reports and court cases that provide clear diagnoses of impediments to land reform.

5 Compensation

Section 25(2)(b) sets out the requirement that compensation is due upon expropriation. Section 25(3) determines that the compensation amount and the time and manner of payment must be just and equitable at the time of expropriation, striking an equitable balance between the person whose property is expropriated and public interest. All relevant circumstances must be considered, including the factors listed in section 25(3)(a)–(e). The Harvey case ruled that compensation need not be determined at expropriation, but can be determined afterwards if it

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85 Genesis Analytics Implementation evaluation of the Restitution Programme (2014).
87 A Gildenhuys Ontieningsreg (2nd Ed, 2001) 163. Procedurally, this has been construed to mean that the plaintiff who relies on the Constitution must aver it the particulars of claims, as in De Villiers v Stadsraad van Mamelodi 1995 (4) SA 347 (T) 35.
88 Constitution s 25(3).
is just and equitable to carry this out.\textsuperscript{91} The compensation can be agreed to by those affected, or decided or approved by a court. When there is no agreement, the Constitution provides principles and factors in section 25(3) for calculating compensation.

The central principle is that the amount of compensation must reflect an equitable balance between the public interest and the interests of those affected. This balance must be established regarding the relevant circumstances including, but not restricted to, the list of factors in section 25(3). This requires contemplating each case individually with regard to the individual property interest that might stem from the pre-constitutional era and the constitutional framework and its legitimate land reform efforts. As indicated, a decision on what is just and equitable cannot be made in the abstract without due regard to the context of the expropriation. When it comes to determining compensation, due regard should be paid to the broader scheme of the Constitution.\textsuperscript{92}

The latter aims to balance the public interest with the interest of those affected (the individual), and this might not always entail the payment of market value. Care should therefore be taken to ensure that the Expropriation Act\textsuperscript{93} or the new bill\textsuperscript{94} is interpreted in line with the Constitution, with caution so as to avoid over-emphasising market value because it is only one of the five factors in an open list to be taken into account when determining compensation.\textsuperscript{95}

C Limitations on expropriation powers

Constitutional rights are not absolute, and can be justifiably limited, for instance around social concerns. The specific criteria that a limitation must comply with are set out in section 36(1) of the Constitution. If it is found that there indeed has been an infringement of a right (step one), the state moves to ask whether such an infringement can be justified in terms of section 36 (step two).\textsuperscript{96} Should there be no payment of ‘just and equitable’ compensation, this would be a violation of section 25(2). Such a violation will only be possible if it complies with section 36(1).\textsuperscript{97}

There is no clear judicial guideline in South Africa on how section 25, section 36 and administrative law (section 33) will influence the rationality of the expropriation itself – in other words, how expropriation will be judged as furthering an important reform purpose in terms of section 25(8) within the confines of the laws.\textsuperscript{98} The reasonableness test in section 36

\textsuperscript{91} In terms of clause 17(1) of the Expropriation Bill, the holder is entitled to payment of compensation ‘by no later than the date on which the right to possession passes’. Clause 17(3), however, makes it clear that a dispute about the payment of compensation will not prevent the passing of the right to possession.

\textsuperscript{92} Van der Walt (note 35 above) at 471.

\textsuperscript{93} Expropriation Act 63 of 1975.

\textsuperscript{94} Expropriation Bill (note 9 above) 23-20.

\textsuperscript{95} Section 36 states: ‘The rights in the Bill or Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the following: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and the extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.’ This is a general limitation clause that applies to all the sections in the Bill of Rights. Our courts follow a two-step approach in determining whether a limitation on rights is justifiable. See Hoops (note 66 above).


\textsuperscript{97} Ibid at 562.

\textsuperscript{98} Hoops (note 66 above). See also Viljoen (note 83 above).
requires a proportionality analysis, balancing the relative importance of the project against
the relative importance of the expropriated right. In terms of section 33 and PAJA, the
reasonableness standard is not fixed. The severity of the infringement will determine whether
the inquiry involves a rationality or a proportionality requirement. Since expropriation is a
severe limitation of a person’s right, the test will probably be one of proportionality. Suppose
courts review a decision made by the expropriating authority in this regard. In that case, it will
examine whether the decision crosses the boundaries of what can be regarded as reasonable.
It is during this reasonableness inquiry that the payment of compensation can play a role.

For example, it is possible that the absence of compensation, or substantially reduced
compensation, will influence such a weighing process. If the owner’s interest is substantially
affected, a compelling reason or justification for the land reform measure is required. This
is the case regardless of an amendment to section 25, since the administrative action of
expropriation will still have to comply with PAJA and section 33 and the general limitation
clause of section 36(1).

What does become important here is that an infringement of section 25(2) – in the case of
land reform purposes, for example – when balanced, can be rescued from being too intrusive
based on the compensation paid. If the compensation is zero, or absent, then the infringement
on section 25(2) will be extensive, which will require the public interest in that specific land
reform project to be significant. This is subject to the provisions of section 36 and section 33,
which deals with just administrative action.

D Expropriation Bill

The Expropriation Bill 23 of 2020 will bring expropriation practices in line with the
Constitution and the demands of administrative justice. The Bill in this sense ties the strings
together and streamlines the laws applicable to expropriation. The legislature has been trying
for almost 12 years to come up with expropriation legislation that is in line with section 25 of
the Constitution, and on which some form of consensus could be reached.

For purposes of our discussion, it should be noted that clauses 12(3) and (4), inserted in the
2018 version of the Bill, were changed slightly, and the 2020 Bill now provides the following:

(3) It may be just and equitable for nil compensation to be paid where land is expropriated in the
public interest, having regard to all relevant circumstances, including but not limited to—
(a) where the land is not being used and the owner’s main purpose is not to develop the land
or use it to generate income, but to benefit from appreciation of its market value;
(b) where an organ of state holds land that it is not using for its core functions and is not
reasonably likely to require the land for its future activities in that regard, and the organ of
state acquired the land for no consideration;
(c) notwithstanding registration of ownership in terms of the Deeds Registries Act, 1937 (Act
47 of 1937), where an owner has abandoned the land by failing to exercise control over
it;
(d) where the market value of the land is equivalent to, or less than, the present value of direct
state investment or subsidy in the acquisition and beneficial capital improvement of the
land; and

99 Hoops ibid.
100 Ibid.
101 Ibid.
(e) when the nature or condition of the property poses a health, safety or physical risk to persons or other property.

(4) When a court or arbitrator determines the amount of compensation in terms of section 23 of the Land Reform (Labour Tenants) Act, 1996 (Act 3 of 1996), it may be just and equitable for nil compensation to be paid, having regard to all relevant circumstances.

There is, therefore, no large-scale or blanket expropriation of land without foreseeing compensation in the Expropriation Bill. As will be clarified below, the Bill refers to ‘nil’ and not ‘without’ compensation, which means that the obligation to pay the compensation is retained, but that it might be that in some instance paying R0 is ‘just and equitable’.

E Constitutional amendment process

1 54th Congress of the ANC: Expropriation without compensation on the table

At the 54th Congress of the ANC in December 2017, the party resolved to start using land reform and rural development as part of the programme of radical socio-economic transformation. To this end, the expropriation of land without compensation is envisioned as one of the key mechanisms available for the government to give effect to land reform and redistribution.

While directly stating its intention to expropriate without compensation, the ANC cautions that, with a view to determining implementation mechanisms, it must be ensured that future investment in the economy is not undermined; agricultural production and food security are not damaged; and harm is not caused to other sectors of the economy.

The document states that concrete interventions that effect land reform should focus on government-owned land and should be governed by the ANC’s ‘Ready to Govern’ policy document, which prioritises the redistribution of vacant, unused and under-utilised state land, as well as land held for speculation and hopelessly indebted land. Acceleration of the programme must be done in an orderly manner, and action must be taken against people who occupy land unlawfully due to so-called ‘land grabs’.

In addition, the report states that land reform must have clear targets and timeframes and must be guided by sound legal and economic principles, and all of this must happen within the country’s overall objectives of job creation and investment.

In the land reform process measures such as land tax, support for black farmers and preferential allocation of black farmers’ water rights and infrastructure provisions should be in place. Training and support should be part and parcel of effective programmes. Land reform must enhance and maintain food security and empower local governments to advance land reform in their areas. Title deeds should be rolled out to black South Africans, and control and administration of areas under communal land tenure should be democratised. This indicates that the ANC post-acquisition policy does not boil down to custodianship or nationalisation.


104 Also included Expropriation Bill (note 9 above) cl 12(3).
In the conference, in summary, the ANC foresees expropriation of land without compensation as one of the mechanisms for government to give effect to land reform with various economic and legal caveats.

2 Motion adopted in the National Assembly, 27 February 2018

After the ANC’s conference, the Economic Freedom Fighters (EFF) tabled a motion in Parliament in February 2018 calling for expropriation without compensation to enable the state to become ‘the custodian of all land’. The ANC amended this motion drastically\textsuperscript{105} to include the economic caveats of their 54th conference. The EFF’s proposal for custodianship (sometimes also referred to as nationalisation) was rejected. The motion adopted is in line with the ANC’s 54th Conference resolution.

This motion became the work of the Joint Constitutional Review Committee (CRC), whose mandate was to

\begin{quote}
[review Section 25 of the Constitution and other clauses where necessary, to make it possible for the state to expropriate land, in the public interest without compensation, and propose the necessary constitutional amendments where necessary. In doing so, the Committee is expected to engage in a public participation process in order to get the views of all stakeholders about the necessity of, and mechanisms for expropriating land without compensation.]
\end{quote}

3 Joint Constitutional Review Committee process

To fulfil its mandate, the CRC engaged in an extensive public participation process in which it was guided by whether it was necessary, and the mechanisms that would be needed, for expropriating land without compensation. The committee found that the majority of people were in favour of a constitutional amendment.

In the final report,\textsuperscript{106} the committee noted two views regarding what is permissible in terms of the Constitution. These two views are listed in the final document of the CRC. The first view states that, in certain limited cases, weighing the factors can result in a compensation

\textsuperscript{105} The motion is quoted in full here, with the parts that the ANC deleted, and the parts that they inserted in italics.

amount of R0. This is already foreseeable within the Constitution under certain circumstances. The state would have to show why R0 is just and equitable in the specific case. It is also subject to review by the courts. However, it does not negate the duty of the state to pay compensation. An owner can still argue that R0 is not just and equitable. The other view simply states that the Constitution implies that land can be expropriated without compensation, but that this must be made explicit.

The problem is that these two views are not the same. The first view maintains the framework of section 25 and the Constitution as a whole, which requires a balancing of factors and interests. It leaves the possibility that, in some circumstances, R0 or nominal compensation is payable. Courts will always test this restriction against the general limitation clause of the Constitution (section 36).\textsuperscript{107} It still respects the ‘just and equitable’ standard of compensation that our Constitution requires, and does amount to a constitutional interpretation of the provision.

The second view takes away the obligation to pay compensation. ‘Without compensation’ changes the legal nature of expropriation to either deprivation or confiscation (depending on the facts), and it relieves the state of the duty to compensate. An owner, therefore, does not have the option to argue that compensation must be paid.

Arguments that state that the first interpretation is not a possible interpretation and that therefore the Constitution should be changed might fall outside the committee’s mandate, because it goes further than making the implicit explicit. It changes the meaning of the section. This, however, informed the mandate of the Ad Hoc Committee to Initiate and Introduce Legislation amending section 25 of the Constitution, without clarity of what it is that is implicit in the Constitution. If the second interpretation is followed, constitutional problems potentially arise in terms of international law, as we will see later.

The Committee’s recommendations were as follows.

Having taken all these into account, the Joint constitutional review Committee recommends:

(a) That Section 25 of the Constitution must be amended to make explicit that which is implicit in the Constitution, with regards to Expropriation of Land without Compensation, as a legitimate option for Land Reform, so as to address the historic wrongs caused by the arbitrary dispossession of land, and in so doing ensure equitable access to land and further empower the majority of South Africans to be productive participants in ownership, food security and agricultural reform programs.

(b) That Parliament must urgently establish a mechanism to effect the necessary amendment to the relevant part of Section 25 of the Constitution.

(c) Parliament must table, process and pass a Constitutional Amendment Bill before the end of the 5th Democratic Parliament in order to allow for expropriation without compensation.

4 Ad Hoc Committee to Initiate and Introduce Legislation amending section 25

The Ad Hoc Committee to Initiate and Introduce Legislation amending section 25 of Constitution gazetted the 18th Constitutional Amendment in December 2019. The Parliamentary legal services proposed the wording after consolidating the inputs made to the

\textsuperscript{107} See the discussion above in part IC above.
committee. The Bill had to be drafted in such a way as to get majority support\textsuperscript{108} for the publication of the amendment.

It is important to remember that the committee’s mandate was to make that which is implicit with regard to the expropriation of land without compensation for land reform purposes explicit.

The draft amendment that was published for comment\textsuperscript{109} read as follows, where the amendment has been italicised by the author:

\begin{quote}
(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court: \textit{Provided that in accordance with subsection (3A) a court may, where land and any improvements thereon are expropriated for the purposes of land reform, determine that the amount of compensation is nil.}
\end{quote}

The Draft Bill further proposes the inclusion of a new subsection, 3A, which tasks national legislation with delineating the circumstances in which a court may determine the amount of compensation payable as R0. Notably, the draft amendment does not use the phrase ‘without compensation’, but rather ‘nil compensation’, indicating a preference for the suggestion that in certain circumstances, after a weighing up of different factors, it is possible that the amount of compensation that is just and equitable is R0.

The public participation process on the specific proposed wording was delayed with the onset of Covid-19, which rendered public participation problematic. The public participation process was finalised in March 2021. The Constitution Eighteenth Amendment Bill, with reference to amending section 25(2)(b) that states:

\begin{quote}
(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court: \textit{Provided that where land and any improvements thereon are expropriated for purposes of land reform as contemplated in subsection (8), the amount of compensation may be nil.} (italic inserted)
\end{quote}

It adds (3A):

\begin{quote}
(3A) \textit{For the furtherance of land reform, national legislation must, subject to subsections (2) and (3), set out circumstances where the amount of compensation is nil.}
\end{quote}

For purposes of this article it is also important to note that there was a suggested amendment to section 25(5):

\begin{quote}
(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable state custodianship of certain land in order for citizens to gain access to land on an equitable basis.
\end{quote}

At the time of submitting the article for publication there was a third proposal on the table that seeks to clarify ‘custodianship’ amongst other things. However, current opinion is that the ANC will not have the necessary support from the EFF in the National Assembly to obtain the requires 2/3 majority to vote the amendment into law.\textsuperscript{110}

\textsuperscript{108} See the discussion in the committee at https://pmg.org.za/committee-meeting/29512/. The arguments made here was that the different political parties can then provide their own input into the draft amendment.


Parallel to this process ran the process of adopting new expropriation legislation to replace the old, outdated 1975 Expropriation Act. As a signal to the public about what type of property the state envisages targeting for ‘nil compensation’, clause 12(3) was included. At the time of submitting the article, the public participation process was still ongoing. This Bill, unlike the Constitutional Amendment Bill, will likely be adopted before the end of the year. Unlike the Constitution, it does not need a two-thirds majority, meaning that on the ANC vote alone the Bill can pass. Moreover, the Expropriation Bill will ‘make explicit what is implicit’ – as legislation should do. Still, unlike a constitutional amendment, the Expropriation Bill once an Act will have to be read in line with the (unamended) Constitution.

It is with this legislative history in mind that we now turn to international law.

III A COMPARATIVE APPROACH TO COMPENSATION FOR EXPROPRIATION

A Introduction

The expropriation of property by the South African government and the question of compensation are not exempt from international law’s prescripts. This is because the Constitution compels a court, tribunal or forum to consider international law when it interprets the property clause.\(^{111}\) The Constitution further compels the court to interpret legislation by giving effect to this constitutional provision that is consistent with international law.\(^{112}\) Due to these clear mandates, the discussion to follow will begin with an appreciation of international law’s prominent place in the South African legal order. As a member state of the African Union, South Africa also has to observe its obligations arising from various regional instruments, such as the African Charter on Human and Peoples’ Rights. Although not mandatory, foreign law may also be included for consideration because, among other justifications, the Bill of Rights was heavily influenced by the constitutions of other countries.\(^{113}\)

The protection of private property has various roots in international law, such as traditional international law rules concerning the treatment of foreign nationals and, specifically, the property they own in host countries. These rules are colloquially referred to as the ‘international minimum standard’. They will be explored in the second part of this discussion. Another is international investment law, particularly Bilateral Investment Treaties (BITs), which substitutes the traditional international law rules in practice. In this regard, a constantly growing body of case law has developed, entailing a clarification of significant issues, such as the conditions under which a state may lawfully expropriate property, the scope of measures affecting the enjoyment of property rights amounting to an expropriation and the question of compensation or damages arising from expropriation. These will be addressed in the third part of the present discussion. Lastly, property rights are, to some extent, protected by human rights law, embracing the argument that the right to own property is a fundamental human right. An encroachment of such a right entitles its owner to indemnification, which will be considered in the last part of this discussion. Although there is no binding treaty governing the protection of property at the global level, it is protected by regional human rights treaties such as the African Charter on Human and Peoples’ Rights.\(^{114}\) The ACtHPR has not yet decided any

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111 Constitution s 39(1)(b).
112 Constitution s 233.
113 Constitution s 39(1)(c); De Ville (note 8 above) at 241.
case concerning property. Therefore, recourse might be had to other regional systems such as the ECtHR, which is by far the most developed, and the IACtHR, which has made important judgments with regard to property rights of indigenous peoples.

What will hopefully transpire from this discussion is that, under international law, South Africa enjoys sovereignty, which allows the Republic to exercise its legislative, executive and judicial competencies within its territory and to the exclusion of others. This implies that South Africa is free to embark on its land reform initiatives within its National Development Plan\textsuperscript{115} and to expropriate property as a means to achieve its goal. However, with this right comes considerable responsibility, notably to move forward with land reform within the legal frameworks within which it operates. This part of the article aims to establish the parameters that international, regional and foreign law set for the expropriation of property with a view to understanding what the compensation requirement entails. Ultimately, it will be established that ‘without compensation’ will fall short of South Africa’s obligations, but that, in exceptional circumstances, ‘nil compensation’ can be justified after due process has been followed and relevant criteria considered.

B The expropriation of foreign-owned property and the international minimum standard

1 Introduction

It is a well-established principle in international law that states enjoy sovereignty\textsuperscript{116} and, as a result, also enjoy sovereignty over their natural wealth and resources.\textsuperscript{117} A ‘basic corollary right’ based on the principle of sovereignty is the right to expropriate foreign-owned property. This can, however, only be done in the public interest or for a public purpose, on a non-discriminatory basis, in conformity with due process and as accompanied by the payment of compensation.\textsuperscript{118} Non-compliance with these conditions, that is, the international minimum standard, may be construed as unlawful taking, in which case the expropriating state will incur international responsibility for its internationally wrongful act.\textsuperscript{119} As a result, the expropriating state will be obligated to make reparation,\textsuperscript{120} and the appropriate remedy favoured by international tribunals for an unlawful expropriation under international law seems to be damages, not restitution.\textsuperscript{121}

The distinction between lawful and unlawful expropriation is well established in international law, and the significance of such a distinction has been noticed and applied to the amount of compensation by international decision makers.\textsuperscript{122} In the case of lawful

\begin{footnotesize}
\begin{enumerate}
\item[116] Max Huber suggests that sovereignty in the relations between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state. See the \textit{Island of Palmas} case (\textit{The Netherlands v The United States of America}) 2 R.I.A.A. (1928) 829, 838.
\item[117] Between 1952 and 1974, the UN adopted numerous resolutions on the issue of permanent sovereignty over natural resources, the latest of which is Resolution 3281 of 12 December 1974.
\item[118] These will be elaborated on in more detail below with emphasis on compensation.
\item[120] Draft Articles (note 1119 above) at art 31
\item[121] CD Gray \textit{Judicial Remedies in International Law} (1990) 16–17.
\item[122] Chorzow Factory \textit{Judgment}, Germany \textit{v Poland} (1928) PCIJ Series A No. 17, and later confirmed in \textit{The Government of Kuwait v American Independent Oil Company (Aminoil)}, Award of 24 March 1982, reprinted in
\end{enumerate}
\end{footnotesize}
expropriation, compensation may be due, and it is limited to the value of the expropriated property (\textit{damnum emergens}). With respect to unlawful expropriation, the appropriate remedy would be damages, which, in addition to the value of the expropriated property, may include lost profits (\textit{lucrum cessans}). The latter may be awarded according to what the claimant concerned reasonably expects.

Turning to the conditions under which expropriation will be lawful, the exact meaning of ‘public interest’ or ‘public purpose’, albeit the first requirement, is not certain. The suggestion, however, is that it should be interpreted broadly, and that states should be granted extensive discretion to determine it.\footnote{See, for example, \textit{James v United Kingdom} [1986] ECHR 2, (1986) 8 EHRR 123 at para 145.} The second requirement, namely that acts of expropriation are to be conducted in a non-discriminatory fashion, is held as prohibited by customary international law.\footnote{\textit{Libyan American} (note 122 above) at 58–59; and \textit{Amoco v Iran} (1988) 27 ILM 1314 at paras 140–142.} The standard of due process, the third requirement, demands an actual and substantive legal procedure where a claim can be raised. Due process further demands this legal procedure to be underpinned by certain basic guarantees, such as accessibility, a fair hearing and an independent and impartial adjudicator. This requires that there be a legal basis for expropriation, in other words, a law that orders the expropriation and recourse to courts, while the state cannot conduct itself in an abusive manner.\footnote{U Kriebaum & A Reinisch ‘Property, Right to, International Protection’ in Max Plank Encyclopedia of Public International Law (2009) at paras 22–23.}

\section*{2 The duty to compensate}

The final and most contentious requirement is compensation. There seems to be little doubt that, in terms of international law, the state has a duty to compensate the dispossessed foreign owner, and it seems safe to assert that the doctrine of unjust enrichment can be considered as the legal basis for this contention.\footnote{A Ghassemi \textit{Expropriation of Foreign Property in International Law} (PhD thesis, University of Hull 1999) 273.} However, pertaining to the question as to whether or not compensation is a condition of the legality of an expropriation, a patent lack of agreement exists among authors. Some support the approach of ‘legality’, while others advocate that of ‘illegality’. Though the practice of capital-exporting states provides some support for the latter theory, the responses of their national tribunals are contradictory.\footnote{Ibid at 113.} At the international level, the jurisprudence of the Iran-United States Tribunal does uphold the former theory. The Tribunal holds that there is a duty to compensate, while the non-satisfaction of the duty does not render the expropriation unlawful as such. It would appear appropriate to agree with the proposition that the payment of compensation cannot be characterised as a legal condition of the expropriation, similar to the instances of public purpose and non-discrimination requirements.

\section*{3 The compensation standard}

If it is therefore accepted that the expropriating state has a duty to compensate the dispossessed foreign owner, the question is what the compensation standard should be. Since 1938, the Hull-formula of ‘prompt, adequate and effective payment’ was applied, but not without

\footnote{21 ILM (1982) 976, 1032 para 143. Also see \textit{Libyan American Oil Company (Liamco) v The Government of the Libyan Arab Republic}, Award of 12 April 1977, reprinted in 20 ILM (1981) 1, 137.}

\begin{itemize}
  \item \textit{Libyan American Oil Company (Liamco) v The Government of the Libyan Arab Republic}, Award of 12 April 1977, reprinted in 20 ILM (1981) 1, 137.
  \item \textit{Libyan American} (note 122 above) at 58–59; and \textit{Amoco v Iran} (1988) 27 ILM 1314 at paras 140–142.
  \item A Ghassemi \textit{Expropriation of Foreign Property in International Law} (PhD thesis, University of Hull 1999) 273.
  \item Ibid at 113.
\end{itemize}
contestation by numerous developing countries, who pursued land reform in that period of time. Many of them demanded a largely unfettered right to expropriate foreign property at any time and pay compensation only if provided for by their respective national laws.

The issue of compensation was taken up by the UN General Assembly in the early 1960s under the rubric of Permanent Sovereignty over Natural Resources, and in 1962 the General Assembly adopted Resolution 1803 [XVII] with considerable support. While it stressed the right to expropriate property as an emanation of state sovereignty, it also made it subject to the rules of international law:

Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the state taking such measures shall be exhausted. However, upon agreement by sovereign states and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.

In the early 1970s, a group of developing countries demanded the establishment of a New International Economic Order. One of the central issues on their agenda was a change to the traditional rules on expropriation and compensation. In 1973, the General Assembly adopted Resolution 3171 [XXVIII], which is also entitled ‘Permanent Sovereignty over Natural Resources’. This resolution omitted any reference to international law and determines that ‘each State is entitled to determine the amount of possible compensation and the mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation of each State carrying out such measures’.

During the negotiations concerning a New International Economic Order in the context of Resolution 3281 [XXIX] of 12 December 1974 entitled Charter of Economic Rights and Duties of States, the question of compensation quickly became one of the most controversial issues. Ultimately, the mentioned Charter was not adopted by consensus, but by a divisive vote of 120 in favour, six against and ten abstentions. Article 2(2)(c) of Resolution 3281 [XXIX] provides that in the case of expropriation—

appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled by the domestic law of the nationalising state and by its tribunals, unless it is freely and mutually agreed by all states concerned that other peaceful means be sought on the basis of the sovereign equality of states and in accordance with the principle of free choice of means.

According to Kriebaum and Reinisch, it is unlikely that these resolutions have effectively changed the law in accordance with their terms. However, the claims of developing countries for a lower standard of compensation as stipulated by these resolutions have, according to them, eroded the formerly established standard of ‘prompt, adequate and effective’ compensation.

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128 This resolution was adopted by 87 votes to two (France and South Africa) with 12 abstentions.
131 Kriebaum & Reinisch (note 125 above) at para 27.
A number of arbitration awards have found that Resolution 1803 of 1962 accurately reflects customary international law, and not Resolution 3281 of 1974. In *Texaco v Libya*, it was held that the voting on Resolution 1803 indicated that it was supported by a majority of states belonging to various representative groups, and that it was to a large extent the expression of a real general will. In contrast, it was held that Resolution 3281 had to be analysed as a political rather than legal declaration concerned with the ideological strategy of development and, as such, it was only supported by non-industrialised states. Moreover, the absence of any connection between the procedure of compensation and international law could not be regarded as a *de lege ferenda* formulation, and indeed it even appeared *contra legem* in the opinion of many developed countries.

In sum, it seems clear that the Hull-formula is no longer accepted by international law, and ‘appropriate compensation’ seems to enjoy the greatest support and has been approved by several arbitral awards. Appropriate compensation has no fixed meaning, but will certainly be less than is suggested by the phrase ‘prompt, adequate and effective’. In *Kuwait v American Independent Oil Co*, the arbitration tribunal found that it was necessary to have regard to all the circumstances of the case with special reference to the legitimate expectations of the parties.

4 Global settlement agreements

Another element contributing to the uncertainty of the level of compensation for expropriations has been the practice of entering into global settlement agreements, which has provided for lump sum payments, usually at considerably reduced value. While the lump sum payment settled the international claim, the actual compensation of the former property owners was regularly achieved by national distribution procedures based on the national legislation of their home states. Whether the reduced compensation payments according to lump sum agreements can be regarded as an expression of a change of customary international or considered as constituting a conscious departure from the customary standard law, remains controversial.

The payment of compensation as one of the conditions of an expropriation to be in conformity with a state’s international obligations was also confirmed by the SADC Tribunal in the *Campbell* case in 2007. This case concerned the expropriation of white-owned farms without compensation after a 2005 amendment of the Zimbabwean constitution made this possible. The Tribunal’s ruling did not directly address the right to own property, but on the issue of expropriation and compensation, the Tribunal held that, within international law, the expropriating state has the duty to compensate. Also, that Zimbabwe could not rely on its national law (its Constitution) to avoid an international-law obligation to pay compensation. This clear legal principle in international law is also codified in the *Vienna Convention on the Law of Treaties*, which provides in art 27 that a party ‘may not invoke provisions of its own internal law as justification for failure to carry out an international agreement’.

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133 Dugard et al (note 12 above) at 434.
134 Ibid at 435.
It is therefore clear that, under international law, states are free to exercise their legislative, executive and judicial competencies to effect expropriation. However, when the exercise of this right affects foreign nationals, it cannot be performed in an unfettered manner. In this sense, international law lays down a minimum standard that is widely accepted by most states. As a member of the international community of states, South Africa has little choice in this regard; if it fails to adhere to this standard of treatment when it expropriates foreign owned property, it will commit an internationally wrongful act for which it will incur international responsibility. Apart from states taking action on behalf of their nationals, they could also consider applying diplomatic pressure on the government, and even institute sanctions as in the period prior to 1994.

C International investment law

Closely related to the international minimum standard described above is international investment law aimed at governing the relationships between states and foreign investors. Lacking a central treaty or institution, international investment law mainly consists of bilateral investment treaties (BITs).¹⁴⁰ These treaties aim to attract foreign investment to the host country with the aim of promoting economic development. In their turn, host countries grant investors full protection and security, fair and equitable treatment, protection against arbitrary treatment and a guarantee against discrimination. The protection against expropriation, or the payment of compensation in the event that expropriation takes place, also usually figures as a central provision of any BIT. The present section of the discussion aims to establish the possible impact of BITs on the standard of compensation.

Most BITs provide for a standard of ‘prompt, adequate and effective’¹⁴¹ compensation, and they frequently concretise the compensation obligation by stating that the amount of compensation should be equivalent to the ‘fair market value’¹⁴² of the expropriated investment immediately before¹⁴³ the expropriation took place. The plethora of arbitral decisions since the 1990s demonstrates that it is not so much the theoretical debate about ‘adequate’ versus ‘appropriate’ compensation that is important, but rather the actual valuation technique used. Some BITs provide guidelines but afford the arbitrators the discretion to choose a valuation method that will be appropriate in the circumstances.

Since re-entering international economic relations in 1994, South Africa has concluded a number of BITs with foreign investors. Over time, however, the Republic has taken issue with what it has considered to be limitations placed by BITs on its sovereign right to regulate public interest. Also, the execution of these treaties has led to several investment disputes,¹⁴⁴ and arguably resulted in the termination of several BITs, while this seems to be part of a

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¹⁴⁰ It also includes investment chapters in preferential trade agreements. These treaties are supplemented by an unknown number of investment contracts between governments and foreign investors, as well as domestic investment legislation.

¹⁴¹ Many BIT provisions further specify that ‘prompt’ means without delay plus interest until the date of actual payment, while ‘effective’ is usually understood as entailing fully realisable and in a freely convertible currency, as already laid down in the non-binding 1992 World Bank guidelines.

¹⁴² This mainly boils down to the amount of compensation that a hypothetical able and willing buyer would pay for the property by comparing similar transactions in the market.

¹⁴³ This rule aims at avoiding losses to investors as a result of reductions in market value flowing from announcements of expropriations.

¹⁴⁴ Dugard et al (note 12 above) at 658 and further.
policy decision by the Department of Trade and Industry to phase out BITs and replace their guarantees with those found under the Protection of Investment Act 22 of 2015.

Concerning the transition phase, this Act determines that existing investments made under BITs will continue to be protected for the period and terms stipulated in the treaties. It is also important to note that, since most guarantees contained in BITs are based on general state practice, they can be regarded as part of the general principles of investment law and, as such, have relevance beyond the life of any individual treaty. The Act also makes provision for investments made after the termination of a BIT, but before promulgation of the Act. In this instance, the relationship between the host country and the investor will be governed by general South African law.\textsuperscript{145}

Here it is important to highlight that the Protection of Investment Act provides that its interpretation and application will be subject to the constitutional prescripts relating to the important place international law occupies in the South African legal order, as described earlier.\textsuperscript{146} However, nowhere in the Act is there any explicit reference to the payment of compensation. This deliberate omission will not automatically allow the government to expropriate without compensation, as this may constitute a violation of the international minimum standard and expose South Africa to claims based on a legitimate expectation that compensation must be considered.

Mindful of the fact that the rules and principles analysed in the preceding two parts are applicable to the relationship between a host state and foreign nationals or investors, we are tempted to argue that these could also be considered and applied to the relationship between South Africa and its nationals. Nowhere in international law is this prohibited. Prohibited treatment of own nations could, however, be considered under the auspices of human rights, as will be done in the section below. Since World War II, human rights have taken centre stage in the international arena, and international law no longer allows states to treat their nationals as they please. The individual is, due to the unbalanced relationship in which it stands towards the state, protected by various human rights instruments. The content of most of these instruments are today accepted as customary international law, and in some instances \textit{jus cogens} and \textit{erga omnes}.

D Property and human rights

The question as to whether human rights can be a legal foundation for the duty to compensate in instances where property is expropriated will be considered in this section. As mentioned, the argument is that the right to own property is a fundamental human right, and an encroachment of such a right entitles its owner, natural or juristic person to indemnification.

1 Universal Declaration of Human Rights

Although there is no binding treaty governing the protection of property at a global level, the body of human rights law laid down in several universal and regional instruments provide a legal basis for the international protection of property rights. A right to property was included in art 17 of the Universal Declaration of Human Rights in 1948 (UDHR), but not in the two

\textsuperscript{145} Protection of Investment Act 22 of 2015 s 15.

\textsuperscript{146} Ibid s 3.
subsequent international human rights Covenants, which were introduced into international law by the declaratory provisions of the UDHR.\textsuperscript{147}

The UDHR was adopted after lengthy periods of deliberation and has in the meantime been embraced worldwide: among others, during the World Conference on Human Rights in Vienna in 1993. Article 17(1) states that everyone ‘has the right to own property alone as well as in association with others’ and art 17(2) that no one ‘shall be arbitrarily deprived of his property’.\textsuperscript{148} The language of art 17(1) is broad and comprehensive, and it clearly applies to individual and collective forms of property ownership. The right to own property is, however, not absolute, since art 17(2) foresees that persons can be deprived of their property under certain circumstances, but not arbitrarily.

Although the UDHR, given that it is a UN General Assembly resolution, enjoys what is commonly referred to as a non-binding character, many of its principles have become incorporated into customary international law, or have even been elevated to a peremptory norm status from which no derogation is permitted by any state. One such example is non-discrimination as contained in in art 2,\textsuperscript{149} and art 17 should also be read in conjunction with this and other provisions of the UDHR.\textsuperscript{150} The question around whether or not the right to own property in art 17(1) enjoys the status of customary international law is, however, debatable. This is because a constant and nearly uniform\textsuperscript{151} settled state practice that is generally and widely accepted,\textsuperscript{152} coupled with an acceptance thereof as legally binding,\textsuperscript{153} is difficult to prove. The difficulty in doing so is perhaps owing to the ideological differences in the way states worldwide think about property. In contradistinction to this, some would argue that there is compelling evidence to support the conclusion that the right to property has received recognition as a rule of customary international law in that state practice is almost unanimous in recognising the right to property, as evidenced by the inclusion of the right to property in the constitutions and legislation of 95 per cent of the 193 UN member states.\textsuperscript{154} This might be true, but the specificities of the right to property are certainly not the same among those comprising the 95 per cent.

Whether or not the right not to be deprived of one’s property in an ‘arbitrary’ manner in art 17(2) belongs to the corpus of customary international law is perhaps not the most pressing issue. From a human rights perspective, with sub-focus on art 17, one is more likely to succeed in stating the word ‘arbitrarily’ than the word ‘property’ to be central. The term ‘arbitrary’ describes ‘a course of action or a decision that is not based on reason or judgment, but on

\textsuperscript{147} The International Covenant on Economic, Social and Cultural Rights (1966)(ICESCR) and the International Covenant on Civil and Political Rights (1966)(ICCPR).

\textsuperscript{148} The right to own property was not included in the two subsequent international human rights Covenants, the ICCPR and the ICESCR, which introduced into international law the declaratory provisions of the UDHR. Both Covenants prohibit discrimination on the basis, inter alia, of property (ICCPR, art 2(1), 24(1), 26; ICESCR, art 2(2)), but they do not include the actual right to own property.

\textsuperscript{149} Filartiga v Pena-Irala 630 F 2d 876 (2d Cir 1980), (1980) 19 ILM 966.

\textsuperscript{150} United Nations general Assembly Resolution 45/98.

\textsuperscript{151} Asylum case (Columbia v Peru) (1950) ICJ 6.

\textsuperscript{152} Fisheries Jurisdiction (Federal Republic of Germany v Iceland) (1974) ICJ 175.

\textsuperscript{153} North Sea Continental Shelf cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) (1969) ICJ 1.

personal will or discretion, without regard to rules or standards.\textsuperscript{155} The term ‘arbitrarily’ in the current context would seem to prohibit unreasonable interferences by states and the taking of property without compensation, but a precise and agreed-upon definition does not appear in the preparatory documents of the UDHR and art 17 in particular.\textsuperscript{156}

2 European Convention for the Protection of Human Rights and Fundamental Freedoms

At the regional level, the right to property is included in a number of instruments. For example, in chronological order, the following documents each protect the right to property: Additional Protocol I to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1952) (Protocol No 1 ECHR); the American Convention on Human Rights (1969) (ACHR); and the African Charter on Human and Peoples’ Rights (1981) (African Charter). In 1990, the United Nations General Assembly Resolution 45/98 stressed the need ‘to ensure respect for the right of everyone to own property’ and ‘the right not to be arbitrarily deprived of one’s property’,\textsuperscript{157} while furthermore requiring that states provide for an adequate procedural and institutional framework in this regard.\textsuperscript{158}

Unlike the international minimum standard on the treatment of foreign nationals and international investment law governing the relationships between states and foreign investors, regional human rights law does not exclusively protect foreign-owned property. The ECHR and ACHR protect the property of everyone under the jurisdiction of the States Parties to the treaty, irrespective of their nationality. However, in contrast to Protocol No 1 ECHR, art 1 reads that every ‘natural or legal person is entitled to the peaceful enjoyment of his possessions’, and the ACHR and African Charter only afford protection to natural persons and not corporations. Clearly, the principle of human rights cannot be used as a legal basis for the law of state responsibility where corporations are involved in the American and African contexts.

One could turn to case law of the ECtHR for guidance in this respect, as it is the most developed on a regional level. For an expropriation to be justified under this regional framework, the deprivation of property must be in the public interest, lawful and proportionate. As to public interest, it is left to states to determine what public interest is. However, nothing prohibits the court from reconsidering the state’s determination of what is in the public interest. In respect of lawfulness, the rules of domestic law must be sufficiently accessible, precise and foreseeable.\textsuperscript{159} This criterion of lawfulness is infringed when national case law leads to an inconsistent application of a rule, which could result in unforeseeable or arbitrary outcomes and deprive litigants of effective protection of their rights.\textsuperscript{160} With regard to proportionality, there must be a correlation between the means employed and the aim sought to be achieved.\textsuperscript{161} A balance needs to be struck between the demands of the community in general, and each individual’s right to the peaceful enjoyment of his/ her property.


\textsuperscript{157} United Nations General Assembly Resolution 45/98 para 3.

\textsuperscript{158} Ibid at para 4.

\textsuperscript{159} Lithgow & Others v The United Kingdom [1986] ECHR 8, (1986) 8 EHRR 329 at para 110.

\textsuperscript{160} Carbonara & Ventura v Italy [2000] ECHR 206 at paras 63–65.

\textsuperscript{161} James v The United Kingdom (note 123 above) at para 50.
The ECHR does not explicitly provide for compensation to a national who has suffered an expropriation. This was confirmed by the ECtHR in Lithgow v the United Kingdom, where the court concluded that ‘the general principles of international law are not applicable to a taking by a state of the property of its own nationals’.162 Despite this, the European court developed a requirement to also compensate nationals in case of an expropriation by applying the proportionality principle. The court reaffirmed that ‘compensation terms are material to the assessment whether the contested legislation respects a fair balance between the various interests at stake and, notably, whether it does not impose a disproportionate burden on the applicants’.163 The requirement of achieving a fair balance between public and private interests will not be respected if property is expropriated without payment of an amount reasonably related to its value.164 The ECHR does, however, not guarantee a right to full compensation in all circumstances, since legitimate objectives of public interest may call for reimbursement at less than the full market value.165 Examples where a reduced level of compensation may be justified include government measures to achieve economic reform and/or greater social justice.166 A total lack of compensation, however, is only justifiable in exceptional circumstances.167 What these circumstances could include are not certain, and will depend on the facts of each case. One example could be where the foreign investor visibly earns inordinate profits from its investment and the host state no benefits at all.168

A further aspect which must be taken into account with a view to calculating any compensation is the length of expropriation proceedings.169 In cases where there are unreasonable delays concerning the payment of compensation, the adequacy of the latter may be diminished.170 Lastly, a difference between nationals and non-nationals regarding the amount of compensation is justified by the ECtHR, which has indicated that there may ‘be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals’.171

3 African Charter on Human and People’s Rights

Closer to home, the African Charter on Human and Peoples’ Rights (1981) determines in art 14 that ‘The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.’ Unlike art 17 of the UDHR, art 14 of the African Charter does not specify who the right holders (individuals, groups or legal persons) are, and does not lay down the normative content of the right. It only commits states to guarantee the right to property. It also does not explicitly require the payment of compensation; neither does it provide protection against arbitrariness or proportionality.

162 Lithgow v The United Kingdom (note 159 above) at para 119.
163 Ibid at para 120.
166 Lithgow v The United Kingdom (note 159 above) at para 121.
167 Ibid at para 120.
171 James v The United Kingdom (note 123 above) at para 63.
The African Commission on Human and Peoples’ Rights has, however, provided some clarity on the content of the right through the Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter. Principles 53 to 55 provide, among others, that the right to property protects the rights of both individuals and groups to the acquisition and peaceful enjoyment of property. It also clarifies that the right to property protects the communal ownership of land and other natural resources and places an obligation on states to ensure security of tenure and prevent interference by third parties as well as state agents. The right may only be limited by states for legitimate public interest in a non-arbitrary manner, according to the law and the principle of proportionality. Effective public participation in any acquisition process and the payment of fair compensation, which must generally be reasonably related to the market value of the property, are prerequisites for the deprivation of the right to property, except in exceptional circumstance where less than market value compensation or none at all may be required. The African Commission has also developed jurisprudence through a number of communications that provide further clarity on the scope and normative content of the right to property. In the *Mauritania* case,172 for example, the African Commission held that arbitrary expropriation without adequate compensation amounted to a violation of the right to property.

From an international and regional human rights law perspective, it is clear that the right to property is not absolute. As a consequence, it can be limited by the state, but only under certain circumstances. The prescripts of human rights law are aimed at the protection of the individual against the state. This does not mean that a state loses its sovereignty to human rights, but that states should exercise their competencies without unreasonably limiting or infringing human rights. Human rights law further requires a fair balance between the means a state employs (expropriation) and the aim it wishes to achieve (economic reform and/or greater social justice). Again, with regard to compensation, it should be considered, and the state has freedom as to the standard and method thereof.

### IV CONCLUSION AND RECOMMENDATIONS

This article sought to look at (im)possibilities of the non-payment of compensation for expropriation in terms of international law. It focused specifically on the question of whether, by default, ‘expropriation without compensation’ and/or ‘nil compensation’ is permissible in international law.

The discussion starts with the ‘one system of law’ argument for a specific reason: to show how the transformative measures, and the protection of property against arbitrary state interference, do not stand in opposition to one another, but are part of the same constitutional goal: to bring about deep-seated social change as required by the preamble to our Constitution. And this also plays out in the calculation for compensation in terms of the Constitution: the protection of property rights from arbitrary state interference does not stand in opposition to the state’s duties to effect land reform. Instead, these interests must be balanced in such a way as to ensure that South Africa achieves its constitutional goals. In this respect, the state’s constitutional duties in terms of international law do not stand in opposition to the state’s national duty to effect transformation.

Ideological differences between capitalist and socialist states, historical differences between former colonial powers and decolonised states, and economic differences between developed and developing states result in disagreement on the standard that must be applied when the property of a foreign national is expropriated. Some insist on an international standard, while others maintain that the domestic law of the expropriating state should govern the situation. This either-or approach is seemingly based on a general assumption or premise that international law and domestic law are two separate legal systems. It is argued here that the truth for South Africa lies somewhere in between. Even if the latter approach is followed, namely that South African domestic law should regulate expropriation, international law will still have to be considered, because the Constitution, as the supreme law of the land, makes this mandatory. Amending section 25 of the Constitution will not absolve the government from considering international law, because the preamble and sections 39(1)(b), 231, 232 and 233 of the Constitution remain intact.

Another incorrect general assumption or premise is that international law is the villain in the narrative around South African property. This could not be further from the truth. Not only did international law condemn apartheid and its racial laws pertaining to property, it also supported and still supports the African National Congress in its quest to bring an end to the injustice the Republic that her people suffered. Under international law, South Africa enjoys sovereignty, which allows the Republic to exercise its legislative, executive and judicial competencies within its territory and to the exclusion of others. This implies that South Africa is free to embark on its land reform initiatives within its National Development Plan, and to expropriate property as a means to achieve its goal. This, however, must happen within the relevant international, regional and domestic legal frameworks. South Africa also enjoys a generous amount of discretion when it comes to the standard and method of compensation.

It has been established here that a failure to consider compensation will fall short of what is regarded as lawful, and that ‘appropriate’ compensation can in some instances be less than market value, and in exceptional circumstances, ‘nil compensation’ could be justified after a due process has been followed and relevant criteria considered.

The article has further established that the government will be held to its international treaty obligations despite any amendment because, under international law, a party may not invoke provisions of its domestic law as a justification for failure to carry out an international agreement. Whether regulated in future by BITs or the Protection of Investment Act, most guarantees afforded to foreign investors are in any event based on general state practice and can be regarded as being part of the general principles of investment law and, as such, these enjoy relevance beyond the life of any individual treaty. Failure by the government to observe its obligations will open the Republic up to claims, and result in South Africa becoming a less favourable destination for foreign investment. Both should be avoided at all costs because we cannot afford either.

Although South African nationals do not enjoy the same protection of their property rights in South Africa under the international minimum standard as foreign nationals in South Africa do, they are not without recourse. This is because the right to own property is a fundamental human right, and an encroachment of such a right, entitles its owner, natural or juristic person to indemnification. International and regional human rights law were considered. Because the African Court on Human and Peoples’ Rights has not yet decided any case concerning property, the jurisprudence of the European Court of Human Rights was useful. Based on
the principle of proportionality, there must be a correlation between the means employed (expropriation) and the aim sought to be achieved (economic reform and/or greater social justice). We have established in this article that a fair balance will only be achieved with the payment of an amount reasonably related to its value (not necessarily full market value). Also, that a total lack of compensation will only be justifiable in exceptional circumstances.

This leads to the conclusion: nil compensation offers the best compromise: in other words, an understanding that the calculation of compensation requires a weighing up of interests, by taking into account the open list of factors listed in section 25(3). In certain instances, this balance might land on nil rand compensation. This position is in line with international and foreign law. When decision-makers and, ultimately, the courts have to decide on ‘just and equitable’ compensation, the following will be positioned to converge in order to reach our constitutional goals: and the protection of property from arbitrary state interference, the state’s duty to effect land reform and the adherence to international law. This will ensure that South Africa indeed belongs to all who live in it.
The Constitutionality of Estoppel in the Context of Vindication

CLIREESH TERRY JOSHUA

ABSTRACT: When the defence of estoppel succeeds against the rei vindicatio it results in the suspension of the owner’s rei vindicatio for an indefinite period. This result is generally in line with the limited evidentiary and defence function of estoppel, which underscores that estoppel cannot change the legal position of the parties. Yet, in 2011, the Supreme Court of Appeal in Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others 2011 (2) SA 508 (SCA) made controversial remarks that suggest that estoppel can have ownership acquisition consequences. This interpretation significantly increases the impact of estoppel on ownership by suggesting that estoppel does not merely suspend the owner’s right to recover its property but instead terminates it altogether. Although the argument that estoppel should have ownership acquisition consequences has been considered by scholars based on doctrinal, comparative and policy reasons, neither the traditional position nor the Oriental Products interpretation has been subjected to detailed constitutional scrutiny. Such scrutiny is imperative as it will establish whether these interpretations are valid interpretations. Therefore, this contribution aims to determine whether the traditional position and the Oriental Products interpretation, respectively, would survive constitutional muster if tested against section 25 of the Constitution of the Republic of South Africa, 1996. The conclusion is that the traditional position constitutes a severe deprivation, but not an arbitrary deprivation of property. It also does not constitute an expropriation of property, since expropriations cannot take place in terms of the common law. Essentially the contribution shows that the traditional position regarding the consequences of estoppel is valid in view of section 25 of the Constitution, the property clause, and can therefore be upheld. Notably, the Oriental Products interpretation, does not survive constitutional scrutiny. It does not meet the law of general application requirement of section 25 and cannot be saved by the limitation clause, viz, section 36 of the Constitution. This is because estoppel, in principle, cannot authorise transfer or compulsory loss and acquisition of ownership since it cannot change the legal position of the parties. What this finding essentially reveals is that the interpretation that estoppel can result in ownership acquisition should be avoided as it is doctrinally flawed and constitutionally invalid.

KEYWORDS: Estoppel and the rei vindicatio, consequences of estoppel, single system of law, section-25 analysis, the property clause, law of general application, non-arbitrary deprivation of property, expropriation, limitation analysis

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I INTRODUCTION

The consequences of a successful estoppel defence ordinarily entail the suspension of the owner’s *rei vindicatio* and hedged possession in favour of the successful estoppel raiser. At the very least, this consequence of estoppel limits ownership by preventing the owner from recovering the property and from being in possession of the property. In recent times, however, the Supreme Court of Appeal in the *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* case has remarked that the result of estoppel succeeding in vindicatory proceedings is termination of ownership. The *Oriental Products* interpretation has significantly increased the impact of estoppel on ownership from constituting a mere limitation to termination thereof. Although the traditional interpretation of estoppel has been questioned on doctrinal, policy and comparative grounds, and the *Oriental Products* interpretation has been flagged as possibly not being constitutionally compliant, the impact that these respective interpretations have on ownership has not been tested against the Constitution in detail.

In *Ex parte President of the Republic of South Africa: In Re Pharmaceutical Manufacturers Association of South Africa* the Constitutional Court held that:

There is only one system of law. It is shaped by the Constitution, which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

Accordingly, rules and principles that comprise the common law (which includes the defence of estoppel and its consequences) must be subjected to constitutional control, especially where potential constitutional issues have already been flagged. It is against this backdrop that this

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5. [2000] ZACC 1, 2000 (2) SA 674 (CC) (‘*Pharmaceutical Manufacturers’*)

6. Ibid at para 44.

7. Section 1(c) of the Constitution of the Republic of South Africa, 1996 read together with s 39(2) of the Constitution. See also *Pharmaceutical Manufacturers* (note 5 above) at para 44; *Carmichele v Minister of Safety and Security* [2001] ZACC 22, 2001 (4) SA 938 (CC) at paras 54–55.
contribution aims to test the constitutional validity of the traditional interpretation of the consequences of estoppel and the *Oriental Products* interpretation of the consequences of estoppel. Since both these interpretations involve interferences with property through the limitation and compulsory termination of ownership, respectively, the interferences will be tested against section 25 of the Constitution, the property clause.

To this end, the first part of the article contextualises the constitutional issue by describing the traditional interpretation of the consequences of estoppel; identifying the extent of the limitation caused by the traditional interpretation on ownership entitlements; and exploring some of the pertinent justifications for the limitation on ownership by estoppel. The second part of the article then discusses the *Oriental Products* case and analyses the remarks the court made in the case regarding the consequences of estoppel. Finally, the third part considers the traditional interpretation and the *Oriental Products* interpretation of estoppel in the terms of the provisions of the property clause. It considers whether the consequences of estoppel under these respective interpretations result in arbitrary deprivations of property in terms of section 25(1); if so, whether the limitations on section 25 can be remedied by section 36 (the limitation clause), and if so, whether the deprivations also amount to expropriations in terms of section 25(2)–(3) of the Constitution. The final part contains the conclusion.

II THE TRADITIONAL CONSEQUENCES OF ESTOPPEL

A The common law

A property owner can vindicate her movable or immovable property from an unlawful *bona fide* or *mala fide* possessor with the property law remedy the *rei vindicatio*.\(^8\) However, a possessor will be able to refute the owner’s *rei vindicatio* with the defence of estoppel if she can show that the elements of estoppel are present, namely misrepresentation, negligence, prejudice, causation and maintainability.\(^9\) In the context of vindication these elements require the possessor to prove that the owner of the property created a negligent representation (that the seller was the owner or at the least had the authority to transfer ownership to the possessor) on which the possessor reasonably relied to her detriment.\(^10\) If the possessor succeeds in proving these requirements, the owner’s *rei vindicatio* will fail.

Estoppel is traditionally understood to be a rule of evidence that estops (prevents) the representor from denying the truth of the representation that she previously made to the representee, where the latter relied on the representation to her detriment. This rule precludes the representor from going back on her representation.\(^11\) In the context of vindication, this ordinarily means that the owner who institutes the *rei vindicatio*, to recover her property, may

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\(^8\) Carey Miller (note 1 above) at 255; Van der Merwe (note 1 above) at 347. See also G Muller et al (note 1 above) at 269.


\(^10\) Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd 1976 (1) SA 441 (A) 452; Absa Bank Ltd v Knysna Auto Services CC [2016] ZASCA 93, 2016 JOL 36038 (SCA) at para 16. See further Van der Merwe (note 1 above) at 368; Boggenpoel (note 4 above) at 77–78; Muller et al (note 1 above) at 274.

not deny that the person who sold property had the authority to dispose of the property (\textit{ius dispondendi}) or that the seller had the right of ownership (\textit{dominium}).\textsuperscript{12} The legal ramification of this so-called evidentiary block or bar on the denial of the representation through vindication involves the suspension of the \textit{rei vindicatio} for an indefinite period.\textsuperscript{13} In other words, the owner as the plaintiff is prohibited from recovering the property from the estoppel raiser. The implication of the suspended vindicatory claim is that the successful estoppel raiser, arguably by default, remains in control of the property also for an indefinite period.

B The limitation caused by the traditional position

1 The extent of the limitation on ownership

The \textit{Apostoliese Geloofsending van Suid-Afrika (Maitland Gemeente) v Capes} case confirms the traditional position regarding the consequences of estoppel, but also indicates that more than the entitlement to recover/vindicate the property is suspended by estoppel.\textsuperscript{14} The Apostoliese Geloofsending (AG) had built a wall to separate two plots that it owned. The wall was not on the boundary between the two plots. AG sold the one plot, which was subsequently transferred to Capes, the defendant. Both the first purchaser and Capes were under the impression that the land on which the wall was situated formed part of the transferred plot. When AG informed Capes that it wants to demolish the wall, Capes protested. Capes argued that the wall forms part of its property as indicated in the written deed of sale that accompanied the transfer of the plot from AG to the first purchaser and then to Capes. AG then asked the court to declare that it is the owner of the land on which the wall is situated and that it can therefore demolish the wall. Capes raised estoppel against AG’s claim. When Capes succeeded with estoppel, AG asked the court to pronounce on whether an owner can, subsequent to estoppel succeeding, still do with the property whatever the owner deems fit.\textsuperscript{15} In the first place, the court held that the defendant, Capes, was not entitled to transfer of the property.\textsuperscript{16} The court then held that the plaintiff (AG, the owner of the disputed piece of the plot) was precluded from exercising its normal ownership entitlements over the property.\textsuperscript{17} This dictum has served as authority for the traditional view that the consequences of estoppel are restricted to merely limiting ownership and do not result in transfer or acquisition of ownership.\textsuperscript{18}

Regarding what this means for the parties’ legal position, Sonnekus and Neels opine that estoppel has no substantive effect.\textsuperscript{19} They argue that estoppel operates to prevent the owner from relying on her ownership in contradiction of her previous representation. Therefore, no

\begin{footnotesize}
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\item \textsuperscript{12} Louw (note 3 above) at 218–219; Van der Merwe (note 1 above) at 373. See also Van der Merwe (note 11 above) at para 257.
\item \textsuperscript{13} Van der Merwe (note 1 above) at 374; Carey Miller (note 1 above) at 308; Sonnekus and Neels (note 1 above) at 473. See also \textit{Apostoliese Geloofsending} (note 1 above) at 58. The suspension of the right to recover for an indefinite period is a consequence of estoppel’s success against the \textit{rei vindactio} combined with the \textit{ne bis in idem} rule, which holds that no action can be instituted twice on the same facts. See Van der Merwe (note 1 above) at 373.
\item \textsuperscript{14} \textit{Apostoliese Geloofsending} (note 1 above) at 59–60.
\item \textsuperscript{15} Ibid at 59.
\item \textsuperscript{16} Ibid at 60.
\item \textsuperscript{17} \textit{Apostoliese Geloofsending} (note 1 above) at 60.
\item \textsuperscript{18} Van der Merwe (note 1 above) at 373; Boggenpoel (note 4 above) at 79; Muller et al (note 1 above) at 278; Sonnekus (note 1 above) at 348.
\item \textsuperscript{19} Sonnekus & Neels (note 1 above) at 473. See also Sonnekus (note 4 above) at 330. Whether this stance is still the position subsequent to the \textit{Oriental Products} case is debatable. In this regard, see \textit{Oriental Products} (note 2
\end{enumerate}
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direct or real legal consequences can be ascribed to a successful estoppel defence against an owner’s *rei vindicatio*. This means that the legal position of both the owner and the *bona fide* purchaser remains unaffected by a successful estoppel defence. However, since the court’s dicta in *Apostoliese Geloofsending* was about the owner’s ability to do what it deemed fit with the property, I submit that the reference here to normal ownership entitlements being impacted purportedly refer to entitlements such as the *ius possidendi* (right to possess), *ius utendi* (the right to use and enjoy), *ius dispondendi* (the right to dispose) and perhaps even the *ius fruendi* (the right to fruits). 20 The finding of the court therefore serves as authority that more than the owner’s entitlement to vindicate the property will ordinarily be limited by the traditional consequences of estoppel. Moreover, the finding indicates that Sonnekus and Neels’ submission about estoppel not having substantive effect merely holds true for termination and acquisition of rights but not for limitations on rights. Other than these remarks made in the *Apostoliese Geloofsending* case, which implies that ownership entitlements are limited by estoppel, case law has not dealt adequately with exactly which entitlements are suspended alongside the entitlement to vindicate the property. Since this article sets out to determine the constitutional validity of the consequences of estoppel, establishing the extent of the impact that estoppel has on ownership entitlements is necessary for an accurate section-25 analysis.

Scholars have outlined anomalies that result from the traditional position regarding the consequences of estoppel. 21 They have pointed out that when assessing the owner’s legal position subsequent to a successful estoppel defence it is possible that the owner would remain liable in instances relating to the property, despite the owner not being in control of the property. 22 For instance, the owner presumably stands to be held liable for (i) any prescribed taxes payable in respect of the property in certain circumstances and (ii) any damage caused by the property where the property is, for instance, an animal. 23 What makes the owner’s position even more precarious is that her ownership can potentially be lost if the successful estoppel raiser is sequestrated ordefaults in paying rent to such an extent that the lessor’s tacit hypothec is triggered and her property is attached and sold in execution. 24 In my opinion, these anomalies result from the owner being precluded from exercising several of its entitlements.

The remarks made in the *Apostoliese Geloofsending* case together with the anomalies that have been identified by scholars, show that estoppel potentially has a severe impact on ownership. However, the precise extent of the impact depends on the number of entitlements that are

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20 A closed list of ownership entitlements does not exist. For a description of some entitlements see Van der Merwe (note 1 above) at 173–176; Muller et al (note 1 above) at 105; Sonnekus & Neels (note 1 above) at 249.

21 In this regard, see the arguments made by Visser (note 3 above) at 635; Pelser (note 3 above) at 154; Van der Merwe (note 11 above) at para 259.

22 Visser (note 3 above) at 635; Pelser (note 3 above) at 154; Van der Merwe (note 11 above) para 259.


24 Pelser (note 3 above) at 154. The landlord’s tacit hypothec is a tacit real security right that allows the lessor to attach and sell property owned by a third party where the lessor defaults with rental payments. For a discussion of the landlord’s tacit hypothec over a third party’s property, see NS Siphuma *The Lessor’s Tacit Hypothec: A Constitutional Analysis* (unpublished LLM thesis Stellenbosch University 2013) at 44–78; AJ van der Walt & NS Siphuma ‘Extending the Lessor’s Hypothec to Third Parties’ Property’ (2015) 132 *South African Law Journal* 518, 523–533; S Viljoen *The Law of Landlord and Tenant* (2016) at 335–339.
limited by estoppel. When assessing which entitlements are limited by estoppel, a distinction should be drawn between movables (goods) and immovables (land). In the context of movable property, the absence of physical control over the movable property after a successful estoppel purportedly results in the owner not being in a position to use and enjoy the movable property. In addition, she will be unable to deliver such property to a subsequent purchaser, lessee or pledgee, or, at the very least, provide effective control in terms of any of the constructive modes of delivery that ordinarily would allow her to burden the movable property. Therefore, the owner would likely not be able to sell, lease or pledge the movable property that she failed to claim back due to estoppel.

Similarly, the owner of immovable property cannot exercise the normal entitlements of ownership in respect of her property. Because the facts that could give rise to a successful estoppel defence in the context of immovable property will always be unique, a distinction will have to be drawn between cases that are similar to Oriental Products, in the sense that successive sales took place where the owner was deregistered, on the one hand, and cases in which the sale took place but the registration into the name of the purchaser had not been concluded, on the other hand. In other words, the distinction arises when the owner is still registered as owner of the property. In cases with similar facts to Oriental Products, where the plaintiff owner’s rei vindicatio failed due to estoppel succeeding, the owner will be denied the rectification of the deeds register and denied control of the immovable property. The result is that the owner’s entitlements over the immovable property are severely limited for an indeterminate time. For instance, the owner cannot occupy the property, and since she is not in occupation of the property, she cannot use and enjoy the immovable property. It also seems like the owner would not be able to exercise her entitlement to dispose of the property, since she would purportedly be unable to provide registration as well as vacant possession of the immovable property to a potential buyer. Furthermore, her entitlement to encumber or burden the property will in all likelihood also be of no real value. The encumbering of immovable property with real rights requires that the particulars of the owner who wishes to burden the immovable property must be reflected in the deeds register. However, since the owner’s particulars are not reflected on the deed, and no endorsement to explain the estoppel situation is made in the Deeds Office, it is implausible that the Registrar would allow registration of a real security right or servitude against the property where the unregistered owner requests such registration.

25 Muller et al (note 1 above) at 181 provides an overview of the methods of constructive delivery that exist in South African law.

26 Oriental Products (note 2 above) at paras 23–24. It is acknowledged that the facts of Oriental Products case are quite peculiar, since it concerns successive sales before estoppel was raised because the registration of the name of the purchaser took place in the deeds register and since the representation was specifically about the failure to rectify the deed. It is also trite that the circumstances in which estoppel could be raised successfully will always be unique. Consequently, it is very difficult to envisage a standard estoppel scenario.

27 Oriental Products (note 2 above) at paras 23–24.

28 In this regard, see the discussion of Apostoliese Geloofsending (note 1 above) at 60 in part IIB above.

29 For valid transfer of immovable property, registration of immovable property in the name of the purchaser is essential. Furthermore, an owner wanting to transfer ownership over her immovable property to a purchaser has a common law obligation to give the purchaser vacant possession at transfer. Carey Miller (note 1 above) at 164; Muller et al (note 1 above) at 244–250; s 16 of the Deeds Registries Act 47 of 1937.

30 For the creation of limited real rights such as real security rights or servitudes over immovable property, registration of the limited real rights in the deeds registry must take place. Muller et al (note 1 above) at 85; s 16 of the Deeds Registries Act 47 of 1937.
Consequently, it would be fitting to describe the owner as a \textit{bare owner}, in the sense that she retains the status of owner, albeit without the usual publicity, but has virtually none of the ordinary ownership entitlements at her disposal for an indefinite time.

In the scenario where the owner who made the misrepresentation is \textit{still registered as owner} in the deeds registry, the owner would effectively also be a \textit{bare owner} once her vindication claim is defeated by estoppel. The owner would be denied control over the immovable property and would not be allowed to occupy or to use and enjoy the property. In practice, the owner’s right of disposal of the property would presumably also be severely restricted, mainly because she would be unable to provide vacant possession of the property to a third party because of the indefinite hedged possession of the successful estoppel raiser even though the property is still registered in her name. Furthermore, her entitlement to either lease, encumber or burden the property will in all likelihood also be of little practical value. She cannot lease the property to a third party because she is incapable of transferring physical control to the third party. Since she is still reflected as the registered owner of the property in the deeds registry, she may in principle still be capable of burdening the property with a mortgage or servitude, but it is uncertain how the relevant registrar of deeds will handle the situation.\footnote{Ibid.}

In this context, the owner could also be described as a \textit{bare owner}, in the sense that she retains the status of owner but has virtually none of the ordinary ownership entitlements at her disposal. This bare ownership status continues for an indefinite period and can be argued to place the owner in a powerless position in relation to her property. Except for her ownership status that essentially remains intact, she is practically in the position of someone with little or no rights over the property, while at the same time she must endure the risk of liability in certain circumstances that she typically would not be able to avoid.

\textbf{2 \textit{Justification for the limitation caused by estoppel}}

One could argue that the unsatisfactory legal position of the owner is simply required for the successful estoppel raiser to receive adequate protection under the law. In the South African common law, the strength of the owner’s right to recover physical control of her property is determined by the \textit{ubi rem meam invenio ibi vindico} principle, which allows the owner to recover her property from any unlawful possessor.\footnote{\textit{Chetty v Naidoo} 1974 (3) SA 13 (A) 20. For a discussion of the Roman maxim \textit{ubi rem meam invenio ibi eam vindico}, see Van der Merwe (note 1 above) at 347; JRL Milton ‘Ownership’ in R Zimmermann & D Visser (eds) \textit{Southern Cross: Civil Law and Common Law in South Africa} (1996) 657, 686. For a discussion of this maxim in the context of estoppel see Pelser (note 3 above) at 153.} This principle ordinarily extends to the circumstances where such possessor was a \textit{bona fide} purchaser.\footnote{Van der Merwe (note 1 above) at 347; Muller et al (note 1 above) at 347.} However, in early South African law, the need to protect innocent purchasers arose in situations where the \textit{bona fide} purchaser would suffer prejudice because of the owner’s careless actions, words or omissions.\footnote{Milton (note 32 above) at 688.}

In these circumstances, fairness required that the innocent purchaser who had been misled by the owner should be protected rather than the careless owner.\footnote{Ibid.} Such protection was achieved by introducing the English doctrine of estoppel by representation as a defence against the
careless owner’s recovery claim. Essentially, estoppel was imported into the South African legal system to counter the harsh consequences of the *ubi rem meam invenio ibi vindico* principle from which the owner’s right to vindicate flows.

In view of the above, considerations of fairness and equity necessitate the purchaser’s protection, since it is regarded as unfair to provide the owner with exclusive protection in these circumstances. As a result, fairness and equity form the basis for the protection afforded to the purchaser in the context of estoppel, especially because there is no other defence or direct remedy afforded to the *bona fide* purchaser against the owner in South African law, contrary to what is available in other jurisdictions.

That fairness requires the protection of the innocent purchaser rather than the careless owner is further underscored by the risk principle and the negligence requirement. The risk principle indicates that since the owner created the risk of misleading the purchaser to her detriment, the owner must carry the loss instead of the purchaser. In other words, the risk principle justifies the protection of the purchaser as opposed to the protection of the owner on the grounds of risk setting. Moreover, the fact that the owner must have been negligent, thus culpable, in making the representation, shows blameworthiness, and further strengthens the justification for the purchaser’s protection against that of the owner.

The analysis above shows that the impact of the traditional position on the owner is not confined to the right to vindicate (*ius vindicandi*). Other ownership entitlements such as the *ius possidendi*, *ius utendi*, *ius fruendi*, *ius abutendi* and the *ius dispondendi* will ordinarily also be limited indefinitely. This preliminary observation about the extent of the impact that the traditional interpretation of the consequences of estoppel has on ownership will have a significant bearing on the outcome of the section-25 analysis in part IV below. The

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36 De Wet (note 1 above) at 10–11; Sonnekus (note 1 above) at 52. These authors discuss how estoppel established itself in legal proceedings in the late nineteenth and early twentieth centuries in South Africa. See also *Merriman v William* 1880 Foord 135 172–176. (This case is one of the earliest cases dealing with estoppel. Although the court decided the case on another basis, it considered whether the party that made the representation could be said to be estopped from denying the representation. It provides evidence of the use of the term and the doctrine in South Africa at the end of the nineteenth century.) See also *Beckett & Co v Gundelfinger* (1897) 4 Off Rep 77 78; *In Re The Contributories of the Rosemount Gold Mining Syndicate in Liquidation* 1905 TH 169 171.

37 Louw (note 3 above) at 220; Pelser (note 3 above) at 154; Harms (note 9 above) at para 79. For a general discussion of equity in South African law see DH van Zyl ‘Aspekte van Billikheid in die Reg en Regspleging’ (1986) 19 *De Jure* 110, 114–124; TW Benet ‘Ubuntu: An African Equity’ in F Diedrich (ed) *Ubuntu, Good Faith and Equity* (2011) 3, 3. It should be noted that South African law has no separate or parallel law of equity as is the case in English law. Yet, it has been reiterated that the South African common law (which predominantly reflects the civilian legal tradition) has equity built into its rules and principles. See HR Hahlo & E Khan *The South African legal System and its Background* (1968) 178; R Zimmermann ‘Good faith and equity’ in R Zimmermann & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 217, 217.


39 JC van der Walt submits that the risk is found in the representation and not in whether the owner should have foreseen the risk. This latter element, which encapsulates negligence in Van der Walt’s opinion, only increases the already existing risk. Van der Walt (note 3 above) at 92. For a contradictory view, see De Wet (note 1 above) at 96.

40 For a discussion of the effect of the addition of negligence to the requirements of estoppel see De Wet (note 1 above) at 99 and Van der Walt (note 3 above) at 92–93.
above analysis also shows that the limitation caused by the traditional position regarding the consequences of estoppel is justified by considerations of fairness and equity, risk setting and fault through negligence. These justifications will also play a pertinent role when I turn to testing the limitation in accordance with the provisions of section 25.

Interestingly, the most recent case that has remarked on the consequences of estoppel seems to suggest that estoppel does not merely result in a limitation of ownership entitlements, it results in compulsory loss and acquisition of ownership by the successful estoppel raiser. This judgment and the remarks made therein, seem to offer an alternate interpretation of the consequences of estoppel. However, due to the severity of compulsory loss and acquisition of ownership this interpretation should not be accepted without proper scrutiny. In this regard, the part below provides an overview of the case and an analysis of the court’s remarks relating to the consequences of estoppel to set the scene for a section-25 analysis of this interpretation in part IV below.

III THE ORIENTAL PRODUCTS CASE

A An overview of the case

In Oriental Products, the third respondent (a former agent of the appellant) fraudulently transferred immovable property, owned by the appellant, to the second respondent, a bona fide purchaser.41 This transfer took place without the appellant’s permission. After this unauthorised transfer, the second respondent transferred the property to the first respondent, also a bona fide purchaser, and the property was registered in the first respondent’s name. This second transfer occurred two months after the appellant discovered that the property was no longer registered in its name. The appellant only instituted proceedings to vindicate after the second sale and transfer took place.42 In this regard, the appellant as owner instituted the rei vindicatio to recover the immovable property and sought rectification of the deeds registry.

To defeat the appellant’s recovery claim, the first respondent raised the defence of estoppel by representation.43 The argument was that the appellant had made a negligent representation that the second respondent had the right to dispose of the property as the registered owner when the appellant failed to rectify the deeds registry immediately after becoming aware of the deregistration. Based on the evidence, the court agreed that the owner’s failure to act timeously created the required negligent representation under estoppel and that all the other requirements of estoppel were also met.44 Thus, the court was satisfied that estoppel should succeed.

In an attempt to refute the first respondent’s estoppel defence, the appellant argued that estoppel is a defence and not a weapon to claim that transfer of ownership had occurred.45 In this regard, Shongwe JA, who wrote the main judgment, remarked:

In the context of this case, the appellant is entitled to retransfer of the property, but for the fact that it cannot assert its right of ownership because of estoppel. Hence the applicant loses its ownership of the property.46 (Own emphasis added)

Harms DP, who wrote the concurring judgment, held:

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41 Oriental Products (note 2 above) at paras 3–10.
42 Ibid at para 2.
43 Ibid at para 15.
44 Ibid at para 22.
46 Ibid at para 23.
That estoppel may only be used as a defence is part of English law, and since the Roman-Dutch roots of the doctrine are said to be found in the exceptio doli, a legal defence rather than an action, the same may be said to apply in our law. Whether this formalistic approach can still be justified need not be considered in this case, even though the effect of the successful reliance on estoppel is that the appellant may not deny that the first respondent holds the unassailable title in the property, or that the deeds registry entry is correct. This means that should the latter wish to dispose of the property, the appellant would not be able to interfere. If this means that ownership passed by virtue of estoppel, so be it. The better view would be that the underlying act of transfer is deemed to have been validly executed.\(^{47}\) (Own emphasis added)

These remarks seem to suggest that a successful estoppel defence could potentially result in the owner’s loss of ownership and the purchaser’s acquisition of that ownership. Both the main and concurring judgments therefore made some interesting and controversial remarks regarding the consequences of estoppel in vindication proceedings.

B Implications of the court’s remarks

Scholars are not in agreement regarding the legal ramifications of these remarks. In particular, there seems to be uncertainty about whether the case means estoppel now results in ownership acquisition or whether the remarks were merely an obiter dictum.\(^{48}\) Van der Merwe is of the opinion that the remarks made by the court in Oriental Products were made obiter.\(^{49}\) Specifically, the remarks pertaining to whether the traditional formalist view that estoppel is merely a cause of action still has a place in our law and therefore whether ownership is now acquired in these circumstances remains obiter. He takes this stance since the first respondent did not expressly argue that ownership had been transferred by way of estoppel. However, he pointed out that the court’s dicta indicate that the court may be open to accepting that acquisition of ownership can take place by way of estoppel.\(^{50}\)

Conversely, Sonnekus concedes that the court in the Oriental Products case held that estoppel creates ownership.\(^{51}\) However, he opines that Harms DP failed to reflect properly on the consequences of his remarks in this regard.\(^{52}\) He relies on Knox NO v Mofokeng to argue that the court’s statements regarding estoppel having the potential to create rights has not been confirmed in case law.\(^{53}\) It should, however, be noted that estoppel was not pleaded in the Knox case, and that the court did not pronounce on the consequences of estoppel.\(^{54}\) Consequently, the Knox case cannot be relied on to argue that the court has revoked its statements concerning the proprietary consequences of estoppel.

In my view, what should also be considered here is the fact that the court’s statements in Oriental Products were made in direct response to the applicant’s attempt to counter the estoppel defence when the applicant argued that ownership could not be acquired through estoppel. Nonetheless, both views regarding the implications of the judgment warrant testing

\(^{47}\) Ibid at para 31.
\(^{48}\) For diverging views regarding the impact of Oriental Products on the consequences of estoppel see Van der Merwe (note 11 above) at para 259; Sonnekus (note 4 above) at 331; Sonnekus (note 1 above) at 349.
\(^{49}\) Van der Merwe (note 11 above) at para 259.
\(^{50}\) Ibid.
\(^{51}\) Sonnekus (note 1 above) at 349.
\(^{52}\) Ibid at 355; Sonnekus (note 4 above) at 331.
\(^{54}\) Ibid at para 30.
of the purported *Oriental Products* interpretation of the consequences of estoppel against
section 25 of the Constitution. If Van der Merwe’s view is correct a section-25 analysis of the
interpretation will function as an *ex ante* checks and balances analysis since it will allow for
observations to be made regarding the constitutional validity of such interpretation. However, if
Sonnekus’s view is the better view of the implication of the *Oriental Products* case, a section-25
analysis of the interpretation will still be valuable as an *ex post* assessment of the validity of the
new interpretation of the consequences of estoppel.

What is also evident from the judgment is that the court is not in unison concerning
the mode of acquisition of ownership through which ownership is purportedly acquired by
way of estoppel. Harms DP’s remark of ownership passing as a result of estoppel\(^5\) ostensibly
points to the recognition that estoppel results in ownership being transferred to the successful
estoppel raiser through derivative means. The statement by Shongwe JA, in turn, hints that the
‘applicant *loses* its ownership of the property’ when the defendant is successful with a claim
based on estoppel and creates the impression that, at least theoretically, estoppel may result
in the successful estoppel raiser acquiring ownership, albeit by way of an original mode of
acquisition.\(^6\) Consequently, this inconsistent use of acquisition terminology creates uncertainty
concerning the correct means of acquisition that would apply when estoppel is successfully
raised in vindication proceedings.

Establishing the mode of acquisition that estoppel with its purported ownership acquisition
consequences is likely to operate under is necessary for determining the extent of the impact
that such consequences may have on existing rights, such as limited real rights. It is generally
accepted that if ownership is acquired through derivative means, the transferee would be
acquiring burdened property and the property would be transferred with the cooperation of
the predecessor in title.\(^7\) Conversely, where the property is acquired by way of original means,
it is generally understood that property is acquired without any burdens and without the
cooperation of the predecessor in title, since the acquisition instead takes place by operation of
law.\(^8\) In other words, if the exact means of acquisition is a derivative acquisition, in the context
of estoppel, the impact of a successful estoppel defence that purportedly results in ownership
acquisition in favour of a successful estoppel raiser would be limited to the termination of
ownership. However, if acquisition takes place through the original mode of acquisition then
the impact of the purported acquisition by way of estoppel would not only be limited to the
termination of ownership but would rather extend to the termination of existing limited real
rights, which includes servitudes and real security rights.\(^9\) The expansive impact that original
acquisition will have on existing rights as opposed to that of derivative acquisition has led
several scholars to submit that if acquisition through estoppel becomes an original mode, it
will likely not survive constitutional muster.\(^10\) More specifically, it has been flagged that the
termination of ownership and limited real rights that would result from a successful estoppel
defence would possibly be interpreted as an arbitrary deprivation of property in terms of

\(^5\) *Oriental Products* (note 2 above) at para 31.

\(^6\) Ibid at 23. For an overview of the different modes of original acquisition of ownership, see Muller et al (note 1
above) at 155–194.

\(^7\) Carey Miller (note 1 above) at 130; Muller et al (note 1 above) at 83.

\(^8\) Carey Miller (note 1 above) at 115; Muller et al (note 1 above) at 83.

\(^9\) Ibid.

\(^10\) Sonnekus (note 4 above) at 339; Boggenpoel (note 4 above) at 81–85; Boggenpoel & Cloete (note 4 above) at
166–171.
section 25(1) of the Constitution. For this reason, scholars have raised the question whether
derivative acquisition of ownership might be more fitting in this context.

The above submission would be plausible if the premise on which it is based is correct (namely that original acquisition always results in the termination of existing limited real rights). However, the submission that derivate acquisition is more suitable in the context of the purported acquisition of ownership through estoppel must fail. Derivate acquisition of ownership requires the cooperation of the predecessor in title, in the sense that the predecessor wills the transfer of ownership. This intention to transfer ownership forms part of the real agreement that is central to the abstract system of transfer that South African law follows. A cursory look at the circumstances that would ordinarily result in a successful estoppel defence shows that the owner, or even the *mala fide* seller (if an exception to the *nemo plus iuris* principle can be argued for), does not have the necessary intention to establish a real agreement to transfer ownership. Consequently, it is perhaps prudent to submit from a doctrinal point of view that although original acquisition might have a more significant impact on existing rights, it arguably is the most appropriate mode of acquisition in the context of estoppel. Besides, Pienaar puts into dispute whether original acquisition indeed has the consequence of terminating limited real rights. His contribution to the distinction between original and derivative means of acquisition (specifically that it is not an automatic consequence of original modes that existing burdens such as limited real rights terminate at original acquisition of ownership) further casts doubt on whether estoppel as an original mode would indeed result in other rights terminating with ownership.

The above outlined uncertainties regarding whether the case is *obiter* or binding, and whether the new interpretation of estoppel means that estoppel results in ownership acquisition as a derivative or original mode of acquisition, and the possible constitutional implications of the respective modes, underscores the vital role that a detailed section-25 analysis would play in providing clarity around the consequences of estoppel. The part below will therefore turn to the section-25 analysis of both the *Oriental Products* interpretation of the consequences of estoppel (termination of ownership), and the traditional interpretation of the consequences of estoppel (mere limitation on ownership).

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61 Ibid.
62 Sonnekus, Boggenpoel and Cloete have raised this question but found that there are also challenges with arguing that estoppel should be a mode of derivate acquisition of ownership. See Sonnekus (note 4 above) at 334; Boggenpoel (note 4 above) at 81–85; Boggenpoel & Cloete (note 4 above) at 166–171. Van der Merwe submits that a new mode of derivative acquisition should be developed in the context of estoppel. See Van der Merwe (note 1 above) at 373.
63 Carey Miller (note 1 above) at 124–125; Muller et al (note 1 above) at 195.
64 Van der Merwe argues for such an exception to be recognised. Van der Merwe (note 1 above) at 373.
65 Carey Miller (note 1 above) at 308–309; Sonnekus (note 4 above) at 351; Boggenpoel (note 4 above) at 80–81; Boggenpoel & Cloete (note 4 above) at 155.
66 GJ Pienaar ‘The Effect of the Original Acquisition of Ownership of Immovable Property’ (2015) 18 Potchefstroom Electronic Law Journal 1480, 1480. See also Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd 1999 (2) SA 986 (T) 1000 in which the court questioned the distinction that is made by scholars between the original and derivative modes of acquisition.
67 Pienaar (note 66 above) at 1480–1505. See also Muller et al (note 1 above) at 83–84.
A General approach to the property clause

Section 25(1) of the Constitution prohibits arbitrary deprivation in that it stipulates that:

No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.\(^{68}\)

Although the section does not positively entrench property rights, its negative expression implies that property rights will enjoy constitutional protection unless these rights are limited in accordance with the requirements expressly set out in the section.\(^{69}\) Van der Walt explains that the function of section 25 of the Constitution is not only to guarantee the protection of property rights, but rather to establish and maintain an appropriate balance between the rights of individuals and the interest of the public realised by way of valid regulatory deprivations.\(^{70}\)

To this end, the property clause indicates that if the two diverging interpretations regarding estoppel are found to be deprivations of property but are brought about by non-arbitrary laws of general application, these interpretations will be constitutionally compliant.

After the Constitution came into operation in 1996, the constitutional text of section 25 required further interpretation to establish its meaning, content and scope with greater certainty. In *First National Bank v Commissioner, South African Revenue Services* (*FNB*) the Constitutional Court provided much needed clarity in this regard when it developed the following set of questions:

- (a) Does that which is taken away … amount to ‘property’ for purposes of s 25?
- (b) Has there been a deprivation of such property … ?
- (c) If there has, is such deprivation consistent with the provisions of s 25(1)?
- (d) If not, is such deprivation justified under s 36 of the Constitution?
- (e) If it is, does it amount to expropriation for purposes of s 25(2)?
- (f) If so, does the deprivation (sic) comply with the requirements of s 25(2)(a) and
- (g) If not, is the expropriation justified under s 36?\(^{71}\)

These questions are prescriptive in section 25 disputes. They should therefore guide the constitutional analysis focussing on the pre- *Oriental Products* interpretation of the common law position (the traditional position) and what could be argued to be the common law position in terms of the *Oriental Products* case (the *Oriental Products* position). To this end, the flagship case of *FNB* will be instructive as a starting point together with more recent

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\(^{70}\) Van der Walt (note 68 above) at 91.

\(^{71}\) *FNB* (note 69 above) para 46. See also Van der Walt (note 68 above) at 75–78; Roux (note 68 above) at 46-2. It should also be noted that subsequent to the *FNB* case, the courts have changed these questions. In this regard, see AJ van der Walt ‘Property Vortices (Part 1)’ 2016 Tydskrif vir die Suid-Afrikaanse Reg 412, 412–427; AJ van der Walt ‘Property Vortices (Part 2)’ 2016 Tydskrif vir die Suid-Afrikaanse Reg 597, 597–621 where Van der Walt outlines how the *FNB* questions have been modified by subsequent cases.
developments on each of the questions to ascertain whether the opposing interpretations of estoppel’s consequences are in line with section 25, respectively.\textsuperscript{72}

\textbf{B Property}

The first question for determination is whether the interest allegedly infringed constitutes ‘property’ for purposes of section 25.\textsuperscript{73} If the interest qualifies as property, such an interest deserves constitutional protection under the section. In this way, the property inquiry as prescribed by \textit{FNB} established a threshold requirement for the application of section 25 of the Constitution.\textsuperscript{74} The Constitution itself does not provide guidance as to what interest or right would qualify for constitutional protection under section 25, apart from indicating in section 25(4)(b) that property is not limited to land.\textsuperscript{75} In \textit{FNB} it was decided that the property concept has to be interpreted generously, because it would be both impossible and unwise to ascribe a fixed meaning to what constitutes property for purposes of section 25, especially so early on in a constitutional democracy.\textsuperscript{76} As a result, the South African approach to the constitutional property concept is described as a wide approach that allows new interests and rights to qualify as property subject to scrutiny on a case-by-case basis.\textsuperscript{77} Furthermore, the Court prescribed a normative approach to the interpretation of section 25 as a whole, and therefore to the question

\textsuperscript{72} Since \textit{FNB} has been criticised (sometimes quite vehemently) by scholars and subsequently developed by some cases, the directive for the application of s 25 as provided for in \textit{FNB} will be used in conjunction with the more recent developments. For criticism of the \textit{FNB} methodology, see Roux (note 68 above) at 46–22; BV Slade ‘The Effect of Avoiding the \textit{FNB} Methodology in Section 25 Disputes’ (2019) 40 \textit{Obiter} 36, 44–46.

\textsuperscript{73} \textit{FNB} (note 69 above) at para 46.

\textsuperscript{74} Van der Walt (note 68 above) at 85; Roux (note 68 above) at 46-10.

\textsuperscript{75} Section 25(4)(b) of the Constitution. See also \textit{FNB} (note 69 above) at para 48.

\textsuperscript{76} \textit{FNB} (note 69 above) at para 51. This dictum is in line with the same court’s observation concerning the property concept in the earlier case of \textit{Certification of the Constitution} (note 69 above) at para 72 where the Court identified that most foreign jurisdictions follow a wide approach to the interpretation of the property concept for constitutional purposes because no standard international guideline exists to this end. For a discussion of the Court’s generous approach to the property concept, see Van der Walt (note 68 above) at 84; Roux (note 68 above) at 46–9–11.

of whether any given interest qualifies as constitutional property. This approach requires that section 25 be construed with all its subsections, historical context and other provisions of the Constitution in mind.\footnote{FNB (note 69 above) at para 51; Van der Walt (note 68 above) at 49. FNB’s normative approach, particularly in the context of the property question, was further developed in Shoprite (note 77 above) at para 50. In Shoprite, the Court, in essence, required that for an interest to qualify as constitutional property, such interest should promote the fundamental rights underpinning the Constitution, namely human dignity, freedom and equality. Yet, the Shoprite approach remains questionable. See Rautenbach (note 77 above) at 826–827; Van der Walt (note 71 above) at 416–419, 599–605; Marais (note 77 above) at 583; Swanepoel (note 77 above) at 213–215; S Swemmer ‘Muddying the Waters – The Lack of Clarity Around the Use of S 25(1) of the Constitution: Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism: Eastern Cape’ (2017) 33 South African Journal on Human Rights 286, 287–293.}

When the consequences of estoppel are considered for purposes of establishing if the interest at stake amounts to property for constitutional purposes, the following becomes evident. The position before Oriental Products, which is referred to as the traditional position, entails the indefinite suspension of the owner’s *rei vindicatio* (the right to vindicate the property), which essentially entails the indefinite suspension of ownership. In addition, the suspension of the right to vindicate results in the indefinite suspension of other ownership entitlements, including the right to use and enjoy, encumber and dispose of the property, which points to further limitations on ownership.\footnote{FNB (note 69 above) at para 51; Van der Walt (note 68 above) at 93.} On the other hand, the Oriental Products position regarding estoppel’s consequences suggest that the suspension of the owner’s *rei vindicatio* at the instance of a successful estoppel defence in effect leads to the owner losing ownership over the concerned property. Considering this interpretation, the property interest at stake is also ownership. Therefore, the question here is whether ownership is deserving of constitutional protection. Since FNB held that ownership of land is central to the constitutional concept of property,\footnote{FNB (note 69 above) at para 51; Van der Walt (note 68 above) at 112. See also Ex parte Optimal Property Solutions CC [2001] JOL 9112 (C), 2003 (2) SA 136 (C) at paras 4–6, 19 (‘Optimal Property Solutions’) where it was decided that the property concept ‘should be read to include any right to, or in property’.} the threshold requirement for the application of section 25 would seemingly be met in this instance because precedent indicates that the affected interest at stake, namely ownership, clearly constitutes property. In addition, the Court in FNB also held that both the objects of rights and rights themselves qualify as property for purposes of section 25, which confirms that ownership as a right constitutes property for purposes of the section 25.\footnote{Part IIB above.} Therefore, ownership, as the interest affected in both interpretations, clearly constitutes constitutional property.

As regards the Oriental Products position, the property inquiry arguably does not end with ownership. Since the Oriental Products position concerns the loss of ownership in terms of an indeterminate mode of acquisition, it needs to be established whether the category of ownership acquisition has a bearing on the property interests that would be affected by estoppel as a mode of acquisition. It appears that if the most appropriate mode of acquisition by way of estoppel is found to be derivative acquisition, the interest that would be affected would likely be limited to ownership. This is because in terms of derivative acquisition, ownership of the transferor passes to the transferee with all infirmities intact, meaning with all rights that existed

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80 FNB (note 69 above) at para 51; Van der Walt (note 68 above) at 49. FNB’s normative approach, particularly in the context of the property question, was further developed in Shoprite (note 77 above) at para 50. In Shoprite, the Court, in essence, required that for an interest to qualify as constitutional property, such interest should promote the fundamental rights underpinning the Constitution, namely human dignity, freedom and equality. Yet, the Shoprite approach remains questionable. See Rautenbach (note 77 above) at 826–827; Van der Walt (note 71 above) at 416–419, 599–605; Marais (note 77 above) at 583; Swanepoel (note 77 above) at 213–215; S Swemmer ‘Muddying the Waters – The Lack of Clarity Around the Use of S 25(1) of the Constitution: Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism: Eastern Cape’ (2017) 33 South African Journal on Human Rights 286, 287–293.

81 Part IIB above.
over the property before transfer. Consequently, no other rights, except for ownership, would be terminated in the estoppel context. However, if the most appropriate category of acquisition is found to be the original mode of acquisition, scholars have pointed out that the affected interest would not be limited to ownership. This submission is grounded in the proposition that unlike derivative acquisition, which passes ownership with existing burdens to the new owner, the modes of original acquisition terminate all burdens and benefits that existed over the property the moment ownership is extinguished. In the estoppel context, this means that holders of limited real rights over the property would purportedly lose these rights if estoppel is seen as a mode of original acquisition. Yet, as explained in part III, whether the termination of burdens and benefits over property acquired by way of original means is a true characteristic of original modes of ownership acquisition is disputed and can therefore not be accepted as an absolute rule. However, it might still be useful to consider whether limited real rights would qualify as property for purposes of section 25 precisely because of the uncertainty in this regard. Since limited real rights are rights over property, the argument can be made that if estoppel is deemed to result in ownership acquisition by way of original means, and if existing limited real rights would be affected by the acquisition that terminated the ownership, the affected limited real rights would also qualify as constitutional property.

C Deprivation

Once it is established that the interests at stake are constitutional property, the second question listed by FNB for consideration arises, namely whether a deprivation of the identified property interest has taken place. Since it is clear that both the traditional and Oriental Products position respectively involve interests that qualify as property for purposes of section 25 protection, the inquiry may proceed to the deprivation question. Only if deprivation of property can be identified, can the section 25 inquiry proceed to determine whether such deprivation complies with the requirements for a valid deprivation set out in section 25(1). Van der Walt points out that the term deprivation may be confusing because it ordinarily refers to the taking away of something, which gives the impression that it is akin to an expropriation. However, he explains that deprivations and expropriations under section 25 of the Constitution are textually and conceptually distinguishable from each other. The most

82 Part III above.
83 Ibid.
84 Ibid.
85 FNB (note 69 above) at para 51; Optimal Property Solutions (note 82 above) at paras 4–6, 19.
86 FNB (note 69 above) at para 46.
87 Van der Walt (note 68 above) at 190.
Authoritative approach to the conceptual distinction between deprivations and expropriations was laid down in \textit{FNB}. In \textit{FNB}, the Court held that:

\begin{quote}
Any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned. If s 25 is applied to this wide \textit{genus} of interference, ‘deprivation’ would encompass all species thereof and ‘expropriation’ would apply only to a narrower species of interference.\textsuperscript{89}
\end{quote}

Accordingly, \textit{FNB} distinguished between deprivations and expropriations by attaching a broad meaning to the concept of deprivation in terms of which a specific category of deprivations would qualify as expropriations to the extent that ‘all expropriations are deprivations, but just some deprivations are expropriations’.\textsuperscript{90}

Notably, the definition of deprivation is also set out in the abovementioned extract from \textit{FNB}. In this regard, a deprivation is any interference with the use, enjoyment or exploitation of private property belonging to a right or titleholder of the concerned property.\textsuperscript{91} Yet, the same Court in a subsequent case ascribed a much narrower meaning to the deprivation concept.\textsuperscript{92}

In \textit{Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing and Others (Mkontwana)} the Court held that:

\begin{quote}
At the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation.\textsuperscript{93}
\end{quote}

(Own emphasis added)

Furthermore, the Court in \textit{Mkontwana} identified that the time and duration of the interference would indicate whether an interference goes beyond normal restrictions to constitute a deprivation for purposes of section 25.\textsuperscript{94} The definition of deprivation in \textit{Mkontwana} was later confirmed in \textit{Offit Enterprises (Pty) Ltd v Coega Development Corporation Ltd} where the Constitutional Court added ‘the impact [of the interference] must be of sufficient magnitude to warrant constitutional engagement’.\textsuperscript{95} The deprivation concept was further elaborated on in \textit{National Credit Regulator v Opperman and Others} and this definition was subsequently confirmed in \textit{City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd and Others}.\textsuperscript{96} These cases endorsed the idea that where the interference goes beyond normal regulation in that the interference has a ‘legally relevant impact on the rights of the affected party’ such interference would amount to deprivation under section 25(1) of the Constitution.\textsuperscript{97}

\textsuperscript{89} \textit{FNB} (note 69 above) at para 57.

\textsuperscript{90} See also \textit{Van der Walt} (note 68 above) at 205; \textit{Roux} (note 68 above) at 46-18.

\textsuperscript{91} \textit{FNB} (note 69 above) at para 57; \textit{Reflect-All} (note 77 above) at para 35; \textit{Shoprite} (note 77 above) at para 73. See also \textit{Van der Walt} (note 71 above) at 420.

\textsuperscript{92} For academic commentary on the narrow approach, see \textit{Van der Walt} (note 71 above) at 605–609; K Bezuidenhout \textit{Compensation for Excessive but Otherwise Lawful Regulatory State Action} (unpublished LLD dissertation Stellenbosch University 2014) 16–17. For arguments in favour of the narrower approach to the concept of deprivation, see Swemmer (note 78 above) at 287–293.

\textsuperscript{93} [2004] ZACC 9, 2005 (1) SA 530 (CC) (‘\textit{Mkontwana}’) at para 32.

\textsuperscript{94} Ibid at para 41. Interestingly, O’Regan J in her concurring judgment warned against a too-narrow approach to the deprivation question. \textit{Mkontwana} at para 90.

\textsuperscript{95} [2010] ZACC 20, 2011 (1) SA 293 (CC) (‘\textit{Offit}’) at para 41.

\textsuperscript{96} [2012] ZACC 29, 2013 (2) SA 1 (CC) (‘\textit{Opperman}’); (CCT184/14) [2015] ZACC 29, 2015 (6) SA 440 (CC) (‘\textit{Link Africa}’).

\textsuperscript{97} See \textit{Opperman} (note 96 above) at para 66; \textit{Link Africa} (note 96 above) at para 167.
narrow approach was subsequently applied in recent cases such as *Shoprite* and *South African Diamond Producers Organisation v Minister of Minerals and Energy NO* (Diamond Producers).

Accordingly, when regard is had to whether the traditional position and the purported position in terms of the *Oriental Products* case amount to deprivations, respectively, the answers would depend on whether the interferences or limitations are so substantial that they have a legally relevant impact on the rights of the affected party.

The first issue to be addressed is whether the limitation of ownership that results from the traditional position qualifies as a deprivation under section 25. The traditional position limits ownership by essentially limiting the owner’s entitlement to recover the property and other entitlements. Since the broad benchmark of *FNB* defines all interferences with ownership entitlements as deprivations, the interference or limitation on ownership through the limitation of the entitlement to vindicate the property amounts to a deprivation. Therefore, if the *FNB* definition of deprivation is followed, the limitation on ownership will easily amount to a deprivation of property. However, it is perhaps prudent to also include an analysis of the narrow definition as set out in the most recent case on this point, namely *Diamond Producers*.

As indicated above, the narrow definition of deprivation that was resorted to in this case is that a limitation will only qualify as a deprivation if the limitation has a legally relevant impact on the identified property. In the *Diamond Producers* case the Court found that s 20A of the Diamonds Act 56 of 1986 affected constitutional property, namely ownership of diamonds. Yet, when the Court had to decide whether s 20A resulted in a deprivation of the identified property (in terms of the narrow meaning of deprivation it construed) it found that there was no deprivation. Although the Court tendered several reasons for this finding, one of these reasons could be of significance for the consideration of the limitation caused by the traditional position of estoppel. The Court reasoned that since s 20A of the Act merely limits the manner in which owners can do business, it does not limit the *ius dispondendi* in its entirety and therefore does not amount to a legally relevant impact on the identified property. Marais points out that the implication of this reasoning in the *Diamond Producers* case is that limitations that merely restrict how property entitlement can be exercised and limitations that affect ownership entitlements partially will not amount to deprivations. He also explains that this line of reasoning should be avoided in future cases for several reasons which I agree with. However, if the *Diamond Producers* reasoning is indeed endorsed in future cases, it...

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98 *Shoprite* (note 77 above) at para 73.


100 Part II A above.

101 *FNB* (note 69 above) at para 57.

102 *Diamond Producers* (note 99 above) para 41.

103 Paras 54–55.

104 Paras 49–53. See further Marais (note 99 above) at 176–186 for an analysis of these reasons.

105 Para 52. See further Marais (note 99 above) at 182–183.

106 Marais (note 99 above) at 182.

107 Marais explains that the reasoning of the court is not appealing because it, firstly, entails conceptual severance type reasoning as it severs the manner in which a right can be exercised from the right to alienate or dispose of the property and ownership in an artificially and problematically way; secondly it contradicts the court’s
would be possible to argue that the limitation on ownership caused by the traditional position of estoppel is distinguishable from the limitation identified in the Diamond Producers case. The limitation on ownership caused by estoppel results from the complete suspension of the right to recover the property for an indefinite period that could include the possibility that the owner would never be able to recover her property.\footnote{Part IIA above.} Additionally, many other entitlements are also suspended indefinitely because of the suspension of the right to vindicate the property.\footnote{Part IIB above.} Consequently, the limitation caused by estoppel does not affect only one ownership entitlement partially, but in fact limits several entitlements completely and possibly in perpetuity. This means that the limitation caused by the traditional position of estoppel is a limitation that has a legally relevant impact on ownership, since it limits several entitlements completely for an indefinite period. Therefore, the interference with the entitlement of an owner in this context can be argued to also comply with Diamond Producers’ narrower conceptual understanding of deprivation. This suggests that since the traditional consequences of estoppel can be argued to comply with both the generous and narrow definitions of deprivation, it will amount to a deprivation of property as envisaged by section 25 of the Constitution.

The next consideration is whether the limitation caused by the Oriental Products position of estoppel qualifies as a deprivation. In this regard, it is essential to ascertain whether the extinction of ownership, and possibly limited real rights as well, complies with both the wide and the narrow deprivation concepts.\footnote{Part III above.} Interference with these rights or entitlements under the wide definition of deprivation constitutes the interference with real rights by way of the extinction thereof. The extinction of ownership constitutes the loss of the most complete real right a person can have over a thing in its entirety and permanently and can therefore be characterised without hesitation as making a substantial impact on the owner’s rights in a legally relevant manner.\footnote{See also FNB (note 69 above) at para 111.} For some of the same reasons, the permanent loss of limited real rights that estoppel may bring about as a mode of original acquisition would likely also result in a substantial and legally relevant interference with the rights of limited real right holders. Therefore, the termination of these real rights would purportedly also constitute deprivations for purposes of section 25 of the Constitution.

Given the above, it is evident that the impact of the competing interpretations of the consequences of estoppel on the identified property interests qualifies as deprivations. The third question raised in FNB that now becomes relevant is whether the identified deprivations comply with the requirements for a valid deprivation as set out in section 25(1).

D Law of general application

Deprivations are part of the normal regulation of property interests and will only be unconstitutional if the deprivation is inconsistent with the requirements in section 25(1).\footnote{FNB (note 69 above) at para 46. See also Van der Walt (note 68 above) at 218–225; Roux (note 68 above) at 46-20; Bezuidenhout (note 92 above) at 14, 20–21.} The first leg of section 25(1) requires that a deprivation should be authorised by a law of general reasoning for finding that s 20A affects a property interest worthy of constitutional property; thirdly it is at odds with the unitary concept of ownership; and finally the reasoning is inconsistent with preceding jurisprudence on deprivations. See Marais (note 99 above) at 182–183 and the sources he refers to there.
application and the second leg requires that the deprivation should not be arbitrary.\footnote{Section 25(1) of the Constitution.} The law of general application referred to in section 25(1) is a law or rule that is authorised by valid and properly promulgated legislation, regulation, subordinate legislation, municipal by-laws, rules and principles of common law and customary law, rules of court and international conventions that apply to the citizenry.\footnote{Van der Walt (note 68 above) at 232–237; Roux (note 68 above) at 46-21 provides an explanation of the requirements any law or rule must comply with in order to constitute law of general application.} The rule or law should be valid and should not apply selectively to only specific individuals or members of groups.\footnote{Roux (note 68 above) at 46-21; Bezuidenhout (note 92 above) at 21–22.} In addition, the identified law of general application is required to authorise the deprivation.\footnote{Van der Walt (note 68 above) at 236–237. See also ZT Boggenpoel ‘Compulsory transfer of encroached-upon land: A constitutional analysis’ (2013) 76 Tydskrif vir Hedendaagse Romeins-Hollandse Reg 313, 320.} If no authority existed for the deprivation, the deprivation would be unconstitutional in terms of section 25(1).\footnote{In Z Temmers Building Encroachments and Compulsory Transfer of Ownership (unpublished LLD dissertation Stellenbosch University 2010) at 154–155 the author argued that a deprivation that is not actually authorised by the law will be procedurally unfair and for this reason inconsistent with s 25. However, in a subsequent publication the author submitted that where the relevant source of law does not authorise the deprivation complained of the deprivation would be unconstitutional for not complying with the law of general application prerequisite of s 25. In this regard, see Boggenpoel (note 116 above) at 320–321. The latter approach has found favour with scholars. See for instance, R Brits Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act (unpublished LLD dissertation Stellenbosch University 2012) at 297; Siphuma (note 24 above) at 83 where these scholars employed the same reasoning in their analysis of the law of general application requirement.} The section–25 inquiry will accordingly come to an end. However, if valid authority for the deprivation can be established, the Court must determine whether there is compliance with the non-arbitrariness requirement in section 25(1).\footnote{FNB (note 69 above) at para 46.}

Both deprivations considered above occur due to interpretations of the common law of estoppel. Consequently, it is clear that the common law of estoppel is the source of law that must be scrutinised. In this regard, it should be noted that the Court has held on numerous occasions that the common law constitutes law of general application.\footnote{The Constitutional Court, in non-constitutional property cases, recognised that law of general application includes the common law. In this regard, see Du Plessis & Others v De Klerk & Another [1996] ZACC 10, 1996 (3) SA 850 (CC) at para 44; S v Thebus & Another [2003] ZACC 12, 2003 (6) SA 505 (CC) at paras 64–65. Moreover, Van der Walt supports recognising the common law as law of general application, see Van der Walt (note 68 above) at 33.} Yet, the authorisation inquiry does not merely concern determining the source of law that provides for the rule, instead, it sets out to determine whether the identified source of law, which in this case is the common law of estoppel, is indeed authorised to result in the identified deprivation of property.\footnote{Boggenpoel (note 116 above) at 320–321.} The focus then turns to whether the common law of estoppel actually authorises the identified deprivations of the property interests brought about by the traditional and the Oriental Products positions of estoppel, respectively.

In terms of the traditional common law position regarding estoppel, as a defence against the \textit{rei vindicatio}, once all the requirements of estoppel are complied with, the estoppel prohibits the owner who instituted the \textit{rei vindicatio} from asserting ownership rights against
the successful estoppel raiser. As a result, the traditional consequence ascribed to estoppel is that the owner’s entitlements including the right to vindicate are said to be suspended against the estoppel raiser. Accordingly, a successful estoppel defence directly authorises the deprivation of property. Therefore, an argument can be made that the said deprivation is authorised by a law of general application, which is the common law of estoppel in this case, and that the first validity requirement of section 25(1) is complied with by the deprivation caused by the traditional interpretation of the consequences of estoppel.

Notably, in a previous publication, Boggenpoel and I raised doubt about whether the authorisation requirement would be met under the Oriental Products interpretation of the consequences of estoppel. A tentative look at the consequences of estoppel indicated that the function and scope of estoppel as a defence is limited to preventing an inequity from ensuing by precluding the owner from recovering her property. In this regard, the defence of estoppel is not meant to change the legal position of the parties. Consequently, it was submitted that estoppel is arguably not authorised to terminate rights that parties held over property before estoppel succeeded as this would change the position of the relevant parties. The question therefore remained whether this tentative observation would be confirmed by further research.

Further research showed that the general view is that estoppel cannot have direct substantive effect. In other words, as a defence, estoppel lacks substantive operational effect to result in compulsory loss of ownership. If it was within the ambit and scope of estoppel to result in acquisition and loss of ownership, the estoppel doctrine should have been flexible enough to not only function as a defence but also as a cause of action. However, as case law has consistently held over the years, estoppel is a shield and not a sword, meaning it is a defence to shield against an otherwise inequitable or unfair outcome as appose to constituting a cause of action that enables one to claim and enforce rights. Therefore, the interpretation that was ascribed to estoppel in Oriental Products exceeded the parameters of what the doctrine can have as a consequence and can thus be said to be unauthorised. Since no authority for the deprivation in the form of loss of ownership arguably exists under the Oriental Products interpretation of the consequences of estoppel, the deprivation that would be caused by such interpretation will be unconstitutional due to potential non-compliance with the law of general application requirement, regardless of the specific mode of ownership acquisition. Consequently, this analysis confirms the initial suspicion that the common law construct of estoppel does not authorise extinction of ownership or limited real rights, for that matter, and that the law of general application requirement in section 25(1) would therefore not be met.

This finding is further supported by another issue that crops up when scrutinising whether estoppel as a derivative mode of acquisition of ownership would be authorised by the common law. Implicit in the law of general application requirement is the principle that before a deprivation of property can take place in terms of law, the requirements that must be complied with for the law to authorise the relevant deprivation must be satisfied. If the

121 Part IIA above.
122 Ibid.
123 Boggenpoel & Cloete (note 4 above) at 166–167.
124 Ibid.
125 Oriental Products (note 2 above) para 31. See also earlier cases in which this phrase was used: Pandora’s Trustee v Beatley & Co. 1935 TPD 358 363; Union Government v National Bank of South Africa Ltd 1921 (AD) 121 128; Barclays Western Bank Ltd v Fourie 1979 (4) SA 157 (C) at 160.
requirements that the law sets out are not complied with, it means that there is no authorisation for the relevant deprivation. Now, since the law of general application would be estoppel as a mode of derivative acquisition, the rules of transfer of ownership would need to be complied with for valid transfer to occur. Yet, as showed in part III, the essential requirement that a real agreement must be concluded for transfer to occur cannot be satisfied in the context of estoppel, since there is no intention or will to transfer ownership. Consequently, derivative acquisition of ownership through estoppel is not authorised. For the above reasons, it would be very difficult to argue that estoppel, either by way of original or by way of derivative means, sanctions ownership acquisition.

It appears that the traditional view of estoppel merely suspending ownership entitlements is authorised by the common law, but that ascribing acquisition of ownership consequences to estoppel is not within the scope of what estoppel can do as a defence, irrespective of the mode of acquisition argued for. Consequently, the Oriental Products position will arguably not survive scrutiny under section 25, since the requirement that the law must authorise the deprivation cannot be satisfied. Only the traditional interpretation of the consequences of estoppel arguably survives the authorisation requirement and can therefore be tested further against the remaining requirements of section 25. The value in testing the traditional consequences of estoppel against the Constitution is that the analysis will give significant insight into whether the courts or the legislator might have to start thinking about crafting a constitutionally compliant legal construct with which to replace estoppel if the traditional consequences are found to be unconstitutional.

E Arbitrariness

1 Procedural non-arbitrariness

Once the authority of the deprivation has been confirmed the next step according to FNB’s questions, is to assess whether the deprivation is arbitrary. FNB confirmed that a deprivation would constitute an arbitrary deprivation if the procedures connected to the deprivation do not constitute fair procedures or if insufficient reason(s) exists for the deprivation on a continuum ranging from rationality to proportionality.127 Accordingly, the arbitrariness test consists of both a procedural and a substantive leg. Importantly, procedural arbitrariness was not defined in FNB, but the subsequent case of Mkowntwana expanded on the concept to some degree.128 In Mkowntwana, the Court decided that procedural arbitrariness is a flexible notion that must be determined on the facts of each case, much like the concept of procedural fairness in other contexts.129 Based on the Court’s finding in Mkowntwana, Van der Walt suggests that procedural arbitrariness under section 25(1) is similar to the procedural fairness inquiry in just administrative actions under administrative law.130

127 FNB (note 69 above) at paras 100. See Van der Walt (note 68 above) at 220–223, 237–241; Roux (note 68 above) at 46-22.
128 Mkowntwana (note 93 above) at para 65.
129 Ibid. See also Reflect-All (note 77 above) at para 40 in which the Mkowntwana ratio pertaining to the procedural arbitrariness test was confirmed.
130 Van der Walt (note 68 above) at 265. However, subsequent to Mkowntwana it was suggested that the procedural arbitrariness test under s 25(1) is a separate and independent test. See Opperman (note 96 above) at para 69. See also AJ van der Walt ’Procedurally Arbitrary Deprivation of Property’ (2012) 23 Stellenbosch Law Review
When determining if the possible deprivation caused by a successful estoppel defence amounts to a procedurally arbitrary deprivation, it will have to be established whether the legal process that causes the identified deprivation furnishes the original owner with sufficient legal recourse to protect her rights. The factors that point to a fair legal process include the fact that before the deprivation the owner had at her disposal the most powerful remedy available to owners to recover lost possession of the property, namely the *rei vindicatio*; that an independent judge presides over the substantive and procedural aspects of the proceedings; and that the owner can apply for review or appeal the decision in terms of the rules of civil procedure. As a result, it would seem unlikely that the deprivation caused by a successful estoppel defence would amount to a procedurally arbitrary deprivation. Instead, the deprivation of property would purportedly comply with the procedural leg of the non-arbitrariness test.

2 **Substantive non-arbitrariness**

The substantive leg of the non-arbitrariness requirement involves determining whether sufficient reason exists for the deprivation of property that is authorised by the law under scrutiny. *FNB* indicated that the question of whether there is sufficient reason for a deprivation depends on the facts of each case and that the issue would have to be decided by way of a strict proportionality test or a less strict rationality review. Where the rationality review or test is applied, the aim is to determine whether the deprivation of the identified property interest is rationally connected to some government purpose. The proportionality test is about determining if the deprivation is proportionate to the purpose it serves, especially in terms of the overall impact that the deprivation has on a particular individual. The substantive arbitrariness test is contextual, and the level of scrutiny (‘the thickness of the test’) varies depending on the facts of each case. In this regard, the Court in *FNB* held that sufficient reason must be established as follows:

(a) It is to be determined by evaluating the relationship between [the] means employed, namely the deprivation in question and [the] ends sought to be achieved, namely the purpose of the law in question.

(b) A complexity of relationships has to be considered.

(c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.

(d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.

(e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving

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131 In most instances where the common law authorises deprivation of property, it is not likely that the deprivation would be arbitrary due to procedure. Instead, procedural arbitrariness is more likely to arise in the context of legislation. For instance, Boggenpoel argues in the context of encroachments that where a court order brings about the deprivation in terms of the common law, which presumably authorised the deprivation as opposed to a deprivation caused by legislation, procedural fairness should not be in issue. Boggenpoel (note 116 above) at 324. Raphulu makes a similar argument in the context of the right of way of necessity. TN Raphulu *The Right of Way of Necessity: A Constitutional Analysis* (unpublished LLM thesis Stellenbosch University 2013) at 121.

132 *FNB* (note 69 above) at para 100.

133 Van der Walt (note 68 above) at 246. See also Van der Walt (note 71 above) at 423, 425; Swanepoel (note 77 above) at 252–264.
law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive. This judgment is not concerned at all with incorporeal property.

(f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.

(g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by s 36(1) of the Constitution.

(h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with ‘arbitrary’ in relation to the deprivation of property under s 25. ‘Arbitrary’ deprivation as applied to s 114 of the Act. 134

Although the FNB decision provided much-needed guidance on how section 25(1) should be approached, the case was silent on how the listed factors should be approached. It can, however, be deduced from subsequent case law that not all the factors will necessarily apply in all instances and that courts are likely to apply only those factors that seem relevant to the specific deprivation in question. 135 This is the approach to arbitrariness factors that will be applied to the traditional position regarding the consequences of estoppel in an attempt to provide a tentative proposal as to how a substantive arbitrariness inquiry of the consequences of estoppel might look. Consequently, anticipated relevant factors will be applied to the deprivation caused by the traditional consequences of estoppel. These consist of the relationship between the means employed and the ends sought; the purpose of the deprivation and the person affected; and the relationship between the purpose and extent of the deprivation and the nature of the property.

aa The means employed and the ends sought

The ends sought to be achieved by the identified deprivation, namely the suspension of some of the owner’s entitlements, especially the right to recover the property, is to protect bona fide purchasers of property in certain circumstances. These circumstances entail situations where such purchasers reasonably relied on negligent representations made by the owners of the property that the seller was the owner or had the authority to dispose of the property to the purchaser’s detriment. 136 As illustrated in part II, this purpose is based on public policy of fairness which is encapsulated in the English law notion of equity, the risk principle and negligence. In this regard, equity requires that the owner’s right should not be enforced against the bona fide purchaser because such enforcement will be unfair. 137 Equity, therefore, requires that the owner’s rights, at the very least, should be limited so that the bona fide purchaser’s interest can be protected. It is accepted that allowing the owner to recover the property in

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134 FNB (note 69 above) at para 100.
135 See for instance Mkontwana (note 93 above) at paras 92–112; Reflect-All (note 77 above) at para 49; Opperman (note 96 above) at paras 68–77. See also Slade (note 72 above) at 40–41.
136 Part IIA above.
137 Harms (note 9 above) at para 79. See also Boggenpoel & Cloete (note 4 above) at 47.
these circumstances will be unfair.\textsuperscript{138} In addition, risk liability by way of the risk principle supports the purpose of the deprivation, namely the protection of the \textit{bona fide} purchaser rather than the protection of the owner, in that risk liability requires that the owner who created the risk of misleading should carry the risk of loss instead of the innocent purchaser.\textsuperscript{139} The means by which the defence of estoppel achieves the protection of the \textit{bona fide} purchaser is through due legal process that suspends the owner’s entitlements when estoppel succeeds. In this regard, a court is only permitted to limit ownership if the court is persuaded that the onerous requirements of estoppel are met.\textsuperscript{140} Therefore, the deprivation occurs in very specific and limited circumstances. Moreover, South African law provides no other remedy or protection to \textit{bona fide} purchasers against the owner seeking recovery from the purchaser in these circumstances, unlike some foreign jurisdictions which offer a third party or \textit{bona fide} purchaser protection measures.\textsuperscript{141} In other words, estoppel is the only mechanism with which a \textit{bona fide} purchaser for value can be protected against the property owner. It is also rather difficult to think of achieving the aim of protecting the purchaser without at the very least placing limitations on the owner’s entitlement to recover the property. Without estoppel operating as a defence that can be raised against an owner’s \textit{rei vindicatio} and by so doing limit the owner’s ownership, the owner could easily recover possession of the property and the law would condone an arguably unfair outcome by allowing such recovery. By suspending the owner’s ability to recover the property, it appears that estoppel prevents the owner from recovering the property in service of the aims of the deprivation, as set out above. A close relationship (or nexus) can therefore be said to exist between the ends sought to be achieved by the deprivation in question and the means employed by estoppel, namely the protection of the purchaser and the suspension of the right to recover the property. As a starting point this analysis indicates that sufficient reasons arguably exist for the deprivation caused by estoppel.

\textbf{bb \hspace{1em} The purpose of the deprivation and the person affected}

Regarding the relationship between the person affected and the aim of the deprivation caused by the traditional position, it is apparent that the person affected by the deprivation is the owner of the property. Arguably, a clear nexus is present between the owner who created the risk of misleading by way of the representation, which ultimately led to the purchaser reasonably relying on the representation to her detriment, and the aim of (or reason for) the deprivation.\textsuperscript{142} In other words, the owner who fails to recover her property with the \textit{rei vindicatio} caused the inequitable and unfair situation that estoppel aims to remedy. The policy reason

\begin{enumerate}
  \item \textsuperscript{138} Ibid.
  \item \textsuperscript{139} Van der Walt (note 3 above) at 92.
  \item \textsuperscript{140} Part IIA above.
  \item \textsuperscript{141} Part IIB above.
  \item \textsuperscript{142} This finding is different from what was found in the \textit{FNB} case regarding the relationship between the aim of the deprivation and the person affected. In \textit{FNB}, the Court found that a close enough link between the person affected and the aim of the deprivation did not exist. This was because s 114 of the Customs and Excise Act 91 of 1964 that caused the deprivation allowed the South African Revenue Services to detain and sell the appellant’s vehicles situated on the tax debtor’s premises to satisfy the debt of the tax debtor. This means that the deprivation, which aimed to secure payment of the debtor’s tax debt, affected the appellant as the owner of the vehicle and not the tax debtor. Consequently, a nexus could not be established between the aim of the deprivation (to recover tax debt) and the person affected (the owner of the vehicles who was \textit{not} also the tax debtor). See \textit{FNB} (note 69 above) at para 108.
\end{enumerate}
of equity indicates that it would be unfair to allow the owner who made the representation to recover the property, thereby specifically linking the owner’s conduct with the unfairness that would ensue if the owner was allowed to recover the property. Moreover, the link between the owner’s representation and the purpose of the deprivation is also supported by the risk principle as an indicator of fairness. Because of the owner’s risk creation and facilitation, the *bona fide* purchaser is ultimately in need of protection against detriment. Therefore, it can be concluded that a close link exists between the person affected by the deprivation (being the owner who created the representation) and the aim of the deprivation (the limitation of several of the owner’s entitlements).

cc The purpose and extent of the deprivation and the nature of the property

The nature of the property concerned is the right of ownership, which is limited by the suspension of the right to recover the property through estoppel, and by implication other entitlements. The extent of the limitation of the right of ownership (meaning, the deprivation) is not limited to the right or entitlement to recover property. As shown in paragraph IIB above, the mere fact that the owner cannot recover her property deprives her of numerous other entitlements that she would have been able to exercise and enjoy, but for the deprivation. These entitlements include the *ius possidendi* (right to possess), *ius utendi* (the right to use and enjoy), *ius dispondendi* (the right to dispose) and perhaps even the *ius fruendi* (the right to fruits). The extent of the limitation is impacted by the duration of the limitation. In this regard, the duration of the suspension of the owner’s right to vindicate is uncertain, although it is generally accepted that these entitlements are suspended indefinitely, which may include a period equivalent to the lifetime of the owner. Furthermore, since the affected property interest is ownership, the link between the nature of the property and the purpose of the deprivation (protection of the *bona fide* purchaser) is clear. Limiting ownership, through the denial of the right to recover, is required to satisfy the deprivation’s aim. The fact that several other ownership entitlements are suspended alongside the right to recover the property for an indefinite period further support the purpose for the deprivation. If the suspension was limited to a short period or if it was practically and legally possible for the owner to still use and enjoy, sell, lease or offer the property as security, irrespective of the suspension of the right to recover, the *bona fide* purchaser’s protection would not be achieved. These considerations point to the existence of a strong connection between the aim of the deprivation, the nature of the property and the extent of the deprivation.

dd The level of scrutiny

As explained earlier, *FNB* held that the nature and extent of the deprivation shows whether a mere rationality or a strict proportionality test should be applied to determine substantive arbitrariness in terms of the property clause. Therefore, when deciding between a rationality or a strict proportionality test, the courts are required to exercise a discretion based on the nature of

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143 Part IIB. See also Harms (note 9 above) at para 79. See also Boggenpoel & Cloete (note 4 above) at 47.
144 Ibid.
145 Ibid.
146 Ibid.
the property and the extent of the deprivation, as illustrated by the Court in *FNB*.\(^{147}\) The reason advanced for the deprivation is required to be more compelling when the deprivation affects all the incidents of ownership completely. The above analysis of these factors confirmed that the deprivation caused by the traditional interpretation of the consequences of estoppel places a limitation on ownership, that the extent of the deprivation is severe since the deprivation is for an indefinite period and does not only involve the suspension of the right to recover but also numerous other ownership entitlements by implication. Considering the identified severity of the deprivation, the arbitrariness inquiry would have to look at proportionality, rather than rationality. Therefore, the proportionality test is the appropriate arbitrariness inquiry for establishing if the traditional view of the consequences of estoppel complies with the non-arbitrariness requirement. On this level of analysis, it may be reasonable to submit that sufficient justification for the deprivation does arguably exist in terms of the proportionality test. This is so since a close relationship was identified between the complexities of relations, the ends sought to be achieved and the means employed, the purpose of the deprivation and the person affected, and the nature and extent of the deprivation in the context of estoppel.

Considering all the close links identified above, it seems probable that a court would likely find that the traditional interpretation of the consequences of estoppel does not result in arbitrary deprivation of property. On the other hand, since no authority could be found for estoppel to have compulsory loss and acquisition of ownership as a consequence, the *Oriental Products* position regarding the consequences of estoppel does not meet the authorisation requirement of section 25 and is therefore invalid and unconstitutional. This means that only the deprivation caused by the traditional interpretation is likely to survive scrutiny under section 25(1) of the Constitution. Because the deprivation caused by the traditional position would likely comply with section 25, as illustrated above, the need to apply section 36 of the Constitution – as indicated in the *FNB* questions – should not arise. However, the analysis above regarding the constitutionality of the *Oriental Products* interpretation of the consequences of estoppel showed that such interpretation would probably not survive constitutional muster, since no authority for compulsory loss of ownership can be found in the common law of estoppel. The question that therefore arises is whether the breach of section-25 can be justified by section 36 of the Constitution. If this breach can be justified, the interpretation can be regarded as constitutionally compliant. Another issue that arises from the section-25 analysis is whether the constitutionally compliant deprivation (the traditional interpretation that was shown to comply with the property clause) and the *Oriental Products* interpretation (if it can be saved by section 36) amount to expropriations. This is a question not yet considered and should arguably be addressed, since litigants may deem their bare owner status, if estoppel defeats their vindicatory actions, as an expropriation brought about by the law.

**F Estoppel, the limitation clause and expropriations**

According to *FNB*, if a deprivation is arbitrary, a court must consider whether the arbitrary deprivation is nonetheless justified in terms of section 36(1) of the Constitution, the limitation clause.\(^{148}\) In this regard, the dominant view is that where a deprivation is found to be arbitrary under section 25(1), the deprivation will generally not survive justification under section 36(1).

\(^{147}\) *FNB* (note 69 above) at para 100.

\(^{148}\) *FNB* (note 69 above) at para 46. See also Van der Walt (note 68 above) at 77–78; Roux (note 68 above) at 46-26.
The reason being that the arbitrariness inquiry, specifically the proportionality test, is very similar to the justification inquiry under section 36 and would, therefore, possibly have the same results. Since the deprivation caused by the traditional position would likely constitute a non-arbitrary deprivation of property in terms of the proportionality test and, hence, comply with section 25 as illustrated above, the need to apply section 36 of the Constitution to the traditional position – as indicated in the FNB questions – does not arise.149

However, the application of section 36(1) does surface when considering that the Oriental Products position regarding estoppel was found to be unauthorised and therefore incongruent with section 25 of the Constitution. Whether section 36 can yield a different outcome for the Oriental Products interpretation of estoppel, which was found to infringe section 25 due to a lack of authority for the resultant deprivation of compulsory loss of ownership, remains questionable. Concerning the question of whether deprivations that are found to be inconsistent with section 25 due to such deprivations not being authorised by a law of general application could be saved by section 36, Van der Walt opines that this would be improbable.150 He argues that since section 36 also requires the infringement to be authorised by law of general application, the reason why the deprivation was found to be inconsistent with section 25 would likewise arguably cause it to be inconsistent with the limitation clause. As a result, it appears that the Oriental Products interpretation of the consequences of estoppel cannot be saved by section 36 and would as a result remain unconstitutional.

The remaining question is then whether the traditional interpretation of the consequences of estoppel that was found to be compliant with section 25(1) would amount to an expropriation in terms of section 25(2)–(3) of the Constitution, which would require compensation to be paid to the owner for the suspension of several of her entitlements for an indefinite period. This question arises because in FNB the Court held that once it is established that the deprivation is in terms of law of general application, and that the deprivation is not arbitrary, or can be saved by section 36(1), courts must determine whether the deprivation constitutes an expropriation in terms of section 25(2)–(3) of the Constitution.151 In this regard, a constitutionally valid expropriation requires the expropriation to be for a public purpose or in the public interest, and that just and equitable compensation is paid for the expropriation.152 In addition, the threshold requirement for expropriations is that they must be enforced in terms of a law of general application. This requirement of a law of general application causes the traditional interpretation of the consequences of estoppel to fall short of an expropriation. In South African law, expropriation can only take place in terms of promulgated legislation that expressly empowers the state to expropriate.153 In the estoppel scenario, the limitation of ownership takes place in terms of the common law. In this regard, no power to expropriate exists at common

149 Roux (note 68 above) at 46-26. However, Roux concedes that where the standard of the arbitrariness test is lower, in other words, the rational connection test or measure is applied instead of a full proportionality review, the s 36(1) limitation clause may have some significance. See Roux (note 68 above) at 46-27.
150 Van der Walt (note 68 above) at 56.
151 FNB (note 69 above) at para 100.
152 Section 25(2)(a)–(b) of the Constitution. See further Van der Walt (note 68 above) at 458–510; Roux (note 68 above) at 46-29, 33–34.
153 Harvey v Umhlatuzi Municipality & Others [2010] ZAKZPHC 86, 2011 (1) SA 601 (KZP) paras 81–87. See also Van der Walt (note 68 above) at 453–454, 496; Roux (note 68 above) at 46-29.
Therefore, the limitation or suspension of rights that may result from a successful estoppel defence cannot amount to expropriation.

V CONCLUSION

The purpose of this contribution was to determine the constitutional validity of the consequences ascribed to the situation where a bona fide purchaser successfully raises the defence of estoppel against the rei vindicatio. In this regard, two opposing interpretations had to be considered because the most recent Supreme Court of Appeal case on the topic, Oriental Products, arguably deviated from the traditional interpretation of what the consequences of estoppel entail. These interpretations consisted of the traditional position and the Oriental Products interpretation.

Part I of the article confirmed that the traditional position involves the suspension of the owner’s rei vindicatio indefinitely. However, further investigation into the position showed that its impact on ownership goes beyond the mere suspension of the right to vindicate. In this regard, the traditional position in fact also limits several other ownership entitlements such as the ius possidendi, ius utendi, ius fruendi, ius abutendi and the ius dispondendi, and results in the owner having bare ownership status. This finding indicated that a section-25 analysis might result in an arbitrary deprivation of constitutional property because of the apparently severe impact of the traditional position on ownership. It was also shown that several reasons exist for the limitation such as considerations of fairness and equity, the risk principle and fault, which may render the position compliant with section 25.

The constitutional analysis of the traditional position completed in part IV showed that although the traditional position results in a severe deprivation of constitutional property, the deprivation is justified under the proportionality non-arbitrariness test, causing it to be a valid deprivation. The position also does not amount to an expropriation since expropriations cannot be authorised by the common law. This means that the traditional position is constitutionally compliant. This finding is significant for a number of reasons. First, it indicates that the position can be upheld as its validity and force is supported by the Constitution. Secondly, litigants who aver that estoppel arbitrarily deprives them of their property or that it amounts to an expropriation because of their bare ownership status, will purportedly not succeed. Thirdly, it shows that the existence of doctrinal anomalies, such as those elaborated in part II of the article, would not, per se render a deprivation arbitrary. The contextual nature of the arbitrariness inquiry is therefore underscored by this observation. Lastly, the finding that the traditional position is constitutionally compliant supports the proponents of the traditional position, since it confirms its validity. Linked to this is the observation that opponents of the traditional position will have to find justification elsewhere to argue for a different outcome in these circumstances.

Part III revealed that the Oriental Products interpretation, which entails that estoppel results in acquisition and loss of ownership, is plagued with uncertainties. It is debatable whether the ownership acquisition interpretation (and the dicta it is based on) are merely obiter or binding. However, I argued in part III that despite this uncertainty about the nature of the remarks, a section-25 analysis will be valuable either as an ex ante or ex post examination of the constitutional validity of the interpretation. Furthermore, the court’s inconsistent use

\[154\] Van der Walt (note 68 above) at 346, 453.
of derivative and original terminology to describe the acquisition of ownership by way of estoppel is problematic from a doctrinal point of view and has implications for the section 25 analysis. Although scholars are also not in agreement regarding the most appropriate mode of acquisition in this regard, they have pointed out that the essential requirement of a real agreement is absent when estoppel succeeds. This essentially eliminates derivative acquisition as an option.

Regarding estoppel and original acquisition, scholars have highlighted that since ownership is acquired unencumbered through original modes, rights other than ownership will also be terminated at acquisition through estoppel. The issue with this argument is that the termination of these rights might not survive scrutiny under section 25. However, it is questionable if this is a valid concern as it has been disputed whether the termination of burdens and benefits is indeed a defining principle of original modes of acquisition. Nevertheless, I submitted that a section-25 analysis that considers both options could potentially be the decider.

Critically, the *Oriental Products* interpretation does not pass constitutional muster under section 25. The hurdle that this interpretation of estoppel cannot overcome is the law-of-general-application requirement. In this regard, estoppel does not authorise the resultant deprivation (termination of ownership), irrespective of whether estoppel operates as an original or derivative mode of acquisition. This is because estoppel is not authorised to change the legal position of the parties, and so cannot terminate rights such as ownership. The termination of limited real rights by way of estoppel is in contravention of section 25 for the same reason. Accordingly, the *Oriental Products* interpretation infringes section 25 of the Constitution. It cannot be saved by section 36 (the limitation clause) because the limitation clause also requires the infringement to be in terms of a law-of-general-application. An important implication of this finding is that an argument to the effect that estoppel by representation can result in the acquisition of ownership is doctrinally flawed and unconstitutional. Thus, if a section-25 challenge is brought against the *Oriental Products* interpretation of estoppel, such challenge will likely succeed. Therefore, courts should steer clear of this kind of reasoning.
Civiliter exercise of a statutory servitude: Reflections on Link Africa and Telkom

GUSTAV MULLER

ABSTRACT: The Constitutional Court has twice been called upon to interpret s 22(1) of the Electronic Communications Act 36 of 2005. In both Link Africa and Telkom SA, the respective local authorities contended that the licensees needed their prior consent for the deployment of the ICT infrastructure. Conversely, Link Africa and Telkom SA SOC Limited contended that the non-consensual statutory servitudes afforded them unhindered powers for the rapid deployment of ICT network infrastructure. However, s 22(2) of the Act demands that the non-consensual servitudes must be exercised civiliter modo. In Link Africa the majority of the Court employed the civiliter principle in its colloquial form to calibrate the servitutal relationship. In Telkom SA the Court calibrated the servitutal relationship without employing this principle at all. My hypothesis is that by eliding the civiliter principle altogether in Telkom SA and by engaging it only in its colloquial form in Link Africa, the Court collapsed the calibration of the servitutal relationship between the licensee and local authority into an adversarial inquiry about their respective rights. Without filtering these rights through the civiliter principle the Court infused an unhealthy paleness into the servitutal relationship that will not be able to withstand the pressure as the push for the rapid deployment of ICT network infrastructure intensifies in coming years. While laudable, the reasoning of the Court in both Link Africa and Telkom SA is disjointed because it does not rely directly on the peremptory property law principles of the common law of servitudes to calibrate the servitutal relationship between licensees and local authorities.


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I INTRODUCTION

The National Planning Commission’s National Development Plan 2030: Our Future – Make it Work (‘NDP’) sketches a path to inclusive and sustainable growth in South Africa through large-scale investment in economic infrastructure in various sectors. In the information and communication technology (‘ICT’) sector, the NDP envisions that the existing infrastructure can be enhanced by using a structured investment approach that will focus on programmes that contribute to the realisation of regional integration in an immediate and practical way. Despite a good core network and sound regulatory framework, South Africa has been slipping down the global benchmark rankings that measure the cost, quality and speed of broadband connectivity, and is now trailing other developing countries. The policy vision is to transform South Africa into an information society and reposition the labour market as a knowledge economy over the medium and long term with a focus on demand-side factors. However, over the short term, this vision depends on supply-side factors – like regulatory reforms and enhancing the existing ICT network infrastructure.

3 NDP (note 1 above) at 138.
5 City of Tshwane Metropolitan Municipality City v Link Africa (Pty) Ltd & Others [2015] ZACC 29, 2015 (6) SA 440 (CC) (‘Link Africa’) at paras 1, 177.
6 NDP (note 1 above) at 172 and South Africa Connect (note 2 above) at 45–50. These factors include e-literacy, education and training, rebates and incentives, and structural reforms across all government departments. In Link Africa (ibid), Cameron J and Froneman J observed that the problems with broadband in South Africa ‘stifle intellectual growth and inquiry, and compromise economic development and efficiency’ (para 113). The Justices noted that the ECA’s purpose ‘is to bring the modern world closer and more productively to us all through the medium of communication’ (para 131). The Justices were persuaded by the submissions of the Minister that in the long term this access ‘offers realistic promise of increases in economic output, new jobs, educational opportunities, enhanced public service delivery and rural development’ (para 178). See also City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd & Others [2014] ZAGPHC 166, [2014] All 559 (GP) at para 3.5 and M Gavaza ‘Connecting Rural SA to Mobile Internet Remains a Sticky Issue’ Business Day (4 November 2020).
The Electronic Communications Act 36 of 2005 (‘ECA’) establishes a regulatory framework for the provision of electronic communication in the public interest by promoting – among other things – the convergence of various information technology sectors; universal access and connectivity; fair and non-discriminatory electronic communication networks and services.\(^8\) The ECA empowers the Minister of Communications and Digital Technologies to develop a policy for the rapid deployment and provisioning of electronic communications facilities.\(^9\) This policy is contained in the *National Integrated ICT Policy White Paper*\(^{10}\) (‘White Paper’) and describes ‘rapid deployment’ as the process whereby electronic communications network service licensees\(^{11}\) (‘licensees’) obtain access to property in terms of wayleaves and servitudes\(^{12}\) to roll out electronic communications networks\(^{13}\) and electronic communications facilities.\(^{14}\) The deployment of the following networks and facilities is identified as a priority: (a) underground fibre optic cables and ducts; (b) fibre optic cables and ducts on private land and in business parks;\(^{15}\) (c) aerial fibre on poles; (d) access to high sites; and (e) access to land or other property for the erection of masts and towers.\(^{16}\)

To this end, s 22(1) of the ECA affords a licensee three important rights.\(^{17}\) First, a licensee has the right to enter any land, railway or waterway.\(^{18}\) Second, a licensee has the right to construct and maintain an electronic communications network or facility on any land, railway or waterway.\(^{19}\) Last, a licensee has the right to alter an electronic communications network

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\(^{8}\) Section 2(a), (c), (g) and (m) of the ECA and *Link Africa* (note 5 above) at paras 121, 175 and 176.

\(^{9}\) Section 21(1) of the ECA and *Telkom SA SOC Limited v City of Cape Town & Another* [2020] ZACC 15, 2021 (1) SA 1 (CC) at paras 5, 22–24.

\(^{10}\) GN 1212 in *GG* 40325 (3 October 2016).

\(^{11}\) Section 1 of the ECA defines ‘electronic communications network service licensee’ as ‘a person to whom an electronic communications network service licence has been granted in terms of section 5(2) or 5(4) [of the ECA].’

\(^{12}\) *White Paper* (note 10 above) at 95; and *Link Africa* (note 5 above) at para 104.

\(^{13}\) Section 1 of the ECA defines ‘electronic communications network’ as ‘any system of electronic communications facilities (excluding subscriber equipment), including without limitation – (a) satellite systems; (b) fixed systems (circuit- and packet-switched); (c) mobile systems; (d) fibre optic cables (undersea and land-based); (e) electricity cable systems (to the extent used for electronic communications services); and (f) other transmission systems, used for conveyance of electronic communications.’

\(^{14}\) Section 1 of the ECA defines ‘electronic communications facility’ as including ‘any – (a) wire, including wiring in multi-tenant buildings; (b) cable (including undersea and land-based fibre optic cables); (c) antenna; (d) mast; (e) satellite transponder; (f) circuit; (g) cable landing station; (h) international gateway; (i) earth station; (j) radio apparatus; (k) exchange buildings; (l) data centres; and (m) carrier neutral hotels, or other thing, which can be used for, or in connection with, electronic communications, including, where applicable – (i) collocation space; (ii) monitoring equipment; (iii) space on or within poles, ducts, cable trays, manholes, hand holds and conduits; and (iv) associated support systems, sub-systems and services, ancillary to such electronic communications facilities or otherwise necessary for controlling connectivity of the various electronic communications facilities for proper functionality, control, integration and utilisation of such electronic communications facilities.’

\(^{15}\) *Link Africa* (note 5 above) at para 171.

\(^{16}\) *White Paper* (note 10 above) at 96.

\(^{17}\) In *Telkom SA Ltd v MEC for Agricultural and Environmental Affairs, KwaZulu-Natal* [2002] ZASCA 96, 2003 (4) SA 23 (SCA), JA Howie highlights that the predecessors of this provision can be found in s 70 of the Telecommunications Act 103 of 1996, s 36 of the Post Office Amendment Act 85 of 1991, s 78 of the Post Office Amendment Act 113 of 1976, s 4 of the Post Office Amendment Act 80 of 1965, s 80 of the Post Office Act 44 of 1958 and s 82 of the Post Office Administration and Shipping Combinations Discouragement Act 10 of 1911.

\(^{18}\) Section 22(1)(a) of the ECA.

\(^{19}\) Section 22(1)(b) of the ECA.
or facility by attaching wires or struts to any building or structure, or by removing such network or facility.\textsuperscript{20} In practical terms, these non-consensual statutory servitudes – which are sometimes also referred to as public servitudes\textsuperscript{21} with a nature akin to personal servitudes\textsuperscript{22} – will form an integral part of the strategy to realise the rapid deployment of ICT infrastructure in South Africa. However, these non-consensual servitudes have in certain locations caused conflict between licensees and local authorities over the construction and maintenance of the electronic communications network.\textsuperscript{23} In the recent past, the Constitutional Court has twice been called upon to interpret s 22(1) of the ECA. In both \textit{Tshwane City v Link Africa}\textsuperscript{24} (‘\textit{Link Africa}’) and \textit{Telkom SA SOC Limited v City of Cape Town and Another}\textsuperscript{25} (‘\textit{Telkom SA}’) the respective local authorities contended that the licensees needed their prior consent for the deployment of the ICT infrastructure.\textsuperscript{26} Conversely, both Link Africa and Telkom SA SOC Limited contended that the non-consensual statutory servitudes afforded them unhindered powers for the rapid deployment of ICT network infrastructure.\textsuperscript{27}

Section 22(2) of the ECA appears to be crucial in mediating between the opposing contentions of local authorities and licensees. It states that in exercising the non-consensual servitudes in s 22(1) of the ECA, ‘due regard must be had to applicable law and the environmental policy of the Republic.’ Simply put, s 22(2) of the ECA demands that the non-consensual servitudes must be exercised \textit{civiliter modo}, which means that the rights must be exercised respectfully and with due caution. In \textit{Link Africa} the majority of the Court employed the \textit{civiliter} principle in its colloquial form to calibrate the servitutal relationship between the licensee (i.e. the servitude holder) and the property owner, in this case the local authority. In \textit{Telkom SA} the Court calibrated the servitutal relationship without employing this principle at all. My hypothesis is that by eliding the \textit{civiliter} principle altogether in \textit{Telkom SA} and by engaging it only in its colloquial form in \textit{Link Africa}, the Court collapsed the calibration of the servitutal relationship between the licensee and local authority into an adversarial inquiry about their respective rights. Without filtering these rights through the \textit{civiliter} principle the Court infused a paleness into the servitutal relationship that will not be able to withstand the pressure as the push for the rapid deployment of ICT network infrastructure intensifies in coming years.

In part 2 of this article, I will delineate the peremptory property law principles that must be used to interpret all servitudes. I contextualise the non-consensual statutory servitudes flowing from the ECA in terms of these principles and critically analyse both \textit{Link Africa} and \textit{Telkom SA} in part 3. I conclude the article by emphasising how the peremptory property law principles – especially the \textit{civiliter} principle – can make the calibration of the servitutal relationship more nuanced.\textsuperscript{28}

\textsuperscript{20} Section 22(1)(c) of the ECA.
\textsuperscript{21} AJ Van der Walt \textit{The Law of Servitudes} (2016) at 529–539.
\textsuperscript{22} \textit{Link Africa} (note 5 above) at para 140, and ibid at 455–464.
\textsuperscript{23} \textit{Dark Fibre Africa (Pty) Ltd v Cape Town City} [2017] ZAWCHC 151, 2018 (4) SA 185 (WCC); \textit{Msunduzi Municipality v Dark Fibre Africa} [2014] ZASCA 165; and \textit{Mobile Telephone Networks (Pty) Ltd v SMI Trading} CC [2012] ZASCA 138 2012), 2013 (1) All SA 60 (SCA).
\textsuperscript{24} \textit{Link Africa} (note 5 above).
\textsuperscript{25} \textit{Telkom SA SOC Limited v City of Cape Town & Another} [2020] ZACC 15, 2021 (1) SA 1 (CC) (‘\textit{Telkom SA}’).
\textsuperscript{26} \textit{Link Africa} (note 5 above) at para 17 and ibid at para 10.
\textsuperscript{27} \textit{Link Africa} (note 5 above) at para 125 and ibid at para 17.
\textsuperscript{28} AJ Van der Walt \textit{Property and Constitution} (2012) at 24 observes that it is ‘the job of academic lawyers … to help figure out how legislation could be introduced, amended and interpreted and how the common law or customary law could be developed so as to promote the spirit, purport and objects of the Bill of Rights.’ (Emphasis added)
II CALIBRATION OF THE SERVITUTAL RELATIONSHIP

The relationship between a servitude holder and the servient owner or local authority is intricate. Servitudes potentially cause conflict because they involve situations where multiple people simultaneously exercise partially intersecting use rights in the same property. The resulting tension flows from the fact that the servient owner may only continue to use and enjoy his or her property in the residual space that is left unburdened by the licensee exercising its rights in terms of the servitude. While Van der Walt concedes that this ‘surface tension’ is perhaps more apparent than real, he argues that this tension focuses our attention on a deeper and more problematic tension that exists between the servient owner’s freedom to create servitudes consensually and the peremptory property principles that regulate the proliferation of limited real rights. The existence of this deeper tension explains why it is impossible to resolve all conflicts that arise from servitudes by referring exclusively (or, at least, mostly) to the servitude-creating agreement when there are peremptory property principles that limit the burdens that owners can create consensually. This is compounded by the fact that not all servitudes are created by agreement, which means that a primary reliance on an interpretation-based resolution of any resulting conflict will be inappropriate in those instances where the servitudes were created in terms of legislation or the common law. Even a purely interpretation-based approach to resolving the tension between a licensee and a servient owner or local authority will still be problematic because it would not fully account for the different legal statuses of non-consensual servitudes that are created in terms of legislation which ‘ha(s) a public-interest aspect that extends beyond private interests. The relationship between a licensee and a servient owner or local authority must therefore ‘be explained in a way that accounts for the role that peremptory and default property principles play in the creation, shaping and adjudication of servitude rights.

The first peremptory principle used to calibrate the relationship between the licensee and the servient owner or local authority is the rebuttable presumption that ownership is free from servitudes (in favorem libertatis). According to Van der Walt, this principle takes the following forms: first, the presumption that land is free from servitudes and the corresponding burden is on the claimant to prove that he or she holds the particular servitude; secondly, if the existence of a servitude can be proved by the claimant, the principle demands a restrictive interpretation in that the court will ‘tread carefully and with circumspection upon the presumption of freedom from servitudes and must consider the nature of the servitude created and the interests of the servient owner and public in the context of the land in question.

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30 Van der Walt (note 21 above) at 187.
31 Ibid.
32 Ibid at 188.
33 Ibid at 188. This approach is articulated in Link Africa (note 24 above) at paras 114–116.
34 Ibid at 189.
35 Ibid.
36 Northview Properties (Pty) Ltd v Lurie 1951 (3) SA 688 (A) at 696A; Ley v Ley’s Executors & Others [1951] 3 All SA 226 (A); CG Van der Merwe Sakereg (2nd Ed, 1989) at 464; CG Van der Merwe CG Servitudes’ in WA Joubert WA Lawsa vol 24 (2nd Ed, 2010) at para 543.
38 Ibid.
39 In Willoughby’s Consolidated Co Ltd v Copthall Stores Ltd 1918 AD 1 at 16 the court stated that: ‘Whether a contractual right amounts in any given case to a servitude – whether it is real or only personal – depends upon the intention of the parties to be gathered from the terms of the contract construed in the light of the relevant circumstances. In case of doubt the presumption will always be against a servitude, the onus is on the person...
of the servitude-creating agreement or grant ‘so as to impose the least cumbersome burden on the servient property’; and thirdly, if it is unclear whether the servitude is praedial or personal, the principle will favour the creation of a personal servitude rather than a praedial servitude because the former imposes a lesser burden. Van der Walt notes that the operation of the in favorem libertatis principle appears to shift the focus away from peremptory property principles in those instances where the terms of the servitude-creating agreement or grant are clear and unambiguous. In these instances, where the terms are clear and unambiguous, the terms of the servitude-creating agreement or grant must be afforded their normal grammatical meaning (the so-called ‘golden rule’). This is the case even if it brings about a result that appears to ‘impose a heavy burden on the servient land’. Special care must, however, be taken in those instances where the terms of the servitude-creating agreement are clear and unambiguous, but it was drafted in such wide terms that it may result in the imposition of an unreasonable or unfair burden on the servient owner. In those instances where the servitude-creating agreement or grant’s terms are ‘general, wide and permissive’, the in favorem libertatis principle must take precedence over the golden rule. The implication is that the golden rule will only take precedence over the in favorem libertatis principle if the wording of the servitude-creating agreement or grant is not only clear and unambiguous, but also ‘precise and specific in identifying and describing exactly the burden to be placed on the servient land’. However, it is possible to depart from the grammatical meaning of the servitude-creating agreement or grant if the interpretation results in an absurdity or apparent conflict with the intention of the parties. The relationship between the licensee and the servient owner or local authority must then be determined with reference to extraneous evidence or contextual factors.

The second peremptory principle used to calibrate the relationship between the servient owner or local authority and the licensee is the principle of effective use. In terms of this principle, a licensee’s interests enjoy preference over the interests of the servient owner or local authority to the extent that this pertains to the entitlements clearly conferred by the

affirming the existence of one to prove it.’ This was confirmed in Lorentz v Melle & Others 1978 (3) SA 1044 (T) at 1050F–G.


42 Van der Walt (note 21 above) at 195–196.


44 Kruger (note 37 above) at para 9; Kruger v Downer 1976 (3) SA 172 (W), [1976] 1 All SA 56 (W) at 59; Van Rensburg v Tauta [1975] 1 All SA 425 (A) at 438; Fourie v Marandellas Town Council 1972 (2) SA 699 (R), [1972] 2 All SA 528 (R) at 530–531; Van der Walt (note 21 above) at 196.

45 Van der Walt (note 21 above) at 202.

46 Ibid at 203 and the sources that he cites in fn 36.

47 Ibid at 196.

servitude-creating agreement or grant.\(^49\) This implies that the licensee acquires – in addition to the servitude – all the entitlements without which the servitude cannot be exercised. These ancillary entitlements are sometimes referred to as baseline entitlements.\(^50\) These baseline entitlements may, however, only be exercised subject to the proviso that the servitude holder does not burden the ownership of the servient property unduly.\(^51\) The function of the principle is to ensure that the licensee is afforded full and normal use of the servitude. To the extent that the wording of the servitude-creating agreement or grant is clear and unambiguous, the *in favorem libertatis* principle cannot be relied on to limit the nature and scope of the entitlements that allow effective use\(^52\) or the baseline entitlements ‘that are necessary for the servitude to exist at all’.\(^53\) The servitude holder and the servient owner are free to determine the nature, scope and impact that the particular servitude will have on the servient property through consensus. However, they are precluded from relying on the free will that consensus affords to evade or suspend the entitlements that would allow the servitude holder effective use of the servitude and any of the ancillary entitlements.\(^54\) But for this prohibition, it would be possible for the licensee and servient owner or local authority to create a servitude through consensus that would in all likelihood be unable to provide the other property with any utility.\(^55\) However, once the nature and scope of the entitlements have been determined, it is possible to refer to the servitude-creating agreement or grant to the extent that it amplifies, specifies or exceeds the baseline entitlements and entitlement to effective use.\(^56\)

The third peremptory principle used to calibrate the relationship between the owner or local authority and the licensee is the *civiliter* principle.\(^57\) Scott points out that the phrase *civiliter modo* is consistently used as a set of adverbs that qualify the conduct of the servitude holder.\(^58\) A servitude holder who acts reasonably,\(^59\) a foundational principle of the law of servitudes, would then be acting in a civilised (*civiliter*) manner (*modo*). He observes further that the word *modo*, especially when used in conjunction with *dum*, means ‘so long as’ or ‘provided that’.\(^60\) The phrase – more fully *dum modo civiliter servitutem exerceat* – should therefore be translated

\(^{49}\) *Cillie v Geldenhuys* 2009 (2) SA 235 (SCA), [2008] 3 All SA 507 (SCA).

\(^{50}\) Van der Walt (note 21 above) at 227. See Van der Merwe (1989) (note 36 above) at 464–465 and HJ Delport and NJJ Olivier *Sakereg Vonnisbundel* (2nd Ed, 1985) at 624.

\(^{51}\) Van der Walt (note 21 above) at 225.

\(^{52}\) Resnekov (note 41 above); *De Kock v Hänel* 1999 (1) SA 994 (C); Kruger (note 44 above); *Van Rensburg* (note 44 above); *Kakamas Bestuursraad v Louw* [1960] 2 All SA 231 (A).

\(^{53}\) Van der Walt (note 21 above) at 227.

\(^{54}\) Ibid at 225.

\(^{55}\) However, see *Kruger* (note 44 above) at 178H–179A.

\(^{56}\) Nolan v Barnard 1908 TS 142 at 152; Roeloffze NO v Botma NO [2006] JOL 18777 (C) at paras 31–32; *Johl v Nobre* [2012] JOL 28764 (WCC); *Zeeman* (note 48 above); Van der Walt (note 21 above) at 227.

\(^{57}\) *D 8 1 9.*

\(^{58}\) J Scott ‘A growing trend in source application by our courts illustrated by a recent judgment on right of way’ (2013) 76 *Tydskrif vir die Hedendaagse Romeinse-Hollandsse Reg* 239 at 242.

\(^{59}\) See *De Kock* (note 52 above) at 1000B–D; Berdur Properties (Pty) Ltd v 76 Commercial Road (Pty) Ltd 1998 (4) SA 62 (D) at 68D–E; Brink v *Van Niekerk* 1986 (3) SA 428 (T); Penny v Brentwood Gardens Body Corporate 1983 (1) SA 487 (C) at 491B–D; *Kakamas Bestuursraad v Louw* 1960 (2) SA 202 (A); *Van Schalkwyk v Esterhuizen* 1948 (1) SA 665 (C); *Cliffside Flats (Pty) Ltd v Bantry Rocks (Pty) Ltd* 1944 AD 106; *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 474; *Gardens Estate Ltd v Lewis* 1920 AD 144 at 150; *Van Heerden v Coetzee* 1914 AD 167; and *Rubidge v McCabe and Sons* 1913 AD 433 at 441.

\(^{60}\) Scott (note 58 above) at 243.
to mean ‘provided that he exercises the servitude with due regard to the other party.’\textsuperscript{61} Van der Walt concludes that it is ‘probably better to refer to the \textit{civilitet} exercise of a servitude’ and to translate the phrase to mean that a licensee must exercise a servitude in such a way that it does not impose an unreasonable burden on the servient owner or local authority.\textsuperscript{62} The purpose of the principle is to protect the owner or local authority against the negative effects that the exercise of the servitude could have on the ownership of the servient land.\textsuperscript{63} These negative effects typically manifest as unnecessary or unwarranted burdens on the servient land that are not necessary for the effective use of the servitude, or not included (specifically or tacitly) in the agreement or grant. The function of the \textit{civilitet} principle is to ensure that the servient property is not burdened by a gratuitous exercise of the servitude that has been created.\textsuperscript{64} Stated differently, the \textit{civilitet} principle regulates the reasonable exercise of a servitude. This requires that a balance must be struck between the licensee’s right to effective use and the residual rights of the servient owner or local authority to use its property to the extent that this does not interfere with the licensee’s use.\textsuperscript{65} However, this does not mean that the licensee may not exercise the servitude simply because it would burden or inconvenience the servient owner or local authority.\textsuperscript{66} Van der Walt argues that a servient owner must accept the entitlements that are ‘either required objectively for effective use of the servitude or that were clearly foreseen in the servitude grant’.\textsuperscript{67} For purposes of non-consensual servitudes, the required balance must be determined with reference to considerations that are external to the agreement or grant.\textsuperscript{68}

### III EXERCISING STATUTORY SERVITUDES

#### A Introduction

The non-consensual servitudes afforded by the ECA must be understood within the context of the above-explained interpretive approach that is specific to the law of servitudes. Non-consensual servitudes create a complex relationship between the owners on whose property the infrastructure will be deployed; the local authorities in whose jurisdiction the deployment will have to be approved and facilitated; and licensees who will be responsible for the construction, alteration, maintenance and removal of networks and/or facilities. The

\begin{itemize}
  \item \textsuperscript{61} VG Hiemstra & HL Gonin HL. \textit{Drietalige Regswoordeboek/Trilingual Legal Dictionary} (1992) \textit{sv civilitet modo}.
  \item \textsuperscript{62} Van der Walt (note 21 above) at 247 and Muller et al (note 29 above) at 381.
  \item \textsuperscript{63} Ibid at 247.
  \item \textsuperscript{64} Ibid at 248.
  \item \textsuperscript{65} Cillie (note 49 above) at para 15. See also Van der Walt (note 21 above) at 249 and JC ‘Erfdiensbaarhede en die Uitoefening daarvan \textit{Civilitet Modo}’ (2007) 70 \textit{Tydskrif vir die Hedendaagse Romeins-Hollandsse Reg} 351.
  \item \textsuperscript{66} In \textit{Van Rensburg} (note 44 above) at 301H the court pointed out that in the application of the principle that a servitude agreement has to be interpreted strictly and in a manner that is least burdensome to the owner of the servient tenement, it must be borne in mind that the nature and extent of the burden is determined according to the meaning which has to be accorded to that agreement. If the meaning thereof is unequivocal, a court is not entitled to depart from it in order to bring about a lesser burden. See also \textit{Fourie} (note 44 above); \textit{De Kock} (note 52 above) at 1000B–D; \textit{Kruger} (note 37 above) at para 9; RRM Paisley and CG Van der Merwe ‘From Here to Eternity: Does a Servitude Road Last Forever?’ (2000) 11 \textit{Stellenbosch Law Review} 452 at 477–478.
  \item \textsuperscript{67} Van der Walt (note 21 above) at 251. See \textit{Fourie} (note 44 above) and \textit{Brink v Van Niekerk} [1986] 1 All SA 485 (T) for examples of particularly burdensome exercises of a servitude that clearly exceed the bounds of the \textit{civilitet} principle.
  \item \textsuperscript{68} This may include the installation of a security gate and access control measures: see \textit{Roeloffze NO} (note 56 above) at paras 31–32; \textit{johl} (note 56 above); Jersey Lane Properties (Pty) Ltd \textit{t/a Fairlawn Boutique Hotel and Spa v Hodgson \& Another} [2012] ZAGPCHC 86.
\end{itemize}
complexity manifests in the fact that the licensee’s exercise of the non-consensual servitudes relegates the entitlements of the owners to a residual position and complicates local authorities’ execution of their constitutional mandate. This surface tension is exacerbated by the fact that policy direction – as articulated in the NDP, Connext SA and the White Paper – all point at promoting competition between different licensees and encouraging the sharing of infrastructure. While this will result in fewer imposing infrastructures and a less congested built environment, it will increase the need for access to those properties where the infrastructure is deployed and will complicate the regulatory environment as competition heats up between licensees. The rapid deployment of this infrastructure will also increase the number of potential legislative and policy measures with which the public’s interest will have to be reconciled.

Authorisations and wayleaves entitle licensees to exercise these servitudes and since the wording of s 22(1) of the ECA is clear and unambiguous, these rights should therefore be given their normal and grammatical meaning. The licensees must furthermore be afforded a clear preference over the entitlements of the owners to the extent that the preference pertains to their entitlements of entry, construction, maintenance, alteration and removal. Crucially, however, the inverse applies to any entitlements that are not clearly afforded by the ECA – such as where the infrastructure may be deployed and the normal operation of the principles of *inaedificatio*. Yet, any alteration or removal may be necessitated by a misalignment or an uneven surface, or the commencement of building works by a local authority or a private person. The non-consensual servitudes that the ECA affords licensees include three important ancillary rights or baseline entitlements to ensure effective use: (a) the right to construct and maintain pipes, tunnels or tubes under any street; (b) the right to erect and maintain a gate in a fence that would otherwise preclude the licensee entry or inconvenience the licensee’s right to enter; and (c) the right to fell or prune any tree or vegetation that obstructs or interferes with the operation and maintenance of an electronic communications network or facility.

Because these non-consensual servitudes arise *ex lege*, they must furthermore be exercised in a way that imposes only burdens that are authorised and needed for effective use. This will

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69 NDP (note 1 above) at 138, 171 and 175; and Connext SA (note 2 above) at 4, 6, 16 and 20–22.
70 NDP (note 1 above) at 177; Connext SA (note 2 above) at 5, 30, 32–34, 44 and 54; and the White Paper (note 10 above) 99 and 101.
71 Paragraph 2.3 of the Draft Policy and Policy Direction on Rapid Deployment of Electronic Communications Networks and Facilities promulgated in terms of GN 800 in GG 43537 (22 July 2020) states that ‘electronic communications network service licensees retain ownership of any electronic communications network or facility constructed.’ While this right is similar to s 23(1) of the Electricity Regulation Act 4 of 2006 and s 135(1)(a) of the National Water Act 36 of 1998 it does not appear in the ECA itself and may therefore be viewed as an *ultra vires* appropriation of power. This is a significant deviation in that this ‘right’ creates a statutory exception to application of the common law principles of *inaedificatio*. These auxiliary things may therefore: not be attached and sold in execution of debt or be subjected to any insolvency or liquidation proceedings, not be subjected to the landlord’s tacit hypothec, and only be acted upon with the written consent of the licensee. See Muller et al (note 29 above) at 166–173.
72 Section 25 of the ECA.
73 Section 24(1)(a) of the ECA. A local authority has a similar power to install conduit pipe for underground cables from a point of connection on the street boundary to a building on a premises in terms of s 23 of the ECA.
74 Section 26(1)(a) of the ECA. The licensee must also provide a set of duplicate keys to the owner or occupier of the land in terms of s 26(1)(b) of the ECA. This ancillary right must be read with ss 20 and 21 of the Fencing Act 31 of 1963.
75 Section 27(1) of the ECA. See G Muller ‘To fell or not to fell: The impact of NEMBA on the rights and obligations of a usufructuary’ (2018) 81 Tydskrif vir die Hedendaagse Romeins-Hollandse Reg 529.
ensure that owners and local authorities have certain procedural protections (such as prior notice before entry, safety measures and traffic control for underground works, access control for gates) and substantive safeguards (such as engagement about the manner and placement of infrastructure, compensation for damage caused to property during alteration or removal, and environmental considerations when felling or pruning trees). Most significantly, in my view, is the fact that the civiliter principle demands non-consensual servitudes to be interpreted with reference to external considerations. Stated differently, the reasonableness with which the licensees exercise these servitudes will be calibrated with reference to the rights and interests of owners and local authorities as found in laws of general application and policy. This calibration of interests must happen within a particular contextual matrix such as those found in Link Africa and Telkom SA.

B Link Africa

In Link Africa the licensee sought permission and obtained the requisite wayleaves from the local authority to install fibre optic cables by attaching them onto the existing sewage infrastructure in Waterkloof Glen. However, the city adopted a new strategy for the roll out of broadband connectivity in its jurisdiction shortly after the respondent commenced with the first phase of deploying the fibre optic cables. In order to prevent the licensee from proceeding with the deployment, the local authority approached the Gauteng Division of the High Court, Pretoria with an application for the following relief: (a) a declaration that the licensee needed the consent of the local authority before it could proceed with the deployment; (b) an interdict that would prevent the licensee from commencing with the second phase of its deployment and would direct it to remove the fibre optic cables that it had deployed in phase one; (c) a review of its own administrative action in awarding the wayleaves; and (d) a declaration that ss 22 and 24 of the ECA are unconstitutional and invalid to the extent that they force the local authority to accept services from the licensee contrary to s 217(1) of the Constitution. Avvakoumides AJ dismissed the application with costs in the court a quo and, since both the high court and Supreme Court of Appeal refused leave to appeal that judgment, the city launched an appeal directly to the Constitutional Court.

Cameron J and Froneman J, who wrote the majority judgment, disagreed with the minority of the Court that licensees required the consent of the local authority to enter the local authority’s property and that ss 22 and 24 of the ECA were unconstitutional for that

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76 Link Africa (note 5 above) at paras 7–9.
77 Ibid at para 4.
78 Ibid at paras 17–19.
79 City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd [2014] ZAGPPHC 166 at para 54.
80 Link Africa (note 5 above) at para 23.
82 Khumalo J, Madlanga J, Molemela AJ and Therom AJ concurred in this judgment.
83 Link Africa (note 5 above) at para 100.
84 Jafta J and Tshiqi AJ penned the judgment and Moseneke DCJ and Nkabinde J concurred in this judgment.
85 The reasoning of the minority can be found in Link Africa (note 5 above) at paras 42–51 and 83.
reason because it amounted to an arbitrary deprivation of property.86 The majority reasoned that the minority’s focus on the absolute nature of ownership had been flawed. The majority reasoned that not only was the minority’s view antiquated,87 it did not find support in the Court’s own jurisprudence.88 Instead the majority reasoned that ‘[a] more supple conception of ownership rights … shows a clear and inviting path to upholding the statute’s validity’ which would ‘enable an important piece of legislation to do the work that Parliament, in the exercise of its rightful powers, designed for it.’89 According to the majority, this finely drawn path90 leads to and ‘finds specific expression in the common law of servitudes.’91 This path affirms the second subsidiarity principle92 that the Court developed to determine the most appropriate source of law to govern a dispute in a single system of law.93 This principle states that a litigant who avers that a right in the Bill of Rights has been infringed – in this case, s 25(1) of the Constitution – must rely on the legislation that was specifically enacted to protect that right – in this case, the ECA – and may not rely directly on the common law when bringing an action to protect the right.94 However, the proviso to this principle that Van der Walt deduced on logical grounds allows a litigant to rely directly on the common law if the legislation does not,

86 The reasoning of the minority can be found in Link Africa (note 24 above) at paras 58–64 and 90–91.
89 Link Africa (note 5 above) at para 106.
90 Ibid at para 134. See Stadstraad van Pretoria v Van Wyk 1973 (2) SA 779 (A) at 784F–H; Casserley v Stubbs 1916 TPD 310 at 312; and Johannesburg Municipality v Cohen’s Trustees 1909 TS 811 at 823.
91 Ibid at para 109.
92 First described as such in AJ Van der Walt ‘Normative Pluralism and Anarchy: Reflections on the 2007 Term’ (2008) 1 Constitutional Court Review 77.
93 Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa [2000] ZACC 1, 2000 (2) SA 674 (CC) at para 44.
94 Ibid at paras 103–105.
or was not intended to, cover the field. The proviso applies insofar as the common law is not, or cannot be developed through interpretation to be, in conflict with the provision in the Bill of Rights or the legislative scheme.\textsuperscript{95} The majority reasoned that, since the ECA was enacted for a specific purpose and does not cover the field of servitudes in its entirety, it appears wholly appropriate to draw on the equitable principles of the common law to animate the ECA’s regulatory framework.\textsuperscript{96}

In holding that the wording of s 22(1) of the ECA had to be afforded its ordinary and straightforward meaning\textsuperscript{97} the majority affirmed the application of the golden rule to servitudes that are couched in clear and unambiguous terms. Significantly, the majority also found that the wording of s 22(1) of the ECA is broad and, by correctly holding that this does not afford licensees unhindered rights,\textsuperscript{98} affirmed the fact that servitudes which are framed in wide and permissive terms must be interpreted restrictively following the \textit{in favorem libertatis} principle. Yet, this restricted interpretation of the licensee’s rights cannot detract from the fact that licensees are afforded ancillary rights that enjoy priority over the interests of owners to the extent that these baseline entitlements are clearly conferred.\textsuperscript{99} In Link Africa the licensee deployed the fibre optic cables by attaching them to the existing underground sewage infrastructure of the local authority as s 24(1)(a) of the ECA clearly permits.

The majority, however, cautioned that s 22(1) of the ECA alone ‘does not determine how the licensee may exercise’ the non-consensual statutory servitude.\textsuperscript{100} It is for this reason that the legislature included the instruction to licensees in s 22(2) of the ECA that ‘in taking any action’ in terms of the non-consensual servitude, it must ‘have due regard … to the applicable law and the environmental policy of the Republic.’\textsuperscript{101} This, the majority held, required the licensee in common law terms to exercise the non-consensual servitude \textit{civiliter modo}.\textsuperscript{102} In Motswagae v Rustenburg Local Municipality (Lawyers for Human Rights as amicus curiae) the Constitutional Court translated this term into simpler language and found that it demanded a servitude be exercised ‘respectfully and with due caution.’\textsuperscript{103} The majority in Link Africa reasoned that this precluded a licensee from exercising the servitude unabashedly\textsuperscript{104} by ‘just barging in, brazenly disregarding municipal protections and duties and works.’\textsuperscript{105} The practical meaning of this would be ‘bound up in the facts’ of the particular case.\textsuperscript{106} In this regard, the majority of the Court correctly held that the ECA skilfully harmonises\textsuperscript{107} the licensee’s full and normal use with the interests of the local authority. This is done through the procedural protections (the duty to give notice and to consult) and substantive safeguards (the selection of the site, supervisory oversight and the obligation to pay compensation for damage caused) in

\begin{itemize}
\item \textsuperscript{95} Ibid at paras 115–116.
\item \textsuperscript{96} Link Africa (note 5 above) at paras 110, 133, 139.
\item \textsuperscript{97} Ibid at para 117.
\item \textsuperscript{98} Ibid at para 125.
\item \textsuperscript{99} Ibid at para 111, 142.
\item \textsuperscript{100} Ibid at para 127.
\item \textsuperscript{101} Ibid at para 127.
\item \textsuperscript{102} Ibid at para 142.
\item \textsuperscript{103} [2013] ZACC 1, 2013 (2) SA 613 (CC) at para 14.
\item \textsuperscript{104} Link Africa (note 5 above) at para 153.
\item \textsuperscript{105} Ibid at para 142.
\item \textsuperscript{106} Ibid at para 143.
\item \textsuperscript{107} Ibid at para 129.
\end{itemize}
ss 24(1)–(3) of the ECA.\textsuperscript{108} This affirms the fact that the \textit{civiliter} principle fulfils a protective function that not only prevents a gratuitous exercise of the non-consensual servitude, but also guards against the potential negative effects that may flow from exercising that servitude.\textsuperscript{109} With this approach the majority confirmed the presumption that legislation does not alter the common law more than what is necessary.\textsuperscript{110} In the context of the ECA, no amendment of the common law of servitudes is required because the suite of peremptory property law principles that are used to interpret servitudes and which are triggered by s 22(2) of the ECA ensures that an appropriate balance is struck between the rights of a licensee, an owner and the local authority. The majority therefore held that the effect of ss 22(1) and 24 of the ECA does not amount to an arbitrary deprivation of property\textsuperscript{111} and dismissed the application.\textsuperscript{112}

\textbf{C Telkom SA}

In \textit{Telkom SA} the applicant\textsuperscript{113} erected a freestanding base telecommunication station – colloquially referred to as a mast – on private property in Heathfield. This formed part of the applicant’s plan to extend the coverage of its mobile network in Cape Town. The plan comprised the development of 135 sites for the deployment of masts and rooftop base telecommunication stations. The applicant erected a mast on the property of the late Mr Kalu in contravention of the city’s Telecommunication Mast Infrastructure Policy (‘Policy’) and Municipal Planning By-Law (‘By-Law’) which precluded such development on property zoned as ‘single residential zone 1.’\textsuperscript{114} This was done while its application to have the erf rezoned to ‘utility’\textsuperscript{115} was still pending approval before the city.\textsuperscript{116} Irked by the applicant’s action the city imposed an administrative penalty\textsuperscript{117} and suspended the processing of the application to

\textsuperscript{108} Ibid at para 152.
\textsuperscript{109} Ibid at para 105
\textsuperscript{110} Ibid at para 153.
\textsuperscript{111} Ibid at paras 154, 174,181.
\textsuperscript{112} Ibid at para 191.
\textsuperscript{113} D Moseneke \textit{All Rise} (2020) 20 and D Moseneke \textit{My Own Liberator} (2016) 323–328 recounts the founding and early history of Telkom.
\textsuperscript{114} The preamble to Part 1 of Chapter 5 in Schedule 3 of the City of Cape Town’s Municipal Planning By-Law describes this zoning as: ‘The single residential zonings are designed to provide locations for predominantly single-family dwelling houses in low- to medium-density neighbourhoods, with a safe and pleasant living environment. There are controlled opportunities for home employment, additional dwellings and low intensity mixed-use development on a single residential property. In recognition of the different socio-economic circumstances of the city there are two single residential zonings, one for conventional housing and one for incremental housing (where upgrading of informal settlements is encouraged).’ Item 21(c) in Schedule 3 of the City of Cape Town’s Municipal Planning By-Law specifically state that consent uses include ‘utility service’ and ‘rooftop base telecommunication station’. See, in general, J Van Wyk \textit{Planning Law} (3rd Ed, 2020) at 237–238.
\textsuperscript{115} The preamble to Part 1 of Chapter 11 in Schedule 3 of the City of Cape Town’s Municipal Planning By-Law describes this zoning as providing ‘for utility services such as electrical substations and water reservoirs, which may be supplied by a municipal, government or private agency; and makes provision for government or authority uses, such as prisons and military bases, that are not covered by another use or zoning category.’ Item 80(a) of Schedule 3 of the City of Cape Town’s Municipal Planning By-Law state that the ‘primary uses are utility service, authority use, rooftop base telecommunication station and freestanding base telecommunication station.’ (Emphasis added) See, in general, Van Wyk (note 113 above) at 235–236 (‘government purpose’).
\textsuperscript{116} \textit{Telkom SA} (note 25 above) at paras 4–7.
\textsuperscript{117} In terms of s 129(1A) of City of Cape Town’s Municipal Planning By-Law.
rezoned the property.\textsuperscript{118} This decision occasioned Telkom to launch a retaliatory application in the Western Cape Division of the High Court, Cape Town in which it challenged the constitutional validity of both the By-Law and Policy.\textsuperscript{119} Both the high court\textsuperscript{120} (per Andrews AJ) and the Supreme Court of Appeal\textsuperscript{121} (per Wallis JA) dismissed the application. It is against these orders that Telkom appealed to the Constitutional Court.

Jafta J, writing for a unanimous court,\textsuperscript{122} endorsed Wallis JA’s exposition\textsuperscript{123} of the jurisprudence on the legislative competence of local authorities as it pertains to municipal planning.\textsuperscript{124} He dismissed Telkom’s contention that municipal planning did not encompass the rapid deployment of telecommunication infrastructure\textsuperscript{125} as being diametrically opposed to the synthesised jurisprudence of both the Supreme Court of Appeal and the Constitutional Court on municipal planning. He summarised this position as follows:

> Our jurisprudence shows that it is municipalities alone which may exercise the power to zone and subdivide land. And the exercise of that power is insulated from interference by other spheres, even on appeal. The notion that these spheres could disregard municipal zoning schemes or bylaws giving effect to municipal planning and use land as they wish, would amount to a serious breach of the Constitution.\textsuperscript{126}

Jafta J then shifted his focus to consider the question of whether the non-consensual statutory servitude must be exercised in accordance with the city’s By-Law and Policy.\textsuperscript{127} Section 156(3) of the Constitution stands central to the determination of this question and states that ‘a by-law that conflicts with national or provincial legislation is invalid.’ However, this condemnation is rendered subject to s 151(1) of the Constitution, which states that the ability and rights of a local authority ‘to exercise its powers or perform its functions’\textsuperscript{128} may not be compromised by national or provincial government. He reasoned that, in applying these provisions to the facts of the dispute,

> the fact that telecommunications infrastructure is established on land creates an overlap between the functional areas of municipal planning and telecommunications which are located in different spheres of government. In accordance with our jurisprudence, the fact that Telkom is licensed to offer telecommunications services does not, without more, entitle it to exercise the rights in section 22(1) of the Act to the total disregard of municipal planning and zoning powers. The Act itself stipulates that the exercise of those rights is subject to compliance with applicable law which includes the impugned bylaw.\textsuperscript{129}

\textsuperscript{118} Telkom SA (note 25 above) at para 8.
\textsuperscript{119} Ibid at para 9.
\textsuperscript{120} Ibid at paras 10 and 11 and Telkom SA SOC Ltd v City of Cape Town [2018] ZAWCHC 53 at para 55.
\textsuperscript{121} Ibid at paras 12–18 and Telkom SA SOC Ltd v City of Cape Town 2020 (1) SA 514 (SCA) at para 55.
\textsuperscript{122} Khumalo J, Madlanga J, Majiedt J, Mhlantla J, Theron J, Victor AJ and Mathopho AJ.
\textsuperscript{123} Telkom SA SOC (note 121 above) at paras 16–29.
\textsuperscript{125} Ibid at para 21.
\textsuperscript{126} Ibid at para 29.
\textsuperscript{127} Ibid at paras 2 and 32.
\textsuperscript{129} Telkom SA (note 25 above) at para 37.
Based on this, Jafta J was able to conclude that no real conflict existed between the city’s powers or functions and the licensee’s non-consensual servitude that flows from national legislation.\textsuperscript{130} He therefore refused leave to appeal the judgment of the Supreme Court of Appeal\textsuperscript{131} and confirmed the order that the high court granted.\textsuperscript{132}

\textbf{D Reflection}

While an otherwise admirable effort, the majority’s disjointed reasoning in \textit{Link Africa} inarticulately utilised the peremptory property law principles to interpret the non-consensual servitude. Despite this, the persuasive force of the majority’s reasoning as it pertains to the effective use of the non-consensual servitude could only be enhanced with reference to external considerations that did not exist when the judgment was handed down. The Court held that the local authority was in no way prejudiced\textsuperscript{135} by the licensee’s practice of attaching the fibre optic cables to the existing sewage infrastructure because ‘the technology avoids the disruption and high costs associated with traditional road-digging.’\textsuperscript{134} The \textit{White Paper} lists the duplication of infrastructure as one of the salient challenges to the rapid deployment of ICT networks and facilities. This challenge is articulated in the following terms:

Currently roads, new buildings and other infrastructure projects are not required to take into account ICT infrastructure in their planning. As a result, although it may be more efficient to, for example, lay fibre when the road is being developed, this is not done. The result is an uncoordinated and inefficient approach to ICT infrastructure deployment, additional costs and delays in the deployment process. \textit{It also results in environmental degradation through either infrastructure duplication, or by repeatedly conducting processes with potential negative environmental impacts, such as digging and trenching}.\textsuperscript{135}

The Department of Communications and Digital Technologies therefore developed the principle that all networks and facilities must be deployed in an environmentally friendly manner in order to avoid the duplication of infrastructure wherever this is possible.\textsuperscript{136} This principle was crystallised into the following objectives: (a) to promote competition in the provision of high quality, innovative and affordable services by avoiding the needless duplication of infrastructure; (b) to reduce or eliminate inconvenience to the public and unnecessary damage to ‘aesthetics or amenity, to land, property, existing premises and infrastructure’; and (c) to promote the shared use of common publicly-owned facilities ‘to reduce deployment times and increase efficiency.’\textsuperscript{137} These issues are a prime example of the kinds of external considerations that a court could use to strengthen its reasoning on the full and normal use of the ancillary or baseline entitlements found in s 24 of the ECA.

Additionally, in holding that the non-consensual servitude does not amount to an arbitrary deprivation of property, the majority’s reasoning that this depends on the extent of

\begin{footnotes}
\footnote{\textsuperscript{130} Ibid at paras 33 and 36.}
\footnote{\textsuperscript{131} See Hofmeyr (note 81 above) at chapter 5-24–5-25.}
\footnote{\textsuperscript{132} \\textit{Telkom SA} (note 25 above) at para 46.}
\footnote{\textsuperscript{133} \\textit{Link Africa} (note 5 above) at para 172.}
\footnote{\textsuperscript{134} Ibid at para 170.}
\footnote{\textsuperscript{135} \textit{White Paper} (note 10 above) at 97 (emphasis added).}
\footnote{\textsuperscript{136} Ibid at 100.}
\footnote{\textsuperscript{137} Ibid at 99.}
\end{footnotes}
the intrusion cannot be faulted. For the most part, the installation of facilities – like fibre optic cables – constitutes small and insignificant intrusions onto private property. There are enough mechanisms and justifications in place in the laws of general application – in this case the ECA and the common law of servitudes – that authorise these intrusions to preclude a conclusion that the non-consensual servitude is either procedurally or substantively arbitrary. However, other facilities – like masts or exchange buildings – will constitute large and significant intrusions which would require more comprehensive mechanisms and substantial justifications to escape the conclusion that they are arbitrary. In this context, the majority’s reference to ways of necessity and the relocation of defined servitudes of way as a result of changed circumstances is misplaced. The majority’s reasoning is that compensation for large and significant intrusions caused by the non-consensual servitudes flowing from the ECA could be justified with reference to the compensation that must be paid for ways of necessity or the relocation of defined rights of way. In advancing this reasoning the majority made the same logical error that Jansen JA made in *Van Rensburg v Coetzee* when he erroneously equated the creation of a permanent way of necessity with a *sui generis* kind of expropriation that demands compensation. The creation of a permanent right of way of necessity by operation of law cannot be expropriatory in nature because there is no common-law authority for expropriation in South African law. Van der Walt suggests that a better explanation for the duty to compensate could be that the compensation is ‘intended to alleviate the burden that is imposed unilaterally on the servient owner by operation of law’ and as such saves the *ex lege* creation of the servitude from being an arbitrary deprivation of property for purposes of s 25(1) of the Constitution. While for purposes of *Linvestment CC*

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140 *FNB* (note 88 above) at para 100. See Muller et al (note 29 above) at 631–637; Van der Walt (note 138 above) at 245–264.


142 Ibid at paras 145–147 referring to *Linvestment CC v Hammersley* [2008] ZASCA 1, 2008 (3) SA 283 (SCA). See also *JJPC Brand Administrators v Lombard* [2019] ZASCA 55. S Van Staden *Ancillary rights in servitude law* (LLD dissertation, Stellenbosch University, 2015) 17 describes ‘changed circumstances’ as the subjective need of either the servient or dominant tenement owners to develop or exploit her land in a different way. Discussed in Muller (note 140 above) at 426–428. See further the Uniform Easement Relocation Act that was adopted in 2020 by the Uniform Law Commission in the United States of America.

143 Ibid at para 152.

144 *Van Rensburg* (note 141 above) at 676C–D.

145 Van der Walt (note 21 above) at 360.

Reflections on Link AfricA and Telkom

In v Hammersley\(^{147}\) the compensation was awarded for policy reasons to pay for all the attendant costs that the relocation would occasion. Furthermore, the ECA does not afford a licensee or the Independent Communications Authority of South Africa (‘Icasa’) the power to expropriate property or impose an obligation to pay compensation.\(^{148}\) The better position would have been for the majority to refer to s 8(1) of the Expropriation Act 63 of 1975, which states that it is possible to acquire existing and new servitudes by way of expropriation as an alternative to expropriating the entire immovable property. The majority could also have supplemented this point with the fact that s 5 of the Infrastructure Development Act 23 of 2014 specifically empowers the Presidential Infrastructure Coordination Commission to expropriate land for strategic integrated projects. To that end, Schedule 1 of the Infrastructure Development Act specifically mentions ‘Communication and information technology installations’ and Schedule 3 specifically includes a strategic integrated project ‘SIP 15: Expanding access to communication technology’. Moreover, the Minister of Public Works and Infrastructure recently promulgated additional strategic integrated projects\(^{149}\) which include one on digital infrastructure.

Finally, the majority’s reliance on the colloquial meaning of *civilitier modo* to connote the fact that a licensee must exercise the servitude ‘respectfully and with due caution’ fails to calibrate the servitutal relationship appropriately. While I should not be understood to be arguing against the use of plain language, my argument is simply that by relying on this convenient shorthand, the principle is divested of its nuance. In both *Link Africa* and *Telkom SA*, the Court’s reasoning on the powers and duties of local authorities could have benefitted greatly from this nuance. The Court undoubtedly correctly held that these powers and duties form part of the ‘applicable law’ to which licensees must have due regard when exercising the non-consensual servitude.\(^{150}\) Yet, it is unclear to me exactly how a licensee will demonstrate that it regarded those powers and duties with respect and due caution. The circumscribed factual matrix of *Telkom SA* presented the Court with an opportunity to complement *Link Africa* by employing the *civilitier* principle\(^{151}\) to ‘traverse new ground’.\(^{152}\) When held to its full meaning, the powers and duties of local authorities delimit the contours within which the *civilitier* exercise of the non-consensual servitude must take place. It does this by ensuring that the burden imposed by the non-consensual servitude and ancillary entitlements are properly authorised without ‘thwarting the purpose of the statute’\(^{153}\) and does not amount to more than what is needed. The calibration of this part of the servitutal relationship must principally be done with reference to the Spatial Planning and Land Use Management Act.

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\(^{147}\) [2008] ZASCA 1; 2008 (3) SA 28.

\(^{148}\) Bezuidenhout (note 146 above) at 239–244.

\(^{149}\) GN 812 in GG 43547 (24 July 2020).

\(^{150}\) *Link Africa* (note 5 above) at paras 185–188 and *Telkom SA* (note 25 above) at para 34.

\(^{151}\) Had it not been for one passing reference to the *civilitier* principle by Wallis JA in *Telkom SA* (note 121 above) at para 41 this principle would have been absent from the series of judgments.

\(^{152}\) *Telkom SA* (note 25 above) at para 20.

\(^{153}\) *Link Africa* (note 5 above) at para 189 and *Telkom SA* (note 25 above) at para 40.
16 of 2013 (‘SPLUMA’) because it contains crucial provisions about cooperation\textsuperscript{154} and efficient administrative processes.\textsuperscript{155} Both these issues are highlighted as challenges\textsuperscript{156} to and have been included as objectives\textsuperscript{157} for the rapid deployment of ICT infrastructure. Conceived of in this way, the civiliter exercise of the non-consensual servitude enlarges the procedural protections and substantive safeguards for owners and local authorities alike. It is then rather simple to demonstrate that due regard was had to these procedural protections and substantive safeguards – like taking ‘into account practical considerations about order and safety’\textsuperscript{158} and ‘the usual impact of the relevant infrastructure on the City and its environs; landscaping; and the protection of the heritage and the environment.’\textsuperscript{159}

IV THE WAY FORWARD

The hope of development and need for social and economic inclusion will intensify the drive for the rapid deployment of infrastructure by way of servitudes – not just in ICT, but also in energy,\textsuperscript{160} water,\textsuperscript{161} and transport.\textsuperscript{162} The ability of the judiciary to calibrate the servitutal relationship between licensees, owners and local authorities appropriately with reference to the peremptory property law principles in the common law of servitudes will be of paramount importance. The landmark judgments of the Constitutional Court in \textit{Link Africa} and \textit{Telkom SA} paved the way and prepared us well for the challenge that lies ahead. \textit{Link Africa} and \textit{Telkom SA} illustrate the importance of having a principled place to start when interpreting these non-consensual servitudes. In both cases this required an interpretation of the ECA and a distinct appreciation of its place within a single system of law. The non-consensual servitudes established in terms of s 22(1) of the ECA must be exercised with ‘due regard … to applicable law and the environmental policy of the Republic’ by licensees. In this article I have shown that the ‘applicable law’ referred to in s 22(2) of the ECA is the peremptory property law principles of the common law of servitudes. If these principles are applied sequentially, they ensure that the servitutal relationship is calibrated in a manner that respects and promotes the interests of licensees, owners and local authorities alike. Collectively these principles: (a) appreciate that overlapping rights cause deep tensions and that non-consensual servitudes must be interpreted with reference to external considerations; (b) afford non-consensual servitudes a restrictive interpretation that aligns with the \textit{in favorem libertatis} principle and in so doing ensures that an irreconcilable conflict is avoided between the ECA and the common law of servitudes; (c) afford a preference to licensees as far as it pertains to the clearly afforded ancillary

\textsuperscript{154} Sections 3(e), 7(d) and 7(e) of SPLUMA as read together with s 41 of the Constitution and the Intergovernmental Relations Framework Act 13 of 2005.

\textsuperscript{155} Sections 3(a), 5(1)(c), 6(1), 7(c) and 8(2)(c) of SPLUMA.

\textsuperscript{156} \textit{White Paper} (note 10 above) at 97–98.

\textsuperscript{157} Ibid at 99.

\textsuperscript{158} \textit{Link Africa} (note 5 above) at para 187.

\textsuperscript{159} \textit{Telkom SA} (note 25 above) at para 43 and \textit{Telkom SA} (note 121 above) para 52. More comprehensively articulated and illustrated in the City of Cape Town’s Telecommunication Mast Infrastructure Policy (2015) at 13–24.

\textsuperscript{160} NDP (note 1 above) at 140–153 and s 22(1) of the Electricity Regulation Act 4 of 2006. See Muller et al (note 29 above) at 397.


\textsuperscript{162} NDP (note 1 above) at 161–169 and Schedule 1 item 7(3) of the Legal Succession to the South African Transport Services Act 9 of 1989. See Muller et al (note 29 above) at 395.
rights or baseline entitlements; (d) ensure that the exercise of these non-consensual servitudes are animated through the civiliter principle – properly understood as exercising a servitude so that it does not impose an unreasonable burden on the servient owner; (e) rely on external considerations – found in policy and/or legislation – to facilitate a contextual delimitation of how these servitudes may be exercised by ensuring that they are properly authorised and do not amount to more than what is needed by licensees; (f) illustrate that the common law of servitudes is flexible and equitable enough to be interpreted in line with the ECA’s regulatory framework; and (g) articulate the procedural protections and substantive safeguards that prevent these non-consensual servitudes from amounting to arbitrary deprivations of property in terms of s 25(1) of the Constitution.

However, Link Africa and Telkom SA have only considered two of the eight interventions – access to trenches and elements of the approval of applications and permits – which the Department of Communications and Digital Technologies has identified as forming part of its multi-pronged approach to the rapid-deployment of ICT infrastructure. The calibration of these servitutal relationships will only become more complex as issues of fair competition; reasonable fees and charges for wayleaves; access to high sites for radio-based systems; the sharing of infrastructure; deployment in new developments; environmental, health, safety and security considerations; and the deployment in emergency situations arise.

Furthermore, the facts of both Link Africa and Telkom SA limit their precedential authority to the servitutal relationship between licensees and local authorities. As the drive for the rapid deployment of ICT infrastructure intensifies, the potential for conflict with owners will increase and the need to appropriately calibrate their servitutal relationship with licensees will become increasingly important.

163 White Paper (note 10 above) at 106.
164 Ibid at 102–105.
165 Ibid at 102 together with the application of the Competition Act 89 of 1998.
166 Ibid at 105.
167 Ibid at 105–106.
While laudable in many respects, the reasoning of the Constitutional Court in both *Link Africa* and *Telkom SA* is disjointed because it does not rely directly on the peremptory property law principles of the common law of servitudes to calibrate the servitutal relationship between licensees and local authorities. In my view, these principles provide the courts with a principled starting point to calibrate the servitutal relationship appropriately. These principles do not limit the powers of courts to engage in constitutional review, interpretation of legislation or the development of the common law.\textsuperscript{172} In fact, the starting point provided by these principles opens interpretive space for the courts to explore the complexities of the servitutal relationship and calibrate it with the requisite nuance. The purpose of these principles is to avoid the establishment of fragmented, parallel property systems – under the ECA and under the common law of servitudes, respectively – and to ensure maximum coherence of both sources of law with the principle of a single system of law.\textsuperscript{173}

\textsuperscript{172} Van der Walt (note 28 above) at 37.

\textsuperscript{173} Ibid at 67–68.
Constitutionally Transforming South Africa by Amalgamating Customary and Common Law: *Ramuhovhi*, the Proprietary Consequences of Marriage and Land as Property

SINDISO MNISI WEEKS

ABSTRACT: In this article, the cases of *Ramuhovhi and Others v President of the Republic of South Africa and Others* [2017] ZACC 41 and *Minister of Justice and Correctional Services v Ramuhovhi and Others* [2019] ZACC 44 form the departure point for analytical discussion of the proprietary consequences of marriage and their relationship to South African law’s conception of land as property under customary law. Beyond that, this substantive issue provides the backdrop for the article’s critical discussion of the possibility (and limitations) of fully establishing living customary law – that is, vernacular law – and its indigenous values, on its own terms under South Africa’s Constitution. The challenge the article confronts is that, in South Africa, customary law and common law currently exist as two more-or-less separate systems of law under a single Constitution. Consequently, vernacular law is presently constitutionally accommodated, rather than integrated, and is thus subject to the dominant nature of South African law’s form and culture resulting in a cultural and epistemic power or capital differential between the systems of customary and common law that needs to be addressed. As part of the solution, the article therefore canvasses the prospects of amalgamating customary and common law as a way of constitutionally transforming South African law and society as a whole. It argues that, in some key, albeit imperfect, ways, *Ramuhovhi I* (and, to a lesser extent, *Ramuhovhi II*) has demonstrated the feasibility of this amalgamation and has thus laid the groundwork for a future in which South Africa truly has the single (amalgamated) legal system first projected by the Constitutional Court in *Alexkor Ltd and Another v The Richtersveld Community and Others* [2003] ZACC 18.

KEYWORDS: constitutionalism, courts, indigenous law, legal culture, postcolonial, vernacularisation

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I INTRODUCTION

In the 2019 case of Minister of Justice and Correctional Services v Ramuhovhi and Others1 (‘Ramuhovhi II’), the Department of Justice applied for extension of the 24-month period that the Constitutional Court had previously granted it in which to remedy the injustice in the Recognition of Customary Marriages Act2 (‘RCMA’), which had been passed in 1998. Section 7(1) of the RCMA had provided that ‘[t]he proprietary consequences of a customary marriage entered into before the commencement of this Act [on 15 November 2021] continue to be governed by customary law’; as of 8 December 2008, when the Constitutional Court opined on the matter, this provision only applied to polygamous marriages. The Court dismissed the application and the order of the Court in Ramuhovhi and Others v President of the Republic of South Africa and Others3 (‘Ramuhovhi I’) continued to apply. In June 2021, the legislature finally amended the RCMA to regulate the proprietary consequences of customary marriages entered into before the commencement of the Act in accordance with the order handed down by the Court in Ramuhovhi I.

Ramuhovhi I came before the Constitutional Court in 2017 when the constitutionality of the section’s application to polygamous marriages was successfully challenged. The applicants were three of Mr Musenwa Joseph Netshituka’s biological children. His estate was the third respondent. The applicants argued that s 7(1) of the RCMA discriminated against and violated the dignity of women like their mothers (Ms Tshinakaho Netshituka and Ms Masindi Netshituka), who had been two of three customary wives married to Mr Netshituka prior to 1998. All three parents named above, plus Mr Netshituka’s third customary wife, Ms Diana Netshituka, were deceased at the time of the proceedings. The ‘proprietary consequences of a customary marriage’ that governed the deceased estate were described by Madlanga J as follows: ‘the parties are agreed that Venda customary law – this being the law at issue here – vests no rights of ownership or control over marital property in wives.’

The reason that the children of Mr Netshituka’s first and second customary wives had brought the complaint was that his fourth wife, Ms Munyadziwa Joyce Netshituka, with whom he had purported to conclude a civil marriage (which was later declared null and void by the Supreme Court of Appeal in 2011), claimed half ownership of the real property that was his primary asset and had been named in Mr Netshituka’s will (which the 2011 SCA decision declared valid) as the executrix of the estate. His children contested the validity of both s 7(1) of the RCMA and Ms Munyadziwa’s registered ownership of an undivided half share of the ‘immovable property upon which a business called the Why Not Shopping Centre is located’. The question before the Court, as Madlanga J expressed it was therefore: ‘does this customary law rule comport with our Constitution and the values it espouses?’

The Court agreed with the applicants’ assessment that the section was unconstitutional because it discriminated against the three previous wives. Writing on behalf of a unanimous court, Madlanga J observed:

No sooner is this equality of wives and husbands in customary marriages ushered in by section 6 [that provided for the equal status and capacity of the spouses] than it is denied – in section 7(1) – to

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1 Minister of Justice and Correctional Services v Ramuhovhi & Others [2019] ZACC 44, 2020 (3) BCLR 300 (CC).
2 Act 120 of 1998.
3 Ramuhovhi & Others v President of the Republic of South Africa & Others [2017] ZACC 41, 2018 (2) BCLR 217 (CC), 2018 (2) SA 1 (CC).
wives in pre-Act customary marriages. Of course, *Gumede* rescued wives in pre-Act monogamous customary marriages from this disquieting situation.

The last sentence highlighted that *Ramuhovhi I* was actually concluding the matter that the Court had left ‘unfinished’ when, in 2009 in *Gumede v President of the Republic of South Africa and Others*,⁴ it had found the same s 7(1) of the RCMA to be constitutionally invalid in so far as it extended to monogamous customary marriages predating the legislation. At that time, the Court had specifically excluded polygamous marriages in the following terms: ‘The order of constitutional invalidity in relation to s 7(1) of the Recognition Act is limited to monogamous marriages and should not concern polygamous relationships or their proprietary consequences.’⁵ It therefore excluded women such as the three Netshituka children, born of polygamous marriages, from the benefits of the Constitution’s protection that the Court had affirmed in *Gumede*. As Madlanga J put it in *Ramuhovhi I*: ‘*Gumede* had rescued wives in pre-Act monogamous customary marriages from this disquieting situation.’⁶ Thus, the Court in *Ramuhovhi I* summarised the situation:

In a sense this application is a sequel to *Gumede*. In that case, the *amicus curiae* (friend of the court) urged this Court to extend its declaration of invalidity to encompass pre-Act polygamous customary marriages. The Court declined to do so. What it said, instead, was that it would draw the Legislature’s attention to what appeared to be a lacuna. However, in the almost ten years since *Gumede*, the Legislature has not filled the gap. That explains how section 7(1) continues to govern pre-Act polygamous customary marriages.⁷

In light of that history, the legislature had already had significant opportunity to remedy the defect in the legislation but had failed to do so.

Yet, at the same time that the Court sought to give the applicants immediate relief,⁸ the Court gave Parliament one last opportunity. This was mainly because it recognised the complexity of the matter and the possibility of its omitting certain key considerations in single-handedly trying to address the problem.⁹ As the Court put it, ‘[t]he proposed relief traverses

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⁴ *Gumede v President of the Republic of South Africa & Others* [2008] ZACC 23, 2009 (3) BCLR 243 (CC), 2009 (3) SA 152 (CC). This case concerned a couple who were in a customary law union since 1968. The Natal Code of Zulu Law said that ‘the family head is the owner and has control over all the property in the family home.’ Section 7(1) of the RCMA, which provided for community of property, marriages concluded before 2000. In her claim for a half share of the joint estate, Mrs Gumede contended that the section was unconstitutional because, inter alia, it discriminated against women. The Constitutional Court confirmed the high court’s declaration of invalidity.

⁵ *Gumede* (note 4 above) at para 58.

⁶ *Ramuhovhi I* (note 3 above) at para 34.

⁷ Ibid at para 3.

⁸ Ibid at para 47: ‘What was said in *Gumede*, though, is still a strong indication that, in this matter as well, we must grant relief that significantly improves the situation of wives in pre-Act polygamous customary marriages. Their rights have been denied for far too long. There is an urgent need for effective redress.’ Concerning the objection to making its order retrospectively applicable, the Court said in para 58: ‘We must balance this against the need to provide adequate relief to the litigants before us and similarly placed people.’

⁹ *Ramuhovhi I* (note 3 above) at paras 48–50. In para 50, in particular, the Court explained: ‘I think it best to leave it to Parliament to finally decide how to regulate the proprietary regime of pre-Act polygamous customary marriages. I consider appropriate relief to be a suspension of the declaration of invalidity accompanied by interim relief. This twin-relief has the effect of granting immediate succour to the vulnerable group of wives in pre-Act customary marriages whilst also giving due deference to Parliament. In the event that Parliament finds the interim relief unacceptable, it is at liberty to undo it as soon as practically possible. Should Parliament fail to do anything during the period of suspension, the interim relief must continue to apply until changed by Parliament.’
terrain that is fraught with imponderables. I cannot discount the possibility that – despite the effort that has been made – someone may suffer harm not foreseen in this judgment.  It therefore allowed parties so affected to approach it for a variation of the order if it caused them unforeseen harm.  To my knowledge, no such claim has been brought.

As a temporary measure, to give the executive and legislature the time needed to pass a more permanent solution, the Court in Ramuhovhi I had ordered that the declaration of constitutional invalidity be suspended for 24 months, during which time the section would be replaced by the following provision:

(a) Wives and husbands will have joint and equal ownership and other rights to, and joint and equal rights of management and control over, marital property, and these rights shall be exercised as follows—

(i) in respect of all house property, by the husband and the wife of the house concerned, jointly and in the best interests of the family unit constituted by the house concerned; and

(ii) in respect of all family property, by the husband and all the wives, jointly and in the best interests of the whole family constituted by the various houses.

(b) Each spouse retains exclusive rights to her or his personal property.

The Court provided further that if Parliament did not ‘address the defect’ during the period of the declaration’s suspension, the Court’s order (as per the provisions in (a) and (b) above) would continue to apply. In other words, equal ownership between husbands and wives in terms of the Court’s provisions ‘a’ and ‘b’ above would apply even though no legislation had been passed to that effect at that stage.

With the suspension period due to end on 29 November 2019, the Minister of Justice brought an application on 15 October 2019 requesting a further extension of 12 months. With multiple opportunities having been provided by the Court and no perceptible sign that such an extension would reasonably result in a different outcome – that is, a legislative amendment as required by the Court’s finding in Ramuhovhi I – the Court in Ramuhovhi II, as stated above, denied the unopposed application. The Minister’s application was thus dismissed without costs and the Court’s prescript therefore continued to regulate pre-RCMA polygynous marriages until June 2021.

While there are many strands of interest in this pair of Ramuhovhi cases (such as the legislature’s lethargy when it comes to addressing the challenge of effectively regulating customary law), in this article, I focus on the proprietary consequences of marriage as discussed in Ramuhovhi I and their relationship to South African law’s conception of land as property under customary law. I use this substantive issue as the backdrop for discussion of the possibility (and limitations) of fully establishing living customary law – which I refer to as vernacular
law\textsuperscript{14} – and its indigenous values, on its own terms\textsuperscript{15} under South Africa’s Constitution. This argument is presented as part solution to the challenge of vernacular law’s present constitutional accommodation being subject to the dominant nature of South African law’s form and culture and there existing a cultural and epistemic ‘power’ or ‘capital’\textsuperscript{16} differential between the systems of customary and common law that needs to be addressed.

The article therefore canvasses the prospects of amalgamating customary and common law as a way of constitutionally transforming South African law and society as a whole. It argues that, in some key, albeit imperfect, ways, \textit{Ramuhovhi I} (and, to a lesser extent, \textit{Ramuhovhi II}) has demonstrated the feasibility thereof and thus laid the groundwork for a future in which South Africa truly has a single (amalgamated) legal system\textsuperscript{17} rather than two more-or-less separate systems of law under a single Constitution, which is the arrangement that currently exists.

\section{\textit{Ramuhovhi I}: Proprietary Consequences of Marriage and Land as Property}

The key question in \textit{Ramuhovhi I}, as the Court described it, was whether the customary law to which the polygamous wives were subject under s 7(1) of the RCMA – and its proprietary consequences – was consistent with the Constitution. As Madlanga J wrote:

\begin{quote}
Although, in some respects, ‘official’ customary law differs from ‘living’ customary law, it cannot be gainsaid that what rights of ownership wives enjoy at customary law are so attenuated as not to amount to much. Unsurprisingly, the parties are agreed that Venda customary law – this being the law at issue here – vests no rights of ownership or control over marital property in wives. The question then is: does that customary law rule comport with our Constitution and the values it espouses?\textsuperscript{18}
\end{quote}

Agreeing with the findings of the High Court of South Africa, Limpopo Local Division, Thohoyandou (High Court), the Court leaned heavily on the reasoning in \textit{Gumede}, highlighting the discriminatory impact of the RCMA’s distinction between women who married before and after the Act had recognised customary ‘unions’ as marriages.\textsuperscript{19}

In \textit{Ramuhovhi I} the Court emphasised that, it ‘is section 9(5) of the Constitution that decrees that discrimination on any of the grounds listed in section 9(3) is unfair unless shown to be fair.’\textsuperscript{20} The government respondents had duly made no attempt to show fairness of discrimination on the basis of gender and, while the deceased’s estate and fourth wife had

\textsuperscript{14} As explained in S Mnisi Weeks \textit{Access to Justice and Human Security: Cultural Contradictions in Rural South Africa} (2018), vernacular law more accurately captures the reality that ‘living customary law’ is, in fact, a hybridised form of law in much the same way that the languages that indigenous South Africans speak have integrated elements from other languages (including those brought by ‘settlers’ to form languages that are more functional and better suited for use in their ever-evolving day-to-day realities. In other words, living (customary) law is rightly termed vernacular law just as South Africans commonly refer to the local languages they speak as ‘the vernacular’.

\textsuperscript{15} A Claassens & G Budlender ‘Transformative Constitutionalism and Customary Law’ (2013) 6 \textit{Constitutional Court Review} 75.


\textsuperscript{17} See this aspiration as set out in \textit{Alexkor Ltd & Another v The Richtersveld Community & Others} [2003] ZACC 18, 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC) at para 51 (‘\textit{Alexkor}’).

\textsuperscript{18} \textit{Ramuhovhi I} (note 3 above) at para 1.

\textsuperscript{19} Ibid at paras 37–38.

\textsuperscript{20} Ibid at para 26.
objected to the arguments presented by the applicants, their protestations had not spoken to fairness.

Key to the Court’s reasoning on discrimination on the grounds of marital status was the consideration that ‘[t]he situation of wives in pre-Act polygamous customary marriages is one of lack of ownership and control of property within the marriage.’ As the Court in Gumede had found, in the words of Mosenek DCJ, ‘the affected wives in customary marriages are considered incapable or unfit to hold or manage property. They are expressly excluded from meaningful economic activity in the face of an active redefinition of gender roles in relation to income and property.’

In his findings in Gumede, Mosenek DCJ had quoted Langa DCJ’s words in Bhe v Khayelitsha Magistrate, as follows:

At a time when the patriarchal features of Roman-Dutch law were progressively being removed by legislation, customary law was robbed of its inherent capacity to evolve in keeping with the changing life of the people it served, particularly of women. Thus customary law as administered failed to respond creatively to new kinds of economic activity by women, different forms of property and household arrangements for women and men, and changing values concerning gender roles in society. The outcome has been formalisation and fossilisation of a system which by its nature should function in an active and dynamic manner.

Based thereon, the Court in Gumede had concluded, ‘Langa DCJ proceeded to hold that a rule of customary law that implies that women are not fit or competent to own and administer property violated their right to dignity and equality.’ The Court in Ramuhovhi I strongly agreed.

Faced with the question of whether there was an interpretation that could be applied in order to redeem s 7(1) of RCMA, the Court in Ramuhovhi I took a pragmatic approach and emphasised that s 7(4), in terms of which women could apply to have their share of the marital property secured by a court order, did not help women in pre-RCMA customary marriages:

The fact of not owning or having control over marital property renders wives in pre-Act polygamous marriages particularly vulnerable and at the mercy of husbands. They cannot be in an equal-bargaining footing for purposes of reaching agreement to make an approach to court in terms of section 7(4). In fact, some may even be cowed not to raise the issue at all. To ask rhetorically, how many husbands would readily give up their position of dominance? Worst of all, it does not require rocket science to realise that some – if not most – wives in these marriages may not even be aware of the existence of the provisions of section 7(4). Thus I think preponderantly wives have not managed to extricate themselves from their pre-Recognition Act woeful situation.

Thus, the Court agreed with the High Court that section 7(1) was constitutionally invalid because of how ‘odious’ its violation was in the way that it limited the rights women in polygamous marriages entered into before 1998 have to human dignity and not to be discriminated against unfairly.

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21 Ibid at para 37.
22 Gumede (note 4 above) at para 35.
24 Ibid at para 90.
25 Gumede (note 4 above) at para 35.
26 Ramuhovhi I (note 3 above) at para 42.
27 Ibid at para 45.
28 Ibid at para 43.
Nonetheless, the Court’s order varied from that of the High Court in notable terms: The interim relief that I propose making is one that best accords with the equality of spouses. It is that, pending the remedying of the legislative defect: a husband and his wives in pre-Act polygamous customary marriages must share equally in the right of ownership of, and other rights attaching to, family property, including the right of management and control of family property; and a husband and each of his wives in each of the marriages constituting the pre-Act polygamous customary marriages must have similar rights in respect of house property. This is a significant departure from the High Court's interim relief in terms of which the rights shared by wives with their husbands were only rights of management and control – not ownership – in respect of marital property.29

The Court in *Ramuhovhi I* thus ruled in favour of full equality between men and women in polygynous30 customary marriages.

In support of its reasoning, the Court in *Ramuhovhi I* quoted *Gumede* as follows:

> Whilst patriarchy has always been a feature of indigenous society, the written or codified rules of customary unions fostered a particularly crude and gendered form of inequality, which left women and children singularly marginalised and vulnerable. It is so that patriarchy has worldwide prevalence, yet in our case it was nurtured by fossilised rules and codes that displayed little or no understanding of the value system that animated the customary law of marriage. ... [D]uring colonial times, the great difficulty resided in the fact that customary law was entirely prevented from evolving and adapting as the changing circumstances of the communities required. It was recorded and enforced by those who neither practised it nor were bound by it. Those who were bound by customary law had no power to adapt it.31

As was the Court in *Gumede*, the Court in *Ramuhovhi I* was therefore clearly resistant to patriarchy’s colonially infused and persistent hold on customary law.

While, as shown above, the *Ramuhovhi I* case was a continuation of *Gumede*, it was also a continuation from *Bhe*. This became most evident in the Court’s discussion of the retrospectivity of its order, concerning which the Court held that ‘[i]t seems just and equitable, therefore, that the retrospective effect of the declaration of invalidity must be as extensive as possible but not affect estates that have been wound up or transfers that have taken effect’.32 Here, Madlanga J drew on *Bhe*, in which Langa DCJ had concluded that:

> What will accordingly be just and equitable is to limit the retrospectivity of the order so that the declaration of invalidity does not apply to any completed transfer to an heir who is *bona fide* in the sense of not being aware that the constitutional validity of the provision in question was being challenged. It is fair and just that all transfers of ownership obtained by an heir who was on notice ought not to be exempted.33

Yet, the Court in *Ramuhovhi I* added to its reasons for the extensive retrospectivity of its order’s application the fact that the customary context specifically warranted it, in particular, because of the multigenerational emphasis of customary law’s indigenous value system, thus in some

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29 Ibid at para 51.
30 Whereas polygamous refers to marriage in which one person has multiples spouses of any sex, polygynous refers more precisely to a marriage in which a man has multiple wives.
31 *Gumede* (note 4 above) at paras 17 and 20, as quoted in *Ramuhovhi I* (note 3 above) at para 1 fn 2.
32 *Ramuhovhi I* (note 3 above) at para 59.
33 *Bhe* (note 23 above) at para 127.
ways privileging the sub-family unit (defined by the ‘house’, or wife and children who primarily comprise it) and showing determination to ensure the perpetuity of its descendants thereby.\(^{34}\)

_**Bhe** has been extensively criticised,\(^ {35}\) in part, for its failure to sufficiently take into account the communal nature of family and house property ownership as distinct from individual property ownership, as well as its implications for the security of persons who rely on the communal home for a place to live or (as the intervening party, Ms Thokozani Thembekile Maphumulo, argued in _Ramuhovhi I_) fulfilment of their right to housing.\(^ {36}\) This was part of the essence of Ngcobo J’s minority judgment in that case.

_Ramuhovhi I_ made strides toward attending to the essence of those concerns\(^ {37}\) by observing:

> The termination of a customary marriage by whatever means has unique consequences insofar as marital property is concerned. … a house does not necessarily come to an end just because the wife whose marriage brought it into existence has died or has had her marriage terminated. A house is made up not just by the wife, but also by the children who are born into it. This must mean that, first, as a unit – and distinctly from other houses that, together with it, make up a polygamous relationship – that house has certain proprietary rights and interests. Needless to say, the most important asset that each house has is the home that its members occupy. Second, house property that accrued after the house had come into existence continues to exist and to attach to that house. Third, only members of that house have an entitlement to enjoy benefits that flow from the existence of the house property, including rights of inheritance to the house property. That must mean, for example, the family head cannot lawfully divest a house of its home and purport to bequeath it as an inheritance to members of another house.\(^ {38}\)

Based thereon, the Court concluded that ‘there is no need to limit the retrospectivity of this Court’s order in respect of house property to marriages not yet dissolved [as] [n]o disruption


\(^{38}\) _Ramuhovhi I_ (note 3 above) at para 60.
would arise purely from the fact of dissolution. Something more than dissolution of the customary marriage would have to occur in order to strip a ‘house’ of its property and, thus, for family falling under such ‘house’ to lose their rights in property associated with it. Once established, a ‘house’ technically continues to exist indefinitely so long as there remain living members (whether wife, children or more distant descendants) who fall under it – whether biologically or through customary modes of ‘adoption’.

In its considerations of the right solution to the problem of the proprietary consequences of polygynous customary marriages, the Court therefore attempted to centre the importance of indigenous values for their adherents. Furthermore, in its recognition of the import of the home as the most essential asset possessed by ‘house’ members in customary families and communities, it agreed with its sentiments in a landmark 2018 decision on land rights, *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another (Mdumiseni Dlamini and Another as amici curiae)*, in which Petse AJ (on behalf of a unanimous court) had opened:

> The statement by Frantz Fanon in his book titled ‘The Wretched of the Earth’ is, in the context of this case, apt. It neatly sums up what lies at the core of this application. He said that ‘[f]or a colonised people the most essential value, because the most concrete, is first and foremost the land: the land which will bring them bread and, above all, dignity’. Thus, strip someone of their source of livelihood, and you strip them of their dignity too.

This was a value that the *Bhe* Court had appreciated, yet without appropriately dwelling on the full context in which customary communities live, in which women are not only wives and children but also grandchildren, sisters, cousins, aunts, nieces, and grandmothers – all depending on ‘family’ property for their livelihood, survival and thus dignity. In his dissent, Ngcobo J had sought to address this imbalance by highlighting the fundamental distinction between individual and collective ownership of (‘family’) property. Moreover, he had sought to do so without downplaying the crucial importance of the fact that successional issues do not necessarily revolve around ownership but collective occupation, use and access to property, thus ‘bearing in mind the interests of minor children and other dependants of the deceased family head’.

By contrast with the majority in *Bhe*, perhaps because specifically presented with a more complex (and less urban-based) family system in this case, the *Ramuhovhi I* Court took seriously the various configurations of customary family and property. The Court therefore spoke specifically to ‘family’ property in an attentive way that the *Bhe* Court had not done by adding to its findings on ‘house’ property that:

> With regard to family property, the family head does not only enjoy the right of ownership and control of family property, he has a corresponding obligation to use the family property for the benefit of each house and its members. Each of the houses constituted by the marriages of the various wives thus has an entitlement to the family property. This endures even if there is no longer a wife in a given house; that is, post-dissolution.

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39 Ibid at para 61.
40 *Maledu & Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd & Another (Mdumiseni Dlamini & Another as amici curiae)* [2018] ZACC 41, 2019 (1) BCLR 53 (CC), 2019 (2) SA 1 (CC).
41 Ibid at para 1.
42 *Bhe* (note 23 above) at para 164.
43 Ibid at para 139.
44 *Ramuhovhi I* (note 3 above) at para 62.
In other words, the Ramuhovhi I Court confronted the nuanced complexity of vernacular law and the social and proprietary relations that exist in terms of it in a way the Bhe majority had seemed hesitant – and had not been forced – to do.

To be clear, my argument here is certainly not that the decision in Ramuhovhi I is perfect. The judgment certainly has many weaknesses. For a start, it takes a single author’s say-so in an academic text as authority on the content of vernacular law when it should rather have invested more into explicitly weighing this scholar’s account of the living law against the testimony received in the case on whether their particular living law’s content is the same as that of the communities studied by Professor Bekker. So far as the reader of the Ramuhovhi I judgment can tell, it did not even occur to the Court to ask this important question. Incidentally, this clarity and investment by courts in grasping the more localised particularities of vernacular law’s content is crucial for the purposes of ensuring equality between different systems of vernacular law and preventing the hegemony of more widely used systems of vernacular law in the amalgamation argued for below. Another weakness in Ramuhovhi I is that the Court appears to give no consideration to the question of citational justice: that is, whether, well into post-apartheid South Africa, it ought to be relying on a white person as the sole supposed authority on a substantive point of vernacular law without at least simultaneously considering (or even just referencing) the diverse body of scholarship that exists on the subject of living law.

A further limitation in the decision is that, as discussed with respect to the virtues of the normative repertoire dynamic in living law below, the Court’s analysis appears to remain embedded within the fixity of the dominant civil law culture of precedent and its orientation toward emphasising the universality of normative principles over the pluriversality and situationality of same. This means that, even in its recognition of living law values such as provision for multiple generations, it did so rather perfunctorily. It did not robustly situate its decision in the corresponding worldview of ubuntu/botho, in terms of which discussion of the ‘house’ as ‘home’ would extend far beyond conceiving of it as merely jointly patrilineal and matrilineal family property or a set of resources on which the descendants collectively depend.

Nonetheless, I do argue that the Ramuhovhi I judgment presented strengths such as dividing individual and family property, as well as distinguishing house property (that is, predominantly

45 Ibid at paras 60–62 cite to Bekker (note 34 above) at 198. With reference to personal property, at para 63, the Court in Ramuhovhi I also cites the work of TW Bennett Customary Law in South Africa (2004) at 254.

46 The other academic authority on customary law quoted shortly after Prof Bekker is Prof Thomas Bennett, thus making two white men the academics turned to by the Court in this decision. Had the decision been issued in 1996 or even 2006, this might be understandable, if not justifiable, because of the relative paucity of scholars (let alone black scholars) writing on customary law at the time. Yet, in 2017, it seems all but unforgivable.

47 A Escobar Pluriversal Politics: The Real and the Possible (2020).

matrilineally-defined family assets) from family property (that is, predominantly patrilineally-defined family assets). It was also strong in so far as it reached the correct conclusion by allowing the daughters to recover and inherit their deceased mothers’ estates even after their father had purported to partly dispose of them to his civil wife at the expense of the polygynous wives he had married under apartheid’s official customary law. Further still, it corrected the demonstrated faults and omissions (that is, considering customary law through a common law lens and not providing for polygynous families) in the Bhe and Gumede judgments, respectively.

Presented with similar complexity pertaining to social and proprietary relations under living law, the Bhe Court had found that it was unable to enter into such nuances as Ramuhovhi I attempted to unravel as described above. For its reasons, the Bhe Court did not feel that it had enough information on the changes that were taking place in customary communities on the ground to decide as to the best way to develop customary law. It, therefore, elected to ‘develop’ customary law by means of (temporarily) replacing its content with modified content from a civil law statute, which the legislature then made permanent through a ‘customary law’ statute. The Ramuhovhi I Court identified the nested systems of social organisation relevant to the conflict before it that exist in terms of vernacular law and their corresponding rights to occupy, use, access as well as manage and control real property or, more specifically, land as property. It then planned for how to at least try to, honour the constitutional demand that all parties have equal rights by appealing to the values and norms that exist within customary law itself, thus using academic customary law’s content and living law’s values as the primary resource from which to derive solutions on how to strike a balance between custom and the Constitution.

In my view this is meaningful progress on the part of the Court, which has steadily been growing in its confidence and competence in dealing with customary law cases. Yet, the Court remains largely locked in an imaginary that sees customary and civil law as almost entirely separate (or otherwise sees common law as the primary source from which customary law content’s redemptive development is to come). Such a view of customary and civil/common law is inconsistent with the Court’s own professed interpretation of the Constitution’s vision of a unitary system of law and may not be as necessary and unavoidable as the Court and most people seem to think. Put differently, it is possible that the amalgamation of customary and common law is not as unthinkable – or, more importantly, impossible – as has been assumed. Therefore, against the backdrop of Ramuhovhi I and II, the rest of this article contemplates the possibilities that presently appear to be outside of the Constitutional Court’s plausibility framework but perhaps should not be.


50 Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009. The legislature’s adoption of the order handed down by the Court in Ramuhovhi I (note 3 above) as its amendment of the RCMA in June 2021 was therefore a repeat action in so far as the legislature had struggled to develop a solution independently of litigation and the Court had thus had to undertake the challenging work of parsing the sometimes competing evidence to develop a workable policy solution for families living under vernacular law. The argument here is that, with more experience under its belt and following much scholarly criticism and debate over the decision handed down in Bhe (note 23 above), the Court in Ramuhovhi I undertook that task of discernment with greater care and attention to living customary law’s areas of uniqueness than had the majority in Bhe.

51 Examples of significant improvements on Bhe (note 23 above) can be seen in Shilubana & Others v Nwamitwa [2008] ZACC 9, 2008 (9) BCLR 914 (CC), 2009 (2) SA 66 (CC) and Mayelane v Ngwenyama & Another [2013] ZACC 14, 2013 (4) SA 415 (CC), 2013 (8) BCLR 918 (CC).
III THEORETICAL FRAMEWORK

The place to start in thinking about ‘harmonising’ or ‘amalgamating’ customary law with the common law is to understand that this is not fundamentally a new or particularly radical idea. Firstly, it is by no means new to think of the common law and customary law as being of a similar nature. The Austrian legal theorist and Professor of Roman Law, Eugene Ehrlich (who lived in 1862–1922), argued that the law, in its propositions, cannot capture the entire body of norms constituting it for, even as soon as the living law is codified, the practice moves on and is (in some way) immediately at variance with the written law. As a consequence, Ehrlich argued for a view of law that refers to sources beyond statutes and precedents, and advocated an approach to the ascertainment of law that looks to that which the institutional law has ignored and even censured, determined by ‘direct observation of life’. This is what customary law scholars argue today. In essence, even Ehrlich understood that the common law is effectively Euro-American customary law. By the same token, then, so-called living customary law – that is, vernacular law – is effectively African common law.

Secondly, there is little novelty in thinking about the common law and customary law together, as being very deeply entwined in South African law. Martin Chanock’s 2001 treatise, The Making of South African Legal Culture, 1902-1936: Fear, Favour and Prejudice, systematically shows how what we refer to as ‘the common law’ and (official) ‘customary law’ were actually created in tandem. Both are products of the social imagination and agenda of the regime of the time. Thus, Chanock actually describes ‘the common law’ as ‘Common Law A’ and ‘customary law’ as ‘Common Law B’. He therefore argues that customary law – and he does not distinguish between official and living – is a product of the same legal culture as the common law: ‘customary law cannot be understood without its white “other” because customary law and the common law “were mutually constructed as mirror images of each other.”

In sum, therefore, it is somewhat artificial to think of (especially official) customary law and common law as separate beasts because they are deeply conjoined by the history of their origins as part of the making of racist South Africa in and through its laws. When the Constitutional Court describes the Constitution as ‘the umbrella of the one controlling law’ to which all others are subject and ‘one supreme law, which lays down a common narrative platform’, declaring that customary law and common law are ‘united in diversity’ as it did in Gumede, there is a sense in which it sounds as if what is being proposed is more radical and transformative than it actually is. That is because the separation and diversity between these forms of law is actually arguably quite limited. They have always shared a ‘common narrative platform’; it is the platform’s change from colonialism and apartheid (or colonial–apartheid) to constitutional democracy that is the variable here.

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53 Ibid at 493–495, 504.
54 M Chanock (2001) at 35.
56 Gumede (note 4 above) at para 22.
57 Ibid at para 1.
58 Ibid at para 22.
59 Ibid at para 1.
But then, why does harmonisation and, all the more so, amalgamation feel like such a daunting task? Most of the difficulty is political. Put differently, as is the case with trying to address any ‘wicked’, ‘emergent’ problems, the ‘adaptive’ challenge is greater than the ‘technical’ challenge. Hence, we all are accustomed to thinking of customary and common law as more separate and different than they actually are. Rhetorically, they have come to occupy very divergent imaginative spaces. That was a core part of the project of apartheid in much the same way that we have been socialised to think of racial differences as real, grounded in biology, when in fact they are socially constructed. Therefore, it is a difficult conversation to start and extends far beyond people’s plausibility frameworks to suggest that the two could conceivably be unified into a single legal system.

However, to say that the political challenge is greater than the technical challenge is not to say that there are no technical challenges worth mentioning because there are legitimate questions about how to practically unite these two forms of law. In fact, to suggest that political and technical challenges are always entirely separate is itself misleading and erroneous because these are mutually reinforcing challenges. That said, it may be that the technical challenges are eminently surmountable if only we can overcome the adaptive challenge.

A The technical challenge: what forms could amalgamation take?

Before proceeding, it is worth clarifying some terms, especially as relates to the distinction between ‘harmonisation’ and ‘amalgamation’. Harmonisation refers to bringing the two systems together and integrating them with one another without joining them into a single entity – keeping them separate under the umbrella of the Constitution. One could therefore say that harmonisation is what we already have, as demonstrated in Ramuhovhi I. Amalgamation is used to refer to bringing them together into a single form of law so that they are not regarded or treated separately. Part of the inspiration for this approach can be found in the decision in Alexkor, wherein the Constitutional Court first affirmed that customary law was a legitimate component of the South African legal order, not subordinate to the common law but similarly subject to the Constitution. In this case, the Court then stated: ‘in the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.’

In his Master’s thesis in anthropology completed at Yale University in 1934, Zacharia Keodireleng Matthews (who would later become the first black man to be appointed as a law professor in South Africa) presented three possible fates of ‘Native Law’ in South Africa’s 1960’s.
future.\footnote{Matthews ibid at 347} First, he considered the possibility of ‘the complete disappearance of Native Law and its replacement by European law’.\footnote{Matthews ibid at 352} Second, he described the possibility that ‘Native Law might develop “as a separate substantive system of jurisprudence”’ (which ‘parallel development’ track he also said was a slim possibility because of the strength of Roman-Dutch law as the law of the ‘dominant group’).\footnote{Claassens & Budlender (note 15 above) at 102–103; and Matthews ibid at 352.} Then, third, he envisioned customary law’s ‘gradual assimilation to European law so that it will contribute its quota to what will ultimately be called not Roman Dutch law nor Native law, but South African law’.\footnote{Matthews ibid at 354.} Aninka Claassens and Geoff Budlender write that ‘[i]n his view, this was the only viable option for the future.’\footnote{Claassens & Budlender (note 15 above) at 103.} In the present journal in 2013, the two agreed with Matthews’ assessment. In this article, I use Matthews’ breakdown as a springboard for clarifying the distinction between harmonisation and amalgamation (Matthews’ option 3)\footnote{Claassens & Budlender (note 15 above) at 103.} and for, ultimately, attempting to independently articulate a transformative vision for equitable amalgamation under South Africa’s Constitution \textit{sans} subordination of customary law to the common law as the presumed dominant partner.

1 \textit{Customary law ceases to exist}

Matthews’ three part typology is somewhat confounded by Ehrlich’s claim that there can never be a perfect union between living law and formal law since Ehrlich observes that, as soon as customary law is captured in legislation or precedent, it moves on in people’s real lives or their lived experiences.\footnote{Ehrlich (note 52 above) at 488.} If Ehrlich is correct, then, firstly, option one largely falls away as a possibility because only the official version of ‘Native Law’ could possibly disappear but the living version would always exist, even if its content were to change radically or if it were to absorb much of ‘European law’ into its content. Indeed, as Jack Simons (1968) later describes, Matthews served on a sub-committee of the Native Representative Council (with three other councillors named Sakwe, Champion and Xiniwe) which reported in 1943 that ‘judicial segregation violates the principle of equality before the law, [and] implies that Native life is static whereas in point of fact it is gradually becoming integrated with the general life of the country’\footnote{HJ Simons (1968) \textit{African Women: Their Legal Status in South Africa} (1968) at 61.} It therefore seems that Matthews clearly recognised the implausibility of vernacular law (that is, living customary law in society) ceasing to exist rather than organically amalgamating with the rest of South African law and society as both naturally evolved.

\begin{thebibliography}{9}
\bibitem{66} The discussion of Matthews’ thesis here is based on both the original text and the discussion in Claassens & Budlender (note 15 above); however, the emphasis in the critical discussion here is placed on Claassens & Budlender’s discussion as a means of continuing the conversation these authors began in the present journal. See ZK Matthews \textit{Bantu Law and Western Civilization In South Africa: A Study in the Clash of Culture} (1934), available at: http://uir.unisa.ac.za/handle/10500/5046
\bibitem{67} Matthews ibid at 347.
\bibitem{68} Claassens & Budlender (note 15 above) at 102–103; and Matthews ibid at 352.
\bibitem{69} Matthews ibid at 354.
\bibitem{70} Claassens & Budlender (note 15 above) at 103.
\bibitem{71} Of course, Matthews’ arguments and breakdown have been discussed by other scholars since then. See, for example, M Pieterse ‘It’s a “Black thing”: Upholding Culture and Customary Law in a Society Founded on Non-Racialism’ (2001) 17 \textit{South African Journal on Human Rights} 364; and J Bekker & G Van Niekerk ‘Gumede \textit{v} President of the Republic of South Africa: Harmonisation, or the Creation of New Marriage Laws in South Africa? Case Note’ (2009) 24 \textit{SA Public Law} 206. My focus on Matthews is partly to emphasise the historical embeddedness of the arguments around harmonisation and amalgamation, and partly to build on the more recent discussion of these ideas in Claassens & Budlender (2013)(note 15 above) in the present journal.
\bibitem{72} Ehrlich (note 52 above) at 488.
\bibitem{73} HJ Simons (1968) \textit{African Women: Their Legal Status in South Africa} (1968) at 61.
\end{thebibliography}
This fact of living law’s organically integratively evolutionary nature lies at the very core of the distinction often made – and now mostly accepted by the Constitutional Court as shown above – between ‘living customary law’ and ‘official customary law’. Hence, in my view, the term ‘living customary law’ is sometimes erroneously used because it should really only refer to customary law as it operates outside of formal legal institutions. What the Constitutional Court sometimes refers to as ‘indigenous law’ or ‘living customary law’, once it has been absorbed into the annals of law that are controlled by formal legal institutions (that is, legislation and court precedent), therefore really ceases to be living customary law or what I have termed vernacular law. Just as Ehrlich intimated, as quoted above, by definition, living law cannot be contained in aspirationally clear, specific and consistently applicable texts such as written legal sources.\textsuperscript{74} It is too dynamic for that. Hence, even vernacular law that has been embraced or accepted by courts or the legislature – or, further still, recognised and then ‘developed’ by courts or the legislature in accordance with the Constitution – must, in essence, be regarded as official customary law. This is true even if, by some measure, its content is consistent with the living law that can be found (by means of ‘observation’) being practised outside of the corridors of legal power.

By the same token, official customary law that is absorbed and integrated into vernacular law, because of living law’s very nature, cannot remain static and must therefore develop some dynamism (whether in its interpretation or application) that would render it no longer official but rather living. Furthermore, this recognition is an important dimension of appreciating that vernacular law is porous and will certainly absorb normative influences from outside of its own setting, even if what becomes of those influences is that they are rendered unrecognisable when compared with their original state.\textsuperscript{75}

As it happens, on this point that ‘European law’ principles infiltrate living law, Chanock observes that the elements of customary law that survive and are not displaced or replaced by common law norms and values are those relating to kinship, marriage, children and such. State law principles concerning contract, buying and selling, mercantile, etc. were integrated with relative ease, though colonial authorities did not want members of customary communities to become freely or equitably integrated into the economy.\textsuperscript{76} In other words, the customary normative aspects that endure mainly concern family. This, as Rosalie Kingwill observes, may be because they are so personal in nature.\textsuperscript{77} The latter, then, certainly do not cease to exist – only be adapted to evolving social, political and economic conditions.

2 Customary law develops as separate system of law

Concerning the second scenario that Matthews identifies as plausible, the Constitution’s mandate to develop both common law and customary law has brought a new vigour to state investment in the development of customary law.\textsuperscript{78} Nonetheless, it seems fair to say that customary law has not developed into a wholly independent and substantive system any more than what already existed on the ground has ceased to exist or evolve as before. This is especially true in the sense that, within the parameters of state law in which official customary law exists,
there has been limited development and it would be overly generous to call official customary law ‘a separate substantive system of jurisprudence’ that has been developed in parallel with the common law.

3 Customary law is united with common law

In the third possibility Matthews presents (amalgamation), it is striking that he envisions customary law integrating into the common law, rather than the other way round – even as he imagines them forming a new, unified body of law. Again, this would seem to be grounded in his belief that the dominance of the group that governs in terms of the common law is too great and that customary communities are becoming integrated into this dominant system, not vice versa. Taken to its extreme, Matthews’ assumption therefore amounts to acceptance that the argument for unification of laws is implicitly an argument for the prevalence of the common law as the foundation upon which the single South African law would be built.

Yet, this assumption is confounded by an extension of the reality named above in reliance on Ehrlich’s findings – the fact that there is really no ‘living law’ (singular), only ‘living laws’ (plural). Customary law is inherently pluralistic. In a sense, therefore, the mention of especially living customary law should always be read as referencing living customary laws – that is, multiple expressions of vernacular law (whether you consider these expressions to be akin to accents, dialects or languages in their own right). Hence, the second and third possibilities Matthews presents – that is, the full, separate development of (official) customary law and customary law’s full integration into a common body of state law – are troubled by a single enduring challenge. Namely, they would both naturally co-exist with vernacular law because it is most likely that the state law would never wholly meet the needs of people on the ground, if only because it is so far removed and evolves relatively slowly.

Given the enduring liveliness of the study of the relationship between law and society, it seems that there may be no place in the world that has succeeded at making the law unitary. Thus, while socio-legal scholars certainly recognise state law’s claims of dominance and exclusive normative authority, they continue to show how the law’s grand claims are overstated given its ‘highly circumscribed ability to control behaviour’. In reality, state-issued law is constantly in competition, under contestation, negotiation and rejection, and being reinterpreted, vernacularised, subverted, undermined, ignored or rendered outright invisible, invalid and

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79 This answers one of the questions posed by K O’Regan ‘Tradition and Modernity: Adjudicating a Constitutional Paradox’ (2013) 6 Constitutional Court Review 105, 125.


81 Illustration of this point can be seen in S Mnisi Weeks ‘Securing Women’s Property Inheritance in the Context of Plurality: Negotiations of Law and Authority in Mbuzini Customary Courts and Beyond’ (2011) Acta Juridica 14.

ineffectual, by all sorts of alternate authorities, institutions, and actors (both those recognised by law as being legitimate and those the state explicitly declares illegal). This teaches us that the law (understood more holistically than that which devolves from ‘the sovereign’) is never unitary, and it is these dynamic manifestations of law that Ehrlich would say need to be identified by means of ‘direct observation of life’. 

To be clear, then, because of the inherent nature of living law as living outside of legal institutions, discussion of an amalgam is in fact discussion of a single official South African law that draws to varying degrees from living law values and rules found in customary and common law in society. In other words, in practical terms, this unified law is institutionally-bound, even as it is informed and inspired by the actions and agency of ordinary people and how they are choosing to live their lives out in the world. It is in its efficacy, in this sense, that I celebrated Ramuhovhi I above. Yet, as I noted, the decision left untouched a set of practical possibilities that I think are worthy of exploration, if not adoption.

What form should amalgamated official law take then in practical terms? There are at least three possibilities. The first possibility would be to retain the choice of law departure point that currently prevails in South Africa but make both options (that is, common and customary law content) generally applicable to everyone. The second would be to retain choice of law but have the common law draw in principles from customary law to make the common law more African in its content until perhaps the two forms of law are essentially unified. The third possibility would be to do away with choice of law altogether and merge customary law and common law content outright, thus saying we have only one law and all courts must apply the same. While there are variances in the degrees to which the three options draw upon customary law, not mentioning the primary basis for political differences on the desirability of amalgamation, there are technical challenges embedded in all steps as well. I turn to discussing these next.

B Debates over technical challenges to unifying customary and common law

Readers will remember that what we are discussing when referring to amalgamation is the integration of official law by taking three possible steps – possibly in a gradual fashion. The first step might be to retain the choice of law, which is the prevailing departure point, but

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84 Ehrlich (note 52 above) at 493–495, 504.

85 Again, this answers one of the questions posed by O'Regan (note 79 above) at 125.

extend both common and customary law coverage to all South Africans so that all have the same choices available. The second step would continue with retention of choice of law but engage the common law in transformation by means of drawing in principles from customary law to progressively Africanise common law’s content until customary and common law were unified, thus leading to the final step. The third step would be to eliminate choice of law altogether and have all courts apply the same unified version of common and customary law, called South African law.

The first step is riddled with challenges around the sheer diversity of expressions of customary law. Thus some basis would need to be set on which – amidst customary law’s then being a law of general applicability – persons could pick a specific localised iteration of it (vernacular law) and compelling reasons for applying that iteration over another expression of vernacular law in court in the given case (with that living law thereby becoming official customary law). Perhaps the averting party’s mere belief that the developing practice in a particular locale of which they are aware is a more morally compelling expression of South Africa’s shared constitutional values would suffice.

However, to embrace that kind of choice of law system would require a radical shift in plausibility frameworks because such would quite likely be seen as ‘forum shopping’. ‘Forum shopping’ is the movement done by people between forums (or authoritative legal audiences) that observe different legal systems; this ‘shopping’ is done based on the individual parties’ determinations of what will yield the best outcome in their particular case at that time. Yet, this practice is frowned upon in formalistic legal systems like South Africa’s, attracting such disdain as is often expressed by resort to the speculation that something would ‘open the floodgates’.

The second step is challenged by similar concerns as the first. Which vernacular law do you infuse into the common law in any single case? This, especially considering that, as Kirby P of the Court of Appeal in Botswana in *Ramantele v Mmusi and Others* appropriately observed, ‘it will seldom be an easy task for the court to identify a firm and inflexible rule of customary law for the purpose of deciding upon its constitutionality or enforceability’. How do you find that vernacular law and choose it?

Even if you say that most communities observing customary law in South Africa observe some core, shared values and norms, is it correct to unify common law with a single expression of vernacular law? That is, what about the minority groups who do not share the majority’s vernacular law norms and values? One must also accept that, if such a process would be undertaken gradually through the courts, it would take a very long time to transform the common law. Furthermore, as already shown by Dennis Davis and Karl Klare, this depends on

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87 ‘Von Benda-Beckmann (note 83 above) at 137. Von Benda-Beckmann writes at 142: ‘The state courts are an alternative to dispute processing within the villages. Through their mere availability, they form a threat to the authority of village institutions… [and] the courts are by no means only a theoretical alternative. Villagers regularly employ courts in their forum shopping, thus demonstrating the relativity of village dispute settlement’. For discussion of this phenomenon’s history in South Africa, see S Mnis Wekes (note 81 above).

a communal will on the South African bench that presently seems largely wanting in practice, especially when it comes to issues of ‘economic distribution’.89

Since the first and second options could be said to be more harmonisation than amalgamation in its fullest sense, the rest of my discussion in this article focuses on the third option. However, it is worth reiterating that the first two options might be reasonable, graduated steps to be taken sequentially toward the third. Nevertheless, one should not lose sight of the contrast between the degrees to which the three options draw upon customary law in particular, which is what grounds the political and adaptive challenge of amalgamating the common law and customary law to form a single South African law, to which I will return in a later part of this article.

1 Ascertaining the content of vernacular law for amalgamation

Evidently, based on the above discussion of the technical challenges presented by the first and second options, the third step is bedevilled by the same concerns as the first two. Even if one jumped ahead and sought to amalgamate the common law and official customary law through a legislative process initially led by the South African Law Reform Commission, these myriad questions would need to be answered first. This therefore does not sound very hopeful. However, there is hope for amalgamation in the simple fact of what the Constitutional Court has achieved thus far.

While previous benches of the Constitutional Court had all struggled with this question,90 Shilubana was the first to articulate a really clear test for determining the content of customary law.91 Yet it is worth going over what was established at least in the first customary law case to come before the Constitutional Court: Alexkor. In that case, the Court first recognised the difficulty of ascertaining customary law’s principles, but then concluded that the meaning of customary law in the Constitution included living law.92 The Court then settled the question of the applicability of subsection 8(3)93 to customary law in the same way that it applies to the common law, as in section 39(2): that is, applying customary law directly between individuals and corporations and subjecting it to development by courts when found to be in conflict with rights in the Bill of Rights. Finally, the Court acknowledged that customary law ‘is a system of law that has its own values and norms.’94

In Shilubana, the Court outlined a three-part test for ascertaining the content of customary law and developing it as necessary. First, the content of customary law must be ascertained from both the past and present usage of the specific community concerned in any one case; it must be studied in its historical and current context. Second, where the content is under dispute, evidence of the present practice must be presented by the parties and the courts must acknowledge developments within that community, if they have occurred, and give effect to them in as far as it is possible to do so without compromising rights.95 Third, while courts should first defer to the developments by customary communities, they must also not shy away

89 Davis & Klare (note 86 above) at 413–415.
90 Alexkor (note 17 above), Bhe (note 23 above) and, to a limited extent, Gumede (note 4 above).
91 Shilubana (note 51 above).
92 Ibid at paras 52–54. Also see discussion of this ‘paradox’ in O’Regan (note 79 above) at 122–125.
93 Refer to Himonga & Bosch (note 62 above) for a discussion of the question of the direct or indirect applicability of the Bill of Rights to customary law in light of the phrasing of section 8 in relation to that of subsection 39(2) of the Constitution.
94 Shilubana (note 51 above) at para 53.
95 Ibid at paras 44–46, 49.
from developing the customary law in order to ensure ‘the continuing effective operation of the law.’ Courts should thus pay particular attention to the fact that ‘[t]he need for flexibility and the imperative to facilitate development must be balanced against the value of legal certainty, respect for vested rights, and the protection of constitutional rights.’

This formed an important basis for the decision that was then made by the Court in *Mayelane*, wherein the Court solicited additional evidence after the hearing and received from the parties affidavits on the content of Xitsonga customary law from individuals in polygynous marriages, traditional leaders, and experts, among others. In that case, the Court had reached a unanimous decision that the second marriage was not valid and upheld the appeal; yet the justices were not unanimous in how they arrived at their shared conclusion. The main judgment was written by Froneman J, Khampepe J and Skweyiya J (with Moseneke DCJ, Cameron J and Yacoob J concurring). These justices in the majority found that the RCMA, which recognises the consent requirements under vernacular law, did not require that consent be given by the first wife, that there was no uniform rule under vernacular law, and that development of Xitsonga law was necessary. So they wrote:

> The perspective we gain from the evidence is not one of contradiction, but of nuance and accommodation. It seems to us that one can safely say the following: (a) although not the general practice any longer, Vatsonga men have a choice whether to enter into further customary marriages; (b) when Vatsonga men decide to do so they must inform their first wife of their intention; (c) it is expected of the first wife to agree and assist in the ensuing process, leading to the further marriage; (d) if she does so, harmony is promoted between all concerned; (e) if she refuses consent, attempts are made to persuade her otherwise; (f) if that is unsuccessful, the respective families are called to play a role in resolving the problem; (g) this resolution process may result in divorce; and finally, (h) if the first wife is not informed of the impending marriage, the second union will not be recognised, but the children of the second union will not be prejudiced by this as they will still be regarded as legitimate children.

In the above, the majority of the Court observed the subtleties embedded in vernacular law such that the ‘normative repertoire’ described by John Comaroff and Simon Roberts means that sometimes principles coexist even when they disagree and which principles prevail is ultimately determined based on negotiation in the context of an actual dispute. At the end of the quoted paragraph from the main judgment we see a second key dimension of their reasoning: how they believed customary law’s content is to be decided. They concluded that ‘it must be emphasised that, in the end, it is the function of a court to decide what the content of customary law is, as a matter of law, not fact. It does not depend on rules of evidence: a court must determine for itself how best to ascertain that content.’

Zondo J differed with the main judgment on what evidence was needed to arrive at their conclusions and how the content of customary law should be ascertained by courts. He held that the Court had not needed additional evidence in order to determine the content of the Xitsonga law. Nonetheless, using the additional evidence he argued that it was clear that there

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96 Ibid at paras 47–49.
97 Ibid at para 47.
98 *Mayelane* (note 51 above).
99 Ibid at para 61; footnotes omitted.
100 Comaroff & Roberts (1981)(note above) at 80–81, 180.
101 *Mayelane* (note 51 above) at para 61; footnotes omitted.
was a material dispute on the content of Xitsonga law. The fundamental differences in Zondo J’s view was that, firstly, he saw a direct contradiction in what the parties and witnesses averred in the affidavits was Xitsonga consent requirements and, secondly, that he was of the view that a dispute over the content of customary law should be decided as a dispute of fact rather than law.

In addition to the disagreement between the justices outlined above was the perspective taken by Jafta J (in whose decision Mogoeng CJ and Nkabinde J concurred) who held that development of the customary law had not been necessary in this case. Jafta J’s bases for disagreement are worth recounting here because of how they shed additional light on the difficulty courts face in ascertaining the content of vernacular law, but also the possibilities inherent therein. The key points in Jafta J’s decision were that, firstly, there is a way of reading the evidence such that the vernacular law principle testified to is in keeping with the Constitution; secondly, it is important to appreciate the nuance in how vernacular law exists as a ‘normative repertoire’ and, further still, how vernacular law is in fact highly localised and thus variable from subgroup to subgroup within even a single language group like the Vatsonga. In addition, such variability may be produced by the variegated rates of normative development between subgroups.

We can say that some of the contestation in Mayelane was around the need to develop customary law when it was found that there was some divergence of opinion (among observers of vernacular law) on the particulars of its content. Jafta J, with Mogoeng CJ and Nkabinde J, made the case that there need not have been development of the existing rules according to what was said in the written testimony provided. In essence, they were arguing that the matter could have been decided by giving vernacular law the most generous interpretation possible within its own terms, worldview, and context. They essentially argued for the Court to rely upon the most favourable (that is, constitutionally-compliant) interpretation of the values and norms that are already inherent in vernacular law.

This argument did not position them too far away from the majority; after all, the majority had itself tried to ascertain and interpret the testimony they had received on the content of customary law in a manner that is fundamentally grounded in customary law’s own values and priorities. As they so importantly appreciated, ‘The perspective we gain from the evidence is not one of contradiction, but of nuance and accommodation.’ In other words, they demonstrated sensitivity to the negotiated nature of vernacular law’s content and thus made great strides toward seeing it as the ‘normative repertoire’ that it is.

The point of recounting these internal debates among the judges themselves is as support for the argument that the Constitutional Court has made significant progress in South African law’s understanding of the nature of vernacular law. Where further development of the Court’s own thinking on how to regard and treat customary law may well still be needed is in how it approaches the development of customary law, when it determines that such is necessary.

Sanele Sibanda and Tshepo Bogosi Mosaka and I raise separate concerns about the way in which the Court in Bhe resolved the problem of the vernacular law practice it had determined required development by replacing it with a statutory solution founded in common law.

102 Ibid at paras 126–127.
103 Ibid at paras 139–141.
104 Ibid at para 61.
principles and values.\textsuperscript{106} The Court in \textit{Mayelane} did not technically turn to the common law for solutions on how to develop customary law. However, it would have been good to see that, even when developing customary law, it considered what the purposes and objectives are for which the principle at issue originally existed, then consider how the political and social economy of customary communities have been altered, and finally the implications all of that has had for rural people and the ability of the normative ideal to achieve the originally intended results in contemporary circumstances. This is effectively the approach that was taken by the Botswanan Court – particularly Lesetedi JA – in \textit{Ramantele}.	extsuperscript{107} As shown, the Court’s reasoning in \textit{Ramuhovhi} takes a welcome (if still incomplete) step toward this.

That deals with the issue of ascertainment of living law for the purposes of amalgamation. What about the politically charged issue of valuing customary law appropriately in the proposed amalgamation project?

### 2 Assigning vernacular law due value in the amalgamated law

If one engages with scholars who have considered and discussed the idea of an amalgamated South African law, one quickly learns that a big sticking point is often the very different nature of the processes observed in vernacular law. This essentially gives rise to the debate between those scholars who enthusiastically support amalgamation and those others who resist it.

In short, those who argue for the amalgamation of customary and common law into a single legal regime\textsuperscript{108} express optimism that it can be done while preserving the integrity of both normative frameworks and their distinctive features, which they perceive to be more limited than conventional narratives claim is the case. These advocates argue that amalgamation means that each element is part of the product, neither is obliterated. They argue that a fundamental change to the South African legal culture would be necessary, agreeing with Chanock that legal formalism is a way of suppressing alternative understandings of law, and the experiences and notions of law held by people other than legal experts.\textsuperscript{109}

These advocates ask why only customary law should be living law. They argue that, surely, the same principle that law should be infused by practice, and courts should be transparent about the ways in which the politics and context in which law happens inform jurisprudence (a principle they attribute to the Constitutional Court), should apply to all law. They also argue that the mythology of the common law as grounded in people’s practice has now been displaced by a notion of common law as the preserve of experts. In fact, they stand with Chanock to say that, like customary law, the European common law is about an imagined past. Put differently, English common law is custom from ‘time immemorial’ – built on reasonableness and accessibility, but it became stultified in South Africa through the application of the doctrine of precedent. Thus, what ultimately separates customary and common law in the South African legal systems is that they were crafted to be separate, to be the flip sides of one another.\textsuperscript{110}

\textsuperscript{106} Sibanda & Mosaka (note 35 above).
\textsuperscript{107} \textit{Ramantele} (note 88 above) at para 81.
\textsuperscript{108} Claassens & Budlender (note 15 above); M Chanock ‘African Constitutionalism from the Bottom-up’ in H Klug & SE Merry (eds) \textit{The New Legalism Realism Volume 2} (2016) ch 2; Matthews (note 66 above); Davis & Klare (note 86 above).
\textsuperscript{110} Refer to A Claassens Untitled Land and Accountability Research Centre seminar paper (11 August 2015)(on file with the author).
On the other hand, those who resist the case for amalgamation do so largely from a place of doubt about the feasibility of merging customary and common law without compromising customary law at the expense of common law.\textsuperscript{111} The latter argue that, given the history of formalism and a legal culture that centres largely on positive sources of law have prevailed in South Africa to the detriment of customary law’s ability to fully flourish, they doubt that customary law will thrive in the context of amalgamation, and that it may be completely overtaken. In addition, they even doubt that the vision of ‘transformative constitutionalism’ put forward by the Constitution will flourish.

One reason given for this doubt is that, as observed by Thandabantu Nhlapo, the difference between the customary and common law systems is one of worldview.\textsuperscript{112} Sibanda and Mosaka also highlight this epistemological (and oft even ontological) difference from which the two spheres of law draw their essence.\textsuperscript{113} Their contention suggests that this concern is more fundamental than the advocates for amalgamation give recognition to in what seems an optimistic view of the possibility of merging these systems.

Ultimately, these scholars who caution against the perils of amalgamation contend that the greatest weakness with the amalgam idea is that it assumes that the South African legal system will be able to take aspects of customary law and incorporate them on their own terms and with their own content when this is likely to be impossible because of the conservatism and formalism of mainstream law, as well as the deeply embedded assumptions that the common law’s substance and practice are inherently superior to customary law.\textsuperscript{114} In its simplest terms, the debate between the pro-amalgamation scholars and those wary of amalgamation boils down to the former believing that we should not be worrying that much about protecting customary law from the common law while the latter believe that such protective impulse is essential because, to do otherwise, is likely to allow colonialism to persist by allowing customary law to be overtaken and predominantly displaced by common law.

The former scholars’ reason for their lack of concern is that customary law is not fundamentally about traditional content of yore that must remain stagnant and protected (from change) in order to preserve its integrity.\textsuperscript{115} To this the sceptical scholars respond that they too believe that Chanock is correct in holding that customary law is predominantly about the process by which it comes into being, and this belief is what leads them to be immensely

\textsuperscript{111} For the sake of complete transparency, I will share that for the longest time I was in this camp – until I embarked upon writing this thought piece as a way of exploring the idea and experimenting with the plausibility of amalgamation.


\textsuperscript{113} Sibanda & Mosaka (note 35 above).


\textsuperscript{115} Yet, in fairness, they acknowledge the need for caution in recognizing the dominance of the common law’s worldview. For instance, Claassens & Budlender (2013)(note 15 above) at 104 say: ‘There are inherent difficulties in the concept of a unified South African law that incorporates strong elements of customary law alongside other strands of law. The primary problem is the dominance of western and common law constructs that fail to recognise, let alone accommodate, indigenous values on their own terms.’
concerned about protecting it from the common law, which observes a different process grounded in legalism, positivism, formalism. They give as an illustration of their concern the fact that, under apartheid, the requirements of legality formed the basis for the recognition of the legitimacy of a principle of law such as a principle of (business) custom and these same requirements historically infused courts’ tests of the admissibility of customary law principles.116

What the pro-amalgamation and cautious scholars may have in common is a desire to move South African law from an approach of merely safeguarding space for customary law to continue to exist in its own little universe or enclaves of subjecthood (that is, the former Bantustans or ‘Homelands’, which have been given over by the democratic government to be governed almost at will by traditional leaders).117 They all are trying to do more than find a place where customary law can be protected in its difference, as Alexkor set the stage for, by increasingly asserting it against hegemonic systems like the common law. In that sense, they may have a basis for conversation with another set of thinkers who present a different idea that moves towards amalgamation but much more slowly.

This third group of scholars (whose expertise is not in customary law but in common law) suggest that the development of customary law and common law should go hand in hand; for instance, Davis and Klare argue that we should use the terms, customary and common law interchangeably wherever they appear in the Constitution.118 We need to draw on customary law principles to develop the common law in future. Thus, just as Barkhuizen v Napier tells us we must look at the context of a contract when interpreting it (particularly considering the ‘relative situation of the contracting parties’ in light of ‘the potential injustice that may be caused by inequality of bargaining power’),119 the same thinking should apply to customary law.

116 The principles for establishing business custom were generally applicable to living law. In proving a business custom to be in existence, one had to show the alleged trade usage … to be universally and uniformly observed within the particular trade concerned, long-established, notorious, reasonable and certain. See Golden Cape Fruits (Pty) Ltd v Fotoplate (Pty) Ltd 1973 (2) SA 642 (C) 645G–I (‘Golden Cape’). The court comments, at 646A–B, that ‘[g]enerally speaking the Courts require convincing evidence of the existence of a trade usage conforming to the requirements listed above.’ See also Couuts v Jacobs 1927 EDL 120; Crook v Pedersen Ltd. 1927 WLD 62; Catering Equipment Centre v Friesland Hotel 1967 (4) SA 336 (O); also, Frankv Olhson’s Cape Breweries Ltd. 1924 AD 289, 297. One also had to prove that it is not contrary to ‘positive law’ (and thus, that it did not attempt to modify a legal rule that the parties cannot contract out of) or the terms of the legal agreement between the parties. (Golden Cape at 645G–I) The legal requirements for the proof of a trade usage or mercantile custom were explicitly transposed to the establishment of living law: in Mosii v Motseoakhumo the Supreme Court dictated that ‘in the ordinary courts of law native custom must be proved in the same manner as any other custom.’ Mosii v Motseoakhumo 1954 (3) SA 919 (A) 930. See also R v Dumezweni 1961 (2) SA 751 (A) 756E. There were clear parallels between subsections 1(1) and 2 of the Law of Evidence Amendment Act 45 of 1988 and the principles governing the admission and recognition of business custom or trade usage. Furthermore, the prerequisites for proving a business custom echo those of legality. The ready ascertainability and sufficient clarity required of customary rules was consonant with the certainty expected of business customs and law in general, in terms of legality. Public policy and natural justice were, in their interpretation, not dissimilar to the reasonableness and conformity with positive law demanded of business custom (the latter requirement self-evidently referring to the doctrine of legality). In practice, the prerequisites for establishing customary law rules in terms of the LEAA had been its universal observance, extended existence and notoriety as in business custom. These criteria gave expression, respectively, to the requirements of consistent applicability, foreseeability and publicity in the principle of legality. Incidentally, ready ascertainability and certainty also go toward satisfying these legality requirements.

117 Refer to, for example, the challenge against the manifestation of this trend in Maledu (note 40 above).

118 Davis & Klare (note 86 above).

119 Barkhuizen v Napier [2007] ZACC 5, 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC) at para 59. Cf. Moseneke DCJ’s dissent (Mokgoro J concurring) at paras 96, 99 and at 104, where he writes: ‘Whilst there is often merit in
law principles. In fact, the process that the Constitutional Court sets out to determine the content of customary law is an almost exact overlap with the principles of transformative constitutionalism – that is, being backwards- and forward-looking at the same time, and having transformation never be a finite program but a processual one whereby it is positive to pursue increasing alignment even if it is never completed or final.120

C Overcoming the technical challenges

The debate above ultimately points to the centrality – if not indispensability – of protecting vernacular law process in any amalgam, even as the amalgam should protect the core normative content and values of vernacular law. In fact, it seems that at least some of the scholars argue that protecting the process is the only way to really protect the content of vernacular law. Thus, scholars on both sides of the amalgamation debate seem to agree on at least the point that the vernacular law processes need to be protected and that key values such as need, and multigenerational provision (thus indicating the importance of children) must be protected as well. The latter is a key part of what Ramuhovhi captured. Moreover, if vernacular law values can align with (not be forced to align with) constitutional rights, then some see that there is a double protection built into the enterprise. This is because certain need-based claims fit within the framework of socio-economic rights protection under the Bill of Rights.121 This too is perceivable in Ramuhovhi’s findings.

All argue that centralising process and value concerns in the discussion of an amalgam could perhaps open up a way for protecting the key essence of vernacular law in a unitary state law system. Yet many stress the critical need for some oversight of the vernacular law processes, especially to protect vulnerable groups and ensure the accountability of traditional elites and local powerholders. Scholars on both sides of the debate also share the concern that official customary law – especially as legislated – has often tried to destroy the vernacular law processes that exist on the ground, and their in-built accountability systems of ‘checks and balances’. They point to evidence showing that, time and again, process is pre-empted or discounted in a whole lot of cases – especially those pertaining to governance.122 Primarily, this happens in the course of the intense struggles that many communities are having over resources, which end up playing out in terms of the challenge of distinguishing land as territory from land as property under customary law.123

120 Comment made by Michael Bishop at Land and Accountability Research Centre Seminar (11 August 2015) at University of Cape Town (per author’s notes).
122 For example, see Shilubana (note 51 above); Pilane & Another v Pilane & Another [2013] ZACC 3, 2013 (4) BCLR 431 (CC); Sigcau and Another v Minister of Cooperative Governance and Traditional Affairs & Others [2018] ZACC 28, 2018 (12) BCLR 1525 (CC); and now Maledu (note 40 above).
1 Clarifying content vs process in vernacular law

Readers will rightly ask what is the essence of vernacular law processes? Essentially, what is the vernacular law process these scholars have in mind when describing the need for its protection as central? The core elements of this process – to do with consultation and consent – are captured in the Interim Protection of Informal Land Rights Act 31 of 1996 (‘IPILRA’) as canvassed in insightful detail by the Court in Maledu. Words often associated with this process include ‘fluid’, ‘flexible’, ‘malleable’, ‘nuanced’ and ‘negotiated’.

A good example of this process is what was described by Comaroff and Roberts in 1981 in their work, Rules and Processes. In essence, they show that vernacular law (in their particular study, Tswana ‘mekgwa le melao’) is made up of a ‘normative repertoire’ which is a variegated set of norms that exist in an undifferentiated repertoire. In other words, there is a multitude of norms that exist at different levels of specificity and generality, and these norms may even contradict one another; but contradictions are resolved by interpreting some norms figuratively (that is, elevating the norms to the metaphorical or symbolic level as opposed to understanding them literally). This determination – that is, the differentiation of an otherwise ‘undifferentiated repertoire of norms’ – is made on a situational basis.

There are obviously certain norms that enjoy wide social acceptance, and these are typically complied with and regarded as obligatory; but this may change over time as the community’s lived reality and its demands shift. Thus, the specific value of most norms is meaningfully determined only in terms of the situation in which the norms are invoked, which happens in relation to contingent or opposing norms. This means that the statement of a particular – even widely held – norm is not necessarily determinant of a dispute’s outcome. Of course, there are some non-negotiable norms, but these are not determined by any individual but are typically demonstrated in practice. Yet it is true that, even while norms are generally negotiable and offer manoeuvrability to the authorities overseeing dispute management, norms are not completely non-determinant of outcomes. This is one of the fundamental tensions that must be balanced within the flexibility that is offered by the nature of vernacular law.

This fundamental negotiability of norms constituting vernacular law is achieved through what the authors describe as the ‘paradigm of argument’, which they explain operates as follows in the context of cases under Tswana ‘mekgwa le melao’. Dispute processes are sometimes devoted primarily to debate over precisely the question of competing norms. Disputing parties and authorities managing disputes organise their utterances (their statements in argument) with reference to the referential principles (the various norms available for them to select from). Disputes are seldom decided by the prescriptive application of norms alone. Rather, the parties will contrive a ‘paradigm of argument’ that is a coherent picture of relevant events and actions in terms of one or more implicit or explicit normative referent.

The ‘paradigm’ they formulate is case-specific, not fixed or predetermined. The complainant will establish the paradigm by ordering the facts around normative referents that may or may not be made explicit. In fact, the party will not typically refer to norms explicitly except if anticipating that their opponent will question his/her/their characterisation of the dispute, thus attempting to erode his/her/their opponent’s paradigm in advance. The other party may then either stay within the paradigm that was established by the complainant – thus, arguing over

124 Maledu (note 40 above). These principles also come out strongly in the key sections from the majority judgment in Mayelane (note 51 above).
the circumstances of the case – or the respondent may choose to present a competing paradigm while accepting the presented facts. In the latter case, the explicit reference to norms seems necessary especially because the respondent is imposing a different paradigm on the case and attempting to assert control over or change the terms in which the debate is proceeding.

It is evident from this that power to negotiate is an essential factor in any party’s being able to win when disputing under vernacular law and in influencing the ways in which vernacular law develops in and through pronouncements made in the context of dispute resolution. The necessity of power to negotiate is made even more evident when one considers what options the dispute resolution forum is presented with when presented with competing paradigms of argument and, hence, competing norms as prevailing norms in a factual scenario. The authority responsible for resolving the dispute and/or the senior men who are observing the case may (a) accept the paradigm agreed to by the parties (if such exists), (b) choose between the competing ones presented by the parties, or (c) impose a completely new paradigm on the disputed issues. If they go with option (b) or (c) then they will most often refer to rules explicitly (though usually indirectly, even then) because they are seeking to legitimise the distinction and justify the finding. The dispute resolution authority may also distinguish the issues and thus put two or more frames on the case.

Under Tswana ‘mekgwa le melao’, legislative pronouncements can sometimes customarily become part of the normative repertoire of the governed communities when they are issued by the customary authority, however, their legitimacy and chances of execution depend on:

(aa) their reflecting public opinion,
(bb) their being delivered by an authority considered legitimate, and
(cc) their utility to individuals in the circumstances in which they might be raised.

This is fundamentally different from the claim of their being determinative merely at the sovereign’s say-so – the latter being the way in which state law is authoritative (at least, in principle).

As you can see from the detailed description above, the vernacular law system is based on negotiated processes at every level. This is so in engagements ranging from between parties in their day-to-day interactions, in the home and in the streets, right up to between community members who comprise the dispute management forums that, in most traditional communities, collectively decide the outcome of the dispute to be resolved before the relevant traditional authority at whose level the forum sits summarises the majority view as the dispute management forum’s decision. In respect thereof, Dutton observed of Sotho speaking communities:

Anyone can ask questions and there is no unseemly hurry; ... Then the smaller fry among the men of the lekhotla give their opinion, the more important people next, and finally the headman gives his decision, which is generally the summing up of the views of the majority. In theory, he can give any decision he likes, but in practice, ... the final verdict is really the general opinion of all present.

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127 There are several levels, as shown by H Mönning The Pedi (1967); D Reader Zulu Tribe in Transition: the Makhanya of Southern Natal (1966) 308; Wilson et al. (note 34); I Schapera, Tribal Innovators: Tswana Chiefs and Social Change, 1795–1940 (1970) London School of Economics Monographs on Social Anthropology no 43, 92.
128 Major E Dutton The Basuto of Basutoland (1923) 5.
Similar observations have been made in other South African cultural communities.129

It is therefore significant when customary authorities adopt the language of their legislative rules being determinative in order to advance their institutional legitimacy claims. This is because this argument gives them more law-making authority than they have under vernacular law and when they succeed at having it enacted in state legislation it is extremely difficult to overcome. Their claims of this type of authority are therefore usually made at the expense of the authority of ordinary rural people to form their vernacular law through their values, choices and evolving practices. Again, this is a fundamental disturbance of the delicate power balance that is essential to vernacular law and makes vernacular law the effective legal system that it can be when it is honoured in its true essence as described above.

2 The case for the feasibility of amalgamation

With a clear view of what is meant by vernacular law’s emphasis on ‘process’ in mind, the final question remaining to be answered in this exploration is this: could such a process as described above be brought into the state legal system? If so, what could such a process look like if it were to form the basis of an amalgamated South African legal system? Arguably, such a process is very well suited to the task of rapidly amalgamating customary and common law into a unified state legal system and doing so with the least possible difficulty. The reason is that the notion of a ‘normative repertoire’ is not fundamentally different from the concept of the law comprising a variety of rules and principles from which judges must commonly select and determine which prevails in the circumstances of a given case. However, importing the concept of a ‘normative repertoire’ comprised of common and customary law rules, principles, norms and values definitely presents a difference of degree: that is, it vastly expands the range of norms that can be considered and applied in any one case.

The concept of a ‘paradigm of argument’ is also not fundamentally different to what happens in legal disputes in state courts today. After all, parties appear before the court with their representatives having framed the disputes in very particular ways and strategically presented the argument that they believe will lead to the most favourable outcome for their client. In that sense, the court making the decision presents what could legitimately be described as a ‘negotiated’ conclusion that is reached by a more adversarial interaction heavily mediated by experts, with the judges ultimately making the determination. Therefore, one can see how there may be a kernel that might tentatively be described as a common base to the amalgamation processes under discussion, even if the common law system tends heavily toward formalism and

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129 P Cook Social Organisation and Ceremonial Institutions of the Bomvana (1931) 146; Reader (note 127 above) at 259. With regard to the amaXhosa, WD Hammond-Tooke Command or Consensus: The Development of Transkeian Local Government (1975) notes at 68, 74 fn 13 that decisions are made by the ‘community-in-council’. Indeed, he writes (at 67) that ‘[a] chief who dared to go against the wishes of his people ran the risk of losing their support, and perhaps his chieftainship. ... Consensus was all important.’ Also see the following cases for the claims made to them, more than for the findings of the courts: in Morake v Dubedube 1928 TPD 625, 630 the court describes the chief as ‘sitting in that capacity, advised by his counsellors’ and wrongly rejects the contention that the chief (and his council) does not possess in him the customary law; Rex v Kumalo and Others 1952 (1) SA 381 (A) speaks of the chief and members of his council as deciding upon the proper punishment for a man for contempt of court; Rex v Ntwana 1961 (3) SA 123 (E) also notes the council’s and headmen’s role in the traditional dispute resolution process; State v Mngadi [1971] 2 All SA 394 (N) similarly notes the headmen’s involvement in the processes of dispute resolution.
thus explicit invocation of norms while the vernacular law system leans in favour of informality and subtlety when invoking norms to make arguments.

It would seem, therefore, that in principle it should be very feasible for a unified legal system to be developed that allowed parties to draw on both vernacular law and common law norms and placed the burden on the parties averring that the vernacular law norms are applicable to the case at hand to show how and why this is so. This would not be that different to what parties have to do now with the common law. In such a scenario, admissibility of the norms averred by parties would be decided by the judges of that case – as is the norm with cases before the state courts today – whose determination would be based explicitly on alignment with the Bill of Rights. Such a shift would make South African law more expansive and capacious rather than constricted and legalistic. It would also readily make the whole body of (official) law more thoroughly South African.

To be clear, I do not mean to elide the magnitude of the task before the courts if they are to proceed with adoption of my proposal. It is indeed correct to say, as did one reviewer of this article, that ‘change, even if deliberate and cumulative, cannot entail things remaining largely the same’. And, as both reviewers legitimately pointed out, the path is riddled with obstacles based on the enduring centripetal force of South Africa’s conservative legal culture rooted in a pre-1994 common law and colonial logics, which resists real change in favour of a depoliticised conception of legal transformation. There are certainly deeper systemic and epistemic challenges that would have to be faced in order to overcome the obvious disharmony between a system favouring the keeping of rules as what it deems to align with justice versus one where justice is seen to be embedded in the processes that lead to socially just outcomes. This undertaking will definitely require further consideration, theorisation and judicial strategising.

My point in noting the similarities between the limited ‘normative repertoire’ and ‘paradigm of argument’ approach expressed in common law today and the vastly expanded scope I propose for an amalgamated legal future for South Africa based on the processual nature of vernacular law is to hearken back to the observation with which I opened my discussion of amalgamation. Namely, drawing on Chanock, I mean to remind the reader that we tend to think of common law and customary law as more different than they are when, in fact, they should rightly be understood as two forms of ‘common law’ that are somewhat distinct and yet related and, in some ways, similar in their essence. This reminder is not just a matter of offering assurances to some vested audiences that, once the changes I propose of crossing over into a new paradigm of amalgamation are implemented, the amalgamated South African legal system will not be so different from the common law they know and love, to which they evidently are unwilling and/or unable to stop clinging. I would argue that this reminder is a matter of historically grounded descriptive and analytical accuracy. Frankly, if legal history and sociolegal studies teach us nothing else, they teach us that we must be very careful not to wholly believe the formally institutionalised common law’s myths about itself.

Nevertheless, to those readers who find themselves drawn to the comforts of interpreting the proposed amalgamated way forward as a means by which customary law can be assimilated

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into the common law as we know it, customary law adherents and their incessant demands ‘accommodated’, and the common law’s sources ‘diversified’, allow me to clarify. What I am advancing is a novel approach that exceeds the formalistic demands of the current system of precedent in which classification according to colonial logics is often determinative of the range of outcomes; in that sense, the system of precedent as we know it cannot be sustained as it is. Mine is a strong claim: amalgamation would only be feasible if the courts wholly embraced the vernacular law concept of a ‘normative repertoire’ comprised of customary and common law rules, principles, norms and values when deciding cases. This article is therefore an invitation to all readers to seriously explore the possibilities that emerge when, instead of falling back on precedent, this concept is coupled with serious engagement with the ‘paradigm(s) of argument’ presented in the cases courts hear.

The proposed process of amalgamation would constitute a process of value-making and aligning customary law and constitutional values. What are those essential vernacular law values? We see these indicated in Ramuhovhi I yet I will summarise them briefly here. Intergenerational equity and provision are always important, and it is largely with respect thereto that children are a central concern alongside marriage and kinship. In a similar vein, provision for the needs of the family (conceived of in extended terms) is essential. Finally, making determinations of what is just based on the means available, and therefore arriving at a fair negotiated solution, is the perennial challenge that each vernacular law dispute ultimately presents.

The latter is often glibly referred to as vernacular law’s tendency toward ‘reconciliation’ and ‘harmony’. In some instances, this language of a conciliatory and harmonious normative system is employed so cheaply as to elide the silencing of vulnerable groups, entrenching of inequality, and other injustices embedded in differences of access to decision-making power and governing authority that these words, when weaponised as the traditional leader lobby often does, 131 can conceal. 132 A different way of grounding the same ideas at the foundation of vernacular law is to describe them in terms of ubuntu botho (which the Court has repeatedly said is implicitly recognised in the Constitution’s protection of dignity) 133 and its implication of a process of shared value-making, balancing interests and needs, ensuring intergenerational access, and providing for those in need.

131 Comaroff & Comaroff Ethnicity Inc. (2014).
In incorporating vernacular law into an amalgamated state system, it is necessary for parties and courts to look at the first principles stated above and whether the outcome of the case will align with those. It is obviously also essential to test the outcome against the Constitution as the foundation of South Africa’s democracy and law. Madlanga J’s judgment in *Ramuhovhi I* went some ways toward demonstrating these two steps that I have said would be essential to the development of an amalgamated South African law that integrates vernacular law and common law under the Constitution in a way that gives vernacular law due respect and position. Taken further, such steps would align the customary law that is embraced in the amalgam of official law with constitutional values even as it would align the common law with those same constitutional values. Such moves would also align and, in time, integrate the common law and customary law into each other.

3 What, then, of land? A few representations

I have described above how the focus on process and value concerns would be essential to respecting customary law in an amalgamated state legal system comprised of vernacular law’s ‘normative repertoire’ as the base combined with the content of common law rules and principles made equally accessible and thus utilised alongside living-turned-official customary law rules and principles to form state law’s dynamically integrated content. How might such an amalgamation look if it were to be given expression with respect to the regulation of land, particularly as a way of resolving the perennial perilousness of regarding land as property under customary law and in South Africa more generally?

It is beyond the scope of this article to provide a thorough answer to this seminal question. However, I can attempt to provide a rough sketch of amalgamation in the realm of land law. I do this here by contemplating how the Court in *Ramuhovhi I* might have possibly stretched further – beyond handing down a decision that would be fair and just under customary and constitutional law – to articulate an amalgamated state law that is more representative of all South Africans (or, at least, the vast majority of the 80.7% of South Africans who identify as Black Africans).

First, it is important to understand *ubuntu* / *botho* more broadly than in the trite ways in which it is often mobilised in common parlance, even by the Court. When duly understood as not simply a ‘worldview’ but a larger web of indigenous values and ethics, meaning and significance, and worldview – that is, epistemology, ontology and methodology, or what Oyèrónké Oyèwùmí collectively terms ‘world-sense’ – the principle of *ubuntu* / *botho* is all-encompassing. Hence, it should naturally arise in any discussion of land, which, interestingly, it does not even in the otherwise compelling decision delivered in *Maledu*. Further still, it should not arise only with reference to the people who seek to make a historically-based claim to the land at issue, but more comprehensively.

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134 For comparative context, see Grande (note 130 above).
135 O Oyèwùmí, *The Invention of Women: Making an African Sense of Western Gender Discourses* (1997) 2–3 (‘The term “worldview”, which is used in the West to sum up the cultural logic of a society, captures the West’s privileging of the visual. It is Eurocentric to use it to describe cultures that may privilege other senses. The term “world-sense” is a more inclusive way of describing the conception of the world by different cultural groups. In this study, therefore, “worldview” will only be applied to describe the Western cultural sense, and “world-sense” will be used when describing the Yoruba or other cultures that may privilege senses other than the visual or even a combination of senses.’)
136 *Maledu* (note 40 above).
There is so much that could be said in unpacking this observation that it is difficult to know where to start. But what I focus on here, based on 15 years of ethnographically based research and writing on the subject, is that animals and land are not regarded as fundamentally separate or different from human beings. In the indigenous world-sense, all three categories of ‘things’ – land, people and livestock – are essential to life and, therefore, living. To make better sense of that idea concerning land, we must confront something that is probably difficult for outsiders to such a world-sense to wrap their heads around: what does it mean for land to be viewed as living? It is not possible to provide a comprehensive answer but, at the risk of being dangerously reductive, I will dare to sketch a general principle here by sharing some basic and curt illustrations of how land is a living and spiritual being.

Land breathes; it moves, shifts and changes; it grows and births things – that is, it gives new life. Land is part of a loving and reciprocal relationship. We live with the land. The land gives us food and water. We care for it, and it cares for us. While it often yields to and embraces our actions, it sometimes (or in some parts) resists. The land can hurt, ail, and mourn. In droughts, it starves and can die, as well as kill. Thus, rather than an inanimate object, land is a living subject.

The land can be good or bad (umhlaba omuhle/omubi), just as the ancestors can be good or bad (idlozi elihle/elibi). It is crucial to understand the land – and its sacredness – in relation to the ancestors and other spiritual forces. After all, the land welcomes our bodies and spirits into its fold and hides them under its cover. Furthermore, in a sense, the land is our oldest and most enduring ancestor of all because it has cared for us since time immemorial – that is, over multiple generations, which readers will recall is one of the highest vernacular law values. While it is beyond the scope of this article to expound upon this, it is nonetheless evident that this world-sense has all sorts of temporal implications as well, calling for engagement with the dominance of settler European time in South African common law and legal culture, and the implications of such dominance for land debates. For now, suffice it to say that the above pronouncement makes clear that the key question that is really presented in the present part of this article is: what happens to South African land laws when you situate them within the vernacular law ‘normative repertoire’ which necessarily includes norms and values such as the land is a living subject? I can only make some constrained suggestions with respect to Ramuhovhi I here because it deals with land only notionally. The broader land question – what would this amalgamation idea mean for restitution claims, for instance? – will surely remain to be answered in a separate work.

I have already stated above that one of the strengths of Ramuhovhi I was that it reached the correct conclusion by allowing the deceased’s daughters to inherit. However, it did not adequately engage with the profundity of vernacular law’s values and their contribution to understanding the depth of significance of the case or its outcome on its own terms. To do so, it would have had to articulate more explicitly the fact that the maintenance of ‘house’ property is important because of the value of providing for multiple generations in the particular context of land as a living subject and situate the discussion within the context of vernacular law’s

137 Even with more than 80 per cent of South Africans identifying as Christians, belief in ancestors remains prevalent as people find ways to reconcile their indigenous and embraced beliefs, for example, by drawing comparisons between their ancestors and the Catholic saints as intercessors who are closer to and therefore appeal to Jesus, the mediator of sins, on their behalf.

138 M Rifkin Beyond Settler Time: Temporal Sovereignty and Indigenous Self-Determination (2017); Zuberi & Bonilla-Silva (note 130 above).
comfort and ease with correcting one’s faults or omissions after one has died as an extension of the indigenous world-sense’s alternative temporal scope.

For deeper grounding in vernacular law’s values, the Ramuhovhi I decision might have recognised that, in posthumously correcting one’s faults and omissions, vernacular law seeks to give expression to ubuntu/botho as prioritising wholeness of life (that is, the essential life principle) through restoration and healing of all relationships – past and present, human and otherwise. For instance, it is commonplace in vernacular law that marriages get completed after one or both of the parties has died. This might happen by means of their children finishing off payment of outstanding lobolo in order to finalise their parents’ marriage posthumously and thus legitimate their own births long after the fact. Similarly, children’s births are often legitimated by their kin, such as their grandfathers, paying damages (often referred to as lobolo, if not the technical term of inhlawulo) after the children’s fathers have died, something that the Bhe case might have benefited from having considered in its interrogation of (il)legitimacy.

In other words, it was fitting that the father’s transfer of property to his civil wife be revisited, questioned and corrected in Ramuhovhi I. This revisitation was due, not just in terms of some narrow, functionalist and materialist textbook conception of customary law that acknowledges a difference between ‘house’ property and family property (separately from personal property) as material assets to be passed down to descendants of the matrilineage and patrilineage, respectively. Rather, revisitation of the father’s decision and actions was fitting as part of the extensive web of indigenous epistemologies, ontologies and methodologies that I have borrowed from Oyěwùmí to collectively refer to as world-sense.

In her compelling discussion of the need for the academy to move beyond settler or colonial logics in order to make room for and ‘imagine alter-Native modes’ of social and material existence as well as political participation, Sandy Grande writes of ‘the difference between subjectivities produced in and through relationship to land and those produced under and through significations of property.’ What does this difference mean practically? As one who knows little about Venda culture, I can only speculate about the meaning of the difference identified by Grande in Venda culture by departing from cultures with which I am both personally and professionally more familiar. I should add that, of course, the parties’ drawing from these other indigenous normative traditions to the extent that doing so could be shown to be consistent with constitutional protections, would have been fair game under my proposed idea of embracing the vernacular law’s ‘normative repertoire’ as the base form of an amalgamated South African law.

When Swati people say, ‘ngimuva ngengati’ (I feel them with/in my blood) to refer to someone to whom they are related, they are expressing a deep value of kinship that is at once

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140 Oyěwùmí (note 135 above).
141 Grande (note 130 above) at 3 (italics in original text).
142 Such articulations among the Zulu people can be seen in records dating back to the end of the 19th century, such as AT Bryant A Zulu-English Dictionary (1905), available at http://archive.org/details/zuluenglishdicti00brya with notes on pronunciation, a revised orthography and derivations and cognate words from many languages; including also a vocabulary of Hlonipa words, tribal-names, etc., a synopsis of Zulu grammar and a concise history of the Zulu people from the most ancient times.
materially based (biological relationship matters) and spiritually based (there are a multitude of ritual ways by which children who are not biologically related can be ‘adopted’ into a family’s blood line). In a case like Ramuhovhi I, the difference described by Grande might have been reflected through some recognition of the material importance placed, under vernacular law, in the fact that the applicants are biologically related to their deceased father and the material asset he gave away in a manner that the civil wife to whom he gave their right to inherit is not related to either the deceased or the land.

Put differently, the ancestral heritage that resides in the land on which the ‘house’ (or, in that case, commercial) property is located runs deep in tying the applicants and their identities to the land through multigenerational relationship in a manner that the fourth respondent cannot emulate. To engage with vernacular law on its own terms, in such a way, the Ramuhovhi I decision would thus have acknowledged the temporal shifts that this world-sense entails, thus pushing beyond the chronological progression of time that prevails in settler European conceptions and the linear establishment of relationships and other social formations.143

I could say more about this line of reasoning by way of illustration but will not because I do not want to venture too far into the realm of speculation. However, I trust that the point is clear: that, by engaging with the legal question before the Court in a way that is not just grounded in the material and positivist conception of ‘house’ or land as property but also grounded in the indigenous world-sense, the Court would have enriched its perspective and understanding and, as I am ultimately arguing, enriched South African law as a whole by making it more resonant with the realities of more South Africans. Yet, to grasp or engage as such, the Court would have needed to tap into a different set of logics, assumptions, and ways of seeing the world – something that presently appears to stand outside of South African law’s plausibility framework.

Before proceeding, however, some important qualifications must be registered. The key thing about embracing the ‘normative repertoire’ approach is that it does not bind the Court to a single form of reasoning or ultimate outcome. The Court could engage the indigenous world-sense and find that it leads it down a path of reasoning that is inconsistent with core constitutional values or produces an outcome that is inconsistent therewith. However, that conclusion does not have to result in perpetual rejection of the vernacular law rules, principles or values; perhaps they are ill-suited to the particular case before the Court at that moment but may add value to courts’ reasoning in future factual scenarios when they might be brought into conversation with other norms in the broader South African repertoire. Indeed, this is a departure from the doctrine of precedent as we know it – and this, as I have already explained above, is one of the novelties of the approach to amalgamation that I have proposed.

In a sense, such a finding is just the flip side of what the Court said in Ramuhovhi I when, in humility, it observed that, despite its efforts, its judgment presented many possibilities for unforeseen consequences, including harm, and thus warranted leaving the door open for

revisiting the question.\textsuperscript{144} Instead, in this instance, the Court would be saying that, despite its best efforts, its judgment of vernacular law rules, principles or values is always profoundly shaped – and thus constrained – by the factual circumstances of the case and the limited surrounding norms that have been selected from the expansive South African repertoire relative to which the rejected vernacular law rules, principles and values have been considered at that moment in time. It would therefore leave the door open for revisiting the ‘rejected norms’ in a different set of circumstances.

So, for instance, in pursuing this course the Court in \textit{Ramuhovhi I} could have acknowledged elements that might cause some discomfort in the values outlined above, such as the implication that the civil law wife in \textit{Ramuhovhi I} does not have as much investment or deep relational connection with the land/property at issue as the applicant children because her attachment to the land is mostly material (that is, her connection is to the land \textit{qua} property), contemporary (rather than retrospectively multigenerational), and mediated by marital relationship (as opposed to patrilineal or matrilineal kinship). In other words, there might be times when the vernacular law principle and values that prevailed in \textit{Ramuhovhi I}, or their implications in the particular factual scenario presented to the Court, should be read figuratively or be seen as suitably superseded by other principles and values that are more constitutionally compelling and/or lead to a more constitutionally consistent outcome in the circumstances.

Appreciative enquiry\textsuperscript{145} seriously engaging vernacular law rules, principles and values, and their adherents, need not \textit{always} lead to an affirmative result – that is, a result that applies such rules, principles and values to the final outcome of the case – in order to be worthwhile. Each encounter of such a kind between the vernacular law, common law and constitutional norms and values is another welcome opportunity to amalgamate them more deeply into a single system and enrich the whole. This is so, especially, when the ultimate goal is the radically constitutional transformation of the South African legal system by drawing upon the wisdom and contributions from the cultural and normative heritage of \textit{all} the country’s peoples which, as I have argued here, should indeed be the case.

\section{IV \hspace{1em} CONCLUSION}

In the end, such an amalgamated system as proposed in the previous sections would heavily depend on courts to do the transformative work. As \textit{Ramuhovhi II}, as well as \textit{Gumede} and \textit{Bhe}, shows, the legislature has not demonstrated eagerness to resolve these prickly issues – especially where they concern protection of the rights of vulnerable groups such as women and children in customary communities. Whenever the legislature tries to address questions of regulating vernacular law, it falls back on dangerous platitudes like ‘traditional leaders are the custodians of our culture and land’, thus more deeply entrenching the static patriarchy imposed by colonial and apartheid authorities in legislation like the Traditional and Khoi-San Leadership Act 3 of 2019 and Traditional Courts Bill (B1D-2017) instead of the vibrancy and dynamism of vernacular law’s deeply negotiated, internally contested and richly contextualised ‘normative

\textsuperscript{144} \textit{Ramuhovhi I} (note 3 above) at paras 65 and 71.

\textsuperscript{145} GR Bushe ‘Appreciative Inquiry is Not About the Positive’ (2007) 39(4) OD Practitioner 33; J Reed \textit{Appreciative Inquiry: Research for Change} (2006); SA Hammond \textit{The Thin Book of Appreciative Inquiry} (3rd Ed 2013).
repertoire’. Even as communities and civil society continue to press the legislature to deliver just results, the courts have become the bearers of the justice hopes of South Africans.

In the recently published *Oxford Handbook of Law and Anthropology*, Rachel Sieder argues that:

> The recognition of legal pluralism in Latin America’s new constitutional regimes, however limited or ambiguous in normative and practical terms, has meant that lawyers, who defend Indigenous Peoples’ collective rights to autonomy, land, and territory, and judges, who adjudicate these cases, have had to engage with alternative cultural conceptions and representations of what ‘law’ itself is.

There is a sense in which the body of (living) customary law cases that have come before the Constitutional Court can be said to have accomplished similar engagement with vernacular concepts of law in South Africa. Indeed, as I have argued above, I would go further to say that, in addition to a different ‘law-sense’, the legal professionals listed by Sieder have been pressed to engage with a different *world*-sense. Yet, as I have demonstrated, such ‘limited’ and ‘ambiguous’ engagement by the relevant attorneys, advocates and justices of the Constitutional Court is not enough to fundamentally transform our entire system in the ways in which we need it to be rendered wholly South African and thus relevant to all South Africans. Indeed, as reviewers correctly pointed out, lower court decisions – and I would add, the arguments presented by many lawyers who appear before those lower-level courts – should give us pause because of how they prove that even the courts are hard-pressed to realise this constitutional aspiration. Yet we cannot refrain from asking more of the courts simply because the precise details of what is asked are difficult for them to do.

What then are the courts to do? The courts must ‘refuse’ to continue perpetrating the

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146 For examples, refer to Claassens & Cousins (note 34 above); and *Tongoane & Others v National Minister for Agriculture and Land Affairs & Others* [2010] ZACC 10, 2010 (6) SA 214 (CC), 2010 (8) BCLR 741 (CC).
150 For example, see *Pilane & Another v Pilane & Another* [2011] ZANWHC 80 (High Court judgment) which was overturned by the Constitutional Court on appeal in *Pilane* (note 121 above).
151 It is crucial to note that the difficulty is on the side of the courts. South Africans live vibrantly culturally and legally hybridised lives. This is what is appropriately described as legal syncretism by BA Gebeye *A Theory of African Constitutionalism* (2021). One sees legal syncretism practised all over the world where different normative systems exist together in people’s lives.
152 A Simpson *Mohawk Interruptus* (2014) describes the indigenous people as engaging in a ‘politics of refusal’. It is in this politics that I am calling the courts to notionally engage in solidarity, even as they are inherently limited by their institutional position within the modern Westphalian conception of the nation-state and the concomitant permanent minoritisation (or ‘Othering’) of indigenous peoples that is part of the political legacy of colonialism detailed by M Mamdani *Neither Settler nor Native: The Making and Unmaking of Permanent Minorities* (2020). M Mamdani ‘Beyond Settler and Native as Political Identities: Overcoming the Political Legacy of Colonialism’ (2001) 43(4) *Comparative Studies in Society and History* 651–664. Legal amalgamation,
extant ‘epistemic violence’ \(^\text{153}\) in terms of which the South African legal order continues to ‘constitute the colonial subject’ \(^\text{154}\) – that is, the four fifths or more of South Africans who are Black and/or Indigenous Africans – and the ways in which they ordinarily view the world and themselves \(^\text{155}\) within it ‘as Other’. \(^\text{156}\) Whether in terms of the Constitution’s vision or morality, it is incumbent on the courts to stand in solidarity in challenging and ultimately overcoming ‘the colonial erasure’ \(^\text{157}\) that is at the foundations of the prevailing logics of South African (common) law as we know it and the ways in which these logics are incommensurate with the indigenous ‘epistemologies and ontologies of law grounded in [profound] conceptions of time, space, and personhood’ \(^\text{158}\) that I have described above as the indigenous world-sense embodied by *ubuntu* / *botho* properly understood. \(^\text{159}\)

Such ‘judicial activism’ is, in fact, foreseen by South Africa’s democratic Constitution. \(^\text{160}\) As Klare wrote when he argued that South Africa’s Constitution mandates ‘transformative constitutionalism’: ‘[t]he Constitution invites a new imagination and self-reflection about legal method, analysis and reasoning consistent with its transformative goals’. \(^\text{161}\) Further still, ‘the Constitution suggests not only the desirability, but the legal necessity, of a transformative conception of adjudicative process and method’. \(^\text{162}\) Largely agreeing, former Deputy Chief Justice Dikgang Moseke wrote that ‘the judiciary is commanded to observe with unfailing fidelity the transformative mission of the Constitution’. \(^\text{163}\)

It is probably fair to say that the degree or nature of transformation envisioned by Klare and Moseneke is exceeded by the vision presented in this article. However, it does not seem fundamentally inconsistent. There is no question that amalgamation of customary and common law would be deeply transformative of South African law. Proceeding with it is not for the fainthearted. But, with judicial (or, alternatively, political) will, it is very feasible.

It does not require codification of vernacular law norms – a futile task anyway, as explained above. It does not require that the judges be radically retrained to become ‘experts’ in customary law – certainly no more so than they would need to be to proceed with a system of choice of law wherein parties could legitimately choose to have their cases heard and decided under their customary law. Moving ahead with amalgamation in the manner proposed does not need courts to do anymore additional legal research into vernacular law than would be required

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\(^{154}\) Ibid at 24–25.

\(^{155}\) F Fanon *The Wretched of the Earth* (1963).

\(^{156}\) Spivak (note 153 above) at 25.

\(^{157}\) Sieder (note 148 above) at 6–7.

\(^{158}\) Ibid. Also refer to Simpson (note 152 above) and Rifkin (note 138 above).

\(^{159}\) Again, refer to Ramose (note 48 above) and others listed there.


\(^{162}\) Ibid at 156.

under the present choice of law system.164 As seen, to determine a fair, informed and reasonable outcome, courts like those in Alexkor, Bhe, Gumede, Shilabana, Pilane, Sigcau, Mayelane, Maledu, Ramuhovhi and the many other cases that have come before the lower courts have taken one or more of several steps. First, they have requested that the parties provide additional testimony and evidence. Second, they have drawn upon the resources of amici curiae. Third, they have gathered the academic materials that they could and regarded them with some healthy scepticism and discernment. Those courts that have been most successful – of which the higher courts certainly make up a larger share – have benefited from all three sets of resources in order to judge vernacular law content more capably than what their training has prepared them for. They have also benefited from a less protectionist approach to the formally institutionalised common law and the colonial logics upon which it is premised. More precisely, such courts have benefited from greater willingness to embrace democratic transformation by, at a minimum, parting with the dominant legal culture of colonial–apartheid.

In keeping therewith, readers will not be surprised to learn that what the proposed undertaking does require is that courts be open to being presented with innovative and unfamiliar arguments drawing on the social science evidence of the vernacular law in any and every case where the South African public takes them up on the invitation to draw from all South Africa’s normative traditions to make a constitutionally adherent argument. It asks that the courts delve deeply in those cases to enquire into what the purposes and objectives are for which the vernacular law principles brought before them originally existed. It also demands that, whatever living law principles are presented to them for consideration, the courts consider how the political and social economy of customary communities have changed since the inception of any precolonial norms presented. Moreover, it necessitates that courts dwell on the implications such changes in political and social economy have had for South African communities and the ability of the (often precolonial) normative ideals to achieve their originally-intended results in the context of contemporary circumstances of material poverty and precarity.165 In short, it requires that courts hold the doctrine of precedent much more loosely than they have ever before, thus drawing again on the character of vernacular law as a system under which rules ‘are open-textured and without strong predictive force’ 166

All of this ultimately suggests the need for courts striving to honour the nature of vernacular law’s processes to grapple with questions of what kind of agency the parties to the dispute at hand were attempting to exercise, and how, and the long-term relational impact of the decision that is reached in the present case. As Former Justice Kate O’Regan describes what is needed of courts faced with the ‘systemic aspect of the paradox’ of tradition and modernity, ‘it will require

164 Indeed, this entails doing as JA Lesetedi argued in Ramantele (note 106 above) and privileging vernacular law in court determinations of the content of custom by drawing upon more modern sources such as contemporary records, recent case studies and oral evidence to obtain a more accurate understanding of vernacular law as it exists at present. This unavoidably entails relying upon factual evidence for the purpose of determining the content of law. Yet, as O’Regan (note 79 above) delineates the distinction:
Recognising that customary law is a question of law, not fact, does not mean that evidence of both members of a community, and expert witnesses, will not be relevant in the determination of the content of customary law. The Recognition of Customary Marriages Act defines ‘customary law’ as the ‘customs and usages traditionally observed among the indigenous peoples of South Africa and which form part of the culture of those peoples. What constitutes a ‘traditionally observed’ custom will be properly a matter for evidence. Nevertheless, as the majority in Mayelane [note 51 above at para 61] held, once that evidence has been heard, it is the ‘function of a court to decide what the content of customary law is, as a matter of law not fact’ (references omitted).

165 For example, see Mnisi Weeks (note 34 above) at 210–217.

166 O’Regan (note 79 above) at 124.
careful contextual analysis and review, to determine which remedy will best accommodate the competing concerns.\footnote{Ibid at 126.}

In other words, courts would need to ask: what outcome were each of the parties trying to negotiate and might there be a creative way to help them overcome the present hurdle (that is, the point at which they reached an impasse) by drawing upon different norms in the full repertoire that exists in all of South Africa? It may even occur that the parties did not realise that they had access to the norms upon which the court might draw.

This element may be the most radical transformation proposed in the idea of amalgamation because it calls upon courts to become ‘allies’ and strategise with the parties to the conflict rather than engage in a winner-takes-all calculus as typically produced by emphasis on the adversarial nature of South African law. In other words, more ‘mediators’ than ‘adjudicators’. In a broader sense, it also calls upon the courts to become ‘allies’ with the ordinary people of the land as a whole in their efforts to conquer the ongoing oppression they experience through the silencing that continues to be perpetrated by the legacy of colonial–apartheid in South African law. Yet, even setting aside the deliberately collective, reparative and transformative language of the Constitution’s Preamble,\footnote{The Preamble reads: ‘We, the people of South Africa, Recognise the injustices of our past; … Believe that South Africa belongs to all who live in it, united in our diversity … [and] adopt this Constitution as the supreme law of the Republic so as to Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law’.} this is the logical conclusion of ubuntu/botho: that we are all in it together – and that must surely include our justices of the courts.

While, in this article, I have deliberately drawn the idea that we are all in it together – and so too the justices of the courts – from the indigenous world-sense, there is evidence of this more humane/humanistic legal and judicial set of ideals being excavated from within the European-American worldview by critical scholars in the Global North.\footnote{For instance, the work of critical race theorists, such as Derrick Bell and Kimberlé Crenshaw, and decolonial and critical indigenous scholars such as Sandy Grande (note 130 above). One helpful articulation of this argument recently is H McGhee The Sum of Us: What Racism Costs Everyone and How We Can Prosper Together (2021).} Those who find it helpful might therefore think of the recasting of the judicial role that I am proposing under ubuntu/botho in a manner similar to the critique levelled by the feminist political theorist, Jennifer Nedelsky, against liberal rights wherein she argues for ‘reconceiving rights as relationship’.\footnote{J Nedelsky ‘Reconceiving Rights as Relationship’ (1993) 1 Review of Constitutional Studies 1.}

Nedelsky objects to the concept of rights that casts them as ‘boundaries others cannot cross and it is those boundaries, enforced by the law, that ensure individual freedom and autonomy’. Instead, Nedelsky argues that this view is impoverished by its belief that ‘autonomy is independence, which thus requires protection and separation from others’.\footnote{Ibid at 7–8.} Instead, she demonstrates that ‘[w]hat makes autonomy possible is not separation, but relationship. This approach shifts the focus from protection against others to structuring relationships so that they foster autonomy.’\footnote{Ibid at 8.}

The vernacular law understanding of land rights under IPILRA defended by the Court in Maledu is representative of this ‘rights as relationship’ conception\footnote{For further explication of this central ideal in vernacular law, see Kingwill (note 34 above), and Mnisi Weeks & Claassens (note 120 above).} but, as shown, it could

\begin{thebibliography}{99}
\bibitem{Ibid at 126.} Ibid at 126.
\bibitem{The Preamble reads: ‘We, the people of South Africa, Recognise the injustices of our past; … Believe that South Africa belongs to all who live in it, united in our diversity … [and] adopt this Constitution as the supreme law of the Republic so as to Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law’.}
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\bibitem{J Nedelsky ‘Reconceiving Rights as Relationship’ (1993) 1 Review of Constitutional Studies 1.}
\bibitem{Ibid at 7–8.}
\bibitem{Ibid at 8.}
\bibitem{For further explication of this central ideal in vernacular law, see Kingwill (note 34 above), and Mnisi Weeks & Claassens (note 120 above).}
\end{thebibliography}
go further and deeper into the indigenous values and world-sense embodied in a robust understanding of ubuntu/botho. A parallel argument can be made about the move from an adversarial system to one in which the courts are effectively mediators and co-strategists to help find the best solution for the dispute with which the parties are confronted: it is a move from courts as security guards of ‘boundaries’ to facilitators of healthy social ‘relations’ or, in terms of a robust appreciation of ubuntu/botho, mediators of reconciliation.

Might it be conceivable in South Africa for the judicial system to be recrafted as part of a ‘relationship’ with the parties to a case (such as between the state and its citizens) that provides the ‘support that make[s] the development of autonomy possible’? An amalgamated system as proposed above would certainly invite just that; thus arguing that, as part of the circle of existence defined by ubuntu/botho, the courts might play a collaborative role in helping parties achieve true freedom as is only possible in the context of healthy relationships that sustain us.
Chastisement and the Consideration of African Customary Law in Child Law Matters

MATHABO BAASE

ABSTRACT: Consideration of African Customary Law and its principles is usually excluded in matters related to child law even where the judgments handed down by the courts directly affect the lives of all South African children. Without disagreeing with the outlawing of corporal punishment in *YG v S* and *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others*, I raise several important questions with respect to the way courts reached their respective decisions. In particular, and in its historical context, I probe their overt reliance on inherently Euro-centric legal instruments and procedural law even as they continue to develop the legal system for a country in which some people subscribe to African Customary Law and identify with the norms, beliefs and values on which it is based. I highlight three key areas in which consideration of African Customary Law could have enabled the courts to reach a broader, more Afro-centric *ratio decidendi*. I further argue for the judicial consideration and application of African Customary Law principles in all child law matters. This paper cannot explore all child law related matters, so it focuses on the most recent nationally significant matter of chastisement to illustrate the approach recommended here in all child-law-related matters.

KEYWORDS: corporal punishment, pluralism, reasonable chastisement

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I INTRODUCTION

The Constitution of the Republic of South Africa, 1996 (Constitution) makes provision for the coexistence and equality of African Customary Law (ACL) and common law,¹ and includes the role for the courts in developing the common law in line with the Constitution.² The pluralistic nature of South Africa’s legal system provides the judiciary with a plethora of principles to consider and apply as they fulfil this role. In doing so, however, courts freely refer to international law and broad constitutional principles but have assigned a narrow avenue through which ACL can be considered. ACL, I argue, can play a substantially greater role when the judiciary develops of the South African common law. I make this argument by using the history of the courts’ jurisprudence regarding the chastisement of children.

Disregard for ACL by legal practitioners and the judiciary can be detrimental in several ways. It may prevent the court from considering alternative solutions to African legal problems and adversely impact the development of South Africa’s legal culture.³ Most affected are the country’s citizens when bound by judgments which may not always reflect their cultural or religious norms, beliefs and values because the Constitution, in dealing with judicial authority, provides that an order issued by a court binds all persons to whom it applies.⁴

This paper argues for the judicial consideration and application of ACL in all child law related matters.⁵ In doing so, it contests the internal limitation provided in section 211(3) of the Constitution.⁶ I draw on recent jurisprudence on the constitutionality of corporal punishment as a lost opportunity to advance my broader argument that the judiciary has failed to draw on ACL principles to the detriment of its legal development in South Africa. A critical analysis of YG v S⁷ and Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others⁸ illustrates a legal culture in which the judiciary emphasises international and foreign law, often to the exclusion of ACL. The paper then briefly summarises the history behind present-day South African substantive and procedural law, whose out-of-date and foreign basis, has a history which, I submit, provides a likely explanation for the current diminished role of ACL in the judicial process. The benefits that result from considering ACL are illustrated by considering how ACL could have aided the courts in YG v S and FORSA v Minister of Justice and Constitutional Development in formulating an Afro-centric and more comprehensive ratio decidendi,⁹ and in proposing solutions to concerns arising in the academic analyses of these cases.

² Constitution ss 39(2) and 173.
⁴ Constitution s 165(5).
⁵ This paper cannot explore all child law related matters, so it focuses on the most recent nationally significant matter of chastisement to illustrate the approach recommended here in all child-law-related matters.
⁶ Section 211(3) provides for the application of ACL when the law is applicable.
⁷ [2018] ZAGPJC 290, 2018 (1) SACR 64 (GJ) (‘YG v S’) ⁸ [2019] ZACC 34, 2019 (11) BCLR 1321 (CC) (‘FORSA v Minister of Justice and Constitutional Development’) ⁹ Afro-centricity is here understood as the centrality of African ‘culture, ideals, values and history’ during the study of African communities or phenomena. L Schreiber ‘Overcoming methodological elitism: Afrocentrism

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A YG v S

At the time of writing in October 2021, YG v S was the most recent South African case involving the chastisement of a child. It first appeared before the Regional Court in Johannesburg in 2018. A Muslim father was charged with two counts of assault, on his wife and his 13-year-old son, respectively. After being convicted on both charges, and notwithstanding his fully suspended sentence, the father appealed to the Gauteng High Court (high court). The charges arose from an incident at the family home when the appellant found his son viewing pornographic material on a family iPad. A verbal altercation between father and son escalated to physical abuse when the appellant concluded that his son was lying about what he had done. The appellant relied on the common law reasonable and moderate chastisement defence and his constitutional right to freedom of religion. He submitted that he had merely disciplined his son in accordance with his beliefs and that his son was aware that pornographic material was forbidden. The constitutionality of the moderate and reasonable chastisement defence was raised by Keightley J mero motu.

The high court maintained that the common law defence should be considered in the interests of justice. Keightley J provided three reasons for this consideration. First, it would clear up legal uncertainty regarding the constitutionality of the common law defence, which would be to the benefit of South African parents who could be implicated in future. Second, the high court emphasised the role of the court in developing the common law in accordance with section 39, read together with section 8(1), of the Constitution. Third, the high court maintained that its silence on the matter would be detrimental to children, as their rights would remain in jeopardy until the legislature decided to intervene.

In detailing the existence and nature of the common law defence, Keightly J referred to legal textbooks and the judgment in Rex v Janke and Janke. Commencing its analysis of the constitutionality of the common law defence, the court listed the relevant rights afforded to the child by the Constitution. These include the right to human dignity; to equal protection; to be free from violence; not to be treated or punished in an inhumane, cruel or degrading manner; protection from neglect, degradation, maltreatment or abuse; and the paramountcy of the principle of the best interest of the child. The court noted the submissions made as a prototypical paradigm for intercultural research’ (2000) 24 International Journal of Intercultural Relations 651, 652.

YG v S (note 7 above) at paras 1 & 2.

Ibid at para 3.

Ibid at para 4.

Ibid at para 10. While most courts rely on the arguments made and evidence placed before them, there are instances where a court hands down a judgment that goes beyond the legal issue between the parties in the matter.

Ibid at para 25.

Ibid at para 26.

Ibid at para 27. These provisions bind the courts to the Bill of Rights and place a legal obligation on the courts to develop the common law in a manner which promotes the objects, spirit and purport of the Bill of Rights. Section 39(3) emphasises the supremacy of the Bill and makes provision for the recognition of other legal systems ‘to the extent that they are consistent with the Bill’.

Ibid at para 28.

Ibid at paras 31–35.

1913 TPD 382 (‘R v Janke & Janke’).

YG v S (note 6 above) at para 36. Constitution ss 10, 9, 12 and 28.
by Freedom of Religion South Africa (FORSa)\textsuperscript{21} in defence of the rights of the parents, which included the right to freedom of religion; opinion and belief; human dignity; religious and cultural communities; and, last, the provision afforded to the protection of families (the ‘natural’ unit of society).\textsuperscript{22}

In addition, the court considered South African cases dealing with the legal issue of corporal punishment. The first was \textit{S v Williams and Others},\textsuperscript{23} in which the Constitutional Court had held that s 294 of the Criminal Procedure Act 51 of 1977 was unconstitutional because it provided for the corporal punishment of juvenile offenders (by whipping), which violated several of their constitutional rights.\textsuperscript{24} Furthermore the Constitutional Court referred to the international trend of abandoning methods of punishment that do not recognise human rights but rather place great emphasis on vengeance and retribution. The Court stressed the obligation of the state to treat its weakest members in a manner that enhances their human dignity and self-esteem. It warned that the state’s inability to do so may cause those adversely affected to increasingly disregard and disrespect the rights of others.\textsuperscript{25} The second case considered by the Keightley J was \textit{Christian Education South Africa v Minister of Education}\textsuperscript{26} in which the Constitutional Court had held that corporal punishment under the South African Schools Act 84 of 1996 was also unconstitutional.\textsuperscript{27} The high court noted the Court’s reasoning regarding the difference between corporal punishment at home and that occurring in a school environment: it emphasised the Court’s point that despite real and difficult challenges, which the state faces when called upon to intervene in matters of child abuse,\textsuperscript{28} it could not shy away from this responsibility, particularly given its legal obligations under the United Nations Convention on the Rights of the Child (1989) (UNCRC). The high court also reiterated the importance of the principle of the Best Interest of the Child\textsuperscript{29} and, after conceding that neither \textit{S v Williams} nor \textit{Christian Education South Africa v Minister of Education} directly considered the common-law defence of chastisement in the home, it commenced its final case discussion, viz., \textit{S v M}.\textsuperscript{30} Here the high court emphasised the views of the Constitutional Court in \textit{S v M} relating to the legislative status of the UNCRC and its role as the international standard against which all legislation should be measured.\textsuperscript{31} The high court also referred to the Court’s call for ‘a change in mindset’ and realignment with the new vision of the Constitution as it accords with the provisions of UNCRC regarding the enactment of children’s rights.\textsuperscript{32} It furthermore emphasised the child rights specifically mentioned by the Constitutional Court in \textit{S v M}, which included the child’s right to dignity; the importance of seeing children as legal subjects

\textsuperscript{21} Fourth Amicus Curiae in \textit{YG v S}.
\textsuperscript{22} \textit{YG v S} (note 7 above) at para 37.
\textsuperscript{23} [1995] ZACC 6, 1995 (3) SA 632 (‘\textit{S v Williams}’).
\textsuperscript{24} \textit{YG v S} (note 7 above) at para 40. These rights include the right to dignity and protection from cruel, inhumane and degrading treatment.
\textsuperscript{25} Ibid at para 40.
\textsuperscript{26} [2000] ZACC 11, 2000 (4) SA 757 (‘\textit{Christian Education South Africa v Minister of Education}’).
\textsuperscript{27} \textit{YG v S} (note 7 above) at para 41.
\textsuperscript{28} Ibid at para 42.
\textsuperscript{29} Ibid at para 43.
\textsuperscript{30} [2007] ZACC 18, 2008 (3) SA 232 (CC) (‘\textit{S v M}’).
\textsuperscript{31} \textit{YG v S} (note 7 above) at para 44.
\textsuperscript{32} Ibid at para 45.
in their own right; and the right to live in a nurturing environment which is secure and free from ‘violence, fear, want and avoidable trauma’.\(^33\)

The high court referred to two Acts that place duties on the state and parents to provide for the rights of children, viz., the Children’s Act 38 of 2005 and the Domestic Violence Act 116 of 1998.\(^34\) The high court then focused on international law, maintaining that South Africa’s ratification of the UNCRC had placed a positive legal obligation on the state to comply with the protections it affords. These include taking the necessary measures to protect children from harm; ensuring that discipline in schools is administered appropriately; and protecting children from torture as well as from treatment and punishment that is cruel, degrading or inhumane.\(^35\) The high court acknowledged that the UNCRC does not explicitly address the matter of parental physical chastisement, but referred to two comments issued by the United Nations Committee on the Rights of the Child (UNCRC) regarding corporal punishment: General Comment No 8 on The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment and General Comment No. 13 on The Right of the Child to Freedom From All Forms of Violence.\(^36\) General Comment 8 states that corporal punishment is not compatible with the UNCRC, given the child’s rights to be free from all forms of degrading and cruel treatment, and places a duty on state parties to detail the steps taken towards abolishing corporal punishment.\(^37\) General Comment 13 addresses the intensity and extent of violence experienced by children. It explains that violence against children is unjustifiable and, furthermore, highlights the importance of a paradigm shift which would enable a child-rights-based approach to the protection and care of all children. In addition to recognising the dignity of the child and the primary position of the family unit, General Comment 13 stresses the fact that no national laws allowing for certain forms of violence should be enacted as these could endanger the child’s absolute right to dignity and integrity.\(^38\) The high court then noted two comments on South Africa’s second report from the United Nations Committee on the Rights of the Child.\(^39\) The first noted that the country had not outlawed corporal punishment, which remained a widely practised form of discipline; the second encouraged the state to adopt legislation prohibiting ‘all forms of corporal punishment’ and chastisement in the home.\(^40\)

Having considered this legislation and case law, the high court analysed the effect of these legal instruments on the common-law defence of reasonable and moderate chastisement. It rejected the argument presented by FORSA that parents are entitled to administer corporal

\(^{33}\) Ibid at para 46.
\(^{34}\) Ibid at paras 48–52.
\(^{35}\) Ibid at para 53.
\(^{37}\) YG v S (note 7 above) at para 54.
\(^{38}\) Ibid at para 55.
\(^{39}\) The UN Committee on the Rights of the Child is a body that monitors state parties’ implementation of the provisions contained in the UNCRC’s comments and conventions. The committee requires that state parties submit regular reports that illustrate how the rights are being implemented. See UN Committee on the Rights of the Child (CRC) (18 August 2021), available at https://www.refworld.org/publisher,CRC,,ZAF,,,0.html. Constitution s 231.
\(^{40}\) YG v S (note 7 above) at para 56. The African Charter on the Rights and Welfare of the Child (1990) was cited once in relation to its concurrence with the international legal instruments at para 57.
punishment to their children as a means of childrearing on the grounds that this is ultimately in the best interest of the child.\(^{41}\) FORSA further stressed the importance of differentiating between violence and chastisement that is reasonable and moderate, stating that the latter serves the child’s wellbeing as it instils discipline.\(^{42}\) The high court provided five reasons for considering even moderate corporal punishment unconstitutional. The first reason pertained to the variation in the physical and psychological wellbeing (or robustness) of children.\(^{43}\) The second stressed the absence of clear factors which determine what constitutes reasonableness in chastisement cases, thereby placing the question of reasonableness within a dangerously subjective frame, which would be detrimental to children as the question of physical punishment would be arbitrary.\(^{44}\) The third reason was that physical punishment violates the child’s rights to bodily integrity and to protection from all forms of violence.\(^{45}\) The fourth reason was that corporal punishment is degrading as it treats children differently from the way adults are treated if they are physically assaulted.\(^{46}\) The fifth reason followed from the fourth in emphasising that the unequal treatment of children and adults amounted to discrimination on the grounds of age, thereby contravening section 9 of the Constitution.\(^{47}\) The high court ended its analysis by considering whether the common-law defence’s infringement of children’s rights could be justified under section 36 of the Constitution, and concluded that the protection of the rights of children outweighed the rights of parents to continue administering corporal punishment for disciplinary reasons.\(^{48}\) The high court furthermore maintained that parents could still discipline their children in alternative non-violent ways, and that its judgment was geared towards the protection of children’s rights and not the future incarceration of non-compliant parents.\(^{49}\) Finally, it rejected FORSA’s further argument that parents have a right to religious freedom on the grounds that this right did not trump the rights of their children.\(^{50}\)

Following its consideration of the merits of the appeal, the high court held that the common-law defence of reasonable and moderate chastisement was unconstitutional and should therefore no longer be provided for under South African common law.\(^{51}\) Freedom of Religion South Africa took the matter on appeal and appeared before the Constitutional Court in 2018.

\(^{41}\) Ibid at para 65.  
\(^{42}\) Ibid at para 66.  
\(^{43}\) Ibid at para 67.  
\(^{44}\) Ibid at para 68.  
\(^{45}\) Ibid at para 70.  
\(^{46}\) Ibid at para 72.  
\(^{47}\) Ibid at para 76.  
\(^{48}\) Ibid at paras 80–81.  
\(^{49}\) Ibid at para 81.  
\(^{50}\) Ibid at para 84.  
\(^{51}\) Ibid at para 107. This article does not contest the high court’s judgment. However, it does raise problems with the approach. Notwithstanding the principle of constitutional supremacy, given the court’s use of s 28 to develop the common law, the court could have provided a more Afro-centric ratio decidendi. While the international instruments may not have been ‘determinative’ they largely informed the Court’s decision, while ACL was not considered at all.
When the matter came before the Constitutional Court, Mogoeng CJ handed down the unanimous judgment. The Court commenced by discussing the facts of the case in *YG v S* and provided a brief social and legal history of corporal punishment in South Africa.\(^{52}\) Having established that FORSA had the necessary standing to bring the matter before the Court,\(^{53}\) it addressed the question of the application for leave to appeal, observing that the application pertained to several constitutional rights and was of public importance. The Court stressed the importance of the case and the need for a nationally binding judgment\(^{54}\) that would have an impact on all the citizens within the Republic, including those who practice ACL.

The Court proceeded by limiting the grounds that it would consider during the adjudication process, as this would allow the Court to deliver a brief judgment while still addressing all the issues.\(^{55}\) It identified two provisions that it would consider: the fundamental right to dignity and section 12(1)(c) of the Constitution.\(^{56}\) After considering the parental right defence raised by FORSA, which again emphasised the need to differentiate between physical abuse and reasonable chastisement, the Court focused on the interpretation of section 12(1)(c) of the Constitution.\(^{57}\) Having explored the technical and legal meaning of the word ‘violence’, the Court maintained that reasonable and moderate chastisement fell within the meaning of violence provided for by section 12(1)(c).\(^{58}\) Here the Court emphasised the widespread and institutionalised violence prevalent in South Africa and the aim of section 12 to alleviate and abolish the nation’s continued challenges in this respect.\(^{59}\) In its discussion on the right to dignity the Court reiterated that it was not only a fundamental right but also one of the core constitutional values.\(^{60}\) It emphasised that each child is an independent legal subject and is therefore entitled to the enjoyment of this right.\(^{61}\)

The Court then addressed the question of whether a section 36 limitations analysis of the child’s constitutional right to human dignity (section 10) and their right to freedom and security of the person (section 12) could yet be declared reasonable and justifiable under the Constitution. It acknowledged that the common-law defence is available to all parents regardless of religion or culture; it furthermore maintained that this defence infringed upon

\(^{52}\) *Freedom of Religion South Africa v Minister of Justice and Constitutional Development & Others* [2019] ZACC 34, 2019 (11) BCLR 1321 (CC) (‘FORSA v Minister of Justice and Constitutional Development’)

\(^{53}\) Ibid at paras 13–20.

\(^{54}\) Ibid at para 21–28. The Court addressed the fact that this case bypassed the Supreme Court of Appeal. The Court allowed its occurrence here due to the similarity of the high court’s declaration to other matters where legislation was declared unconstitutional. It maintained that the unconstitutionality of the common-law defence had far reaching and serious implications.

\(^{55}\) Ibid at para 30. Even though there were no third parties who brought the matter of ACL before the Court, it may be argued that the Court could of its own accord have taken a more extensive legislative approach and considered ACL, because of the significant impact that its judgment would inevitably have on society.

\(^{56}\) Ibid at para 31.

\(^{57}\) Ibid at paras 32–35. This s makes provision for the right to freedom and security, which encompasses the right to be free from public or private forms of violence.

\(^{58}\) Ibid at para 40.

\(^{59}\) Ibid at para 42.

\(^{60}\) Ibid at para 45.

\(^{61}\) Ibid at para 46.
children’s constitutional rights, specifically those provided by sections 10 and 12.\textsuperscript{62} The Court highlighted and acknowledged the primary obligation that rests on parents to raise their children to be respectable and responsible members of society, and stressed that parents are accordingly to blame when their children behave in a delinquent manner.\textsuperscript{63} The Court then observed that the invalidation of the common-law defence meant it was no longer available to parents who used moderate and reasonable chastisement as a means of childrearing. The principle of \textit{de minimis non curat lex} (the court does not concern itself with trivialities) rule was presented and accepted by Mogoeng CJ as alternative legal recourse for those parents who may face legal prosecution for trivial forms of corporal punishment due to the invalidation of the common-law defence.\textsuperscript{64} Regarding section 28(2) (the principle of the best interest of the child), the Court reemphasised the legal obligation that rests on the state to respect, fulfil, protect and promote the rights of the child provided by section 28. In addition, the court held that the judiciary is bound by this section and needs to ensure that the child’s best interests are protected in all matters pertaining to the child. A court could, accordingly, justify the continued existence of the common-law defence only if it would be in the child’s best interest to do so.\textsuperscript{65}

The Court discussed four reasons why the defence of reasonable and moderate chastisement should no longer form part of the South African common law. First, it observed that there is no national or international legislation which expressly provides parents with the right to administer corporal punishment as a means of discipline, and contrasted this absence with the rights of children clearly contained in various national and international legal instruments.\textsuperscript{66} The second reason pertained to evidence highlighting the harmful effects of corporal punishment.\textsuperscript{67} The third reason pertained to the best interest of the child.\textsuperscript{68} In further considering the true nature of the best interest of the child in relation to discipline, the Court acknowledged that the absence of all forms of discipline could not be in the child’s best interest. It however held that the common-law defence relating to corporal punishment could not be retained as it infringes the child’s right to dignity.\textsuperscript{69} Fourth, the Court maintained that other non-violent parenting methods are available.\textsuperscript{70}

In closing, the Court held that the violence involved in moderate and reasonable chastisement of a child constituted assault, which is a criminal offence. In addition, if someone other than a parent assaulted a child they would be convicted of a crime.\textsuperscript{71} The Court therefore upheld the judgment handed down by the high court and called upon Parliament to draft a regulatory framework.\textsuperscript{72} The Court concluded by maintaining that law enforcement agencies should consider future matters arising from this judgment on a case-by-case basis.\textsuperscript{73}

\begin{itemize}
\item \textsuperscript{62} Ibid at para 50.
\item \textsuperscript{63} Ibid at para 51.
\item \textsuperscript{64} Ibid at para 52.
\item \textsuperscript{65} Ibid at para 56.
\item \textsuperscript{66} Ibid at para 63
\item \textsuperscript{67} Ibid at para 64.
\item \textsuperscript{68} Ibid at para 65.
\item \textsuperscript{69} Ibid at para 67.
\item \textsuperscript{70} Ibid at para 69.
\item \textsuperscript{71} Ibid at para 72.
\item \textsuperscript{72} Ibid at paras 73–74.
\item \textsuperscript{73} Ibid at para 75.
\end{itemize}
Both courts in *YG v S* and *FORSA v Minister of Justice and Constitutional Development* acted in accordance with the authority extended to them by the Constitution; they also followed legal protocol and reached fair and reasonable judgments. Yet, as I discuss in section IV, neither seized the opportunity to consider ACL principles in their development of the common-law. This judicial approach did not, however, develop spontaneously. South African legal development provides an explanation for the narrow application of ACL in the development of the common law.

II HISTORICAL DEVELOPMENT

The process of colonialization led to the infiltration of foreign ideologies in legislative guise. Most pre-constitutional judges were well versed in Roman-Dutch and English Law owing to the various occupations of the Cape Colony by the Dutch and the British. The dominance and survival of these legal systems were further ensured by continued recognition of Roman-Dutch Law as the common law of the Cape Colony and the future training and education of South African judges following the second British occupation of the Cape Colony. These developments resulted in the subsequent adoption of Roman-Dutch rules, the most noteworthy for present purposes being the general rule of reasonable and moderate chastisement. While this rule was also received in English Law, the more significant influence of the British occupation of the Cape is found in the reception of English procedural law.

A Pre-1994 Case Study: Chastisement in a Euro-centric Legal System

Courts that presided over pre-1994 chastisement cases found themselves in a Euro-centric legal framework. The bench was trained in English Law and was functioning under the common Roman-Dutch Law, with little to no knowledge of ACL. The courts accordingly interpreted

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74 Constitution Chapter 8 and s 173.
75 Constitution ss 8 (3)(a) and 39.
77 JR du Plessis (note 76 above) at 19.
78 Paleker (note 76 above) at 345. The *Raad van Justitie*, was replaced by English judiciary in 1827 when the British government took over the Cape Colony from the Dutch. The British government established the Supreme Court of the Cape of Good Hope in accordance with the First Charter of Justice. This court was staffed with members of the Cape, English, Irish and Scottish bar. Those who were not members of the bar were required to have a legal doctoral degree from European institutions, primarily Dublin, Oxford, and Cambridge.
79 The British government enacted legal charters which introduced detailed procedural rules including the way matters were to be raised, argued, and contested, and the procedure required for the presentation of evidence. Paleker emphasises such characteristics of English procedural law as the adversarial nature of this litigation process, the prominence of the parties, the presentation of oral argument, procedural immediacy, and public hearings. Paleker (note 76 above) at 343, 352.
80 *Die Volksraad* enacted addendums to the *Grondwet* following the *Groot Trek*. These essentially reasserted Roman-Dutch Law as the substantive law and provided procedural rules for the *Hooggerechtshof*; Paleker (note 76 above) at 343–356.
and applied Roman-Dutch common law rules within an English procedural framework, even though the English procedural system was not designed for a South African legal system.\textsuperscript{81}

The influence of Euro-centric law is evident in the earlier South African criminal justice system’s reception of the European model of physical punishment,\textsuperscript{82} according to which whipping was the preferred punishment for most juvenile offenders.\textsuperscript{83} Pre-constitutional court records further indicate the extent to which the South African private law (family law) was influenced by Euro-centric law, as in the case most relevant to this paper, \textit{Rex v Janke and Janke}. This was a criminal case involving the corporal punishment of a child that took the form of assault, which is a criminal offence. The Transvaal Provincial Division (TPD) discussed the circumstances under which a parent would be permitted to administer reasonable and moderate chastisement. The matter came before the TPD on appeals from a magistrate’s court which had convicted the parents of assault and sentenced them to imprisonment with hard labour.\textsuperscript{84} The appeal was against the sentence. The TPD discussed the rights and responsibilities of the parties, maintaining that parents have the necessary authority to administer corporal punishment to their children under a general rule drawn from Roman, Roman-Dutch and English Law.\textsuperscript{85} This general rule provided for a parent’s right to administer reasonable and moderate chastisement for misconduct by the child. The rule limited the form of punishment, however, by excluding occurrences where parents acted in an immoral manner and where the administration of the punishment was for reasons other than ‘correction and admonition’.\textsuperscript{86} The court in \textit{R v Janke and Janke} cited the \textit{Corpus Juris Civilis: the Digesta} 47.10 (\textit{iniuria}); 32 & 33 (legacies and \textit{fideicommissa}) and Codex 9.15 (the correction of relatives), and made reference to the writings of Voet, and M de Villiers, and WO Russell, as well as to \textit{Queen v Soga Mgikela} (1892–1893) 10 SC 240. It also provided a short excerpt from the English court judgment in \textit{Regina v Hopley} 2 F & F 202 (‘\textit{Regina v Hopley}’),\textsuperscript{87} which maintained that parents or schoolmasters may inflict moderate and reasonable corporal punishment in attempting to correct ‘what is evil in the child’. After listing several factors to be considered when chastising a child, the court in \textit{R v Janke and Janke} emphasised the importance of administering corporal punishment only for correctional purposes.\textsuperscript{88}

The precedent established in \textit{R v Janke and Janke} was applied to similar cases over several decades.\textsuperscript{89} Most of those that followed \textit{R v Janke and Janke} centred on the pupil–schoolmaster relationship. Common law made provision for action in \textit{loco parentis}, giving schoolmasters the authority necessary to administer moderate and reasonable corporal punishment on students

\textsuperscript{81} The legislative changes made by \textit{Die Volksraad} were not repealed when the British annexed the Republic in 1877. Roman-Dutch Law retained its national substantive legal status and English procedural law continued to govern the judiciary even in the Boer territories. Paleker (note 76 above) at 343–357.


\textsuperscript{83} Ibid.

\textsuperscript{84} \textit{Rex v Janke and Janke} 1913 TPD 382 (\textit{R v Janke and Janke}) at 384.

\textsuperscript{85} Ibid at 385.

\textsuperscript{86} Ibid.

\textsuperscript{87} In this case a schoolmaster obtained permission to chastise a 13-year-old boy. The schoolmaster administered corporal punishment for over an hour, causing the boy’s death. The court emphasised the condition that punishment must be \textit{reasonable} and \textit{moderate}, most likely because of the devastating outcome of this case.

\textsuperscript{88} \textit{R v Janke and Janke} (note 84 above) at 386.

in their care.\textsuperscript{90} As in \textit{R v Janke and Janke}, the courts relied on Voet and foreign case law.\textsuperscript{91} Other courts considered the provisions of, inter alia, s 7(k) of the Orange Free State Provincial Ordinance 9 of 1913;\textsuperscript{92} s 62(5) of the Ordinance of 1930 (the Education Consolidation Law of 1930); s 353 of Act 31 of 1917; and s 89 of Act 32 of 1917,\textsuperscript{93} which gave the parameters of the \textit{in loco parentis} common-law provision.\textsuperscript{94} There were also cases that dealt primarily with family law and the rights of custodial and non-custodial parents.\textsuperscript{95}

B  African Customary Law Pre-1994

The courts established during the colonial rule paid little to no regard to ACL during their hearings.\textsuperscript{96} However, the British policy which authorised the law of the conquered territory to remain in place until it was changed by the conqueror, as well as the limited initial reach of the colonisers, enabled most tribes in the country’s interior to continue practising ‘deep legal pluralism’\textsuperscript{97} with little interference from the British. This situation changed towards the mid-19th century, when autonomous areas were established and administered in an attempt to ‘civilise’ the population and eradicate customs and laws considered ‘barbarous’.\textsuperscript{98} The British government introduced legal and administrative means to control these areas including the repugnancy clause and chieftain treaties,\textsuperscript{99} and later during British rule established magistrates’ courts. However, insufficient militia and police officers made it nearly impossible for the country’s government to enforce foreign official law on the indigenous population.\textsuperscript{100} The non-adherence to foreign law resulted in continued application of ACL by magistrates and traditional leaders, notwithstanding the government’s non-recognition of deep legal pluralism. The application of ACL was so prevalent during the late 19th century that the Native Laws and Customs Commission of 1883 made a recommendation which encouraged the legal recognition of ACL as an uncodified common-law system. The Cape government did not give effect to the recommendation, but this did not deter continued application of ACL by customary institutions and magistrates in civil cases where the parties were African people.\textsuperscript{101}

\textsuperscript{90} \textit{Rex v Schoombee} 1924 TPD 481.

\textsuperscript{91} Voet’s writings were applied in matters dating as early as 1892. \textit{Queen v Soga Mgikela} (1892–1893) 10 SC 240.

\textsuperscript{92} \textit{Rex Respondent v Scheepers Appellant} 1915 AD 337. Section 7(k) provided principles with the necessary authority to administer corporal punishment to pupils who displayed ‘habitual and gross neglect of duty, disobedience, obstinacy, or vice’. An internal limitation, however, required principles to launch a careful inquisition before administering the corporal punishment. Furthermore, to refrain from administering such punishment cruelly.

\textsuperscript{93} \textit{Rex v Theron} & Another 1936 OPD 166. The Criminal Procedure & Evidence Act 31 and the Magistrates’ Courts Amendment Act 32 of 1917. The provisions in s 62(5) are similar to s 7(k) and add the further requirement of immoral conduct. Section 353 made provision for the moderate whipping of male persons who were under the age of 21 and limited the number of lashes to 15 cuts, while s 89 provided a magistrate with the necessary authority to administer punishment by whipping under special circumstances in common assault cases.

\textsuperscript{94} \textit{S v Lekgathe} [1982] 3 All SA 663 (B). This court did try to consider ACL in this case and consulted I Schapera \textit{A Handbook of Tswana Law and Custom} 1938.

\textsuperscript{95} \textit{Germani v Herf} & Another 1975 (4) SA 887 (A); \textit{Du Preez v Conradie} & Another [1990] 3 All SA 349 (BG). The court prohibited the non-biological stepfather from administering corporal punishment to his wife’s children.


\textsuperscript{97} Ibid at 8. ‘Deep legal pluralism’ refers to the everyday practices of the community that may not be codified in a legal document.

\textsuperscript{98} Ibid.

\textsuperscript{99} Ibid.

\textsuperscript{100} Ibid at 9.

\textsuperscript{101} Ibid.
ACL was accordingly observed and applied in certain legal matters prior to its legal recognition in 1910 and the enactment of the Black Administration Act 38 of 1927. Judicial notice was, however, limited to matters between ‘Native and Native only’ and primarily applied to civil and family disputes.102

Nationally, however, the colonisation process and subsequent segregation of courts had a detrimental effect on the courts’ view of ACL,103 as evidenced by the early courts’ disregard for it in pre-1994 chastisement cases. This disregard perpetuated a legal culture that neglected ACL and hampered its development through the ordinary judicial process. It also deprived the higher courts of several ACL principles.104

III THE CONSTITUTIONAL ERA

Hope for rectification of earlier neglect came from the Constitution’s recognition of ACL as an official and separate legal system, in accordance with the provisions of Chapter 12,105 and the legal obligation on all courts to apply ACL, when applicable, in terms of Section 211 (3). Predominant reliance upon the Canadian Charter of Rights and Freedoms during the drafting of the South African Constitution, however, in addition to ‘liberal borrowings’ from the USA and Germany, produced a Constitution that remained centred on Euro-centric law.106

The governing document that resulted, as informed by foreign legal systems, created a South African judicial system that required constant reference to those external systems for proper interpretation of the legal principles adopted and for ensuring their correct application.107 Davis observes that this continued practice was consistent with the earlier established legal culture, which saw the courts’ frequent consideration of English, Dutch and Australian law prior to and following the constitutional era.108 Multiple provisions in the interim and final South African constitutions perpetuated the pre-1994 legal culture. This includes section 211(3) of the Constitution, which provides that the court apply ACL when it is applicable. I submit that this internal limitation undermines the importance and value of ACL.109

102 Black Administration Act 38 of 1927 Chapters 4 and 5.
104 C Rautenbach & JC Bekker (note 96 above) at 38. The view of Western Courts’ was shaped by the fact that ACL was subordinate to the country’s legal order (state legislation which did not entail or reflect African jurisprudence). Furthermore, some courts could not take judicial note of ACL and its application was limited to instances where it was compatible with public policy and natural justice.
105 Read with Constitution s 39(2) and (3).
107 Ibid at 191–192. The borrowing does not make the Constitution beholden to its foreign origin. However, courts and legal practitioners still rely heavily on these sources when fulfilling the duties of their office. It is not unreasonable to refer to the original documents and countries of origin when domestic challenges arise which contest their validity.
108 Ibid at 192.
109 This article does not advocate for the disregard for an individual’s choice to select their desired legal system. It merely advocates for the consideration of principles from all major legal systems in particular matters.
Development in the South African law of procedure (conceived without consideration of ACL) has been primarily structural during the Constitutional era, with chapter 8 of the Constitution marking the final provision for the Courts and Administration of Justice. The country’s post-1994 judiciary finds itself, once again, in a predominantly English procedural legal framework based on that of a foreign country which, arguably, did not have an officially recognised pluralistic legal system, and whose procedures favour a textual authoritative adjudicative process which compels litigating parties to ‘open proceedings with at least implicit reference to a pre-existing set of rules’. The quasi-repugnancy nature of section 211(3) further influenced the procedural court rules in matters where choice of rule is applicable, requiring courts to consider the principles of the legal system chosen by the litigating parties or that is inferred by the surrounding circumstances in the case. Further restriction on procedural law in relation to ACL is provided in s 1(1) of the Law of Evidence Amendment Act 45 of 1988, which requires ACL to be readily ascertainable and sufficiently certain for it to be applicable.

These substantive and procedural limitations continue to chart the course of South African courts’ interpretation and application of ACL in general.

A Post-1994 case study: chastisement in the constitutional era

The post-constitutional judiciary’s interpretation and application of ACL in matters concerning chastisement was elucidated in *S v Williams and Others* and *Christian Education South Africa v Minister of Education*.

In *S v Williams* the court stressed the important role of the courts in cultivating a new culture founded on and recognising human rights. It furthermore emphasised the need to define certain concepts in a manner that reflects the lived experiences and circumstances of South Africans. Its Afrocentric statement was however followed by the court’s stance on the importance of valuable insights to be gained from public international and foreign case law, and its consideration of provisions from, for example, the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1976), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953). It briefly considered African case law and the provisions of the Banjul Charter on

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110 This structure was established prior to and maintained throughout the Unification of South Africa. The Administration of Justice Act of 1912 eradicated the legal procedural variations between the South African provinces. The Administration act was replaced by the Magistrates Courts Act 32 of 1944 and the Supreme Court Act 59 of 1959 due to pragmatic reasons. Paleker (note 76 above) at 358, 359.
111 Paleker (note 76 above) at 340.
114 Pieterse (note 113 above) at 395.
116 Ibid at para 23.
118 Signed by South Africa in 1994.
119 *S v Williams* (note 115 above) at paras 26, 27 and fn 24.
Human and Peoples’ Rights (1981). It furthermore maintained that the values articulated in the Republic of South Africa Constitution Act No. 200 of 1993 (the interim Constitution) and other legislation should be the backdrop against which the court makes its evaluations.

Similarly, the court in Christian Education South Africa v Minister of Education emphasised international legal instruments. It considered provisions from, for example, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987), the UNCRC, the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1976), and the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981). ACL was referenced only twice. The first instance pertained to the Constitutional provisions which are geared towards the protection of individual rights, more specifically the right to freedom of association, and section 211(3) of the Constitution was cited in highlighting the diverse and pluralistic nature of South African society. Second, the court referred to ACL in relation to the supremacy of the Bill of Rights and the Constitution. The importance of the international instruments and the South African government’s obligations to adhere to them is not contested. What is being emphasised here is the disregard for unique ACL principles. The courts, holding true to pre-1994 legal culture, continue to prioritise international law over ACL. Not much has changed in the judicial approach of South African courts in chastisement cases. This has resulted in an ‘either-or’ reality as opposed to an approach which includes ACL alongside international and foreign law as lodestones for courts when developing the common law.

The high court and Constitutional Court’s adjudicative approaches in YG v S and FORSA v Minister of Justice and Constitutional Development were informed by the substantive and procedural limitations that came out of the colonisation of South Africa. Present-day legal process would dictate that the courts primarily evaluate common-law legal principles as well as those arising from the relevant religious systems. There was no procedural obligation on the court to consider ACL as the parties neither conducted their lives in accordance with it, nor did any of them present ACL arguments before the court. This method of litigation is in keeping with pre-1994 procedural rules that emphasised the role of the litigating parties. Courts still primarily draw on the legal principles from within the selected legal sub-system, bolstered by relevant international and foreign law. This procedure is understandable in matters where the judgment handed down by a court directly affects only the litigating parties, but justification fails in matters where the decision binds the entire country, including those who do not subscribe to the legal system selected by the litigating parties. I submit that this situation places

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120 Ibid at para 40 and fn 58. South Africa acceded to this regional legal instrument in 1996.
121 Ibid at para 59.
122 Signed by South Africa in 1993.
124 Ibid at footnote 11.
125 Ibid at para 19.
126 Ibid at para 40.
127 Ibid at para 24 and Constitution s 18.
128 Ibid at para 26 and Constitution s 39 (3).
129 Constitution Chapter 14.
130 Pieterse (note 113 above) at 395.
131 Paleker (note 76 above) at 352.
an obligation on the Supreme Court of Appeal and Constitutional Court to consider ACL in all nationally binding cases. At minimum, in cases where precedent would have a wide-ranging effect on the regulation of the behaviour of the country’s inhabitants, ACL should stand to contribute as much as international or foreign law should in the development of common law.

My argument is made with understanding and support for the influential role of lower courts in shaping South Africa’s legal culture and their adjudication over matters of public interest. It also comes with appreciation of the limited knowledge of ACL in some lower courts, their stretched resources, and the difficulty of considering legal systems beyond the scope of those contained in the arguments presented by legal representatives. It can be argued that the Constitutional Court, with its greater access to financial and other resources, should consider ACL when adjudicating over legal matters that will directly affect society as a whole. Should the Court decide to do so, however, it would face additional procedural challenges in the form of the law of evidence and the adopted textual authoritative adjudicative process. Unlike international and foreign legal instruments, ACL is not always neatly codified and fixed, which makes it incompatible with an adjudicative process that compels litigating parties to ‘open proceedings with at least implicit reference to a pre-existing set of rules.’

The procedural limitations that these incompatibilities place on the South African judiciary are evident in both the high court and the Constitutional Court’s reasoning. Both courts extensively considered international and foreign legislative tools with no reference to ACL. This is disconcerting from the perspective of the judiciary’s role in developing South African common law. The aspirations in the Bill of Rights place a weighty mandate on the judiciary. This mandate as practised may be understood from the viewpoint of legal anthropology, and the concept of legal form for which Moore offers three explanations: law as culture, law as domination, and law as problem-solver. If asked, present-day legal practitioners would emphasise the third explanation and, accordingly employ logic and reason in a pragmatic and legally technical manner to provide solutions to social problems. This position is in keeping with the judiciary’s often formalistic legislative approach. Judges would accordingly maintain that their primary function is to ‘speak the law, not make it.’

This latter reasoning is, however, flawed in two respects. First, when interpreting the law, judges are required to consider the wider context of the surrounding legal provisions and to ascertain the objective of the legislator, to better aid the courts in their legal adjudicative duties.
Second, judges are required both to interpret the law and to hand down judgments which provide the court’s decisions with the reasons for those decisions. The adjudication process, therefore, places judges in the position of not only interpreting and applying the law but also, in handing down reasoned and legally binding judgments, of acting as lawmakers only in the matters brought before them.\textsuperscript{141}

Judgments matter. They are instrumental in perpetuating a certain legal culture, and they also steer societal norms, inform ideological values, and set the measure for legal morality in matters brought before them.\textsuperscript{142} These real consequences are less problematic in a societal order where the people are governed by a singular legal system containing the beliefs, norms and values that are accepted by most of the population. The judgments reached by the court would take these into consideration during the adjudication process and create legal principles, and a legal culture, which would continue to reinforce these beliefs, norms and values. This is particularly true in a legal system where the judgments of the higher courts are used as precedents in future cases.\textsuperscript{143} Herein lies the challenge of a Euro-centric substantive and procedural law in a pluralistic legal system.

IV AN ARGUMENT FOR AFRICAN CUSTOMARY LAW

The reception of foreign law provided South African legal practitioners with an array of legislative tools.\textsuperscript{144} Often overlooked, however, is the culturally distant nature of some of the principles, values, beliefs and norms which underly these tools.\textsuperscript{145} When adjudicating over disputes, courts are, therefore, not only considering legal issues but also contesting social practices which are often informed by differing sets of values, beliefs, principles and norms.\textsuperscript{146} ACL encompasses a number of indigenously held dictums that are common across people groups. For example, the principle of \textit{ubuntu} is accorded prominence. Similarities, however, do not stretch across both ACL and Euro-centric law. Ntlama and Ndima list five elements of ACL that illustrate the more obvious differences between Euro-centric law and ACL; these include the latter’s emphasis on its acceptance by the community whose affairs are being regulated as well as its flexibility of ACL.\textsuperscript{147}

Raising Euro-centric law above ACL in a hierarchy of legal systems, therefore, essentially constitutes a clash of ideologies, which often places courts in a difficult position.\textsuperscript{148} Facing

\begin{footnotesize}
\begin{enumerate}
\item Klare (note 3 above) at 165.
\item Klare (note 3 above) at 164 fn 39.
\item Bennett (note 112 above) at 20.
\item Moore (note 138 above) at 105. Here Moore refers to Comaroff & Comaroff who argued that the colonisations process was essentially an attempt to colonise consciousness. Due to the inconsistency of English law with the everyday workings of indigenous people.
\item C Fuller ‘Legal Anthropology: Legal Pluralism and Legal Thought’ (1994) 10 \textit{JSTOR} 9, 10. Fuller asserts that the dominance of the colonising state will always be challenged due to these ideological differences.
\item Ntlama & Ndima (note 103 above) at 8. Bennet’s first element is that African customary law rested ‘not on the will of [a] sovereign or supreme legislature for its validity but rather on its acceptance by the community whose affairs it regulated’ (Jobodwana 2000,31). Second, that customary law, ‘to be valid and enforceable must be in existence at the relevant time it is sought to be enforced.’ Third, that it is flexible. Fourth, that sanctions and punishment were not ‘strictly institutionalised’. And fifth, that the rules of customary law were unwritten.
\end{enumerate}
\end{footnotesize}
this challenge, South Africa’s post-constitutional courts have often deferred to legal positivism and relied on Euro-centric substantive law to be adjudicated according to Euro-centric legal procedures, which has resulted in a re-colonisation of ACL to bring it into alignment with the Constitution.149 This legal culture becomes more prevalent when legal practitioners are unaware of this conundrum and do not approach it with the necessary caution and mindfulness.150

In section 211(3), the Constitution makes explicit provision for and regulates the way courts should consider ACL but, though it is afforded equal legal status, its use is restricted to matters where it is applicable. The question then becomes: when is ACL applicable?

Bennett provides some clarity by identifying three approaches to this issue. He views ACL to be applicable, first, to certain classes of disputing persons or matters disputed including ‘succession, marriage and land tenure’. This approach posits that one can deduce the cultural orientation (European or African) of the parties by considering the ‘cause or matter or class of disputants.’151 The second approach limits the application of ACL to certain people groups, primarily members of certain tribes or cultural communities. The third approach pertains to the status of the parties (complainant or defendant), providing a level of judiciary discretion which allows courts to apply ACL when one or both of the parties observe ACL.152

From these approaches Himonga concludes that ACL is primarily applicable in private law matters concerning the African child. Without defining the ‘African’ child at this point, she explains that this legal system will not apply to children who belong to other racial groups.153 Following this submission, she states that ACL deals with the rights of children and in this way intersects with the best interest of the child. She emphasises that, when dealing with matters pertaining to child law, the judiciary should apply the legal system which best serves the child’s best interest.154

An argument can here be made to favour ACL and to encourage courts to consider its provisions in matters where this would be in the best interest of the child.155 With regard to the judgment in YG v S and FORSA v Minister of Justice and Constitutional Development, both courts took pains to emphasise the element of public interest and the need to provide a nationally binding judgment.156 Yet, although their judgments affect all children including


150 Bennett (note 112 above) at 11.

151 Present-day legal discourse regarding an amalgamated South African law warrants notice. Some scholars would contest the assertion that there are only two primary cultures, but the feasibility of accomplishing a unified legal culture is doubtful, given the inherent value differences between the legal systems. A Claassens & G Budlender ‘Transformative Constitutionalism and Customary Law’ (2014) 6 Constitutional Court Review 75, 104.


153 Himonga (note 152 above) at 86.

154 Ibid at 87.


156 FORSA v Minister of Justice and Constitutional Development (note 52 above) at para 23 & YG v S (note 8 above) at para 29.
those who subscribe to ACL, both courts neglected to consider the matter from an ACL perspective.\textsuperscript{157}

A further argument for considering ACL in chastisement cases can be made, in the broader context of the aspiration for a coherent, realistic and representative South African legal culture and common law. In \textit{S v Makwanyane and Another} [1995] ZACC 3, 1995 (6) BCLR 665 (CC) (‘\textit{S v Makwanyane and Another}’) Sachs J recognised the importance of considering traditionally held beliefs and values when developing South African jurisprudence. He furthermore regarded recognition and consideration of ACL by courts in future as restoring dignity to its underlying ideas and values. Having identified the ability to exercise this consideration as one of the values of an open and democratic society, he emphasises the role of ACL in matters of public importance and urges courts to look beyond the values enshrined in previously exalted portions of the law that are rooted in Euro-centric legal systems. He also raises concerns about constant over-reliance on foreign law and the need to adhere to international law (evident in the cases discussed in this paper) and their perpetuation of stereotypes regarding knowledge systems and the social hierarchy that stemmed from the process of colonisation.\textsuperscript{158}

\textbf{A \hspace{1em} The way forward}

Much has already been written on the judgments in \textit{YG v S} and \textit{FORSA v Minister of Justice and Constitutional Development}. To imagine how ACL could be used to shape the way the judiciary approaches cases involving a child’s best interests, I draw attention to Lenta,\textsuperscript{159} Clark\textsuperscript{160} and Sloth-Nielsen.\textsuperscript{161}

Lenta criticises the Constitutional Court’s judicially minimalist approach. He notes that the Court’s narrow and shallow analysis left its judgment vulnerable to misinterpretation, that those who disagree with its decision could become resentful, and that this resentment may, in turn, lead to disrespect for the Court and for the law. He also grieves the lack of an educational component, averring that the Court missed a chance to inform citizens of the wrongfulness of corporal punishment.\textsuperscript{162} Clark echoes some of Lenta’s sentiments. She also discusses the arguments for and against corporal punishment and emphasises the important role that transformation of societal attitudes and practices plays in successful implementation of the law.\textsuperscript{163} Sloth-Nielsen’s contribution concludes with disappointment at the Court’s inability to use the opportunity to hand down a judgment which contributes to South Africa’s standing as ‘one of the leaders on children’s rights in the world’.\textsuperscript{164}

Could ACL have assisted the Court in providing a more robust and Afro-centric judgment, and could certain African principles address the points raised by Lenta, Clark and Sloth-Nielsen? Potentially, the Court could have made a unique contribution to jurisprudence had it considered ACL. This may have addressed Sloth-Nielsen’s lament at the missed opportunity

\textsuperscript{157} Himonga (note 152 above) at 84.


\textsuperscript{160} Clark (note 89 above).

\textsuperscript{161} Sloth-Nielsen (note 82 above).

\textsuperscript{162} Lenta (note 159 above) at 199–200.

\textsuperscript{163} Clark (note 89 above) at 357.

\textsuperscript{164} Sloth-Nielsen (note 82 above) at 203.
to contribute to the ongoing international conversation on chastisement, and to cement South Africa’s standing in the international child law sphere. The following three ACL principles may have assisted the high court and Constitutional Court, and address the points raised by the remaining legal scholars.

1 Ubuntu

A fundamental characteristic of Euro-centric law is its emphasis on the rights of the individual. By contrast, ACL places the wellbeing of the community above individual interests. If ‘I am because we are’, there is irrefutable interdependence between the ‘I’ and the ‘we’; the demise of the one would lead to the demise of the other. The important underlying values of ubuntu accordingly speak to the need to foster the child’s sense of worth and dignity while also reinforcing the child’s respect for the fundamental freedoms and human rights of others. Ubuntu therefore emphasises the child’s status as an integral participant in the community, and as one whose negligent treatment could therefore adversely affect the larger society. While children are considered to have rights, they also have responsibilities towards the community. Some scholars, however, view this non-child-centred approach as insensitive and potentially dangerous for the child. Though disregard for children rights is a real danger in any society, few contain within their social contracts a philosophy that places the child firmly within the context of an immediate and extended family, all of whose members assume responsibility for the child. More significantly, such a philosophy encourages the protection of children’s rights and wellbeing on the grounds of their inherent worth as well as because of the detrimental effect that their demise would have on the community as a whole. The Court alluded to this principle when it emphasised the need to end the cycle of violence prevalent in South Africa. It is therefore incorrect to assume that ACL does not contain rules which promote the wellbeing of the child merely because these rules are not codified in international legal vernacular.

The responsibilities of the child as a member of the community are provided in article 31 of the African Charter on the Rights and Welfare of the Child (1990) and include the child’s duty to act in a manner that ensures familial cohesion, to respect their elders (parents and superiors), to ‘preserve and strengthen’ African cultural values, and to act as a contributor to the moral societal wellbeing. These responsibilities address Lenta’s argument that corporal punishment does not afford children the necessary real-life experiences to recognise the full extent of the implications of their misbehaviour, and that alternatives which require children to make reparations may better serve their development and develop their self-awareness. This

167 Sloth-Nielsen & Gallinetti (note 166 above) at 70.
168 Burman (note 148 above) at 32.
169 Songca (note 155 above) at 89.
170 Himonga (note 152 above) at 81.
171 FORSA v Minister of Justice and Constitutional Development (note 52 above) at para 42.
172 Himonga (note 152 above) at 87.
line of reasoning falls squarely within the ACL’s restorative justice agenda.\textsuperscript{174} It acknowledges that the temporal nature of corporal punishment does not give the child the necessary time to self-reflect,\textsuperscript{175} and it is able to accommodate effective alternatives to corporal punishment by which the child can honour his or her responsibility towards the community in ways that preserve and strengthen that community’s values.

The communal nature of \textit{ubuntu} brings further benefits, particularly in relation to the pragmatic and efficient implementation of the Court’s judgment.

\section{Implementation}

The narrow top-down approach employed by courts, especially in matters of family law, means that adjudication at times neglects ACL and the principles that it could contribute. Had the Court considered the ACL approach to childrearing, particularly the notion that the child belongs to everyone, it may have found a solution to two further issues. First, the Court could have reached a more inclusive, bottom-up approach.\textsuperscript{176} In doing so it would make the community aware of its own pre-existing values, in turn encouraging it to accept the Court’s judgment without the necessity for an ideological shift. Second, this could have addressed the concerns surrounding the implementation of the Court’s judgment as it provides for communal accountability.\textsuperscript{177} The immediate intervention by fellow members of the community in matters where some may not be disciplining their children in a legal manner provides internal and or self-policing. Stated differently, if the child belongs to everyone then everyone must take responsibility for the child. This includes protecting the child from cruel and inhumane punishment which may endanger the child’s wellbeing.

\section{Alternative Dispute Resolution}

The Court and legal academics voiced their concern about the possible future incarceration of non-compliant parents and the adverse ramifications this might have on the family dynamic.\textsuperscript{178} Notwithstanding the Court’s submissions regarding the \textit{de minimis non curat lex} rule, the relevance of ACL and its promotion of alternative dispute resolution cannot be emphasised enough.\textsuperscript{179} The necessity for state intervention is not disputed but the way it does so is important. Litigious state intervention which may lead to parental incarceration is not the ideal outcome – it could deplete government resources and add to the number of child-headed families. As an alternative, the state could hold sessions (facilitated, perhaps, by a family or child psychologist) akin to family meetings, to make non-compliant parents aware of the detrimental effects of corporal punishment as a disciplining method and to introduce the benefits of alternatives. This approach would also enable the parties involved in the dispute to apply a solution that would best serve the interests of the particular child as distinct from

\begin{thebibliography}{99}
\bibitem{174} Sloth-Nielsen & Gallinetti (note 16 above) at 71. Cf Songca (note 155 above) at 83.
\bibitem{175} Lenta (note 159 above) at 198.
\bibitem{176} Bottom-up law is understood as case-by-case adjudication that ‘produces law when courts adopt general principles to decide the outcome of individual disputes.’ JJ Rachlinski ‘Bottom-up versus Top-down Lawmaking’ (2006) 73 \textit{The University of Chicago Law Review} 933, 933.
\bibitem{177} Himonga (note 152 above) at 82.
\bibitem{178} \textit{FORSA v Minister of Justice and Constitutional Development} (note 52 above) at para 52; Lenta (note 159 above) at 195–196; and Sloth-Nielsen (note 82 above) at 200.
\bibitem{179} Himonga (note 152 above) at 85–86.
\end{thebibliography}
merely following general regulations that may not serve all children equally well. The overall long-term societal benefit would far outweigh the costs helping to address (and end) the cycle of violence; it would also empower families by enabling them to own the solutions to their disputes and to develop more effective parental skills.

In summary, I argue that incorporating core principles of ACL in issues of chastisement, as presented here, could create a platform for the development of legislation that is both child sensitive and culturally relevant. The principle of ubuntu presents a powerful tool to communicate the need to protect children’s rights and to benefit the child and the family. It can galvanise members of the community to become invested in and actively ensure the wellbeing of its children. It can encourage the implementation of alternative intervention strategies to provide necessary rehabilitation, social educational programs and parental training services where needed.\textsuperscript{180}

V CONCLUSION

This paper considered the approach of the pre- and post-1994 judiciary in cases in which the courts resolved the issue of corporal punishment by outlawing it in the juvenile criminal system, schools and home. Though these courts acted in accordance with the respective legislation, their over-reliance on international and foreign law in matters pertaining to the best interest of the African child limited their ability to hand down judgments which considered pertinent ACL. This in turn inhibited them from considering alternative solutions that could more easily be accepted by and work for most customary South African communities.

A consideration of ACL could have aided the courts in three ways. First, by considering the principle of ubuntu, courts could have employed the ACL principle that children have rights and responsibilities. Such consideration would communicate the detrimental effect that neglecting the rights of the child would have on the community. Explicitly furthering the principle of ubuntu could, in addition, have revealed the advantages of employing alternative methods of disciplining and rearing children. Second, formal support for the idea that the child belongs to everyone could have helped to ensure communal responsibility for the child, provide internal policing and by extension implementation. Third, alternative dispute resolution could offer a practical solution where non-adhering parents continue to exercise corporal punishment.

One wonders whether South African courts would have considered ACL in all South African cases if the Constitution had placed a positive obligation on them to do so, how such an obligation might have shaped their judgments and the South African legal culture, and whether it might have provided more certainty in some key areas. Contrary to views which may be held by certain legal pragmatists, it is not enough that the cases discussed here had positive legal outcomes in removing the use of corporal punishment. When law is seen as a means for cultural beliefs to be not only disseminated but also shaped, the approaches taken by South African courts matter, as do the legal tools that they consider and apply during the adjudication process.\textsuperscript{181} Therefore, and despite the Euro-centric substantive and procedural limitations that dictate the South African judicial process, it is not far-fetched to expect the country’s courts to consider the range of constitutionally recognised tools available to them, and actively include ACL when determining and ensuring the protection of the best interest of the African child.

\textsuperscript{180} Lenta (note 159 above) at 196.

\textsuperscript{181} Moore (note 138 above) at 99. The term ‘cultural beliefs’ includes the norms, values and morals of a particular cultural group, which in turn inform its behaviour.
Such inclusion should be paramount in the development of an inclusive and representative South African common law which aims to meet all the aspirations contained in the Bill of Rights while also restoring the dignity of indigenous African groups and their ideologies.
Contractual Fairness at the Crossroads

LEO BOONZAIER

ABSTRACT: In Beadica 231 CC v Oregon Trust the Constitutional Court set out to clarify the law on contractual fairness controls, which have been hotly contested between it and the Supreme Court of Appeal (‘SCA’). In this article I assess the Beadica judgment and its likely effects. The Court sounds some notes of caution in applying the test set out in Barkhuizen v Napier and narrows its controversial judgment in Botha v Rich NO. It also claims that the widely perceived divergence between it and the SCA is more apparent than real. I welcome the narrowing of Botha, but argue that important differences between the two courts remain. And though the Beadica judgment suggests the Court will now be more cautious than it once was about applying Barkhuizen, there are also reasons to doubt the judgment marks a lasting retreat. Most importantly, in AB v Pridwin Preparatory School, decided on the same day as Beadica, the Court created a new basis upon which to intervene in contractual disputes. To the extent that the Court continues to rely upon that new basis, any restraints on the application of Barkhuizen may be outflanked.

KEYWORDS: contract law, fairness, public policy, application of constitutional rights

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On 17 June 2020, the Constitutional Court decided two contractual disputes: \textit{AB v Pridwin Preparatory School} and \textit{Beadica 231 CC v Trustees of the Oregon Trust}. In both cases, the respondent had sought to bring the parties’ contract to an end by relying on its strict terms. In both cases, the applicant resisted this by relying on constitutional imperatives. The judgment in \textit{Beadica} is a significant waypoint, and perhaps a watershed, in the development of contractual fairness controls. It is the main subject of this article. \textit{Pridwin}, by contrast, manages to say almost nothing about contract law. Of that, more later.

I INTRODUCTION

A Beadica

The applicants in \textit{Beadica} were small black-owned businesses which rented out building equipment in Cape Town. They were founded using money provided by the National Empowerment Fund, whose purpose is to facilitate economic participation by black South Africans. They entered into two agreements with a Mr Sale, their former employer, who controlled the two business entities who featured as the respondents. With one, the applicants concluded a franchise agreement for ten years. With the other, they concluded a lease agreement over the premises from which their business was to operate, for an initial five years, with an option to renew for a further five. This option was exercisable, crucially, ‘at least six months prior to the termination date’ of the initial lease. Seemingly the businesses operated successfully, and each of them purported to exercise the renewal clause as the initial leases drew to a close. The problem was that they sent their written notice four months before the lease expired – not the six months stipulated. Mr Sale did not respond to their written notices until the week before the leases were due to end. He then invoked the contract’s terms and required the lessees to vacate.

The lessees went to court seeking a declaration that they had validly renewed their leases, despite their failure to comply with the notice period stipulated in the contract. They pointed out that they were ‘unsophisticated’ parties who could not be expected to comply with the technical requirements for renewal, that Mr Sale had suffered no prejudice by their delay, and that their ten-year franchise agreement showed that the lease was always expected to continue beyond the first five-year term. The National Empowerment Fund intervened to argue that the failure of the businesses, which was the inevitable consequence of eviction, would be a serious setback to its objectives.

In the Western Cape High Court, Davis J found for the applicants.\footnote{\textit{Beadica 231 CC v Trustees of the Oregon Trust} [2017] ZAWCHC 134, 2018 (1) SA 549 (WCC) (\textit{Beadica HC}).} He acknowledged that their case would fail outright if the strict terms of the lease were enforced. But he said that these must be subjected to ‘the doctrine of good faith and fairness’.\footnote{Ibid at para 30.} He sourced this approach in Constitutional Court jurisprudence, especially its 2014 judgment in \textit{Botha v Rich NO},\footnote{\textit{Botha v Rich NO} [2014] ZACC 11, 2014 (4) SA 124 (CC) (\textit{Botha}).} which

\begin{enumerate}
\item \textit{AB v Pridwin Preparatory School} [2020] ZACC 12, 2020 (5) SA 327 (CC) (\textit{Pridwin CC}).
\item \textit{Beadica 231 CC v Trustees for the time being of the Oregon Trust} [2020] ZACC 13, 2020 (5) SA 247 (CC) (\textit{Beadica CC}).
\item Here I am drawing upon E Cameron and L Boonzaier ‘Venturing beyond Formalism: The Constitutional Court of South Africa’s Equality Jurisprudence’ (2020) 84 \textit{Rabels Zeitschrift für ausländisches und internationales Privatrecht} 786, 818–834.
\item \textit{Beadica 231 CC v Trustees of the Oregon Trust} [2017] ZAWCHC 134, 2018 (1) SA 549 (WCC) (\textit{Beadica HC}).
\end{enumerate}
he understood to lay down a ‘principle of proportionality’ in the exercise of contractual rights.\textsuperscript{7} In Davis J’s view, the consequences of Mr Sale’s insistence on the strict terms of the renewal clause would be calamitous for the applicants – their businesses would collapse – and set back the National Empowerment Fund’s objectives.\textsuperscript{8} Moreover, the sole reason for this would be the applicants’ failure to give the full six months’ notice, but only four: a technical slip on their part, and one readily understood given that ‘they were not sophisticated business people’ and did not fully understand their contractual rights and obligations.\textsuperscript{9} Hence to insist on the strict terms would be punishingly and ‘disproportionately’ rigid.\textsuperscript{10} It would allow Mr Sale to ‘pursue[ his] own self-interest without regard to the other party’s interest’ – exactly the kind of conduct that Botha said ought, in our constitutionalised contract law, to be restrained.\textsuperscript{11} Davis J therefore declared that the option to renew the lease agreements had been validly exercised.

The Supreme Court of Appeal (‘SCA’) took a very different view.\textsuperscript{12} Lewis JA (with Cachalia, Salduker, Mbha, and Schippers JJ concurring) sought to dismantle Davis J’s judgment in systematic detail. She could find no sound basis for his decision. He had analogised his intervention to the application of the old \textit{exceptio doli generalis}, for example, which he took to show that South African courts have long ‘ameliorated the strictness of a legal rule’ in the name of equity.\textsuperscript{13} But Lewis JA said the \textit{exceptio} had been invoked successfully only rarely, and had been abandoned altogether in the \textit{Bank of Lisbon} case.\textsuperscript{14} The famous judgment in \textit{Sasfin (Pty) Ltd v Beukes},\textsuperscript{15} decided shortly after \textit{Bank of Lisbon}, had invalidated a contract on the basis that it was ‘contrary to public policy’. But its facts were ‘unusual’, Lewis JA said, and it applied a much higher bar than Davis J’s standard of mere ‘unfairness’.\textsuperscript{16} Moreover, there is a pressing policy concern that strongly favours adherence to the strict rules of contract law: legal certainty.\textsuperscript{17} This is vitally important to commerce, and an incident of the rule of law, which is destroyed when rules are subjected to judicial discretion.\textsuperscript{18} Davis J had ignored these sound propositions, Lewis JA said, even though they had been endorsed in SCA precedents which were binding upon him.\textsuperscript{19} She then laid out the SCA jurisprudence on the control of contract terms, including three judgments given in the previous two years.\textsuperscript{20} The crucial lesson she drew is that ‘although fairness and reasonableness inform policy they are not self-standing principles’.\textsuperscript{21}

\textsuperscript{7} \textit{Beadica HC} (note 4 above) at para 35.
\textsuperscript{8} Ibid at para 39.
\textsuperscript{9} Ibid at para 37.
\textsuperscript{10} Ibid at para 42.
\textsuperscript{11} \textit{Botha} (note 6 above) at para 46. Davis J refers to this passage in \textit{Beadica HC} (note 4 above) at paras 32, 40.
\textsuperscript{12} \textit{Trustees for the time-being of Oregon Trust v Beadica 231 CC} [2019] ZASCA 29, 2019 (4) SA 517 (SCA) (‘\textit{Beadica SCA}’).
\textsuperscript{13} \textit{Beadica HC} (note 4 above) at para 12.
\textsuperscript{14} \textit{Beadica SCA} (note 12 above) at para 19, citing \textit{Bank of Lisbon and South Africa Ltd v De Ornelas} [1988] ZASCA 35, 1988 (3) SA 580 (A) (‘\textit{Bank of Lisbon}’).
\textsuperscript{15} \textit{Sasfin (Pty) Ltd v Beukes} 1989 (1) SA 1 (A) (‘\textit{Sasfin}’).
\textsuperscript{16} \textit{Beadica SCA} (note 12 above) at para 28.
\textsuperscript{17} Ibid at paras 26, 35.
\textsuperscript{19} \textit{Beadica SCA} (note 12 above) at para 25.
\textsuperscript{20} Ibid at paras 27–34. The three cases are \textit{Roazar CC v Falls Supermarket CC} [2017] ZASCA 166, 2018 (3) SA 76 (SCA); \textit{Mohamed’s Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd} [2017] ZASCA 176, 2018 (2) SA 314 (SCA) (‘\textit{Mohamed’s Leisure}’); \textit{AB v Pridwin Preparatory School} [2018] ZASCA 150 (‘\textit{Pridwin SCA}’).
\textsuperscript{21} \textit{Beadica SCA} (note 12 above) at para 35.
That is consistent with the SCA’s jurisprudence. But it is not easily reconciled with the Constitutional Court’s judgment in Botha, on which Davis J heavily relied. That gave Lewis JA an opportunity to malign Botha, which had, she said, been ‘severely criticised’.22 She quoted the view of Dale Hutchison, a foremost contract lawyer, that the decision was ‘embarrassingly poor’.23 She also quoted approvingly the criticisms of it by Malcolm Wallis, a senior SCA colleague, who said Botha created unacceptable uncertainty.24 And she described the proposition on which Davis J had taken Botha to rest – that a court will not impose a ‘disproportionate’ consequence upon a contracting party – as ‘entirely alien to South African contract law’.25 The upshot, for Lewis JA, was that Botha was irrelevant. She did not mention it again – just as it had not been mentioned in the three SCA judgments on which her excursus was based.26 In applying these precedents, Lewis JA found no public policy basis upon which to aid the applicants.27 True, the lapse of the lease would have severe consequences for them. But they were the authors of their own misfortune: ‘it was the [applicants], through non-compliance with the renewal clause, who jeopardized their businesses’.28 So Lewis JA upheld the appeal and ordered Beadica’s eviction.29

The difference between the High Court and SCA judgments was therefore marked. Davis J, applying Constitutional Court jurisprudence, thought he was entitled to ameliorate the strict terms of the lease for the sake of fairness. Lewis JA, applying the principles the SCA has repeatedly set out, said there was no basis in South African law for a judge to do this. And she castigated Davis J for ignoring the SCA precedents – even as she herself defied Botha, a binding judgment of the country’s highest court.

B Its background

The stakes were high, therefore, when Beadica was appealed to the Constitutional Court. They were high also in the appeal in Pridwin, for closely related reasons. For it was in Pridwin that the SCA, per Cachalia JA, had provided the succinct statement of its jurisprudence that Lewis JA applied in Beadica.

This is what Cachalia JA said:30

(i) Public policy demands that contracts freely and consciously entered into must be honoured;
(ii) A court will declare invalid a contract that is prima facie inimical to a constitutional value or principle, or otherwise contrary to public policy;
(iii) Where a contract is not prima facie contrary to public policy, but its enforcement in particular circumstances is, a court will not enforce it;

22 Ibid at para 17.
25 Beadica SCA (note 12 above) at para 38.
27 Beadica SCA (note 20 above) at paras 39–46.
28 Ibid at para 44.
29 Ibid at para 47.
30 Pridwin SCA (note 20 above) at para 27.
(iv) The party who attacks the contract or its enforcement bears the onus to establish the facts;
(v) A court will use the power to invalidate a contract or not to enforce it, sparingly, and only in
the clearest of cases in which harm to the public is substantially incontestable and does not
depend on the idiosyncratic inferences of a few judicial minds;
(vi) A court will decline to use this power where a party relies directly on abstract values of fairness
and reasonableness to escape the consequences of a contract because they are not substantive
rules that may be used for this purpose.

Applying that approach, Cachalia JA found – much like Lewis JA later would in Beadica – that there was simply no basis upon which to assist the applicants, though they had invoked constitutional rights in seeking to restrain the respondent’s purported termination of the parties’ contractual relationship.31 And he also repeated the SCA’s time-honoured view that ‘fairness and reasonableness are not free-standing grounds to impugn the terms of a contract’.32 It was therefore irrelevant that the termination might have been harsh or ‘unfair’; the applicants had to point to some compelling policy consideration in their favour, and this they had not done.

The SCA and Constitutional Court agree, by and large, about points (i) to (iv) in Cachalia JA’s summary.33 They are embodied in Barkhuizen v Napier,34 the Constitutional Court’s founding judgment on this topic, delivered in 2007, which has been accepted many times by the SCA.35 The case was about the enforceability of a clause in a consumer insurance contract that imposed a time limit on the insured’s right to sue. Ngcobo J’s majority judgment holds that courts ought to control such terms using their power to invalidate terms that are contrary to public policy.36 This power in fact predates Barkhuizen by at least a century,37 but that judgment gave it new force.

What new force did Barkhuizen give? That is where the dispute lies. Cachalia JA’s points (v) and (vi) are attempts to curtail it. Point (vi) is especially striking. It states that fairness and reasonableness are not directly applicable tests for controlling contract terms. Yet here is what Barkhuizen says:

In general, the enforcement of an unreasonable or unfair time limitation clause will be contrary to public policy. ... Notions of fairness, justice and equity, and reasonableness cannot be separated from public policy. Public policy considers the necessity to do simple justice between individuals.38

There are two questions to be asked in determining fairness. The first is whether the clause itself is unreasonable. Secondly, if the clause is reasonable, whether it should be enforced in the light of the circumstances which prevented compliance with the time limitation clause.39

The Court went on to say repeatedly that the enquiry before it is whether the enforcement of the clause would be ‘unfair’ to the applicant ‘and thus contrary to public policy’.40

31 Ibid at paras 75–80. I discuss the facts of Pridwin more fully in part IVB below.
32 Ibid at para 76.
33 A partial exception may be the phrase, ‘inimical to a constitutional value or principle’, since the whole issue hinges on what ‘values or principles’ are included. I discuss this in part IIE2 below.
35 Consider especially Bredenkamp (note 18 above).
36 The majority would not have intervened, however, on the facts of Barkhuizen. A minority of three judges (Mosebenke DCJ, Mokgoro J, and Sachs J) would have.
37 The canonical judgment is that of Innes CJ in Eastwood v Shepstone 1902 TS 294.
38 Barkhuizen CC (note 34 above) at para 51.
39 Ibid at para 56.
40 Ibid at paras 84–86.
So point (vi) is not uncontroversial. The same is true of the famous phrase echoed by both Cachalia JA in *Pridwin* and Lewis JA in *Beadica*: that reasonableness and fairness are not ‘self-standing’ or ‘free-floating’ grounds that may be used to control contract terms.\footnote{Pridwin SCA (note 20 above) at para 76; Beadica SCA (note 12 above) at para 35.} This view derives from SCA judgments given before the decision in *Barkhuizen*.\footnote{Brisley v Drotsky [2002] ZASCA 35, 2002 (4) SA 1 (SCA) at para 22 made this point in relation to good faith, citing D Hutchison ‘Good Faith in the South African Law of Contract’ in R Brownsword, NJ Hird and GG Howells (eds) *Good Faith in Contract: Concept and Context* (1999). See also para 70 (Olivier JA). The point was repeated in Afrox Healthcare Bpk v Strydom [2002] ZASCA 73, 2002 (6) SA 21 (SCA) (‘Afrox’) at para 32; South African Forestry Co Ltd v York Timbers Ltd [2004] ZASCA 72 (‘SAFCOL’) at para 27.} These said that, although reasonableness and fairness ‘underlie and inform the substantive law of contract’,\footnote{Hutchison ‘Good Faith’ (note 42 above) at 743–744.} they do not ‘constitute independent substantive rules that courts can employ to intervene in contractual relations’; ‘they cannot be acted upon by the courts directly’.\footnote{SAFCOL (note 42 above) at para 27.} But the correctness of that view is open to doubt after *Barkhuizen*, which instates reasonableness and fairness as the directly applicable tests. Or so one would think.

The explanation of Cachalia JA’s point (vi), and of the SCA’s continued post-*Barkhuizen* insistence that reasonableness and fairness are not ‘free-floating’, is that the SCA has undertaken a concerted ‘reading down’\footnote{See Hutchison ‘From Bona Fides to Ubuntu’ (note 23 above) at 115.} of the *Barkhuizen* judgment since it was given. The two key protagonists are Harms DP and Brand JA, who sought to preserve the approach they had themselves laid down in the SCA prior to *Barkhuizen*.\footnote{Between them Brand JA and Harms DP wrote the main judgments in each of Brisley v Drotsky, Afrox, and SAFCOL.} Their main containment strategies – to be discussed more fully later\footnote{Consider part IID below.} – are these:

(1) First, they have said that the passages of *Barkhuizen* quoted above must be viewed in their context. They appear only after Ngcobo J had determined that the contractual clause at issue infringed the applicant’s constitutional right of access to court.\footnote{Constitution of the Republic of South Africa, 1996, s 34. See Barkhuizen CC (note 34 above) especially at paras 46–49.} The fairness test was his means of adjudicating whether that rights-limitation, once established, makes the term contrary to public policy and thus invalid. So *Barkhuizen* in effect endorses a *conditional* fairness test: it comes off the shelf only if a constitutional rights-infringement has been established. This is the interpretation defended by Harms DP in *Bredenkamp v Standard Bank*,\footnote{Bredenkamp (note 18 above). This reasoning was prefigured, however, by F Brand in ‘The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution’ (2009) 126 South African Law Journal 71, 85.} the SCA’s first judgment on contractual fairness post-*Barkhuizen*. The SCA has repeatedly cited it since, including in Cachalia JA’s principles (ii) and (iii).\footnote{Now consider Pridwin SCA (note 20 above) at para 29(ii)–(iii).}

(2) Second, they have said that *Barkhuizen*, despite appearances, did not intend to depart from the law as the SCA had set it out in the years prior. This is because *Barkhuizen* did not expressly overrule any of the SCA’s judgments. In fact it agreed with the SCA’s important statement that ‘good faith is not a self-standing rule, but an underlying value’.\footnote{Barkhuizen CC (note 34 above) at para 82, citing Brisley v Drotsky (note 42 above) at para 32.} ‘Unless and until the Constitutional Court holds otherwise’, therefore, the law is as stated by
the SCA prior to *Barkhuizen*.\(^{52}\) And hence, notwithstanding the passages of *Barkhuizen* I quoted above, ‘a court cannot refuse to give effect to the implementation of a contract simply because that implementation is regarded by the individual judge to be unreasonable and unfair.’\(^{53}\) This is the position taken by Brand JA in two judgments he gave in 2011, *Maphango v Aengus Lifestyle Properties* and *Potgieter v Potgieter NO*,\(^ {54}\) the latter of which Cachalia JA cites in support of his point (vi).\(^ {55}\)

These containment strategies are, in part, mutually supportive. But the second strategy, owed to Brand JA, is much more far-reaching. If taken seriously, it means we do not need to update our understanding of South African contract law in light of *Barkhuizen* at all. Harms DP’s strategy, by contrast, accepts that *Barkhuizen* has effected a significant change, since it allows contract terms to be tested for fairness. But it contains the fairness test by insisting on a precondition.

In any event, both strategies seemed to be confounded by the Constitutional Court’s judgment in *Botha*.\(^ {56}\) Judges Harms and Lewis had already sounded the alarm extra-curially\(^ {57}\) after the Court had remarked in *Everfresh* that it is ‘necessary to infuse the law of contract with constitutional values, including values of ubuntu’, and that ‘[c]ontracting parties certainly need to relate to one another in good faith’.\(^ {58}\) But *Botha* went further.

The applicant in the case, Ms Botha, was the hire-purchaser of premises on which she ran a laundry business. After she had fallen into several months’ arrears, and ignored the seller’s entreaties, the seller sought to cancel the contract, invoking the agreed cancellation clause. Ms Botha resisted on the basis that it would be unfair to evict her, citing ‘the *Barkhuizen* principle’.\(^ {59}\) This was because she had already paid well over half the purchase price for the property, and had thus acquired a right under the Alienation of Land Act to have the property transferred into her name.\(^ {60}\) Cancellation would unfairly strip her of that right, she said. And the Constitutional Court agreed. It made no finding that the applicant’s constitutional rights were infringed.\(^ {61}\) It said the basis for restraining the seller’s cancellation was simply ‘fairness’.\(^ {62}\) It located the unfairness in the ‘disproportionate’ consequences of cancellation in the circumstances of the case\(^ {63}\) (which Davis J later treated as a generally applicable yardstick


\(^{53}\) *Maphango* (note 52 above) at para 25.


\(^{55}\) *Pridwin SCA* (note 20 above) at para 27 fn 12.

\(^{56}\) *Botha* (note 6 above).


\(^{58}\) *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30, 2012 (1) SA 256 (CC) at paras 71–72.

\(^{59}\) *Botha* (note 6 above) at para 15.

\(^{60}\) Act 68 of 1981, s 27.

\(^{61}\) There are some passing references to the applicant’s invocation of constitutional rights: *Botha* (note 6 above) at paras 15, 19. But there is no further discussion of this by the Court.

\(^{62}\) Ibid at paras 21, 24, 49–51.

\(^{63}\) Ibid at paras 49–51.
in *Beadica*). The judgment does not mention *Bredenkamp, Maphango or Potgieter*, but its approach seems inconsistent with all of them, since it treats fairness as a standard that is directly and unconditionally applicable to restrain any reliance on one’s contractual rights. Hence the uneasy truce that once held between the two courts could no longer be sustained. The SCA’s judgments had insisted upon principle (vi), but *Botha* was understood to defy it.

Moreover, the Constitutional Court’s conclusion that cancellation would be unfair seemed to be the kind of ‘idiosyncratic inference of a few judicial minds’ that Cachalia JA’s point (v) deplores. No doubt cancellation would be harmful to Ms Botha – but what of the interests of the seller? The Court was ‘almost cavalier’ in sweeping these aside. Ms Botha had repeatedly failed to meet her contractual debts, ignored the seller’s demands to make amends, and by the time of the Court’s judgment had occupied the seller’s property rent-free for seven years. The seller was seeking a remedy for this, in reliance on the contractual provisions to which Ms Botha had agreed. But none of that seemed to concern the Court (which also made no provision for payment to the seller of interest). ‘Frankly’, wrote Wallis, ‘it is difficult to see on what basis that was fair.’

As we have seen, the SCA did not accede to *Botha*’s adventurous new approach. Because *Botha* does not mention the SCA precedents, Fritz Brand (by then retired) was still clinging to the view that it could not have overruled them; these must, then, remain valid. Carole Lewis, however, who now took centre stage as the SCA’s senior contract lawyer and an established opponent of the Constitutional Court’s jurisprudence, was more candid. In her *Beadica* judgment she rejected *Botha* not because it was (supposedly) consistent with the SCA’s prior judgments, but because it was wrong. She instead applied the opposite approach summarised by Cachalia JA in *Pridwin*, which allowed her to dismiss the applicants’ case with ease; and she found no common ground at all with the approach that Davis J had sourced in the jurisprudence of the Constitutional Court. And this was part of a pattern. Though *Beadica* was eye-catching for the frankness with which Lewis JA expressed her scorn, several prior SCA judgments (including *Pridwin*) had already restated the law impervious to the Court’s approach. Predictably, this created problems for lower courts. Some of Davis J’s colleagues said his reasoning in *Beadica* was ‘disturbing’ and refused to follow it, preferring the jurisprudence of the SCA. Others, however, continued to apply Davis J’s approach – even after Lewis JA had condemned it. After all, Davis J’s approach was itself sourced in the ‘unambiguous’ precedents of the Constitutional Court, which are binding even upon the SCA.

With our two highest courts at loggerheads, then, producing irreconcilable results, there was ‘the urgent need for strong leadership and a definitive ruling on the matter by

64 See note 7 above.
65 It cites only two SCA judgments in total, both on the *exceptio non adimpleti contractus: Botha* (note 6 above) at para 43 fn 62.
66 Hutchison ‘From Bona Fides to Ubuntu’ (note 23) at 120.
67 Wallis (note 24 above) at 557.
68 For criticism of the SCA’s response see Cameron and Boonzaier (note 3 above) at 833–834.
70 Lewis (note 57 above).
71 These were cited at note 20 above.
74 Ibid at paras 40, 45.
the Constitutional Court’. That is the background against which the Court considered the appeals in both *Pridwin* and *Beadica*. They were heard several months apart, but handed down on the same day—a signal that the Court was trying to get all its ducks in a row, before settling the issue of fairness in contract in one fell swoop.

II THE PRINCIPLES

The question facing the Constitutional Court was whether Beadica had validly renewed its lease with Mr Sale, despite its clear failure to comply with the terms of the renewal clause. Beadica argued that the strict application of these terms would be contrary to public policy and constitutional values. It relied heavily upon the Court’s own judgments, especially *Barkhuizen* and *Botha*, to which it urged an expansive interpretation, and criticised their side-lining by the SCA. Mr Sale, by contrast, argued that the Court’s judgments did not licence an approach radically different from the SCA’s, and that courts have no general power to override the contract’s agreed terms merely because of the severe consequences. In any event, he said, echoing Lewis JA, Beadica’s unexplained failure to comply with the specified notice period was its own responsibility, not something from which the Court ought to rescue them.

The Court split 7:3. The majority, led by Theron J, dismissed the appeal from the SCA, with whose approach she found much common ground. The minority, by contrast, led by Froneman J, would have held in favour of Beadica, on the basis of an approach that chimes with Davis J’s. Several aspects of the majority judgment are noteworthy.

A Responsibility

First, the Court owned its responsibility to provide clear guidance about fairness in contract. It situated its decision in the context of the ongoing Constitutional Court–SCA feud, noted the extensive criticism of its own judgment in *Botha*, and proclaimed the importance of providing a resolution. And it engages at length with both courts’ jurisprudence and the academic commentary, confident that all of it is worth taking seriously.

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75 Hutchison ‘From Bona Fides to Ubuntu’ (note 23 above) at 101.
76 *Pridwin* was decided over a year after it was heard—a uniquely long lapse. It was therefore foregrounded in some media critiques of the Court’s sluggishness: T Broughton ‘ConCourt efficiency is declining’ *GroundUp* (17 August 2020); Professor Balthazar ‘South Africa’s profound institutional failure’ *Daily Maverick* (18 August 2020). The wider critique is justified, but *Pridwin* may not be the cleanest illustration: it seems likely that the delayed hand-down is explained by a desire that it coincide with *Beadica* (which was heard six months later).
77 Strictly speaking there were four applicants, each an equivalently situated separate corporate entity. For simplicity I will refer to them collectively as ‘Beadica’ in the singular.
78 The applicants’ written submissions are available at https://collections.concourt.org.za/bitstream/handle/20.500.12144/36616/Applicants%27%20Heads%20of%20Argument.pdf?sequence=16&isAllowed=y.
79 The respondents were the two corporate entities (Beadica’s lessor and franchisor respectively) which Mr Sale controls.
80 Consider the respondent’s written submissions, available at https://collections.concourt.org.za/bitstream/handle/20.500.12144/36616/First%20Respondent%27s%20Heads%20of%20Argument.pdf?sequence=20&isAllowed=y.
82 Madlanga J concurred in Froneman J’s judgment. Victor AJ wrote a separate dissent which finds much common ground with Froneman J.
83 *Beadica CC* (note 2 above) at paras 17–19.
84 Ibid paras 20–60; see also para 17 fns 22–23.
These might seem like obvious tasks for an apex court. But they were things it failed to do in Botha, which cited not a single SCA judgment on fairness in contract, even while endorsing an approach that seemed flatly inconsistent with them. Nor did it note any complexities about the proper reach of the Barkhuizen principle, even as the Court expressed it in terms that were alarmingly broad. To some extent, this may have reflected a lack of awareness about how contested the existing jurisprudence had been. On the other hand, some of the Court’s wider remarks about the need to give our contract law a shake-up may have suggested that its disregard for the SCA precedents was deliberate. Either way, post-Botha developments did not presage a détente. The Court’s critics, as we saw, became all the more hostile, and in Beadica Lewis JA forewarned any attempt to honour its jurisprudence – which may well have drawn an equally hot-headed response from the Court. Lewis JA’s endorsement of the view that Botha was ‘embarrassing’, in particular, seemed likely to attract a slap-down.

And certain prominent public statements did not augur well. The Judicial Service Commission interviews held in April 2019 (that is, shortly before the appeals in Pridwin and Beadica were heard) seemed to display the Court’s lack of interest in, and even contempt for, opposition to its contract-law judgments. One commissioner – tellingly, it was Judge Cachalia – asked the candidates for appointment to the Court whether they were aware of academic criticism of the Court’s judgments in private and commercial law (including in contract law, which Cachalia at one point singled out). Though each of the candidates he asked had acted on the Court, and were now seeking permanent appointment to it, they all said they were entirely unaware of any such criticism. Moreover, this was not regarded by the other commissioners as a worrying admission. Quite the contrary: Chief Justice Mogoeng intervened to warn judges against reading academic criticism, since it might unduly influence them to the detriment, he implied, of judicial independence. He also rejected the criticisms of the Court’s judgments in contract law specifically: intervening to offer his own response to Cachalia’s question, he explained that these criticisms are borne of the view that contract law is ‘untouchable’ and should be insulated from constitutional values; this means you are ‘in for

85 For what it’s worth, neither party in Botha mentioned Bredenkamp (or any other post-Barkhuizen case law) in their written submissions. Both quoted Barkhuizen extensively and took it at face value; their disagreement was only about how to apply it to the facts.

86 Some passages in Everfresh and Botha, for example, suggested a new dawn, including ‘the development of a new constitutional contractual order’: Everfresh (note 58 above) at paras 22–24, 36, 71–72; Botha (note 6 above) at para 46.

87 Note 23 above.

88 The interviews are transcribed at www.judgesmatter.co.za/interviews/april-2019-interviews/transcripts-april-2019. (The references in the footnotes below are to these transcriptions.) And see for discussion N Tolsi ‘JSC confounds at ConCourt interviews’ New Frame (5 April 2019) available at www.newframe.com/jsc-confounds-concourt-interviews; F Rabkin ‘SCA tensions dominate at interviews’ Mail & Guardian (5 April 2019) available at mg.co.za/article/2019-04-05-00-sca-tensions-dominate-at-interviews.

89 He was sitting on the Commission only fortuitously, after Mandisa Maya, President of the SCA, had had to recuse herself for unrelated reasons.

90 These candidates were Annali Basson, Patricia Goliath, and Jody Kollapen. The same topic arose in Fayeeza Kathree-Setiloane’s interview, but she was not directly questioned on it.

91 Goliath interview at 11; Kollapen interview at 8–9. Another commissioner, Dali Mpofu SC, said that academic complaints about the Court’s judgments in commercial law ‘must be rejected with contempt’ (Kathree-Setiloane interview at 29), and later described the existence of commercial law as a ‘myth’, since all law in South Africa is subject to the Constitution (ibid at 29, 33).
a hiding if you are ever going to try and tamper with it’.92 Mogoeng did not give Cachalia the opportunity to ask his question to the last two candidates.93

In short, whether as a result of ignorance or ill-will, the Court’s judges seemed unlikely to treat the SCA jurisprudence, or the criticism of the Court’s own approach, as worthy of engagement and accommodation. It seemed they might forge ahead with all the more certitude. And the first important thing to say about Beadica, then, is that these fears have not materialised. The judgment in Beadica engages closely with the academic commentary and jurisprudence of the SCA and accepts the need to placate the discord.

B Retreat

Second, the pointed manifestation of this conciliatory attitude is a clear climbdown from the heights of Botha – or at any rate from the expansive view of that judgment that had been taken by most commentators. Theron J says the judgment must be understood narrowly; it therefore does not effect the great change to the law that its critics thought.94

Her explanation is that Botha was about a ‘unique statutory context’, namely the sale of property in instalments under the Alienation of Land Act.95 It was only to give effect to that Act, and in particular to preserve Ms Botha’s right to transfer of the property under section 27 of it, that the Court restrained the seller’s purported cancellation of the contract of sale. It follows, for Theron J, that much of the commentary on Botha was mistaken: it assumed that the judgment is authority for the general proposition that the termination of a contract will be restrained if it would be ‘disproportionate or unfair in the circumstances’.96 But this assumption, she says, ‘is based on a misreading of the ratio decidendi in Botha and rests on a misconception of what that case was about’.97 For the same reason, the SCA judgment in Beadica was ‘unfortunate’.98 It assumed an ungenerous and extreme reading of Botha and on that basis maligned and marginalised it. But Lewis JA could simply have distinguished it – neither the Alienation of Land Act nor any other statute was at issue in Beadica – and thus avoided any clash between the two courts’ precedents. Theron J herself, having interpreted Botha in this way, clearly regards it as irrelevant and unavailing to Beadica’s case.99

Theron J presents all this as a straightforward reading of what Botha said. It is not. The wide interpretation may ultimately be mistaken,100 but there was surely a basis for it in the Court’s reasoning. Botha contains some sweeping statements, and a range of commentators took them at their word. High Court judges did the same. And we should note that even the SCA has on occasion applied the wide reading. Though, as we saw, many of its judges have rejected Botha, they have not been able to corral all their colleagues. Botha was unhesitatingly applied by the SCA in Louw v Davids, for example, to justify the court’s refusal to allow the cancellation of a

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92 Goliath interview at 26.
93 As it happens, these were the two candidates ultimately appointed to the Court, Zukisa Tshiqi and Steven Majiedt, who therefore sat on Beadica. And, as it turned out, Mogoeng CJ was absent from Beadica.
94 See Beadica CC (note 2 above) at paras 44–59.
95 Ibid at para 56.
96 Ibid at para 59.
97 Ibid at para 59.
98 Ibid at para 60.
99 It is not mentioned again, except once, to underscore Theron J’s narrow interpretation: ibid at para 79.
contract since it would be, in the circumstances, ‘disproportionate’. The bench was unusually composed in that case (featuring three acting judges, including a certain Davis AJA), and the result could have been justified on independent grounds, but the point stands. Theron J has, in truth, deliberately distinguished Botha, rather than giving simple effect to its wording, and has thereby changed the law that some High Courts, and sometimes the SCA, were applying. In my view, she was right to do this – but we should be clear about what she was doing.

The Court’s authoritative narrowing of Botha should be welcomed, I think, regardless of partisan affiliation. Even if one favours much more robust controls over contractual fairness, Botha would, on its orthodox interpretation, have made it very difficult for the law to develop these in a way that is rationally accountable. Botha failed to engage with legitimate and important questions about the proper scope of Barkhuizen, even as it seemed to assume highly contentious answers to them. To underscore a point made earlier, Botha did not mention Harms DP’s interpretation in Bredenkamp – by far the most significant and considered judicial discussion of Barkhuizen – even though the judgment seemed to defy it, since it made no mention of any constitutional rights of Ms Botha that were threatened by the Trust’s cancellation. Even apart from this, the application of the principle asserted in Botha was most puzzling. The Barkhuizen test can, in principle, be filled out with objectively discernible criteria, so that greater fairness is introduced into our contract law without generating haphazard and inscrutable results. But in Botha no such criteria could be discerned. Nor did the Court seem to think it owed any. Even those who had once strongly supported the Court’s attempts to constitutionalise our contract law said they were now perturbed.

After Botha, in short, we seemed to be on a runaway train. But Beadica shows that there is someone at the controls, and with a willingness to apply the brakes. We now have a much-needed opportunity, one hopes, to pause and reflect.

C Rhetoric

The third noteworthy point about the Beadica judgment is that it has, in its rhetoric, retreated still further from the strongly pro-fairness stance of Botha. But at this point my assessment of the judgment becomes more mixed, for a number of reasons.

102 Plasket AJA acknowledged this at para 22.
103 The Court’s attempt to shift the blame for the impression that its judgment created brings to mind Gcaba v Minister for Safety and Security [2009] ZACC 26, 2010 (1) SA 238 (CC) in which Van der Westhuizen J implied that a serious inconsistency between two of the Court’s prior judgments was merely ‘perceived’ – a result, he implied, of ‘confusion’ generated by ‘academics’. See especially paras 2, 58.
105 It does gesture vaguely towards some constitutional rights when discussing Ms Botha’s arguments (see paras 15, 18), but these are not mentioned again. Nor is any need to establish a constitutional right-infringement acknowledged, the Barkhuizen principle instead being presented in wide terms, with ‘fairness’ the sole yardstick.
106 D Bhana ‘The Constitutional Court as the Apex Court for the Common Law of Contract: Middle Ground between the Approaches of the Constitutional Court and the Supreme Court of Appeal’ (2018) 34 South African Journal on Human Rights 8, 30. Indeed Lewis JA may have been in an analogous position. She had once argued strongly in favour of greater contractual fairness controls, but seemed to have been scared off by the Constitutional Court’s hell-for-leather approach: see Lewis (note 57 above) at 81–82 and her earlier work cited there.
Botha, Everfresh, and indeed Barkhuizen had emphasised the need for a newly vigorous reworking of our contract law to achieve greater fairness, the consistent implication being that the SCA’s approach was too rigid. Change was afoot – and to be celebrated, the Court and its backers suggested, since it would ensure that the values of the Constitution permeate a contract law that was hidebound and out-of-date. Whereas Froneman J’s minority judgment in Beadica is firmly in this same tradition, Theron J tells a different story. She emphasises continuity with the pre-constitutional era; caution rather than enthusiastic change; and conciliation between the approaches of the Constitutional Court and the SCA.

One notices that something new is in the offing as soon as Theron J begins her historical survey. Whereas Froneman J uses our early case law to show that contract law has always (despite myths about the sanctity of certainty and contractual autonomy) been open to judicially imposed standards of fairness, the lesson Theron J draws from it is that ‘[a]s far back as the nineteenth century, our courts cautioned that legal certainty would be undermined if free-standing notions of good faith [or reasonableness or equity] were to be adopted’.  

In most accounts of our more recent jurisprudence, the Bank of Lisbon case is regarded as a nadir, since it not only abrogated the exceptio doli generalis, which had been used to legitimate the development of equitable contractual doctrines, but refused to accept that the concept of good faith could play a similar role. Yet Theron J gives an uncritical account of the majority judgment (which ‘buried’ the ‘superfluous, defunct anachronism’ of the exceptio doli) – and mentions neither Jansen JA’s celebrated dissent nor the academic outcry. In the later judgment of Sasfin, a differently composed Appellate Division used the device of public policy as a new avenue to introduce fairness controls after Bank of Lisbon. But Theron J, rather than noting the promise of Sasfin for the pursuit of sorely needed contractual fairness, emphasises instead the case’s unusually strong facts, as well as the Appellate Division’s caution that the courts’ power to intervene should be exercised ‘sparingly and only in the clearest of cases’ – that is, Cachalia JA’s point (v) from Pridwin.

Thus far, one might conclude that Theron J meant only to provide a staid report of the case law, postponing her critical thoughts for later. But things become more remarkable when Theron J proceeds to discuss the constitutional-era jurisprudence of the SCA and Constitutional Court. Here she leaves a distinctive imprint. In the two courts’ jurisprudence she claims to find only harmony – which, to my knowledge, is something no one has ever claimed before. And she suggests a continuing role for the SCA’s pre-Barkhuizen jurisprudence that would, I think, surprise even the SCA. Its 2003 judgment in Afrox Healthcare Bpk v Strydom, for example, which could find no basis to control an exemption clause even in an egregious case, triggered an avalanche of critical commentary. This criticism has been acknowledged by the

107 Beadica CC (note 2 above) at para 22.
108 Bank of Lisbon (note 14 above).
110 Beadica CC (note 2 above) at para 25. Froneman J, by contrast, says ‘[t]he wisdom of [the Bank of Lisbon] decision remains doubtful’, and suggests it has left a gap in our contract law: ibid at para 129.
111 Sasfin (note 15 above).
112 See again Zimmermann (note 109 above) at 259–260.
113 Sasfin (note 15 above) at 9B–C, cited in Beadica CC (note 2 above) at para 27.
114 Afrox (note 42 above).
SCA\textsuperscript{115} and even by the author of \textit{Afrox}, Brand JA, who seemed to imply that his judgment might have shown a lack of imagination.\textsuperscript{116} Despite this, Theron J’s own discussion of \textit{Afrox} mentions none of the criticism, and even goes on to suggest that its approach continues to be well-supported.\textsuperscript{117} She says something similar about \textit{Afrox}’s immediate precursor, \textit{Brisley v Drotsky}.\textsuperscript{118} That judgment’s statement of principle seems flatly inconsistent, for reasons I explained earlier, with \textit{Barkhuizen}. Yet Theron J says \textit{Barkhuizen} confirmed it.\textsuperscript{119} Later, she presents \textit{Bredenkamp} as a rote application of \textit{Barkhuizen} – rather than the deliberate narrowing that was widely perceived.\textsuperscript{120} And finally Theron J comes, as already mentioned, to \textit{Botha}, which she says made no substantial change to our law.\textsuperscript{121}

More strikingly still, Cachalia JA’s principle (vi) somehow emerges from this potted history entirely unruffled. Theron J indeed repeats that principle throughout; it seems to be the main point she wishes her exposition to establish.\textsuperscript{122} This culminates in the following passage:\textsuperscript{123}

\begin{quote}
Much was made by the applicants in this case of a “divergence” between the approach of this Court and that of the Supreme Court of Appeal to the judicial control of contracts. The “divergence” is said to center on the role of abstract values in our law of contract and whether these values can be directly relied upon to invalidate, or refuse to enforce, contractual terms. This controversy has now been put to rest by the clarification of the law as expressed by this Court in \textit{Barkhuizen} and \textit{Botha}. There is agreement between this Court and the Supreme Court of Appeal that abstract values do not provide a free-standing basis upon which a court may interfere in contractual relationships.
\end{quote}

So, in Theron J’s telling, there is no difference between the approaches of the two courts. And she reaches this conclusion primarily by downplaying, indeed denying, the novelty of the approach of the Constitutional Court. The last sentence of the quotation is directly traceable to the SCA’s judgment in \textit{Brisley v Drotsky} in 2002 – and, if Theron J’s judgment is taken at face value, then nothing the Court has said since then has changed the law. Or, at any rate, any changes that have occurred are the modest ones embodied in Cachalia JA’s six principles, which, in closing, she approvingly quotes and affirms in full.\textsuperscript{124}

Moreover, Theron J seeks to give this restrained approach a normative underpinning. Predictably, she emphasises the importance of \textit{pacta sunt servanda} and commercial certainty. The former has been described, in earlier judgments, as a ‘sacred cow’,\textsuperscript{125} and the latter as a ‘shibboleth’,\textsuperscript{126} both of which are mocking descriptions of the superstitious reverence for the common law of contract that the SCA is thought to exhibit. But in Theron J’s account there is no such cynicism. Her invocation of these values is entirely credulous\textsuperscript{127} – and indeed she

\begin{footnotes}
\item[115] \textit{Napier v Barkhuizen} [2005] ZASCA 119 at para 8.
\item[116] Brand “The Role of Good Faith” (2009) (note 49 above) at 89. Carole Lewis, too, accepts that in this area ‘the common law most certainly still requires development to ensure fairness’: Lewis (note 57 above) at 83.
\item[117] \textit{Beadica CC} (note 2 above) at paras 30, 38.
\item[118] \textit{Brisley v Drotsky} (note 42 above).
\item[119] \textit{Beadica CC} (note 2 above) at para 38.
\item[120] Ibid at paras 39–42.
\item[121] Note 45 above.
\item[122] Consider again \textit{Beadica CC} (note 2 above) at paras 44–60.
\item[123] Ibid at paras 22, 29, 38, 40, 42.
\item[124] Ibid at para 79.
\item[125] Ibid at para 82. She does add two glosses to the principles, however, which I discuss later.
\item[126] \textit{Barkhuizen CC} (note 34 above) at para 15. Compare \textit{Bredenkamp} (note 18 above) at para 37.
\item[127] \textit{Beadica HC} (note 4 above) at para 44.
\item[128] See \textit{Beadica CC} (note 2 above) especially paras 83–90, 92.
\end{footnotes}
uncynically owns the description of *pacta sunt servanda* as ‘sacred’.\(^{129}\) And uncertainty, she continues, is ‘inimical to the rule of law’.\(^{130}\) We have heard things like this before, including from the Constitutional Court,\(^ {131}\) but even so there is an unmistakable shift of emphasis. Theron J is not merely making a reluctant concession to these imperatives;\(^ {132}\) she is giving them centre-stage. In this reverence for commercial certainty and *pacta sunt servanda*, the Constitutional Court suddenly seems more piously SCA-like than the SCA.

In addition, Theron J pushes these commitments in some relatively novel directions:

> [C]ontractual relations are the bedrock of economic activity and our economic development is dependent, to a large extent, on the willingness of parties to enter into contractual relationships. If parties are confident that contracts that they enter into will be upheld, then they will be incentivised to contract with other parties for their mutual gain. ... It is indeed crucial to economic development that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed.\(^ {133}\)

And since ‘[t]he fulfilment of many of the rights promises made by our Constitution depends on sound and continued economic development of our country’, sanctity of contracts is ‘essential’ to the constitutional project, which would be ‘imperilled’ if courts undermine *pacta sunt servanda*.\(^ {134}\)

Later, Theron J pointedly applies this to the case before her. Responding to Beadica’s argument that black economic empowerment (BEE) would be set back by allowing Mr Sale to snuff out their business, she says the truth is quite the opposite. It is Beadica’s own argument that jeopardises BEE, since upholding it ‘would increase the risk of contracting with historically disadvantaged persons’.\(^ {135}\) If courts were loath to enforce contracts against those previously disadvantaged, this might deter other parties from contracting with them in the first place, or cause those other parties to insist on more one-sided terms. ‘These outcomes would’, Theron J says, ‘undermine the very objects that the [National Empowerment] Fund … seek[s] to achieve’.\(^ {136}\)

This reasoning – replete with talk of ‘incentives’ and the unintended consequences of regulation – is unmistakably indebted to modern economic theories of contract law. Rather than trying to ensure justice *inter partes*, the rules of contract law should be designed to serve as an instrument of economic growth; rather than trying to prevent exploitation by powerful economic actors, the preponderant concern is that those actors might then take their business elsewhere. Whether or not one agrees with this reasoning, it marks a shift. It is not the kind of the thing for which the Court is known. A constitutionalised approach to contract law has hitherto been understood to entail much *more* judicial control of contracts, a much greater willingness on the part of courts to prevent exploitation.\(^ {137}\) Consider, for example, the

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\(^{129}\) Ibid at para 86, quoting *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 at 465.

\(^{130}\) Ibid at para 81.

\(^{131}\) *Barkhuizen CC* (note 34 above) at para 57.

\(^{132}\) Contrast, for example, the merely footnoted acknowledgment of *pacta sunt servanda* in *Botha* (note 6 above) at para 23 fn 38, or Davis J’s discussion of the need for legal certainty only to pre-empt an objection: *Beadica HC* (note 4 above) at paras 40–44.

\(^{133}\) *Beadica CC* (note 2 above) at para 84.

\(^{134}\) Ibid at para 85.

\(^{135}\) Ibid at para 101.

\(^{136}\) Ibid at para 101.

following passage of Botha – surely this topic’s most often quoted piece of judicial rhetoric of the last decade:

Bilateral contracts are almost invariably cooperative ventures where two parties have reached a deal involving performances by each in order to benefit both. Honouring that contract cannot therefore be a matter of each side pursuing his or her own self-interest without regard to the other party’s interests.  

To that fraternal proclamation, Beadica offers a riposte. Theron J emphasises the perils of enforcing duties of altruism. Moreover, whereas the extremes of the South African context are usually taken to make the need for judicial fairness controls especially pressing, Theron J draws the opposite conclusion: we need the economic growth especially badly; we need to take particular care to stay on the right side of those who might deign to contract with BEE initiatives.

This sudden outbreak of neoliberalism, even within a Court reputed as its enemy, is likely to have commercial practitioners salivating. But what should the rest of us make of all this?

For one thing, we should draw out a point, latent in what I have said so far, about the rise of Justice Theron. She wrote the majority judgments in Beadica as well as Pridwin (which I am coming to later) Both are about significant issues and have received much attention. Both Theron J’s judgments are ‘maximalist’, in the sense that over the course of a hundred paragraphs she seeks to deal comprehensively with issues of fundamental principle. She is expressly mindful, moreover, of the apex court’s power to resolve these in a way that will influence the legal system as a whole. All this is true, too, of her majority judgment in Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd the previous year: also 100 paragraphs plus, also expressly mindful of the apex court’s power to give guidance, also keen to comprehensively state the law on an issue that had become controversial. These are long and lofty judgments, even by the Court’s standards. There is a certain deliberateness about them; they read as though they are written with one eye on history, and of the current Court’s place within it.

Theron J’s seemingly confident sense of her own role has been impactful, and may become more so. Of the judges whom she failed to persuade in Beadica and Pridwin, two of them (Cameron J and Froneman J) have since retired. A further two were acting judges (that is, Nicholls AJ, who dissented in Pridwin, and Victor AJ, who dissented in Beadica). Only Mogoeng CJ, who joined the dissent in Pridwin, and Madlanga J, who joined the dissent in Beadica, remain permanent members of the Court. With Mogoeng CJ himself notoriously absent from many hearings, and Zondo DCJ on extended leave at the State Capture Commission, there is room for leadership on the Court, and Theron J may, just three years after her appointment, be looking to provide it. She is evidently capable of winning

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138 Botha (note 6 above) at para 46.
140 Beadica CC (note 2 above) at para 18.
142 N Tolsi ‘Mogoeng absent for more than half of ConCourt judgments’ Mail & Guardian (16 November 2018). It is possible that Mogoeng CJ, had he sat in Beadica, would have been partial to Froneman J’s approach: compare his remarks discussed at note 88 above.
majorities, even as she takes sometimes bold approaches, and there are signs her coalition will stay intact.

In sum, Theron J’s judgment in *Beadica* suggests a new approach to fairness in contract, which she seeks to supply with intellectual heft; and it managed to secure a majority that prevailed over the outgoing Froneman J. It is tempting, therefore, to read her judgment as a watershed, and perhaps a changing of the guard. The age of the aggressive constitutionalisation of contract law is over; it is now a return to ‘business as usual’, with the Constitutional Court brought into line with the cautious approach of the SCA.

**D Reality**

I am sure there is something to this simple picture. But there are wrinkles in it. Though *Beadica* tries to convey an unequivocal message, its legacy is likely to be complex. There are several reasons, to be developed over the course of the remainder of this article, to doubt that *Beadica* marks the lasting retreat towards a cautious, pro-certainty approach that at first it seems. This part discusses the most striking respect in which Theron J’s rhetoric fails to persuade. The main message of her judgment is that she has resolved any tension between the jurisprudence of the Constitutional Court and of the SCA; indeed she has shown, she says, that the divergence is ‘more perceived than real’. Well, it would be nice if that were true. But it is not.

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143 The contrast with Jafta J’s and Zondo J’s early years at the Court is plain. Though they were immediately some of the Court’s most frequent writers, this was almost always in dissent, indeed often solo. On the other hand, the Court has changed a great deal since then, with the effect that Jafta J has become a stalwart in the Court’s main voting bloc (and his erstwhile opponents, Cameron J and Froneman J, were forced into the role of conscientious dissenters). Theron J may now be profiting, in short, from the coalition that Jafta J and Zondo J created.

144 It may be worth remembering that, even as an acting judge in 2015, Theron J overturned *S v Ndhlovu* [2002] ZASCA 70, [2002] 3 All SA 760 (SCA) a longstanding and widely cited SCA judgment on criminal procedure: see *Mbholo v S; Nkos on v S* [2015] ZACC 19, 2015 (2) SACR 323 (CC). The judge who decided *Ndhlovu* was Cameron JA, who now sat on the Constitutional Court alongside Theron J. But that did not deter her from holding that *Ndhlovu* was not only wrong but unconstitutional, and claiming it had overlooked a relevant statute.

145 Since some members of the *Beadica* majority (including Theron J) spent several years at the SCA and participated in the development of its contract-law jurisprudence, it may stand to reason that the Court’s approach has now converged. See, for example, *Potgieter* (note 52 above), concurred in by Majiedt JA; *Rouzar* (note 20 above), authored by Tshiqi JA and concurred in by Majiedt JA; and *MEPF v SAMWU* (note 26 above) and *Liberty Group Ltd v Mall Space Management CC* [2019] ZASCA 142, 2020 (1) SA 30 (SCA), both concurred in by Tshiqi JA. Mathopo JA, who as an acting judge formed part of the *Beadica* majority, authored the SCA judgment in *Mohamed’s Leisure* (note 20 above).

146 One crucial feature of the wider terrain, though one that is unfortunately beyond the scope of this article, is the Consumer Protection Act 68 of 2008 (‘CPA’). Section 48 of that Act gives consumers a clear right to challenge any term of a consumer contract that is ‘unfair, unreasonable or unjust’ (and the Act gives a raft of other protections besides). Hence the courts now have an indisputable statutory power, in those contracts where it is most needed, to intervene in the name of fairness and reasonableness; and, had the CPA been in force at the time of *Afrox*, *Barkhuizen*, and *Bredenkamp*, the result in each case may well have been different. The CPA has therefore taken much of the normative pressure off the common-law powers of intervention that I am discussing in this article, as well as significantly reducing their practical importance. On the other hand, the common-law powers continue to apply, of course, in contracts not covered by the Act. And what the courts have said about those powers (including in *Beadica*) continues to influence the application of s 48 of the CPA. (See, for a recent example, *Magic Vending (Pty) Ltd v Tambwe* [2020] ZAWCHC 175, 2021 (2) SA 512 (WCC), which I discuss further below.) What is clear is that a full appraisal of fairness in South African contract law would have to attend closely to the CPA, and not only to the common-law rules that I am discussing.

147 *Beadica CC* (note 2 above) at para 80.
To be sure, Theron J has endorsed a reading of Botha that is much narrower than anticipated. To that extent she has, as I said above, offered a very useful clarification, which does quash one source of disagreement between the two courts. But the perceived divergence between them began well before Botha, whose excision can therefore only count for so much. What is surprising about Theron J’s judgment, after all, is that she professes perfect agreement across all of the two courts’ judgments in the constitutional era (and maybe even in the preconstitutional era). And that conclusion is most implausible. The gap between the approaches is real, and very little that Theron J says helps to bridge it. What she does instead is obscure the gap, through fallacy and equivocation.

The first question to which the post-constitutional case law addressed itself was this: Is a court entitled (at any point) to disapply the agreed terms of the contract on the basis that, in the court’s judgement, the terms are (perhaps extremely) unreasonable or unfair? The SCA, prior to Barkhuizen, consistently held that the answer is ‘no’. This it did in Brisley and Afrox, as well as in SAFCOL v York Timbers.\(^{148}\) The Constitutional Court, especially in Barkhuizen, quite clearly said ‘yes’. I don’t see how else one can understand its core passage, which I quoted above.\(^{149}\) To be sure, there are important debates to be had about when exactly the reasonableness and fairness enquiries kick in, and how best to apply them when they do. But the fact that Barkhuizen licences courts to undertake them surely cannot be denied.

Accordingly, Froneman J, who is much more clear-sighted on these issues than Theron J, says politely that her judgment, by presenting Barkhuizen as consistent with Brisley and Afrox, ‘may be read to underplay what Barkhuizen actually decided’.\(^{150}\) Quite so. In fact, commentators had concluded that Barkhuizen was not only incompatible with the statements of principle in Brisley and Afrox, but showed their results were wrong: the clauses in both cases, which the SCA held it was powerless to restrain, would not have passed Barkhuizen’s fairness test.\(^{151}\) So Theron J’s unqualified statement that in Barkhuizen the Constitutional Court ‘affirmed the position of the SCA in Brisley’,\(^{152}\) which is a key plank on which to rest her later conclusion that the difference between the two courts is non-existent, is particularly surprising. It suggests that the Constitutional Court’s approach, as set out in Barkhuizen, is consistent even with the SCA case law prior to Barkhuizen. That is an especially strong claim, which few would endorse. The only person I know who did endorse this claim is Fritz Brand, whom Theron cites.\(^{153}\) But Brand had a rather special interest in defending the continuing correctness of the judgments in Brisley, Afrox, and SAFCOL, because he wrote them. His view that nothing the Constitutional Court had done in Barkhuizen (or in Botha) had changed the law, since it had not expressly overruled the SCA precedents, might have seemed rather

\(^{148}\) Note 42 above.

\(^{149}\) Notes 38–39 above.

\(^{150}\) Beadica CC (note 2 above) at para 145.


\(^{152}\) Beadica CC (note 2 above) at para 38.

\(^{153}\) Ibid at para 57 fn 135. See also para 17 fn 23 and especially para 31, which lean heavily on Brand’s views.
wishful\textsuperscript{154} – a glib way to negate what Barkhuizen had set out to do. Remarkably, however, it has now been endorsed by the Court whose judgments Brand sought to negate.

How then is Theron J able to sell this image of supposed harmony? The answer is that she trades on confusion, which has at least two related sources. The first is that Barkhuizen did indeed cite Brisley with approval. But it did so for a much narrower point than the one Theron J comes to base upon it. The second is that the courts have consistently affirmed, throughout the constitutional era, that abstract values are not ‘free-standing’ or ‘free-floating’ tests. But this does not show, \textit{pace} Theron J, that the courts’ approach has remained constant. It shows that the ‘free-standing’ metaphor has changed meaning.

1 The Brisley bugbear

Barkhuizen, as we have seen, endorsed fairness and reasonableness as the yardsticks by which the validity of a time-bar clause was to be assessed. Even as it did so, however, it held that ‘good faith is not a self-standing rule, but an underlying value that is given expression through existing rules of law’.\textsuperscript{155} For this proposition Ngcobo J cited the judgment in Brisley,\textsuperscript{156} as well as the writings of Dale Hutchison on which the SCA’s approach was itself based.\textsuperscript{157}

So Barkhuizen was willing to approve the SCA’s view that good faith has only a secondary role in South African law. The question is what we should take from this. SCA apologists like Fritz Brand have taken from it a strong and surprising conclusion. Brand said it showed that Barkhuizen did not purport to change our law.\textsuperscript{158} This is because the judgment, through its endorsement of Brisley, meant to affirm, so Brand claimed, the SCA’s long-established view that abstract values are never directly applicable legal tests. Barkhuizen therefore cannot have departed meaningfully from the approach the SCA had laid down thitherto.

But this rests on an interpretive mistake. It reads Ngcobo J’s rejection of good faith specifically as a rejection of abstract values \textit{tout court}. But he did not mean to reject all abstract values. He was discussing good faith \textit{in contradistinction} to fairness and reasonableness, meaning to reject a role for the former, without casting any doubt on the application of the other two.\textsuperscript{159}

\textsuperscript{154} Did Brand himself even take it seriously? Arguably not, since his extra-curial writing quickly accepted that the law would move on from Afrox: see again Brand and Brodie (note 151 above) at 115. Moreover, his first discussion of Barkhuizen acknowledged that its ‘core investigation’ is ‘whether the enforcement of the time-limitation clause involved would in the circumstances be reasonable and fair’: Brand ‘Good Faith’ (2009) (note 49 above) at 85. He then complicated this, though only slightly, by referring to other passages of Barkhuizen that created ‘unpredictability’ about the correct approach to abstract values: ibid at 86. It was only later that (as I discuss below) he began to attach undue weight to those passages, as well as to the fact that the Court did not expressly overrule Brisley, Afrox, and SAFCOL, and thus to profess the conveniently simple view that Barkhuizen did not require any updating of the views he had expressed in that trilogy of cases.

\textsuperscript{155} Barkhuizen CC (note 34 above) at para 82.

\textsuperscript{156} Ibid fn 58. The citation given is to para 32 of Brisley, but this must be a mistake, since that paragraph says nothing of relevance. The intention must have been to refer to para 22, which is cited correctly in fn 59.

\textsuperscript{157} See again note 42 above.

\textsuperscript{158} One can chart Brand’s deployment of this idea through Brand (note 49) at 86; Maphango (note 52 above) at para 24; Potgieter (note 52 above) at para 33; Brand (note 54 above) at 240, the last two of which Theron J cites.

\textsuperscript{159} As Froneman J puts it, Barkhuizen is ‘direct authoritative precedent’ that, in at least some circumstances, ‘fairness, reasonableness and simple justice between persons are the unmediated standards against which the validity of the clauses or their enforcement is judged. \textit{It is only in relation to good faith} that the Court referred to the then existing state of affairs that it is not a "self-standing rule"’. See Beadica CC (note 2 above) at para 151 (emphasis added).
That should have been obvious, given that his judgment’s core passages instated fairness and reasonableness as directly applicable legal tests. Ngcobo J was, at the point he cites 

Brisley, addressing a quite different argument – this one raised by the respondent insurer, rather than by Mr Barkhuizen.\footnote{This is indicated in \textit{Barkhuizen CC} (note 34 above) at paras 79–80. See also para 21.} This argument did not cast any doubt on the fact that fairness and reasonableness were the appropriate yardsticks by which to assess public policy, which Ngcobo J, to repeat, had by this point already clearly accepted.\footnote{Ngcobo J had instated (and many times repeated) his fairness test between paras 50 and 73. It is only thereafter that he turns to the insurer’s ‘defences’ based upon the maxim \textit{lex non cogit ad impossibilia} (paras 75–78) and good faith (paras 79–81), and then says that he refuses to entertain either of them (para 82). That part of Ngcobo J’s judgment is severable from its establishment of a fairness test is made even clearer by the judgments of his colleagues. O’Regan J wrote separately to say that, although she concurred in the passages in which Ngcobo J set out his fairness test, she reserved her position on the issue of good faith (para 120). Moseneke DCJ, still more clearly, said that the insurer’s argument based upon good faith was ‘belated’ and ‘of no practical value’ (para 119).} Rather, the insurer’s argument was that it was under a general duty of good faith in its performance of the parties’ contract, which entailed a duty not to assert the time-bar clause unjustly; hence it was unnecessary to invalidate the clause in the name of fairness, since fairness could be ensured in this other way.\footnote{Particularly at para 79; and also Moseneke DCJ’s account of it at paras 118–119.} Ngcobo J replied that there was no need to take a position on this defence, since Mr Barkhuizen’s claim was bound to fail regardless of it: even assuming the insurer’s defence failed, Mr Barkhuizen’s claim would fall into an evidentiary hole, since he had provided no explanation of why he had failed to comply with the time-bar.\footnote{Especially at para 83: ‘In the view I take of the facts’, Ngcobo J said, ‘it is not necessary to reach any firm conclusion.’ See also Moseneke DCJ’s account of Ngcobo J’s conclusion at para 118.} 

In sum, Ngcobo J’s citation of 

Brisley stands only for what it says: that \textit{good faith} is not a self-standing rule. It does not cast doubt on the fact that reasonableness and fairness are. And indeed Ngcobo J was willing to grant the point about good faith only \textit{arguendo},\footnote{It is clear, as explained, that O’Regan J and Moseneke DCJ thought even this was incautious. Moreover, it is arguable that the Court has, in more recent cases, endorsed for good faith a more robust role: see especially \textit{Everfresh} (note 58 above) at para 72. If it has, that would furnish a further objection to Theron J’s reliance on this part of \textit{Barkhuizen}. But I do not pursue that point here.} since it made no difference to his application of the fairness test he had by this point authoritatively established. He said that 

Brisley reflected the law ‘as [it] currently stands’, and hinted that the position may change under the influence of the Constitution.\footnote{\textit{Barkhuizen CC} (note 34 above) at para 82.} He declined to take that step in \textit{Barkhuizen}, however, where the issue had been raised only as ‘an after-thought’\footnote{This is Moseneke DCJ’s description: para 119.} and in any event did not matter.

This feature of \textit{Barkhuizen} is not ambiguous or difficult to interpret. The problem has arisen only because the judges of the SCA had taken a different view from Ngcobo J about what 

Brisley signifies, and projected their own views onto \textit{Barkhuizen}. The SCA had said that good faith is not a directly applicable test, \textit{and the same is true} of reasonableness and fairness. They are all of them ‘abstract values’, which are unsatisfactory as legal tests. Hence, they are afflicted by a shared vice, and must be rejected for that shared reason. That is why the SCA thought it natural to widen the antipathy from good faith itself to encompass \textit{all} ‘abstract
ideas’, of which ‘good faith, reasonableness, fairness and justice’ were mere examples. And the SCA later convinced itself, or sought to convince others, that Ngcobo J (since he, too, had rejected good faith, citing Brisley) shared its general view. In truth, however, that view played no part in Ngcobo J’s willingness to cite Brisley, and plainly he did not share it. Conspicuously absent from Barkhuizen is any antipathy to abstract values in general (or any citation of Afrox’s expression of it). To the contrary, Barkhuizen is replete with their invocation – and it instates two abstract values, reasonableness and fairness, as directly applicable within its hallmark test.

So Afrox and Barkhuizen built two quite different claims atop Brisley. They are not in dialogue, despite their shared source, and on the key point they diverge. The two approaches give two different answers to the most basic question of all, namely whether fairness and reasonableness are directly applicable tests. Afrox says ‘no’, and Barkhuizen says ‘yes’, and never the twain shall meet – no matter how much one pretends they do.

2 A free-floating metaphor

The second source of confusion – through which Theron J’s judgment contrives the illusion of harmony, but not its actuality – is still more fecund. It is the vagueness and opacity inherent in the hackneyed claim, which I have already quoted, that reasonableness, fairness, and good faith are not ‘free-floating’, ‘free-standing’, or ‘self-standing’ rules or tests. This uses a metaphor to describe our law’s approach to these values, and one which has been invoked in almost every judgment from Brisley to Beadica.

There is nothing wrong with using a metaphor as a supplement to legal analysis. But there is a great deal wrong with using it as a substitute. And when a metaphor is cut adrift from its context, carried through twenty years of case law from opposing courts addressing different issues and applying it to different objects, and then held up as a statement of law that captures the essence of the whole topic, the death of analytical clarity is close at hand. In Beadica, Theron J uses the fact that both the SCA and Constitutional Court have consistently endorsed this metaphor to generate the powerful conclusion that the two courts’ approaches align. But they do not align. The metaphor has been a constant in our jurisprudence only because it can mean so many different things.

Here are the three pertinent things it might mean to say that fairness and reasonableness are not ‘free-standing’ (or ‘free-floating’, or ‘self-standing’):

1. No application (except indirectly). A court’s assessment of the fairness or reasonableness of a particular contract term (or its enforcement in a particular dispute) is never a ground for invalidating it. (However, a court may develop doctrines that are fair and reasonable, and the application of those doctrines to a particular contract term (or dispute) may have important legal consequences.)

2. Conditional application. A court’s assessment of the fairness or reasonableness of a particular contract term (or its enforcement in a particular dispute) is a ground for invalidating it, but only if certain prior requirements are satisfied.

167 Afrox (note 42 above) at para 32 (my translation). See also SAFCOL (note 42 above) at para 27. To be sure, Brisley itself mentioned reasonableness (redelikheid) and fairness (billikheid) several times. Crucially, however, these are not mentioned in the passage Ngcobo J cites (nor in the work of Hutchison quoted there).

168 Afrox is, however, cited for other points: see Barkhuizen CC (note 34 above) at para 28 fn 11; para 59.
3. Authorised application. A court’s assessment of the fairness or reasonableness of a particular contract term (or its enforcement in a particular dispute) is a ground for invalidating it, but only if there is a legal doctrine that makes it so.

These three propositions are not meant to cater for all the parameters that are relevant in determining the role of fairness and reasonableness. For example, there is an important question, which I am suspending for the moment, about the degree of unfairness or unreasonableness (supposing these are indeed the applicable criteria) that is necessary to justify the court’s intervention. How high, in other words, is the threshold set? But we can separate that question from the prior one I am tackling here: namely, in what circumstances (if any) are the fairness and reasonableness of a contract term (or its enforcement) legally relevant?

The first proposition is by far the most rigid. It says that fairness and reasonableness are never directly applicable to a particular contract term or dispute. It is the proposition that emerged in the SCA jurisprudence prior to Barkhuizen, and most clearly in Afrox and SAFCOL. There Brand JA held, based on Brisley, that ‘abstract ideas like good faith, fairness, reasonableness, and justice … do not create an independent or “free-floating” basis for the invalidation or non-enforcement of contractual provisions’, which he understood to mean that these values ‘are not themselves legal rules’, and that, ‘[w]hen it comes to the enforcement of contract terms, the court has no discretion and does not act on the basis of abstract ideas’. Put differently, ‘contractual stipulations cannot be avoided on the basis of abstract notions such as fairness and good faith’; these ‘do not constitute independent substantive rules that courts can employ to intervene in contractual relationships’ and ‘cannot be acted upon by the courts directly’.

Their influence ‘is merely of an indirect nature’: they are values that underlie the ‘crystallised legal rules’ – but it is these, not the values themselves, that the court must apply. Otherwise, the court would be substituting legality with its own discretion, in defiance of the rule of law.

The second proposition is the intermediate one defended by Harms DP in Bredenkamp. He concedes, in light of Barkhuizen, that a court may sometimes assess a contract term or its enforcement for fairness and reasonableness. But he says it may do so only if a prior test has been met. That prior test, according to Harms DP’s interpretation of Barkhuizen, is that the term (or its enforcement) infringes a constitutional right of the complainant, or implicates some other constitutional value.

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169 I return to it in part IIE3 below.

170 Afrox (note 42 above) at para 32 (my translation). The paragraph in its original Afrikaans reads: ‘Aangaande die plek en rol van abstrakte idees soos goeie trou, redelikheid, billikheid en geregtigheid het die meerderheid in die Brisleysaak beslis dat, ofskaan hierdie oorwegings onderliggend is tot ons kontraktereg, dit nie ‘n onafhanklike, oftwel ‘n “free floating” grondslag vir die tersydestelling of die nieafdwinging van kontraktuele bepalings daartel nie; anders gestel, alhoewel hierdie abstrakte oorwegings die grondslag en bestaansreg van regsreëls verteenwoordig en ook tot die vorming en die verandering van regsreëls kan lei, hulle op sigself geen regsreëls is nie. Wanneer dit by die afdwinging van kontraktsbepalings kom, het die Hof geen diskresie en handel hy nie op die basis van abstrakte idees nie, maar juist op die basis van uitgekristaliseerde en neergelegde regsreëls.’

171 SAFCOL (note 42 above) at paras 27, 31.

172 Afrox (note 42 above) at para 32 (my translation). See too Hutchison ‘Good Faith’ (note 42 above) at 230–231, quoted in Brisley (note 42 above) at para 70 (Olivier JA).

173 Brisley (note 42 above) at para 24.

174 Bredenkamp (note 18 above). See the first containment strategy discussed at notes 48–50 above.

175 Ibid at paras 41–53. The constitutional right at issue in Barkhuizen itself, Harms DP points out, was the right of access to court. Harms DP held that Mr Bredenkamp’s case failed because the closing of his bank account
To endorse this second proposition is to abandon the first. This is because the second proposition concedes – as, after Barkhuizen, it must – that fairness and reasonableness are sometimes directly applicable. In substance, Harms DP acknowledges this change, and rightly so. He never says or suggests that Barkhuizen achieved nothing, in the way that Brand did. Rather, he gives a detailed account of the key test, fleshes it out with some instances where it would justify judicial intervention, and states that the court must (sometimes) assess the fairness and reasonableness of the term or its enforcement. Nor does he suggest that Afrox should still be treated as authoritative. So far, so good. There is an important difference between Afrox and Bredenkamp, which Harms DP does not deny.

Yet he obscured this difference by describing the new proposition in the same language as the old one from which he was departing. He summed up his conclusion in Bredenkamp by saying that ‘fairness is not a free-standing requirement for the exercise of a contractual right’. This is, of course, the metaphor that had been popularised in Brisley and Afrox. But Harms DP was using it to express a conclusion that shows those judgments to be wrong, since he grants, under pressure from Barkhuizen, that fairness is sometimes directly applicable. The metaphor remained useful to Harms DP, I suppose, because it captured the idea that the fairness test was coupled to a prior condition; fairness was, in that sense, not ‘free-standing’. That is clearly a different idea to the one expressed in the first proposition. But Harms DP’s use of the same metaphor to express it might, if taken out of context, give the spurious impression of continuity. Unfortunately that spurious impression was presented as truth by Fritz Brand, who had, as I said, a peculiar interest in eliding the change that had occurred between Afrox and Barkhuizen. Harms DP’s repetition of Brisley and Afrox’s metaphor helped him to do it. And Brand’s views found their way into Cachalia JA’s principle (vi), which reprises the old meaning of the metaphor despite Barkhuizen. Lewis JA then repeats both Cachalia JA’s principle, and uses them to underscore the metaphor, in her judgment in Beadica.

Froneman J is, again, clear-sighted about these machinations. He specifically points out that the ‘free-standing’ metaphor had acquired a second meaning in Bredenkamp. And he chastises the SCA judges who took advantage of the confusion to reprise the first. Although Bredenkamp ‘did not purport to contradict Barkhuizen’s general import’, he says, SCA judgments following it ‘uncritically adopted the mantra that “abstract values of fairness and reasonableness” may not directly be relied upon by the courts’. They thus reprised Brisley and Afrox’s first reading, even though it is inconsistent with Barkhuizen and indeed Bredenkamp. Lest there be any

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176 Ibid at paras 47–48.
177 Afrox is nowhere cited. Brisley and SAFCOL are cited only passingly.
178 Bredenkamp (note 18 above) at para 53.
179 Maphango (note 52 above) at para 23, where Brand JA uses Harms DP’s endorsement of the free-standing metaphor as his entrée to justify repeating, as good law even after Barkhuizen, his own judgments in Brisley and SAFCOL. And he repeats all of this, almost verbatim, in Potgieter (note 52 above) at paras 32–34.
180 He takes this principle from Potgieter (note 52 above) at paras 32–34. See Pridwin SCA (note 20 above) at para 27 fn 12.
181 See also Pridwin SCA (note 20 above) at para 76.
182 Beadica SCA (note 12 above) at paras 34–35.
183 Beadica CC (note 2 above) at para 155.
184 Ibid at paras 155–156.
185 Ibid at paras 156–158.
confusion about the point, Froneman J singles out for criticism Cachalia JA’s principle (vi), and Lewis JA’s endorsement of it. 186 Despite all this, however, Theron J merrily endorses what those judges said, and uses the persistence of the ‘free-standing’ metaphor as her main piece of evidence that Afrox, Barkhuizen, and Bredenkamp all agree.

Indeed Theron J stretches the metaphor still further – which brings me to the third meaning I mentioned. According to it, fairness and reasonableness are not ‘free-standing’ in the sense that they may not be applied as legal tests unless there is a legal rule authorising their being so used. This proposition is by far the weakest. Like the second proposition, it accepts that fairness and reasonableness may be applied directly. Unlike the second proposition, however, which imposes a meaningful restriction on when those tests may be applied, the third proposition does not. It says a court may apply a fairness or reasonableness test provided only that it is licenced to do so by some legal doctrine. Arguably that requirement is satisfied trivially, whenever a court may apply a fairness or reasonableness test – for to say that a court may, legally speaking, apply that test seems inevitably to entail that some rule of law empowers it to do so. Certainly, the proposition is satisfied very easily. It is satisfied provided only that the fairness or reasonableness test is conceived of as taking place under some doctrinal heading – such as, pertinently, the longstanding rule that a contract term (or its enforcement) is invalid if it is contrary to public policy.

The punchline is that Theron J in Beadica seems, in the end, to understand the requirement that the fairness test not be free-standing only in this minimal sense. Here is the passage in which her lengthy discussion of our courts’ jurisprudence culminates:

\[A\]bstract values [including fairness and reasonableness] have not been accorded autonomous, self-standing status as contractual requirements. Their application is mediated through the rules of contract law; including the rule that a court may not enforce contractual terms where the term or its enforcement would be contrary to public policy. It is only where a contractual term, or its enforcement, is so unfair, unreasonable or unjust that it is contrary to public policy 187

So it is this fact – that fairness and reasonableness are channelled through public policy – that Theron J ultimately holds up as showing that the SCA and Constitutional Court agree after all. 188 In truth, however, this third proposition is anodyne in the extreme. It gets us no closer to the much stronger first proposition that the SCA in its early judgments endorsed (and which it continues to endorse, despite Barkhuizen), nor even to the more moderate second one endorsed in Bredenkamp. To be sure, Theron J had at earlier points in her judgment seemed to endorse both the first and the second readings of the metaphor. But apparently she did so only because she thought that the Court had already endorsed these, and that they were equivalent in meaning to each other and to her third reading. Both assumptions are mistaken. The three meanings are not equivalent, and in fact the first is incompatible with the others.

Theron J’s third proposition also does nothing to allay the SCA’s worries about unfettered judicial discretion, upon which its own endorsement of the metaphor is based. Theron J cites the value of certainty as a justification for her novel proposition, 189 but it is hard to see any connection. The kernel of Barkhuizen, as understood in Beadica, is that if a term (or its

186 Ibid. He also criticises principle (v), on comparatively minor grounds, which I briefly consider in part IIIA.
187 Beadica CC (note 2 above) at para 80.
188 The quotation is meant to explicate her view that ‘the divergence between the jurisprudence of this Court and that of the Supreme Court of Appeal is more perceived than real’: see again Beadica CC (note 2 above) at para 80.
189 Ibid especially at para 81.
enforcement) is gravely unfair then it will be contrary to public policy, and if it is contrary to public policy then it will be invalid.\textsuperscript{190} Theron J’s third proposition reminds us that our law interposes the intermediate conclusion: namely, that the term is contrary to public policy. But that intermediate conclusion, though it may allow us to give the fairness test a neat taxonomical home, adds nothing of substance. The public policy doctrine is merely a conduit. It leaves unaltered the fact that the term (or its enforcement) will be invalidated in virtue of the court’s assessment of its fairness, which it does nothing to restrain. Hence, as Froneman J points out, the majority judgment’s key conclusion has, by its own logic, failed.\textsuperscript{191} It does not bear out the normative commitments upon which the SCA’s position was based, and which Theron J invokes in support of her own.

Froneman J describes Theron J’s deployment of the metaphor as ‘innovative’,\textsuperscript{192} and he is not wrong. Yet the slippage between the first and third propositions may be traceable to Brand JA’s early SCA judgments on the topic. This was a result of Sasfin. There the Appellate Division, as is well known, invalidated a contract by applying the public policy test, the pivotal aspect of which was said to be the need to do ‘simple justice between man and man’.\textsuperscript{193} In Afrox, Brand JA took Sasfin to show that ‘a contract term which is so unreasonable that it is inconsistent with public policy is unenforceable’.\textsuperscript{194} That seems accurate enough. But it would seem in considerable tension with his bald statements, in the same judgment, and then again in SAFCOL, that reasonableness gives courts ‘no discretion’, ‘cannot be acted upon by the courts directly’, and cannot be used by courts to intervene in contractual relationships.\textsuperscript{195} The breadth of those statements was doubtful, in short, even when Brand JA made them.\textsuperscript{196} Certainly they became unsustainable once Barkhuizen had gone much further than Sasfin and held repeatedly that fairness and reasonableness are the controlling constitutional-era tests. Yet, far from causing Brand JA to moderate his views, Barkhuizen seemed to have the opposite effect. As we have seen, he continued, after Barkhuizen, to invoke the most unyielding passages of Brisley, Afrox, and SAFCOL – and now without any counterweighing acknowledgment of

\textsuperscript{190} Of course, these connections may not be so straightforward if, for example, Bredenkamp’s second reading of the metaphor is true, since in that case the term’s unfairness results in invalidity only if a constitutional right has (also) been infringed. I dealt with that possibility elsewhere. My point here is that Theron J’s endorsement of the third proposition only does not help to instate any such restraints.

\textsuperscript{191} Beadica CC (note 2 above) at paras 160–161.

\textsuperscript{192} Ibid at para 145.

\textsuperscript{193} Sasfin (note 15 above) at 9G, quoting Jajbhay v Cassim 1939 AD 537 at 544.

\textsuperscript{194} Afrox (note 42 above) at para 8 (my translation). The original Afrikaans is: ‘n Kontraksbepaling wat dermate onbillik is dat dit met die openbare belang, in stryd is, is regtens onafdwingbaar.’ See also Brisley v Drotsky (note 42 above) at para 31.

\textsuperscript{195} Notes 170–172 above.

\textsuperscript{196} At that stage Brand JA’s statements might have been defended, I suppose, on the basis that he was treating the public policy test and the principle of good faith as two quite separate legal mechanisms, and so his seemingly inconsonant statements should be separated on the same basis: he was saying that, even though reasonableness is relevant within the public policy test, there is no basis other than that for using reasonableness and fairness as grounds for courts to intervene directly and invalidate a contract’s terms. (Note the separation of his ‘public policy’ discussion at paras 8–30 of Afrox from the discussion of ‘bona fides’ at paras 31–32; and also the last line of para 32.) But, if that were all Brand JA meant in confining ‘abstract values’, it would make it only more strange that he later deployed his remarks in order to interpret Barkhuizen – which had instated fairness and reasonableness as the applicable yardsticks within the public policy test. If his initial rejection of abstract values is to be made plausible by separating it off from the public policy test, in other words, then his later extension of those remarks into precisely that realm becomes all the more objectionable.
Indeed he suggested that they held the key to interpreting a judgment of a court higher than his own that had, in truth, shown almost no sympathy with his views whatsoever. So it may be said, with some justification, that it was the SCA that introduced, and then much aggravated, the tension between the first and third propositions. And the SCA continues to reproduce it: Cachalia JA’s principle (vi), which derives from Brand JA’s rejection of ‘abstract values’, is not consistent with his principles (ii) and (iii), which derive from Sasfin and especially from Barkhuizen.\(^{197}\) The former embodies what I have been calling the first reading of the ‘free-floating’ metaphor; the latter is consistent only with the third reading, or perhaps, if one applies the lens of Bredenkamp to it, with the second one.

Even so, what the Constitutional Court has done in Beadica comes as a surprise. For it has fulsomely denied that any tension exists, and on that basis endorsed both halves of the disjunction, including the views of Brand JA which defy the Court’s own judgments. The ‘free-floating’ metaphor helps to obscure the tensions, but the veneer is cracked and paper-thin.

E RESULTS

So Beadica tries to rewrite history, but history is stubborn. And, in the case of the development of judicial fairness controls in our contract law, it is no fairy tale. There are questions of real import to which our different courts have at different times given different answers. Instead of confronting these, Beadica repeats and reifies deep ambiguities, which are not capable of providing the clear guidance Theron J claims to value. Yet Beadica will have effects that are real, even if its historical basis is not. In this part I try to make sense of these.

1 Botha

First, and most obviously, Botha v Rich has been confined. As a result, no court should rely on its precedential force to justify intervening in future – except, of course, in disputes where the purchaser’s right under s 27 of the Alienation of Land Act are at stake, and perhaps in analogous cases where the court is trying to give effect, in a contractual context, to a statutory scheme.\(^{198}\) Its invocation in judgments like Louw v Davids,\(^{199}\) therefore, which took it to stand for a far-reaching proportionality test for the exercise of contractual rights, even absent any relevant statute, must be regarded as mistaken.\(^{200}\)

Beadica in fact suggests something stronger: it describes the parts of Botha in which the Court said cancellation should be restrained on the basis of its proportionality test as ‘obiter dicta’.\(^{201}\) But that seems wrong. The remedy that the Trust in Botha asked for, and which both lower courts ordered, was that the contract be declared cancelled. The Constitutional Court upheld an appeal against that order, and set the cancellation aside, for the reasons it identified in the passage of its judgment to which Theron J refers. This was surely a necessary part, therefore, of the Court’s decision. It is true the Court had to decide other issues before it got

\(^{197}\) One feature of his principle (v) is also suspect, for related reasons that I mention at note 245 below.

\(^{198}\) Compare Boonzaier (note 100 above) at 10. Magic Vending (note 146 above) at para 10 considered the logic of Botha to be applicable, in principle, to the Rental Housing Act 50 of 1999.

\(^{199}\) See again Louw v Davids (note 101 above) at para 30.

\(^{200}\) Naturally these judgments may be defensible on some other basis. In the case of Louw v Davids, the SCA in fact noted other bases: see para 22.

\(^{201}\) Beadica CC (note 2 above) at paras 55–56.
there. But its holding that cancellation ought to be restrained in the name of proportionality and fairness was the final crucial link in the chain.202

The correct view thus seems to be that Botha does establish, as ratio, that a disproportionate effect on the seller is a powerful reason to hold that the enforcement of a contract term would be unfair; but that the question of fairness arises only if a prior condition is satisfied. The condition was satisfied in Botha because of the statutory scheme, to which proper effect would not be given if the Trust’s enforcement of the contract were left unrestrained.

2 Bredenkamp

That then means attention can return to the proper effect of Barkhuizen, unclouded by the controversial way it was pressed into service by Botha. Beadica indeed emphasises that Botha ‘did not revisit or revise the Barkhuizen test’, which ‘remains the leading authority in our law’ on fairness in contract and the public policy test.203

One important question is whether Bredenkamp’s interpretation of Barkhuizen is correct. Prior to Beadica, the Court had not considered Bredenkamp’s interpretation at all. In Beadica both the majority and minority judgments consider it. The problem I posed in part IID was that, although the majority endorsed the view in Bredenkamp, it did so only after equating it, mistakenly, with views that are distinct. Despite this flaw in the supporting reasoning, however, it seems we should now regard Bredenkamp as officially confirmed. The text of both judgments supports this.204 Theron J’s endorses it via her approving quotation of Cachalia JA’s principles (ii) and (iii),205 which were based upon it; and other passages of her judgment adopt its core holding implicitly.206 Froneman J, who considers the correctness of Bredenkamp more squarely, reaches the express conclusion that it is correct, indeed unexceptional.207 So it seems that Bredenkamp, which was given ‘almost disrespectful’ treatment in Botha,208 has now been conclusively affirmed.

But perhaps the real question is: what does Bredenkamp stand for, and how will it be applied? For here there are – inevitably – tensions in the case law, and, depending on how they are settled, Bredenkamp may have vastly different implications.

To be more precise: what is the condition upon which Barkhuizen’s fairness test is now conditional? On the very first account of Bredenkamp that I gave,209 it was offering an

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202 See also Boonzaier (note 100 above) at 10 (arguing that the issue of cancellation cannot be separated from those that came before).
203 Beadica CC (note 2 above) at para 58.
204 It would also mesh well with Beadica’s narrowing of Botha. If it were really true that Barkhuizen unconditionally subjects all contract terms (and their enforcement) to a fairness test, it is hard to see why there was any need to narrow Botha. Botha would have been merely spelling out what was immanent in Barkhuizen. But if Barkhuizen in truth subjects terms and their enforcement to a fairness test only conditionally – i.e. only if the Constitution is implicated – then we can understand the sense in which the rejected interpretations of Botha were indeed too expansive: they did not recognise the condition.
205 Beadica CC (note 2 above) at para 82.
206 Her initial account of Bredenkamp raises no objection to it: ibid at paras 40–42. Indeed she points out how consistently it has been affirmed by the SCA. See also para 87, which I discuss at note 216 below.
207 Ibid at paras 153–154.
208 Hutchison ‘From Bona Fides to Ubuntu’ (note 23 above) at 119.
209 See part IB above.
interpretation of Barkhuizen that was deliberately moderate.\textsuperscript{210} By saying that the fairness test is engaged only when the term (or its enforcement) infringes a constitutional right, it imposes a meaningful precondition for the fairness test’s operation, and one which may be desirable, since it restrains the judicial discretion that had troubled the SCA.\textsuperscript{211} First, the term (or its enforcement) is subjected to a fairness test only in a subset of cases, not all of them. Second, the establishment of the prior condition is less discretionary and open-ended than the fairness test itself, since the question of whether a certain right has been infringed is an enquiry structured by the constitutional text and much case law. Hence the two steps, taken together, produce some determinacy that the fairness test alone does not. And, although I’m sure Harms DP’s reading was motivated in part by his view that it was a desirable one, it seems faithful to Barkhuizen.\textsuperscript{212} After all, the Court there found that Mr Barkhuizen’s constitutional right of access to court was infringed, and developed its fairness test only thereafter, as a means of deciding whether the infringement sufficed to make the clause (or its enforcement) contrary to public policy.

It cannot be denied, however, that Harms DP said something wider: he said that the relevant question is whether constitutional ‘values’ are implicated – not confining himself to the infringement of ‘rights’.\textsuperscript{213} That is the wording on which Froneman J seizes in Beadica, expressly rejecting the interpretation of Bredenkamp that I have just outlined.\textsuperscript{214} Bredenkamp, he says, does not require an infringement of rights; the fairness test kicks in provided only that the contractual term is ‘in conflict with constitutional values or other public policy considerations’.\textsuperscript{215} Theron J does not discuss the issue at the same length, but she endorses Froneman J’s view. In a passage in which she speaks of the ‘constitutional rights and values’ that inform public policy,\textsuperscript{216} she adds (in a footnote presumably designed to head off any disagreement with Froneman J): ‘This is not to say that a constitutional right must be implicated for a contractual term to be contrary to public policy.’\textsuperscript{217} So she evidently agrees that Bredenkamp is not as constrained as some thought.

But if merely identifying an implicated constitutional value is sufficient to trigger the fairness inquiry, then Harms DP’s precondition is made vapid, or at least potentially so. For the Court has shown a willingness to link almost any dispute before it to constitutional values – including to fairness itself.\textsuperscript{218} And it merely needs one or two off-handed sentences in which to do it. If Harms DP’s use of the word ‘values’ is exploited in this way, it would undermine what his judgment in Bredenkamp was trying to do, namely to interpose a meaningful precondition.

\textsuperscript{210} In some ways, Harms DP was surprisingly willing to give Barkhuizen a wide scope. For example, he might have understood the judgment – not without plausibility – to apply only to time-bar clauses, or only to terms that implicate the right of access to court. (Though if this were so, then naturally there would be a need for similar controls to be developed for other terms in future cases.) Yet he did not limit it in this way, instead assuming that the fairness test applied across contract law generally. He settled only for the limitation that I discuss in the text.

\textsuperscript{211} Compare Bredenkamp (note 18 above) at paras 39–40.

\textsuperscript{212} But see, for a forcefully expressed alternative view, J Barnard-Naudé ‘Deconstruction Is What Happens’ (2011) 22 Stellenbosch Law Review 160.

\textsuperscript{213} See Bredenkamp (note 18 above) at paras 46–48.

\textsuperscript{214} See again Beadica CC (note 2 above) at paras 153–154.

\textsuperscript{215} Ibid at para 154.

\textsuperscript{216} Ibid at para 87.

\textsuperscript{217} Ibid at para 87 fn 200.

\textsuperscript{218} Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews [2009] ZACC 6, 2009 (4) SA 529 (CC) at para 221.
before the fairness enquiry is activated.\textsuperscript{219} Moreover, there is a ready explanation for why Harms DP used the language that he did. He was constrained to use it, because Ngcobo J had used it in 
\textit{Barkhuizen}; and Ngcobo J was constrained to use it in \textit{Barkhuizen} because the Constitution uses it in section 39(2).\textsuperscript{220} Ngcobo J had decided (for reasons unrelated to anything said so far) that his power to develop the public policy test was sourced in this section, which bases itself upon constitutional values – and not in section 8, which speaks of ‘rights’.\textsuperscript{221} And so he felt he could not avoid honouring section 39(2)’s language – even though in substance his reasoning was clearly that Mr Barkhuizen’s constitutional right was infringed, and not (merely) that constitutional values were implicated.\textsuperscript{222} It is strongly arguable that Ngcobo J’s premise was mistaken: in truth, he was fully entitled to develop his public policy test under s 8.\textsuperscript{223} More importantly, the truth (or falsity) of that premise is entirely irrelevant to the question of how the public policy test ought to be designed. So it is unfortunate that this incidental fact seems to have determined the precedential effect of \textit{Bredenkamp} in a way its rationale arguably does not support. More unfortunate still is the fact that the Court offers essentially no reasoning to justify this aspect of its decision.\textsuperscript{224} Nor does it explain what sorts of ‘values’ are sufficient to engage public policy in this context – although that would seem now to be the pivotal issue.

3 The lower courts and a higher bar

The result is that \textit{Botha} has been narrowed, which is valuable, but otherwise \textit{Beadica} establishes few principles of significance. It does decide, almost by accident, that \textit{Bredenkamp} is correct – but it understands that judgment in a way that may subvert its main message. At any rate, the law as so understood leaves two very wide questions in the hands of lower courts. What sorts of values or considerations bear on public policy in this context? And, once considerations of that kind are implicated, thus activating the fairness test, what does it take to satisfy it?

The future of \textit{Barkhuizen} seems therefore to depend almost entirely on the attitude of the courts applying it. In the case of the SCA, that attitude could hardly be clearer. The

\begin{footnotesize}
\begin{enumerate}
\item To be fair, the SCA had many times quoted Harms DP’s inclusion of ‘values’, including in Cachalia JA’s principle (ii). In application, however, it took a robust line about what counted as a relevant value, denying almost invariably that any was implicated.
\item Strictly speaking, it refers to the ‘spirit, purport, and objects’ of the Constitution. But this cumbersome phrase is customarily substituted, of course, with ‘values’.\footnote{Strictly speaking, it refers to the ‘spirit, purport, and objects’ of the Constitution. But this cumbersome phrase is customarily substituted, of course, with ‘values’.}
\item Ngcobo J thought there was no ‘law of general application’ at issue in the case, which meant s 36 of the Constitution was inapplicable; and since s 36 is linked to s 8 (by ss (3)(b)) he thought the latter was thus also inapplicable: see \textit{Barkhuizen CC} (note 34 above) at para 23.
\item Ngcobo J is thus drawn into strange locutions, such as that he is considering the ‘values that underlie our constitutional democracy, as given expression to in s 34’ – i.e. in the particular right of Mr Barkhuizen that he said was infringed: ibid at para 36 (emphasis added). Harms DP, evidently noticing the significance of this, draws attention to it in \textit{Bredenkamp} (note 18 above) at para 43.
\item The majority simply falls into line with Froneman J, who does not say why he thinks this is the best understanding of \textit{Barkhuizen}. But if I may venture a hypothesis, it is that Froneman J feared that if \textit{Barkhuizen} is ‘read down’ then our contract law will not be developed as progressively as it might otherwise be: courts will be empowered to intervene in fewer cases. But this seems to me to rest on a mistaken presupposition. It is undoubtedly true that \textit{Barkhuizen} itself would be narrower if \textit{Bredenkamp}’s interpretation of it were favoured. But why does everything need to be staked on \textit{Barkhuizen}? Other principles can be developed, and should be developed, to ensure fairness in circumstances where \textit{Barkhuizen} itself does not. In fact it is far better to develop a suite of principles, each targeted at a particular problem, rather than trying to stretch a single principle to cover all of contract law.
\end{enumerate}
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overwhelming likelihood is that they will continue to say, as they have said almost invariably up to now, that they can perceive no relevant policy considerations, nor any unfairness, that might justify intervening. And, although the burden of part IID was to show that Beadica’s approval of the SCA jurisprudence rests on a series mistakes, the fact is that the Constitutional Court has now given its approval – which the SCA may use to legitimate its proceeding as before. Indeed the SCA has already done both of these things. Its most recent judgment applying Barkhuizen holds that – since Beadica affirmed Cachalia JA’s principles from Pridwin, and moreover urged fidelity to pacta sunt servanda – there was no basis for it to intervene.225

The likely approach of the various High Courts is, inevitably, harder to characterise.226 Few judges have been as enthusiastic about applying Barkhuizen as Davis J – who has now retired – but others may be willing to continue the fight. It is plain, however, that their opponents have been given a boost: those judges who are reluctant to intervene may now, like the SCA, extract from Beadica various passages to fortify their views. One passage that has already found favour is this one, which derives from Brisley and Afrox:227

It is only where a contractual term, or its enforcement, is so unfair, unreasonable or unjust that it is contrary to public policy that a court may refuse to enforce it.228 Though this passage seems to grant that the term (or its enforcement) is invalidated in virtue of the court’s assessment of its unfairness or unreasonableness, the modifier (‘so’) draws attention to the fact that the unfairness needs to be extreme. This brings to mind the passages of Barkhuizen in which Ngcobo J seemed to suggest that the unfairness or unreasonableness must be ‘manifest’ in order to justify intervention,229 which some commentators found encouraging.230 This reading was never consummated, however – as Botha shows with particular clarity231 – and it may be debated how much weight Theron J was attaching to her phrasing here. But she did take care to emphasise that courts must use their powers under the public policy test with ‘perceptive restraint’,232 which comes to much the same thing.

Just what it takes for a term (or its enforcement) to be ‘manifestly’ unfair, or ‘so’ unfair that it engages public policy, however, or just how much restraint is required of judges given their counterweighing duty to invalidate ‘contracts that undermine the very goals that our Constitution is designed to achieve’,233 are questions not easily answered. And other judges may, of course, extract quite different, pro-fairness passages from the mêlée. It will all depend, as ever in this field, on the particular judge.

225 Beadica 231 CC v Sale’s Hire CC [2020] ZASCA 76 especially at paras 44–45. As it happens, this judgment is a result of other litigation brought by Beadica against Mr Sale. See further text at note 280 below.

226 For a brief survey of the diverse attitudes of the High Courts (before the Constitutional Court decision in Beadica) see Hutchison ‘From Bona Fides to Ubuntu’ (note 23 above) at 121–123.

227 Note 194 above.

228 Beadica CC (note 2 above) at para 80, cited in Magic Vending (note 146) at para 8.

229 Barkhuizen CC (note 34 above) at paras 60, 63, 67.


231 But see the continued use of this phrasing in, for example, Mohamed’s Leisure (note 20 above) at para 21.

232 Beadica CC (note 2 above) at paras 88–89.

233 Ibid at para 90.
III THE FACTS

There is good reason to doubt the usefulness, then, of Theron J’s grand claims that she has brought clarity to this area. We could do with less pontificating, and more praxis. But it is true that her judgment, when it finally turns to the dispute before her, does contain some pointed holdings of practical import. Both stem from Beadica’s averment, which had received much attention in both lower courts, that its owners ‘were not sophisticated business people’ versed in contract law niceties. For Davis J in the High Court, this was a powerful point in their favour. For Lewis JA in the SCA, it was anything but. She doubted its factual truth, and in any event rejected its legal relevance in the absence of an explanation why Beadica had failed to comply with the notice period. In the Constitutional Court, Theron J comes down firmly on Lewis JA’s side. As she does so, two features of her reasoning stand out.

A Claimant characteristics

The first is that she gives very short shrift to Beadica’s argument that BEE businesses should not lightly be allowed to fail. We saw earlier that she rejected this argument on economistic grounds, namely that it would deter other parties from contracting with BEE businesses. This is not exactly a *cri de coeur* for non-racialism. Nevertheless, we should recognise the significance of the Court’s refusal to countenance the thought that Beadica’s vulnerable black-owned status entitled it to special treatment. Beadica’s counsel seemed to think this would be a winning argument, and it received the strong endorsement of Victor AJ in dissent. But on the facts of *Beadica*, at least, the majority had no appetite for it.

The broader issue here is the extent to which a court may, in making its fairness assessment, consider the particularities of the parties before it. It is in the nature of Barkhuizen’s so-called ‘second leg’ that the court must consider at least some of these: the court is to ask itself whether, even though the term is fair on its face, its enforcement in the particular circumstances is unfair. This creates certain worries. Perhaps the main point of Moseneke DCJ’s dissent in *Barkhuizen* was to reject any suggestion that the complainant’s ‘personal attributes and station in life’ might bear on whether the clause ought to be enforced against him. The context was that Mr Barkhuizen, since his complaint related to insurance he had taken out over his new BMW 328i, was presumably not a poor or illiterate person – which, it had been suggested, should count against his pleas for judicial aid. This Moseneke DCJ rejected, saying that there should be an ‘objective assessment of the terms of [the] bargain’, which should not be shirked because of the complainant’s personal characteristics. Or, as Sachs J put it, ‘The rich too have rights’. *Beadica* may be said to confirm that there are limits to the Court’s willingness

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234 *Beadica HC* (note 4 above) at paras 37–38.
235 *Beadica SCA* (note 12 above) at para 39.
236 Ibid at paras 41, 44.
237 Note 135 above.
238 It seems to have been Beadica’s main argument on appeal: see applicant’s written submissions especially at paras 130–137, available at https://collections.concourt.org.za/bitstream/handle/20500.12144/36616/Applicants%27Heads of Argument.pdf?sequence=16&isAllowed=y.
239 *Beadica CC* (note 2 above) at paras 221–228.
240 *Barkhuizen CC* (note 34 above) at paras 58, 69.
241 Ibid at paras 94–104.
242 Ibid at para 96.
243 Ibid at para 149.
to consider the particularities of the complainant – now in the opposite kind of case from Barkhuizen, in which the complainant claims a special vulnerability.

If that is right, some fine distinctions need to be drawn. One must distinguish the complainant’s attributes and social status, which are not relevant, from the impacts of the term upon him, which are. This helps to show, incidentally, why Cachalia JA’s principle (v) is wrong insofar as it suggests that only ‘harm to the public’ is to be considered under the Barkhuizen test. It is clear that public policy does take account of the harm ‘to the individual contracting party’, as Froneman J explained, and Theron J agreed – the only respect in which she departed from Cachalia JA’s principles.

Second, one must distinguish – probably with difficulty – the parties’ respective attributes and status from their relative bargaining power, since the latter is a weighty factor in the fairness test.

There is some play in the joints here, and it is hard to say whether the Court’s holding in Beadica will prove robust. Perhaps its rejection of the argument based on Beadica’s BEE status was helped by the fact that Beadica’s complaints of unfairness were in any event unconvincing.

B Evidence of non-compliance

That brings us to the second point to emerge from this part of Theron J’s judgment. She makes clear that a court should not entertain a contractual fairness claim that the applicant has not properly evidenced. In particular, unless the applicant explains the reason for failing to comply with the clause it is seeking to invalidate, it ought to lose:

A party who seeks to avoid the enforcement of a contractual term is required to demonstrate good reason for failing to comply with the term. ... The absence of any explanation for the failure to comply will, in most cases, be the end of the enquiry.

At this point, the demise of Beadica’s case is imminent. All that Beadica had alleged, Theron J points out, is that its owners ‘were not sophisticated business people and not fully apprised of their rights and obligations regarding their options to renew the leases’. But this is not good enough: Theron J points out that they were the operators of franchises, with previous managerial experience; and that in any event the renewal clauses were ‘in simple, uncomplicated language, which an ordinary person could reasonably be expected to understand’. Hence Beadica’s profession of ignorance did not go far enough, and the Court was driven to the inference that ‘the applicants simply neglected to comply with the clauses in

Passages of Barkhuizen treat party-specific impacts as highly relevant to its ‘second leg’: see para 69 (Ngcobo J); cf. para 104 (Moseaneke DCJ); and for discussion Sutherland (note 230 above) at 57–59. And see now Botha (note 6 above) at para 51: ‘The fairness of awarding cancellation is self-evidently linked to the consequences of doing so.’

The phrase comes from an English judgment quoted in Sasfin (note 15 above) at 9. But the Appellate Division did not attach any significance to that particular phrase, and indeed the reason it intervened in Sasfin seems inconsistent with it.

Beadica CC (note 2 above) at paras 90, 158.

Though she adds her own glosses on two other issues (at paras 83–90), these are consistent with what Cachalia JA had said.

Afrox (note 42 above) at para 12; Barkhuizen CC (note 34 above) at para 59.

Beadica CC (note 2 above) at paras 91–92.

Ibid at para 93.

Ibid. Here Theron J is approving Lewis JA’s reasoning in Beadica SCA (note 12 above) at para 39.

Beadica CC (note 2 above) at para 94.
circumstances where they could have complied’. That meant they had to lose, since public policy does not require the Court to rescue parties from their own, easily avoidable failings.

Theron J’s statement that the applicant can succeed only if they explain their non-compliance with the impugned term might seem innocuous, indeed inevitable. After all, it is a general rule of civil litigation that the applicant must prove its case. And Barkhuizen expressly confirmed, moreover, that the party seeking to have a term (or its enforcement) declared invalid bears the onus of establishing the unfairness – in particular by ‘show[ing] that, in the circumstances of the case, there was a good reason why there was a failure to comply’. The SCA has affirmed this principle many times, including in Cachalia JA’s principle (iv). In Beadica, Theron J was merely repeating it.

Her doing so is nevertheless significant. For this principle was, again, not honoured in Botha. The Court there found for Ms Botha even though (as far as one can tell from the judgment) she provided no explanation of why she had failed, for several months, to make her instalment payments – a fact which the respondents foregrounded as a point telling decisively against her. What’s more, the Court at the moment of crucial decisional relevance imposed the burden of proof not on Ms Botha, who was complaining of the unfairness, but on the respondent Trust whose enforcement of the contractual cancellation clause she was seeking to restrain. The Court assumed, in the absence of evidence to the contrary, that the Trust’s enforcement of the cancellation clause was unfair – and on that basis found for Ms Botha. That is an eccentric approach to the burden of proof, and the opposite of the one taken in Barkhuizen, Bredenkamp, and now Beadica, whose return to normality should be welcomed.

Even accepting the principle, however, there are important questions about how to apply it. Though we can agree that the Court ought to reach decisions only if these are justified by the evidence provided, it does not follow that Beadica’s initial failure to provide the evidence should prove fatal. For one should remember that the Court has occasionally shown a willingness to request new argument, and sometimes even new evidence, to allow it to deal with cases where there is an important issue at stake but a lack of information upon which to decide it. When one remembers that Barkhuizen itself was seriously hamstrung by the vanishingly slender

253 Ibid at para 95.
254 Barkhuizen CC (note 34 above) at para 58; also paras 84–86.
255 Bredenkamp (note 18 above) at paras 45–49; Pridwin SCA (note 20 above) at para 27.
256 Beadica CC (note 2 above) at para 92.
257 Arguably there is a difference between the relevant non-compliance in these cases. In Botha the non-compliance was with a primary obligation, in virtue of which the other party’s (secondary) right to cancel was triggered. The validity of the secondary right to cancel, not the primary obligation with which the complainant had failed to comply, was the subject of the litigation. In Barkhuizen and Beadica, by contrast, the subject of the litigation was the validity of the very clause with which the complainant had failed to comply. No doubt the complainant’s reasons for non-compliance (or lack thereof) should matter in all three cases, but perhaps not in the same way.
259 ‘The Trustees’, Nkabinde J explained, ‘did not properly address the disproportionate burden their claim for relief would have on Ms Botha. … That was a fundamental error.’ For it meant that the Trustees ‘could not justify this Court’s awarding the relief they sought’. See Botha (note 6 above) at para 51.
260 Ibid at para 51.
262 The most famous example is probably AllPay Consolidated Investment Holdings (Pty) Ltd v CEO, South African Social Security Agency [2013] ZACC 42, 2014 (1) SA 604 (CC), though the stakes there were incomparably higher.
statement of case, and that in *Everfresh* the Court was unable to develop the common law in a pro-good faith direction because of a lack of argument, one might say it was high time for the Court to take procedural steps to allow it to decide a contractual fairness case properly.

A related question is whether there truly was a lack of information to justify intervening in *Beadica*. Neither Davis J in the High Court nor Froneman J in his Constitutional Court dissent thought so. Davis J said he was ‘not sure what more is required [of Beadica] in these circumstances’. Beadica had stated in its founding affidavit, as we have seen, that they were unsophisticated business persons and were unaware of the lease’s terms. Mr Sale apparently met this allegation with a bare denial, which seems to fall short of creating a material dispute of fact. That being so, the court had no reason to disbelieve Beadica’s claims of ignorance. As Froneman J put it, then, Beadica’s explanation ‘was not contradicted by any direct evidence’. And besides, he continues – and this seems to me his crucial point – ‘there is enough circumstantial evidence to back up their contention’. The letters in which Beadica sought renewal were, as Davis J and Froneman J noted, ‘informal’ and ‘somewhat crude’. That is not really surprising; the applicants were dealers in building equipment, and had acquired an ownership role only because of a scheme designed to empower those previously disadvantaged. It seems clear that they – unlike Mr Sale – had no legal representation. And their counterparty was their former boss, now franchisor, on whose favour their businesses depended. Is it not overwhelmingly likely that he and his lawyers were in control of the terms of the agreements, the details of which Beadica remained ignorant until it was too late? To say that the Court lacked the evidence from which to draw the necessary conclusions may indeed seem, as Froneman J put it, to be ‘closing one’s eyes to reality’.

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263 Mr Barkhuizen’s ‘spartan’ statement of case is quoted in *Barkhuizen CC* (note 34 above) at para 121. That it seriously hampered the adjudication of his claim is clear from, for example, *Barkhuizen SCA* (note 115) at paras 8–9; *Barkhuizen CC* (note 34 above) at paras 84–88.

264 *Everfresh* (note 58 above).

265 Some of the judges in *Everfresh* were in fact willing to take such steps: see the dissenting judgment of Yacoob J, which was concurred in by (among others) Froneman J and Mogoeng J. Perhaps tellingly, those who were not willing included Jafta J and Khampepe J.

266 *Beadica HC* (note 4 above) at para 38.

267 Ibid at para 27.

268 *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51, 1984 (3) SA 623 (A) at 634–635.

269 True, Lewis JA held in the SCA that Beadica must have been aware of the terms of the renewal clause, since they tried to exercise it, albeit late; and Theron J quoted this passage approvingly: *Beadica SCA* (note 12 above) at para 39; *Beadica CC* (note 2 above) at para 93. But this is not convincing. First, that Beadica sought renewal after the deadline had passed cannot show they knew about the renewal clause when it mattered. Second, and more fundamentally, it is in fact doubtful that Beadica was aware of the clause at any point. In their letters requesting a new lease, they made no mention of it; the reason they gave for their request was only that the termination date for the old lease was looming. This conspicuous failure to mention the renewal clause is at least compatible with Beadica’s ignorance of it.

270 *Beadica CC* (note 2 above) at para 196.

271 Ibid at para 196.

272 Ibid at para 198.

273 *Beadica HC* (note 4 above) at para 38.

274 *Beadica CC* (note 2 above) at para 197.

275 At least, not at the time they sought renewal: ibid at para 198.

276 Ibid at para 197.
After all, the facts of modern-day contracting put much pressure on the presumption that all terms ought to be enforced. The stronger party often imposes terms on the other party that the other party has not read, cannot be expected to read, and would not be able to change even if he did read them. This makes it doubtful whether such terms are really voluntarily agreed, and courts need to police their validity accordingly: the terms are already on the back foot, many would say, and it should not take much from the complainant to push them over the edge. This kind of sentiment was apparent in Sachs J’s judgment in *Barkhuizen*, which made much of the fact that the time-bar clause was contained in a standard form contract, and for that reason he was willing to invalidate it despite the dearth of evidence about Mr Barkhuizen’s conduct and circumstances. It is a sentiment that Davis J and Froneman J seem to share. So it is not surprising that they felt able to breathe life into Beadica’s skeletal averment. Although the renewal clause was not a standard term, it seems to have sufficed, in their view, that it was not meaningfully negotiated.

On the other hand, this line of objection may rely on too much speculation. Surely it is for the complainant to say at least something about the circumstances in which the contract was concluded. These are simple facts, well within Beadica’s knowledge, and which previous case law shows to be vitally important. All it did, instead, was faintly profess its lack of savvy. Should an applicant really be allowed, through a single-sentence averment, not tested in evidence, to claim for itself the status of a vulnerable person, entitled to a judicial thumb on the scales? Some may find the approach of Davis J and Froneman J far too credulous. We do not know very much about how vulnerable Beadica really was, and it could not have been all that difficult for it to tell us. What we do know is that Beadica was able to pursue not one, but two, court applications against Mr Sale to appellate level (and, as far as one can tell, it did so by hiring paid lawyers). In addition to the matter I am discussing, it instituted separate litigation against Mr Sale for various alleged breaches of the parties’ franchise agreement. It lost that case in the High Court, which refused leave to appeal. Beadica then sought special leave from the SCA, which also refused. After that, Beadica applied to the SCA once again, to have its refusal of special leave reconsidered. The SCA did reconsider it, after full argument, but unanimously dismissed the application – and its discussion suggests that Beadica’s claims had much vituperative force behind them, but not much law. So should we really cue the violins for poor Beadica’s plight? Or be thankful that, faced with a litigious opportunist, a majority of the Constitutional Court refused to be taken for a ride?

277 Consider paras 106–111 (Moseneke DCJ), and for discussion Sutherland (note 230 above) at 60–66.

278 Once again, it is worth remembering the Court’s approach elsewhere. In *Sarrahwitz v Maritz NO* [2015] ZACC 14, 2015 (4) SA 491 (CC), the Court unanimously overlooked some grave deficiencies in the applicant’s conduct of the litigation and found for her, with Mogoeng CJ saying (at para 27), ‘It does become necessary at times to read the papers of a party – especially a vulnerable litigant – with a measure of compassion, when it is in the interests of justice to do so.’ Cameron J and Froneman J wrote a separate concurrence; they agreed with the result but would have preferred a solution different from the majority’s. Theirs included asking for additional evidence to address a gap in Ms Sarrahwitz’s case: ibid at para 99.

279 Moreover, Beadica had lost in the SCA because its explanation for failing to comply with the notice period was inadequate, but, despite this, its heads of argument in the Constitutional Court made no attempt to plug the gap. Rather, its counsel tried to pivot away from the issue, arguing that the absence of an explanation should not be decisive against it (see para 125 ff) – hardly a vote of confidence in the explanation Beadica might have provided. (Of course it may have been too late, as this stage, for Beadica to remedy the paucity of facts. But then it was surely also too late for the Court to invent them.)

280 Beadica 231 CC v Sale’s Hire CC (note 225 above).
Either way, the majority’s unwillingness to indulge Beadica may tell us something. It evinces a less sympathetic attitude towards this complainant than the Court has shown on other occasions, certainly less than a minority of the Court would have continued to show here. So perhaps we should not expect the Court to drive forward the constitutionalisation of our contract law with the enthusiasm it once did. Or, at any rate, we should not expect it to do so unless litigants provide it with more than the smell of an oil rag.

And that brings us to perhaps the most lastingly important question. What would have counted as an adequate explanation for Beadica’s non-compliance? What sort of reason for non-compliance might a complainant adduce, in other words, to justify a finding that a term’s enforcement would be unfair? On one extreme, it would surely suffice if the complainant had failed to give timeous notice because he was comatose: this is the example that Ngcobo J used in *Barkhuizen*.281 On the other extreme, *Beadica* seems to establish that a mere profession of ignorance of the contract’s terms is not sufficient.282 This seems a sensible conclusion: a party should not be able to evade a clause merely because he did not know about it; it must be the case that he *could not reasonably* have known about it. But then he must provide some explanation of why that was indeed so. A possibly valid explanation, we may infer from *Beadica*, is that the clause was in legalese that would be baffling to him even if he had read it.283 We may infer this because, as mentioned, one of the reasons Theron J gives for rejecting Beadica’s urgings is that the renewal clause was in ‘simple, uncomplicated language, which an ordinary person could reasonably be expected to understand’.284 That holds out the possibility that, if in some future case things are otherwise, *Beadica* can be distinguished, and the complainant’s non-compliance with the clause overlooked. Apart from these small points, however, there is much that remains up for grabs.

**IV THE FUTURE**

So does *Beadica* really mark a newly cautious approach to the development of fairness overrides? That is certainly the judgment’s most obvious meaning. But there are also reasons to doubt it. First, as I argued in part II, Theron J’s judgment fails in its professed aim of setting out a clear approach to contractual fairness that unifies our two highest courts’ jurisprudence. Instead it attempts an implausible rewrite of history. And although her judgment does, almost by accident, endorse the SCA’s judgment in *Bredenkamp*, that endorsement is cast in a way that undermines, rather than advances, Harms DP’s moderating intent. Second, as I argued in part III, Theron J’s dismissal of Beadica’s case for lack of evidence means she loses the chance to flesh out her approach in its application. Not much content has been added to *Barkhuizen*.

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281 *Barkhuizen CC* (note 34 above) at para 69.

282 This is because, as this part has explained, Beadica’s argument that it was ‘not fully apprised of its rights and obligations’ was given such short shrift. The slight wrinkle is that Theron J’s judgment covers her bases, leaving us unsure what significance to attach to each. Was Beadica’s case rejected because it had failed to prove it was ignorant of the notice period? Or because, even accepting Beadica was ignorant, it *could* easily have informed itself – so that its ignorance failed to establish any unfairness? Theron J offers reasons to doubt both steps in Beadica’s argument.

283 What a court would do if the complainant were altogether illiterate is far from clear. The Court (or a majority of its members) has been willing to say only that this would be a relevant factor in assessing fairness: *Barkhuizen CC* (note 34 above) at para 64.

284 *Beadica CC* (note 2 above) at para 94.
A Hard case, bland law

I also said that, despite this, the tone of Theron J’s judgment is newly moderate; and that its approach to the evidence and arguments is unyielding. She evinces a relative lack of sympathy for Beadica’s complaints of unfairness that may be telling. But how telling?

Here it bears emphasis that Beadica was a very difficult case in which to justify intervening. Froneman J’s minority judgment, though it would have intervened, acknowledges that it was a ‘hard call’.285 That may be an understatement. It was hard not only because of the minimal evidence that Beadica supplied. It was hard because the renewal clause, of whose notice period Beadica now complained, was in fact very favourable to them.286 It conferred upon them a power to bind Mr Sale to a new contract that was unilateral and ‘substantively unqualified’.287

The sole restriction on their exercise of this power was the notice period – and, even then, there could be no suggestion that a six-month notice period was inherently unfair.288 So Beadica’s complaint was that a clause which gave them a very robust power, through which they could unilaterally bind Mr Sale, should be strengthened even further by the judicial excision of the only restriction on their power – the ex facie fair notice period with which they had (without explanation) failed to comply. That is a novel and contestable use of the Barkhuizen principle,289 whose more natural application is to restrain contractual powers that are draconian – not, as here, to overlook a mistake by a party whose contractual powers are already strong enough. Maybe that can be justified.290 But it requires work.

Moreover, the effect of the court’s intervention would be to create a new contract between the parties, rather than (as in many applications of Barkhuizen) to restrain the termination of an existing one.291 That creates both normative and practical problems. The normative problem is this: whereas the effect of a court’s restraining cancellation is merely to preserve a contract to which the parties, in arranging their own affairs, have consented, the effect of deeming a renewal is to create a new contract to which the parties have not consented – and which

286 Ibid at para 95.
287 Beadica HC (note 4 above) at para 40.
288 Compare Beadica SCA (note 12 above) at para 39.
290 An appealing characterisation of Beadica’s claim may be that they were seeking to estop Mr Sale from relying on the (otherwise entirely fair) notice period: compare Boonzaier (note 100 above) at 12; Thompson (note 261 above) at 655–657. This possibility was raised by Beadica in the alternative (see their written submissions at paras 155–156, available at https://collections.concourt.org.za/bitstream/handle/20.500.12144/36616/Applicants%27Heads of Argument.pdf?sequence=16&isAllowed=y). As the doctrine of estoppel reminds us, it is crucial to show that Mr Sale had created the impression that the contract would be renewed (or had a responsibility to dispel any such impression and failed to do so) such that it would now be inequitable for him to act inconsistently with it. There is some licence for such a finding in the facts of Beadica, since the parties’ franchise agreement perhaps created the expectation of the lease’s renewal (compare Beadica HC (note 4 above) at para 40), and Mr Sale did not respond to the renewal request for four months, despite implying that he would – possibly a deliberate way to foreclose Beadica’s options (compare Beadica CC (note 2 above) at para 200). Even so, finding for Beadica on this basis would be a stretch: see Botha (note 289 above) at 456. Nevertheless, the key point is that doctrines like estoppel are at least asking the right questions.
291 This is noted (passingly) by both Lewis JA and Theron J: Beadica SCA (note 12 above) at para 42; Beadica CC (note 2 above) at para 97.
they probably did not even expect.292 The concomitant practical problem is that, because the contract is one imposed by the court, rather than assented to by the parties, it is difficult to determine what its terms should be. The court cannot easily, or fairly, invent them.

Again, it may have been possible to address these problems – the facts of Beadica were in important respects special293 – and it is not my purpose to argue otherwise. Nevertheless, they entail some criticism of the minority judgments in Beadica, which do not address them and in fact obscure them.294

They also remind us, incidentally, of the unfortunate fact that the Court refused to hear an appeal in Mohamed’s Leisure (Pty) Ltd v Southern Sun.295 This was a case in which, as in Beadica, the SCA was unwilling to apply the Barkhuizen principle to ensure greater fairness – but which, quite unlike Beadica, concerned Barkhuizen’s most familiar domain of application, namely the restraint of a purported cancellation,296 and which, also unlike Beadica, was amply evidenced. At issue was the cancellation of a lease of commercial premises out of which the complainant had been operating since 1982. The reason the lessor sought cancellation was that the complainant had twice fallen into arrears. But the total period in which it had been in arrears was a matter of days. Moreover, the evidence undisputedly showed that this had been entirely the fault of the complainant’s bank, which had twice failed, despite the complainant’s most diligent efforts, to effect the necessary transfer. On both occasions the complainant acted

292 Compare Gouws NO v BBH Petroleum (Pty) Ltd (note 72 above) at para 54 (rejecting Davis J’s approach for similar reasons).

293 The two problems I mentioned explain why a legal system ought to preserve the distinction between restraining cancellation and deeming a renewal, and to be more willing, in general, to do the former. But that may be consistent with making exceptions in particular cases, and perhaps Beadica ought to have been one of them: on its unusual facts, arguably both of the problems can be solved. This finds some resonance in the judgment of Davis J: see Beadica HC (note 4 above) especially at para 36. The parties’ 10-year franchise agreement, to which their lease agreement was concomitant, clearly showed that they envisaged their relationship might endure for a further five years; and indeed they had agreed to confer upon Beadica a unilateral power to ensure that it would endure. So Mr Sale arguably could not complain that the Court was imposing a contract on him to which he had not assented. In addition, the old lease (since it anticipated the possible renewal by Beadica) stipulated a mechanism by which to determine the new lease’s terms (ibid at para 19). Thus the Court could effectuate a renewal without practical difficulty. One might even say that, looking at ‘the substance of the two agreements read together’ (ibid at para 43), this was more like the preservation of the parties’ own contractual relationship than the deeming of a new one.

294 Indeed Victor AJ at one point wrongly describes the issue as whether to allow ‘the cancellation of the lease’: Beadica CC (note 2 above) at para 230. Froneman J’s judgment is more careful, and yet in large part misdirected, because it fails to identify the kind of unfairness that was at issue. Over the course of several paragraphs, he urges that our courts have the power to police the fairness of the ‘exchange’ between the parties: ibid at paras 114–127, 187–188. But here there was simply no unfairness in the exchange (at any rate, Beadica claimed none). No doubt Mr Sale’s conduct, in the course of implementing the parties’ contract, may have been unfair. But that is a different normative basis for intervening, which needs proper articulation. (Also misdirected, for similar reasons, is Froneman J’s comparison (at paras 185–187) with § 138 of the German BGB, which concerns the invalidation of unfair contracts. This contract was not unfair, and it was essential to Beadica’s case that it remain valid, since it contained the renewal clause they claimed to have exercised. Their attempt to restrain Mr Sale’s unfair conduct would be a matter not for § 138 but for § 242.) It is admirable that Froneman J tried to develop the Barkhuizen test so that it provides more structured answers (see especially his three criteria at para 187), but the attempt is doomed unless one has identified the right questions.

295 Mohamed’s Leisure (note 20 above). The Constitutional Court dismissed the application for leave to appeal (CCT 335/17) on 21 February 2018.

296 See further text at notes 305–313 below.
swiftly to rectify the bank’s error (and it had failed to prevent the bank’s second error only because the bank misled it, saying wrongly that the instalment had already been paid). The High Court readily intervened to prevent cancellation, applying Barkhuizen. But the SCA unanimously upheld an appeal by the lessor, with fatal effects for the complainant’s business. It reasoned, as ever, that there was simply no public policy basis upon which to intervene.

One commentator said the SCA’s decision ‘reflects the old conservatism of 2002 and indeed of 1988’, and it is hard to disagree. Certainly, the facts presented a far stronger case for intervention than in Beadica, and would have been a far better vehicle for the consideration of our law on contractual fairness controls. That the Court refused even to hear an appeal in Mohamed’s Leisure – though three of its members would have upheld the appeal on the much weaker facts of Beadica – is both a puzzle and a pity.

But the main point to highlight here is simply this: that Beadica was a weak case should qualify our assessment of the majority judgment. It gives us reason to doubt that judgment’s lasting impact. On the facts of Beadica what the majority does is emphatically reject the complainant’s demands for judicial intervention. Yet the Court was being asked to overcome all of the justificatory hurdles that I have set out in this part, even in the face of the dearth of evidence that I emphasised in the previous one. So perhaps we should conclude only that the current Court is not quite as adventurous as it appeared after Botha, but infer very little beyond that. If some future case is even slightly stronger on the law than Beadica, or slightly better evidenced, then it may not be surprising if the Court wishes to intervene. And, if it does, then the weak facts of Beadica can be easily distinguished. No doubt the Court’s rhetoric, which I discussed in part IIC, goes wider than this. But perhaps the Court was – not for the first time – using unnecessarily grand rhetoric to ennoble what was, in fact, an unremarkable result.

In upshot, then, there may be a third reason to doubt whether Beadica marks a lasting retreat by the Court from its ambitious constitutionalisation of our contract law.

B Misdirected application and Schrödinger’s contract

But it is the fourth and final reason for doubt, which I discuss in what remains of this article, that may be the most important. That reason is Pridwin. There a majority of the Court, again per Theron J, resolved a complaint about contractual unfairness, but on this occasion it did so without applying Barkhuizen’s public policy test. Theron J considered it to be irrelevant in Pridwin because that case involved what she called the ‘direct application’ of the Constitution. On this basis she found for the complainant, and restrained the other party’s enforcement of a contract term – and yet did not consider the requirements of Barkhuizen at all. If this is the start of a new trend, then whatever restraints Beadica introduced into the Barkhuizen principle will count for very little: complainants now have a way to bypass them.

Pridwin arose from a dispute between a Mr B and the Johannesburg preparatory school his two sons attended. The school, Pridwin, provided tuition to the boys in terms of a ‘parent
contract' it had agreed with Mr B and his wife. It sought to terminate that contract after a long series of altercations with Mr B, whose casus belli was his sons’ cricket matches. Convinced his sons were being mistreated, he became verbally abusive to the umpires and especially to Pridwin staff, to whom he made threats of physical violence. The school came to an arrangement with Mr B that was intended to avoid such incidents in future, but after Mr B broke its conditions, and again became hostile at his son’s sporting event, the school ran out of patience. It purported to cancel the parent contract in reliance upon the agreed cancellation clause, which entitled either party ‘to cancel this contract at any time, for any reason’, upon one term’s written notice.301

Although there could be little doubt that Mr B’s conduct was intolerably extreme, cancellation would result in his sons having to leave the school. This significant impact upon the third parties whom the contract sought to benefit was the genesis of Mr B’s court application. He argued that the cancellation was impermissible because it infringed the boys’ constitutional rights to basic education and to have their best interests considered.302 He lost resoundingly in the High Court303 and – as we have seen – in the SCA.304 But the Constitutional Court was more receptive.

To make the case that Pridwin had infringed the boys’ rights took some work, because it was a private school, and therefore did not obviously have a constitutional duty to provide the boys with schooling. There was also the interesting and unusual feature of the case that the rights at stake were not those of Mr B, the contracting party who sought to restrain his counterparty’s exercise of the cancellation clause, but of his dependents. Nevertheless, the case seemed squarely a matter for the Barkhuizen principle: the parties had agreed a contract, a term of which gave Pridwin a robust power; and Mr B sought to invalidate that term (or its enforcement) on the basis that it would have an impact that was unfair. Moreover, the particular power at issue – the power of cancellation – has been by far the most frequently addressed issue under Barkhuizen.305 It generated the litigation in Maphango306 and of course in Botha,307 both of which reached the Constitutional Court.308 The same issue was central to Bredenkamp, which resulted in Harms DP’s landmark judgment in 2010,309 and has now reached the SCA a further three times in the last three years: in Mohamed’s Leisure,310 Louw v Davids,311 and Liberty

301 The contract also stated elsewhere, presumably ex abundante cautela, that the school was entitled to cancel the contract on certain enumerated grounds, which included the parent’s serious non-cooperation with the school and behaviour by him negatively affecting the well-being of staff.


303 AB v Pridwin Preparatory School [2017] ZAGPJHC 186 (Hartford AJ).

304 Notes 30–32 above.

305 Compare J du Plessis ‘Giving Practical Effect to Good Faith in the Law of Contract’ (2018) 29 Stellenbosch Law Review 379, 404 (the question of which grounds may be relied upon to restrain cancellation under Barkhuizen ‘lies at the epicentre of debates on the future of our law of contract’).

306 Maphango (note 52 above).

307 Botha (note 6 above).

308 In Maphango, however, a majority of the Court decided to remit the matter to the Rental Housing Tribunal. The minority would have applied Barkhuizen. See Maphango v Aengus Lifestyle Properties (Pty) Ltd [2012] ZACC 2, 2012 (3) SA 531 (CC).

309 Bredenkamp (note 18 above).

310 Mohamed’s Leisure (note 20 above).

311 Louw v Davids (note 101 above).
Group.\textsuperscript{312} And it has also yielded some of the most consequential High Court judgments to apply \textit{Barkhuizen}.\textsuperscript{313} In some of these cases, the complainant was successful, and in others not. But there was no doubt that the right way to adjudicate them was under the \textit{Barkhuizen} principle. And that was, of course, the way the lower courts had adjudicated \textit{Pridwin}.\textsuperscript{314} The minority in the Constitutional Court would have done the same.\textsuperscript{315}

Theron J decided for the majority, however, that the \textit{Barkhuizen} principle was irrelevant. Though in \textit{Beadica}, decided on the same day as \textit{Pridwin}, she had spent 103 paragraphs comprehensively setting out the law on that principle, she said \textit{Pridwin} was different and so none of it applied. Here are the crucial passages of her reasoning, which urges a distinction between two claims – one about the enforcement of the contract in light of \textit{Barkhuizen}'s public policy test, and the other about the boys’ constitutional rights:

\begin{quote}
[T]he claim based on public policy is directed, not at upholding the constitutional rights of the boys, but at the School’s enforcement of the Parent Contract and the potential invalidity of [the cancellation clause]. This claim is contractual in nature … It is about the enforcement of a contractual term.\textsuperscript{316}
\end{quote}

By contrast:

The claim relating to the constitutional validity of the decision to terminate the Parent Contract is directed at upholding the boys’ constitutional rights. This claim is grounded in Pridwin’s obligation not to breach the boys’ rights in sections 28(2) and 29(1) of the Constitution, which flow directly from the Constitution and operate independently from the contract.\textsuperscript{317}

On this basis, Theron J says that applying \textit{Barkhuizen}'s public policy test in this case ‘conflates two different approaches’.\textsuperscript{318} In truth, ‘there is no need to determine the public policy challenge; one should give effect to the second claim, based on the boys’ constitutional rights, instead.\textsuperscript{319}

This reasoning is puzzling.\textsuperscript{320} The key move in the quotation is left unjustified. Theron J gives no valid reason, in other words, why the fact that the boys’ constitutional rights ‘operate independently from the contract’. Merely pointing out that the boys’ constitutional rights and the enforcement of the parent contract are two different things does not establish that they operate independently. And indeed every indication had been that they \textit{do not} operate independently: the applicant’s case was that Pridwin’s invocation of the cancellation clause was invalid \textit{because} of its effect on the boys’ constitutional rights; he invoked the boys’ constitutional rights \textit{in order} to restrain the enforcement of Pridwin’s contractual power. The two issues seemed therefore to be closely interdependent – and both squarely matters for \textit{Barkhuizen}.

\begin{flushright}
\textsuperscript{312} Liberty Group (note 145 above).
\textsuperscript{313} Combined Developers v Arun Holdings [2013] ZAWCHC 132, 2015 (3) SA 215 (WCC) (which does not cite Barkhuizen, but clearly means to apply it).
\textsuperscript{314} Their shared conclusion that the school’s cancellation infringed no constitutional rights meant, however, that the Barkhuizen complaint got no traction.
\textsuperscript{315} Nicholls AJ (Mogoeng CJ, Cameron J, and Froneman J concurring).
\textsuperscript{316} Pridwin CC (note 1 above) at para 103.
\textsuperscript{317} Ibid. Mocumie JA, in her dissent in the SCA, had drawn a similar distinction when explaining the argument of Mr B’s counsel, who perhaps wanted, for strategic reasons, to skirt around rather than confront the normative force of \textit{pacta sunt servanda}. See Pridwin SCA (note 20 above) at para 88.
\textsuperscript{318} Pridwin CC (note 1 above) at para 102.
\textsuperscript{319} Ibid at para 107; see also para 130.
\textsuperscript{320} For critiques paralleling my own see M Finn ‘Befriending the Bogeyman: Horizontal Application in \textit{AB v Pridwin}’ (2020) 138 South African Law Journal 591; N Ally & D Linde ‘\textit{AB v Pridwin Preparatory School}: Private School Contracts, the Bill of Rights and a Missed Opportunity’ (2021) 11 Constitutional Court Review 275.
\end{flushright}
It is especially strange Theron J thought that Mr B’s invocation of constitutional rights took his case **outside** the remit of Barkhuizen, since that is exactly what Barkhuizen involved. Mr Barkhuizen had argued that the time-bar clause infringed his right of access to court and was, for that reason, contrary to public policy. As I have said many times before, it was only after the Court had found that the clause infringed that right that it invoked its fairness test at the second step; indeed it was this infringement of a constitutional right that triggered the public policy test’s application. Yet somehow Theron J claims in Pridwin (citing Barkhuizen) that Mr B’s reliance on a constitutional right is what makes that test **irrelevant**.

So how does Theron J end up endorsing a position so perplexing? It seems to be a result of our muddled debate about the ‘direct’ and ‘indirect’ horizontal application of constitutional rights — and of the fact that Barkhuizen said, confusingly, it was doing the latter.

The problem is that we have tended to conflate two different senses in which horizontal application may be ‘direct’ or ‘indirect’, which in Pridwin comes to a head. The first sense picks out two different techniques by which a constitutional principle can be given horizontal effect. ‘Direct application’ means applying constitutional norms to the parties’ conduct without intermediation. ‘Indirect application’ means applying constitutional norms to an intermediate legal rule (statute or, more relevantly here, the common law), which is then applied, in turn, to parties’ conduct. The right triggers a development of the common law, and the common law, as developed, is what regulates the parties’ conduct. Though this sense of the distinction is widely used in South Africa, it tends to be conflated with another. On this second understanding, direct and indirect application are associated with two different things that one might apply: ‘direct application’ is the application of constitutional rights themselves, and ‘indirect application’ is the application not of the rights themselves but of the values underlying them.

One can understand how the direct/indirect terminology seems a fitting way of marking this new distinction: the application of the rights themselves may be contrasted with their having effect only through the values that underlie them — that is, ‘indirectly’. Nevertheless, this second distinction is plainly different from the first. It is about *what* is being applied (the rights or their underlying values?), whereas the previous distinction is about *how* they are being applied (through the common law or not?). It is important that the two questions are kept separate. One reason is that it is entirely possible for constitutional rights themselves to apply to a dispute via the intermediation of the common law. That is, ‘direct’ application (in the second sense) might occur ‘indirectly’ (in the first sense). But one will overlook this possibility if one is not alive to the equivocation to which the direct/indirect terminology is prone: one will be misled into thinking that the right itself *must always* apply directly in the first sense, i.e. without the intermediation of the common law. That would be an especially alarming error because our Bill of Rights arguably does not authorise direct application in the first sense at all.

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522 The conflation happened almost immediately, because in Germany, whence the distinctions derive, constitutional rights can have horizontal effect only through the influence of their underlying values upon the common law. In Germany, in other words, the two senses of ‘indirect’ always coincide — meaning it is easy, but also relatively costless, to conflate them. In South Africa, they do not coincide — so conflating them is not costless.
Both of its application sections\textsuperscript{323} – namely s 8(2), which authorises application of the rights themselves, and s 39(2), which authorises application of the values underlying them – expressly say that application is to occur by means of a development of the common law.\textsuperscript{324}

Unfortunately, this seems to be precisely the error that Theron J commits.\textsuperscript{325} She recognises, correctly, that Mr B is invoking his sons’ constitutional rights, rather than the values underlying them. She then infers, also correctly,\textsuperscript{326} that the natural way to give effect to these rights, as against private parties, is s 8(2) of the Constitution. Because s 8(2) is associated with ‘direct application’, however, Theron J believes she has hereby offered a reason to reject its opposite. And since Ngcobo J in\textit{Barkhuizen} claimed to be using ‘indirect application’ when he devised his public policy test, Theron J concludes that the public policy test must be inapposite here.

But at the heart of this reasoning is a mistake. It runs together the two distinct meanings of direct/indirect application.\textit{Barkhuizen}’s public policy test is an instance of indirect application in the sense that it mediates the application of the Bill of Rights through a common-law rule. But it is not an instance of indirect application in the other sense. It does not in any way preclude, in other words, the application of constitutional rights themselves (as opposed to the values underlying them). Quite the contrary: \textit{Barkhuizen} patently relied upon the constitutional right of access to court itself. That Ngcobo J sought to give effect to it by means of a development of the common law’s public policy test does not change that.

Admittedly \textit{Barkhuizen} expresses itself poorly about this. That judgment itself falls prey to the ambiguities in the direct/indirect terminology, and engages in a damaging tussle with section 36’s ‘law of general application’ requirement besides.\textsuperscript{327} Its pertinent weakness here is that it relies upon s 39(2) and forsakes what it calls, without disambiguation, ‘direct application’ under s 8. As commentators noted in the immediate wake of the decision, this was at odds with what Ngcobo J was doing in substance: namely, giving horizontal effect to a specific

\textsuperscript{323} I leave aside the possibility that indirect (i.e. unmediated) application may be licenced (or indeed required) by other sections, such as sections 38 and 172, which empower courts to provide a remedy perhaps even where the common law does not. See Finn (note 320 above) at 594. I also leave to one side the question of whether the judicial creation of a brand-new cause of action, under the impetus of the Constitution, should be considered a form of mediated application (since the cause of action, once created by the court, is the common law through which the Constitution is mediated) or unmediated (since, before the court’s decision, there is \textit{ex hypothesi} no common law on the matter). Neither possibility is relevant to\textit{Pridwin}, since Theron J invoked s 8 instead of an existing common-law mechanism, viz. the \textit{Barkhuizen} test.

\textsuperscript{324} Section 39(2) is especially clear, since it begins, ‘When developing the common law …’. Section 8 is very slightly less clear, but s 8(3) seems more than clear enough. That the application of rights under s 8 takes place by means of common-law development was unanimously affirmed by the Constitutional Court in \textit{Khumalo v Holomisa} [2002] ZACC 12; see especially paras 31, 33. Such was the terminological and conceptual muddle about direct/indirect application, however, that some failed to see this affirmation for what it was. They thought that, since O’Regan J relied on s 8, she was endorsing direct application in both senses.\textsuperscript{325} This is how I understand the reasoning expressed in\textit{Pridwin CC} (note 1 above) at paras 105–107, 122.

\textsuperscript{326} Or so we can grant here. If Theron J is indeed right about this, it may cause trouble for her view (stated in\textit{Pridwin CC} at para 197) that s 36, the general limitations clause, is not engaged — since the Constitution is explicit that s 8 and s 36 are interlinked. She attempts to head off this trouble by importing the internal limitation standard of ‘appropriate justification’, on the prospects of which see Finn (note 320 above) at 605.\textsuperscript{327} The conclusion he reaches on this point — that there was no relevant ‘law of general application’ — is the main respect in which Ngcobo J’s \textit{Barkhuizen} judgment seems outright wrong, rather than merely poorly expressed: see S Woolman ‘The Amazing, Vanishing Bill of Rights’ (2007) 124 \textit{South African Law Journal} 762, 775. But that, ironically, is virtually the sole point from Ngcobo J’s judgment which Theron J follows: \textit{Pridwin CC} (note 1 above) at para 197.
constitutional right through the intermediation of the common-law public policy test.\textsuperscript{328} It is most unfortunate that Theron J nevertheless doubles down on \textit{Barkhuizen}’s errors, rather than straightening them out, and indeed uses them to confect a newly damaging conclusion. She says that, if the complainant is relying on a constitutional right to restrain the exercise of a contractual power, one cannot use \textit{Barkhuizen}’s public policy test. That is a fallacy which \textit{Barkhuizen} does not even remotely support.\textsuperscript{329}

One of the most puzzling features of \textit{Pridwin} is that \textit{Beadica}, handed down by the same judge on the same day, seems fully in tune with these points I have been making. In \textit{Beadica} Theron J says, citing \textit{Barkhuizen}: ‘Constitutional rights apply through a process of indirect horizontality to contracts.’\textsuperscript{330} That seems to me an entirely accurate account of \textit{Barkhuizen} (with ‘indirect’ here meaning, necessarily, mediated via the common law).\textsuperscript{331} And \textit{Beadica} accordingly goes on to adjudicate the complainant’s aforementioned argument – that enforcement of the notice period against them, as black-owned businesses, would infringe their constitutional right to equality in section 9(2)\textsuperscript{332} – through the public policy test.\textsuperscript{333} But that makes it only more mysterious why \textit{Pridwin} says that, in order to apply constitutional rights to the parties’ contractual dispute, one must use direct application – and to support this reasoning engages in a lengthy discussion of \textit{Barkhuizen}.

Adding to the puzzle is the fact that in \textit{Beadica} Theron J explained there were powerful normative reasons for channelling the impact of constitutional rights through the common law.\textsuperscript{334} The main one is that it avoids parallelism, in other words the unnecessary creation of a duplicative ‘constitutional’ cause of action alongside an existing common-law one. For this Theron J cited, predictably, the Court’s celebrated judgment in \textit{Pharmaceutical Manufacturers}, which condemned the creation of two parallel systems of law – one constitutional, one common law.\textsuperscript{335} Much better to integrate the two perspectives: constitutional imperatives must be made effective, but that should be done by reforming the common law ‘within its own paradigm’.\textsuperscript{336} By forsaking all of this in \textit{Pridwin}, however, the Court seems to have created the parallel cause of action that in \textit{Beadica} it rightly deplored.\textsuperscript{337}

In short: despite Theron J’s strenuous urging that she is undertaking ‘direct application’ of the two boys’ rights in terms of s 8, there is no reason why she could not have done so via \textit{Barkhuizen}’s public policy test. This provided a perfectly good common-law framework within


\textsuperscript{329} It is all the more striking, therefore, that Theron J accuses the minority, which channelled its rights analysis through the existing \textit{Barkhuizen} test, of confusedly adopting a ‘novel approach’ (at para 102).

\textsuperscript{330} \textit{Beadica CC} (note 2 above) at para 71.

\textsuperscript{331} It must mean this, because it cannot mean the other sense of ‘indirect’: that would be incompatible with the fact that ‘constitutional rights’ (not the values underlying them) is the subject of the sentence.

\textsuperscript{332} See part IIIA above.

\textsuperscript{333} See again \textit{Beadica CC} (note 2 above) at paras 99–102.

\textsuperscript{334} Ibid at para 71 ff.

\textsuperscript{335} \textit{Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa} [2000] ZACC 1, 2000 (2) SA 674 (CC) at para 44, cited in \textit{Beadica CC} (note 2 above) at para 71.

\textsuperscript{336} \textit{Carmichele v Minister of Safety and Security} [2001] ZACC 22, 2001 (4) SA 938 (CC) at para 55, the preceding paragraph of which is quoted in \textit{Beadica CC} (note 2 above) at para 75. See for relevant discussion Ally & Linde (note 320 above) 20 ff.

\textsuperscript{337} Indeed the judgment circumvents two further mechanisms which ought to take precedence over unmediated reliance on the Constitution: see Finn (note 320 above) at 601–602.
which to adjudicate the claim in *Pridwin* – one with at least a century-long pedigree, and one which has been debated and developed with special vigour for the last fifteen years. Had Theron J used it, the result in *Pridwin* would surely have been the same;338 she would have been amply justified in taking a robust approach to the clause at issue. Indeed *Barkhuizen* may have helped to highlight some reasons why: the cancellation clause formed part of the standard terms imposed by the school,339 the relationship between schools and those who wish to attend them is (arguably) one of unequal bargaining power,340 and this clause had not (only) been used unfairly in the particular circumstances but was manifestly overbroad *ex facie*.341

Theron J’s choice to circumvent the public policy test may cause real problems in future. The Court has fared badly with parallel causes of action in other contexts, most notoriously the bifurcation in administrative law between the Promotion of Administrative Justice Act342 and the principle of legality.343 But it seems the Court’s extraordinary appetite for procedural wrangling remains unsated,344 and that fairness in contract may be its next victim. The danger is especially acute because, as I have argued, *Pridwin*’s account of how to distinguish the two kinds of claim is incoherent. If one is seeking to restrain the exercise of a contractual power on the basis of a constitutional right, does one use *Barkhuizen* – which seemed the obviously correct route hitherto – or *Pridwin*’s new approach? It is not easy to answer this question sensibly. And it may therefore turn out that – rather than consolidating our jurisprudence on fairness in contract, as *Beadica* claimed – the Court has fractured it.

C Conclusion: All quiet?

That the Court’s stated reasons for doing this are uniformly fallacious is not a point I will continue to labour. The point I am building towards is only this: one cannot assess *Beadica*’s lasting impact without paying close attention to *Pridwin*. For consider: *Pridwin* decides that, where one contracting party wishes to restrain the exercise of the other’s contractual power on the basis of constitutional imperatives, he need not rely on the *Barkhuizen* principle to do so. He may, instead, use *Pridwin*’s alternative approach. And, as *Pridwin* illustrates, a party may, by that alternative route, successfully restrain the other’s exercise of a contractual power, without having to pass the public policy test at all. Nor is any mention made of the cautions Theron J urged in *Beadica*: there is no mention of *pacta sunt servanda*, the fact that intervening in the parties’ contractual arrangements is justified only in the clearest of cases, or

338 Nicholls AJ’s minority judgment reached the same conclusion as Theron J about the validity of the school’s cancellation by applying (admittedly rather cursorily) the public policy test. She quotes Langa CJ’s remarks in *Barkhuizen* that the distinction between the two approaches ‘will seldom be outcome determinative’, which seems correct: *Barkhuizen CC* (note 34 above) at para 186; *Pridwin CC* (note 1 above) at para 67.

339 *Barkhuizen CC* (note 34 above), especially the judgment of Sachs J, with whose emphasis on this feature the other judges agreed: see paras 87 (Ngcobo J) and paras 106–108 (Mosekane DCJ).

340 Ibid at para 59.

341 Ibid at para 60.

342 Act 3 of 2000.


344 I am thinking here of cases such as *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31, 2016 (1) SA 132 (CC)(which concots technical reasons not to adjudicate a compelling rights claim of public importance) and *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40, 2018 (2) SA 23 (CC)(which greatly aggravates, rather than allays, the problem just mentioned at note 343 above), as well as the Court’s increasingly opaque jurisprudence on its own jurisdiction, which Eshed Cohen tackles in ‘The Jurisdiction of the Constitutional Court’ (2021) 11 *Constitutional Court Review* 433.
any of the other restraining imperatives she there so piously invoked. These can be waved away, apparently, if one asserts that constitutional rights ‘operate independently’ of the contract. And hence the law as laid down by Theron J in Beadica, however moderate in appearance, can simply be outflanked.

How should we make sense of these apparently inconsistent attitudes, expressed by the same judge on the same day? Perhaps it is possible to align them, to see them as serving a single strategy. For their combined effect is to reduce the status of the common law-centred public policy test, which Beadica grants to be relatively moderate and inhibited, and to carve out a new, purely ‘constitutional’ mechanism, which Theron J, later in her Pridwin judgment, suggests is more ‘transformative’. Beadica recognised, in other words, that the Barkhuizen principle has clear limits, and requires presumptive deference to pacta sunt servanda, which may be departed from only after some delicate enquiries. And it attests that, especially in the SCA’s hands, the Barkhuizen principle has not wrought major changes to our law. If Beadica stood alone, then, one might think the Court has settled into a new mode of caution. But perhaps the inference the Court in fact draws from this is that it needs an alternative approach – one less inhibited by the niceties of the common law. And that is where Pridwin comes in. There the Court arrogates to itself a new power to intervene in contractual disputes that is unfettered by Barkhuizen’s restraints, offering its direct hotline to the Constitution as legitimation. The Court can now decide contractual disputes in a constitutional idiom in which it is more comfortable, and which does not require the same engagement with and indeed deference to the jurisprudence of the SCA. Perhaps Beadica reflects not a newly conservative approach to contractual fairness, in other words, but a newly conservative approach to the common law. Having reached a newly pessimistic conclusion about achieving contractual fairness ‘within [the common law’s] own paradigm’, the Court has decided to find it elsewhere.

If this is right, then the Court may exploit the route carved out in Pridwin again – at least in cases where, as in Pridwin itself, its intervention is merited on a basis that feels paradigmatically constitutional – and thus continue to exercise the vigour that its critics fear. Beadica may herald a new approach to the constitutionalisation of our contract law, then, but not in the way one might think. The Court has retreated from the extremes to which it once took Barkhuizen – but it has also opened a new front.

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345 Pridwin CC (note 1 above) at paras 120–121, 127–130. There are many reasons to doubt this suggestion that using s 8 instead of the public policy test will be more transformative, but the relevant point here is that this seems (rightly or wrongly) to be the Court’s view.

346 Carmichele (note 336 above) at para 55.

347 This is (obviously) a vague criterion – which in a way is the point. As I said earlier, the workings of the parallel causes of action are likely to be inscrutable. But one imagines the Court will be attracted to Pridwin’s directly constitutional route if the complainant can point to the infringement of a constitutional right on which the Court has a rich jurisprudence; and it will not be so attracted if, as in Beadica, it either does not wish to intervene or can detect no infringement of a well-worn constitutional right.
**Pridwin: Private School Contracts, the Bill of Rights and a Missed Opportunity**

NURINA ALLY & DANIEL LINDE

ABSTRACT: *AB and Another v Pridwin Preparatory School and Others* is a cause for both celebration and concern. The Court’s conclusion that private schools are bound by the rights to basic education and the paramountcy of a child’s best interests is an important development in South Africa’s education jurisprudence. However, the majority judgment missed an opportunity to fully embrace the constitutionalisation of contract law through section 8 of the Constitution. By contrast, the minority’s approach hints toward a promising pathway to demonstrating how section 8, when properly applied, can offer a coherent and balanced approach to the development of the common law in order to give effect to or justifiably limit the application of constitutional rights in contractual disputes.

KEYWORDS: basic education, best interests of the child, horizontal application, common law development, independent schools.

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I  INTRODUCTION

Do private schools bear constitutional obligations in relation to the right to basic education? At first blush, the question may seem uncontroversial. Yet, as the Pridwin CC¹ case demonstrates, this has certainly been a contested issue.

The matter arose out of a dispute between wealthy parents and an elite private school in one of Johannesburg’s plushest suburbs. Fed up with ongoing aggressive and outrageous conduct by the parents of two learners at the school, the school cancelled the parents’ contract with the school. The result was that the children, who were model learners by all accounts, were required to leave their school by the following term. A legal battle ensued over whether the school’s termination of the contract, without more, was constitutionally defensible.

Having taken more than a year to hand down judgment, the Constitutional Court clearly agonised over the case, which brings to life the complex interplay between contractual autonomy and constitutional rights, debates around the extent to which private entities can and should be bound by obligations under the Bill of Rights, as well as the scope and implications of children’s rights to a basic education and to have their best interests considered paramount in every matter concerning them.

In this article we welcome the Constitutional Court’s conclusion that private schools are bound by the right to basic education and the paramountcy of a child’s best interests. However, while both the majority and minority judgments reach this conclusion through a horizontal application of rights, they diverged in their willingness to subject the impugned contractual provision itself to scrutiny under section 8(2) of the Constitution of the Republic of South Africa, 1996 (Constitution), which provides for the application of the Bill of Rights to natural and juristic persons. The majority, seeking to pay respect to the approach adopted in Barkhuizen v Napier,² entrenched the unhelpful divide between the so-called direct and indirect application of constitutional rights in contractual disputes. The perplexing and ironic result of the majority’s approach in Pridwin CC is an artificial avoidance of the contractual relationship between the parties and a missed opportunity to develop the common law of contract having due regard to constitutional rights. By contrast, we argue that the minority’s willingness to loosen the strictures of Barkhuizen should be embraced. The minority’s approach in Pridwin CC hints toward a promising pathway to demonstrating how section 8, when properly applied, can offer a coherent and balanced approach to the development of the common law in order to give effect to or justifiably limit constitutional rights in contractual disputes.

II  BACKGROUND

A  The dispute – sins of the father

Pridwin Preparatory School (Pridwin) is an elite private school situated in one of Johannesburg’s wealthiest suburbs. Parents pay substantial fees, the affordability of which is well beyond the reach of the great majority of South Africans.³ The school’s relationship with learners and their parents is regulated by a contract concluded prior to entry into Pridwin. It was the termination

¹  AB &Another v Pridwin Preparatory School & Others [2020] ZACC 12, 2020 (5) SA 327 (CC) (‘Pridwin CC’).
³  For the 2020 school year, the tuition fees at Pridwin ranged from approximately R117 000 to R156 000. According to Statistics South Africa, in 2015 approximately 40 per cent of South Africans were living below the upper-bound poverty line of R995 per capita per month. Statistics South Africa ‘Men, Women and Children:
of these parent contracts, following an intense and nasty dispute between the school and the parents of two young boys (aged six and ten years old), that took centre stage in a legal drama that eventually reached the Constitutional Court in 2019.4

Every judge who heard the matter accepted that, on the record, the dispute arose primarily from the perpetual and unreasonable demands, and unrelenting hostility of the children’s father (AB) toward the school, ‘aided and abetted’ by his wife’s (CB’s) conduct.5 The parents took particular issue with the quality of sports coaching at Pridwin, motivated by the belief that the natural sporting talent of their children was not being sufficiently nurtured by the school.6 To this end, AB resorted to a range of pedantic interventions including, for example, analysing hard copy and electronic versions of cricket results to make sure that his sons’ achievements were being properly recorded and obtaining the services of an actuary to challenge team selection processes.7

AB’s pursuit of sporting excellence also manifested in outwardly aggressive behaviour. He demeaned, threatened and harassed umpires, coaches and staff when any adverse decision was made against his sons in sports matches. When his son was declared ‘out’ in a cricket match at a rival school, AB hurled expletives and verbal abuse at the umpire and, with a cricket bat in his hand, threatened to kill the umpire. On another occasion he verbally abused the school’s cricket coach and made disparaging remarks about other children on the team. This prompted another parent at the school to complain about the adverse effect AB’s conduct was having on her son.8

The parents and the principal agreed that AB would correct his behaviour at sporting events.9 The resulting calm did not last long. Less than six months after the truce, AB arrived at a soccer match with his own coach in tow, who then sought to instruct the school’s coach (during the match). This led to yet another argument with the school’s principal, who in turn made it clear that AB had breached their prior agreement.10 By 30 June 2016, the school had reached its limit. The school sent a letter to the parents terminating their contract with the school in relation to both children, and relying on the following termination clause:

The School also has the right to cancel this Contract at any time, for any reason, provided that it gives you a full term’s notice, in writing, of its decision to terminate this Contract. At the end of the term in question, you will be required to withdraw the Child from the School, and the School will


5 Pridwin CC (note 1 above) at para 10. See also: Pridwin HC (note 4 above) at paras 127–137; Pridwin SCA (note 4 above) at paras 9–22, 73 (majority) and 85 (minority); Pridwin CC (note 1 above) at paras 5, 10–31, 100. Following the Constitutional Court’s judgment, CB (the mother of the children) penned an opinion piece refuting the ‘caricature of the uncivilized brown person’, which, she said, ‘so successfully managed to capture the imagination of the media and the judiciary’ (CB: ‘I was the Barbarian at the Gate of Pridwin Preparatory School’ Daily Maverick (19 June 2020), available at https://www.dailymaverick.co.za/article/2020-06-19-i-was-the-barbarian-at-the-gate-of-pridwin-preparatory-school).

6 Pridwin CC (note 1 above) at para 12.

7 Pridwin SCA (note 4 above) at para 11 and Pridwin CC (note 1 above) at para 12.

8 Pridwin CC (note 1 above) at paras 16–19.

9 Ibid at paras 20, 21.

10 Ibid at paras 26–29 and Pridwin SCA (note 4 above) at para 18.
refund to you the amount of any fees pre-paid for a period after the end of the term less anything owing to the School by you.¹¹

Five months after the contracts were terminated, the parents approached the High Court on an urgent basis to challenge the cancellation. The main issue before the court was whether the school’s termination clause should be constrained by the rights of the two children who, as a result of the termination and through no fault of their own, would be excluded from the school.

B The broader context – expanding role of independent schools

A fight between badly behaved wealthy parents and an elite private school may not set the scene for a case with significant public interest implications. But the broader context matters.

Firstly, the specific termination clause at issue in the case is regularly utilised in pro forma contracts by member schools of the Independent Schools Association of South Africa (ISASA). ISASA’s membership includes approximately 750 independent schools across South Africa servicing 167 000 pupils (of varying social and economic backgrounds).¹² Indeed, ISASA intervened in the matter as a respondent exactly because of the extensive consequences that the case had for its member schools. As it said: ‘ISASA is the author of the Parent Contracts. The potential for far-reaching consequences arises from the fact that contracts similar to the Parent Contracts are used in a number of ISASA’s other member schools.’¹³

Secondly, intervening as amicus curiae, Equal Education (EE), a social justice movement advocating for equal and quality education in South Africa, highlighted the significant growth of independent schools across the country over the previous two decades. Between 2000 and 2010 alone, enrolment at independent schools grew by 75.9 per cent.¹⁴ Public school enrolment grew by only 1.4 per cent in that period.¹⁵ Equal Education also pointed to the significant change in the demographics of children attending independent schools, from ‘being mainly white and serving the rich’ to ‘being mainly black and the majority of schools now serving low- and middle-income learners’.¹⁶ Independent schools are also not necessarily a beacon of highly-resourced educational opportunity. Instead, EE cited research indicating that low-fee independent schools are likely to be in ‘abandoned factories and shacks to shopping centres’ and may have smaller classes as well as fewer facilities than public schools.¹⁷

¹¹ Pridwin CC (note 1 above) at paras 97–98. About five months after the contract was terminated, the principal wrote to the provincial department of education seeking confirmation that the boys could be placed in a public school if the parents sought this option. The provincial department indicated that a place in a specific school could not be guaranteed and that at least one of the boys could be placed on a waiting list.

¹² Ibid at para 112.

¹³ Ibid at para 113. See also NM v John Wesley School & Another [2018] ZAKZDHC 64, 2019 (2) SA 557 (KZD) (‘John Wesley’), where a low-fee independent school, and member of ISASA, relied on an ISASA policy document when excluding a learner from the writing of examinations as a result of the parents’ inability to pay school fees.


¹⁵ Ibid.

¹⁶ Heads of Argument for EE (note 14 above) at para 6.2.

¹⁷ Ibid at para 6.3. See also T McKay, M Mafanya & A C Horn ‘Johannesburg’s Inner City Private Schools: The Teacher’s Perspective’ (2018) 38 South African Journal of Education 1, 1 where they indicate that a sample of teachers in Johannesburg’s inner city private schools reported ‘unhappiness with their low salaries, long working hours and poor working conditions’ and ‘lamented the lack of adequate teaching and learning materials, as well as negligible educational infrastructure such as libraries, laboratories and sports fields’; and J Brickhill & Y van...
Thirdly, the dramatic growth of private sector involvement in education is also not unique to South Africa. Globally, there have been similar trends, prompting an international effort by various experts to consolidate international law principles on the regulation of private involvement in education. The resultant ‘Abidjan Principles’ emerged in response to the expansion of private sector involvement in education over the past two decades, which ‘if left unchecked, could gravely impair the progress made in the realisation of the right to education.’

As we discuss in more detail below, the Court in *Pridwin CC* specifically recognised the implications of the growth of the independent school sector for the rights of children. As Theron J, writing for the majority, put it: ‘[a]s the power and significance of the independent school sector continues to grow, so too does the need for constitutional protection.’ It was this question then – the extent of constitutional protection afforded to children in private schools – that was the key issue that had to be addressed throughout the litigation.

**C  Journey to the Constitutional Court – key issues**

The initial urgent application was launched in the High Court in December 2016. Over the course of the three-year legal battle, the children remained at Pridwin but eventually left the school in early 2019 (before the Constitutional Court hearing was due to take place).

The thrust of the parents’ challenge throughout the litigation was that Pridwin’s authority to cancel the parent contracts was constrained by the rights of the two learners. In particular, Pridwin was required to have a reasonable basis for cancelling the contracts and could only do so after having considered representations on whether such cancellation would be in the best interests of the two children (who would be effectively expelled from the school). These obligations, it was argued, flowed from Pridwin’s duties to respect the children’s right to basic education (s 29(1)(a) of the Constitution) as well as the rights of the children to have their best interests taken into account (section 28(2) of the Constitution). In the alternative to this direct reliance on sections 29(1)(a) and 28(2), the parents argued that the termination clause itself was contrary to public policy, unconstitutional and unenforceable to the extent that it allowed Pridwin to derogate from its duties under those constitutional provisions.
Equal Education (as amicus curiae in the High Court and Constitutional Court) and Centre for Child Law (as amicus curiae in the Constitutional Court) supported the argument that private schools bear constitutional obligations in relation to their learners. ISASA joined the proceedings as second respondent, in support of Pridwin.

Pridwin accepted that it was bound by section 28(2) of the Constitution but argued that this requirement had been met. Even though the principal had not specifically solicited representations on the best interests of the two boys, he had nonetheless taken their interests into account and appropriately weighted those interests against the other 445 children at the school.24 In relation to section 29(1)(a), Pridwin and ISASA strenuously objected to the claim that the right to basic education imposed any obligations on private schools in respect of their learners.25 The nub of their contention was that private schools do not provide basic education at all. On the contrary, the provision of basic education is a constitutional function which the state has a duty to provide. Since the state is the bearer of the positive obligation to provide basic education, it follows that basic education refers to state provided schooling and not to schooling by wholly independent private schools. To conclude otherwise, they said, would result in private schools being saddled with the constitutional duty to provide basic education to children.

The High Court and majority of the Supreme Court of Appeal26 agreed with Pridwin and ISASA on all fronts, and upheld the parent contract in accordance with the principle of pacta sunt servanda (that parties should honour contracts that have been entered into freely and consciously).27 This set the precedent that private schools are not bound by the right to basic education in relation to the learners who attend those schools, and that a private school can terminate parent contracts without having obtained representations on the best interests of the children who would be excluded as a result. The Constitutional Court unanimously upended the approach of the courts a quo. Although both the minority and majority judgments applied section 8(2) of the Constitution through different routes, all the judges agreed that Pridwin was bound by obligations in relation to the right to basic education and the paramountcy of best interests of the child.

In the analysis that follows, we welcome the Court’s reversal of the approach of the courts below and the assessment of Pridwin’s obligations under section 8(2) of the Constitution. In doing so, the Court has developed the substantive content of rights in an education context and the obligations of private schools. However, by failing to follow the schema of section 8 in its entirety, the Court missed an opportunity to fully realise the transformative potential of the horizontal application of rights under section 8 of the Constitution in contractual relationships.

24 Pridwin SCA (note 4 above) at paras 29, 31, Pridwin CC (note 1 above) at para 145.
26 Mocumie JA wrote a dissenting judgment in the Supreme Court of Appeal.
27 In Barkhuizen (note 2 above) at para 87, the Court described pacta sunt servanda maxim as ‘a profoundly moral principle, on which the coherence of any society relies’ and as ‘a universally recognised legal principle.’
III THE COURT GETS IT RIGHT: PRIVATE SCHOOLS ARE BOUND BY THE BILL OF RIGHTS

A Private schools are bound by section 28(2) of the Constitution

Pridwin and the courts below accepted that private schools are bound by section 28(2) of the Constitution and are thus required to consider the best interests of the child as paramount in matters concerning them. Nonetheless, even though the High Court and Supreme Court of Appeal recognised that an assessment of the best interests of the child may necessitate a fair hearing in some circumstances, they also stressed that the paramountcy of a child’s best interests is not necessarily a trump against all other interests. The courts were unwilling to hold that private schools have a general obligation to receive representations on the childrens’ best interests before terminating a parent contract. They were also satisfied that, in this case, the principal of the school had (despite not obtaining specific representations) taken the interests of the two boys into account and properly balanced this against the interests of all the other learners at Pridwin.28

The Constitutional Court held that the courts below had erred in their assessment of whether the duty under section 28(2) had, in fact, been met in this case. The majority held that in the circumstances of the case ‘s 28(2) requires that a fair process be followed by an independent school when it takes a decision that affects the rights of children to a basic education.29 Significantly, an oral hearing is not necessarily required in all circumstances in order to satisfy the requirements of a fair process.30 Justice Khampepe considered it necessary, in a concurring opinion, to emphasise that it is the child who has an independent and self-standing right (apart from their parents) to a fair process in the circumstances of a case as this one.31

The minority opinion of Nicholls AJ (with Mogoeng CJ, Cameron and Froneman JJ concurring), whilst not necessarily in disagreement with the majority, was more explicit in underscoring that the procedural right to a fair process when a private school contract is terminated does not hinge on section 28(2) by itself. Rather, it is because the decision or termination affects the right of a child to basic education that the obligation of private schools to solicit specific representations when terminating a parent contract is crystallized. As Nicholls AJ put it:

If the Supreme Court of Appeal is correct that independent schools have no constitutional educational obligations towards those children attending them, it may be difficult to locate an obligation under section 28(2) paramountcy alone as the source of a constitutional right in favour of the children in the contractual arrangement between the School and the parents.32

We appreciate Nicholls AJ’s emphasis on this point. The paramountcy of best interests under section 28(2), whilst significant, is not the only right grounding the necessity of a fair process in the circumstances of the case. Indeed, stretching the right in this way runs the risk of diluting the effectiveness of the principle itself. As Sachs J warned in S v M:

28 Pridwin HC at para 77, Pridwin SCA (note 4 above) at paras 31–33.
29 Pridwin CC (note 1 above) at para 153.
30 Ibid at para 151.
31 Ibid at para 221. Khampepe J (at para 226) states: ‘the procedural right forming part of the best interests of the child in this context is, first and foremost, a right given to the child, which may be exercised by a representative where children are not of sufficient age or maturity to make these representations themselves.’
32 Pridwin CC (note 1 above) at para 75.
If the paramountcy principle is spread too thin it risks being transformed from an effective instrument of child protection into an empty rhetorical phrase of weak application, thereby defeating rather than promoting the objective of section 28(2). 33

Echoing this caution, child rights advocate, Professor Ann Skelton, has argued that the Court’s ‘love affair’ with the best interests principle in some cases has led to an under-recognition and under-development of other substantive rights held by children. 34 She urges an approach instead where courts ‘pronounce on a clear rights violation’ and then ‘use best interests to fill in any normative gaps’. 35 In other words, the right under section 28(2) plays an important role in an assessment of rights violations of children, but courts should be wary of placing all of the analytical weight on section 28(2).

The failure then of the courts below to recognise that section 28(2) requires a procedural component in this case must be assessed in relation to their stance that the children’s right to basic education was not implicated. Moreover, it was the question of whether section 29(1)(a) binds private schools to any extent that was particularly contentious.

B Private schools are bound by section 29(1)(a) of the Constitution

Agreeing with the school and ISASA, the High Court and the Supreme Court of Appeal took the view that private schools are not bound by the right to basic education. Instead, the courts below held that section 29(1)(a) is concerned with state-provided public education and a private school may only be considered as providing a basic education under section 29(1)(a) if it is: (i) state-subsidised; or (ii) where there is otherwise a ‘contractual nexus’ with the state in terms of which the private school provides education. 36

In our view, the interpretation of basic education as only referring to state-provided, state-subsidised, or state-contracted education is quite remarkable. This approach not only leaves private schools immune from constitutional control over the provisioning of the fundamental right to basic education, their core business, 37 but the reasoning of the Court also has dramatic implications for interpreting the scope of constitutional rights more generally. Indeed, the reluctance of the courts below to regard a private school as being bound by the right to basic education appears to have been animated by the anxiety that if private schools are bearers of obligations in terms of section 29(1)(a), then any private person involved in the provision of a constitutionally guaranteed right must also be similarly bound. The majority in the Supreme Court of Appeal were openly mortified by the prospect:

If the appellants were correct that Pridwin, a non-subsidised independent educational institution, is providing a basic education, it would lead to remarkable consequences. It would mean that a private security company contracted to provide safety and security to a community is discharging

35 Ibid at 579.
37 As J van der Walt ‘Progressive Indirect Horizontal Application of the Bill of Rights: Towards a Co-Operative Relation between Common-Law and Constitutional Jurisprudence’ (2001) 17 South African Journal on Human Rights 341, 353, has noted in relation to socio-economic rights more broadly: ‘It would be the irony of ironies if socio-economic rights were by definition not to apply to horizontal relations between private legal subjects in South Africa, given that the power relations between private individuals that have the potential to result in the violation of fundamental rights most often turn on socio-economic issues.’
a constitutional function. So too would a private clinic that renders treatment to a patient, since the provision of health care services is also a state obligation.38

This proposition, said the majority of the Supreme Court of Appeal, ‘simply cannot withstand the most basic scrutiny’.39 In contrast, the Constitutional Court embraced the implications of private entities involved in the provision of a constitutionally guaranteed right attracting obligations under the Bill of Rights. Indeed, Theron J cautioned that the ‘aversion to constitutional obligations’ demonstrated by Pridwin and ISASA ‘is out of step with section 8(2) of the Constitution and its transformative purpose to improve the lives of all citizens and undoing the status quo of entrenched inequality and disadvantage in our society’.40

Referring to the effect of section 8(2) as a ‘transformation of private relations’,41 both the majority and minority of the Court impressed upon private entities such as Pridwin that they are not immune from constitutional obligations, and the Court was ultimately unanimous that private entities in the position of Pridwin are at least under an obligation not to interfere with or diminish the right which forms the subject of their services without appropriate justification. It is notable that the Court framed this obligation as a purely ‘negative’ one when, in fact, the substance of the Court’s finding is that Pridwin bears an obligation, once it has enrolled a child, to ensure that the child’s education is not diminished.42

The recognition that a private school has, at the very least, an obligation not to impede the education of a child at that school without appropriate justification is not novel. In KwaZulu-Natal Joint Liaison Committee,43 the Constitutional Court recognised that the right to basic education extends to all learners, including learners at independent schools.44 In that case the reduction of state subsidies to independent schools was held to involve ‘the negative rights of those learners – the right not to have their right to a basic education impaired’.45 In Juma Musjid,46 the Constitutional Court recognised that a private trust that was not even involved in providing basic education had an obligation not to diminish the right to education of children attending school on the trust’s property. In Pridwin HC the court sought to narrow the import of KwaZulu-Natal Joint Liaison Committee by contending that section 29(1)(a) applies to learners in state-subsidised independent schools.47 The Supreme Court of Appeal sought to side-step Juma Musjid as distinguishable on the basis that the children were attending a public school, and the obligations attendant on the Trust in Juma Musjid were therefore not

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38 Pridwin SCA (note 4 above) at para 40.
39 Ibid.
40 Pridwin CC (note 1 above) at para 120.
41 Ibid at para 131.
42 M Finn ‘Befriending the Bogeyman: Direct Horizontal Application in AB v Pridwin’ (2020) 137 South African Law Journal 591, 602–604 argues that the differentiation between negative and positive obligations in Pridwin is unhelpful and suggests that ‘[t]he sharp, and seemingly normatively significant, distinction between negative and positive duties should be abandoned.’ See also Lowenthal (note 18 above) at 269.
44 Ibid at paras 38, 45.
47 Pridwin HC (note 4 above) at paras 31–32.
at all relevant to Pridwin – since Pridwin had not interfered with the children’s attendance at a public school.48

In our view the Constitutional Court was correct in rejecting these approaches. Taking into consideration the scope of the duties imposed on private schools by the right to basic education in terms of section 8(2), the Court unanimously rejected the view that the right refers only to state-provided, state-subsidised, or state-contracted education. The Court diagnosed that this conclusion was based on the ‘misconceived’ premise that a person only provides a basic education where they have a positive constitutional duty to do so,49 thereby conflating the ‘content of basic education with the duty to provide it’.50 As Nicholls AJ pointed out, this approach failed to recognise that the right to basic education contains both positive and negative obligations, which do not necessarily apply in the same way to all providers.51 Aptly highlighting the flawed foundations to the reasoning of the courts below, Theron J stated that: ‘Pridwin does not have to step into the shoes of the state in order to provide a basic education. And the state does not cease to provide basic education due to the operation of independent schools like Pridwin.’52

The lower courts’ conflation of the identity of the provider of a basic right and the content of that right is also reflected in the hinging of whether a basic education is provided (or received) on a ‘contractual nexus’ with the state. Here, the respondents and courts below relied on the Constitutional Court’s judgment in AllPay,53 as authority for the proposition that private actors can only be considered as providers of a constitutional right when there is a contractual relationship with the state. We agree with Theron J that this reliance was ‘misplaced’.54 In AllPay, the Court held that a company, Cash Paymaster Services, had specifically undertaken constitutional obligations by virtue of its contract with the South African Social Security Agency. Having done so, it could not ‘simply walk away’ when that contract was declared invalid.55 At no point does the AllPay judgment suggest that the only means by which a private entity may incur constitutional obligations is where there is a contractual relationship with the state. Instead, the case merely demonstrates that one of the ways in which private entities can assume constitutional obligations is through such a contract.56 Similarly, the suggestion that constitutional obligations are assumed only when there is a state subsidy cannot be sustained. As Nicholls AJ highlighted, this reasoning would lead to the untenable conclusion that once the state stops payment of a subsidy, a child is no longer receiving a basic education.57

Pridwin and ISASA also sought to rely on section 29(3) of the Constitution to ground the argument that privately-provided education does not fall within the scope of section 29(1)

48 Pridwin SCA (note 4 above) at paras 41–44.
49 Pridwin CC (note 1 above) at para 177.
50 Ibid at para 178.
51 Ibid at para 86.
52 Ibid at para 178.
53 Allpay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer of the South African Social Security Agency & Others (No 2) [2014] ZACC 12, 2014 (4) SA 179 (CC)(‘AllPay’).
54 Pridwin CC (note 1 above) at para 177.
55 Allpay (note 53 above) at para 66.
56 It is worth noting that in AllPay, the Constitutional Court considered Cash Paymaster Services to be an organ of state under s 239 of the Constitution and was not concerned with the application of s 8. For a thorough analysis of this aspect of the AllPay judgment, see M Finn (2015) 31 ‘Organs of State: An Anatomy’ South African Journal on Human Rights 631.
57 Pridwin CC (note 1 above) at para 83.
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(a) Section 29(3) expressly provides for the right of any person to establish and maintain independent educational institutions. \(^{58}\) Pridwin argued that this must mean that privately-provided education is distinct from that provided by the state (under section 29(1)(a)). But this does not accord with the structure of section 29. As Theron J stressed, it is clear that the rights set out in sections 29(1) and 29(3) are not ‘mutually exclusive’ or ‘bifurcated standards’ but are rather ‘cooperative’, ‘intertwined’ and ‘mutually reinforcing’ provisions. \(^{59}\) Section 29(1) (a) ’speaks to the right of children to be educated’ and section 29(3) ‘speaks to the freedom given to independent schools to provide education’. \(^{60}\) The education which an independent school is entitled to provide is therefore either a basic or further education, as referred to under sub-sections 29(1)(a) and (b) respectively. \(^{61}\) In addition, the standard of education provided by an independent school cannot be inferior to public schools (as required by section 29(3)(c)).

The guidance provided to private schools by the Court here is important, as it is evident that some private schools have been under the impression that the right to establish an independent school under section 29(3) releases them from obligations under section 29(1). \(^{62}\)

But if basic education includes privately-provided education, does this mean that the luxuries of a Pridwin education may be claimed as a guaranteed right? Indeed, one of the arguments advanced by Pridwin and ISASA was that schools such as Pridwin do not provide a mere basic education, but rather provide a superior education and should therefore fall beyond the net of any obligations under section 29(1)(a). Hartford AJ in the High Court was clearly persuaded by this concern when she reasoned that because ‘[a] Pridwin standard of education is not what is guaranteed in section 29(1)(a) of the Constitution’, this must support the conclusion that private schools do not provide a basic education. \(^{63}\)

In contrast, the Court was not persuaded by this concern. The Court held that there is a standard of basic education which the state is required to provide, and which independent schools must also maintain. Where a school provides more than that which is required, this does not mean that the rights and obligations under section 29(1)(a) are suddenly irrelevant. As Theron J put it:

The quality of the education may, at times, extend beyond what section 29(1)(a) requires from the state. But that does not mean that children stop receiving a basic education the moment they enrol at these independent schools, nor do they lose constitutional protection against unjustified interferences with their education while they remain at these schools. \(^{64}\)

Nicholls AJ went further and reasoned that the definitional scope of the concept of basic education is not determined in contradistinction to a superior education, but is rather defined as being distinct from further education (as set out in section 29(1)(b)). \(^{65}\)

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58 Section 29(3) provides: ‘Everyone has the right to establish and maintain, at their own expense, independent educational institutions that (a) do not discriminate on the basis of race; (b) are registered with the state; and (c) maintain standards that are not inferior to standards at comparable public educational institutions.’

59 Pridwin CC (note 1 above) at paras 157, 167.

60 Ibid at para 157.

61 Ibid at para 156.

62 This trend is illustrated by the facts of John Wesley (note 13 above).

63 Pridwin HC (note 4 above) at para 46. Hartford AJ (at para 33) went so far as to say that ‘on a practical level, article 29(1)(a) does not guarantee a right to equal education for all people and nor does it guarantee a right to attend an independent school of one’s choice. If this were the position, chaos would ensue.’

64 Pridwin CC (note 1 above) at para 164.

65 Ibid at para 79.
suggested that basic education may be coterminous with primary schooling, but this is debatable (indeed doubtful). By contrast, and preferably, Theron J adopted a more expansive and flexible understanding of the concept of basic education. She resisted equating basic education with primary schooling and specifically noted that international instruments have shifted away from the use of the terms ‘primary’ or ‘elementary’ education to the broader notion of ‘basic education’. The general thrust of Theron J’s judgment endorses an understanding of basic education as ‘in its broadest and most general sense’ pertaining to that which is required in order to have ‘one’s basic learning needs met.’

Notably, in Moko (handed down after Pridwin CC), the Constitutional Court sought to clarify its approach to the scope of basic education under section 29(1)(a). Writing for a unanimous court, Khampepe J, in Moko, suggested that the thrust of Nicholls AJ’s minority judgment in Pridwin CC was to indicate that ‘primary school education most certainly falls within the definition of basic education’ (emphasis in original). In Moko Khampepe J held that a basic education is effectively school education until Grade 12 and that to limit basic education ‘to only primary school education or education up until Grade nine or the age of 15’ would be an ‘an unduly narrow interpretation of the term.’

A full critical assessment of the Court’s approach to the right to basic education is beyond the scope of this article. However, the point we have sought to highlight here is that, by directly addressing whether and to what extent private schools are bound by the right to basic education (under section 8(2) of the Constitution), the Constitutional Court provided important content and definitional scope to the right and, as Lowenthal noted, offers a ‘welcome clarion call for the centrality and normative priority of the right of children to quality education.’ The Court confirmed that private schools can indeed be providers of basic education and that when they undertake to do so they are, at the very least, bound by the obligation not to interfere or diminish that right without appropriate justification. Together with the obligations arising from the paramountcy of children’s best interests, the Court established that children cannot be excluded from private schools unless the school has met the requirements of substantive and procedural fairness. At a minimum, this requires private schools to receive representations on the best interests of the children who would be so excluded.

66 Nicholls AJ is initially tentative on this point stating: ‘[w]hile it is difficult to establish where the line should be drawn between basic education and further education, it cannot be disputed that basic education includes what is commonly known as primary education.’ However, she then goes on to suggest this more definitively when she says that the concept of basic education ‘stands in contradistinction not to a superior education, but to a secondary or tertiary education’. Pridwin (note 1 above) at paras 78–79.
67 Indeed, in Juma Musjid (note 46 above) at para 38, the Constitutional Court (with reference to relevant national legislation) recognised that basic education at least includes schooling from seven to 15 years of age or the ninth grade.
68 Pridwin (note 1 above) at para 160.
69 Ibid at para 166.
70 Moko v Acting Principal of Malusi Secondary School & Others [2020] ZACC 30 (‘Moko’).
71 Ibid at para 29.
72 Ibid at paras 31–32.
73 For a comprehensive assessment of the approach of courts to interpreting the right to basic education in South Africa, see F Veriava Realising the Right to Basic Education in South Africa: The Role of the Courts and Civil Society (2019).
74 Lowenthal (note 18 above) at 265.
This is of significant practical importance. As noted earlier, the number of private schools in South Africa is growing and these new schools are increasingly more likely to provide education to learners from low-income households. As we argue below, the finding that private schools are bound by constitutional obligations arising from the right to basic education and the paramountcy of the best interests of the child ought to influence the contractual terms those schools are permitted to agree and enforce. Because of this, if private schools, absent agreements with or subsidies from the state, bear no constitutional obligations in respect of the children they enroll, the results would be perverse: a wholly independent private school catering to a poor community would have greater liberty to punish, exclude and expel learners, while its state-subsidised counterpart would be constrained. It is precisely learners at low-fee private schools (whether state subsidised or not), who are more likely to struggle to quickly find a new school to attend, be provided with catch up plans, and be counseled through any trauma they might have experienced.

In summary then, we welcome the Court’s assessment of rights under section 8(2) and its finding that private schools are bound by the right to basic education and the paramountcy of the best interests of the child. However, our enthusiasm for the Court’s approach to the ‘direct’, horizontal application of rights is ultimately curbed. As we discuss below, by avoiding the contractual relationship between the parties, the Pridwin CC majority missed an opportunity to address the troubled legacy of Barkhuizen and to ensure that the transformative thrust of section 8 is used to develop the common law of contract in line with the Constitution.

IV THE COURT MISSES AN OPPORTUNITY: CONSTITUTIONAL CHALLENGES TO CONTRACTUAL DISPUTES AND THE DIRECT APPLICATION OF THE BILL OF RIGHTS

The availability of section 8(2) to parties challenging a provision of a contract has been the source of much controversy in South African law, particularly following the judgment of the Constitutional Court in Barkhuizen. It was this issue – whether the impugned school termination clause could be tested through direct application of rights under section 8(2) – that split the Pridwin Court.

The parents had cast their claim as a challenge, in the first instance, to the validity of the principal’s decision to exercise the termination clause (thereby excluding the two children from Pridwin). This claim was premised on the assumption that the termination clause was capable of a constitutionally compliant construction (that is, one which required any decision to terminate the contract to be taken after having afforded a fair hearing and on a reasonable basis). To the extent that the termination clause was not considered capable of such a construction, the parents relied on their second claim: that the clause fell to be declared contrary to public policy, invalid and unconstitutional (for derogating from the rights contained in sub-sections 29(1)(a) and 28(2) of the Constitution).

In light of the two boys having already left Pridwin by the time of the Constitutional Court hearing, Nicholls AJ, for the minority, would have held that the constitutionality of the principal’s decision to terminate the contract in the circumstances of this specific case was moot. The question requiring resolution, and which would go ‘far beyond the confines of

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this case’ with ‘practical and far-reaching effects’, said Nicholls AJ, was the constitutionality and enforceability of the termination clause. She would therefore only have granted leave to appeal in relation to that issue.76 Having squarely focused her attention on the validity of the termination clause, Nicholls AJ approached this question through an enquiry under section 8(2) of the Constitution, ultimately concluding that the termination clause should be declared ‘unconstitutional, contrary to public policy and unenforceable to the extent that it purports to allow Pridwin to cancel the Parent Contracts without following a fair procedure.’77

Theron J, writing for the majority, did not agree with this route. Addressing the divergence between the two judgments head on, Theron J disagreed with Nicholls AJ’s willingness to apply section 8(2) in her consideration of the challenge to the contractual provision itself.78 In Theron J’s view, this approach was rejected in Barkhuizen and could not be countenanced. Instead, Theron J applied section 8(2) to the decision made by Pridwin to exclude the learners, a decision which she suggested could be de-linked from the contract entirely.79

As we argue below, the approach of the majority reflects and reinforces the unfortunate insulation of contract law from the full scope and benefit of constitutional development. We proceed by setting out the role and scope of section 8 of the Constitution and the uneasy legacy of Barkhuizen, before turning to an analysis of the opportunity presented by and missed in Pridwin.

A Section 8 of the Constitution and contracts: the trouble with Barkhuizen

The constitutional project imposes duties not only on the state, but on private individuals, corporations and other entities. The manifest constitutional aspiration of transforming society is one that is scarcely capable of being realised unless individuals are committed to the reconstruction of the ethical and material foundations of the country.80 As the Pridwin CC court held, this transformative impulse is given expression in section 8 of the Constitution.

Section 8(1) is the starting point for the applicability and binding status of the Bill of Rights in relation to the state (so-called ‘vertical’ application). It says:

The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary, and all organs of state.

Section 8(2) relates to the applicability and binding status of the Bill of rights in relation to private persons (so-called ‘horizontal’ application). It says:

A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of the duty imposed by the right.

76 Pridwin CC (note 1 above) at paras 49–59.
77 Ibid at para 96.
78 An undercurrent of frustration surfaces in Theron J’s judgment, most noticeably when describing the efforts of Cameron and Froneman JJ to bridge the apparent chasm between the majority and minority. In response to their ‘valiant attempt’, Theron J simply states: ‘I make no comment. The second judgment will speak for itself in this regard’. Pridwin CC (note 1 above) at para 104.
79 Pridwin CC (note 1 above) at paras 102–107.
While the Bill of Rights applies to private persons, the distinction between sections 8(1) and 8(2) makes clear that obligations do not bind them in the same way they do to the state. A provision in the Bill of Rights applies to private persons if it is applicable, and then to the extent that it is applicable. Both those questions – the applicability and the scope – are to be determined by assessing whether the right in question is capable of an interpretation which can ground a cause of action against a private party, and with reference first to the nature of the right and the duty imposed by the right.

If a provision in the Bill of Rights binds a private person, we are directed to section 8(3). Section 8(3)(a) says that in order to give effect to a right, and in the absence of legislation that does so, a court must apply, or if necessary, develop the common law. Section 8(3)(b) permits courts to develop common law rules which limit the right, provided that the limitation is justifiable in terms of section 36(1).

The process required under section 8(2) was well articulated in Khumalo. There the Constitutional Court was tasked with assessing the applicability of the right of freedom of expression to private parties. The defendant in a defamation suit, a newspaper, argued that the plaintiff should have been required to allege that the defamatory publication was false, a requirement that was not captured in South African common law at the time. The newspaper submitted that the private law of defamation should be adapted so as to respect the right of media defendants to freedom of expression under section 16 of the Constitution.

With only private parties before her, O’Regan J, writing for the Court’s majority, was tasked firstly with assessing whether there was some duty encapsulated in section 16 which applies to a person who is subject to defamatory publication – in other words, was the if requirement in section 8(2) satisfied. She noted that the ‘print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas’. Turning to the parties before her, in the context of the right, O’Regan J contended that the media ‘are key agents in ensuring that these aspects of the right to freedom of information are respected’. They bear both constitutional rights and constitutional obligations under section 16. In light of the intensity of the right in question and the potential invasion of the right that could be occasioned by persons other than the state, O’Regan J concluded that freedom of expression found ‘direct horizontal application’ in the case before her.

Having made that determination, the overall scheme of section 8 required that O’Regan J examine the common law of defamation and ask whether it unjustifiably limited the right to freedom of expression. If it did, the Court would be compelled to develop it. Ultimately, the Court held that the rule developed in Bogoshi, recognising the availability of a reasonable publication defense where a publisher is accused of defamation, places the common law in a position which satisfies the section 36 limitations analysis.

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83 Khumalo & Others v Holomisa [2002] ZACC 12, 2002 (5) SA 401 (CC) (‘Khumalo’).
84 Ibid at para 22.
85 Ibid at para 33.
In stark contrast to the approach in *Khumalo*, the majority of the Court in the seminal (and fiercely criticised) decision of *Barkhuizen* were disinclined to examine the constitutionality of a contractual provision with reference to section 8(2). *Barkhuizen*'s approach – of eschewing the applicability of section 8 and relying exclusively on section 39(2) as the ‘portal’ through which to assess contractual disputes – is associated with ‘indirect’ as opposed to ‘direct’ application of the Bill of Rights. But there has also been considerable debate, indeed confusion, around the use and meanings of the terms ‘direct’ and ‘indirect’ horizontal application in South African jurisprudence and scholarship. We do not rehash the nuances of those debates here; nor do we attempt to offer a definitive proposal on how the terms should be utilised. Suffice it to state that for our (limited) purposes, we employ ‘direct’ application to refer to the resolution of a dispute by the application of constitutional rights via section 8 of the Constitution. Indirect application is used to refer to the application of constitutional values to the common law underlying the dispute via section 39(2) of the Constitution. As we will explain, we do not view these two approaches as necessarily mutually exclusive (which was the unfortunate view suggested in *Barkhuizen* and perpetuated in *Pridwin CC*).

While providing an important infusion of constitutional values into the assessment of public policy under the common law of contract, the majority judgment of Ngcobo J gave insufficient and unconvincing reasons for rejecting the applicability of section 8(2) and the approach adopted in *Khumalo*. The core of Ngcobo J’s discomfort on this score was centred on the concern that a specific contractual provision is not a law of general application, and therefore cannot ever meet the threshold requirement for any justifiable limitation of rights under section 36 of the Constitution. But, as critics have noted, the Court failed to recognise that it is the underlying common law rules of contract (which are undoubtedly of general application) that are ultimately under scrutiny in any constitutional challenge to contractual provisions. It follows that the common law rule of *pacta sunt servanda* subject to public policy

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87 D Bhana ‘The Horizontal Application of the Bill of Rights: A Reconciliation of ss 8 and 39 of the Constitution’ (2013) 29 South African Journal on Human Rights 351, 355. In *Barkhuizen*, Ngcobo J, writing for the majority, held that the applicant had conflated two distinct lines of attack – the one being a public policy challenge to the contractual provision at issue (as provided for by the common law), and the other being a challenge based on the direct applicability of a guaranteed right. Public policy must, said the Court, be tested against the objective values evidenced by the Constitution and, in particular, the Bill of Rights. Here the Court invoked s 39(2) of the Constitution, requiring development of the common law in a manner that ‘promotes the spirit, purport and object of the Bill of Rights’.

88 Bhana ibid at 354 notes that ‘confusion abounds’ in debates about direct and indirect horizontality; Friedman (note 80 above) at 88 argues that current debates on horizontal application ‘damagingly conflates several discrete issues, and continues to sow confusion about how horizontality is supposed to work’; M Dafel ‘The Directly Enforceable Constitution: Political Parties and the Horizontal Application of the Bill of Rights’ (2015) 31 South African Law Journal 56, 57 refers to the ‘labyrinth that has come to surround horizontality in South Africa’.

89 For various proposals on this issue see, for example, C J Roederer ‘Post-Matrix Legal Reasoning: Horizontality and the Rule of Values in South African law’ (2003) 19 South African Journal on Human Rights 57, 70–71; Bhana (note 87 above); Friedman (note 80 above); F Du Bois ‘Contractual Obligation and the Journey from Natural Law to Constitutional Law’ (2015) 1 Acta Juridica 281; and most recently L Boonzaier ‘Contractual fairness at the Crossroads’ (2021) 11 Constitutional Court Review 229.


91 *Barkhuizen* (note 2 above) at paras 23–26.

92 For example, see S Woolman and H Botha ‘Limitations’ in Woolman et al (ed) *Constitutional Law of South Africa* (2006) para 34.7(dd), where the authors assert that a rule constitutes a law of general application for the
can always be developed to say that in particular circumstances certain types of clauses must be taken as not offending public policy. In such circumstances, it would not be the contractual clause itself that limits the right, but an application of a legal rule of general application.

Moreover, to the extent that there is an undercurrent in Barkhuizen that suggests that section 39(2) operates only to the exclusion of section 8, it cannot be correct, and various commentators have convincingly dispelled this notion.93 While section 8 situates all ‘direct’ applications of the Bill of Rights, both vertical and horizontal, section 39(2) articulates the need for all law to accord with the spirit, purport and objects of the Bill of Rights. On its own terms, section 39(2) applies whenever a court, tribunal or forum interprets legislation, or develops the common law or customary law.94 Section 39(2) gives effect to a wide range of circumstances mandating normative constitutional interpretation, encapsulating the need for the values of the Bill of Rights to permeate all areas of law, including the regulation of private affairs.95 However, where the process mandated in section 8 leads a court to develop the common law, section 39(2) also becomes operative. In other words, a section 39(2) enquiry is not only capable of being housed under section 8 but is in fact necessitated by it.

The majority in Barkhuizen were therefore misguided in suggesting that (a) sections 8 and 39(2) of the Constitution operate in a mutually exclusive manner, and (b) that section 8 is generally not a viable route by which to assess a constitutional challenge to contractual provisions. Indeed, in his separate concurring judgment, then Chief Justice Langa said he was not convinced that certain rights might not apply directly (through section 8) to contractual terms and the common law that underlies them.96 Our contention is that Pridwin CC is precisely the type of case in which they should.

B A missed opportunity to clarify Barkhuizen’s uneasy legacy – the trouble with Pridwin CC

Barkhuizen left in its wake the regrettable sense that contractual disputes must live outside the type of transformative application of fundamental constitutional obligations in private relations that section 8 inspires. However, searching for redemption and adopting a generous reading, it is arguable that Barkhuizen stopped short of expressly asserting that contractual provisions may never be considered under section 8. While it claimed that it ‘ordinarily’ ought to be an assessment undertaken by direct resort to the question of public policy,97 the majority judgment, read with Langa CJ’s short separate comment, left open the gap of a possibility that some contracts, which implicate the Bill of Rights directly, can be appropriately tested through an analysis under section 8(2).

In our view, Pridwin CC represents one of the most clear-cut cases of a contractual relationship, built on the foundation of constitutionally guaranteed rights, being able to squeeze into that gap. Here, children at school are (as the Constitutional Court in Pridwin

purposes of s 36(1) of the Constitution when it encapsulates ‘parity of treatment, non-arbitrariness, precision and accessibility’. See also Woolman (note 90 above) at 774–775 and, more recently, I M Rautenbach ‘Constitution and Contract: Indirect and Direct Application of the Bill of Rights on the Same Day and the Meaning of “in terms of law”’ (2021) 1 Tydskrif vir die Suid-Afrikaanse Reg 379, 393–394.

93 Friedman (note 80 above); D Bhana (note 87 above).
94 Friedman (note 80 above) at 74–78.
95 Friedman (note 80 above); Du Bois (note 89 above).
96 Barkhuizen (note 2 above) at para 186.
97 Ibid at 28.
CC rightly holds) clearly entitled to the right to basic education and are always protected by the section 28 injunction to advance the best interests of children. In addition, the very existence of independent schools is encapsulated within the scheme of section 29. As Mocumie JA, the lone dissenting judge in the Supreme Court of Appeal, put it:

The context in which the contracts in issue were concluded between the parties, is distinctly different – not one of the normal day to day contracts in the commercial world. That is what distinguishes the facts of this case from all others referred to by counsel for the School, particularly the judgments of this Court, a distinction the high court seems to have missed.

Given the ‘extraordinary’ nature of this type of contract, the Pridwin CC case then offered a particularly good opportunity to reassess the scope for direct application of the Bill of Rights to contractual questions. In her minority judgment, Nicholls AJ appeared to grasp that the occasion for loosening the conceptual straitjacket placed over section 8(2) by Barkhuizen had arrived. Seizing on Langa CJ’s concurring judgment in Barkhuizen, Nicholls AJ sought to carve out at least some room for embracing section 8(2) as a viable route when assessing the constitutionality of contractual provisions, especially where the contractual relationship centres particular rights very clearly. Here she asserted:

Barkhuizen clearly viewed the constitutionality of a contractual clause through the prism of public policy. However, where constitutional rights are directly at issue, I do not understand Barkhuizen to inhibit determining the enforceability of a contractual clause by direct application of the Bill of Rights to private persons in terms of ss 8(2) and 8(3).

Even though Nicholls AJ did not carry through the section-8 analysis to its proper conclusion (a point we return to below) her recognition that contract law need not be immune to the direct application of constitutional rights is to be embraced. Unfortunately, Nicholls AJ did not prevail over the majority of the Court and, despite the opportunity at hand to soften Barkhuizen’s uneasy legacy, the majority hardened its edges.

Unlike the minority, Theron J adopted an unimaginatively strict reading of Barkhuizen and uncritically held that there had been no room to subject the contractual relationship between Pridwin and the parents to a direct, horizontal application of rights under section 8(2). If the constitutionality and enforceability of the contractual provision were to have been assessed, Theron J contended, this had to proceed as a public policy challenge, which could not be housed under section 8. In drawing this distinction, the majority reinforced rather than corrected Barkhuizen’s misguided view that there is a dividing line between direct horizontal application of the Bill of Rights and constitutional scrutiny of contracts. If the door to direct application in constitutional challenges to contracts was indeed left open by Barkhuizen (however slightly), Theron J closed it.

While disappointing, followed to its logical conclusion, one would have expected Theron J’s reasoning to have led to an assessment of the enforceability of the school’s termination clause through the public policy route. But this is where things become particularly perplexing. Despite her views on Barkhuizen’s constraints, Theron J was still eager to adopt direct application under section 8. Citing academic opinion and extra-curial judicial commentary critiquing the Constitutional Court’s seeming preference for an ‘indirect’ application of rights and resultant failure to give ‘identifiable content’ to those rights (a critique which, notably,
was directed in large part at Barkhuizen). Theron J urged that direct horizontal application should be embraced. As she said: ‘This Court should not avoid direct horizontal application where it appears to be the most appropriate means of resolving a constitutional dispute.’

Caught in a dilemma of both wanting to respect Barkhuizen and apply section 8(2), Theron J bypassed the contractual relationship and simply subjected Pridwin’s decision to terminate the contract to an analysis under section 8(2). But this effort to de-link the termination clause from the decision to cancel is unsustainable since, as Theron J acknowledged, the impugned conduct took place in terms of the contract. By artificially ignoring the fact that the decision was an instance of the enforcement of a contractual provision, the majority side-stepped any consideration of whether the contractual provision was consistent with a constitutionally-infused understanding of public policy (i.e. the very approach that Barkhuizen mandated as being appropriate in constitutional challenges to contractual terms). Instead, she said that this exercise was ‘rendered superfluous’ with the analysis under section 8(2) being viewed as sufficient to produce the relevant outcome. However, this failed to account for the requirement under section 8(3) that a Court must, in the absence of applicable legislation, engage with the common law underlying the relationship between the parties (in this case, the common law of contract). Ironically then, the majority’s effort to uphold Barkhuizen’s conclusion on the applicability of section 8 of the Constitution to contracts leads to avoidance of an assessment of the contract in terms of Barkhuizen altogether – an irony that is especially deepened when considering that on the same day as handing down Pridwin CC, Theron J authored the majority judgment in Beadica which seemingly emphasised the importance of applying Barkhuizen in contractual disputes.

Thus, even though we appreciate the majority’s analysis of rights under section 8(2), the approach to direct application by Theron J was misguided and incomplete. At the same time, while Nicholls AJ’s approach is preferable, it too is not entirely satisfying. While Nicholls AJ initially seemed on track to aligning the Barkhuizen test of constitutionally infused public policy with a fulsome undertaking of the process mandated by section 8, strangely, she too did not follow section 8’s schema to its conclusion. After finding that the school was subject to constitutional duties under section 8(2), Nicholls AJ erred by then asserting that those

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101 Pridwin CC (note 1 above) at para 130. Theron J referred to ‘certain academics’ having criticised the Constitutional Court’s ‘avoidance of direct application of the rights in the Bill of Rights’ and proceeded to cite Woolman’s ‘The Amazing, Vanishing Bill of Rights’ (note 90 above) in the corresponding footnote. However, Woolman’s critique in the cited article is, in part, aimed at Barkhuizen’s failure to apply section 8(2) in constitutional challenges to contracts. It is also noteworthy that Theron J cited Moseneke DCJ’s extra-curial writing on direct application (Pridwin CC note 1 above at paras 127–129) but failed to recognise that Moseneke DCJ was specifically addressing the implications of direct application on the law of contract. See D Moseneke ‘Transformative Constitutionalism: Its Implications for the Law of Contract’ (2009) 20 Stellenbosch Law Review 3.

102 Pridwin CC (note 1 above) at para 130.

103 Ibid at para 98.

104 Ibid at para 107 where Theron J stated: ‘On this approach, and in light of the outcome reached by applying s 8(2), a decision in respect of the public policy challenge is rendered superfluous.’


106 For a broader discussion on the Constitutional Court’s judgment in Beadica, see Boonzaier (note 89 above).

107 Nicholls AJ recognised that ‘[a]ll contractual agreements between private parties are governed by the principle of pacta sunt servanda, unless they offend public policy’, and that the impugned provision in the parent contract ‘must stand up to scrutiny, based on the test set out in Barkhuizen.’ Pridwin CC (note 1 above) at para 61.
constitutional duties, quite aside from any assessment of the common law of contract under section 8(3), curtailed the contractual autonomy of the parties; and so, she said:

In these instances, the enforcement of the contract must be subject to the constitutional precepts outlined above because of the direct applicability of rights in the Bill of Rights. *Even if the more general public policy approach is preferred*, the result will effectively be the same: it is against public policy to enforce a contractual claim that infringes the constitutional rights of children who are not parties to the contract. (Our emphasis)\(^{108}\)

While not a model of clarity, we read Nicholls AJ to be indicating that the direct application of rights to the contractual provision is an alternative to and mutually exclusive from the public policy route. In this way, she appeared to revert to a suggestion that the direct application of rights under section 8(2) can be undertaken without any reference to an assessment of public policy; but this is exactly what section 8(3) requires.\(^{109}\) This is also a confusing statement in light of Nicholls AJ’s proposed order asserting that the parent contract was ‘contrary to public policy’.\(^{110}\) The separate judgment of Cameron and Froneman JJ speaks to the failure of both the minority and majority judgments to engage with section 8(3). Described by Theron J as making a ‘valiant’ effort to ‘find common ground’ between the diverging judgments,\(^{111}\) Cameron and Froneman JJ emphasised that both judgments were correct in finding that Pridwin bore obligations in terms of sections 28 and 29 of the Constitution, but also point out that such a finding should have driven both judges to an assessment of the common law under section 8(3) of the Constitution.\(^{112}\)

The confusion arising in *Pridwin* underscores the wisdom of the scheme of section 8 and the clarity it can offer in contractual disputes implicating fundamental rights. The structure of section 8 – when properly followed – would have compelled the Court to have undertaken a full assessment of the contractual law underpinning the dispute between Pridwin and the parents. After having correctly determined that the constitutional rights in question are capable of, and in fact necessitate, an interpretation which yields constitutional duties on the independent school (an analysis we have commended), the Court should have expressly engaged the process set out in section 8(3). In the absence of relevant legislation, the Court should then have considered whether there is applicable common law that gives effect to or limits the rights of the learners. The common law in question would be *pacta sunt servanda*, subject to a constitutionally infused notion of public policy. The correct approach would have then entailed an assessment of whether public policy could permit a private school to insert an

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\(^{108}\) *Pridwin CC* (note 1 above) at para 91.

\(^{109}\) It should be noted that neither the applicants nor *amici* pleaded for the public policy inquiry to be housed under s 8(3), which may have contributed to Nicholls AJ’s diversion. As Moseneke DCJ has written: ‘[a] judgment is an outcome of an intricate evaluation of the total legal materials presented by the parties. In our system, judges do not make cases for litigants; they have to make do with what is before them ... As is required in relation to any cause of action, a party seeking to rely on the horizontal application of a fundamental right or on the development of the common law has to plead its cause unequivocally’, Moseneke (note 101 above) at 11.

\(^{110}\) *Pridwin CC* (note 1 above) at para 96.

\(^{111}\) *Pridwin CC* (note 1 above) at para 104.

\(^{112}\) We note that Cameron and Froneman JJ also created some uncertainty when they indicated that despite the differences between the minority and majority judgments, they ‘consider that the same result would have been reached, indirectly, by applying public policy considerations where clause 9 3 was sought to be enforced, and thus agree with the order the first judgment makes’, *Pridwin CC* (note 1 above) at para 219. Whilst this also muddies the waters, what is clear is that both judges recognised the need to engage with s 8(3) once the direct application of rights under s 8(2) is undertaken.
open-ended contractual provision allowing it to summarily terminate its contract and thereby infringe the rights of the children (which, as the court established under section 8(2), bind the private school).

1. **Why the missed opportunity matters**

In our view, Nicholls AJ’s judgment together with the refinement offered by Cameron and Froneman JJ could have paved the way toward a sound application of section 8 to constitutional challenges to contracts on a case-by-case basis. However, given our approval of the outcome of the case as set out earlier, one may ask why we consider this missed opportunity to have any real significance. In our view, following section 8’s approach with its culmination in an assessment and, if necessary, development of the common law, is consequential for at least four interrelated reasons.

First, it represents a fidelity to the overall scheme of the Constitution and the imperative to transform the common law. By pointing us in the direction of common law where it exists, the scheme of section 8 affords due respect to the existence and value of the common law. Simultaneously, and significantly, section 8 recognises the need to transform the common law with reference to fundamental rights. Theron J’s approach, which attempts to usurp the question of the contract’s validity as a matter of existing common law, is incorrect. If the contractual relationship between parties can be bypassed altogether, this raises a question over whether the existence of a contract and the principle of *pacta sunt servanda* have any relevance at all. Moreover, if the common law underpinning the contractual relationship is avoided, the transformative force of section 8 is undermined. As Davis and Cheadle have argued:

> The potential for horizontal application calls into question the private/public divide which previously lay at the centre of the legal system. But it does so not by creating a direct, separate constitutional cause of action, but rather by ensuring that the newly created constitutional action must be mediated through our common law. In this fashion, the legal apartheid between an egalitarian constitution and a laissez faire common law is destroyed.

The common law ought to be engaged with, interpreted, developed, or rejected in accordance with the spirit, purport and objects of the Bill of Rights. By artificially avoiding the contractual relationship between the parties, the majority’s method of direct application reinforces rather than destroys the ‘legal apartheid’ between contract law and the Constitution. In this way, *Pridwin CC* lends to the ongoing failure by courts to fully embrace the constitutionalisation of contract law.

Second, section 8 offers a coherent path to constitutionally limiting rights between private persons. We have already discussed how Barkhuizen erred in reasoning that section 8 precludes an effective section 36 limitations analysis in contractual disputes. In fact, the scheme of

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113 The Constitutional Court in *Carmichele v Minister of Safety & Security* [2001] ZACC 22, 2001 (4) SA 938 (CC) at para 55, stated that a full appreciation of the manner in which fundamental constitutional values must, in terms of s 39(2), influence the common law, requires ‘not only a proper appreciation of the Constitution and its objective, normative value system, but also a proper understanding of the common law… Not only must the common law be developed in a way which meets the s 39(2) objectives, but it must be done in a way most appropriate for the development of the common law within its own paradigm’.

114 Cheadle and Davis (note 82 above) at 66.

115 Finn (note 42 above) at 599 also argues that the *Pridwin* majority’s approach ‘perpetuates the idea that there are parallel systems of law, with the law of contract governed by the common law, and direct application governed by the Constitution.’
section 8 – by requiring an assessment of the underlying common law (the law of general application) in a dispute—explicitly anticipates and accommodates the need for a potential limitation of rights in line with section 36 of the Constitution.\textsuperscript{116} By contrast, the majority’s approach of applying section 8(2) to the outcome of contractual enforcement (without reference to legislation or common law) results in the very issue which \textit{Barkhuizen} sought to avoid. Admitting that on her approach a limitation analysis ‘is not possible due to the “law of general application” threshold,’ Theron J purported to import the ‘standard of appropriate justification’ in \textit{Hoërskool Ermelo}\textsuperscript{117} as being ‘equally applicable.’\textsuperscript{118} But this stretches the reference to ‘appropriate justification’ in \textit{Hoërskool Ermelo} beyond all contexts. In that case, the Court was explaining that once a person enjoys the benefit of a right then the duty-bearer (the State in that case) has an obligation not to interfere with the right without ‘appropriate justification’.\textsuperscript{119} It is difficult to read Moseneke DCJ’s description of the scope of the right as a replacement of a limitations analysis under section 36. Nor would this be a sound approach; if a right is limited, then a limitations analysis must follow to consider whether the limitation is justifiable.\textsuperscript{120} It should be noted that Nicholls AJ’s judgment is equally perplexing on this score, leading Cameron and Froneman JJ to note that ‘in fidelity to section 8(3)(b)’ they consider that the appropriate route to any limitations analysis should be via section 36(1).\textsuperscript{121}

The two points above have particular relevance in response to the \textit{Pridwin CC} majority’s approach to the direct application of rights under section 8(2) – which does not engage the common law nor a limitations analysis under section 36. However, one may well ask whether the route set out in \textit{Barkhuizen} (i.e. considering public policy and section 39(2) without resort to section 8), nevertheless offers an adequate accommodation of these challenges? After all, \textit{Barkhuizen} does still insist on the constitutionalisation of contract law, and the Court’s reasoning avoided (albeit dubiously) an encounter with a section 36 limitations analysis. Does anything really turn then on whether the constitutionalisation of contract law takes place

\textsuperscript{116} Section 8(3)(b).
\textsuperscript{117} \textit{Head of Department: Mpumalanga Department of Education & Another v Hoërskool Ermelo & Another} [2009] ZACC 32, 2010 (2) SA 415 (CC) (‘\textit{Hoërskool Ermelo}’).
\textsuperscript{118} \textit{Pridwin CC} (note 1 above) at para 197.
\textsuperscript{119} \textit{Hoërskool Ermelo} (note 117 above) at para 52. Even on its own terms, the \textit{Pridwin CC} majority’s ‘appropriate justification’ analysis lacks clarity. See, for example, Lowenthal (note 18 above) at 271–272 assesses of some of the shortcomings of the \textit{Pridwin CC} majority’s justification analysis.
\textsuperscript{120} Rautenbach (note 92 above) at 390 goes so far as to suggest that, by adopting an ‘appropriate justification’ analysis (rather than engagement with s 36), the \textit{Pridwin CC} majority was effectively engaged in an \textit{indirect} application of rights. The avoidance of s 36, he argues, ‘turned the [\textit{Pridwin majority}] route into a detour for indirect application’. While framing the \textit{Pridwin CC} majority’s approach as indirect application may compound confusion around the use of direct/indirect application terminology, we agree that a full and proper engagement with s 8’s schema would lead to an engagement with s 36 where rights are limited.
\textsuperscript{121} \textit{Pridwin CC} (note 1 above) at para 217. Significantly too, in an effort to find common ground between the majority and minority judgments, Cameron and Froneman JJ interpret Theron J as – in effect – developing the common law by recognising that independent schools cannot diminish or interfere with a child’s right to basic education. According to the judges, this ‘newly-established common law right’ is then limited by the recognition that diminishment may occur where there is in-process and in-substance fairness. This limitation, suggests the judges, meets the s 36(1) threshold as mandated by s 8(3). Finn (note 42 above) at 606–607 has offered a compelling critique of Cameron and Froneman JJ’s analysis, which she suggests ‘raises as many questions as it purports to answer.’ See also Lowenthal (note 18 above) at 270–271 who suggests that Cameron and Froneman JJ’s approach does not resolve the uncertainty created by the \textit{Pridwin CC} majority over the application of s 8(3).
‘directly’ (through the method set out in section 8) or ‘indirectly’ (through the method set out in *Barkhuizen*)?

We think so. This leads us to the third reason why we consider the approach of the *Pridwin CC* majority (in reinforcing *Barkhuizen*’s direct and indirect application binary in respect of contracts) to be a missed opportunity. As some scholars have argued, an engagement with constitutional rights through section 8(2) leads to a substantive interpretation of those rights, as opposed to sole reliance on the general ‘spirit, purport and objects’ of the Bill of Rights. As Rautenbach notes, even if one assumes that the same outcomes may ultimately be reached via the direct and indirect application routes, “[t]he possibility that different methods could lead to different results can never be excluded, because the focus on particular aspects of the investigation may differ” (our emphasis).

In *Pridwin CC*, the Court’s analysis of the rights to basic education and best interests of the child provides important clarity on the scope and content of those rights and, in turn, corresponding obligations on private schools. Indeed, as we have noted earlier, Theron J explicitly pursued direct application under section 8(2) in the hope of comforting critics who have charged the Court with eschewing the development of the substantive content of rights in favour of an ‘over-reliance’ on section 39(2). The source of these commentators’ angst has, in part, been rooted in *Barkhuizen*’s reticence to develop the contours of the relevant rights and corresponding obligations that exist between contracting parties. As we have discussed, we see no reason why the substantive assessment of rights which section 8(2) requires cannot be applied to the law of contract underpinning disputes. In doing so, courts can clearly establish the rights and duties of contracting parties.

Delineating the nature and scope of rights in contractual disputes may also, we suggest, have important implications for the outcome of a case (and this is our final reason for lamenting *Pridwin CC* as a missed opportunity). Even though Langa CJ (in his concurring judgment in *Barkhuizen*) suggested that ‘the distinction between direct and indirect application will seldom be outcome determinative’, the specific rights and obligations between parties give particular

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122 Friedman (note 80 above) at 64 notes that the academic debate over direct and indirect application ‘lost steam’ in part because ‘it was unclear what was at stake between the direct and indirect models’ with some declaring the distinction inconsequential. Roederer (note 89 above) at 79, for example, found it ‘very difficult to see what the fuss about s 8 versus s 39 could possibly be about’. However, several commentators have challenged the view that the distinction between s 8 and s 39 is entirely redundant, including, for example, A Fagan ‘The Secondary Role of the Spirit, Purport and Objects of the Bill of Rights in the Common Law’s Development’ (2010) 127 South African Law Journal 611; Friedman (note 80 above); and Rautenbach (note 92 above).

123 Woolman (note 92 above) at 763, for example, has critiqued: ‘By continually relying on s 39(2) of the Constitution to decide challenges both to rules of common law and to provisions of statutes, the court obviates the need to give the specific substantive rights in Chapter 2 the content necessary to determine the actual validity of the rule being challenged in the instant matter and of similar rules challenged in subsequent matters.’

124 Comparing the Court’s approach in *Pridwin* and *Beadico*, Rautenbach (note 92 above) at 395 argues that the indirect application route in the latter case resulted in less attention being paid to ‘the impact of enforcing the contractual clause’. For this reason, and despite its deficiencies, Rautenbach indicates that the approach of the *Pridwin* Court on this score should be ‘commended’.

125 Note 101 above.

126 In fact, the usefulness of a rights-based analysis is demonstrated by *Barkhuizen* itself, as the Court arguably did engage in an analysis of s 34 (right of access to courts). Woolman (note 92 above) at 777 makes the point that *Barkhuizen* ‘says one thing and then does another’ and that, despite its claim to indirect application, ‘the language of *Barkhuizen* suggests that the court is, in fact, undertaking something akin to direct application of the Bill of Rights.’

127 *Barkhuizen* (note 2 above) at para 186.
force to the need for and precise contours of public policy development. The question of what public policy requires in a particular contract may indeed be heavily influenced by a finding that one contracting party bears a relevant constitutional duty in terms of the Bill of Rights. As Bhana puts it, while sections 8(1) and 39(2) clearly subject all law, including the common law of contract, to the Bill of Rights, section 8(2) requires a judge to consider the extent of the application of the Bill of Rights to a particular matter and the contract law that ought to govern it. Section 8(2) is thus ‘a crucial precursor to the development that a judge may deem necessary in terms of section 8(3) of the Constitution’ and ‘where the common law of contract appears to fall short, the relevant contract or contractual clause must similarly be assessed in terms of section 39(2) and/or section 8(2) of the Constitution, with a view to developing an appropriately constitutionalised body of contract law.’

Section 8(2) focuses an enquiry on the particular context of the dispute before it, whether the nature of the right at issue and the nature of the duty imposed by it render it applicable, and then to what extent. The nature of the private parties before the court is also relevant. As Cockrell has expressed it, section 8(2):

[P]roceeds on the assumption that constitutional rights might be agent-relative and context-sensitive, inasmuch as their direct application against private agencies will depend on the circumstances of the case and the characteristics of the particular person.

This contextual approach to the applicability of section 8(2) finds favour in several decisions of the Constitutional Court. In Khumalo, O’Regan J suggested that the unique relationship between the media and the right to freedom of expression means that private persons are obligated to respect that right, and that the law of defamation must function with this constitutional requirement in mind. In Daniels, the Court indicated that the duty imposed by the right to security of tenure by its nature rests (in both the positive and negative sense) on private landowners, as a result of the nature of the relevant constitutional provision and its relationship to landowners. So context informs the applicability of constitutional provisions to private persons, and the content of the obligations imposed by them. Grounding the assessment of public policy development in the specificity of rights obligations under section 8, with its agent-relative focus, also mitigates the floodgates concerns that can preoccupy judges when considering the development of the common law. This was indeed a significant concern for the High Court and Supreme Court of Appeal: if the best interests of children means Pridwin could not expel learners without a hearing, would that mean that no commercial party could ever do anything which might be to the detriment of children, without first having a

128 Fagan’s (note 122 above) at 617 analysis of the distinction between developing the common law on the basis of rights as compared to the spirit, purport and objects of the Bill of Rights is instructive here. As he argues: ‘the objects of the Bill of Rights justify many more common law developments than do the rights therein’. Rights may therefore ground a more specific development of the common law than the broader spirit, purport and objects of the Bill of Rights.


130 Ibid at 7.

131 Ibid.

132 A Cockrell ‘Private Law and the Bill of Rights: A Threshold Issue of “Horizontality”’ in Butterworths Bill of Rights Compendium (RS 13 Oct 2003) Ch3A 13; see also the contextual questions for determining the applicability of a provision of the Bill of Rights advocated by Dafel (note 88 above) at 64.


134 Ibid at paras 43–51.
Pridwin: Private School contracts and the Bill of rights

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Hartford AJ in the High Court thought that this would ‘create an absurd situation and open the floodgates in relation to the termination, on notice, of all contracts involving children whether directly or indirectly’. To illustrate this concern, Hartford AJ offered the example of parents defaulting on payments to a bank in terms of a credit agreement which was specifically for the purchase of a scooter that would transport their sons to school. If a common law rule were to require a hearing before the cancellation of contracts implicating children and their access to school then the bank would be required to afford the parents an opportunity to make representations before terminating the credit agreement. This, she said, would be absurd.

An analysis of public policy that proceeded from a finding that both the best interests of the child principle and the right to basic education apply horizontally in the specific context of a private school could have eased Hartford JA’s concern. The relationship between an independent school and parents and learners, and the nature of that school’s duties in relation to the rights of a learner, may well be very different from the relationship between a bank and the same parties. These differing relationships may in turn bear heavily on the constitutionality of contractual arrangements. Nicholls AJ touched on this distinction in her critique of the Supreme Court of Appeal’s floodgates concerns. Those concerns failed to account, Nicholls AJ wrote, ‘for the peculiar nature of contracts that seek to impinge upon or regulate the fundamental educational rights of children under the Constitution’. We agree. The textual framework of the Constitution provides a mechanism for asserting this distinction: section 8(2). When we have reached an interpretation of the common law via section 8(2), the spirit, purport and objects of the Bill of Rights may have different (and more specific) implications than circumstances in which no direct obligations exist. It may not offend the common law, understood in light of section 39(2), for a bank to insert a termination provision in its scooter rental agreement where the implementation of that agreement might negate access to basic education, precisely because the section-39(2) exercise in that case might take place without a finding that a provision in section 29 binds the bank.

We should not be misunderstood. Our appreciation of the Court’s analysis of the substantive rights in issue demonstrates the importance of a judicial embrace of the direct application of rights under section 8(2). However, the Court’s well-intentioned leveraging of section 8 as a transformative constitutional tool will remain limited if the approach in Pridwin gains traction in future cases. First, the necessity of transforming the existing foundations of the common law in private relations will not be met. Second, the balanced and principled approach to the

135 While Finn (note 42 above) at 601 and, similarly, Boonzaier (note 89 above) propose that the Barkhuizen approach would have yielded a similar outcome for the Applicants as that reached by the Constitutional Court, it is interesting (and perhaps instructive) that the approach was not ultimately successful for the Applicants in the High Court or Supreme Court of Appeal. We do not contend that the Barkhuizen approach was necessarily incapable of reaching this outcome (particularly if Barkhuizen is understood as offering a more robust rights-based analysis than it otherwise suggested – see note 126 above). However, we suggest that the development of the common law through a s 8 analysis could have mitigated some of the concerns raised in the lower courts and may impact the outcome in some cases.

136 Pridwin HC (note 4 above) at para 89.

137 Ibid.

138 Pridwin CC (note 1 above) at paras 62–63.

139 See reference to Fagan’s analysis described at note 122 above. Finn (note 42 above) at 595 also notes that indirect application via s 39(2) ‘will often have more far-reaching effects’, whereas direct application via s 8, ‘typically provides the impetus and justificatory basis for a more discrete legal rule’.
limitation of rights under section 36 of the Constitution will be negated. Third, opportunities for a context-sensitive, agent-relative and rights-specific development of the common law of contract will remain stunted.

V CONCLUSION

The *Pridwin CC* judgment is a cause for both celebration and concern. On the one hand, the Court’s conclusion that private schools are bound by children’s rights to basic education and the paramountcy of a child’s best interests is an important step forward in education jurisprudence. With a rise in low-fee independent schools, activists and education lawyers will welcome the Constitutional Court’s confirmation that private schools cannot ignore their obligations in providing the fundamental right to basic education. On the other hand, the missed opportunity to rectify the uneasy legacy of *Barkhuizen*, and to fully embrace the constitutionalisation of contract law is to be lamented. In this sense *Pridwin* has actually dealt a blow to the transformative potential of section 8 of the Constitution, which mandates a connection between the Constitution and the existing common law.
Non-Racial Constitutionalism: Transcendent Utopia or Colour-Blind Fiction?

KEVIN MINOFU

ABSTRACT: This article considers non-racialism in the South African Constitution. It locates non-racialism as a founding provision of the South African constitutional order and then proceeds to trace its history in the anti-apartheid movement up until its inclusion in the Constitution. An understanding of this history clearly shows that the most prominent proponents of non-racialism have always rejected the existence of race on an ontological level, while accepting its salience in social reality. The article then analyses a string of decisions in affirmative action cases where the Court has had to contend with the principle of non-racialism in circumstances where race-conscious remedial action has been affirmed by the Court. The article contends that a proper understanding of these cases and, moreover, the entire constitutional scheme indicates that non-racialism in the Constitution does not stand as an impediment to race-conscious redistributive efforts – it instead rejects colour-blindness and acts as a powerful licence to dismantle all forms of racial hierarchy by being actively attentive to race in decision-making.

KEYWORDS: affirmative action, discrimination, founding provisions, non-racialism, remedial measures

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I INTRODUCTION

1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:

   a. [...]
   b. Non-racialism and non-sexism.¹

The Constitution underpins the new Republic of South Africa that emerged from the racially divided system of apartheid and centuries of colonialism. In establishing the new South Africa, the Constitution declares that one of the values which underlies this new Republic is ‘non-racialism.’

However, what does ‘non-racialism’ mean? And how should this founding constitutional value shape our commitment against not only the continued historical consequences of centuries of colonialism and apartheid but also the contemporary strife of South Africa’s intractable relationship with race? What role does it play in constitutional law cases that deal with race? Does it operate as a neutral value that does not have any determinative effect on cases, or does it place demands on cases that implicate race? In this article, I attempt to answer some of these questions.

Non-racialism as a phrase and a concept abounds across contemporary South African life and is invoked in politics, culture and media often to mean contradictory things. Considering it is a value defended by the Constitution, it is also the subject-matter of constitutional litigation. One recent example is the Masuku case, the outcome of which was awaited at the time of writing in November 2021.² The case deals with an allegation of hate speech made in the context of protests related to the conflict between Palestine and Israel. In advocating for a particular construction of s 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 (‘Equality Act’), one of the amicus parties contended that non-racialism demands that the government ‘will not treat individuals of different races differently for that reason alone’.³ This assertion offers one view of what non-racialism means in a constitutional sense. The opportunity to make such an argument exists precisely because, unlike some of the other founding values in the Constitution such as the ‘rule of law,’ ‘constitutional supremacy’ and ‘human dignity,’ non-racialism is an international concern,⁴ but it has a particular history in South Africa. Furthermore, it has never been expressly pronounced upon by our courts. In an increasingly strained South African landscape, where we are likely to see a growing contestation about the continued salience of race in our society, our courts are going to have to confront what the founding value of ‘non-racialism’ means in the constitutional setting and what bearing it has on difficult cases dealing with racial conflict.

To address the questions raised above, I propose to proceed as follows. Firstly, I will explore an interpretation of the concept of non-racialism as it is provided for by the Constitution and consider the bearing that the concept has as a founding provision. Secondly, I will look back to explore the history of non-racialism in South African politics, with specific reference to its roots and, at times, its competing conceptions. In this exercise, I hope to show that non-racialism is

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¹ Constitution of the Republic of South Africa (1966) s 1 (‘the Constitution’).
³ Masuku Fifth Amicus Curiae Heads of Argument (submitted by the Rule of Law Project) at para 39.
a praxis which demands a commitment to dismantle the material consequences that continue to give race such importance in South African life. I argue that both the particular pre-1994 understanding of non-racialism, together with its contemporary articulation, have relevance for how the Constitutional Court must view the concept within the Constitution. I will then analyse a particular line of cases which bring to bear some of the competing considerations of race, non-racialism and discrimination. I focus on a series of affirmative action cases before the Constitutional Court to assess how the Court itself has theorised non-racialism in the Constitution and the bearing it has on some of these difficult cases. Lastly, I contend that the Court has undervalued the substantive obligations of non-racialism, which would mean that a commitment to non-racialism does not stand in opposition to race-based affirmative action policies and redistribution efforts. In this regard, non-racialism stands not as empty neutral platitude but as a powerful and potentially transformative ideal that authorises far-reaching measures to challenge and dismantle all instances of racial subordination.

II NON-RACIALISM AS A FOUNDING PROVISION

As described above, ‘non-racialism’ is ensconced in the Constitution, in a section which the National Assembly may not amend without a 75 per cent majority. What are the implications for non-racialism’s prominence in the Constitution?

As Fowkes notes, the structure of section 1 of the Constitution shares similarities with the document submitted by the Panel of Constitutional Experts (an independent panel of seven members set up to advise the Constitutional Assembly on constitution drafting) on the criteria that should be applied when considering issues for inclusion in the constitution. Fowkes argues that given that these ideas were considered to be framing principles, which undergirded the writing of the entire Constitution, the values set out in section 1 operate as ‘descriptions of particularly important aspects of what other parts of the Constitution already protect and uphold’.

This understanding of the founding provisions is important as it aims to reconcile some of the debate that exists as to the role of the values listed in section 1 in the Constitution. One interpretation which was defended in the NICRO case is that, in the Court’s parlance, the section does not ‘give rise to discrete and enforceable rights in themselves’. However, there are contrary approaches which contend that section 1 may act as a source of independent and justiciable obligations, such as the apparent approach in the Modderklip case, which considered the rule of law in section 1(c). This is buttressed by the Court’s jurisprudence on the principle of legality which also draws its authority from the founding provisions in section 1(c).

Fowkes contends that these two positions may be reconciled if one considers that the founding provisions constitute ‘descriptive principles’ which ‘describe basic features of South

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5 Constitution s 74.
7 Ibid.
9 President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd [2005] ZACC 5, 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC) (‘Modderklip’) at para 38: ‘The first aspect that flows from the rule of law is the obligation of the state to provide the necessary mechanisms for citizens to resolve disputes that arise between them. This obligation has its corollary in [the section 34 right]’.
Africa’s constitutional order. It follows then that they operate by indicating certain values that the Constitution itself aims to uphold and protect. Thought of the other way, particular features of the Constitution – both in its structure and specific provisions – are designed to live up to the values set out in section 1. That means that the obligations set out in section 1 do not exist independently purely because of section 1 but are given life and effect by the provisions of the Constitution.

Thinking about this in terms of non-racialism, as a value, it is given effect by specific provisions in the Constitution. Thus, when aiming to determine what non-racialism means in the context of the Constitution, the most defensible approach would be to define non-racialism with reference to how the Constitution provides for its inclusion as a value. In a Dworkonian sense, this requires us to determine the best concept of non-racialism which fits our case law. In addition, on a normative basis, what conception of non-racialism best justifies the provisions of the Constitution and our existing case law?

The challenge, however, is that courts have left the value of non-racialism sufficiently vague that numerous conflicting conceptions of it could constitute a ‘best fit’. As such, there is the further task of adjudicating which of these conceptions we should adopt as the meaning of non-racialism. In accomplishing this, I believe that reference to the history of the concept’s development is instructive. I do not believe that this is a capitulation to originalism – the American school of interpretation which looks at what the words meant at the time they were drafted – a proposition which our courts have largely rejected. However, studying the history of non-racialism helps inform an understanding of a particular philosophy around race that is able to justify the way the Constitution treats race and what non-racialism therefore entails.

Non-racialism implicates how we understand race and its role in society, both historically and in the present. In addition, it provides a vision for the future of South African society and race’s role (if any) in that future. It also contends with the strategies and means by which we reconcile with our past and move from the present to that future. In many respects, the key contestations around non-racialism exist because it is used equivocally in different contexts. Yet, the Constitution’s founding values are presumed to have definitive meaning; a meaning which accords with the Constitution as a whole. In tracing the concept’s history, a history which no doubt substantiated its inclusion in the Constitution, I hope to identify the interpretation that best accords with South Africa’s foundational law.

III HISTORY OF NON-RACIALISM

A The 1950s and multi-racialism

Non-racialism has had a long and complicated life in South African political history and has been articulated in different ways by disparate groups. In its modern prefiguration, it was developed in the 1950s by groups opposing apartheid.

11 Fowkes (note 6 above) at 12.
Non-racialism had its first emergence in South Africa in the argument that the franchise in the Cape Province should not be restricted by race.15 However, in the 1950s, non-racialism was appropriated in response to a number of developments in both South Africa and the decolonisation movement across the African continent.16 Non-racialism owes its contemporary meaning to the theorising around a different term that began in the 1930s, namely, ‘multi-racialism’. At that time, white South African liberals began to speak of a ‘multi-racial society’ as a new vision for South Africa. The new perspective was seen as a middle-ground approach which would respond to demands for increased power from the Black African majority, while still ensuring that whites maintained their disproportionate dominance in South African life.17 This form of multi-racialism would consist of separate qualified franchises for each of the racial groups based on a federalist model. Meanwhile, as the calls for decolonisation spread across the continent, there was much debate about what these post-colonial societies would look like, as they comprised native populations, Asian populations and white settler communities. In what is now Zimbabwe, colonial officials argued for a Central African Federation of the two Rhodesias (North and South) with Nyasaland into a multi-racial partnership of the territories now known as Zimbabwe, Zambia and Malawi.18 A similar configuration in the Kenyan Constitution of 1954 saw increases in the representation of Black Kenyans and Indian Kenyans with the consolidation of power by whites.19 As Soske adds, these configurations of multi-racial society were seen by their proponents ‘as the only alternative to barbarism’.20

In South Africa, the tumult of the Defiance campaign (launched in 1952 as a large-scale mobilisation against apartheid laws) reinvigorated debate about an alternate anti-apartheid vision for South Africa. The national unity and racial diversity that coalesced in the Congress Alliance saw an inclusive vision of South African society where everyone would have a claim to the territory. This culminated in the adoption of the Freedom Charter in 1955. In contrast to the premise that the separate racial groups needed separate representation, Chief Albert Luthuli began speaking of a multi-racial, but united, people of South Africa and the need for a ‘common society’.21 Later on Luthuli himself began to use the phrase ‘non-racial’ to describe his vision for South African society.22 In this early theorising non-racialism was understood as a vision of a universal, generic humanism.23 This form of humanism rejects the biological essentialism of race as a category of human difference. The central justification for the ruling National Party’s race classification was based on the alleged importance of biological, social and observable characteristics which were considered objective and therefore scientifically

16 Ibid.
17 Ibid at 6.
18 Ibid at 10.
19 Ibid at 12.
20 Ibid.
22 Suttner ibid.
23 Ibid.
verifiable. As such, the policy of apartheid was predicated on the idea that because of these distinctions between racial groups, it was necessary to keep them separate in all spheres of life. By arguing that, ontologically, race was an illusion, non-racialism attacked one of the key pillars of apartheid thought.

Theorisation about non-racialism was indebted to the powerful critiques of multi-racialism made by anti-colonial critics such as Tom Mboya in Kenya, who argued that multi-racialism was effectively a form of segregation. Non-racialism was asserted as a means to oppose the multi-racialism of apartheid and white liberal thought. This was picked up by the African nationalist wing of the ANC and what effectively became the PAC, as Robert Sobukwe noted, ‘we reject multi-racialism in favour of a non-racial democracy because multi-racialism suggests a maintenance of racial groups’. Rejecting biological essentialism, they argued that race was a consequence of divisions wrought by settler colonialism. For Sobukwe this meant that it was of paramount importance that African liberation should be led by Black Africans.

However, non-racialism’s proponents did concede that while race was not biologically determinative, its social construction had material consequences. This was self-evident in apartheid South Africa, where depending on the colour of your skin, and how you were subsequently classified, your entire life trajectory would be shaped and determined. In that way, race was very real. As Suttner notes, an analogy could be drawn with classification based on class, which is also a social construction without any biological truth, but which had real world effects.

B The 1960s and onwards: challenging the meaning of non-racialism

This conception of non-racialism as the antithesis of the multi-racialism of the apartheid project became a crucial pillar of the liberation movement after the 1950s. It became a key organising praxis for the Congress Alliance which comprised coalitions of different racial groups opposing apartheid. The ANC began to conceive of a ‘multi-racial society and non-racial democracy.’ Oliver Tambo would later describe the commitment to non-racialism as robust anti-racism:

There must be a difference. That is why we say non-racial. We could have said multi-racial if we wanted to. There is a difference. We mean non-racial, rather than multi-racial. We mean non-racial – there is no racism. Multi-racial does not address the question of racism. Non-racial does. There will be no racism of any kind and therefore no discrimination that proceeds from the fact that people happen to be members of different races. That is what we understood by non-racial.

Non-racialism became a rallying cry for the entire movement and this reached its apotheosis with the formation of the United Democratic Front in 1983, which, with its diverse membership of organisations, saw non-racialism as a response to the fragmentation of the anti-apartheid

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25 Suttner (note 21 above) at 24.
26 Soske (note 15 above) at 17–18.
29 Suttner (note 21 above) at 27.
movement at the time.\textsuperscript{31} However, some adherents of non-racialism who emanated from the Unity Movement such as Neville Alexander warned that any vision of non-racialism could not capitulate to the language of race.\textsuperscript{32} This amounted to an insignificant negation of apartheid's 'herrenvolkism'.\textsuperscript{33} In his view, non-racialism had to amount to a 'complete deconstruction of the category of race, and a refusal to allow its re-emergence in any form, particularly in progressive politics'.\textsuperscript{34}

There were other theorists of race and non-racialism, who noticed Sobukwe's more radical understanding of non-racialism, namely, Steve Biko with his theorisation of Black Consciousness (BC). For him, the liberal adoption of the concept of non-racialism was merely a fig leaf for purportedly multi-racial collaboration that would only lead to white domination in organising spaces – as his experiences in multi-racial student politics had demonstrated convincingly.\textsuperscript{35} For Biko, non-racialism was an end and not a means.\textsuperscript{36} As he said, 'I think what we want is a non-racial society. That is non-racial within the context of the country and peoples where we are.'\textsuperscript{37} As Biko writes, BC would be unnecessary in a society which was not exploitative and did not stratify on the basis of race.\textsuperscript{38} Biko's vision of race, and thus non-racialism, was material in that race was not merely the problem of classification by race but also applied to the distribution of material resources resulting from that classification. Moreover, Biko saw race not as a question of skin colour, but one of law, economics, politics and sociology. This is shown in how he described people who were 'Black': 'those who are by law or tradition politically, economically and socially discriminated against as a group in the South African society and identifying themselves as a unit in the struggle towards the realisation of their aspirations'.\textsuperscript{39} The journey to this process required passage through Black Consciousness which would liberate the oppressed racialised groups in South Africa from the material and psychological oppression of racism. As Modiri writes:

> It is worth recalling the classic Black Consciousness dual formulation of liberation in terms of the 'psychological' and the 'physical'. Freedom from psychological oppression entails 'emancipation from mental slavery' and from an inferiority complex. It extends also to epistemological and cultural liberation. On the other hand, 'physical' liberation from the material oppression suffered by Blacks in a racist society includes freedom from economic deprivation, social death, political disenfranchisement and legally sanctioned discrimination. \textit{It is only once Blacks are liberated in this manner, that a truly non-racial post-colonial nation can come into being.} That is to say that for Biko, liberation must entail both respect for plurality and difference as well as the restoration of material and symbolic parity between whites and Blacks such that those categories cease to be of any meaning or value.\textsuperscript{40} (emphasis added).

\textsuperscript{31} Petersen (note 27 above) at 69.
\textsuperscript{32} Ibid.
\textsuperscript{33} Ibid.
\textsuperscript{34} Ibid. Also No Sizwe/N Alexander ‘One Azania, One Nation’ in B Pityana et al \textit{Bounds of Possibility: The Legacy of Steve Biko & Black Consciousness} (1st ed, 1991), 250.
\textsuperscript{36} D Hook \textit{Voices of Liberation: Steve Biko} (1st Ed, 2014) 147.
\textsuperscript{37} Ibid.
\textsuperscript{38} Biko (note 35 above) at 96.
\textsuperscript{39} Ibid.
\textsuperscript{40} Modiri (note 35 above) at 176–177.
In fact, anything short of that material commitment to upending racial hierarchy by recourse to colour-blindness would merely entrench racism, and as Biko deliberately labeled it, ‘white racism.’\(^41\) As such, Biko’s conception of non-racialism was fully emancipatory of the lived conditions of racial oppression, and he wrote against versions of the ideology which would have resorted to colour-blind concessions to the status quo. Moreover, the dismantling of race would require attending to its legal, economic, political and social manifestations too.

Posel argues that non-racialism can be understood as both an ethical and a strategic imperative. The ethical motivation is, as described above, a theory of humanism which worked to transcend the artificial barriers which race erected. As Posel argues, this was not merely a reincarnation of Enlightenment principles which had seen humanism as only adhering to white European males but one which drew upon the racialised and colonised experience of South Africa. Drawing from interviews with Ahmed Kathrada, it was a ‘mode of mutual recognition as human beings notwithstanding historical and contextual differences of race.’\(^42\) This was an inheritance from the Congress movement which had taken up non-racialism in the 1950s without ever denying the social fact of race. From a strategic standpoint, the recognition that there was a need to galvanise and unite the disparate groups which formed the liberation movement. Although Kathrada conceded that the term was under-theorised even then, he argues that it was effective as an organising tool to bring the different factions together for a common goal – which was toppling the apartheid system.

By the dying days of the apartheid regime, non-racialism had emerged as an organising political ideal among a broad swathe of the anti-apartheid groups. In 1991, the African National Congress produced a guiding document for the constitutional negotiation process called the ‘Constitutional Principles for a Democratic South Africa.’ In terms of that document, the ANC set out that:

A non-racial South Africa means a South Africa in which all the artificial barriers and assumptions which kept people apart and maintained domination, are removed. In its negative sense, non-racial means the elimination of all colour bars. In positive terms it means the affirmation of equal rights for all … A non-racial Constitution can be adopted rapidly but a non-racial South Africa would take many years to evolve … the Constitution must provide the positive means to reduce progressively the imbalances and inequalities and to ensure that everybody has an equal chance in life.\(^43\)

This gives an indication of at least what the ANC, which had a great influence over the constitutional negotiations, understood non-racialism to mean. Given the trajectory of the ANC’s embrace of non-racialism over the previous 40 years, this understanding of non-racialism was to inform the constitutionalisation of the concept. It is telling that the ANC’s understanding involved the removal of barriers that not only separated South African

\(^{41}\) Biko (note 35 above) at 54:

In terms of the Black Consciousness approach we recognise the existence of one major force in South African society. This is white racism. It is the one force against which all of us are pitted. It works with unnerving totality, featuring both on the offensive and in our defence. Its greatest ally to date has been the refusal by us to club together as Black people because we are told to do so would be racialist. So, while we progressively lose ourselves in a world of colourlessness and amorphous common humanity, whites are deriving pleasure and security in entrenching white racism and further exploiting the minds and bodies of the unsuspecting masses.


but importantly, ‘maintained domination.’ This understanding, at the very least, seems to extend beyond a bare rejection of race but also the power relations that race had created. This is also corroborated by the fact that ANC was embracing non-racialism but espousing policies that would use race to reshape economic, political and social relations in South Africa. As described earlier, it was this journey from the ANC’s guiding document to the paper submitted by the Constitutional Experts that brought non-racialism as a founding provision of the Constitution. However, as Everatt describes:

Unfortunately, the drafters of the Constitution took no time to define what non-racialism meant, how it ought to be realised in practice, how behaviours need to change or – most importantly – how to amend the economic underpinning of both racism and apartheid, a necessary precondition for realising any kind of non-racialism in practice.44

Even though non-racialism is not expressly defined in the Constitution, I argue that an analysis of how the Constitutional Court has dealt with affirmative action cases illuminates a particular vision of non-racialism. It is one which accords with its radical understanding of race as part III on the history of non-racialism has attempted to uncover. However, before I proceed with the analysis of the Court’s affirmative action judgments, I need to briefly sketch some of the contemporary challenges to non-racialism that have been prevalent since the inception of the Constitution. These challenges, I believe, will have to be faced as the Court begins to deepen its theorisation of non-racialism.

C  The 1990s, constitutionalism and new challenges

In the early 1990s, non-racialism was eclipsed by the frantic attempts at reconciliation on a policy level. This culminated in the idea of South Africa as a ‘rainbow nation’. It is at the very least debatable whether we must consider the idea of the rainbow nation as a version of non-racialism. As Posel argues, the idea of a rainbow seems to concede that there is some racial plurality.45 As opposed to contesting the idea of race it accepts it because of our multi-racial history. As has been detailed above, while non-racialism is an ethical pursuit which aims to create a society where the concept of race does not have material consequences, it very much accepts race as an existing social fact that cannot be ignored in any attempt to transcend race.

The limits of this rainbow nation rhetoric can be seen in the challenge brought about by the ‘Rhodes Must Fall’ and ‘Fees Must Fall’ movements of the last five years. These student movements reacted directly to the persistence of racism in white-dominated university spaces 20 years after the end of apartheid. The critique that these movements made of the rainbow nation concept was that it merely acted as an illusion of transformation while not fundamentally modifying the privileging of whiteness in South African university spaces. However, this critique does not seem to me to be one which is fundamentally irreconcilable with the concept of non-racialism. One of the strands of the ‘Fallist’ thinking was that whiteness was not a natural consequence of varying phenotypes but a social construction which resulted in those who were deemed not to be white to suffer material consequences. Similarly, non-racialism as an ethical concept also regards the dismantling of the concept and privileging of whiteness as a key element in moving towards a non-racial society.

44  Everatt (note 14 above) at 12.
45  Posel (note 42 above) at 2169.
From the other side, however, non-racialism has been taken up by political forces to effectively argue for colour-blindness. In particular, at a conference in 2020 the Democratic Alliance (DA) proposed to adopt a policy of ‘non-racialism over multi-racialism’. While conceding that race is a social construct, the DA asserted that this new policy would aim to move past the apartheid classifications of race that prevented economic redress to the millions of impoverished South Africans. As discussed in detail above, the main protagonists of non-racialism have understood it not only to recognise that race is a social construct, but also to use race to dismantle itself. The DA’s policy seems to attempt to dispense with race as a means of understanding South African society while glossing over the fact that South Africans have been disadvantaged by centuries of white supremacy. Colour-blindness most often has the effect of freezing the material racial resource allocations at a particular point and being unsuitable to create the transformative society that the country has committed itself to. This articulation of non-racialism was like the one contended by the amicus in the Masuku case.

In this regard, Petersen identifies four conceptions of non-racialism which serve as a useful frame for uncovering non-racialism in the Constitution.

1. **Non-racialism as a deconstruction of race**

In this conception of non-racialism, the notion of race as a scientific category is rejected, together with any other essentialist arguments for its salience. As Petersen describes in this regard, ‘non-racialism is a radical project, therefore, that at once confronts racial domination and essentialist notions of difference and identity’. Race is therefore seen not as skin colour but as systems of domination and subordination that render whiteness as proximate to power. As such, dismantling ‘race’ as a category requires opposing these systems that delineate resources along racial lines.

2. **Non-racialism as anti-racism**

Non-racialism as anti-racism could appropriately be seen as a closely linked, yet broader, concept to non-racialism as a deconstruction of race. As anti-racism, non-racialism is a key theoretical underpinning to the idea of racism and racial domination. As espoused by Biko, this is a frontal attack against the multi-racialism of apartheid but also the liberal theorising around race that

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47. Petersen (note 27 above) at 64.

48. Ibid.

49. For a sustained understanding of ‘whiteness’ as a legal-property regime see C Harris ‘Whiteness As Property’ (1993) 106(8) Harvard Law Review, 1707, 1737:

Moreover, as it emerged, the concept of whiteness was premised on white supremacy rather than mere difference. “White” was defined and constructed in ways that increased its value by reinforcing its exclusivity. Indeed, just as whiteness as property embraced the right to exclude, whiteness as a theoretical construct evolved for the very purpose of racial exclusion. Thus, the concept of whiteness is built on both exclusion and racial subjugation. This fact was particularly evident during the period of the most rigid racial exclusion, as whiteness signified racial privilege and took the form of status property.

See also Crenshaw’s observation in ‘The Eternal Fantasy of a Racially Virtuous America’ New Republic (22 March 2021) that ‘We must grapple with the fact that whiteness – not a simplistic racial categorization, but a deeply structured relationship to social coercion and group entitlement – remains a vibrant dimension of power’, available at https://newrepublic.com/article/161568/white-supremacy-racism-in-america-kimberle-crenshaw.
emerged from the Freedom Charter. As discussed above, in this vision, non-racialism was not the means of transformation but the end. As such, it was a critique of the Unity Movement’s argument that any discussion of race was a slippery-slope to the reification of racial categories, because any deconstruction of race had to fully tackle race and its physical and psychological wages now.\(^\text{50}\) The sophistication of Biko’s argument is that he theorises the category of Black not as a settler-colonial and apartheid category but one which is linked to the struggles of all racialised and oppressed groups.\(^\text{51}\) Further, this also charted the history of race not back to apartheid but to the first colonial encounter and the dispossession and pillage that followed thereafter.\(^\text{52}\)

3 **Non-racialism as cross-racial alliance and co-operation**

In this conception, non-racialism as described above by Kathrada was used as an organising tool for various anti-apartheid groups attempting to form alliances and networks across racial divides. This became dominant in the UDF and the ANC (once it allowed white members to form parts of its Executive Committee after 1985) during the politics of the 1980s. Non-racialism in this conception was a retort to the Black Consciousness’s deep suspicion of even white liberals’ presence in activist spaces. After the formal end of apartheid this conception of non-racialism as a defence against the BC movement’s suspicion was still often used to describe organisations and spaces which allowed membership and participation of all races.\(^\text{53}\)

4 **Non-racialism as anti-racialism**

A fourth deployment of non-racialism is that which is against all discussion of race. As articulated above by the DA, this does not share any of the critical attempts to deconstruct race but is better described as a form of race-neutrality or colour-blindness. In this regard, race is a discredited theory but is also something that has necessarily been overcome or superseded. The demise of formal apartheid ended the legitimate uses of race as a social category and as such attempted to evoke race-talk only to revive race logics, particularly when discussing affirmative action. The argument goes further, however, this commitment to anti-racialism means that any invocation of race is racist. Therefore, an equivalence is drawn between groups as diametrically opposed as white supremacists and ‘Black Lives Matter’. As Soske writes, this is only possible because the language of race is only ever mediated through supposedly neutral institutions, so that whiteness is equivalent to blackness, when in fact whiteness can only function in a hierarchical system where blackness is subordinated.\(^\text{54}\) As Petersen writes,

firstly, unlike the deconstruction position, this position does not recognise the salience of racial domination as an historical construct with a long and brutal tail that continues to wreak havoc in peoples’ lives. Secondly, non-racialism here does not mean deconstructing the notion of race but means opposing all categorising and organising of people in terms of ‘racial’ groups.\(^\text{55}\)

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\(^{\text{51}}\) Biko (note 35 above) at 96.


\(^{\text{53}}\) See, for example, the ANC Membership Policy, available at https://www.anc1912.org.za/how-to-join-the-anc/.

\(^{\text{54}}\) Soske (note 15 above) at 2.

\(^{\text{55}}\) Petersen (note 27 above) at 66.
The heterogenous interpretations of non-racialism have shown that while it has always been a contested and nebulous concept, it emerged out of opposition to the concretisation of race that apartheid mandated and out of visions of a society that would still rely on race as its organising theory. This shows that it required a radical commitment to anti-racism which would seek to break the conditions by which race was made real but, in opposition to colour-blind understandings of race, this did not mean an ignorance to the social fact of race.

At this stage, however, it seems most appropriate to see how the Constitutional Court has grappled with the concept of and commitment to non-racialism. I propose to do so by looking at those dealing with race conscious affirmative action. It is evident that we see strands of all these conceptions of non-racialism in the case law, and yet no single version has consistently been used in all cases that implicate race, its history, and its implications for the Constitution’s transformative project. However, the Constitutional Court’s affirmative action cases, I argue, have implicitly conceived of a version of non-racialism which is most coherent with the concept’s history, and therefore, the Constitution.

IV CONSIDERING THE CONSTITUTIONAL JURISPRUDENCE

A Race conscious affirmative action

The affirmative action cases are instructive because they expose an apparent tension between some conceptions of non-racialism and the fact that race-conscious affirmative action policies, not only actively take race into account in the allocation of benefits, resources and employment, but they therefore also treat people differently on the basis of their race. Of course, there are other areas of constitutional law where non-racialism would be implicated, namely hate speech and pure discrimination cases. By analysing these cases, I hope to assess how the Court has squared the apparent contradiction at the heart of affirmative action cases together with how this is illuminated by the standards that review courts use to justify affirmative action policies.

1 Van Heerden

Although the phrase non-racial or non-racialism has been used in previous cases before the Court, one of the first major instances where the commitment required interrogation was in the case of Van Heerden.56 The case concerned certain pension fund provisions which were intended for parliamentarians. Because there had been a transition between the apartheid-era Parliament and that of the democratic Parliament, the Minister of Finance had devised certain pension provisions which would have had the effect of benefiting members who had entered Parliament in 1994 as opposed to those who had entered prior to democracy. Aggrieved members challenged this on the basis that this amounted to unfair discrimination based on race (almost all the members of the pre-1994 Parliament would have been white).

The Court had to consider whether these pension provisions fell within the purview of a remedial measure in terms of section 9(2) of the Constitution or should be adjudicated under the unfair discrimination provisions of section 9(3).57


57 Section 9 of the Constitution is as follows:

1. Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures
Mosenke J, writing for the majority of the Court, was of the view that the measure fell under section 9(2). Mosenke J affirmed again that section 9 of the Constitution demands substantive equality and not a mere formal equality where differently situated individuals are treated in the same way. Following this reasoning, he held that section 9(2) of the Constitution did not amount to a deviation of the principle of equality or some concession for ‘positive’ or ‘reverse’ discrimination; instead, these remedial measures formed a crucial part of the ‘foundational equality objective of the Constitution and its broader social justice imperatives’. In his view the test to determine whether an act fell within a remedial measure in terms of section 9(2) was three-fold:

It seems to me that to determine whether a measure falls within section 9(2) the inquiry is threefold. The yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons and the third requirement is whether the measure promotes the achievement of equality.

This principle has come to be known as the Van Heerden test.

However, what is pertinent is that Moseneke J reaches this conclusion without seriously interrogating what the commitment to non-racialism means in the context of the race-conscious remedial efforts. There are passing references to the commitment to building a non-racialist society but the judgment seems to implicitly accept that this society may only be reached through the remedial measures envisioned in section 9(2).

Sachs J in a concurring judgment goes a little further in engaging in that enquiry. While concurring with Mosenke J’s judgment that the remedial action should be considered under section 9(2), he was also sympathetic with the view that assessing a measure under section 9(2) could not completely insulate it from the assessment of fairness in section 9(3).

At a minimum, the Court’s rejection of a formal equality framework represents an implicit disavowal of a mere anti-classification view of the equality provisions in section 9 of the Constitution. In this regard, the classification of individuals on the basis of race does not

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58 Van Heerden (note 56 above) at para 26.
59 Ibid at para 30.
60 Ibid at para 37.
61 Ibid at para 44:

However, it is also clear that the long-term goal of our society is a non-racial, nonsexist society in which each person will be recognised and treated as a human being of equal worth and dignity. Central to this vision is the recognition that ours is a diverse society, comprised of people of different races, different language groups, different religions and both sexes.

62 For more on the distinction between the anti-classification and anti-subordination views of equality jurisprudence see JM Balkin & RB Siegel ‘The American Civil Rights Tradition: Anticlassification or Antisubordination?’

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infringe section 9 and neither does the differential treatment of people on the basis of race either, provided that the treatment is done in accordance with the test set out by Moseseke J, the measure would fall within the purview of section 9(2) and thus escape being deemed unfair discrimination under section 9(3). It therefore follows that not only would race-conscious affirmative action policies not be in contradiction with the aspiration of non-racialism as set out in section 1 of the Constitution, but it also seems implicit in all the judgments that they are necessary to reach such a non-racial society. In addition, the Court has taken a deferential approach to remedial policies, requiring that the state must show that these policies are designed to achieve equality but not necessarily to show that they factually have. This indicates that the Court must be of the view that a permissive attitude to remedial measures under section 9(3) is a vital component of non-racialism. While the Court does not, unfortunately, directly contend with why non-racialism is not an impediment but a strut for this expansive notion of race and remediation, the Court does seem to reject the narrow notion of non-racialism as merely anti-racialism, in favour of a notion that sees the commitment to non-racialism authorising efforts to dismantle substantive barriers that serve to prop up racial hierarchy.

2 Barnard

The next time the Court had to consider the relationship between section 9(2) and section 9(3) would be in *Barnard*. The case dealt with a white woman police officer who was not promoted to various roles because her promotion would not have fulfilled various racial and gender goals of the police. Despite the fact that *Barnard* came after the *Van Heerden* case, it was apparent that courts in the wake of *Barnard* have used divergent reasoning to adjudicate affirmative action claims. Given this uncertainty, there was hope that the Court would use *Barnard* to settle this confusion once and for all. Unfortunately, the case sowed more confusion than it clarified. While all four judgments agreed that Ms Barnard’s dismissal was constitutionally justifiable, they arrived there in different ways.

The majority judgment penned by Moseseke ACJ (who also penned the test in *Van Heerden*) avoided having to apply the *Van Heerden* test to this case which had emanated out of the Employment Equity Act 55 of 1998 (EEA). Moseseke J was of the view that the central basis of the claim was unclear and had not been properly pleaded. Moreover, in that event, there was no proper unfair discrimination claim before the Court. However, he went on to say that despite not having to rule on the exact question, the *Van Heerden* test did apply to remedial measures taken within the auspices of the EEA – at least at the stage of their formulation. When it came to challenging their implementation, he suggested, *obiter*, that the intensity of review was one which encompassed rationality and legality, but he did not have to decide in this matter. A second judgment penned by Cameron, Froneman and Majiedt JJ concluded the unfair discrimination challenge was before the Court and the appropriate test was one of fairness, drawing from the EEA itself and labour law. A third judgment by Van der Westhuizen J was

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63 *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23; 2014 (6) SA 123 (CC); 2014 (10) BCLR 1195 (CC)(‘Barnard’).

also of the view that the unfair discrimination claim was before the Court, the Van Heerden test should be applied here but the appropriate standard to assess the implementation of the remedial measure was one, drawing from section 36 of the Constitution, of proportionality. A fourth judgment by Jafta J criticised the second judgment’s use of fairness and argued that the standard should be one of rationality in achieving the purposes of representativity and equity.

In attempting to understand how the Court conceived of non-racialism’s role in the adjudication process, it is useful to draw from what the Court said about it. From the outset Moseneke ACJ situated remedial measures within a constitutional understanding of substantive equality which is designed to work ‘towards a more equal and fair society that hopefully is non-racial, non-sexist and socially inclusive’. On the other hand, Moseneke ACJ was of the view that:

Remedial measures must be implemented in a way that advance the position of people who have suffered past discrimination. Equally, they must not unduly invade the human dignity of those affected by them, if we are truly to achieve a non-racial, non-sexist and socially inclusive society.

In this regard, remedial measures have two opposing effects on non-racialism. Firstly, they are necessary measures to create a non-racial society but, secondly, they must not unduly invade human dignity of those affected by them if a non-racial society is to be created. The second judgment by Cameron, Froneman and Majiedt JJ picked up this tension but then went further in noting that the Constitution empowers the use of race in remedial measures:

Race, in other words, is still a vitally important measure of disadvantage, but in planning our future we should bear in mind the risk of concentrating excessively on it. To achieve the magnificent breadth of the Constitution’s promise of full equality and freedom from disadvantage, we must foresee a time when we can look beyond race. (emphasis added)

In this statement, the second judgment does something interesting. While rightly encouraging us to look at other factors of disadvantage beyond race, it then hopes for a minimised role for race in the future. But in deploying its argument that the standard by which race-conscious affirmative action should be tested is ‘fairness’, a higher standard than one of rationality, it makes race more suspect, in the parlance of US constitutional law. By making race more suspect as a category of remedial measures, it invites policy-makers to avoid it if they must. In many respects, the argument could be made that things should cut the other way: the more we speak about race now and address its consequences, the less it may continue to be a feature of our society. This problem is another aspect that goes missing when non-racialism is under-theorised as a concept. In addition, it is evident that for the second judgment, race is merely instrumental to, or indicative of, disadvantage as opposed to being the disadvantage in and of itself. This narrow view of race’s continued dominance in South African society reveals a myopia regarding how race was used to allocate resources and how racism continues to subordinate those not defined as white in contemporary South Africa.

The third judgment in Barnard engages further by noting that an individual who has been excluded by a remedial measure may have their dignity impaired in the use of race. In a society committed to becoming non-racial, how can this be accepted? Van der Westhuizen J was of the view that this is because remedial measures are meant to restore the dignity of people who were victims of past discrimination. Furthermore, while the dignity of one individual cannot be weighed against those of millions, at the very least, a proportionality enquiry that considered

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65 Barnard (note 63 above) at para 30.

66 Ibid at para 32.
these factors would have been appropriate. Van der Westhuizen J added that such an enquiry ‘must take into account whether the measure undermines the goal of section 9 to promote the long-term vision of a society based on non-racialism and non-sexism and must be alive to shifting circumstances and the distribution of privilege and under-privilege in society’. As he noted earlier in the judgment this requires an intersectional analysis of the harm suffered by the individual and that of the beneficiaries. While again not expressly dealing with the notion of what non-racialism means, this judgment provides a nuanced analysis of how race continues to play a controlling factor in remedial measures cases even in a society striving to become non-racial. In this regard, this is not by minimising race at the expense of other factors of disadvantage, but in considering all these factors, intersectionally. A non-racial society would thus be one that did not continue to offend the dignity of people based on their race.

3 Solidarity

The next case to consider race-conscious remedial measures was Solidarity. In Solidarity the Court had to consider a challenge against an employment equity plan formulated by the Department of Correctional Services which had set certain national targets for the representation of racial groups in the Department. One of the key issues the Court had to consider was whether the use of national targets had been appropriate without reference to regional targets too. This was because most of the applicants were Coloured correctional officers in the Western Cape (where Coloured people form a larger share of the population than they do nationally). They alleged that they had not been promoted because of the unfair discrimination mandated by the planned national targets.

In deciding this question, Zondo J, writing for the majority, considered whether the ‘Barnard principle’ was also applicable to Coloured individuals. Identifying the Barnard principle as being the question of ‘whether an employer may refuse to appoint an African person, Coloured person or Indian person on the basis that African people or Coloured people or Indian people, as the case may be, are already overrepresented or adequately represented in the occupational level to which the particular African, Coloured or Indian candidate seeks appointment?’

The Court concluded the answer in the affirmative. This was even though Coloured people represented a group which had suffered previous disadvantage and comprised Black people in terms of employment equity legislation. However, the Court found that the numerical targets set by the Department were not quotas. However, he declared the plan for racial targets at a national level to be unconstitutional on the basis that the Department did not consider regional demographics.

Not unsurprisingly, the Court made short shrift of what the commitment to non-racialism entailed in a matter where a disadvantaged racial group alleged unfair discrimination in terms of a remedial measure. The majority judgment did not mention it at all and the dissenting

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67 Ibid at para 147.
68 Ibid at para 153.
70 Ibid at para 38.
71 Ibid at para 38.
judgment from Nugent AJ only referred to the principle in relation to a discussion of *Barnard*. This must be understood as a missed opportunity for the Court to expand on a discussion which had been opened in *Barnard*.

However, Zondo J in the majority, expounded on the *Barnard* principle. He held that it connotes that in the context of workforces ‘the level of representation of each group must broadly accord with its level of representation among the people of South Africa’.73 However, this conclusion was reached without the preceding logical steps that would have justified that conclusion. However, the presumption underlying that argument must be that where workplaces do not accord with population demographics this must be a symptom of structural race, gender and other societal barriers that prevent the inclusion of underrepresented groups. In this regard then, affirmative action measures which aim to bring about demographic representativity in the workplace are justified under section 9(3) of the Constitution. It therefore follows that the use of race, in this instrumental fashion, is thus crucial to realising the aspirations of non-racialism. The Court’s inability to substantiate this bold step is symptomatic of the under-theorisation of non-racialism in constitutional discourse.

4. **SA Restructuring and Insolvency Practitioners Association**

At the time of writing in November 2021 the most recent case in which the Court had to consider race-conscious affirmative action policies was *SARIPA CC*.74 This matter concerned a policy implemented by the Minister of Justice and Constitutional Development to overhaul the system of appointing trustees by the Master. In terms of the policy, certain groups of people, based on their race and gender, were to have preferential treatment in the allocation of trustee appointments. The policy was challenged, inter alia, as being in violation of section 9 of the Constitution. The High Court found that the policy did not pass the *Van Heerden* test. While the policy passed the first leg of the test, which required that it aim to target persons disadvantaged by unfair discrimination, Katz AJ, writing for the court, held that the policy was not rationally related to its purpose and, importantly for these purposes, thirdly, held that the policy amounted to a rigid racial quota.75

In this regard, Katz AJ held that quotas were inimical to the aspiration of achieving equality and violated the dignity of non-beneficiaries of the affirmative action policy. To support this argument, Katz AJ stated the following, ‘a scheme of this nature does violence to the notion of transformation from a racist, racialised, sexist and gendered past to a non-racial and non-sexist future.’76 As Ramalekana has written, Katz AJ held that the ‘the commitment to non-racialism and non-sexism required individual skill and expertise to be approached from a neutral perspective.’77

73 *Solidarity* (note 69 above) at para 40.
74 *Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association* [2018] ZACC 20, 2018 (5) SA 349 (CC), 2018 (9) BCLR 1099 (CC) (*SARIPA CC*).
75 *South African Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development* [2015] ZAWCHC 1, 2015 (2) SA 430 (WCC), 2015 (4) BCLR 447 (WCC) (*SARIPA HC*).
76 Ibid at para 215.
77 N Ramalekana ‘What’s So Wrong with Quotas? An Argument for the Permissibility of Quotas under s 9(2) of the South African Constitution’ (2020) 10 Constitutional Court Review 251, 282.
In the Supreme Court of Appeal the policy was also deemed to be irrational.\textsuperscript{78} Further, Mathopo AJ writing for that court agreed that quotas are unconstitutional, and this policy amounted to a quota.\textsuperscript{79} He held that ‘one form of arbitrariness, caprice or naked preference is the implementation of a quota system, or one so rigid as to be substantially indistinguishable from a quota.’\textsuperscript{80}

When the matter came before the Constitutional Court, the majority judgment penned by Jafta J, sidestepped the issue of whether the policy amounted to a quota but concluded on the basis of the \textit{Van Heerden} test that the policy was irrational for largely similar reasons as those given by the Supreme Court of Appeal.\textsuperscript{81}

Most relevant for these purposes is the powerful minority judgment written by Madlanga J. Departing from the majority’s reasoning that the policy fell to be set aside because it was not reasonably likely to achieve equality, Madlanga J concluded that this was not supported on the facts and, moreover, precision was not a requirement of the \textit{Van Heerden} test and some deference had to be accepted if equality was to be achieved.\textsuperscript{82} In addition, while not definitively holding that quotas were constitutionally permissible, Madlanga J was sceptical about the conclusion that they were impermissible.\textsuperscript{83} He held that the assessment of every policy had to be done on a case-by-case basis and no general rules could be divined.\textsuperscript{84} Further, an ineluctable conclusion of remedial efforts was that there would be individuals who would be harmed by policies but that alone was insufficient to invalidate an affirmative action policy. He held:

\begin{quote}
after all, \textit{Van Heerden} has held that remedial measures will have casualties or result in ‘hard cases’. Lest redress towards the attainment of substantive equality will move at such a snail pace that the dream for equality will be as good as not being realised, it just cannot be business as usual.\textsuperscript{85}
\end{quote}

Again, while none of these judgments (barring the high court’s) explicitly contend with how a commitment to non-racialism rubs up against race-conscious affirmative action, they do offer different visions of how courts must contend with race.

The high court judgment’s conception of non-racialism can best be described as anti-racialism, or in other words, it locates the harm as the use of racial classifications in and of themselves. While accepting a history of racial disadvantage and the need for redress the high court ultimately treated the use of race with suspicion and as being inherently problematic.\textsuperscript{86} As Katz AJ explained, ‘such harm to the core value and right of dignity is the product of a measure which elevates race and gender as absolute categories without any regard to individual characteristics or the context in which appointments must take place.’\textsuperscript{87} Furthermore, in balancing the social categories of race and gender against individual ‘merit’ required that they

\textsuperscript{78} On the basis that in category D of the policy white men were in the same category as certain non-white groups which may not stand a chance of appointment in that category.

\textsuperscript{79} \textit{Minister of Justice and Constitutional Development & Another v South African Restructuring and Insolvency Practitioners Association & Others} [2016] ZASCA 196, 2017 (3) SA 95 (SCA) (‘\textit{SARIPA SCA}’) at para 34.

\textsuperscript{80} Ibid at para 32.

\textsuperscript{81} These were namely the category D applicants.

\textsuperscript{82} \textit{SARIPA CC} (note 74 above) at para 90.

\textsuperscript{83} Ibid at para 79–80.

\textsuperscript{84} Ibid.

\textsuperscript{85} Ibid at para 86. He also approvingly cited \textit{Thibaudeau v Canada} (1995) 2 SCR 627 (cited in \textit{Van Heerden}) that held that ‘the fact that a [measure] may create disadvantage in certain exceptional cases while benefiting a legitimate group as a whole does not justify the conclusion that it is prejudicial’.

\textsuperscript{86} \textit{SARIPA HC} (note 75 above) at para 214.

\textsuperscript{87} Ibid at para 215.
be treated from a neutral perspective which meant that if race or gender was used without regard to individual ‘merit’, this would have the effect of being racist to the non-beneficiary of the policy.

As argued above, such a view on non-racialism can only be described as a dehistoricised neutralisation of the history of race. The commitment to equality cannot result in non-racialism being used as a cudgel to treat all applications of racial categories as the same. As Sachs J noted in Van Heerden, there is a need to distinguish the use of race in ‘measures taken to enforce racism and those taken to overcome it’. 88 In many ways, the judgment of the Supreme Court of Appeal picks up on this with its supposition that the policy was problematic because it failed to take into account the individual merits of non-applicants – as Ramalekana describes, the ‘individualised’ approach. 89

The minority judgment of Madlanga J offered a radically distinct conception of how race could be used in remedial efforts. Firstly, Madlanga J exposed the distinction between the use of race against individualized ‘merit’ as fallacious. Individual merit itself was a consequence of South Africa’s racialised and gendered history. As the Judge described therefore, the reason white people were – and continue to be – disproportionately better qualified and more experienced is a function of the subjugation of black people and their exclusion from accessing equal opportunities through centuries of colonialism and apartheid. 90

As such, an attempt to draw a delineation between the history of racism and individualized merit was misguided as they exist on the same continuum of settler coloniality and white supremacist notions of what constituted ‘merit’ in the first place. In addition, considering this, it became evident why Madlanga J aptly described it as ‘outrageous’ to attempt to draw an equivalence between the harm suffered by non-beneficiaries of affirmative action policies and those who have been harmed by centuries of racist discrimination. 91 While he did not expressly rely on non-racialism for this argument, the Judge described how that would never be countenanced in a ‘normal society’. 92 This judgment accords with the view of non-racialism which treats it as an end and not as a means. It is only by confronting this legacy of racism that South Africa can transition from an unequal and racially divided society to a normal, non-racial society.

B Analysing the race-conscious affirmative action cases

Brassey argues that this line of cases amounts to the courts’ rejection of non-racialism in favour of endorsing a policy of multi-racialism. 93 Multi-racialism as has been previously discussed, had been eschewed as a model of race relations by anti-apartheid groups in the 1950s. Interestingly, Brassey reaches this conclusion without seriously describing what non-racialism is. Instead, Brassey charts the history of how courts have treated race-conscious policies in both South Africa and the USA. In particular, he cites with approval Justice Harlan’s dissent in Plessy v Ferguson the case which enshrined segregation in the United States through the ‘separate but

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88 Van Heerden (note 56 above) at para 147.
89 Ramalekana (note 77 above) at 274–275.
90 Ibid.
91 Ibid.
92 Ibid.
equal’ doctrine.\textsuperscript{94} However, Harlan’s dissent also advocated for the colour-blind view of the Bill of Rights which is still the dominant treatment of race in US constitutional law.\textsuperscript{95} As has been argued by numerous scholars, but perhaps most forcefully by the critical race theorists, colour-blindness is an ideology that not only fails to weaken but actually reinforces white supremacy. In Brassey’s estimation, the very language of race, amounts to a rejection of non-racialism – an argument as I detail above which does not comport with critical understandings of non-racialism. Colour-blindness has clearly been repudiated by our Constitution and by the Court.\textsuperscript{96}

In her essay arguing for the constitutional permissibility of racial quotas, Ramalekana contends that what section 9(2) prohibits from a dignitarian position, is the creation of an ‘underclass’ which deems non-beneficiaries as less worthy in society.\textsuperscript{97} Drawing from the dignity jurisprudence of the Court, Van der Westhuizen’s powerful third judgment in Barnard as discussed above, and the distinction between individual and collective dignity, Ramalekana contends that:

- the principle that affirmative action measures which treat persons or groups as second class, marking them with a badge of inferiority, as an ‘underclass,’ and which obliterate the chances of admission and advancement, creating an absolute barrier, violate the right to dignity – they are a disproportionate means of promoting the achievement of equality.\textsuperscript{98}

This is an argument not only about dignity but one which incorporates an understanding of social power. In this regard, it is not the mere use of race which is an affront but the use of race in such a way to relegate non-beneficiaries to second-class citizenship. It follows then that most affirmative action policies should attempt the opposite, viz., uplift those who for centuries have been relegated to second-class citizenship (and in South Africa’s case, to no citizenship at all). This comports with a powerful understanding of non-racialism which sees the privileges and resources that adhered to whiteness in this country as necessary to dismantle. As such, it is only by targeting the structural barriers that race created using race itself that we can move towards non-racialism.

While in all four cases, the Court has not expressly contended with what the constitutional commitment to non-racialism entails, the remedial measure (affirmative action) cases give us some key insights. Firstly, they tell us that there is no obvious tension between sections 1(b) and 9(2) of the Constitution. Remedial race conscious measures are a necessary component to create a non-racial society that is undergirded by a conception of substantive equality. Secondly, there are factors to be balanced, which means that, at the very least, non-racialism entails that remedial race-conscious efforts must be rational. Thirdly, although the commitment to non-racialism is aspirational, the Constitution recognises the social fact of race, and it must be contended with by the courts. In fact, the Court’s inability to grapple with this critical notion of non-racialism undermines the powerful anti-subordination principles which underlie its inclusion in the Constitution.

\textsuperscript{94} Ibid at 450. \textit{Plessy v Ferguson} 163 US 537 (1896).
\textsuperscript{95} \textit{Plessy} at 1145 (‘I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of citizens is involved.’)
\textsuperscript{96} Sach J’s judgment in \textit{Van Heerden} (note 56 above) at para 147 (endorses Thurgood Marshall J’s rejection of colour-blind ideology in his dissenting judgment in \textit{City of Richmond v JA Croson Co.} 488 US 469 (1989)).
\textsuperscript{97} Ramalekana (note 77 above) at 257
\textsuperscript{98} Ibid at 272.
Returning to the idea of non-racialism as a founding provision of the Constitution, which has created specific contours and obligations about how the Constitution governs race relations, the study of the above cases shows that the vision of non-racialism that the Constitution endorses is one which creates both negative and positive obligations. The negative obligation prohibits unfair discrimination, hate speech and other injury based on race, while the positive obligations mandate that active measures are taken, which consider race, to dismantle power relations defined by race in South Africa.

While non-racialism remains a contested concept in South African life, I contend that its meaning in the Constitution, informed by the history that gave rise both to its conceptualisation and its inclusion in South African constitutionalism, favours this understanding of non-racialism. Because of the controversy non-racialism invites, it opens a particular discursive space for its definition. This is something the Court cannot ignore, particularly as litigants submit competing versions of the concept in litigation. However, when assessing the vision of the Constitution and the ways in which the above cases have justified the use of race in response to difficult questions about the allocation of resources, it is clear that the only coherent vision of non-racialism is one which accepts the social reality of race and aims to dismantle that social reality by considering race. Moreover, the apparent tension between prohibiting unfair discrimination by race on one hand and mandating race-conscious remedial efforts on the other proves to be illusory given the understanding of non-racialism that aims to dismantle racism as well as all power relations shaped by race. While the Court is likely to receive more arguments for a retreat to a colour-blind understanding of non-racialism, which have increasing traction in popular discourse, it should work to theorise non-racialism’s role in the Constitution more robustly to limit the proliferation of alternative views which do not accord with the transformative mission of the Constitution. The Court’s failure to do so, and its under-theorisation of the concept, is in danger of allowing for the regression on the bold constitutional commitments on the question of race.

V CONCLUSION

In conclusion, this article has located non-racialism as a founding provision of the Constitution, a descriptive principle which elucidates the vision the Constitution establishes with respect to the question of race. In revealing this vision, I have looked at the history of non-racialism as it emerged as a mode of political organising, as a vision of future race relations and as a philosophical understanding of race itself. This history of non-racialism has revealed that while it has been deployed in disparate contexts, it was never merely just a rejection of the social salience of race. In its political manifestations and its ethical considerations, it encompassed a sustained critique of racial hierarchy and not the bare rejection of racial classifications.

Given this material understanding of race, it is unsurprising that in dealing with race, the Court has rejected formal equality arguments in favour of a substantive equality which not only permits, but demands, that race is considered and addressed in remedial efforts to undercut persistent racial hierarchy. This is borne out with the dominant standards of review utilised in assessing affirmative actions which show a deference to policies that seek to remedy the continued lived consequences of racial stratification. While the Court has under-theorised what the commitment to non-racialism means in a constitutional context, I contend that its
jurisprudence affirms this substantive understanding of non-racialism, which is more than a rejection of colour-blindness but stands in contrast to multi-racialism too.

What is evident is that as far as the Court is concerned, non-racialism requires an active engagement with the idea of race in historical and contemporary South African life. It is my view that such engagement requires a frankness, boldness and urgency in dealing with the persistence of racial subordination in the present if we are to envisage a society which is no longer structured along its oppressive fault lines in the future.
Discriminatory Language: A Remnant of Colonial Oppression

TANVEER RASHID JEEWA & JATHEEN BHIMA

ABSTRACT: Speech carries tremendous power. It shapes our realities, influences our consciousness and, often, the chance for any real change requires changing the way we speak. In South Africa’s post-apartheid constitutional state, remnants of colonial oppression surround us, not only in tangible aspects, but also through speech. This paper argues that the way hate speech has been developed through jurisprudence has rendered the concept of hate speech sterile within a South African context. Specifically, this paper uses the tenets of critical race theory and its accompanying endorsement of an intersectional approach to critique the reasonable man test as contained in section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (‘Equality Act’) and as formulated by the courts through its jurisprudence. The argument proposed is that the courts’ formulation of the legal test for hate speech under section 10 of the Equality Act does not and will not protect previously (and currently) disadvantaged groups because the present test fails to take cognisance of the fact that ‘objectivity’ is a tainted principle where apartheid and colonialism has shaped laws and its adjudicators. This paper explores aspects of race and law and the way in which ‘colour-blindness’, non-racialism and the apparent neutrality of the law constitute a veil behind which implicit biases are left unchecked to the detriment of Black people. Importantly, this paper engages with the harms that arise from applying laws that are, and so we argue, ‘conceived through the white eye’, and we attempt to demonstrate the resulting fallacious nature of the ‘reasonable man’ test. Ultimately, this paper seeks to question: Who is the reasonable person? Is the reasonable person a member of the group of persons targeted by the speech? Or is the reasonable person akin to the utterer of speech? Or, yet again, is the reasonable person a neutral third party who is assumed to be aware of the South African context but belongs to no racial group?

KEYWORDS: critical race theory, hate speech, intrinsic bias, reasonableness

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I  INTRODUCTION

We construct the social world, in large part, through speech. How we speak to and of others determines whether and on what terms we accept them into our world as groups and as individuals.¹ Speech carries tremendous power. It shapes our realities, influences our consciousness and, often, the chance for any real change requires changing the way we speak. In South Africa’s post-apartheid constitutional state, remnants of colonial oppression surround us, not only in tangible aspects, but also through speech. Not yet belonging in our past, apartheid persists through oppressive spatial planning and economic disenfranchisement based on race, gender, and sexual orientation; and, like a roach, persistent in its will to persevere, oppressive and discriminatory language is aimed at perpetuating the derision of dignity of many individuals and groups. Despite our country’s hate speech laws, it is not uncommon to find news stories about racist, sexist, homophobic or ableist language unashamedly spewed at previously (and currently) disadvantaged groups.

For example, the Constitutional Court prompted a reframing and possible renewal of the law through its judgment in Qwelane v South African Human Rights Commission and Another.² The Court declared s 10(1) of the Equality Act unconstitutional and invalid to the extent that it was inconsistent with sections 1(c) and 16 of the Constitution; and highlighted the importance of hate speech laws in protecting marginalised persons and groups.

While we applaud the Court for vehemently condemning homophobia, we argue that the Court’s formulation of the legal test for hate speech under s 10 of the Equality Act³ did not and will not adequately protect previously (and currently) disadvantaged groups. In this article, we argue for the use of a critical race theory (CRT) perspective which we contend is consistent with the South African constitutional framework. We apply this perspective to the requirement that the notion of hate speech must be determined with reference to a ‘reasonable person’ test.⁴ Through engaging with the history and vagueness of the test, we highlight its propensity to hide judicial bias. Doing so, in our view, leads to two conclusions. First, we argue for the need to continue advancing the racial transformation of the judiciary. Secondly, we highlight the importance of awareness of bias by judges and the role of legal academics in exposing instances of inherent bias.

II  THE RELATIONSHIP BETWEEN RACE AND THE LAW

The choice of CRT as a theoretical framework is mostly justified by its precept of questioning the status quo in an effort to gauge the tangible impact of said status quo on Black people.

²  ‘Qwelane’ [2021] ZACC 22.
³  Before the Court in Qwelane (ibid) was the constitutional validity of s 10(1) of the Equality Act which stated that: ‘Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to – (a) be hurtful; (b) be harmful or to incite harm; (c) promote or propagate hatred.’
⁴  At the time of writing in November 2021, Qwelane was the latest judgment on hate speech handed down by the Constitutional Court. This means that the reasoning of the judgments on hate speech that arose before Qwelane only apply to the extent that they relate to the requirements of the hate speech test under s 10(1) of the Equality Act that have withstood constitutional scrutiny. In this case, as will be seen later, the requirement of reasonableness still stands, and on this basis, the reasoning in Afriforum v Malema [2011] ZAEQC 2, 2011 (6) SA 240 (EqC), and Nelson Mandela Foundation Trust v Afriforum [2019] ZAEQC 2, 2019 (6) SA 327 (GJ) must still apply.
A malleable and evolving paradigm, CRT challenges existing theories of society with the acknowledgment that without a consideration of race and racism, there can be no adequate account of power relations and consequently, existing norms and theories will be biased in the favour of white supremacy.

The theory started as a scholarly movement in the United States in the early 1970s, burgeoning from the works of well-known Black civil rights lawyer, Derrick Bell. Back then, Bell had claimed that regardless of the abolition of slavery, and promulgation of civil rights statutes to prohibit racial discrimination, ‘the fact of slavery refuses to fade’. Grounded in this ‘refusal to fade’, scholarly writings under CRT effectively point out that what is seen as ‘racial progress’ is usually only a ‘regeneration of the problem in a particularly perverse form’. Critical race theory thus arose at a time where ‘new theories were needed to cope with emerging forms of institutional or “colorblind” racism and a public that seemed tired of hearing about race.’ Critical race theory’s constant challenge to the dominant liberal thought is to provide a platform where scholars are free, not only to judge civil reforms on paper, but rather to assess their tangible impact in practice.

This assessment has led critical race theorists to conclude that, during changing times, racism was evolving too. The theory repositioned racism and characterised it as ‘ubiquitous, ordinary, making it hard to see’. In contrast to the blatant racism imposed by demeaning laws under apartheid or slavery, the racism that post-racial society is facing is covert and does not necessarily amount to racial vilification:

In ways so embedded that it is rarely apparent, the set of assumptions, privileges, and benefits that accompany the status of being white have become a valuable asset – one that whites sought to protect and those who passed sought to attain, by fraud if necessary. Whites have come to expect and rely on these benefits, and over time these expectations have been affirmed, legitimated, and protected by the law. Even though the law is neither uniform nor explicit in all instances, in protecting settled expectations based on white privilege, [American] law has recognised a property interest in whiteness that, although unacknowledged, now forms the background against which legal disputes are framed, argued, and adjudicated.

The new ‘neutral’ and ‘colour-blind’ laws have led to the depoliticisation of race, and the assumption that race is no longer necessary as we are all treated equally before the law. Yet, laws that do not consider our different lived experiences and struggles, cannot lead to substantive equality. The argument is usually that laws, whether posturing as neutral or not, reflect the views of policy-makers and the white majority. In the South African context, there is a Black majority government and a Black majority population. However, despite white people constituting a minority, they own a majority of the means of production, wealth, knowledge

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7 Ibid.
10 Ibid at 101.
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Law, it is said, is conceived through the white eye; it represents the white perspective. It starts from the white experience and fails to recognise the view and experiences of the disadvantaged and black persons. Given the history of South Africa, an example of the law being ‘conceived through the white eye’ is the absence of a defence against witchcraft as justifiable under South African criminal law. Despite the efforts of white settlers and the apartheid government, the majority of South Africans still believe, and continue to believe, in witchcraft. For example, ‘busakatsi’, which refers to witchcraft in an African context, includes the use of harmful medicine; harmful magic; and other means or devices that may cause illness, misfortune or death to a person, or damage to property. This belief prevails in both educated and uneducated communities regardless of geographic location. Yet, in many instances, courts have ignored accused persons’ belief in witchcraft, and in so doing have denied the traditional culture of the parties.

An example of this disregard of traditional culture is found in S v Mokonto, where the Appellate Division disregarded the issue of the accused’s belief in witchcraft as having no relevance to the question of whether the accused had had the intention to kill the deceased. In addition to this, regardless of the fact that everyone has the right to freedom of conscience, religion, thought, belief and opinion under section 15 of the Constitution, as well as everyone being free to enjoy their culture and practice their religion under section 31, the use of witchcraft remained prohibited under the Witchcraft Suppression Act 3 of 1957. A CRT approach seeks to question the disregard of traditional culture and we argue that such disregard of traditional culture in favour of western norms is but a single example of how the law is ‘conceived through white eyes’.

This was particular evident in Rex v Mbombela, a case decided by the then South African Appellate Division in 1933, where the accused had killed his younger cousin under the erroneous belief that the latter was a ‘tikoloshe’. The Judge rejected the accused’s defence, stating that:

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13 Ibid.


17 1971 (2) SA 310 (A), [1971] 2 All SA 530 (A).

18 Rex v Mbombela AD 269 (1933).

19 A tikoloshe is believed by amaXhosas to be a mischievous or malevolent spirit that takes the form of a little man with small feet. The accused argued that he did not recognize the victim as his young cousin since the former had looked away before dealing the blows. According to indigenous religious belief receiving a glance from a tikoloshe means death.
by the law of this country there is only one standard of ‘reasonable man’… the man of ordinary knowledge and intelligence… [T]he race, or the idiosyncrasies, or the superstitions, or the intelligence of the person do not enter into the question.\textsuperscript{20}

While many could argue that a reasonable Xhosa man would have believed that the victim was a tikoloshe, the Court refused to take into consideration the context of the accused, implying that:

\begin{quote}
this ‘reasonable man’ – an ideal figure, bleached of the cultural and religious traits of the accused and (although not conceded by the Court to be so) reanimated with those of the colonial official – would not have shared the belief in the tikoloshe underpinning [the accused’s] mistake.\textsuperscript{21}
\end{quote}

These examples suggest that despite the constitutional change, the law retains a bias against the cultures and beliefs of Black people – with the law being used as a ‘colorblind’ tool which we argue can lead to the demise of Black communities and individuals. This challenges the liberal view that the law is innocent, neutral and that any connection between racism and law is exceptional and curable.\textsuperscript{22} What appear to be ‘colour-blind’ laws entrench a bias against Black people and further preserve the status quo through their application.

Beyond just the law itself, critical race theorists argue that the application of the law too often entrenches bias and furthers white interests under the guise of race neutrality. While many legal scholars accept the notion of judicial bias, CRT takes it further and explains that this judicial bias is often in favour of whiteness. Judicial bias manifests itself through explicit and implicit biases. Explicit biases are stereotypes and attitudes known to the judge, and openly sanctioned as suitable because there are no social norms against these explicit biases.\textsuperscript{23} If social norms against explicit biases do exist, the judge may conceal the explicit bias. Implicit biases, on the other hand, are stereotypes and attitudes that are held subconsciously and do not depend on the judge’s conscious awareness of the reasons they give for decisions but are reflected in those decisions.\textsuperscript{24}

To prove the existence of implicit bias, Harvard University developed an ‘Implicit Association Test’ (IAT) which assesses the strength of associations between concepts, evaluations or stereotypes.\textsuperscript{25} While the IAT is a test that was developed and applied in the United States, we rely on its observation that white judges demonstrate strong implicit bias favouring white people over Black people to show that judges hold racial bias too, even unknowingly. Empirical evidence based on the IAT in the United States shows that white judges demonstrated strong bias favouring white people over Black people.\textsuperscript{26} Thus, compared to the view that law is distinct and autonomous from social life, judges’ decisions are not based on an organic and pre-political interpretation of the law.\textsuperscript{27} Instead, judges reveal their biases

\textsuperscript{20} Rex v Mbombela (note 18 above) at 270.
\textsuperscript{23} Ibid.
\textsuperscript{25} Ibid.
in their interpretations and applications of law to facts. In fact, many critical race theorists consider these implicit biases not to be remediable. If so, such biases will be widespread in a country like South Africa with a history of racial discrimination and inequality. Such biases have the opportunity to reveal themselves in many ways and often in the interpretation of broad terms where judicial discretion must be exercised such as ‘reasonable’, ‘sensible’, ‘common sense’ and ‘fit and proper’.28 This article considers the notion of ‘reasonableness’ and will seek to highlight the dangers it poses for judicial bias in the context of deciding what constitutes hate speech or not.

A Critical race theory and hate speech

In recognising explicit and implicit biases in judges, one cannot escape the impact that these biases have on interpreting the law. As a result, when a legal test or threshold incorporates an objective standard of reasonableness, it can work to obscure the effect of perspective. The work of Richard Delgado is a useful starting point in our interrogation of how perspective can serve to perpetuate or redress racial harm.

Delgado believes that the ‘old, formalist view of speech as a near-perfect instrument for testing ideas and promoting social progress is passing into history’ and in its place is ‘a much more nuanced, skeptical (sic); and realistic view of what speech can do, one that looks to self- and class interest, linguistic science, politics, and other tools of the realist approach to understand how expression functions in our political system.’29 The outcome, he argues, is more humane.

Delgado proposes that the CRT approach to hateful and racist language is as follows – firstly, that the marketplace of ideas is sterile when dealing with ‘systemic social ills like racism and sexism’ because these systemic ills are ‘embedded in the reigning paradigm, the set of meanings and conventions by which we construct and interpret reality’ and any person speaking out against the ruling paradigm is labelled as politically extreme or incorrect.30 Secondly, freedom of expression is used to sanitise the status quo. Specifically, Delgado argues that ‘communication is expensive, so the poor are often excluded; the dominant paradigm renders certain ideas unsayable or incomprehensible; and our system of ideas and images constructs certain people so that they have little credibility in the eyes of listeners.’ Thirdly, and lastly, that hate speech may be more of an inequality problem and less of a freedom of expression problem, as hate speech entrenches the status quo and solidifies the unequal distribution of social power. In explaining the perceived tension between speech and equality, Delgado stated ‘[s]peech, at least in the grand dialogic sense, presupposes rough equality among the speakers’31

He poses an important question: ‘We are questioning whether the continuum of high-value (viz., normal) and low-value speech may not be all there is. Could there be no-value speech, or negative-value speech, which not only could, but should be restricted?’ We argue that, at least in South Africa, there is such a category of speech, and it should be restricted.

28 Faigman et al (note 24 above) at p 126.
30 Ibid at p 171.
31 Delgado (note 1 above) at 868.
B Hate speech in South Africa

South Africa’s position in relation to hate speech is a rejection of the notion that the right to freedom of expression is supreme above all other rights. This approach is in line with the Constitution’s vision for South African democracy. It is clear from the various duties in section 7(2) of the Constitution that the duties of the state are not only limited to protecting the constituent rights but, additionally, the state is obliged to promote rights that foster social welfare. Accordingly, the Constitutional Court, in Islamic Unity,34 recognised two categories of harm which are engendered by hate speech, the harm that it causes to the recipient of the speech and the harm caused to society as a whole.35 Significantly, the judgments from the Court regarding hate speech stress that through the regulation of hate speech, an important balance between the rights to equality, dignity and free speech needs to be achieved.

The most recent judgment of the Court on hate speech, the Qwelane case, highlighted this balance between the rights to equality, dignity and free speech. The facts in Qwelane are as follows. The applicant, the late Mr Qwelane, was the author of an article entitled: ‘Call me anything but gay is not okay’ published in the Sunday Sun newspaper in 2008. The article was understandably deeply offensive to members of the LGBTQIA+ community and eventually led to proceedings in the Equality Court and the High Court. When the case reached the Constitutional Court, the Court found that s 10(1)(a) of the Equality Act – which allowed ‘hurtfulness’ to be sufficient for speech to constitute hate speech – to be unconstitutional due to its vagueness and unjustifiable limitation of section 16 of the Constitution.

The Court read s 10(1) of the Equality Act to prohibit speech that ‘could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred’.36 The Court in Qwelane found that the words ‘reasonably be construed’ and ‘to demonstrate a clear intention’ imply an objective test which takes into consideration circumstances and facts around the utterance and ‘not mere inferences or assumptions that are made by the targeted group’ (emphasis added). Adding that the Supreme Court of Appeal erred in its conclusion that the test was subjective, the Constitutional Court highlighted that an objective approach which considers the context in which the words are spoken, is more in line with the spirit, purport, and objects of the Bill of Rights.37 The Court also endorsed the criteria of reasonableness as applied in Le Roux, a case that dealt with the context of defamation:

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33 Constitution s 7(2):‘The state must respect, protect, promote, and fulfil the rights in the Bill of Rights.’
34 Islamic Unity Convention v Independent Broadcasting Authority 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC) (‘Islamic Unity’).
35 The Court in Islamic Unity endorsed the theory of the two harms which were developed by the Canadian Supreme Court in R v Keegstra [1990] 3 SCR 697, (1990) 3 CRR (2d) 193 (‘Keegstra’). The Court found the first harm against the individual arose from the fact that there could have been a ‘grave psychological and social consequence’ to the ‘individual’s sense of self-worth and acceptance’. The United States Supreme Court in Virginia v Black 538 US 343 (2003) relied on this grave psychological and social consequence which it believed was based on the terror associated with the physical violence which minorities have experienced in the past, for being ‘punished’ because of their immutable characteristics. The second category of harm in Keegstra was broader and was based on the belief that hate speech has the potential to fuel violence and discrimination, and thus, the potential to social tensions. It is interesting to note that there was a split vote in the Canadian Supreme Court in Keegstra with a division of four to three.
36 Qwelane (note 4 above) at para 176
37 Ibid at para 99.
Discriminatory Language: a remnant of colonial oppression

The test to be applied is an objective one. In accordance with this objective test, the criterion is what meaning the reasonable reader of ordinary intelligence would attribute to the statement. In applying this test, it is accepted that the reasonable reader would understand the statement in its context and that they would have had regard not only to what is expressly stated but also to what is implied.38

Relying on Rustenburg Platinum Mine,39 the Court in Qwelane held that words themselves do not bear an inherently racist meaning and indicated the importance of the context in which the words are published, propagated, advocated or communicated.40

Taking into consideration all the above, the Court concluded that the hate speech test is objective and the requirement of reasonableness in and of itself was left intact. This is even though the judgment embraced the principle of intersectionality, one of the key products of CRT.41 Instead of questioning what an objective test means in relation to hate speech, the focus was on the objectivity of the requirement of reasonableness. As illustrated in the previous sections, a CRT approach to hate speech would have required an in-depth analysis into this allegedly ‘neutral’ requirement of reasonableness. However, before this paper delves into this analysis, it is important to consider whether CRT is compatible with the South African Constitution.

C  Critical race theory in South Africa

It is not commonly accepted that the South African legal landscape allows for the application of CRT. This is mostly because of the value of ‘non-racialism’ adopted by the South African Constitution.42 It is commonly understood that non-racialism is a vision embraced by the drafters of the Constitution in an effort to work towards a society which will not be driven by racial identification. Yet, the problem arises as to what the value of non-racialism means pro tempore. In the absence of a society in which race would not matter, what does non-racialism mean? Does one ignore race in an effort to achieve such a society? Is such a society even fathomable if one does not address existing racial discrimination?

To answer these questions, it is essential to briefly consider the history of non-racialism. The concept seems to have emerged some time before the adoption of the Freedom Charter in the 1950s.43 Chief Albert Luthuli adopted the phrase to convey his ‘universal’ vision for South

40 Qwelane (note 4 above) at para 98.
41 K Crenshaw ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Colour’ (1993) 43 Stanford Law Review 1241, 1244 and Qwelane (note 4 above) at paras 58–60 shows that the Court endorsed the principle of intersectionality to highlight that people are affected by different aspects of their identity and occupy vastly different positions in society based on their wealth and resources. See also Mahlangu and Another v Minister of Labour and Others [2020] ZACC 24; 2021 (1) BCLR 1 (CC); 2021 (2) SA 54 (CC) at paras 65, 73–107, discussed below.
42 This article does not attempt to provide an exhaustive account of non-racialism under South African law. For more information regarding discussions on non-racialism, see M Brassey ‘The More Things Change … Multiracialism in Contemporary South Africa’ (2019) 9 Constitutional Court Review 443–471 and K Minofu ‘Non-racial Constitutionalism: Transcendent Utopia or Colour-Blind Fiction’ (2021) 11 Constitutional Court Review 301. Section 1(b) of the Constitution states that: ‘The Republic of South Africa is one, sovereign, democratic state founded on the following values: non-racialism and non-sexism.’
43 Minofu ibid.
African society, one which would reject race as a means of categorisation and differentiation.\textsuperscript{44} Such a meaning appears to be in line with what Glasgow described as ‘racial eliminativism’.\textsuperscript{45} This translates into the removal of racial categorisation from state policies and institutions, from public life and social discourse, and finally, from private attitudes and thoughts. The endpoint would be that racial categorisation would no longer be of import in our lives, and we would all be equal regardless of race.

While the achievement of such a society is laudable, it is not one that can be achieved while there is still rampant systemic inequality and socio-economic inequity.\textsuperscript{46} As it stands, an interpretation of non-racialism which rejects any acknowledgment of race or redress measures may in fact entrench existing racial inequalities.\textsuperscript{47} Acknowledging race allows us to see that Black people and other people of colour still endure the consequences of apartheid, despite its formal abolition. It is with this knowledge in mind that the legislature put into place affirmative action as per the Employment Equity Act 55 of 1998. It is clear from the Employment Equity Act’s preamble that these laws aim to provide Black people with redress in the form of equality of opportunities to correct for past injustices.\textsuperscript{48}

If the value of non-racialism, as per the Constitution, is understood as the complete rejection of racial categorisation, then policies such as affirmative action would be deemed unconstitutional. This view, in its denial of the ramifications of existing, long-lasting, and pervasive racism has been termed by Conradie as a ‘power-evasive’ ideology, an ideology that refuses to acknowledge existing power dynamics in society. Simply put, this ‘power-evasive’ ideology seeks to mask the historical power amassed by the minorities that have historically wielded such power.\textsuperscript{49} Much like our earlier discussion about the allegedly neutral laws, such power-evasive ideologies allow holders of these ideologies ‘to avoid obtaining knowledge about the way race plays out in society’.\textsuperscript{50} Many people who believe in these power-evasive ideologies do so because they find it hard to understand the appeal of investigating ‘so-called new guises of racial (dis)advantage’ now that blatantly racist legislation has officially been repealed by a non-racial constitution.\textsuperscript{51} Thus, racism is only seen and acknowledged in the form of violent racist incidents, which is then blamed on particular individuals:\textsuperscript{52}

Social ills are crafted as problems located within specific individual relationships and the possibilities for social action are thus undermined. The hegemonic liberal humanist discourse insisting that we focus on our ‘common humanity’ erases the specificities of race experiences and evades the question of who has the power to define that humanity.\textsuperscript{53}

\textsuperscript{44} Ibid.
\textsuperscript{46} MS Conradie ‘Critical Race Theory and the Question of Safety in Dialogues on Race’ (2016) 36(1) Acta Theologica 5, 6.
\textsuperscript{47} Ibid.
\textsuperscript{48} Employment Equity Act 55 of 1998 Preamble: ‘Recognising – that as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market; and that those disparities created such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws.’
\textsuperscript{49} Conradie (note 46 above).
\textsuperscript{50} Ibid at 9.
\textsuperscript{51} D Hook (Post)Apartheid Conditions: Psychoanalysis and Social Formation (2013) 70.
\textsuperscript{52} Conradie (note 46 above).
This understanding of non-racialism, in its refusal to acknowledge the existing harms of racism in a post-apartheid society, is not, in our view, in line with and does not give effect to the spirit, purport and objects of the Bill of Rights. This is because, on a textual reading of the Constitution, it is clear that it envisages race as a ground on which unfair discrimination may take place. Section 9(3) prohibits discrimination based on race, thereby anticipating from its inception that race not only still exists but also has an impact.

In Rustenburg Platinum Mine, a case in which a white man used the term ‘swartman’ ('Black man') to refer to a Black person, the Court remarked that,

> The past may have institutionalised and legitimised racism but our Constitution constitutes a ‘radical and decisive break from that part of the past which is unacceptable’. Our Constitution rightly acknowledges that our past is one of deep societal divisions characterised by strife, conflict, untold suffering and injustice. Racism and racial prejudices have not disappeared overnight, and they stem, as demonstrated in our history, from a misconceived view that some are superior to others.54

> It becomes clear that a view that society as it currently exists should be sanitised of context, is misconceived. The Constitution’s commitment to break away from the past, as is seen from Rustenburg Platinum Mine, to achieve a society which is non-racial, requires the judiciary to deal with racial discrimination head-on by acknowledging not only its origins, but also its continued existence. An approach that acknowledges the influence of race on different aspects of the lives of people in South Africa is in line with CRT and would require a deeper engagement of the continuing legacy of racism on our law and judicial decision-making.

Additionally, the Constitution mandates affirmative action. Section 9(2) of the Constitution states that ‘To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.’

On this premise, the Constitution once again not only recognises that race will have an impact on people’s lives, it will also allow the state to adopt measures and legislation actively to assist with people’s advancement on the grounds of their race. These are precisely the kinds of policies that people with power-evasive ideologies believe should not be permissible. Since we already pointed out that not allowing these policies would, in and of itself, serve to perpetuate racial inequality, we now point out that it would also be unconstitutional. This is because, as Ngcobo J writes in Doctors for Life, ‘[p]rovisions in the Constitution should not be construed in a manner that results in them being in conflict with each other. Rather, they should be construed in a manner that harmonises them.’55 Additionally, ‘while it is true that foundational values play a role in the interpretation of the Bill of Rights, their role is limited to illuminating the language of a particular provision of the Bill.’56 We consequently argue that an interpretation of the value of ‘non-racialism’ which aligns with a power-evasive ideology is one that would be in conflict with section 9(2) of the Constitution and thus ought to be abandoned.

Lastly, the Equality Act aims to protect previously marginalised communities, including Black people. The prohibited grounds included in s 10(1) of Equality Act are directly extracted

54 Ibid.
from section 9(3) of the Constitution, under the equality clause.\(^{57}\) The Equality Act was enacted to give effect to the equality clause, as shown by its long title.\(^{58}\) The preamble of the Equality Act would suggest that its content was enacted with the aim of being a means of redress for inequalities suffered in the past and those that are still being suffered:

The consolidation of democracy in our country requires the eradication of social and economic inequalities, especially those that are systemic in nature, which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people; [...]\(^{59}\)

Although significant progress has been made in restructuring and transforming our society and its institutions, systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy \(^{60}\)

The Equality Act’s point of departure is aimed at protecting groups which have been and are currently unfairly discriminated against, which includes Black people within the South African context. This acknowledgement of the impact that race has in the daily lives of people in South Africa, once again shows that CRT is consistent with the approach adopted in the South African legal landscape.

Having carved out the place of CRT within a South African context, we now demonstrate that the Court has already adopted tenets of CRT in previous judgments, albeit not always explicitly. In Rustenburg Platinum Mine,\(^{59}\) the Constitutional Court held that the Labour Appeal Court’s point of departure regarding ‘presumptively neutral’ phrases was misguided as it ‘fails to recognise the impact of the legacy of apartheid and racial segregation that has left us with a racially charged present’ and—

it cannot be correct to ignore the reality of our past of institutionally entrenched racism and begin an enquiry into whether or not a statement is racist and derogatory from a presumption that the context is neutral – our societal and historical context dictates the contrary.\(^{60}\)

More recently, in the case of Mahlangu, dealing with a Black domestic worker’s claim for compensation for her daughter under the Compensation for Occupational Injuries and Diseases Act 130 of 1993, the Court underscored the suitability and the need to consider CRT in a South African context.\(^{61}\) In Mahlangu, Victor J for the majority, went to great lengths to detail how

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\(^{57}\) Constitution section 9 states: ‘(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.’

\(^{58}\) The long title of the Equality Act states the following: ‘To give effect to section 9 read with item 23(1) of Schedule 6 to the Constitution of the Republic of South Africa, 1996, so as to prevent and prohibit unfair discrimination and harassment, to promote equality and eliminate unfair discrimination, to prevent and prohibit hate speech, and to provide for matters connected therewith.’


\(^{60}\) Ibid at para 48.

\(^{61}\) Mahlangu (note 41 above).
the Court has in the past endorsed CRT through the concept of intersectionality, albeit without necessarily having used the term. Intersectionality, a term coined by Kimberlé Crenshaw, has been defined as highlighting ‘[t]he interconnected nature of social categorizations such as race, class, and gender, [that create] overlapping and interdependent systems of discrimination or disadvantage.’62  

In *Mahlangu*, the majority held that domestic workers are discriminated against on multiple levels due to their race, gender, class and social status. If the value of non-racialism absolved the courts from considering one’s race, to achieve a non-racial society, the Court would have rejected the concept of intersectionality not only in *Mahlangu*, but in numerous other cases.63  

We argue that the Court was correct in endorsing the concept of intersectionality, and that doing so is in line with the Constitution. Since we have demonstrated that CRT is applicable in the South African legal landscape, and indeed helpful, we turn to consider its application to the notion of ‘reasonableness’ when determining what constitutes hate speech test under the Equality Act.

III REASONABLENESS AND CRT

Through the words ‘could reasonably be construed,’ s 10 of the Equality Act calls for the application of a reasonableness test. Here, many questions arise: Who is the reasonable person? Is the reasonable person a member of the group of persons targeted by the speech? Or is the reasonable person akin to the utterer of speech? Or, yet again, is the reasonable person an allegedly neutral third party who is aware of the South African context but belongs to no racial group?

A The ‘reasonable man’: a colonial legal fantasy and a colourless fallacy

In South Africa, the test for the reasonable person in criminal law is derived from the civil law test found in the delictual case of *Kruger v Coetzee*.64  

While this test was formulated in 1966 in the South African context, its use dates to the 1800s in the French, English and Anglo-American legal systems. In the post-enlightenment context, the ‘reasonable man’ was a means for the judge to provide the jurors with a hypothesis ‘as a way to distance [them] from their more immediate response to the case’ so as to reduce ‘the chance of them deciding simply on the basis of whether they thought the defendant was morally culpable’.65  

Consequently, the objective test enabled jurors to step into the shoes of this hypothetical man. Instead of having a stable identity and characteristics, the reasonable man ‘is conjured by the specifics of the case in which he is invoked’.66

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64 1966 (2) SA 428 (A) 430.


Yet, despite its longevity in the legal sphere, this test is globally controversial with many scholars calling it an ‘inappropriate standard’ due to its inability to address bias. In the United States, some scholars have called for the test to be replaced by the ‘Reasonable Black Person Standard’. The debate around this test has leaned towards questions of the identity of the reasonable person: how old is the reasonable person? What is the sex or race of the reasonable person? But more importantly, is the reasonable person a veil behind which a court hides the biases inherent in its judicial discretion?

Within an African context, Carpiniello has argued that the ‘reasonable man’ was during colonial times necessary as the idea of a ‘reasonable native’ was deemed questionable. Hence, regardless of the reasonable man’s immutable characteristics, there were identities that he could not adopt – in this case, that of a non-European. This was because the colonial administration deemed that the ‘natives’ were incapable of being reasonable, as a consequence of being ‘savages’. In fact, the reasonable man test ‘used to signify the [District] Commissioner’s exceptionalism, demonstrating his ability to enter imaginatively into the psychology of the colonial subjects whilst maintaining his hold of reason.’ From its inception, and particularly in the African context, the reasonable man was white.

B A reasonable man in South Africa

The idea of reasonableness can be a veiled threat. The requirement of reasonableness allows judges to hide their racist and harmful stereotypes and attitudes behind this notion. In turn, given the supposed neutrality of the concept, it is difficult to challenge the reasoning as to what a reasonable individual would say or do, thus leading judicial biases to become entrenched in precedent. Consequently, it is important to consider the nature of the reasonableness test in South Africa. Astrada and Astrada have argued that revisiting the reasonable person through the lens of culture and demographic reveals that the enduring historic reasonable person requires some form of reconceptualization if law is to maintain congruence with the sociocultural, political and economic actualities of the present. They further argue that a re-examination of the reasonable person from a sociocultural perspective reveals a complex relationship between the reasonable person and the administration of justice. Retaining the historical reasonable person – one premised on specific racial (White), ethnic (Western), class-based (upper class) and gendered (Male) components – is problematic if the law is to serve and reflect the people that comprise the present polity. This is because, as shown through our earlier discussion of the lack of innocence of the law, the law is not neutral.

It becomes clear from our discussion of CRT that to be ‘colour-blind’ in one’s approach to the law does not benefit previously marginalised groups, especially not in cases where context is imperative. The reasonable person ought to be one who is neutral in the face of racial discourse, and if one dares put it, a ‘raceless’ reasonable person. However, that person does not exist: every

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69 Baxter (note 66 above)
70 Ibid at 5.
71 Ibid at 6.
individual belongs to a particular race group and cannot, particularly within the South African context, claim to be beyond racial bias. Individuals would have either benefited from privilege by virtue of their race or have suffered prejudice for the same reason. While they might not be consciously aware of either, the intrinsic bias remains.

Thus, the reasonable person test will reflect what the judge deems to be reasonable. As pointed out by Delgado, ‘judges are no quicker than others to surmount their own limitations of culture and experience’.73 He adds: ‘Only a judge with no experience, history, or community – virtually with no language – could render a completely unbiased decision in a case calling for reformulation of the terms by which we define that community, change our history, alter our language. There is no such judge.’74

Judges, like other members of society, belong to different communities. Their interpretation of neutral terms such as ‘reasonable’, ‘just’ and ‘fair’ is not devoid of context. It remains dependent on the judges’ experiences, on what they have heard or read, on ‘an interpretative community of its own’.75 Judges, when presiding on matters relating to hate speech, are required to choose which meaning they ascribe to the speech. This is because speech often has more than one meaning.76 The meaning can either be that which is put forward by the targeted audience of the speech; that put forward by the utterer of the speech; or, as should be the case, the meaning ascribed by a reasonable by-stander who happens to bear witness to the speech (the reasonable man). The judge, in choosing the latter proposition would in theory not be choosing from the first two meanings of the speech, that of the utterer or the targeted audience. However, this is simply not true because no individual, even in the judge’s imagination can be raceless. Given the ubiquity of race, the reasonable person in South Africa still must belong to a race group.

Based on this line of thinking, we argue that the reasonable man is a heuristic, a mental shortcut used by the judiciary to signal neutrality but which in fact conveys their own values and, unfortunately, biases.

IV WHAT DOES THIS MEAN FOR THE HATE SPEECH TEST?

Having established that the reasonableness requirement in the hate speech test is one which needs closer consideration given our history, the way forward is a difficult one. While judicial bias exists, it cannot be removed that easily. If the interests of the judges are reflected whenever discretion is exercised, then it seems logical that a transformation of the judiciary and the appointment of more Black people, should eventually alter the ‘reasonable man’ test. Hence, the first sound step to rid the judiciary of racial bias against Black people is to appoint more Black judges. However, while this approach seems sound in theory, it unfortunately does not account for the fact that, as we discussed above, the law itself is not neutral and Black judges will have their own biases.

The only solution appears to be, in the tradition of critical legal studies (CLS), the critique and uncovering of implicit bias. Judges must remain perpetually vigilant about the way in

74 Ibid.
75 Ibid at 107.
which they apply the reasonable person test; it runs the risk that they will be influenced by implicit biases to draw their conclusions. With greater awareness, it is possible that more obvious prejudices can be countered. The role for academics becomes vitally important in exposing cases of implicit bias. Great acknowledgement of subjectivity than a false objectivity would aid in more transparent adjudication.

It is important to recognise that most of the changes that need to be introduced are cultural and social, and require a long-term overhaul of the many stereotypes held by people in power. The need for such change is clear. During the period 2016 to 2017, the South African Human Rights Commission found in their Annual Complaints Trends Analysis Report that race related complaints accounted for 69 per cent of all complaints, with those relating to hate speech being the most prevalent. As it stands, the prevalence of instances of deeply derogatory speech being hurled at previously (and currently) disadvantaged persons does not inspire confidence, in the law, and in our ability as a nation to rid ourselves of strong racial prejudices. Consequently, pointing out the discrimination that Black people face at the hand of seemingly neutral laws and judges is never a futile exercise. As Botha contends, in a society where hate speech is met with silence, ‘hate is normalised and eventually the speech ‘gains the informal authority of a social practice’.

V CONCLUSION

The power of the white world is threatened whenever a black man refuses to accept the white world’s definitions.

Such are the words of James Baldwin, succinctly summarising the issues which we have addressed in this paper. The theme that arises time and time again in this paper is the supposed neutrality of the law and its ‘pure and neutral’ interpretation and application. Much like slavery, the fact of apartheid refuses to fade. The discrimination communities used to suffer under apartheid remains vividly alive, not only through the act of hate speech, but through its adjudication. Using CRT, we argue that laws, and those regulating hate speech, are not neutral and inadvertently give expression to power-evasive ideologies which include intrinsic racial biases. Such biases exist not only in the laws, but through their interpretation in the courtroom too. This is rendered particularly possible where a wide discretion exists, such as the notion of the ‘reasonable person’, which is the focus of this paper. Within the context of discoursing hate speech, we argue that the reasonable man test under s 10 of the Equality Act is just a veil of neutrality behind which judges’ implicit biases are unlikely to be challenged. We underscore that there is no such thing as a ‘raceless’ reasonable man who can be used as yardstick to measure speech constitutes hate speech. To address this lacuna that often leads to the implicit prioritisation of white interests, this paper highlights the need for continued transformation of the judiciary through the appointment of more Black judges. Additionally, we argue that all judges should constantly be aware of their biases and their impact when relying on supposedly neutral laws, especially when deciding on and developing hate speech jurisprudence. Finally, we

contend that academics also have a vital role in analysing judgments and exposing the operation of judicial bias therein. While these efforts will be of help, we acknowledge that they will only have tangible effects in the long term, and therein lies the importance of continuous critique of hate speech jurisprudence through the lens of CRT.

MARK HEYWOOD

ABSTRACT: In this article I argue that during the first 25 years of South Africa’s democracy, economic policy and socio-economic rights have tacked two parallel paths, rarely meeting and neither cognizant of the other. In the words of Philip Alston and Nikki Reisch, the result has been to ‘decouple economic management from democratic decision-making’. Yet, shaping economic policy to enable a socially just society is, I argue on the basis of constitutional provisions as well as the design and architecture of the Constitution of the Republic of South Africa, 1996 (Constitution), an inescapable duty that falls on every level of government. Both constitutional jurisprudence and international law supports this contention. I argue that the failure of the executive and legislature to recognise this is evident from the various iterations of economic policy South Africa has pursued since 1996. Not only is the resulting gross inequality socially unsustainable (something most commentators agree on), but legally impermissible. In short, my argument is that the Constitution has as much sway over economic governance as it has been seen to have over political governance. I look at alternative economic policies, which are constitutionally permissible but warn that resorting to public impact litigation alone to bring about these policies will not be sufficient to bring about transformation and social justice. To reshape the economy within the constitutional tracks of social justice I suggest there is a treasure trove of jurisprudential permissions already available. However, to put this treasure trove to work, the following is required: constitutional advocacy with argument targeted at the executive and the legislature, as well as public education.

KEYWORDS: African National Congress (ANC), austerity, economic justice, inequality, international law, neoliberalism, participatory democracy, social justice, tax.

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motion. The article is dedicated to social justice activists everywhere who work tirelessly for human dignity and equality, but who desperately need to elucidate a plausible 21st century theory of change if social justice and human rights are ever to become a reality.
Economic Policy and the Socio-Economic Rights in the Constitution

All babies are born naked. Soon afterwards, however, some are dressed in expensive clothes and put on a path to a privileged life while the majority wear rags and must perform miracles to escape from a life of exhaustion, exploitation, servitude and fear.₁ — Yanis Varoufakis

Modern redistribution does not consist in transferring income from the rich to the poor, at least not in so explicit a way. It consists rather in financing public services and replacement incomes that are more or less equal for everyone, especially in the areas of health, education and pensions. … Modern redistribution is built around a logic of rights and a principle of equal access to a certain number of goods deemed to be fundamental.² — Thomas Piketty

I  INTRODUCTION

A great deal has been written about the ‘transformative’ nature of the Constitution of the Republic of South Africa, 1996 (‘Constitution’).³ The Constitutional Court itself has frequently commented on how the Constitution mandates government to pursue policies that aim at the realisation of rights and the narrowing of inequality.⁴ However, as the quantum of ‘available resources’ is implicated in almost all aspects of transformation and rights realisation, it is impossible to discuss this matter without addressing issues of economic policy. This is because ultimately it is the state of the economy (usually measured narrowly by the Gross Domestic Product (GDP), debt, levels of investment and employment) that government officials always tell us determines both how much funding can be budgeted for socio-economic rights and where funds are to be prioritised.⁵ This forces us to ask whether and how the South African government’s economic policy and the Constitution’s justiciable socio-economic rights talk to each other.

In this article, I examine this question by, first, setting out why and where the Constitution places positive obligations on the government in the realm of economic policy. I then suggest how economic policy, as determined by the executive and legislature, must, like all other areas of law and policy, be scrutinised to see whether it complies with constitutional obligations. Thereafter, I examine whether the South African government has taken the rights and obligations in their main economic policy directions into account. I focus on economic policy directions since 1994. I then conclude by making a series of recommendations for economic policy measures and programmes, supported by law, that would enable rights-realisation and social justice.

South Africa’s deepening poverty and inequality is a stain on the Constitutional era in my view. I argue that this is not the result of a design flaw in the Constitution, but of what former

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₁ Another Now, Dispatches from and Alternative Present (2020) 53.
⁴ For a fuller discussion of this see part IIA.
⁵ For example, see Economy and Finance, available at https://www.gov.za/about-sa/economy, where the government states that South Africa’s National Development Plan (NDP) recognises that faster, broad-based growth is needed to transform the economy, create jobs, and reduce poverty and inequality by 2030.'
Deputy Chief Justice Dikgang Moseneke has called a failure to ‘grasp the nettle … to change our world irreversibly.’ I thus ask questions about what can be done to change this status quo.

II THE GOVERNMENT’S POSITIVE OBLIGATIONS RELATING TO ECONOMIC POLICY

In *Shadow of Liberation*, Vishnu Padayachee and Robert Van Niekerk examine the economic and social policy of the African National Congress (ANC) between 1943 and 1996. Their primary focus is on the evolution of economic policy. They document how during the early 1990s the constitution-making process was a constant backdrop to the ANC’s debates with its allies in the Congress of South African Trade Unions (COSATU) and the South African Communist Party (SACP) on economic policy. They also illustrate how the constitution-making and economic policy debates rarely talked to each other, confirming the assertion of Moseneke in his first book, *My Own Liberator*, that:

> When the constitution was negotiated, the parties skirted around the need for social change. The negotiators did not stare in the eye the historical structural inequality in the economy. There was no pact on how to achieve the equality and social justice the economy promised. Instead, the constitution imposed qualified duties on the state to facilitate access to social goods such as health, housing, water, education and social grants. But these socio-economic entitlements were premised on and limited to state transfers as and when funds were available. On the face of it, the protections were praiseworthy and they promised a state-sponsored reduction of poverty, but in practice socio-economic rights did not speak to how to restructure the economy in a way that rendered it more productive and inclusive.

From this, Moseneke concluded:

> The absence of a social pact was a far-reaching omission given the inequality embedded in the social structure of the country at the start of the transition. I am, however, not debating whether at the time of the negotiations, given the balance of forces, a radical social pact was feasible. Short of an outright military conquest, probably it was not.

The period examined in this article begins where Padayachee and Van Niekerk left off their analysis, in February 1997, the time of the coming into force law of the Constitution. By coincidence, this was also the moment that saw the ANC government, led by then Deputy President Thabo Mbeki, ushering in a conservative economic policy, known as the Growth, Employment and Redistribution (gEAR) strategy. This policy was sharply and frequently criticised by the ANC’s alliance partners for caving in to ‘neo-liberal economic doctrine’; and for its plans to cut public expenditure on key socio-economic rights such as to healthcare.

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10 Ibid at 353.
services and basic education. Former Minister of Trade and Industry Rob Davies referred to GEAR as ‘a lodestone around which the different contending forces in the struggle over the direction of the National Democratic Revolution (NDR) would mobilise for years to come.’ He regarded it as the point at which ‘the finance ministry progressively assumed hegemony over economic policy.’

Padayachee and Van Niekerk explored the genesis of GEAR and the abrupt end of the much more progressive Reconstruction and Development Programme (RDP). However, other than to say that the ‘unnecessary lurch to economic conservatism … undoubtedly had serious negative consequences for the South African economy and for the poor and the working class’ they did not document GEAR’s failures: these were most notably the changing shape of inequality and the precipitous rise in inequality in access to socio-economic rights, particularly health care services, sufficient food and basic education. Nor do they record the subsequent zigzags in the economic policies that followed GEAR.

Before providing an analysis of these policies, it is necessary to illustrate what bearing the Constitution’s positive obligations must have on the government’s economic policy and decisions, irrespective of the ideological complexion of the political party elected to power.

A The Constitution’s bearing on economic policy directions and decisions

According to recital 5 of its preamble the Constitution is ‘the supreme law of the Republic’. It is vested with this power ‘so as to’: ‘Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights’ and ‘[i]mprove the quality of life of all citizens and free the potential of each person.

In the context of my argument, the three words ‘so as to’ are important. They establish that the Constitution’s drafters intended there to be a direct causal connection between the supreme law and its socio-economic objective to ‘improve the quality of life of all citizens and free the potential of each person.’ According to Sandra Liebenberg ‘this contention is supported also by horizontal application provisions in sections 8(2) and (3) of the Constitution as well as by the injunction to interpret all law including legislation, common law and customary law to ‘promote the spirit, purport and objectives of the Bill of Rights.’ The ‘so as to’ connection is further reinforced in the founding provisions where ‘[h]uman dignity, the achievement of

The actual impact of GEAR on socio-economic rights is still disputed. For the left, GEAR was a watershed moment away from transformative economics. However, according to some researchers the evidence does not unequivocally support that contention. See, for example, A van Zyl & C van der Westhuizen ‘Deep Cuts? Social Service Delivery Under GEAR’ Trade and Industry Policy Strategies (TIPS) (2003), available at https://www.tips.org.za/research-archive/annual-forum-papers/2003/item/360-deep-cuts-social-service-delivery-under-gear. In this paper, the authors argue that ‘while budgeted and actual social spending and social spending as share of the budget increased, actual per capital social spending and social spending as share of GDP decreased over the period. We also find that social spending as share of GDP declined by less than total expenditure’s share of GDP. The evidence is therefore not conclusive enough to substantiate the claim that social spending was drastically cut under GEAR.’

Towards a New Deal, A Political Economy of the Times of My Life (2021) 71.

Ibid at 71. Importantly, at 70 Davies points out that the policy didn’t work in its objective of attracting significantly increased levels of Foreign Direct Investment (FDI). Arguably, a salutary lesson for today’s economic policy.

Padayachee & Van Niekerk (note 7 above) at 234.

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15 Padayachee & Van Niekerk (note 7 above) at 234.

16 Constitution recital 8 of the Preamble.

17 Private communication with Prof Sandy Liebenberg, December 2020.
equality and the advancement of human rights and freedoms’ are listed as core values. It is on this basis that Moseneke DCJ could write in Hoerschool Ermelo that:

In an *unconcealed design*, the Constitution ardently demands that this social unevenness be addressed by a radical transformation of society as a whole and of public education in particular. This it does in a cluster of warranties. I cite only a few.19 Moseneke was writing about the right to basic education, but there can be no doubt that his description of the Constitution’s ‘unconcealed design’ extends to all rights. Significant too is the declaration that ‘law or conduct inconsistent with it is invalid’.20 The use of the word ‘conduct’ clearly extends this injunction beyond just the state. Also, note the unambiguous duty created by the mandamus that ‘the obligations imposed by it must be fulfilled’.21

The importance of the preamble and the founding provisions has been emphasised consistently and unambiguously by the Court, for example in *Van Heerden* where (then) Moseneke J referred to the Constitutional ‘command’ in relation to equality referring to this as ‘a standard which must inform all law and against which all law must be tested for constitutional consonance’.22 In the words of Moseneke J: ‘Of course, democratic values and fundamental human rights espoused by our Constitution are foundational. But just as crucial is the commitment to strive for a society based on social justice.’23 He further found that:

This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. *The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage.* It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution.24

The importance of the Constitution’s founding provisions is evident from the way in which they are encased in the Constitution and protected against alteration and watering down. A unique threshold of 75 per cent is set for any amendment to Chapter 1, compared with two thirds for all other chapters. Chapter 2, the Bill of Rights, goes further in reducing any ambiguity about the Constitution’s purpose. It makes its jurisdiction clear by stating that it ‘applies to all law, and binds the legislature, the executive, the judiciary and all organs of state’.25 Private parties and ‘conduct’ also fall under the Constitution’s sway ‘if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right’.26

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18 Constitution s 1(a). This is listed as the first of the Constitution’s values.
19 Head of Department: Mpumalanga Department of Education & Another v Hoërskool Ermelo & Another [2009] ZACC 32, 2010 (2) SA 415 (CC), 2010 (3) BCLR 177 (CC) (‘Hoërskool Ermelo’) (emphasis added).
20 Constitution s 2.
21 Ibid.
23 Ibid at para 25.
24 Ibid at para 27 (emphasis added).
25 Constitution s 8(1).
26 Ibid s 8(2).
ECONOMIC POLICY AND THE SOCIO-ECONOMIC RIGHTS IN THE CONSTITUTION

It is now well established in a line of jurisprudence that the state has a positive duty to intervene in private conduct to prevent private actors from violating rights, including economic conduct, where it is necessary to facilitate the realisation of a right.27

Liebenberg illustrates the (barely tapped) power of the Constitution over private markets by pointing to the substantive judicial interventions in property law under the influence of the right to housing as ‘one of the best and more explicit examples of the ways in which the Constitution has had an impact on private law’.28 In addition, intervention in the pharmaceutical market is a clear example of what the state can do when recognising and fulfilling a duty to intervene to realise socio-economic rights, in this case s 27. In the cases of medicines, governmental action was prompted by the devastating HIV/AIDS epidemic in the early 2000s and because of the centrality of affordable medicines to the ‘right of access to healthcare services’.29 Even in this case it required the existence of a strong activist movement, the Treatment Action Campaign (TAC),30 mobilising for affordable medicines to put pressure on the government to use its constitutionally sanctioned powers to bring down the price of medicines.

However, I argue that this unconcealed design does not stop at the Constitution. Since 1996 the language of much subsidiary legislation provides further evidence of a recognition of this duty. For example, according to the Competition Act, the very raison d’etre of the Competition Commission and Tribunal is ‘to promote employment and advance the social and economic welfare of South Africans’.31 Although the words used in the Competition Act are ‘economic welfare’ I argue that the legislature’s meaning here is intended to be almost interchangeable


For example, see Minister of Health & Another v New Clicks South Africa (Pty) Ltd & Others [2005] ZACC 25, 2006 (8) BCLR 872 (CC)(‘New Clicks’), where at para 236 Moseneke J writes: The scheme is criticised by the Pharmacies on the ground that regulation of prices is less effective than market forces. The choice of price regulation, if not inconsistent with the Medicines Act, was a policy decision within the domain of the legislature and the executive with which this Court will not interfere. This Court is concerned with whether the scheme meets the requirements of the Medicines Act and was adopted in accordance with the provisions of the Constitution and PAJA, and not with whether there may be better ways of achieving the same purpose. Further, at para 734 Moseneke writes: ‘I do not agree that by devising a scheme to make medicines affordable through regulation 10, which sets the dispensing fee for pharmacies, the Minister’s conduct is ulterior, irrelevant or irrational to the purpose of s 22(2) and (3).’ Considering some contemporary debates about economic policy it might also be worth noting how Moseneke dispenses with the fear-mongering argument that regulating prices would deter investment and cause a collapse of pharmacies by weighing the actual expert evidence placed before the court. All these statements have resonance and relevance when it comes to the power of the Constitution over markets and economic policy.


31 Competition Act 89 of 1998 s 2(c).
with socio-economic rights. However, the question of the inconsistency of language within the Constitution and between the Constitution and other legislation is something that will need further analysis by academics and probably eventually the courts.

Scholars and the courts have agreed that the Constitution does not create a hierarchy of rights. Nonetheless, they have accepted that there are what have been termed ‘empowerment rights’ as well as rights such as access to information and administrative justice that facilitate access to other socio-economic rights. Section 29, the right of ‘everyone to basic education’, is one of these.

In the context of its ‘unconcealed design’, it cannot be an accident that once the Constitution, in chapter 2 section 8, has dealt with the application of the Bill of Rights, the first tangible self-standing right, it deals with the right to equality. Its place in the Constitution would suggest that equality is a right that must envelop all other rights. Section 9(2) of the Constitution makes this express by stating that ‘[e]quality includes the full and equal enjoyment of all rights and freedoms’. The state ‘may’ take ‘legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination’. Admittedly, ‘may’ is not as strong as the injunction that the state ‘must’ take ‘reasonable legislative and other measures to progressively realise’ the socio-economic rights to housing and health care services. However, even if ‘may’ is read conservatively, it amounts to a permission.

32 In Government of the Republic of South Africa & Others v Grootboom & Others [2000] ZACC 19, 2001 (1) SA 46, 2000 (11) BCLR 1169 (‘Grootboom’) Yacoob J referred to all rights as being ‘inter-related and mutually supporting’ at para 23, noting that ‘socio-economic rights must all be read together in the setting of the Constitution as a whole’ at para 24. The relationship between rights is built on in subsequent jurisprudence. For example, in Port Elizabeth Municipality v Various Occupiers [2004] ZACC 7, 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC)(‘Port Elizabeth Municipality’) at para 23: The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each case. This is cited approvingly by Nkabinde J in Juma Musjid at para 70, when she discusses ‘the role of our courts when confronted with competing rights’. The right to education is specifically described as an empowerment right by the UN Committee on Economic, Social and Cultural Rights in General Comment No. 13: General Comment 13 (21st Session, 1999) ‘The Right to Education (art 13)’ UN Doc E/C.12/1999/10 para 1. This description and quote from the General Comment was cited with approval by the Constitutional Court in Juma Musjid at para 41. Kristina Bentley and Richard Calland describe access to information (ATI) as a ‘leverage right’ and ‘a tool to advance social and economic rights’ (K Bentley & R Calland ‘Access to Information and Socio-Economic Rights: A Theory of Change in Practice’ in M Langford, B Cousins, J Dugard & T Madlingozi (eds) Socio-Economic Rights in South Africa: Symbols or Substance? (2014) 341–364, 342. There are also a number of works recognising the important role of administrative justice in protecting socio-economic rights, for example: G Quinot et al Administrative Justice in South Africa: An Introduction (2nd Ed, 2020); G Quinot & S Liebenberg ‘Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa’ (2011) 3 Stellenbosch Law Review 639–663.

33 For example, Juma Musjid (note 27 above); Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng & Another [2016] ZACC 14, 2016 (4) SA 546 (CC), 2016 (8) BCLR 1050 (CC)(‘FEDSAS’).

34 Constitution s 9(2). This is confirmed in the dictum of Moseneke J in Van Heerden (note 22 above) at paras 22–26.

35 This is the language used in Constitution s 26 (Housing) and s 27 (Health care, food, water, and social security).
In a 2020 judgment of the North Gauteng High Court\(^{36}\) Kollapen J wrote of the ‘general transformative trajectory of the Constitution in which the principle of equality finds centre place’ and quoted approvingly from the Constitutional Court judgment in \textit{Minister of Justice and Others v Restructuring and Insolvency Practitioners Association and Others}\(^{37}\) to the effect that ‘throughout the many, many years of the struggle for freedom, the greatest dream of South Africa’s oppressed majority was attainment of equality. By that I mean remedial, restitutary or substantive equality, not just formal equality’.\(^{38}\) It is significant to the theme of this article that this case was about positive action taken by the government to specifically protect black businesses when it intervened in the tourism market in the context of the Covid-19 pandemic. Kollapen J found that this was ‘not only permissible at the level of principle but warranted and necessary’.\(^{39}\)

At the level of principle and given the deep fault lines including those of poverty, race and exclusion that continue to exist in our society, the onset of the Covid 19 crisis has on the one hand united South Africans in dealing with and attempting to overcome the impact of the virus. On the other hand it has also sharply highlighted the fault lines in our society where it is so evident that more often than not the poor and the disadvantaged face the major brunt of the crisis. The response to the crisis must therefore recognise this uneven playing field and therefore calibrating such a response to deal with the impact of the crisis as well as the effect of historical disadvantage is not only permissible at the level of principle but warranted and necessary.

The point is simply that a race neutral response can have the effect of deepening the fault lines on our society.\(^{40}\)

The untapped potential of section 9 to drive economic transformation is something several academics are increasingly beginning to focus their attention on. Cathi Albertyn, for example, in a paper presented at a conference of the \textit{South African Journal on Human Rights} in February 2021 referred to substantive equality as being ‘redistributional’ in paying attention to ‘what structures people’s freedom.’ She said that during the Covid-19 pandemic the courts had emphasised ‘the omnipotence of the Constitution in economic decision making by the government’.\(^{41}\)

Notably, in section 9(2) ‘social origin’ is also a listed category on which the state may ‘not unfairly discriminate directly or indirectly’. This is reinforced by the legislature in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, which recognised ‘socio-economic status’ in section 34 as a directive principle to be considered for inclusion as a prohibited ground of discrimination because of ‘overwhelming evidence of the importance, impact on society and link to systemic disadvantage and discrimination’.\(^{42}\)

\(^{36}\) \textit{Solidarity obo Members v Minister of Small Business Development & Others; Afriforum v Minister of Tourism 7 Others} [2020] ZAGPPHC 133 (‘Solidarity’) at para 28.


\(^{38}\) Ibid at para 61.

\(^{39}\) \textit{Solidarity} (note 36 above) at para 36.

\(^{40}\) Ibid at paras 36–37.


\(^{42}\) According to Sandy Liebenberg ‘SER status is still a directive principle and has not yet been included in the prohibited grounds but can be enforced through other grounds or analogous grounds. There are apparent amendments to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA)
Arising from this understanding of positive duties the courts, in a number of cases, have found that the failure to take ‘reasonable measures’ and dedicate ‘available resources’ towards the realisation of socio-economic rights amounts to unfair discrimination based on race and social origin. For example, in Minister of Basic Education v BEFA the SCA found that ‘[t]here can be no doubt that those without textbooks are being unlawfully discriminated against’, adding that ‘[t]he law is clear. … We must guard against failing those who are most vulnerable. In this case we are dealing with the rural poor and with children. They are deserving of Constitutional protection.’ Further evidence to support the argument that the Constitution requires government to pursue a pro-poor economic policy through legislation and regulations is the inclusion of socio-economic rights (related to the environment, housing, health care, food, water, social security, children and education) that must:

1. Either be progressively realised ‘within available resources’, but with the firm instruction that the state ‘must take reasonable legislative or other measures’ to this end;45
2. Or be provided for as soon as possible ‘unless and to the extent that it is impossible under the circumstances’46 because they are unqualified. This must include every child’s right to ‘basic nutrition, shelter, basic health care services and social services’ and everyone’s ‘right to a basic education.’47

As a result of litigation by, inter alia, the Legal Resources Centre (LRC), the Centre for Child Law, Equal Education and SECTION27 the courts have begun to elaborate on the immediate duties that arise from the right to a basic education.48 However, there is still no clarity about the exact ambit of a child’s right to basic nutrition or health care services. In addition, the ad hoc efforts of the state to use social security to fulfil these rights through grants such as the Child Support Grant (CSG) or – during the Covid-19 crisis, the Social Relief of Distress and Caregivers Grant — are almost certainly insufficient to meet these two rights if they are assessed purely by the cost of what is required to fulfil these needs, i.e., the cost of meeting a child’s minimum caloric level.

currently being drafted. Equality courts have recognised socio-economic status as ground, for example, the Khayelitsha police resourcing challenge.’ (Private communication, February 2021). Liebenberg’s reference is to Social Justice Coalition & Others v Minister of Police & Others [2018] ZAWCHC 181; 2019 (4) SA 82 (WCC) where the Equality Court found that ‘[d]iscrimination on the ground of poverty, in my view, and as the applicants have shown, amounts to unfair discrimination’ (at para 65) and declared at para 94.1 ‘that the allocation of Police Human Resources in the Western Cape unfairly discriminates against Black and poor people on the basis of race and poverty’.

43 Minister of Basic Education v Basic Education for All [2015] ZASCA 198, [2016] 1 All SA 369 (SCA), 2016 (4) SA 63 (SCA) at para 49.
44 Ibid at para 50.
45 Constitution ss 26 & 27.
46 F Veriava Realising the Right to Basic Education, The Role of the Courts and Civil Society (2019) especially 114–116 ‘The Immediate Realisation Principle – Towards the “Standard of Possibility”’, where Veriava asserts that ‘at the remedy stage, where government is unable to provide a particular input immediately, it will be required to establish this. Government must then provide details as to the precise nature and extent of the constraints, including budgetary constraints, that would make immediate provisioning impossible.’
47 Constitution ss 28 & 29.
That some of these duties do fall directly on the state was affirmed in the *Treatment Action Campaign* case, in which the Constitutional Court recognised that because medicines are a specialised and legally regulated good it was not primarily in the power of parents to ensure children had access to them (as distinct from housing in *Grootboom*, where ‘parental care’ forms part of the responsibility in ensuring their children have ‘access to adequate housing’ and ‘shelter’). However, as a counter argument particularly in the context of how much weight should be attached to the budgetary implications of ordering the fulfilment of a right, it could be posited that one of the factors persuading the Court to order the government to roll-out a programme providing the anti-retroviral drug Nevirapine was that it was being offered free by the manufacturer and was therefore affordable within the state’s budgetary and economic constraints. This would suggest that the Court felt that if the state did not have to pay for fulfilling the obligation it could not raise resource constraints as a defence to its conduct.

It would seem nonsensical to think that the Constitution would be designed in a way that would burden the government with a set of obligations to fulfil its citizens’ rights with major budgetary implications, but at the same time be ‘neutral’ (in Kollapen J’s words) on the policy arena of government – economics – that is most determinant of whether (or not) it could acquire the resources needed to fulfil these rights. It would be equally nonsensical that courts would make orders with budgetary implications without envisaging that a concurrent duty falls upon the government to devise economic and fiscal policies that are needed to provide the resources to implement them.

**B All roads should lead to rights**

The contents and structure of the Bill of Rights, its centrality to the whole Constitutional schema, is crucial to supporting my argument that economic policy must be formulated with the objective of fulfilling rights and must be assessed through this lens by policy-makers (and when called upon by the judiciary) at every stage. I go even further and argue that other chapters of the Constitution work towards the same end. Accordingly, in chapter 3, the principles of cooperative government and intergovernmental relations set out in section 41 include the following:

- (b) *secure the well-being* of the people of the Republic;
- (c) provide effective, transparent, accountable and coherent government for the Republic as a whole;
- (d) *be loyal to the Constitution*, the Republic and its people.

In Chapter 10, the relevant basic values and principles governing public administration, listed under section 195 include:

- (b) Efficient, economic and effective use of resources must be promoted;
- (c) Public administration must be development-oriented;
- (d) Services must be provided impartially, fairly, equitably and without bias;

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50 *Grootboom* (note 32 above).

51 Ibid at paras 70–79; see also the discussion on children’s rights in the *TAC* case (note 30 above) at paras 74–79.

52 *Constitution* s 41 (emphasis added).
(c) People’s needs must be responded to, and the public must be encouraged to participate in policy-making.\(^{(53)}\)

Moreover, in chapter 14, we find section 237, ‘Diligent Performance of Obligations’, tucked away under the General Provisions and insufficiently relied on or cited. It requires that ‘[a]ll constitutional obligations must be performed diligently and without delay.’\(^{(54)}\)

Finally, in support of the argument advanced about the centrality of realising/fulfilling rights to the ‘unconcealed design’ of the Constitution is the fact that important mechanisms are built into the Constitution to try and ensure rights are properly and consistently integrated into government planning. For example, one of the constitutionally prescribed functions of the South African Human Rights Commission (SAHRC) is that:

3. Each year, [it] \(^{(55)}\) must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.\(^{(55)}\)

Unfortunately, as a result of years of serial poor compliance with its questionnaires and requests whilst then Advocate Kollapen was the SAHRC’s chairperson (2002–2009), the Commission was frustrated in meaningfully fulfilling this responsibility. In my view, the use of the word ‘must’ means that failing to ensure this information was provided and assessed is arguably a violation of the SAHRC’s obligations under section 184(3) undermining a key aspect of the Constitution’s design in relation to socio-economic rights. According to the current Chairperson, Advocate Bongani Majola, ‘the section 184(3) mandate is handled by the Research Unit of the Commission who have advised that the Commission still exercises it and annually sends requests to organs of state requesting information on the measures referred to therein. However, it is the reporting of the results and sharing of the government data that remain challenges.’ Majola added that nevertheless, ‘the Commission is working on those challenges and that had written to government departments in 2017/18, drawing their attention to the section and advising them that the Commission would be requesting this information each year.’ He said:

In essence, the S184(3) mandate is being adhered to. The data is being requested from government, and is then analysed against accepted indicators and benchmarks derived from constitutional and international jurisprudence. Monitoring and assessment occurs based on this information, supplemented with official, public information such as that provided by Stats SA. It is verified against SAHRC provincial monitoring data and CSO monitoring reports. Furthermore, evidence from civil society is also used to compare against and is often used to challenge the State’s information.\(^{(56)}\)

\(^{(53)}\) Constitution s 195 (emphasis added).

\(^{(54)}\) It is important to note here that both ss 195 and 237 have been found to be justiciable, and not mere baubles on the constitutional scaffold. See, for example, Minister for Justice and Constitutional Development v Chonco & Others [2009] ZACC 25, 2010 (1) SACR 325 (CC), 2010 (2) BCLR 140 (CC), 2010 (4) SA 82 (CC); Public Protector v SA Reserve Bank 2019 (6) SA 253 (CC) at para 151; and Economic Freedom Fighters v Speaker of the National Assembly & Another [2017] ZACC 47, 2018 (2) SA 571 (CC) at para 217, where the Court says of s 237 that ‘It is the duty of this Court to ensure that this injunction is followed.’

\(^{(55)}\) Constitution s 184 (emphasis added).

\(^{(56)}\) Personal communication with Advocate Bongani Majola on 8 and 24 March 2021. Between 1997 and 2012, the SAHRC produced annual socio-economic rights progress reports (available at https://www.sahrc.org.za/index.php/sahrc-publications/section-184-3-reports) but has now ceased doing so. In correspondence, Majola argues that ‘the realisation of socio-economic rights, to a large extent, stalled in 2008 and there has been very
I argue that 25 years after the signing of the Constitution the failure to ensure compliance with section 184(3) is an omission that raises more questions about the robustness of what I would term the ‘social justice system’ and the adequate resourcing of essential ‘state institutions supporting democracy’, the name given by chapter 9 to institutions like the SAHRC, the Commission for Gender Equality (CGE) and the Auditor General.

C Chapter 13: Unlucky for many – the sting in the Constitution’s tail?

In the early 1990s, as South Africa entered upon the path of political negotiations to end apartheid, the country was not an island and very much subject to both the political and economic winds that were blowing across the globe. The world was at an early point in the ascendancy of neo-liberal economics and its related state- and law-craft. In his book *Globalists*, Quinn Slobodian argues that ‘neoliberalism has been less a discipline of economics than a discipline of statecraft and law.’\(^{57}\) With meticulous research he shows how the outcome of decolonisation generally, and the negotiations in South Africa in particular, occupied the neo-liberal theorists.\(^{58}\) In South Africa, the ways in which the market could be insulated from democracy were a vital issue for conservative economists globally. As a result, they threw some of their intellectual weight and influence behind the old regime and engaged in discussion about strategies to shape the new legal framework. Friedrich Hayek visited South Africa in 1963 and Milton Friedman in 1976. In a chapter looking at the race politics of the Mont Pelerin Society and its approach to decolonisation, Slobodian records how leading neo-liberals had established a relationship with the National Party from the 1960s, and how —

Hayek’s message to Hutt and others was that a state captured by black voters would cease to be a problem if the state itself was stripped pre-emptively of its right to grant exemptions from the discipline of the competitive market. … Hayek’s proposal was to downgrade the significance of representative government by reducing its roles to the enforcement of competition and contract.\(^{59}\)

This fits with the argument of Padayachee and Van Niekerk that the ‘apartheid regime and the local capital skilfully used their access to not inconsiderable political, economic and intellectual resources to outfox and outmanoeuvre’ the ANC economics team, noting too it was a ‘major bonus’ that ‘these policy ideas more or less coincided with those of the Washington Consensus institutions’.\(^{60}\) Both paid very careful attention to those parts of the future Constitution that would have a bearing on economic policy and public expenditure. For example, they detailed the sudden convergence between economic policy-making and Constitution writing when it came to deciding the mandate of the South African Reserve Bank (SARB), something they describe as ‘the most significant decision taken on economic policy at the constitutional

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\(^{58}\) Ibid in ‘A World of Races’ ch 5 146–181.

\(^{59}\) Ibid at 175. William Hutt was a lecturer at the University of Cape Town for nearly 40 years and published a book titled *The Economics of the Colour Bar* (Ludwig von Mises Institute) in 1964.

\(^{60}\) Padayachee & Van Niekerk (note 7 above) at 176.

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negotiations in the early 1990s.\textsuperscript{61} Their argument is that those responsible for economic policy in the ANC ‘failed the democratic movement in some crucial ways: by too easily embracing a Washington Consensus world view’ and arguing that ‘there was no alternative’\textsuperscript{62}.

In relation to the SARB Padayachee and Van Niekerk document the way in which the Constitution-drafting process tied the bank’s mandate irrevocably to inflation targeting, which was, and still is, a key pillar of neo-liberal economic thinking that was prevalent in the 1990s and 2000s.\textsuperscript{63} Thus, according to section 224, the SARB’s primary object is ‘to protect the value of the currency in the interests of balanced and sustainable economic growth in the Republic’.

Inflation targeting refers to the use of monetary measures (sometimes called monetarism or supply side economics) such as high interest rates, which aim to constrict money supply, and borrowing to prevent inflation. In the interest of preserving the value of the currency by so doing they also discourage \textit{expansionary} policies by governments that necessitate large scale borrowing for investment in public services such as those needed to realise rights of access to healthcare services or basic education.\textsuperscript{64} However, monetarism is a highly contested economic theory, rather than a scientific rule, that should not have been embedded in a constitutional provision. Doing so made South Africa unusual amongst nations. Today, the efficacy of inflation targeting is increasingly questioned by many economists, including 2001 Nobel prize winner in economics Joseph Stiglitz.\textsuperscript{65} Yet, in this sphere of government, the Constitution has circumscribed the powers of the executive, the legislative and even the judiciary.

In recent years, debates between political parties and within the ANC-SACP-COSATU Alliance have tended to focus on the merits of the constitutionally guaranteed independence of the SARB from government,\textsuperscript{66} another neo-liberal shibboleth of the early 1990s that found its way into the final Constitution. Yet, in many ways, this is of secondary importance to fixing its ‘primary object’ in perpetuity. The SARB could, for example, be independent but still adopt expansionary economic policies that could have the effect of weakening the currency whilst strengthening human rights. The ripple effect of this has been to inhibit a raft of economic measures needed to fulfil duties to realise rights that might necessitate a more expansionary monetary policy. Government has succumbed to what former US Treasury secretary Larry

\textsuperscript{61} Slobodian (note 57 above) at 180. At the Constituent Assembly, Theme Committee 6.2 dealt with financial institutions and public enterprises. For those researchers interested in revisiting what shaped the text of chapter 13 of the Constitution, the Committee’s membership and Constitution’s terms of reference are available at https://ourconstitution.constitutionhill.org.za/theme-committee-6/.

\textsuperscript{62} Slobodian (note 57 above) at 157.

\textsuperscript{63} For one historical account of neo-liberal economics, see B Appelbaum \textit{The Economists’ Hour, How the False Prophets of Free Markets Fractured our Society} (2019).

\textsuperscript{64} For example, see all the chapters in R Balakrishnan & D Elson (eds) \textit{Economic Policy and Human Rights, Holding Governments to Account} (2011); and R Balakrishnan, D Elson & J Heintz \textit{Rethinking Economic Policy for Social Justice, The Radical Potential of Human Rights} (Routledge, 2016).


Summers has called a ‘balance of financial terror’, or what we might call in our context balancing rights against a terror of finance.\(^{67}\) Padayachee and Van Nierkerk leave their analysis of the intrusion of economics into constitution-making at the doors of the SARB. They do not interrogate other parts of the constitutional text relating to finance, in which, I believe, their thesis could have been more strongly affirmed.

Overall, chapter 13 of the Constitution, titled Finance, is arguably one of the pivotal chapters of the Constitution. In a sense, it should be the real gateway to the Constitution’s social justice vision. Yet, paradoxically, it is a gateway that is blocked. Despite the Constitution’s design, it does not mention any financial obligations towards rights at all. Although there is a reference to ‘equitable shares and allocations of revenue’,\(^{68}\) there is no use of the word ‘equality’ or ‘rights’. These are subsumed under ‘national interest’ and, even worse, ‘national debt’. This makes the chapter at best inconsistent, and at worst completely at odds, with the objectives of the Constitution set out in its founding provisions.

The problem first becomes evident in the sections dealing with the division of revenue. For example, in section 214 (2), setting out the criteria that the annual Division of Revenue Act 9 of 2021 (‘DORA’) ‘must take into account’, the Constitution is prescriptive when referring to accountability, ‘effective financial management, debt, fiscal capacity’. The language becomes considerably more amorphous than that used in the Bill of Rights. Section 214 (2), for example, refers to:

\begin{itemize}
  \item[(d)] the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them;
  \item[(f)] developmental and other needs of provinces, local government and municipalities;
  \item[(g)] economic disparities within and among the provinces.
\end{itemize}

The same can be said of the reference to ‘transparency, accountability and effective financial management of the economy, debt and the public sector’ prescribed in section 215(1).

Finally, it is worth debating the effect of the Constitution in establishing an independent Financial and Fiscal Commission (FFC). I argue that there is a danger that the FFC’s central responsibility in the fiscal and budgetary process pre-empts duties that fall squarely on Parliament to ensure the realisation of socio-economic rights. DORA may only be enacted after the FFC has been ‘consulted and any recommendations of the Commission have been considered’.\(^{69}\)

Given all of the above, as well as the powers allotted to the Treasury in section 216(1) to ‘ensure both transparency and expenditure control in each sphere of government’ (though ‘standard accounting practice, uniform expenditure classifications and uniform treasury norms and standards’) there is good reason to worry about how the Constitution’s social justice mandate may be diluted or subverted. Further, given what we have learned through hard experience of the vulnerability of the state to capture by both ideological and criminal interests, it should at least be borne in mind that were these institutions all to fall under the control of persons with a conservative ideological bent (for example one who prioritises ‘fiscal discipline’

\(^{67}\) Quoted by A Tooze in *Crashed, How a Decade of Financial Crises Changed the World* (2018) 35.

\(^{68}\) Constitution s 214.

\(^{69}\) Constitution ss 214(2) & 220. The work of the Finance and Fiscal Commission and the extent to which its records show it has been aware of its constitutional obligations (outside of chapter 13) is an issue I flag as meriting further research.
at the expense of human rights), it would be possible to thwart the democratic process of legislature, as well as its duty under international law to ensure that ‘the maximum of its available resources’ are always directed towards rights realisation.\(^{70}\)

\section*{D Public participation on money matters}

In February of each year, Parliament must approve the division of revenue and proposals on tax. This function is set out in section 77 of the Constitution, Money Bills. Section 77(3) requires that ‘[a]n Act of Parliament must provide for a procedure to amend Money Bills’. This did not happen until 2009 with the passing of the Money Bills Amendment Procedure and Related Matters Act 9 of 2009, which also established a Parliamentary Budget Office (PBO). This meant that until 2009 the legislature’s powers were limited to approving or rejecting the budget, i.e., it was not allowed to make amendments. Although Parliament and the committees tasked with the processing the budget hold hearings and debate the Bills,\(^{71}\) there has not yet been an instance where they are amended or rejected; not even, for example, over the contentious decision to increase Valued Added Tax (VAT), a regressive taxation measure with a greater adverse impact on the poor, from 14 to 15 per cent in 2018.

As a result, economic policy – despite its make-or-break implications for rights – is treated as if it is purely the domain of the executive and inoculated from real scrutiny by the legislature. Except in very broad outline, in the debate that follows the annual State of the Nation (SONA) address by the President and budget speech by the Minister of Finance, economic policy has never been intensely scrutinised through the lens of rights obligations by either the National Assembly or by the courts. It was, thus, an unusual departure in response to the 2021 budget when Michael Sachs, the former head of the Treasury’s budget office and acting head of the FFC, was reported to have called into question the budget’s constitutionality, because it ‘unambiguously envisages a retrogression in socio-economic rights set out in the bill of rights’, which was likely to extend beyond the three years of the medium-term expenditure framework until debt has stabilised.\(^{72}\) In a paper prepared by the FFC, we find the following unprecedented statement:

> Neither the budget speech nor the budget review makes any reference to the state’s constitutional obligations regarding these matters. There is also no indication that government has considered how the rights contained in the Constitution will be protected in the context of falling resource allocations. It is hard to avoid the conclusion that executive has not considered these matters seriously when preparing its budget proposal to parliament.\(^{73}\)

\(^{70}\) According to art 2(1) of The United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR), ‘[e]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.’


\(^{73}\) Finance and Fiscal Commission, Supplementary Comment on Budget 2021 and the Bill of Rights (5 March 2021).
Leaving economic policy to the executive was a catastrophic omission in the constitutional design. In making the (unpopular at the time) case for socio-economic rights, Etienne Mureinik showed that he understood that economic policy would have an impact on rights and might require judicial oversight in cases where it was disputed:

if the government is confident of its economic case, let it make it in court, where it can be exposed to scrutiny. If the government could adduce economic evidence and argument to make a plausible case, the court would have to uphold the programme. A central deficiency of the present order is that the economic case for a government programme, if it is made at all, is made at the level of slogan and newspaper headline, and, occasionally, at the not much less superficial level permitted by the constraints of parliamentary procedure.74

A strange constitutionally approved anomaly has therefore been created. Whilst courts have found that Parliament has a duty to ensure meaningful public participation in relation to other state duties and areas of life,75 such as the changing of provincial boundaries, the same principle has not been applied for economic policy and the budget.76 Up to this point, the effect of this has been to tilt influence away from ‘we, the people’ and towards unelected influencers of economic policy such as international rating agencies, banks, and international financial institutions: this, despite economic policy’s important implications for human rights. The result, according to Alston and Reisch, is precisely that ‘the making of tax policies is often seen as the epitome of democratic decision-making in practice, rather than as a process that might, by its opacity and propensity to be hijacked by special interests, pose a real threat to the assumptions underlying the democratic state’.77 Put bluntly, it is when economic policy is shifted away from having to answer to constitutionally protected human rights that it becomes vulnerable to capture. One way to counter this, according to Liebenberg, lies in the ‘unexplored potential in the “meaningful engagement” jurisprudence of the CC, which the Court has linked to the “reasonable measures” requirement in sections 26(2) and 27(2).’78

Based on the above analysis, I conclude as follows:

1. The realisation of socio-economic rights is fundamental to the basic structure of the Constitution.

75 Doctors for Life International v Speaker of the National Assembly & Others [2006] ZACC 11, 2006 (12) BCLR 1399 (CC), 2006 (6) SA 416 (CC)(‘Doctors for Life’); and Matatiele Municipality & Others v President of the Republic of South Africa & Others (2) [2006] ZACC 12, 2007 (1) BCLR 47 (CC)(‘Matatiele’). Significantly, in Matatiele, the Court said: ‘The nature and the degree of public participation that is reasonable in a given case will depend on a number of factors. These include the nature and the importance of the legislation and the intensity of its impact on the public. The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say’ (at para 68).
76 It seems ironic that in the electoral contests between political parties a great deal of debate is often around economic policy. This is something the electorate assess as they choose which party to vote for. Parties are elected to government on the basis of their promises and economic ideologies. Yet, once in government economic policy becomes the exclusive terrain of the executive and, for the most part, seems to be placed out of reach of the legislature and, some would argue, the courts.
78 Private communication, February 2021.
2. Economic policy, conduct and governance should be open to the same level of scrutiny, and therefore correction by courts where needs be, as political conduct, where there is now an extensive jurisprudence that has (repeatedly) reached all the way to the conduct of the President.79

3. There is a surmountable problem with the design and language of parts of the Constitution that has the potential to stymie the Bill of Rights. This is especially evident in chapter 13.

4. Although the language of the Constitution is silent on economic obligations, and sends contradictory signals, this silence cannot mean that the government therefore has a free rein to impose austerity measures80 or adopt economic policies that denude socio-economic rights of resources; it cannot cause a ‘progressive regression in rights’ or ‘regressive realisation’ (an apt oxymoron), as is clearly happening now.81 Relevant here is an emerging line of jurisprudence that forbids retrogressive measures when it comes to rights.82

My claim that the Constitution should have a direct bearing on economic policy is supported by an evolving jurisprudence around these rights. Thus far, most of this jurisprudence has focused on the state’s duties when budgeting for rights and, directly linked to this, its duty to protect ‘available resources’ from corruption. Up to this point, therefore, I argue that constitutional law governing budgeting has established the following benchmarks:

1. A budget is a non-negotiable component of a reasonable plan to realise socio-economic rights.83
2. It is not a defence for the state to simply aver that it does not have available resources. It must provide evidence that it does not.84

81 In recent years, South African civil society organisations have increasingly invoked the Constitution to challenge ‘fiscal consolidation’ and pointed out its negative impact on socio-economic rights. See M Heywood ‘Threading the Budget Through the Eye of the Constitutional Needle’ *Daily Maverick* (20 October 2020), available at https://www.dailymaverick.co.za/article/2020-10-20-threading-the-budget-through-the-eye-of-the-constitutional-needle/. Submissions have also been made to Parliament by organisations like the C-19 People’s Coalition (available at https://c19peoplescoalition.org.za/submission-to-the-standing-and-select-committees-on-appropriations/) and Budget Justice Coalition (available at https://budgetjusticesa.org/). However, although this issue is fiercely contested, it has not yet reached the courts. One of the complaints of civil society is that carefully considered submissions to Parliament’s finance committees are not being properly considered. In 2021, this led to the BJC choosing to boycott the public hearings on the Appropriations Bill.
83 *Grootboom* (note 32 above) at para 68.
84 *Khosa & Others v Minister of Social Development & Others, Mahlaule & Another v Minister of Social Development* [2004] ZACC 11, 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC) (‘*Khosa*’) at para 62. In *Mahlaule*, the Court rejected the state’s assertion that the extension of the benefits in question to all eligible permanent residents would ‘impose an impermissibly high financial burden on the state’ (at para 60). In doing this, it emphasised that the state had failed to provide ‘clear evidence to show what the additional cost of providing social grants to aged and disabled permanent residents would be’ (at para 62). But even if the state’s ‘speculative’ calculations could be accepted, the Court ruled that these did ‘not support the contention that there will be a huge cost in making provision for permanent residents’ (at para 62).
3. In planning for rights, the state must look at the availability of resources within its overall budget and not just in one particular envelope.85

4. When it comes to those rights that are immediately realisable, like ‘basic education’ or ‘children’s rights to basic nutrition, shelter, basic health care services and social security’, the state must budget sufficient resources to fulfil those rights, unless it can show that it is impossible to do so.86

In relation to corruption, the duty to protect resources destined for rights realisation has been found to provide justification to show why the state must ensure the independence of its National Prosecuting Authority (NPA) and investigative units, because, as the Constitutional Court said in Glenister v President of South Africa, corruption has become ‘a scourge’ that ‘poses a real danger to our developing democracy’:

It undermines the ability of the government to meet its commitment to fight poverty and to deliver on other social and economic rights guaranteed in our Bill of Rights. Organised crime and drug syndicates also pose a real threat to our democracy.87

The jurisprudence provides an important foundation for the assertion that all policies adopted by the state should facilitate the progressive realisation of socio-economic rights. However, thus far this jurisprudence has been confined to the state’s duty to budget its ‘available resources’ appropriately to realise human rights as part of plans and policies. Even an important judgment like Blue Moonlight is about how government divides its fiscal cake, not how it bakes it in the first place. Inevitably, this means that when the cake shrinks, for whatever reason, rights shrink with it. That is precisely what is happening in South Africa. Thus, I argue that there is an a priori duty to ‘take legislative and other measures’ that are needed to raise the financial resources needed to budget adequately for the realisation of rights. As already mentioned, there is ample support for this contention in the UN Committee on Economic Social and Cultural Rights (CESCR) doctrine on mobilising ‘the maximum available resources’.88

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85 City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd &Another [2011] ZACC 33, 2012 (2) BCLR 150 (CC), 2012 (2) SA 104 (CC)(‘Blue Moonlight’) at para 74: The City provided information relating specifically to its housing budget but did not provide information relating to its budget situation in general. We do not know exactly what the City’s overall financial position is. This Court’s determination of the reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations. In other words, it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations.

86 Veriava (note 46 above) at 114–116. The question of how, with what speed and by what means the state budgets for immediately realisable rights has not yet been resolved by the courts and has left these rights somewhat hollow. At the time of writing, a judgment was still awaited from the Limpopo High Court in the case of Rosina Komape & Others v. Minister of Basic Education & Others, a matter that relates to the state’s duty to provide safe sanitation at schools in Limpopo. In 2018, in Komape & Others v Minister of Basic Education [2018] ZALMPPHC 18 Müller J had included a structural order to build school toilets. The Limpopo Education department responded that it did not have sufficient budget and would not be able to fulfil the right before 2030. SECTION27, the applicants’ attorneys, returned to court to challenge non-compliance with the original court order.


The blame for this lacuna in the law cannot lie at the door of the courts. They can only deal with what is presented to them. In this instance, the first failure lies with the executive and legislative to understand their constitutional obligations. It also lies with the failure of civil society in its public interest litigation to challenge state failure in this regard. According to Alston and Reisch, the result of this ‘neglect of tough issues regarding public financing’ is that ‘[h]uman rights experts have been sidelined in debates about the fiscal foundations of social progress and remain largely ignorant of one of “the most fundamental ways through which power and equality are mediated in society and in the economy: taxation.”’

E Tax and rights

In his acclaimed analysis of modern inequality, Thomas Piketty argues that building what he terms ‘a fiscal and social state’ is an essential part of modernisation and economic development. He warns, however, that:

The historical evidence suggests that with only 10-15% of national income in tax receipts, it is impossible for a state to fulfil much more than its traditional regalian responsibilities: after paying for a proper police force and judicial system, there is not much left to pay for education and health. Another possible choice is to pay everyone — police, judges, teachers, and nurses — poorly, in which case it is unlikely that any of these public services will work well. This can then lead to a vicious circle: poorly functioning public services undermine confidence in government, which makes it more difficult to raise taxes significantly. The development of a fiscal and social state is intimately linked to the process of state-building as such.

To those who might argue that taxation and fiscal policy is not a constitutional or human rights issue, he has this to say: ‘Taxation is not a technical matter. It is pre-eminently a political and philosophical issue, perhaps the most important of all political issues. Without taxes, society has no common destiny, and collective action is impossible.’

Nobody would dispute that taxation is a matter governed by a variety of fields of law. However, many probably would dispute the unambiguous assertion made by Alston, in his capacity as UN Special Rapporteur Human Rights and Extreme Poverty, that ‘[t]axation policies are human rights policies.’ This is why in South Africa today, any argument about rights realisation has to address the state’s fiscal policy, and why it is important to stress that having a plan to raise sufficient revenue, including but not limited to raising taxes, is a constitutional duty. This was confirmed inadvertently by the Constitutional Court in some of its earliest judgements. For example, an early warning of the need to secure resources for rights was given in *Soobramoney* where, after referring to the socio-economic rights enshrined in sections 26 and 27 of the Constitution, Chaskalson P stated:

89 Liebenberg argues that decisions like *Mazibuko & Others v City of Johannesburg & Others* [2009] ZACC 28, 2010 (3) BCLR 239 (CC), 2010 (4) SA 1 (CC) (‘Mazibuko’) have had a chilling effect on positive rights realisation in the sphere of ss 26 & 27 rights. ‘Even if one disagrees with the outcome, I think the reasoning in the judgment supports a very deferential and procedurally orientated approach to socio-economic rights. Which is not to say that one can’t do something with procedure in terms of prising open some spaces for civil society to get their voices heard on questions of budgetary decision-making,’ (Personal communication (note 78 above)).

90 Alston & Reisch (note 77 above) at 8.

91 Piketty (note 2 above) at 627.

92 Ibid at 630.

What is apparent from these provisions is that the obligations imposed on the State by ss 26 and 27 in regard to access to housing, healthcare, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. In similar vein, Sachs J in Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others observed that ‘absent government compulsion to pay taxes, the expenditure necessary for elections to be held, for parliament to pass legislation, or for this Court itself to uphold fundamental rights, would not be guaranteed.

Fareed Moosa, for example, explains it as follows:

Section 7(2) of the Constitution obliges the State to ‘respect, protect, promote and fulfil’ the rights entrenched in the Bill of Rights. To do so necessitates that the government has sustained access to adequate finance. Financial constraints in the public treasury will hinder the State’s ability to achieve social justice through the fulfilment of, inter alia, socio-economic rights. Unless the problem of strained governmental resources is overcome, the aspiration of a fully transformed society with human dignity, freedom and equality for all will have a hollow ring. Finances derived from taxes are, thus, crucial. Success of the social transformation project hinges on the efficiency and effectiveness of tax collection by the South African Revenue Service (SARS). Inadequacy in public finances will hamstring the South African government’s ability to fulfil the human rights of its people which, in turn, will give rise to cries that the government is failing in its duty under the Constitution to perform all constitutional obligations ‘diligently and without delay.

The Human Rights Commission recommended, inter alia, in its 2017/18 Equality Report the following:

It is accordingly recommended that government continues its review of South Africa’s tax. … National Treasury must report to the Commission on measures considered or taken to increase tax revenue in an effort to achieve substantive socio-economic equality, while minimising any detrimental impact on the rights of the poor, within 3 months of the release of this report.

The argument here is not that the Constitution or the courts should prescribe to government the details of a particular economic policy it should follow or set tax levels – that would obviously violate the separation of powers. Rather, constitutional obligations to ensure equality, social justice and socio-economic rights must create a set of parameters within which economic policy choices are either lawful or unlawful. Money bills are laws of general application, and they can therefore limit rights, but they may only do so ‘if the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including … less restrictive means to achieve the purpose.

The language of section 36 means that there are boundaries. If an economic policy, assessed in the light of expert evidence, will on the balance of probabilities give rise to a retrogression of fundamental rights, or not facilitate their progressive realisation, and if there are alternative

95 Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others [1995] ZACC 13, 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 at para 250.
98 Constitution s 36.
policies or measures (such as taxes) that would, then it is these alternative policies that the
government is obliged to follow in our constitutional state. It is interesting that the Finance
and Fiscal Commission, in a submission referred to above, seems to recognise this as it states
in its critique on 2021 budget ‘that “available resources” implies a distributional question.
Not only has government decided to reduce allocations to healthcare and basic education and
reduce the real value of social grants over the medium term, it has also decided to reduce the
resource envelope available to it by lowering the tax burden.’

As argued by Kate Raworth in her 2017 book, *Doughnut Economics: Seven Ways to Think
Like a 21st Century Economist*, economic policy-making should emulate medicines ‘that
combine the uncertainty inherent in intervening in a complex system (like the human body)
with having responsibility for significant impacts on other people’s lives.’ She suggests that,
like medical practice, economics should abide by a ‘do no harm’ principle and adopt other
ethical principles. I argue South Africa’s constitutional law should play a part in establishing
this as a normative principle.

F  Duties created by international law

South Africa has ratified several international and regional human rights treaties that give rise to
express duties to mobilise the ‘maximum available resources’ to realise a raft of socio-economic
rights. Particularly relevant here are the International Covenant on Economic, Social and
Cultural Rights (ICESCR), ratified by South Africa in 2015, the Convention of the Elimination
of all Forms of Discrimination against Women (CEDAW), ratified by South Africa in 1995,
the Convention of the Rights of the Child (CRC), ratified in 1995, and the Convention on
the Rights of People with Disabilities (CRPD), ratified in 2007. Also important is the African
Charter on Human and People’s Rights, to which South Africa is a party.

Ratifying these treaties has given further weight to existing domestic obligations derived from
the Constitution. In *Al Bashir*, for example, the SCA found that ratifying the Rome Statute
and the passing by Parliament of the Implementation of the Rome Statute of the International
Criminal Court Act 27 of 2002 (the Implementation Act) gave rise to certain clear duties at
a domestic level. With reference to the constitutional design to place South African within
the ‘family of nations’ it explained the ‘inter-relationships’ of both customary international

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99  Finance and Fiscal Commission (note 73 above) at para 11.
100  K Raworth  *Doughnut Economics: Seven Ways to Think Like a 21st Century Economist* (2017) 160–162. It is
    unfortunate that Raworth and other ‘Rethinking Economics’ economists seem to attach little value to human
    rights law in their proposals about how to reorganise economies in order to meet essential needs and limit
    environmental damage. I see this as an indictment of the failure of human right activists to steer the law into
    the territory of economics. This is despite the opportunity created by the marked drift towards recognizing
    socio-economic rights and socio-economic status in constitutions, particularly between 1990 and 2010. This
    drift is documented in J Heymann, A Sprague & A Raub *Advancing Equality, How Constitutional Rights can
    Make a Difference Worldwide* (2020), who, drawing on a database of all the world’s constitutions, point out at 184
    that ‘more recently adopted constitutions are likelier to prohibit explicit SES discrimination: only about one
    third of constitutions adopted before 1990 include an explicit guarantee, compared to more than three-quarters
    of those adopted since 1990.’
101  African Commission on Human and People’s Rights *Pretoria Declaration on Economic, Social and Cultural
102  Minister of Justice and Constitutional Development & Others v Southern African Litigation Centre & Others
law and international agreements within our law and the duties that arise therefrom.\footnote{Ibid at paras 62–65.} In this case, it was the duty to arrest former Sudanese President when he was in Johannesburg in 2015 to attend an ordinary session of the African Union (AU). Following in the wake of this case, the North Gauteng High Court revoked the executive’s decision to withdraw from the International Criminal Court without seeking the approval of legislature, noting:

As the Constitutional Court explained in \textit{Glenister II} para 96, a resolution by parliament in terms of s 231 (2) to approve an international agreement is ‘a positive statement … to the signatories of that agreement that parliament, subject to the provisions of the Constitution, will act in accordance with the ratified agreement’. Therefore, the approval of the international agreement in terms of s 231 (2) creates a social contract between the people of South Africa through their elected representatives in the legislature, and the national executive. That social contract gives rise to the rights and obligations expressed in such international agreement.\footnote{Democratic Alliance \textit{v} Minister of International Relations and Cooperation \& Others (Council for the Advancement of the South African Constitution Intervening) [2017] ZAGPPHC 53, 2017 (3) SA 212 (GP), [2017] 2 All SA 123 (GP), 2017 (1) SACR 623 (GP) at para 52. In this case, at paras 33–34, the court quoted approvingly from \textit{Glenister v President of the Republic of South Africa \& Others} [2011] ZACC 6, 2011 (3) SA 347 (CC), 2011 (7) BCLR 651 (CC) (‘\textit{Glenister II}’)}

In a similar vein, in 2018, the Constitutional Court overturned the decision of then President Jacob Zuma to withdraw South Africa from the Southern African Development Community (SADC) Tribunal noting the ‘centrality’ of international law ‘in shaping our democracy’.\footnote{Law Society of South Africa \& Others \textit{v} President of the Republic of South Africa \& Others [2018] ZACC 51, 2019 (3) BCLR 329 (CC), 2019 (3) SA 30 (CC) at para 4.} If this has been found to be the case in relation to the Rome Statute and the SADC Tribunal, both – it is important to note – human rights bodies, then South Africa’s ratification of the ICESCR must give rise to a similar level of positive duties to take measures to advance the rights therein. Although we have the benefit of a Constitution whose Bill of Rights encases many of the rights found in the ICESCR, there are subtle but significant differences, such as between the duty to raise ‘maximum available resources’ (ICESCR article 2) and ‘available resources’ (SA Constitution sections 26 and 27) to realise rights. In my view, the Bill of Rights therefore does not relieve either the executive or the legislature of the duty to take account of General Comments and the reports of the small army of Special Rapporteurs, whose mandate is to advise states and assist the development of policy and legislation that is aimed at giving effect to the obligations assumed voluntarily by state parties to the international human rights treaties.\footnote{On the domestic legal effect of the ICESCR, General Comments and Concluding Observations, see S Liebenberg ‘South Africa and the International Covenant on Economic, Social and Cultural Rights, Deepening the Synergies’ (2020) 3 \textit{The SA Journal on Judicial Education} 13–41.} This necessity is evident in our jurisprudence, which usually occurs as the last resort of people seeking constitutional protection. It is not however evident in our policy and law making, which is required to be proactive in taking seriously our international obligations.\footnote{As holistic guides to states’ obligations under these treaties see, for example, UN Human Rights Office of the High Commissioner \textit{Handbook for Human Rights Treaty Body Members} (2015); and UN OHCHR \textit{Working with the United Nations Human Rights Programme: A Handbook for Civil Society} (2008).}
Under the ICESCR South Africa is obliged to report on its progress in implementing the rights in the Covenant every two years which is then reviewed by the Committee on Economic, Social and Cultural Rights.\textsuperscript{108} Civil society is also permitted to make submissions before the Committee.\textsuperscript{109} The last took place in 2018. After the hearings, the Committee issues concluding observations and recommendations to the state party, which come under 32 different sub-headings.\textsuperscript{110} Many of its findings are far-reaching. For example, in the November 2018 report, the Committee commented on the state’s duty to allocate the ‘maximum of its available resources’ to socio-economic rights, while welcoming ‘the efforts pursued since the end of apartheid, the persistence of such inequalities signals that the model of economic development pursued by (South Africa) remains insufficiently inclusive’.\textsuperscript{111} It went on, noting that ‘[t]he state party’s fiscal policy, particularly relating to personal and corporate income taxes, capital gains and transaction taxes, inheritance tax and property tax, does not enable it to mobilise the resources needed to reduce such inequalities; and is not sufficiently progressive in that regard’.\textsuperscript{112} The Committee, therefore, recommended that South Africa ‘review its fiscal policy’\textsuperscript{113} and ‘re-examine its growth model in order to move towards a more inclusive development pathway’.\textsuperscript{114} On the vexed matter of the ‘austerity measures’ currently being implemented by the South African government, it suggested an approach not dissimilar to that which the Constitutional Court has taken when presented with disputes over the government’s previous failures to fulfil rights to housing and access to health care services. It ‘reminded’ the state party that:

where austerity measures are unavoidable, they should be temporary, covering only the period of the crisis; necessary and proportionate; not result in discrimination and increased inequalities; and ensure that the rights of disadvantaged and marginalised individuals and groups are not disproportionately affected.

The committee recommends that the state party:

(a) Increase the level of funding in social security, health and education;
(b) Task the Department of Planning, Monitoring and Evaluation with ensuring that public policies are directed towards the realisation of the rights of the Covenant; and

\textsuperscript{108} According to article 16.1 of the ICESCR, ‘[t]he States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.’ See, also, United Nations Office of the High Commissioner on Human Rights (UN OHCHR) Reporting Compliance by State Parties to the Human Rights Treaty Bodies: Concepts and Definitions (15 May 2020), available at https://www.ohchr.org/Documents/Issues/HRIndicators/MetadataReportingCompliance.pdf.

\textsuperscript{109} According to the UN OHCHR, ‘[t]he reporting process should encourage and facilitate, at the national level, public participation, public scrutiny of State policies, laws and programmes, and constructive engagement with civil society in a spirit of cooperation and mutual respect, to advance the enjoyment by all of the rights protected by the relevant treaty.’ (ibid at 1).


\textsuperscript{111} Ibid at para 16.

\textsuperscript{112} Ibid.

\textsuperscript{113} Ibid at para 17(a).

\textsuperscript{114} Ibid at para 17(e).
(c) Ensure the Standing Committee on Public Accounts in the national parliament (and its equivalents in provincial parliaments) take such rights into consideration in assessing the budgetary choices of the national and provincial governments respectively.\(^{115}\)

According to ‘other recommendations’ made by the CESCR, South Africa is expected to respond to these recommendations as well as to ‘disseminate them widely at all levels of society, including at national, provincial and municipal levels, in particular among parliamentarians, public officials and judicial authorities, and that it (South Africa) inform the Committee in its next periodic report about the steps taken to implement them.’\(^{116}\)

States are required to report back on progress with recommendations in their next periodic report; in South Africa’s case this will be in October 2023. However, the committee requested responses to its recommendations concerning social security, social assistance, and refugee rights to education within 24 months. One of their recommendations was to ‘[e]nsure that those between the ages of 18 and 59 with little or no income have access to social assistance’.\(^{117}\)

In March 2021, South Africa submitted a response, including a report that the Department of Social Development had ‘commenced policy work for income support for those between the ages of 18 to 59 with little or no income, including the consideration of a universal Basic Income Grant.’\(^{118}\) This obviously falls far short of the committee’s recommendations, something that will add weight to arguments that the ‘missing middle’ in SA’s social security system, that is the millions of unemployed people between 18 and 59, constitutes a violation of rights under section 27(1)(c), the right of everyone to ‘social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.’\(^{119}\)

### III HAS ECONOMIC POLICY BEEN TAILORED TO ENABLE RIGHTS REALISATION?

In his reply to the debate on the 2018 SONA, President Cyril Ramaphosa said the following:

> What emerged clearly from the debate yesterday, is that all the members of this Parliament are committed to build a nation where progress is measured not by growth in gross domestic product or global competitiveness rankings, but by how the lives of the most vulnerable and marginalised are changed for the better.

> We are building a nation where our greatest concern must be those in society who have least. The poor. The unemployed.

> The most important people in this country are not those who walk the red carpet in Parliament, but those who spend their nights on the benches outside its gates.\(^{120}\)

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\(^{115}\) Ibid at para 19.

\(^{116}\) Ibid at para 82. See also the CESCR note on follow-up procedures to concluding observations, available at https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/FollowUp.aspx?Treaty=CESCR&Lang=en

\(^{117}\) Ibid at para 48(c).


Since then, Ramaphosa has frequently repeated this mantra, particularly as a result of the crisis created by Covid-19 and the lockdown measures instituted under the national State of Disaster.\(^\text{121}\) In many of the President’s recent public speeches we find phrases like ‘inclusive economy’, a ‘new economy founded on fairness, empowerment, justice and equality’ and ‘build back better’ to be very much in vogue.\(^\text{122}\) However, fine words aside, as pointed out by Austrian sociologist Rudolf Golscheid more than a century ago, it is only when we come to the national budget and the Medium Term Budget Policy Statement (in October every year) that we find ‘the skeleton of the state stripped of all misleading ideologies.’\(^\text{123}\) The question is: Have South Africa’s economic policies borne out the claims of Ramaphosa and his predecessors to be governments ‘measured not by growth in gross domestic product or global competitiveness rankings, but by how the lives of the most vulnerable and marginalised are changed for the better’?\(^\text{124}\)

Answering this brings us back to where we left off with Padayachee and Van Niekerk earlier in this article. In the early 1990s, as it prepared for taking over government, the ANC set up a left-leaning Macro Economic Research group (‘MERS’) to develop economic policy proposals for the ANC once in government.\(^\text{125}\) However, its proposals were castigated by the mainstream media and *Shadow of Liberation* records how the MERS proposals were discarded in late 1993.\(^\text{126}\) MERS gave way to the Reconstruction and Development Programme (RDP), 1994–1996, which was developed within the Alliance and served as the platform on which the ANC campaigned in 1994.\(^\text{127}\) However, it too was unceremoniously abandoned within two years. Since 1996, the ANC in government has adopted five different economic policies. They are:


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\(^\text{123}\) Alston & Reisch (note 77 above) 1.

\(^\text{124}\) Ramaphosa (note 120 above).

\(^\text{125}\) Padayachee & Van Niekerk (note 7 above) 88.


ECONOMIC POLICY AND THE SOCIO-ECONOMIC RIGHTS IN THE CONSTITUTION


(4) The National Development Plan (NDP) 2030,131 adopted in 2012, paradoxically at more or less the same time as an undeclared policy of austerity based on cutting public spending and fiscal consolidation.132


In relation to each of these policies, our analysis requires us to ask the following questions: Were the constitutional obligations towards rights realisation expressly considered as part of their conception? Did the implementation of these policies have a negative or positive effect on rights? I suspect the government will argue that each of these policies is expressly predicated on overcoming poverty and inequality by building an economic foundation that is robust and strong enough to create employment and increase revenue for taxes. However, broad, non-specific references to the Constitution are insufficient if the policies are not capable of realising the rights in the Bill of Rights.

Whenever the government has been challenged in court over the constitutionality of its approach to socio-economic rights and equality, the track record of its defeats bears this contention out. In 2002, after losing the Constitutional Court case against TAC over a programme to provide the drug Nevirapine to preventing mother-to-child HIV transmission, Ayanda Ntsaluba, the then Director General of the Department of Health, told me that the government intended to set up a social cluster of DGs to look at implications of socio-economic rights for departments such as health and education, but also for governance and decision-making about resource allocation more broadly.134 There is, however, no evidence that this happened. Instead, since the conclusion of TAC in 2002, the government has continued to lose almost every case in which it faced a challenge over the non-fulfilment of its duties to provide for socio-economic rights. Examples are the Limpopo textbooks cases,135 the challenge


132 In my personal interactions with officials of the Treasury and other experts, there is a commonly shared view that 2012 was the year in which increases of public expenditure on rights plateaued before beginning an actual decline. The Finance and Fiscal Commission paper (note 73 above), for example, notes at para 5 that ‘over the last decade or so the services established to ensure the provision of these rights have been under significant budget pressure.’ See, also, M Blecher, J Davén, A Kollipara, Y Maharaj, A Mansvelder & O Gaarekwe ‘Health Spending at a Time of Low Economic Growth and Fiscal Constraint’ (2017) 40 South African Health Review 25–40.


of minimum norms and standards for school infrastructure\textsuperscript{136} and, most recently, the challenges over the National School Nutrition Programme (NSNP) brought in 2020 during the Covid-19 crisis.\textsuperscript{137} The only exception was the important \textit{Mazibuko} case over water rights,\textsuperscript{138} but despite the applicants not succeeding with their claim, the case could hardly be considered a victory for government. The judgment by O’Regan J contains an important section titled ‘The role of courts in determining the content of social and economic rights: the proper interpretation of section 27(1)(b) and 27(2) of the Constitution’ which includes the following:

The Constitution envisages that legislative and other measures will be the primary instrument for the achievement of social and economic rights. Thus, it places a positive obligation upon the state to respond to the basic social and economic needs of the people by adopting reasonable legislative and other measures. By adopting such measures, the rights set out in the Constitution acquire content, and that content is subject to the constitutional standard of reasonableness.\textsuperscript{139}

The million Rand question is what are these ‘other measures’ that the state could reasonably be taking to guarantee socio-economic rights. It seems that because it has not applied its mind, supported by the fact that there is no express constitutional directive on economic policymaking, the Constitution has, at no time, directly influenced the shape of economic policy. This has brought us to a point where, in the context of the Covid-19 pandemic, which has deepened poverty and widened inequality,\textsuperscript{140} there is a fraying of the constitutional contract and a danger that the constitutional centre will no longer hold.

Twenty-five years into the life of the Constitution, the time for judicial deference – indeed silence – over economic policy is over. The economic policy currently being pursued by the government is ad hoc, incoherent, fragmented, and amorphous. It lacks a theoretical and evidence-based foundation. Even as much of the world moves away from neo-liberal notions of economy, South Africa’s economic policy still centres on an increasingly discredited notion of fiscal consolidation achieved through debt reduction. This is to be achieved by cuts in public expenditure with a particular focus on reducing the public sector wage bill, a matter that will be heard on appeal by the Constitutional Court later in 2021.\textsuperscript{141}

The results are catastrophic for the poor. Education is a case in point. Earlier in this article I have referred to basic education as an ‘empowerment right’ and pointed to the importance the Constitutional Court has attached to it in several of its judgments. Yet, since 2010, government funding per pupil has fallen by 8 per cent from 2010 to 2017, from R17 822 per child to R16 435.\textsuperscript{142} In the 2021 Budget Review, the Treasury was explicit that it is regressing on rights, saying that:

\textsuperscript{136} Equal Education \& Another v Minister of Basic Education \& Others [2018] ZAECBHC 6, [2018] 3 All SA 705 (ECB), 2018 (9) BCLR 1130 (ECB), 2019 (1) SA 421 (ECB).


\textsuperscript{138} Mazibuko (note 89 above) at paras 46–68.

\textsuperscript{139} Ibid at para 66 (emphasis added).

\textsuperscript{140} One of the most effective measures of the impact of Covid-19 on key socio-economic indicators has been the ongoing waves of the National Income Dynamics (NIDS) Coronavirus Rapid Mobile (CRAM) surveys conducted by researchers at the University of Stellenbosch, available at https://cramsurvey.org/reports/.

\textsuperscript{141} Public Servants Association \& Others v Minister of Public Service \& Others [2020] ZALAC 54, [2021] 3 BLLR 255 (LAC).

Low compensation growth of 0.8 per cent over the MTEF (Medium Term Expenditure Framework) period, combined with early retirements, will reduce the number of available teachers. This, coupled with a rising number of learners, implies larger class sizes, especially in no-fee schools, which is expected to negatively affect learning outcomes.\(^{143}\)

A similar scenario faces the right to health. Despite the findings of state failure by Moseneke DCJ in relation to the Life Esidimeni tragedy\(^ {144}\) and by the SAHRC in access to mental health care services more generally,\(^ {145}\) resources for mental health care have not increased sufficiently to fulfil the rights of people with mental illnesses. Although, in April 2020, money was provided for what was billed to be a ‘R500m stimulus package’ to respond to the Covid-19 crisis, little of this was new money and a significant part was found by moving money from within and across government departments, to the detriment of other rights.\(^ {146}\) The stock response to this, but one that goes to the heart of the argument made in this article, is that the government has no alternative. It is responding to the inflexible ‘laws’ of economics and the market. The alternative, according to the Minister of Finance, Tito Mboweni, is to face a ‘sovereign debt crisis’, which would have an even more detrimental impact on rights.\(^ {147}\)

However, it is here that a section-36 analysis would uncover a body of expert economic opinion that would show the contrary.\(^ {148}\) Options are available to the government. Yet, options, such as to increase personal income taxes on the highest income bracket, a once-off wealth tax\(^ {149}\) or to borrow money from funds that exist within the country (such as the over capitalised


\(^ {149}\) For data on wealth inequality and wealth concentration in South Africa, see A Chatterjee, L Czajka & A Gethin Estimating the Distribution of Household Wealth in South Africa (April 2020) World Inequality Database Working Paper 2020/06, available at https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/scis/documents/Estimating%20the%20Distribution%20of%20Household%20Wealth%20in%20South%20Africa.pdf, who argue that: ‘The top 10 per cent own 86 per cent of aggregate wealth and the top 0.1 per cent close to one third. The top 0.01 per cent of the distribution (3 500 individuals) concentrate 15 per cent of household net worth, more than the bottom 90 per cent as a whole.’
Government Employees Pension Fund and the Public Investment Corporation)\textsuperscript{150}, have been discarded without public debate in favour of the exact opposite. In the February 2021 budget corporate income tax, reductions were made at the same time as reducing the real value of social grants, drawing universal criticism from civil society organisations, pointing to the deleterious effect this would have on rights and, paradoxically, the economy itself.\textsuperscript{151}

In the final part of this article, I explore some of these options – the ‘less restrictive means’ of activist’s arguments are available to the government and would help fulfil its mandate to achieve social justice and equality.

**IV STRATEGIES TOWARDS A RIGHTS-BASED ECONOMY/ ECONOMIC POLICY**

Concluding their introduction to the collection of essays on *Tax, Inequality and Human Rights*, Alston and Reisch say that one of their messages is that:

human rights proponents can no longer pursue the limited agenda that has been the bread and butter of human rights research and advocacy for the past half-century, focused on reiterating the normative principles enshrined in numerous international treaties, exposing transgressions, and assuming that change will come without any engagement with the structural issues that often shape and facilitate the violations they are criticizing. Fiscal policies and the broader economic, social and political priorities they reflect must become part of the overall debate, even if specific groups insist on pursuing more specialised agendas.\textsuperscript{152}

During his tenure as the UN Special Rapporteur on Extreme Poverty and Human Rights, Alston highlighted the fact that although the idea of socio-economic rights had found its way into international law and national constitutions, it had not been followed by a remodelling of legislation governing economic policy to serve the law. In a 2016 report to the Human Rights Council, he drew attention to this and called for a better system to embed and institutionalise socio-economic rights in policy-making, which he termed a ‘Recognition, Institutionalisation and Accountability (RIA) framework that focuses primary attention on ensuring recognition of the rights, institutional support for their promotion and accountability mechanisms for their implementation.’\textsuperscript{153}

Affirming the approach suggested by Alston, I believe that what is needed is recognition that just as criminal justice requires a criminal justice system (with, e.g., police, courts, prisons, independent human rights monitors), the realisation of social justice requires that we conceive of a social justice system, with well capacitated institutional regulators of quality, consistent and methodical monitoring, delivery systems (like schools and hospitals), oversight bodies and appropriate budgets.

\textsuperscript{150} See D Gqubule ‘Alternative Options to End Austerity and Fund a Stimulus for the SA Economy’ *Policy Brief Presented to the National Labour and Economic Development Institute* (31 May 2021).


\textsuperscript{152} Alston and Reisch (note 77 above) at 22.

Fortunately, it would seem as if this message is being heard in South Africa, at least within civil society. In the last few years, several social justice organisations have pivoted their rights activism to start to encompass budget and economic advocacy. The formation of the Institute for Economic Justice (IEJ) in 2019, which is closely aligned with civil society human rights organisations, provides a backbone of pro-poor economic analysis. It joins organisations like the Studies in Poverty and Inequality Institute (SPII). Similarly, the Budget Justice Coalition (BJC), founded by ten organisations, is increasingly vocal on economic and rights issues as well as providing a forum for the exchange of ideas amongst organisations working to advance different socio-economic rights. These organisations are beginning to move beyond critique. They are involved in human rights-based monitoring of budgets, developing monitoring tools and, most importantly, starting to sketch out human rights based economic policies, supported by a normative strategy to campaign for measures that will assist their implementation. In 2020, for example, the BJC developed an Alternative People’s Budget on the eve of the publication of the government’s Medium Term Expenditure Framework (MTEF). In early 2021, its critique of the budget generated extensive media coverage and public discussion.

This is reflective of an international trend towards ‘Rethinking Economics’ in civil society and academia. For example, Rethinking Economics, which describes itself as a ‘network of students, academics and professionals building a better economics in society and the classroom’ is a student organisation, which now has chapters in many universities internationally. Respected heterodox economists, such as Kate Raworth and Stiglitz, are now advancing feasible alternative economic models. Tellingly though, these economists are not yet tying their proposals to a human rights framework or appreciating that there may be leverage in either national or international human rights law for their proposals. The reason, which should be a wake-up call for constitutional lawyers, is that they have become sceptical of the power of human rights, influenced by books like Samuel Moyn’s *Not Enough, Human Rights in an Unequal World* into believing that human rights are ‘unambitious and ineffectual in practice’ and ‘merely nipping at the heels’ of the neo-liberal giant Moyn calls the ‘Doppelgänger’ of market fundamentalism; and thus unable to have any impact on inequality.

The problem does not only lie with human rights. One of the greatest challenges is to overcome the dominance in economic thinking of neoliberalism and what it prescribes concerning how economies grow or stagnate. This dominance has not been achieved because it is the best model, but because it has been shored up by the terror of finance and threats of what will happen if its prescripts are broken. The least that we need is an informed debate about economics, including the contentions of Modern Monetary Theory about how economics and

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156 The Rethinking Economics website, available at https://www.rethinkeconomics.org/about/ provides more information about the purpose and organization of this network.

economies must adapt in a world that now faces a perfect storm of the climate crisis, inequality, and pandemics such as Covid-19. To this end, in South Africa there is a need for co-operation between economists and lawyers to provide better arguments, evidence and modelling to show that a socio-economic rights based economic model is feasible. The irony is that South African capitalism is trapped by the very status quo that it seeks to protect, which is destroying jobs and wealth (the opposite of what capitalism claims it is best at doing) thereby creating an ever-shrinking domestic market. Moseneke writes that ‘equality rights properly asserted may serve as a catalyst for economic growth and in turn socio-economic upward mobility.’\textsuperscript{158} This is a crucial insight because contrary to what free market thinkers would have us believe, there is a dynamic market and economy waiting to be unleashed through realising human rights.

In response to the Covid-19 pandemic in late 2020, the South African government adopted a new economic policy, called the Economic Recovery and Reconstruction Plan.\textsuperscript{159} However, based on the criticisms of continued austerity economics that I have pointed to above it seems likely that this plan will repeat the mistakes of earlier economic policies and, thus, be still-born and lead to polarisation rather than consensus around a social compact as hoped for by Ramaphosa. In the words of Dennis Davis: ‘I see no tangible evidence of a viable move towards the type of inclusive growth which can vindicate the social democratic promises of the Constitution.’\textsuperscript{160} There are already signs of this in the growing divisions between the government, public sector workers and their trade unions as well as between the ANC and pro-poor social justice movements.

To conclude this article, and as an attempt to illustrate how it is possible to practically embody the social justice mandate of the Constitution below, I set out some of the components that would make a human rights-based economy feasible and self-sustaining. In the context of fears sometimes expressed about arbitrary, irrational, and unreasonable actions by governments towards markets it is important to note that all the measures I suggest are possible within the rule of law and many of the instruments and institutions that would be needed to give effect to them are already at South Africa’s disposal:

A Maximising available resources

As a range of writers, including Piketty, Alston and Stiglitz attest, together with the hard-lived realities of many governments who find they are now unable to fund basic social services causing growing inequality, the conservative approach developed towards taxation over the last 40 years the fiscus will never be anywhere near big enough to meet the needs of the 21st century state or the human rights obligations governments have willingly taken upon themselves when they


\textsuperscript{159} Address by President Cyril Ramaphosa to the Joint Sitting of Parliament on South Africa’s Economic Recovery and Reconstruction Plan (15 October 2020), available at https://www.gov.za/speeches/president-cyril-ramaphosa-south-africa%E2%80%99s-economic-reconstruction-and-recovery-plan-15-octgclid=Cj0KCQiA7yYyCBhD_ARIsALkJ54o5wINV-4aqWaj3KiLvBxyxQYe8Ou87rtibjkB1j1OjnPamwCblTaaAlldQfALw_wcB.

\textsuperscript{160} DM Davis \textit{Funding of the Vaccine and the General Implications of Budget 2021 for Inclusive Growth and Reduction of Poverty: An Outline of a Presentation to the Wits Institute for Social and Economic Research (WISER)} (1 March 2021).
ratify international human rights treaties.\textsuperscript{161} This is not because the state confronts an absolute limitation on the resources it can raise, in fact according to Gqubule\textsuperscript{162} and other economists it has substantial resources at its disposal, but because it has made policy choices that limit its power to garner the resources that are available. Yet, it is possible to substantially expand the fiscus through legal means. In a recent speech judge Dennis Davis, the former chairperson of Davis Tax Committee, talked of a significant tax gap of up to R100 billion a year and referred to ‘vast sums of money which will continue to flow under SARS radar.’\textsuperscript{163} In this context, it should be noted that many of the recommendations made by the Davis’ committee, which was set up in 2013 to ‘to assess our tax policy framework and its role in supporting the objectives of inclusive growth, employment, development and fiscal sustainability,’\textsuperscript{164} have still not been implemented. Note again that realising socio-economic rights does not feature in the Tax Committee’s terms of reference. Some of these include:

• Improved tax collection;
• Introducing a wealth tax on the wealthiest people in South Africa;\textsuperscript{165}
• Clamping down on illicit financial transfers and tax evasion.

In addition, there is enormous scope for bolstering the capability of state institutions to act more expeditiously and effectively against corruption as well as irregular, fruitless and wasteful expenditure, which robs the fiscus of tens of billions of Rands a year.\textsuperscript{166}

B Reducing the cost of healthy and dignified living

In South Africa, many of the goods and services that are designated as socio-economic rights or which are essential to facilitate access to rights, are priced out of reach of the poor, be this safety and security, essential nutrition (food), potable water, health care or basic education. Yet, the state has at its disposal legal means to intervene in markets to reduce private expenditure by the poor on public goods in ways that do not amount to further taxes on the poor. For example:

• The state’s powers under the Medicines and Related Substances Amendment Act 14 of 2015, such as parallel importation and compulsory licensing of essential medicines that are unjustifiably expensive, have never been used despite the defence the government made

\textsuperscript{161} ICESCR art 2; Convention of the Rights of the Child art 4; UN Convention on the Elimination of All Forms of Discrimination Against Women art 2 (although it is notable that there is no direct reference to resources).

\textsuperscript{162} Gqubule (note 150 above).

\textsuperscript{163} Davis (note 160 above).


of the lawfulness of the Act when it was challenged by the Pharmaceutical Manufacturers Association in 1998.\footnote{M Heywood “‘Debunking Conglomotalk’: A Case Study of the Amicus Curiae as an Instrument for Advocacy, Investigation and Mobilisation’ (2001) 5 Law, Democracy and Development 133–163.}

- It is possible to better regulate the private health sector and thereby reduce the spiralling costs of private health care by implementing the recommendations made by the Competition Commission’s Health Market Inquiry (HMI), whose final report was released in 2019 but has not been implemented.\footnote{Competition Commission of South Africa ‘Health Market Inquiry into the Private Healthcare Sector, Final Findings and Recommendations Report’ (September 2019), available at http://www.compcom.co.za/healthcare-inquiry/}

- There is a positive duty to implement better price regulation of aspects of the food market, to ensure affordability of essential nutritious food, particularly for children.\footnote{T Ledger An Empty Plate: Why We Are Losing the Battle for Our Food System, Why it Matters and How We Can Win it Back (2016).}

The success of Health Promotion Levy on sugary beverages (the so-called sugar tax), introduced in 2018, which has both generated revenue and changed unhealthy patterns of consumption,\footnote{M Essman, L Smith Taillie, T Frank, Shu Wen Ng, BM Popkin & EC Swart ‘Taxed and Untaxed Beverage Intake by South African Young Adults After a National Sugar-sweetened Beverage Tax: A Before-and-after Study’ (2021) 18 PLoS Medicine, available at https://doi.org/10.1371/journal.pmed.1003574} is a model that should be extended to other unhealthy foodstuffs such as fast foods.

- As demonstrated during the Covid-19 lockdown, alcohol and other substance abuse costs families and the state tens of billions of Rands in providing health care for preventable trauma and disease. A combination of investment in effective public health/health literacy campaigns and better regulation and enforcement around alcohol and tobacco sales would reduce the burden and cost of preventable disease and trauma, allowing redirection of savings to areas of essential health care that are currently starved of resources.

C Investing in the infrastructure of delivering rights

Properly directed public and private expenditure aimed at fulfilling key socio-economic rights in the Constitution, would boost the economy and make it possible to:

- Create jobs (and income) in the public sector through a massive social infrastructure improvement project aimed at delivering rights to health care services, basic education, food, water and a safe and healthy environment; and

- Identify public goods that are underpinned by human rights, where jobs can be created that would ultimately be cost saving. For example, a properly trained and remunerated workforce of Community Health Workers (envisioned but not properly implemented since the first Health White paper in 1994), would help to prevent the development of communicable and non-communicable diseases such as TB and diabetes, which, if not prevented, become extremely costly to the public health system.\footnote{M Heywood The Broken Thread – Primary Health Care, Social Justice and the Dignity of the Health Care Worker (2014), a paper presented to the Wits Institute for Social and Economic Research (WISER) seminar series, available at https://health-e.org.za/2014/09/02/paper-broken-thread-primary-health-care-social-justice-dignity-health-worker/)}. Similarly, informal workers, like waste pickers, who already play a major part in protecting the environment...
through recycling, could play a role in saving the state billions of rand a year incurred through illegal dumping and the loss of recyclable waste to landfills. In addition, jobs can be created in clean energy alternatives as part of what is termed the ‘just transition’ away from carbon-based energy as part of climate crisis mitigation and adaptation plans.

A combination of these measures would start a cycle of growth and realise rights thereby creating hope. Income from employment will generate demand for consumer goods – and expand the market. An expanding rather than continually shrinking domestic market would create new jobs in the market for goods and services and these employees too will start to pay taxes. By paying taxes we recycle public expenditure back into the fiscus as a result of more people paying tax. It is such Keynesian thinking that underlies the Biden administration’s rescue package in the United States. The question is why, particularly given its constitutional obligations, the South African government cannot do the same.

V CONCLUSION

In the last three decades, in the absence of the maximum of available resources being made available by the state in South Africa, the public goods that should be the stuff of socio-economic rights have increasingly been privatised and have become the basis for new post-apartheid inequalities. This is a global phenomenon. It is most evident in the food, health, and education systems in South Africa, each of which has seen growth in the private market and exclusion of those who cannot afford to purchase their human rights. Those wholly

172 S Kings & S Wild South Africa’s Survival Guide to Climate Change (Pan Macmillan, 2019) 167. According to Kings & Wild, there are 60 000 to 90 000 people who earn a living from picking municipal waste. This number is likely to have grown because of the loss of formal employment caused by Covid-19 lockdowns. They quote research suggesting ‘about R17 billion is lost to landfills every year’. For further information on the role of waste pickers see, for example, the work and research of Women in Informal Employments: Globalizing and Organizing (WIEGO), available at https://www.wiego.org/informal-economy/occupational-groups/waste-pickers.

173 In early 2021, unemployment in South Africa reached a record high, with over 30 per cent of the workforce unemployed. However, other than the temporary Social Relief of Distress Grant expanded for Covid-19 (that ended in April 2021 but was reinstated in August in the wake of riots that engulfed Gauteng and KwaZulu-Natal in particular in which people ransacked and looted shops), there is no grant available for unemployed adults. Nonetheless an estimated 17 million people survive on social grants of one form or another, costing the fiscus R229.4 billion in 2021/22. Although South Africa’s social security system is a fulfillment of the state’s duties under s 27(1)(c) and is unique for a developing country, many argue that it is unsustainable financially and socially. The fact that so many people are dependent on social grants is a result of the failure of the Constitution’s key promises in its Preamble rather than an affirmation of it. It is the result of failures that have been documented in this article. The small amounts of money that people receive for social grants (for current value of grants, see https://www.businessinsider.co.za/what-to-know-about-budget-2021-including-civil-servant-pay-and-social-grant-hikes-2021-2) is survivalist. It does not meet their basic needs, including the amount it would cost to fulfil a child’s right to basic nutrition, where that child is wholly dependent on the state. From an economic perspective, despite being the fourth largest allocation in the budget (after basic education, health, and debt servicing), it is such a small amount per capita in terms of purchasing power. It does not have any expansionary or multiplier effect. It does not allow people to enter the economy. It just allows them to eat. As a result, there is growing clamour for the introduction of a Basic Income Grant (BIG), whose function would be to try to provide people with enough money to enter the economy and begin to generate new value. As mentioned above (note 119 above), the government says that it is considering this. However, based on current economic policies, it seems highly unlikely.

dependent on the state, still overwhelmingly black people, who were historically disadvantaged by apartheid, are then left at the mercy of failing public health systems and inadequate basic education, which can no longer protect – never mind fulfil – their fundamental rights. My argument is that this situation will continue until the economic policies that give rise to it are realigned with the Constitution. It is for this reason that Alston and Reisch challenge us with what they call an ‘existential question’:

The concrete consequences of privatization for the respect, protection and fulfilment of human rights confront human rights with an existential question: can they continue to concentrate only on what is feasible within a system that is required to function with ever fewer public resources, or must they tackle broader issues of fiscal policy?175

Tackling ‘broader issues of social fiscal policy’ is not just ‘a lust of the blood, but a permission of the [Constitutional] will’, to abuse Iago’s cynical comment on Roderigo’s infatuation with Desdemona in William Shakespeare’s Othello.176 If this lacuna is not filled, South Africa’s democratic project risks being destroyed as inequality and poverty become more and more entrenched, causing our society to develop in a shape directly contrary to the vision and values set out in both the Preamble and founding provisions of the Constitution. If social justice activists fail to ‘grasp the nettle’ (as Moseneke suggested we should do) and begin to take better advantage of the Constitution, given its unassailable mandate, activism for the ‘full and equal enjoyment of all rights and freedoms’ will be disarmed.

In 2020/21, there has been discussion within organisations such as the Budget Justice Coalition and SECTION27 about turning to the courts and legal strategies to challenge the rights violations that occur as a result of fiscal policy have been considered.177 However, at this point, that is, arguably, not a question primarily for the courts, although they will inevitably have to address these issues in the near future, but for all rights-bearers under our Constitution, including the MPs and MPLs they elect to represent them in the national and provincial legislatures, who swear to ‘obey, respect and uphold the Constitution’ upon assuming office.178 Obedience must include its social justice and equality mandate.

The reason action and resolution on this ‘existential question’ is so vitally important is because ultimately the whole legitimacy of South Africa’s constitutional enterprise depends on it. Covid-19, and the measures taken to mitigate it, have deepened poverty and inequality. An opportunity to centre Covid-19 mitigation measures on realising socio-economic rights that would have reduced vulnerability and Covid-19 transmission in overcrowded and under-resourced settings was missed. Instead, like in most other societies, government

175 Alston and Reisch (note 77 above) at 17.
176 W Shakespeare Othello act 1, scene 3, line 330.
177 In October 2020, SECTION27, for example, briefed counsel on a possible case to challenge cuts to the Education Infrastructure Grant (EIG) and its regressive effect on learners’ rights to basic education in Limpopo. In August 2021, the Alternative Information and Development Centre (AIDC) applied to be an amicus curiae in the Constitutional Court appeal against the Labour Appeal Court’s judgment affirming government’s reneging on the third year of a wage agreement for public sector workers. It said it wanted to make arguments about how ‘the LAC failed to approach the key questions from the constitutional paradigm that governs exercises of public power implicating the economy. The LAC particularly failed to situate the public service in its constitutional context and to appreciate its crucial role in the realisation of the rights in the Bill of Rights, instead setting the public service against rights.’ (at para 5) The National Treasury opposed the application, and it was refused by the Court on procedural grounds. The written submissions of the AIDC were drafted by T Ngcukaitobi SC, J Brickhill and M Bishop.
178 Constitution, schedule 2, s 4(1), Oaths and Solemn Affirmations.
opted for lockdown, coercion and minimal economic support. South Africa has suddenly been accelerated along a path, with growing unemployment and rights regression, that is unsustainable. Fry and Gqubule warn that ‘the inadequate economic response to the pandemic and the planned austerity measures will eviscerate the dreams and promises of South Africa’s liberation and herald the start of a second lost decade in terms of economic development until 2030.’

It has been the experience of many other societies that where transformation and equality cannot be achieved within the rule of constitutional law people and parties may opt to fight for it outside the rule of law. This is what substantially underlies the trend of the last decade towards populism internationally in what Pankaj Mishra calls ‘the age of anger’. Society is now looking for ways to ‘build back better’ a term coined by the United Nations but now frequently used by politicians across the globe, including in South Africa. We have the legal architecture to do so. Were the human rights that are so central to South Africa’s democracy to be made central to its economic renewal, it were possible that our country could be put back on the path towards the vision that inspired the many who sacrificed their lives in fighting for a society truly rooted in the Preamble’s promise of ‘democratic values, social justice and fundamental human rights’.

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Converging Tax Policy and Human Rights in the Face of Tax Abuse: A Developing Country Perspective

SALOME CHIGUBU & THABO LEGWAILA

ABSTRACT: The intersection between tax and human rights has largely been looked at from a social or economic, and not a rights-based perspective. Tax or fiscal policy has an indirect impact on a country’s ability to discharge its social obligations to the citizenry and thereby ensure the provision of human rights that the citizenry is entitled to. This article explores the intersection between tax and human rights law to demonstrate that formalising tax policies in a manner that centres the focus on the fulfilment and protection of human rights would leave less room for tax abuses and ensure that more money is available to the state to improve the lives of its citizens. Effectively tackling inequitable tax policies and tax abuse is an avenue that states can use to ensure that the ‘maximum available resources’ are allocated to the progressive realisation of economic, social and cultural rights.

KEYWORDS: corporate tax abuse, developing countries, economic policy, fiscal policy, government expenditure, tax avoidance, tax evasion, tax planning, transfer pricing

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I INTRODUCTION

It is incontrovertible that taxation policy plays a vital role in a government’s ability to raise the funds required to ensure realisation of various human rights. The amount of revenue that a state acquire through taxation impacts on the states’ ability to meet its citizens’ various social and economic needs effectively. These needs include food security, public health and education, most of which are deemed to be human rights. Taxation’s role is so essential that the old maxim ‘taxation is one of the few things that one can be certain about’\(^1\) still rings true today. Without revenue collected from tax a government would be unable to meet its obligation to provide basic economic and social rights listed above. In addition, taxation policy has the potential to facilitate a greater and more stable flow of revenue to sustain the provision of investment in public services and infrastructure.\(^2\)

In spite of these imperatives, certain governments continue to find themselves unable to mobilize sufficient resources to provide for the delivery of the quality of public services required or to meet their nation’s cumbersome public debt obligations. The persistence of budget deficits in most developing countries\(^3\) makes it clear that the tax policies of low-income countries (LICs) need to be reviewed to effectively tackle tax abuse\(^4\) and increase tax revenues.

The effect of harmful tax practices on the delivery of human rights obligations has been insufficiently monitored and examined by human rights bodies even though ‘human rights norms apply to all aspects of fiscal policy’\(^5\) and tax abuse ‘negate[s] an essential source of revenue which should be used to realise socio-economic rights’.\(^6\) This is partly because international human rights standards grant governments a wide margin of discretion in matters of economic and social policy since they are often faced with strained budgets and difficult choices in prioritising competing social policies.\(^7\) Furthermore, because:

Taxation has traditionally been understood as a fundamentally ‘economic’ or ‘development-related’ undertaking by which policy makers generate revenue for socio-economic development, fiscal policy makers are more concerned with the ‘economic’ aspects of taxation (such as the maximization of tax revenue) rather than the non-economic aspects like human rights.\(^8\)

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2. M Sepulveda Carmona Report of the Special Rapporteur on Extreme Poverty and Human Rights UN Doc A/HRC/26/28 (2014). The report ‘examines how a state’s use of its revenue raising power has a direct impact on its ability to comply with international human rights obligations, in particular relating to the economic, social and cultural rights of people living in poverty’.
3. For the purposes of this article the terms ‘developing countries’ and ‘LICs’ are used interchangeably to refer to countries having a standard of living or level of industrial production well below that possible without financial or technical aid.
4. ‘[A]n abusive tax position includes criminal conduct, tax evasion, avoidance, and embarking on schemes that appear to be in compliance with the tax laws but do not result in the multi-national corporation (MNC) paying what is referred to as a fair share of taxes’, See K Datt ‘Tax and Human Rights: Much Ado About Nothing’ (2018) 16 Journal of Tax Research 113, 114.
However, ignoring the fact that taxation and spending policies need to take human rights obligations into account results in ‘extremely unjust effects’. For example, if a government has an inequitable tax policy or gives enormous subsidies to the wealthy with no social transfers to the poor, human rights are infringed.

According to Alston,9 scholars have begun to realise that when tax policy is viewed as a human rights concern and not simply as an aspect of economic policy — ie, a policy concerning the management the money supply, inflation, interest rates and efforts to increase the country’s productive capacity — it ‘becomes a matter of what the objectives are and how they can be achieved.’10 Recent works by various scholars and international organizations have penned that a human rights approach to inefficient or harmful financial and tax regulatory measures might serve as an alternative avenue to combat international tax abuses and the resulting impact on revenue.11 Corporate tax abuse has also garnered the attention of politicians and policymakers globally over the last few decades as the issue of tax avoidance has been exacerbated by globalisation.

Globalisation refers to the process by which businesses operate on an international level across borders. It has ‘resulted in a shift from country-specific operating models to global models based on a matrix of management organisations and integrated supply chains that centralise several functions at a regional or global level’.12 The internet has made it possible for businesses to locate many productive activities in geographic locations that are distant from the physical location of their customers. Sophisticated tax planners are then able to reduce or avoid tax liability for their companies by ‘employing tax planning strategies that exploit gaps in the architecture of the international tax system to artificially shift profits to places where there is little or no activity or taxation.’13 The practice is referred to as Base Erosion and Profit Shifting (BEPS).

According to Cobham and Jansky, ‘[u]sing firm-level Orbis data, OECD estimated a global loss of USD 100 billion to USD 240 billion in 2014, or 4 to 10 per cent of all CIT revenues (and up to USD 2.1 trillion over 2005–2014).14 Ortiz, Chai and Cummins estimate that over USD 285 billion in annual revenue is lost by developing countries because of tax evasion15

10 Ibid.
13 Ibid. See also European Commission Recommendation on Aggressive Tax Planning (6 December 2012) which states that aggressive tax planning ‘exploits difference in tax systems by taking advantage of the technicalities of a tax system by taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purposes of reducing tax liability’.
and that Africa loses twice as much in illicit financial flows\textsuperscript{16} as it receives in aid. Such loss of revenue for developing countries\textsuperscript{17} ‘bleeds them of essential resources’

For the schoolchild in Haiti, the new mother in Malawi, or the farmer in Bangladesh, these losses have a real impact: they result in classrooms that are overcrowded, health clinics that are never built, and water that is never delivered. People’s opportunities are being stolen from them – because tax revenues are not collected.\textsuperscript{18}

These tax abuses have proved so devastating that the G20 endorsed an Action Plan on Base Erosion and Profit Shifting (BEPS Action Plan)\textsuperscript{19} that calls for ‘fundamental changes to the current mechanisms and the adoption of new consensus-based approaches, including anti-abuse provisions, designed to prevent and counter base erosion and profit shifting.’\textsuperscript{20} The BEPS Action Plan is therefore ‘aimed at reducing multinational tax avoidance and improving cross-border tax dispute resolution’, because aggressive tax planning ‘undermines the fairness and integrity of tax systems because businesses that operate across borders can use BEPS to gain a competitive advantage over enterprises that operate at a domestic level. Moreover, when taxpayers see multinational corporations legally avoiding income tax, it undermines voluntary compliance by all taxpayers.’\textsuperscript{21}

Ultimately, the loss and abuse of these essential resources reflect a link between derisory domestic and international resource mobilisation and poor human development. This understanding has resulted in stakeholders stressing the importance of —

clarifying the human rights responsibilities of states, business enterprises and other actors to encourage improved domestic tax policies and strengthened international cooperation efforts to confront tax abuses (…), the current imbalances of information, income and power. Tax has the potential to be an instrument to confront these imbalances and inequalities. So do human rights.\textsuperscript{22}

\textsuperscript{16} Illicit financial flows are defined as ‘money that is illegally obtained, transferred, or utilized. These funds typically originate from three sources: commercial tax evasion including trade misinvoicing and abusive transfer pricing; criminal activities, including the drug trade, […] bribery and theft by corrupt government officials.’ See United Nations Economic Commission for Africa (UNECA) ‘Illicit financial flows: report of the High Level Panel on illicit financial flows from Africa’ (2014). See also D Kar and D Cartwright-Smith ‘Illicit financial flows from Africa: A hidden resource for development’ (2010), available at https://gfintegrity.org/report/briefing-paper-illicit-flows-from-africa/.

\textsuperscript{17} Developing countries have a higher reliance on corporate income tax (CIT) at 10% of GDP, compared to 3% for developed countries. The impact of BEPS in developing countries is accordingly particularly damaging. See I Burgers & I Mosquera ‘Corporate taxation and BEPS: a fair slice for developing countries’ (2017) 10 Erasmus Law Review 29, 41. See also Cobham & Jansky (note14 above) at 216–217.


\textsuperscript{19} The OECD BEPS Plan addresses the use of strategies for the purpose of applying existing inadequate tax rules to shift profits to low or no tax jurisdictions, regardless of whether sufficient economic activity is present in those jurisdictions. See OECD ‘BEPS frequently asked questions’, available at https://www.oecd.org.

\textsuperscript{20} Burgers & Mosquera (note 17 above) at 29. See also OECD Tax Annex to the St Petersburg G20 Leaders’ Declaration (September 2013), available at https://www.oecd.org/g20/summits/saint-petersburg/Tax-Annex-St-Petersburg-G20-Leaders-Declaration.pdf.


This article explores the intersections between tax and human rights law to demonstrate that formalising tax policies in a manner that focuses on the fulfilment and protection of human rights leaves less room for tax abuses and ensure that more money is available to the state to improve the lives of its citizens. This is because effectively tackling inequitable tax policies and tax abuses should have a positive effect on the levels of poverty and the progressive realisation of economic, social and cultural rights (ESCR). This is on the assumption of good governance where the revenue raised ‘would actually be used for public purposes and for the achievement of human rights through the provision of public goods and services’.

To this end the article starts by analysing the intersections between taxation and human rights followed by an in-depth discussion into the reasons why taxation is a human rights issue. It then breaks down the concept of tax policy and the role that it plays in developing countries. Thereafter, it explores the issue of tax abuse and its effects on the achievement of human rights before a conclusion is reached.

Duly considering the current efforts being made by the international community to prevent tax abuse, this paper will also briefly examine the issue of corporate accountability by analysing the measures that are currently in place to deter further abuses and/or hold corporations accountable for engaging in activities that may potentially have dire effects on the ability of individuals to have their basic human rights met by their governments.

II BACKGROUND

Non-governmental organisations (NGOs), through the donations they receive, have often championed the protection of human rights, and played a primary role in focusing the international community on human rights issues. They tend to step in and fill the gaps that governments fail to cater for in the areas of food, health, and education, amongst other things. Governments, more specifically in developing countries, often claim to fail to meet various human rights obligations due to a lack of funds to adequately meet the needs of their subjects.

The vast population of citizens in developing countries live in deplorable circumstances and struggle to obtain food each day, let alone adequate housing and medical care. In Zambia, for example, it was found that 54.4 per cent of the country’s 15.5 million citizens live below the poverty line, with 52.9 percent of households living in traditional huts and 77 per cent using...
pit latrines. Governments are responsible for providing their citizens with adequate housing, food and health care, however, the governments’ of developing countries often face dire budget deficits and rely heavily on financial aid from the more developed international communities who, ironically, ‘are also home to companies taking wealth from those same poorer countries at a rate, and amount that far outstrips aid flows. They are also, in some cases, architects of the very structures – tax havens and offshore finance hubs – that enable them to do so’. The issue of tax havens and other tax avoidance strategies is dealt with in more detail in part VI.

Tax abuses result in taxable income that escapes the tax collector, resulting in reduced revenue. This erosion in the tax base has a significant effect on a state’s ability to progressively realise the socio-economic rights of its citizens. Accordingly, Mendis is of the view that:

allowing the continuation of a financial and tax regulatory structure that negatively affects public revenue which could have been directed towards social services and which therefore impedes the achievement of human rights standards and goals within your own territory or extraterritorially, can be identified as a violation of State responsibility (emphasis added).

This often results in the poorest and most needy members of society being impacted the most. For example, according to UNICEF and the WHO, more than one billion individuals in developing countries still do not have access to adequate sanitation such as a toilet or latrine. This has ominous health implications for such individuals and has been said to cause death and disease, particularly among children. Furthermore, many children, especially in the rural areas, lack access to education because adequate school systems are not established due to the lack of financial resources. Such statistics work to uphold and emphasise that ‘[i]neffective taxation systems, corruption and mismanagement of government revenues from, among others, state-owned businesses and corporate taxation, can limit the resources available for the fulfilment of children’s rights’.

NGOs should not be at the forefront of providing these needs; these underfunded areas are, firstly, the responsibility of governments whose subjects provide the taxes with which to meet human rights obligations. Governments should therefore take all the viable avenues available to them to optimise the collection and distribution of tax revenue to finance and support the provision of ESCR. Accordingly, the Committee on the Rights of the Child has demanded accountability where tax evasion, alongside corruption, has negatively impacted on the level

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32 Maziwisa & Lenaghan (note 6 above) at 239.
33 Mendis (note 25 above) at 29.
35 World Economic Forum ‘Just How Big a Problem is Lack of Access to Education?’ YouTube (22 July 2016), available at https://youtu.be/7hvdl-TS_80, highlights those 16.7 million girls in Sub-Saharan Africa alone, are not in school.
37 International Bar Association Human Rights Institute (note 22 above) at 8.
of resources available for the implementation of the Convention on the Rights of the Child.\textsuperscript{38} Moreover, the African Charter on Human and Peoples’ Rights (African Charter) provides that ‘[s]tate parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources’.\textsuperscript{39}

Governments, particularly in developing countries, could have more money available to spend in areas where it is most needed, such as health and education, if they improved their tax policies and took measures against the tax loopholes that expose them to tax abuses.

\section*{III INTERSECTIONS BETWEEN TAXATION AND HUMAN RIGHTS}

There are three policy documents that delineate the concept of human rights: the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).\textsuperscript{40} The existence of such instruments together with various other international efforts, such as the establishment of global and regional overseeing bodies, has had a pivotal role to play in the way that states exert the authority that they hold over their subjects, in relation to human rights.\textsuperscript{41}

International treaties, such as the ICESCR, do not dictate specific fiscal policies that governments need to put in place. Accordingly, society has traditionally deemed tax codes incapable of violating human rights. Therefore, except for the right to freedom from arbitrary deprivation of property and the right to privacy, the conception of a right that has been infringed by the way in which taxes are levied would be difficult. However, despite the lack of specificity in international treaties, there are limits to the amount of discretion available to states in the formulation of fiscal policies.

For instance, article 2(1) of the ICESCR requires parties to use the ‘maximum’ of their resources to achieve ‘the full realization’ of the Covenant’s rights by, inter alia, the ‘adoption of legislative measures’:

\begin{quote}
Each state party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieve progressively the full realization of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures
\end{quote}

Thus, a human rights perspective shows that taxation is a critical part of complying with the principle of making use of the maximum available resources (MAR),\textsuperscript{42} as set out in article 2(1) of the ICESCR. Member states to the ICESCR are obliged to demonstrate that every effort has been made to use all available resources at their disposal to satisfy as a matter of priority their

\textsuperscript{38} UN Committee on the Rights of the Child (note 36 above).


\textsuperscript{40} A Waris \textit{Tax and Development: Solving Kenya’s Fiscal Crisis through Human Rights} (2013) 128.


\textsuperscript{42} UN General Assembly \textit{International Covenant on Economic, Social and Cultural Rights} (1966) A/RES/2200A(XXI)

‘[E]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.’
minimum core human rights obligations, to take deliberate and targeted measures to safeguard the rights of vulnerable members of the population and to ensure the widest possible enjoyment of rights despite the circumstances. Furthermore, the Committee on Economic, Social and Cultural Rights has elaborated that even in times of resource constraints, states have a duty to move as expeditiously and effectively as possible towards the goal of fully realising all rights. In addition, any deliberately retrogressive measures require strict justification and must be carefully considered with regard to the totality of rights set forth in the Covenant. It was further determined that a lack of adequate resources cannot be invoked by any state as an excuse for inaction in the face of deprivations of economic and social rights (ESR). The question of resources is particularly critical to the fulfilment of ESCR since this is dependent on the amount of resources a state has at its disposal to fund the requisite public services and policy interventions. Furthermore, owing to the fact that ‘a state is in violation of the Covenant if it fails to allocate the maximum available resources to realizing human rights’ it is important to understand how the concept of MAR is relevant to tax.

IV TAX AND FISCAL POLICY AS HUMAN RIGHTS ISSUES

Part 1 of this article highlighted how tax and fiscal policy play a role in enabling a state to generate the conditions required to guarantee its citizens human rights. This is because ‘rights cannot be protected or enforced without public funding and support … all rights make claims on the public treasury.’ This is an argument made by various individuals, but as will be determined in the following paragraphs, it is insufficient as a complete argument. This part therefore seeks to delve more deeply into understanding why tax abuses and tax policy should be understood as human rights issues.

According to Alston, tax is a human rights issue because:

It reflects better than all the ministerial statements and white papers the real priorities of a government. We can see clearly the activities it chooses to incentivise, those that it opts to dis-incentivise, the groups that it decides to privilege, and the groups that it chooses to ignore or penalise.

Mendis considers ‘a good tax and financial regulation system [to be] the most dependable method towards raising revenue which could be used for public goods and services, […] which could be required under a state’s international human rights law obligations, especially the […] (ICESCR)’. However, when a state is faced with decreased revenues from an eroded tax base,
alternative sources of revenue are sought out to urge the national treasury and support the national budget. The state often resorts to regressive avenues and ‘tends to place the burden on the shoulders of its citizens’ through increased personal taxes such as value added tax (VAT) and income tax, ultimately resulting in a disproportionate effect on the poorest households who lose more buying power relative to wealthy households.\(^ {53} \)

Developing nations tend to rely heavily on consumption taxes, even though a large part of their economies are informal.

The informal sector is economic activity that is not reported to the state, and that is not regulated or protected by the State. Because this informal part of the economy is outside the formal system, it has been difficult to raise significant revenues from consumption taxes.\(^ {54} \)

Moreover, developing nations face problems in collecting personal income taxes because it is largely dependent on individuals who are formally employed within the formal economy, where employers deduct income tax from their wages and pay it over to the state on their behalf. Also taxing the elite poses challenges in that they are well equipped to hide their money overseas or employ tax consultants to find loopholes in the income tax rules so as to hide their earnings from scrutiny of tax officials. This means that the collection of corporate tax, which is a lucrative source of revenue, is not maximized.\(^ {55} \)

Furthermore, the pressures of globalisation have had developing countries engaged in as a ‘race to the bottom’ in which developing nations compete against each other to attract foreign direct investment (FDI).\(^ {56} \) They offer ever more generous tax incentives\(^ {57} \) to multinational corporations to lock in the potential benefits associated with FDI, such as industrial development and job growth. However, evidence indicates that ‘the cost of these incentives often outweigh their intended benefits. For example, ‘the Tax Justice Network has provided recent estimates suggesting that Kenya, Tanzania, Rwanda and Uganda are losing between USD 1.5 billion and USD 2 billion a year in revenues foregone as a result of tax incentives.\(^ {58} \)

The ICESCR\(^ {59} \) accordingly urges states to ‘take rigorous measures to combat illicit financial flows, tax evasion and fraud “with a view to raising national revenues and increasing reliance on domestic resources”’, because ‘in order to fully devote the maximum available resources to

\(^{53}\) Maziwisa & Lenaghan (note 6 above) at 242.


\(^{55}\) Avi-Yonah ibid at 7.

\(^{56}\) FDI is defined by the Organization for Economic Co-Operation and Development (OECD) as a ‘category of investment that reflects the objective of establishing lasting interest by a resident enterprise in one economy […] in an enterprise […] that is resident in an economy other than that of the direct investor’. See A Titus & T’Gutuza ‘The Relationship Between Tax Incentives and Human Rights Obligations in the Drive to Attract Foreign Direct Investment: Are Developing Countries in Africa Getting it Right’ (2018) Acta Juridica 149, 149.

\(^{57}\) Tax incentives can take the form of reduced corporate income tax rates, tax holidays, investment allowances, and special economic zones (SEZs). See Titus & Gutuza (note 56 above) at 150.

\(^{58}\) Ibid at 150–151.

\(^{59}\) The CESCR increasingly presumes non-compliance with the MAR clause whenever tax policy is either insufficient of discriminatory in nature. See O De Schutter, NJ Lusiani & S Chaparro ‘Re-Righting The International Tax Rules: Operationalizing Human Rights in the Struggle to Tax Multinational Companies’ (2020) 24 The International Journal of Human Rights 1370, 1372.
human rights, states have a duty not only to generate resources, but also prevent the diversions of resources.’\textsuperscript{60}

According to De Schutter et al:

It has been calculated in 2014 that, if developing countries were to raise even 15 percent of their national income tax \ldots, the additional revenue collected ($198 billion per year) would represent more than all foreign development assistance combined. Yet many developing countries, the tax base remains very low, and does not allow the States concerned to effectively fulfil the rights of the Covenant.\textsuperscript{61}

Accordingly, national tax systems must not only be judged on how effectively they generate revenue but must also be judged on how fairly they redistribute wealth and uphold the human rights of their citizens.\textsuperscript{62} According to De Schutter et al, it is important to examine not only how taxes are raised, but also how the money raised is to be spent. The combination of revenue mobilisation and spending choices matters in respect of the realisation of ESCR and —

neither of these two elements alone shall in itself suffice to assess whether the efforts of the State are sufficient: just like one can easily imagine a State with generous social policies addressed at tackling poverty, but in which such policies are essentially financed by the poor themselves, it is possible to have a State tax the rich but not use the revenues collected in ways that have a significant impact on the reduction of inequalities.\textsuperscript{63}

According to the Committee on ESCR, taxation serves to ensure that the rights of the disadvantaged and marginalised groups are not disproportionately affected.\textsuperscript{64} This approach would force governments to be more accountable to their citizens through the sort of policies that they implement. If states would prioritise their human rights obligations to their citizens and make decisions with these obligations in mind, the policy decisions put in place would be more successful in ensuring that they do not adversely impact on the most vulnerable members of the nation.

The tax abuses engaged by MNCs greatly impact a state’s ability to combat poverty and development issues. Studies have shown that more money flows out of developing countries through corporate tax avoidance than flows in through development aid.\textsuperscript{65} Such MNCs fail to be a foundation for sustainable development when they continue to aggressively lobby for tax holidays and structure their affairs through secrecy jurisdictions and tax havens. Zambia Sugar, for example, admitted to paying ‘virtually no tax’ in Zambia between 2007 and 2013 despite generating profits of USD 123 million of which an average of USD 83.7 million was taken out of Zambia into and via tax havens including Ireland, Mauritius, and the Netherlands.


\textsuperscript{61} De Schutter et al (note 59 above).


\textsuperscript{63} De Schutter et al (note 59 above) at 1373.


Furthermore, an estimated USD 27 million was lost to public services because of various tax avoidance schemes and special tax breaks.66

Corporate tax abuse can be deemed to be a human rights issue because when MNCs take part in transfer mis-pricing, non-taxation of natural resources, negotiation of tax holidays, and the use of offshore investment accounts; they engage in depriving governments of the resources needed to address poverty and to finance programmes seeking to protect and fulfil internationally recognized human rights.67 The IBHARI Report’s task force argues that states’ obligations to protect ESCR should be understood to include the obligation to assess and address the domestic and international impact of corporate, fiscal and tax policies on human rights.68 It can further be argued that when governments opt to grant further tax incentives to international investors over generating revenue that could be used to better meet the needs of the many, they work to further the gap between the wealthy and the very poor.

An analysis of the various acts that lead to the disparities in income, which can block development and increase demand for government social spending, between the wealthy and the poor has led to the realisation that it is important to redistribute societal resources if inequality is to be tackled and human rights realised. This is based on the growing consensus that ‘rising inequality seems to be the main reason for the disappointing overall record on reducing poverty’.69

Possibly, the most important reason for dealing with taxation through a human rights lens is accountability. Ross’s70 research has shown that states that are more dependent on foreign aid71 and natural resource exploitation, as opposed to domestic resource mobilisation through taxation, ‘tend to be more corrupt,72 conflict-ridden, authoritarian, poorer, more unequal, and have lower long term economic growth, whereas governments which are dependant to a greater extent on domestic taxes for their revenue have incentives to be more answerable to taxpayers’.73 This is because taxation makes people feel the need to engage with how their taxes are utilised as well as the sort of policies that are put in place. People are willing to obey their elected government ‘only if its actions provide security, improve […] lives and enhance […] welfare’.74

67 Holmes & Sunstein (note 50 above).
68 International Bar Association’s Human Rights Institute (note 22 above).
71 ‘Up to 2001, donors in toto provided more than USD 12 billion of financial assistance to Zambia which was equivalent to almost 20% of GDP’. Refer to C Von Soest *How Does Neopatrimonialism Affect the African State? The Case of Tax Collection in Zambia* (German Institute of Global and Areas Studies Working Paper No 32, 2006), available at https://www.files.ethz.ch/isn/47051/wp32.pdf.
72 According to Transparency International ‘Zambia Country Data’, several ministers were involved in corruption scandals without being dismissed. Furthermore, Zambia’s corruption ranking in 2017 was at 96 out of 180, with a score of 37/100, which made it part of the worst performing regions in Sub-Saharan Africa, available at https://www.transparency.org/country/ZMB.
73 A Nolan; R O’Connell & C Harvey *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (2013) 82.
This part of the article has shown that taxation is one of the critical areas of policy to interrogate when assessing whether states are drawing on the ‘maximum of available resources’ and an indispensable policy instrument for mobilising additional public resources to finance human rights related expenditure. Furthermore, it plays a major, potential role in redistributing resources to mitigate and redress social inequalities and tackling discrimination. Additionally, it has an important role in cementing the bonds of accountability between states and citizen.

V TAX POLICY

Tax policy refers to ‘the choice by a government as to what taxes to levy, in what amounts, and on whom.’ Tax policy seeks to provide guidelines, rules and modus operandi that would regulate a nation’s tax system and provide a basis for tax legislation and administration. It has however been argued that traditional tax policy is only minimally concerned with the effect that taxation can have on existing social, political, and economic disparities in terms of participation or access and does not acknowledge the various ways that tax policy can reinforce existing inequalities or biases. This can, in part, be attributed to the fact that tax policy and human rights law have historically not been assessed under the same framework.

The problem with traditional tax policy is that because it lacks a human rights perspective, even though undesirable consequences may result from the policies that are put in place, traditional tax policy deems these consequences as irrelevant to its goals and beyond its power to correct. For example, Sierra Leone, like most developing countries, regards attracting FDI to be one of its primary goals. As a result, foreign investors enjoy very generous concessions on mining exports, of which only one of the five major mining companies operating in the country paid corporate taxes for the 2013 financial year. Furthermore, an Extractive Industries Report, on Zambia, found that between 2005 and 2009, over 500 000 Zambians employed in the mining sector were carrying a higher tax burden than the mining companies. Most developing country governments tend to disregard such undesirable consequences, despite the fact that harnessing the wealth of their mineral resources provides them with the greatest opportunity for growth, poverty reduction and development. Developing countries instead opt to argue that they do not have the administrative capacity to regulate such occurrences, and find solace in the fact that the companies help provide jobs for the populace while the companies’ retained profits allow them to continue to invest in the countries. This will be discussed in further detail, using Zambia as an example, below.

79 Africa Progress Panel (note 69 above).
This article, however, seeks to argue that government tolerance of these consequences as a part of the status quo needs to stop. Governments, of developing countries especially, need to take more substantive steps to ensure that their citizens benefit the most from the various policies and agreements they and their nationals enter into. Bird has stated that ‘a good internal tax system provides not only revenue but is an essential element in developing a capable state’. States need to adopt tax policies that are transparent and responsive to the needs of their citizens. Furthermore, the drafters of such policies need to understand that such policies play a major role in achieving the aims and ambitions of the state and its citizens.

A Tax policy and developing countries

A country’s ability to develop an adequate internal tax system plays a vital role in its ability to make economic progress. This is because ‘a good internal tax system provides not only revenue but an essential element in developing a capable state’. Most developing countries continue to face various tax policy challenges in their attempts to establish efficient tax systems. It is important to note that their efforts have not been in vain in that most of their tax structures have experienced much improvement in terms of the taxes and the rates. Nevertheless, growth in domestic revenue mobilization as a result of various reforms has not significantly improved, as illustrated by their average tax-GDP ratio of between 10 and 15 per cent. This is especially clear since research has shown that tax revenues in most LICs, especially in Sub-Saharan Africa (SSA), have been stagnant for at least the past 30 years with no notable difference since the 1980s. Morrissey stipulates that this can be attributed to the absence of growth in the fundamental tax base – the formal sector employment and earnings (the income tax base) – and increasing difficulties in taxing sectors that are growing, such as resource extraction, multinationals and very wealthy individuals.

Developing countries face daunting challenges in establishing effective and efficient tax systems. It would therefore be naïve to expect developing countries to increase their tax take through more vigorous collection efforts. This is because most LICs have economic structures that make imposing and collecting taxes difficult. Furthermore, LICs have tax administrations with limited resources and capacity. However, it can be argued that globalisation and trade liberalisation have played a major role in encouraging tax reforms in developing countries even though globalisation further complicates the challenges faced by revenue authorities. The complication arises because globalisation allows taxpayers who are actually resident in a country to arrange their affairs so that their taxes are completely hidden from the domestic revenue authorities. This will be discussed in more detail later in the article.

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82 Ibid.
84 Bahl & Bird (note 81 above).
Due to the fact that developing countries aim to become more integrated with the international economy, the tax arena has seen developing countries increasingly adopt more indirect taxes, such as VAT, in their systems in an effort to increase revenue. However, more modern taxes, such as personal income taxes (PIT), have continued to play a limited role with revenues that account for around one and two per cent of GDP. Additionally, owing to the structure of most developing countries, it has been estimated that less than five per cent of the population pay PITs that are collected from wage-withholding, such as pay-as-you-earn (PAYE), by the public sector and corporations. This is owing to the majority of the population working in the informal sector whose operations make enforcement practically impossible.

Furthermore, research has shown that there has been a decline in corporate income taxes (CIT) in most developing countries due to rate reductions, incentive policies that narrow the tax base, and various corporations failing to report profitability. This decline in CIT is ‘especially harmful’ because the profits that MNCs generate ‘provide the best chance for tax to actually be collected in those countries’. Bahl and Bird contend that income taxes, together with property taxes, are some of the most difficult taxes for most developing country tax administrations to administer. This is because their tax administrations are limited in capacity due to low human capital, limited resources and their staff are not trained for such advanced capabilities. Furthermore, the majority of developing countries are mainly characterized by a large agricultural industry which makes up the majority of the countries’ total output and employment. As explained above, the employment opportunities of developing countries often lie in the informal sector which is, as stated above, almost impossible to tax. All these challenges culminate in a reduction in the possibility that developing countries are unlikely to achieve high tax levels.

Faced with these challenges, developing countries tend to rely heavily on domestic and foreign borrowing, but this is not an adequate alternative to increasing tax revenues. Most of the people in developing countries have very low incomes therefore limited if any savings from which their governments cannot borrow. As an alternative, the reliance that governments place on foreign aid can have many deleterious consequences flowing from their dependency.

89 A VAT imposes a tax at each stage of the production process which is then passed through to the final consumer. It is regarded as one of the most economically efficient forms of consumption tax.
90 Carnahan (note 88 above) at 173.
91 PITs are generally administered through a wage withholding tax system where employers withhold part of the employees’ wages and remit that amount to the tax administration.
92 Carnahan (note 88 above) at 176.
93 Carnahan (note 88 above) at 173.
94 This is because the informal sector is largely cash based and is comprised of individuals who poorly keep record of their financial transactions.
95 CITs are levied on the profit earned by companies, which is the revenue they generate less the deduction of allowable expenses.
96 Gaughran (note 31 above).
97 Bahl & Bird (note 81 above) at 283.
100 Tanzi & Zee (note 98 above).
on aid.\textsuperscript{101} For example, Romero and Sharpe report that governments in a large number of developing countries have had to give considerable weight to policy advice which has been provided by international financial institutions such as the World Bank and International Monetary Fund (IMF) because the advice has traditionally been ‘directly or indirectly linked to disbursement loans.’\textsuperscript{102} Dependency on these loans results in governments losing a level of control as they are compelled to apply the provided advice despite any possible number of undesired consequences.

In spite of these complications, taxation emerges as one of the most effective domestic tools that governments have direct control over with which to develop the resources needed to meet their social, economic, and political goals. If developing countries continue failing to control their domestic tax policies and take effective measures against domestic and international tax abuse, the constant struggle to meet the basic needs of the most vulnerable members of their individual states will continue.\textsuperscript{103}

B Tax policy structures in Zambia: The case of Zambia Sugar

Earlier on, it was stated that Zambia Sugar reported that it paid virtually no tax in Zambia between 2007 and 2013 despite the fact that it had made an immense amount in profits. This paragraph will therefore analyse the Zambian tax system as well as some of the gaps that it contains. We use Zambia Sugar as an example.

1 The Zambian tax structure

Zambia taxes income on a source basis.\textsuperscript{104} This means that income that is sourced, or deemed to be sourced, in Zambia is subject to tax within the country. In this regard, the corporate income tax rate is pegged at a rate of 35 per cent compared to 28 per cent in South Africa. In addition, Zambia also taxes the dividend and interest payments to resident companies. In a situation where disbursements (e.g., management and consultancy fees) are paid to a non-resident company, Zambia then levies a 20 per cent withholding tax,\textsuperscript{105} which is similar to that of South Africa,\textsuperscript{106} on such disbursement amounts. Moreover, Zambia provides extensive tax incentives, especially for mining operations whose tax rate is lowered to 30 per cent, and lowered even further for farming and agro-processing operations whose tax rate is set at 10 per cent.\textsuperscript{107}

\textsuperscript{103} It is submitted that this is a result that the IMF has contemplated and therefore it added the strengthening of internal revenue collection to its conditions for the provision of new loans. Refer to CB Hill; MF Mcpherson (eds) \textit{Promoting and Sustaining Economic Reform in Zambia} (2004) 141.
2 Addressing how Zambia Sugar used Zambia’s tax policies to its advantage

It is common cause that companies often resort to aggressive tax planning to arrange their financial affairs in a manner that allows them to retain as much profit as possible. One of the ways that this is done is through treaty shopping,\footnote{108 ‘Treaty shopping indicates the attempt to access tax treaty benefits that do not pertain to the particular person or corporate entity attempting access to the benefits. See JL Flanagan ‘Holding US Corporations Accountable: Toward a Convergence of US International Tax Policy And International Human Rights’ (2018) 45(4) Pepperdine Law Review 685, 724.} which is also one of Zambia Sugar’s most enriching forms of tax planning, as will be seen below.

One of the biggest contributors to Zambia Sugar’s ability to avoid taxes in Zambia is the tax treaty between Zambia and Ireland, which has been in force since 1973. One of the agreed terms of this treaty is that the state of residence of the service provider is exclusively entitled to the taxing rights on professional services.\footnote{109 Article 12 Convention Between Ireland and The Republic of Zambia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital gains.} In light of this, Zambia Sugar structured its business transactions such that it pays excessive management and consultancy fees to Illovo Sugar Ireland (ISI). As a result of the tax treaty between Zambia and Ireland, Zambia is no longer able to levy a withholding tax on the management and consultancy fees that Zambia Sugar pays to ISI. In addition to this, Zambia Sugar is entitled to further deduct the costs of the management and consultancy fees from its profits as operating costs.\footnote{110 ActionAid (note 66 above).} In order to ensure optimal profit generation and not fall victim to high tax rates in Ireland, ISI goes on to make payments to Illovo Sugar Ltd, which is established in South Africa, and to another Illovo subsidiary in Jersey, as well as to the Illovo Group Marketing Services (IGMS) which is established in Mauritius whose tax rate is a low 3 per cent. As can be seen, these arrangements take advantage of the various loopholes in the tax treaties to ensure that Zambia Sugar pays as little as possible in tax and that the money sent to Ireland is also not subject to as much tax as it technically should be.\footnote{111 C O’Brien ‘Zambia Sugar’s Sweet Irish Tax Deal’ The Irish Times (14 February 2015), available at https://www. irishtimes.com/news/world/africa/zambia-sugar-s-sweet-irish-tax-deal-1.2103225.}

The tax treaty between Zambia and Ireland has additionally been beneficial to Zambia Sugar in that at a time when it needed to expand as a business; it had ISI provide it with a loan of USD 70 million to ensure that the tax treaty would be applicable. The implications of this transaction were that Zambia could, again, not levy a withholding tax on the interest on the loan that Zambia Sugar paid to ISI. Furthermore, Zambia Sugar could deduct the interest payments as actual costs to the company, to reduce its declared profits. This is although ISI had to borrow the money from branches of the commercial banks in the United Kingdom and notwithstanding that Zambia Sugar received the funds through a Zambian bank account. This would also mean that ISI would have to pay interest on the loan it acquired from the United Kingdom commercial banks. In accordance with the treaty between Ireland and the United Kingdom, the taxing rights on interest payments are allocated to the state of residence of the beneficiary of the payment, being Ireland.\footnote{112 Article 12(1) of the Convention between the Government of Ireland and the Government of the United Kingdom for the Avoidance of Double taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains.}
In contrast, had Zambia Sugar acquired the loan directly from the United Kingdom commercial banks, the treaty between the United Kingdom and Zambia would have applied and Zambia would therefore have been allowed to levy a withholding tax up to 10 per cent on the interest payable. In addition, if the loan was provided from the commercial banks’ head offices, being the United States, Zambia would likely have been able to levy a 15 per cent withholding tax on the profits since Zambia does not have a treaty with the United States.\(^{113}\) As can be seen from the example provided, treaty shopping is an aggressive form of tax planning and will be dealt with in greater detail at a later stage.

Zambia Sugar accordingly benefitted not only from its aggressive tax planning practices, but the immensely advantageous tax incentives it received in Zambia. There are two specific tax incentives granted to Zambia Sugar which further reduced their tax burden in Zambia.\(^{114}\) Firstly, Zambia Sugar’s operations were categorised as farming operations, as such, its profits were taxed at a special rate of 10 per cent for farming and agro-processing, instead of the general CIT rate of 35 per cent. This is notwithstanding that a large part of its profit was derived from producing sugar and not farming. Moreover, Zambia Sugar was granted a 0 per cent tax rate for the first five years of operation in Zambia because it was deemed, by the Zambia Development Agency (ZDA), to have made an investment in a priority area and created desperately needed jobs for the local population.\(^{115}\)

There is no substantial evidence to support Zambia’s need to have granted Zambia Sugar the 0 per cent tax rate. Furthermore, it is uncertain as to whether Zambia Sugar would have withdrawn its investment in Zambia had it not received the tax break through the 0 per cent tax rate incentive. However, considering the advantageous treaty implications and immensely reduced tax rate, it can be argued that Zambia Sugar probably did not need the extra persuasion.

It has been established that the realisation of ESCR is heavily dependent on a country’s resources. Accordingly, it is vital that developing countries realise that the consequences of granting tax incentives are not only financial but ultimately have a human cost because if the tax incentives ‘do not yield the envisaged benefits, the resultant reduction in tax revenue may result in budget cuts as governments are forced to make up the shortfall in revenues elsewhere.’\(^{116}\) Accordingly, any policy that impacts on a country’s resources, particularly its fiscal resources, must find a balance between the country’s objectives of investment, growth and employment and the need to ensure that sufficient resources are made available to meet the basic human rights of citizens. It is accordingly essential that the ‘country’s budgetary efforts are aligned with its human rights obligations.’\(^{117}\) This is further supported by the Committee on ESCR General Comment No 24\(^{118}\) which held that:

States parties should also encourage business actors whose conduct they are in a position to influence to ensure that they do not undermine the efforts of the States in which they operate to fully realize the Covenant rights - for instance by resorting to tax evasion or tax avoidance strategies.

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\(^{113}\) LS Wu ‘Bittersweet (Tax) Symphony’ (2016) 1 Taxation Perspectives 139, 144.

\(^{114}\) Wu ibid.

\(^{115}\) Ibid.

\(^{116}\) Titus & Gutuza (note 56) at 151.


\(^{118}\) Committee on Economic, Social and Cultural Rights, General Comment No 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities (2017) UN Doc E/C.12/GC/24 para 23 (‘General Comment 24’).
in the countries concerned. To combat abusive tax practices by transnational corporations, States should combat transfer pricing practices and deepen international tax cooperation, and explore the possibility to tax multinational groups of companies as single firms, with developed countries imposing a minimum corporate income tax rate during a period of transition. Lowering the rates of corporate taxes with a sole view to attracting investors encourages a race to the bottom that ultimately undermines the ability of all States to mobilize resources domestically to realize Covenant rights. As such, this practice is inconsistent with the duties of the States Parties to the Covenant. Providing excessive protection to bank secrecy and permissive rules on corporate tax may affect the ability of States where economic activities are taking place to meet their obligation to mobilize the maximum available resources for the implementation of economic, social and cultural rights.

In as much as governments have a role to play in their failure to effectively meet the vital human rights needs of their subjects, such responsibility also rests of the corporations and the actions they implement, as will be illustrated in the following part of this article.

VI TAX ABUSE AS A VIOLATION OF HUMAN RIGHTS

Governments rely on healthy state finances to fund social programmes, redistribute wealth, and support economic development. The failure of wealthy corporations and individuals to pay their share of tax shifts the burden to poorer citizens or results in programmes and services being terminated or underfunded. Abuse of the tax system harms the ability of states to act in the interest of the people. This part of the article therefore examines the implications of corporate tax abuse on a state’s ability to effectively meet the human rights needs of its people.

A Tax abuse

Tax abuse is an issue that has received a considerable deal of attention from governments, the media and the public at large. The attention this issue has received has been exacerbated by a series of leaks and investigations concerning tax and banking practices in countries such as Panama, Luxembourg and Switzerland in addition to the tax scandals involving major corporations like Starbucks, Apple and Google that were widely reported in the media and resulted in global public outcries for MNCs to be held accountable for the implications of their actions that result in gross human rights violations.119 This culmination of events has pressured states into addressing this issue of tax abuse. Tax abuse is a collective term used to refer to aggressive tax avoidance120 and illegal tax evasion.121 It has also been labelled as ‘an activity with no social returns but high social costs’.122 It is important to note that even though tax avoidance is generally regarded as being legal, over the years the line between the various tax avoidance

119 Flanagan (note 108 above) at 688. See also International Bar Association’s Human Rights Institute Task Force (note 22 above) at 2 which found that tax abuses have considerable negative impacts on the enjoyment of human rights.


121 Ibid. Tax evasion is the unlawful avoidance of tax liabilities that are due.

strategies has become blurred as it borders closely on tax evasion. This has been proven by the inconsistency in the various findings that have been made through national tax rulings.\textsuperscript{123}

Globalisation has added a new dimension to the already complicated methods used by multinational corporations to avoid paying taxes. According to the OECD:

Globalisation has in effect caused products and operational models to evolve, creating the conditions for the development of global strategies aimed at maximising profits and minimising expenses and costs, including tax expenses. At the same time, the rules on the taxation of profits from cross-border activities have remained fairly unchanged, with the principles developed in the past still finding application in domestic and international tax rules…[T]he changes in business practices brought about by globalisation and digitalisation of the economy have raised questions among governments about whether the domestic and international rules on the taxation of cross-border profits have kept pace with those changes.\textsuperscript{124}

The OECD has noted that MNCs save on vast amounts, that often range from ‘hundreds of millions of USD in a single transaction or series of transactions’.\textsuperscript{125} Furthermore, in as much as it is difficult to determine the precise amounts in respect of tax avoidance figures, the Tax Justice Network estimates that all forms of tax evasion amount to approximately USD 3.1 trillion,\textsuperscript{126} which is ‘a little over 5 per cent of the world’s GDP.’\textsuperscript{127} In addition to this, profit shifting\textsuperscript{128}, to avoid paying taxes, ranges in amounts between USD 60 billion to USD 160 billion per year.\textsuperscript{129} Such astounding amounts in profit shifting have serious implications in that they ‘may undermine public trust in the system, create inequalities, and reduce tax revenues’\textsuperscript{130} Furthermore, the former United Nations Secretary General, Kofi Annan, correctly compared tax abuse to ‘taking food off the table for the poor’\textsuperscript{131} in that its effects are mostly experienced by the most vulnerable groups of our population.

B Forms of tax abuse

Multinational corporations have ‘many devices — often highly complex, interlocking, and very effective — by which to reduce their total tax bills’.\textsuperscript{132} In practice the strategies used by corporations to shift profit vary and are dependent on the situation at hand. However, there are certain elements that facilitate profit shifting, such as tax havens, transfer pricing and treaty shopping as will be discussed in a little more detail below.

\textsuperscript{123} Bernards et al (note 121 above).
\textsuperscript{124} OECD \textit{Addressing Base Erosion and Profit Shifting} (2013), available at https://doi.org/10.1787/9789264192744-en.
\textsuperscript{125} OECD ibid.
\textsuperscript{127} S Darcy ‘The Elephant in the room: Corporate tax avoidance & business and human rights’ (2017) 2 \textit{Business and Human Rights Journal} 1, 4.
\textsuperscript{128} Profit shifting refers to strategies used by corporation to reduce their overall tax liability by reporting profits in low-law or no-tax foreign jurisdictions by artificially reallocating income and expenses. See Bernards et al (note 121 above) at 3.
\textsuperscript{130} OECD (note 125 above).
\textsuperscript{132} IMF (note 130 above).
1 Tax havens

The term ‘tax haven’ does not have an exact definition.\(^{133}\) Tax havens are countries that levy taxes at a substantially favourable rate in relation to other jurisdictions. The existence of tax havens is often problematic because they enable tax avoidance and evasion by structuring their legal and tax systems in a manner that protects bank secrecy which favours the tax abusers whose funds are invested within their jurisdictions.\(^ {134}\) This makes it immensely difficult for various governments to acquire an accurate account of the profits made by MNCs in that the various governments receive little to no co-operation from either the tax haven jurisdiction or the MNCs.\(^ {135}\)

The favourable nature of these tax haven jurisdictions proves so beneficial to MNCs that they opt to set up headquarters or various additional subsidiaries in tax havens. They then instruct subsidiaries in jurisdictions with high tax rates to contract with their tax haven subsidiaries to enter into money-losing arrangements involving trade mis-invoicing, abusive transfer prices as well as inflated consulting and trademark fees. These arrangements allow them to manipulate the system in a manner that allows them to show profits as accruing in a tax haven and to declare losses or menial profits within the jurisdictions of nations with steeper tax rates.\(^ {136}\)

Such arrangements are so widely used that, in 2012, it was reported that between USD 22 and 33 trillion in private assets were held in tax havens to evade and avoid taxes.\(^ {137}\) Furthermore, estimates of the annual tax revenue lost to developing countries due to this kind of tax avoidance and evasion amounted to between USD 98 and 106 billion\(^ {138}\) annually between 2002 and 2006. This amount is comparable to the total amount of USD 83.5 billion that was budgeted for overseas development assistance from OECD countries in 2009.\(^ {139}\) Such statistics are “barebones estimates”\(^ {140}\) into the amounts of money lost and it can be argued that far larger amounts continue to be lost annually. This is because it is almost impossible for precise and accurate figures to be established, owing to banking secrecy that prevails in most tax havens together with the lack of transparency in respect of the way funds are managed in those jurisdictions.\(^ {141}\) It is therefore a likely outcome that the various estimates that are provided through the various studies are significantly underestimated to err on the side of caution.

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\(^{134}\) According to the OECD, a tax haven usually has the following features: no or only nominal taxes, lack of effective exchange of information, lack of transparency, and no substantial activities.

\(^{135}\) RT Kudrle ‘Tax havens and the transparency wave of international tax legalization’ (2016) 37 University of Pennsylvania Journal of International Law’ 1153, 1155.


\(^{140}\) A Deneault ‘The High Cost of Tax Havens’ (2016) 50 Canadian Dimension 1, 9.

It is no surprise that Sepúlveda Carmona\(^{142}\) would reiterate that tax havens are jeopardizing compliance with their human rights obligations when they enable and encourage tax abuse and other illicit financial flows through their tax secrecy laws. This is because, if the money that is lost through these tax diminishing measures was available to allocate according to current spending patterns, the amount going into health services could save the lives of 350 thousand children in less developed countries under the age of five every year.\(^{143}\) Furthermore, poor countries are more vulnerable to the impact of tax havens than the wealthier states. This is because ‘46% of reported cross border investment into low income and lower middle-income countries in 2011 came from tax havens, compared to 37% into upper-middle and high-income countries’.\(^{144}\) In addition to this, ‘almost one in every two dollars of reported corporate investment in developing countries is now being routed from or via a tax haven’.\(^{145}\)

One of the effects of tax havens is that they have enticed governments all over the world to be drawn into a ‘race to the bottom’.\(^{146}\) The Quebec Finance Minister, Michel Audet, for example, indicated that fear of ‘capital flight’ was a major reason for his decision to cut the corporate investment income tax rate ‘from an already paltry 16.25% to 9.9% in 2007’.\(^{147}\) The unfortunate fact is that the race to the bottom, in fear of capital flight, has been a devastating reality for most developing countries that already lose too much to abusive tax practices.\(^{148}\) Sepúlveda recognised that if countries are to realise tax justice, they need to work together and adopt the coordinated measures against tax evasion that are taking place globally, as part of both domestic and extraterritorial human rights obligations and to fulfil their duty to protect people from human rights violations by third parties, including business enterprises.

Sepúlveda’s insights above, not only introduce a human rights aspect to the issue of tax abuse, but emphasise that co-operation is essential between the states if cross-border tax avoidance strategies are to be effectively managed and dealt with. This is especially true for low-income countries that are at a far greater disadvantage if they are to tackle this issue alone.

The human rights approach that has been introduced is by no means the ultimate remedy to this issue. However, it does help to build the case for reforms that boost government revenues, especially from the well-off individuals and corporations, to ensure that governments are better able to meet the needs of the many. This is further supported by the Lima Declaration on

\(^{142}\) M Sepúlveda Carmona (note 2 above).


\(^{145}\) Ibid.

\(^{146}\) OV Sokolovska ‘Race to the Bottom in International Tax Competition: Some Conceptual Issues’ (2016) 2 Journal of Tax Reform 98–110. The race to the bottom is because of tax competition. It essentially refers to how various governments implement what they deem to be ‘competitive policies’ such as various tax breaks and lower tax rates to seem more attractive than their counterpart states. This essentially means that countries are affected by other governments’ policies through the distribution of the tax base among countries, which is affected by the fiscal policy of all countries. Governments strategically interact with each other and try to attract the mobile tax base through the policy decisions they make. See overview by JD Wilson ‘Theories of Tax Competition’ (1999) 52 National Tax Journal 269–304.

\(^{147}\) Deneault (note 140 above).

\(^{148}\) Sokolovska (note 146 above).
Tax Justice and Human Rights,\textsuperscript{149} which ‘called for the integration of human rights standards in efforts to reform the deeply splintered tax system … that unfairly privileges multinational corporations’,\textsuperscript{150} and was endorsed by advocates, practitioners, scholars, activists, jurists, litigators and many other individuals committed to advancing tax justice through human rights and to realizing human rights through tax policy.

2 Transfer pricing

Transfer pricing is a form of profit-shifting that enables MNCs to manipulate the income and expenditure of the company, across the various jurisdictions that it is based, to be able to declare higher profits in countries with lower taxes and vice versa. It refers to the process of setting internal prices for goods and services that are sold between its related enterprises or subsidiaries.\textsuperscript{151} With this, it must be noted that transfer pricing, in essence, is not illegal or unethical when it falls within the arm’s length principle.\textsuperscript{152} This is because the price set should essentially be equivalent to that which the seller (i.e. the company) would charge an independent party or buyer. The price could also be similar to what an independent buyer could pay an independent seller.\textsuperscript{153} From a financial perspective, transfer pricing is likely the most important cross-border tax issue internationally.\textsuperscript{154} This is attributed to the fact that a large proportion of world trade is accounted for by cross-border trade that takes place within MNEs, where branches or subsidiaries of the same MNE exchange goods and services.

Transfer pricing becomes an issue of concern when companies deliberately set these prices at something other than the market rate in an effort to lower profits of the subsidiary in a country with high taxes and ultimately minimize the company’s tax liability.\textsuperscript{155} This is what is referred to as transfer (mis)pricing. There are various actions that lead to transfer mispricing.


\textsuperscript{150} Flanagan (note 108 above) at 688.


\textsuperscript{152} The arm’s length principle refers to the methods used with the intention of evaluating pricing agreements between related parties from the perspective of unrelated parties. See Flanagan (note 108 above) at 712.


such as, ‘export mispricing,\textsuperscript{156} import mispricing,\textsuperscript{157} IP rights,\textsuperscript{158} and re-invoicing.’\textsuperscript{159} A clear example of export mispricing is with Glencore, a Swiss-based global mining parent company with a subsidiary in Zambia trading as Mopani Mines. After investigation by the Zambian authorities, it was determined that copper from Mopani Mine was being sold to Glencore at far lower prices than the market rate.\textsuperscript{160} In this situation, the authorities of Zambia, like many other countries, are placed in an uncomfortable and difficult position in that they would need to devise a solution that protects their tax base whilst also not burning the bridges for continued or further FDI.

Such conduct obviously has some onerous implications for the treasury and ultimately, the citizens of states that fall victim to such conduct. This is especially true for developing countries who, as we know, ‘lack capacity of their tax authorities to establish and enforce transfer pricing rules.’\textsuperscript{161} This is supported by the fact that the High Level Panel on Illicit Financial Flows from Africa found that ‘only three African countries had transfer pricing units in their internal revenue services.’\textsuperscript{162} Even with the OECDs Transfer Pricing guidelines, developing countries face dire straits in their effort to implement such guidelines in practice.\textsuperscript{163} Therefore, ‘when developed countries tolerate internal pricing mechanisms and other arrangements that enable those corporations to effectively avoid such taxes that would otherwise be due to the developing country, they do an immense disservice.’\textsuperscript{164} Despite this, it must still be noted that developing countries are themselves also to blame to the extent that they allow transfer pricing to continue to take place by not developing regulations and failing to effectively staff their revenue authorities.

\textsuperscript{156} This is where a ‘subsidiary of a company avoids paying taxes in a relatively high-tax country by selling its products at a loss to a subsidiary in a low-tax country, which then sells the product to final customers at market price and yields the profit.’ See United Nations Human Rights Office of the High Commissioner Illicit Financial Flows, Human Rights and the Post-2015 Development Agenda (2016) UN Doc. A/HRC/28/60.

\textsuperscript{157} This refers to ‘where locally run enterprises are able to shift profits to affiliates in countries offering lower levels of taxation through…artificially inflating the price paid for intermediate products purchased from overseas affiliates so as to lower stated local profits.’ See I Saiz ‘Resourcing Rights: Combating Tax Injustice from a Human Rights Perspective’ in A Nolan, R O’Connell and C Harvey Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights (2013) 77, 86. For example, ActionAid has chronicled how global beer company SABMiller’s breweries in Ghana pay extremely high fees for ‘management services’ from a Swiss-based affiliate, thus lowering corporate profits within Ghana. See ActionAid Calling Time: Why SABMiller Should Stop Dodging Taxes in Africa (2010), available at https://iogt.org/wp-content/uploads/2019/05/calling_time_on_tax_avoidance.pdf.

\textsuperscript{158} This is much more common and involves companies storing their intellectual property rights in a subsidiary in a low tax jurisdiction and then charging affiliates in high tax locations artificially high rates for the use of that intellectual property. See M Henn Tax Havens and the Taxation of Transnational Corporations (2013), available at https://library.fes.de/pdf-files/iez/global/10082.pdf. SABMiller, for example, holds the rights to brands of beer sold in Africa in a Dutch company, to which African brewers must pay significant royalties.

\textsuperscript{159} Iyer (note 155 above) at 4. Re-Invoicing is an illegal act that ‘occurs when goods leave a country of export under one invoice, then the invoice is redirected to another jurisdiction…where the price is altered, and then the revised invoice is sent to the importing country for clearing and payment purposes.’ See Hollingshead (note 138 above).

\textsuperscript{160} Africa Progress Panel (note 69 above) at 14.

\textsuperscript{161} Iyer (note 155 above) at 5.


\textsuperscript{163} This is mainly because most developing countries do not have the resources to spare to implement the suggested guidelines.

\textsuperscript{164} Gaughran (note 32 above).
Transfer pricing is prone to misuse because, despite all the efforts and guidelines to better equip tax authorities the world over, the fact remains that determining an arm’s length price can be complex and resource intensive. An example of this can be taken from the Australian case, between the Australian Taxation Office (ATO) and Chevron, which was brought before the federal court. The case was so complex and resource intensive that the ATO needed to call nearly two dozen expert witnesses from the banking industry, oil, gas and transfer pricing experts together with academics in these fields, in an effort to make and prove its case. These are the sort of resources that developed nations can afford to have at their disposal. On the other hand, the tax authorities in most developing countries have little or no expertise on transfer pricing, scarce public data for comparison and lack proper internal review mechanisms among other things. However, despite this negative outlook, the world realises that developing countries cannot lose hope because transfer pricing plays such a major role on the state of a country’s tax base. It has therefore been suggested that tax authorities in developing countries ought to start by honing their skills in respect of the most common types of transactions and sectors in their economy. For example, tax authorities should master the processes of the natural resources, manufacturing and service sectors in order to more effectively enforce taxes with objectives that realistically take into account their available capacity.

All in all, it is vital that developing countries strengthen their tax governance to aid their efforts in domestic resource mobilization as this may help them rely less on foreign development assistance to eradicate poverty and meet their citizens basic human rights’ needs.

3 Treaty shopping

The bilateral tax treaties that countries often enter in an effort to diminish the possibilities of double taxation have proven quite beneficial over the years in that they have encouraged international trade and investment. However they have also opened up avenues for companies which are residents of a non-treaty country to exploit the treaties in order to avoid taxes and gain access to treaty benefits which would technically not have been available to them. This is known as ‘treaty shopping’ and it can prove financially devastating for treaty member countries as could be seen from the example of Zambia Sugar above.

Companies ensure the acquisition of treaty benefits by setting up a company in one of the treaty member states, which is preferably a tax haven jurisdiction or a jurisdiction with low tax rates, to serve as an intermediary to shift profits and take advantage of the tax allowances that the treaty offers. Companies may go even further in their avoidance strategies by presenting the

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165 In this case, ATO alleged that Chevron had used intercompany loans and related party payments to cut its tax bill by USD 260 million.


168 Silberztein ibid.

169 International Bar Association’s Human Rights Institute (note 22 above) at 89–91.

nature of the income as tax deductible. As one can assume, this undoubtedly has the potential to result in significant revenue losses for the states who are party to the treaty.\textsuperscript{171}

An example of how treaty shopping works is when two countries, A and B, enter into a tax treaty agreement that creates such a favourable tax environment that the residents of either nation not only benefit from it but also creates an environment that is conducive to foreign investment. This means that a company which is resident in country C and has an intermediary company in country B – a country with which it has a favourable treaty – can also benefit from the advantages (such as reduced rates of withholding taxes) that result from the treaty between country B and country A despite country C not having a treaty with country A. This is because the intermediary company in country B is deemed to be a resident of country B and is therefore entitled to the various advantages that result from the treaty between country A and B, in spite of the parent company being based in country C.\textsuperscript{172}

This form of treaty shopping is favoured because it not only allows for a company which is in a country with an unfavourable treaty or no treaty to benefit, but it also allows for companies to take advantage of the differences in the tax relief that is provided by the various treaties amongst the various countries. These differences encourage the investors to make the most use of the most beneficial treaty for their transactions. This is an undesirable consequence because it frustrates the purpose behind the treaty in that it results in the avoidance of taxation altogether and not simply double taxation.\textsuperscript{173} This is referred to as double non-taxation.

Tax abuse has a significant human rights impact that needs to be more overtly discussed and dealt with by the various international human rights agreements and treaties which guarantee basic rights that are denied by most developing countries because of their governments being deprived of the resources needed to meet such basic rights.\textsuperscript{174}

\section*{C \ Current measures against tax abuse}

Tax abuse has been an issue that has been at the forefront of state issues for the last few years. In that time, the world has been working on putting measures in place to counteract aggressive tax planning.\textsuperscript{175} In the past, states have typically relied on enhancing administrative co-operation through concluding agreements to exchange information and encouraging administrative assistance to tackle aggressive tax planning. Furthermore, most countries have had general anti-avoidance rules (such as substance over form) within their domestic legislation together with additional anti-abuse rules in tax treaties.\textsuperscript{176} However these measures have proved ineffective against the various specific forms of aggressive tax avoidance practices.

As such, states recently agreed to commit themselves to ‘enhancing revenue administration through modernized, progressive tax systems, improved tax policy and more efficient tax

\textsuperscript{171} Oguttu ibid at 238.
\textsuperscript{172} Ibid at 240.
\textsuperscript{173} Ibid at 242.
\textsuperscript{174} Cohen (note 141 above) at 18.
In order to achieve this, the parties made a commitment to ‘consider inserting anti-abuse clauses in all tax treaties’ and pledged to ‘make sure that all companies, including multinationals, pay taxes to the Governments of countries where economic activity occurs and value is created, in accordance with national and international laws and policies’. In addition to this, the parties present at the conference referred to the need for technical assistance and initiatives such as the OECDs ‘Tax Inspectors without Borders’ and the efforts of the G20 and the OECD on base erosion and profit shifting (BEPS).

The conference in Addis Ababa also resulted in an agreement for countries to engage in voluntary discussions in respect of tax incentives which are believed to offer ‘greater benefits to multinationals and their shareholders, than the citizens and governments of developing countries’.

D Holding corporations accountable for their abusive actions

Over the years, businesses have acquired so much power that they can now be regarded as some of the most powerful actors on the world stage, even more powerful than the governments of today. This is considering the increase in globalisation and international commercial activity, in which tax plays a major role, which has created challenges — for the protection of human rights — that are as a result of this global business and the mechanisms it uses to ensure that it ultimately profits. This power that has been attained by these corporations poses a challenge in that it results in businesses having far greater influence on the enjoyment of human rights by the citizens of a state. This influence may even reach farther than that possessed by the state itself.

This understanding of the power possessed by corporations has resulted in a surge of literature that is concerned with the social implications of commercial enterprise. The literature available questions how best we can harness the benefits that result from having a cosmopolitan and bountiful economy whilst also effectively regulating the corporations that bring forth such bounty when their conduct dismisses the plight of human beings. The fear that however continues to hover around this issue is that of upsetting or chasing off the ‘goose that lays the golden economic egg’.

For years governments have provided corporations with major tax breaks and tax advantages to attract further and/or new foreign investment into their economies. This consistent flexibility towards multinational corporations has resulted in what the OECD and other international bodies have referred to as ‘the race to the bottom’. This is in light of the fact that studies have found that there is little convincing proof of the fact that such policies actually play a

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178 Ibid.
179 Ibid.
180 Oxfam (note 131 above).
184 Sokolovska (note 146 above). Furthermore, see Wilson (note 146 above).
substantial role in attracting or sustaining FDI. Studies however do show that governments disadvantage their economies further with policies that result in a decrease as opposed to an increase in state coffers that fund the various needs of society. This problem is further exacerbated by the fact that MNCs continue to partake in strategies that further reduce their tax obligations in the economies that already provide what can be deemed to be advantageous tax breaks.

Corporate Social Responsibility (CSR), which is largely based on voluntary initiatives, is an avenue that has been devised for businesses to deal with their human rights responsibilities. This article however strays from supporting such non-binding initiatives. This is because even though such initiatives have some effect; they prove ineffective in situations that demand that the corporation be held accountable. An example of this can be found in relation to De Beers, a diamond company in South Africa, that was found to be benefitting excessively from royalty and export tax structures that are ‘riddled with loopholes, short-changing citizens of [South Africa] of tens of millions of dollars a year in revenue.’ When held to account to this, De Beers opted to deflect and instead reflect on the economic contribution that the corporation makes. As can be seen from the De Beers example, non-binding initiatives have little effect and are likely to be highly acceptable to corporations the world over. This is because the implementation of such non-binding initiatives would ultimately be dependent on the company and its values.

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185 S van Parys ‘The Effectiveness of Tax Incentives in Attracting Investment: Evidence from Developing Countries’ (2012) 3 Reflets et Perspectives De La Vie Economique 120–141, whose study results show that firms reward higher transparency and security more than a lower tax burden. It also confirms that the basic investment climate conditions are key to investors before tax incentives.

186 For example, Zambia has a high malaria and HIV/AIDS rate. This is further impacted by the fact that it prevalently affects the vastly poor population. This therefore places a heavy financial burden on governments as well as places demands on the government to address the pressing health and other social issues. A lack in implementing policy strategies that increase state coffers and maximise the available financial resources is a failure by the state on its people. This is especially because financing such areas through foreign aid has become more challenging. This means that if states do not take all the necessary measures with the policies that they implement to ensure that they can mobilise the maximum funds from their own resources, they will continue to fail to meet the basic and essential needs of their people. See JC Anyanwu, YG Siliadin & EOkonkwo Role of Fiscal Policy in Tackling the HIV/AIDS Epidemic in Southern Africa (African Development Bank Working Paper 148, 2012), available at https://www.afdb.org/en/documents/document/working-paper-148-role-of-fiscal-policy-in-tackling-the-hiv-aids-epidemic-in-southern-africa-26868.


189 In this regard, it is important to note that in as much as corporations such as De Beers make considerable contributions to our economies; the estimated scale of corporate tax abuses also undermines some of the claims that foreign investment and private enterprise are major drivers of sustainable development. While there is undeniable evidence that foreign investment and private enterprise is and can be a powerful force for development and positive human rights impacts, evidence about the extent of tax abuses by multinational enterprises serves to reinforce criticism and cynicism about the role of the private sector in development. Also see Business & Human Rights Resource Centre ‘So. Africa: “Rough and Polished” Report Alleges Tax Avoidance by Diamond Mining Companies; De Beers Denies Claim’, available at https://business-humanrights.org/en/so-africa-rough-and-polished-report-alleges-tax-avoidance-by-diamond-mining-companies-de-beers-denies-claim.
Attention to corporate responsibility for human rights violations was prevalent in the 1990s because high-profile instances of sweatshop labour and environmental damage by oil companies. Such attention resulted in the UN taking action by preparing draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights.\textsuperscript{190} The draft Norm’s wide range of obligations was in many respects ‘equal to states’ own obligations to respect, protect and fulfil human rights’.\textsuperscript{191} These efforts that worked towards the implementation of binding standards on the activities of business enterprises were however not well received by states or businesses, and resulted in the UN Commission on Human rights electing to instead have a Special Representative ‘identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights’.\textsuperscript{192} This decision to elect a Special Representative resulted in the birth of the United Nations Guiding Principles on Business and Human Rights.

The United Nations Guiding Principles on Business and Human Rights (UN gP) which were endorsed by the UN Human Rights Council in 2011 and supported by businesses around the world, is currently one of the most prevalent documents in the field of business and human rights.\textsuperscript{193} It sets out the global standard of expected conduct for all business enterprises and stipulates that:

[Business] enterprises have a responsibility to respect human rights, also in their business relations, which require them to:

(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; and
(b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.\textsuperscript{194}

This provision carries such authority for the argument, as expressed throughout this article, which holds that corporations act adversely to the enjoyment of human rights by citizens when they engage in activities that deprive treasuries of funds that would otherwise be owed. It explicitly highlights that business enterprises have a responsibility to avoid the negative impacts on human rights caused by tax abuses. However, in as much as the UN Guiding Principles (GP) recognize this fact, they too fail to elaborate on any legally binding obligation on businesses to respect human rights.\textsuperscript{195} As such, it can be determined that in as much as this document received immense support and endorsement from businesses the world over, the principles themselves remain insufficient to deal with the issues relating to the adverse impact


\textsuperscript{194} Ibid.

\textsuperscript{195} D Bilchitz Human Rights Obligations of Business (2013) 38. Also see Thielbörger & Ackermann (note 191 above) at 46.
of business on human rights. It is for this reason that scholars, activists and other members of the international community, despite offering support for the UN GPs, continue to call for alternative, more binding works to deal with the human rights obligations of businesses. This is because corporations and states should both be held accountable to ensure that the implications on basic human rights standards are not taken lightly or ignored by these bodies during business activities or policy decision processes. Unfortunately, major powers such as the United States and the EU have shown favour to pursuing the implementation of the UN GPs over engaging in discussions on a binding treaty. Therefore, with no binding obligation on business to respect human rights, they will likely continue to disregard the implications of their practices on the basic human rights standards.

Considering all this, it is important to highlight that neither the draft Norms nor the UN GPs specifically mention aggressive corporate tax avoidance nor did the Special Representative conspicuously address it. In addition to this, the UN Working Group on business and human rights has also not paid much attention to this issue since it was established in 2011.

VII CORRUPTION

It would be remiss to simply place the burden of the failure to meet essential human rights on corporations and their tax practices. Responsibility to fulfil these human rights needs must more so fall on the states that create these tax policies and direct the funds acquired. This is because even though the lost revenues play a significant role, the levels of corruption in the various institutions of government, especially in developing countries, is a far more significant factor. This is because if corruption is not addressed, even if these states, in a perfect world, managed to close all the avoidance loopholes and managed to maximise the amounts collected in revenue, corruption would be like a leaking bucket that would ensure that the resources collected continue to fail to reach the poorest people, for whom this article advocates.

Article 2(1) of the ICESCR obliges states to prioritise their obligations to provide for the most basic human rights of their citizens. The responsibility lies with them for the article obliges states to demonstrate that ‘every effort has been made to use all available resources at their disposal to satisfy as a matter of priority their minimum core human rights obligations, to take deliberate and targeted measures to safeguard the rights of vulnerable members of the population and to ensure the widest possible enjoyment of rights’ despite the circumstances.

To more effectively illustrate the veracity of the statement above, Transparency International Malawi ranked Malawi at 122 out of 180 states, with a corruption perceptions index score of 31 out of 100. It was reported that in 2013, the Republic of Malawi’s government coffers lost millions of dollars in public funds as a result of the ‘massive and rampant’ corrupt

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199 Darcy (note 127 above) at 16.
practices ‘perpetrated by the executive’ and ‘at the highest levels of government’\textsuperscript{201} The levels of corruption, through looting in particular, became shockingly blatant when ‘an accounts assistant for the Ministry of Environment and Climate Change was arrested for illegally being in possession of […] [about USD 310 000] in cash’.\textsuperscript{202} In the same period, various other officials were further caught with millions of dollars hidden in their offices, cars and houses. Such atrocious levels of looting and pillaging of state coffers, amongst government officials at all levels, resulted in ‘a surge in expenditure and a drop in total revenue’ which resulted in the Malawian government accruing a budget deficit of approximately K40 4 billion.\textsuperscript{203}

To make an already unsavoury situation worse, ‘foreign development donors pulled the plug on USD 150 million for the 2013/14 fiscal year.’ This proved to be an insurmountable blow as ‘40 per cent of Malawi’s annual budget is donor-funded’.\textsuperscript{204}

Despite the extremity of the example provided above, it must be noted that corruption is not an insurmountable hurdle that cannot be curbed with diligence and good governance. It is an issue that can be addressed in tandem with the redress of tax policies. In addition to this, it must be noted that the amounts lost because of lax tax policies, which allow corporations to avoid paying millions of dollars, much like the case of Zambia Sugar which paid virtually no taxes despite making profits of approximately USD 123 million, are far more significant in value. This is especially apparent when one realises that the lost taxes are about only one of the multiple multi-national corporations operating in Zambia, like many other nations in similar straits. The fact that countries may have a certain level of corruption does not negate the fact that lost revenues because of tax avoidance and lax tax policies are significant enough to leave a substantial dent in a state’s ability to meet various human right’s needs.

VIII CONCLUSION

This article has canvassed the idea that taxation policies need to take human rights obligations into account. It has further submitted the idea that developing economies can take steps to improve the state of their economic coffers in relation to their ability to provide the adequate and essential ESCR for their subjects, viz., food, health services and education. This can be facilitated through an analysis of the various taxation policies that are currently in place; and identifying and removing the loopholes that result in tax abuses by corporations which significantly erode the tax base. Effectively tackling such gaps will go a long way to significantly increase the funds available to these states to meet the ESCR of their citizens. Furthermore, the collection of taxation revenues will continue to prove difficult if measures are not put in place to improve tax administration and review tax exemptions and incentives.

Tax incentives may play a role in attracting foreign investors; however, governments need to continuously review such incentives to ensure that the ones that appear to disproportionately favour a sector of the economy and not add value in terms of employment creation, skills transfer, and economic growth are phased out. This would benefit citizens in the long run as it


\textsuperscript{202} Ibid.

\textsuperscript{203} Ibid.

allows an increase in the revenues collected and results in less reliance on regressive taxes, which tend to place on the shoulders of citizens and ultimately result in a disproportionate burden on the poorest households. Unfortunately, states often resort to the reliance on regressive taxes when faced with decreased revenues from an eroded tax base. Accordingly, it is vital that developing countries realise that the consequences of granting tax incentives are not only financial but ultimately have a human cost. Moreover, that tax incentives must balance the country’s objectives of investment, growth and employment and the need to ensure that sufficient resources are made available to meet the basic human rights of citizens. This is made possible when the country’s budgetary efforts are aligned with its human rights obligations.

Considering all this, it is still important to note that creating the political will and momentum to make meaningful change to the current tax systems will likely take a concerted and prolonged effort, especially from developing countries that need to work a little harder than their developed country counterparts to ensure that they can raise sufficient funds to meet the basic needs of their citizens and sustain their economies without reliance on financial aid. As hard and arduous a journey as it may seem, this article posits that it is achievable for developing economies to rise above budget deficits and scant realisation of citizen human rights.
South African Taxpayers’ Right to Privacy in Cross-Border Exchange of Tax Information

CARIKA FRITZ

ABSTRACT: Specific provisions of the Constitution of the Republic of South Africa, 1996, the Tax Administration Act 28 of 2011, the Promotion of Access to Information Act 2 of 2000 and, more generally, the Protection of Personal Information Act 4 of 2018 (‘POPIA’) create a framework to protect taxpayers’ information privacy. Despite the protection that is given to taxpayer information in South Africa, taxpayer information is exchanged across borders to other tax jurisdictions, as such an exchange ensures tax transparency, correctly allocating taxing rights and identifying tax avoidance and impermissible tax evasion. In this article, I question whether there are sufficient safeguards in place in international tax agreements, which facilitate the cross-border exchange of taxpayer information, to ensure that the infringement of taxpayers’ privacy right is reasonable and justifiable as required in terms of section 36 of the Constitution. In this respect, I conclude, firstly, that the POPIA standard of ‘relevant’ must prevail over the international tax agreement standard of ‘foreseeably relevant’ as this would lessen the impact on a taxpayer’s privacy. Secondly, I conclude that when the taxpayer’s information is in the possession of SARS, a taxpayer must be informed that the taxpayer information is subject to an imminent exchange. Such a notification would allow a taxpayer the opportunity to make representations and the confidentiality of a taxpayer’s information is better maintained, as the taxpayer can argue whether or not the relevant information contains any trade, industrial, business, commercial or professional secret or trade process.

KEYWORDS: protection of personal information, tax administration, information privacy, international tax agreements, Model Tax Convention, South African Revenue Service

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I INTRODUCTION

When considering privacy in relation to the exchange of tax information, a specific type of privacy, that is, information privacy, applies. Westin defines information privacy as ‘the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others’.\(^1\) In a similar vein,

\[i\t\] it is not true, for instance, that the less that is known about us the more privacy we have. Privacy is not simply an absence of information about us in the minds of others; rather it is the control we have over information about ourselves.\(^2\) (Emphasis added)

Taxpayers would want some degree of control over the way in which the South African Revenue Service (SARS) handles their taxpayer information,\(^3\) as this information could reveal details about their income, spending habits, club membership and loans.\(^4\) Blum suggests that people may be wary to have their taxpayer information revealed, as it could lead to comparisons with others, embarrass them if it lands in the wrong hands, or could make taxpayers susceptible to identity theft or targets for scam artists or kidnappers.\(^5\) This illustrates the importance of protecting taxpayers’ information in South Africa.

Both the Tax Administration Act 28 of 2011 (‘TAA’) and the Promotion of Access to Information Act 2 of 2000 (PAIA) deal with the confidentiality of taxpayer information.\(^6\) As information could reveal details about their income, spending habits, club membership and loans.\(^7\) Apart from legislation protecting taxpayers’ confidentiality, the Protection of Personal Information Act 4 of 2018 (‘POPIA’) regulates the processing of personal information. As s 1 of POPIA defines ‘personal information’ to be information that relates to an identifiable person, including information about a person’s finances, POPIA seeks to protect the collection, retention, dissemination and use of taxpayers’ information.

Despite the protection that is given to taxpayer information in South Africa, such information is exchanged across borders. Why would such an exchange of taxpayer information be necessary? It is crucial to be able to determine a taxpayer’s tax liability.\(^8\) Nonetheless, ‘[a] situation which no doubt frequently arises is that information furnished by taxpayers is incomplete, inaccurate and sometimes misleading’.\(^9\) Consequently, SARS is afforded several information-gathering powers, which are contained in Chapter 5 of the TAA. These powers include inspecting business premises;\(^10\) requiring a person to produce relevant material in person;\(^11\) conducting an audit;\(^12\) conducting an enquiry before a presiding officer;\(^13\) searching

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\(^1\) AF Westin Privacy and Freedom (1967) 7.


\(^3\) The TAA s 67(1)(b) defines taxpayer information as information given by a taxpayer or obtained by SARS in relation to the taxpayer.


\(^6\) The TAA Chapter 5 contains the information gathering powers of SARS.


\(^8\) TAA s 45.

\(^9\) Ibid s 47.

\(^10\) Ibid s 48.

\(^11\) Ibid s 51.
and seizing a taxpayer’s property;\textsuperscript{12} and requesting relevant material from a taxpayer or a third party.\textsuperscript{13} In spite of this array of powers, their sphere of application is limited, as it is difficult to enforce these powers in another jurisdiction.

As a result of globalisation and technological advancements, taxpayers are not restricted to transacting only in the jurisdiction where they are a tax resident or are present. This means that the activities that trigger tax, and the information associated with it, are not necessarily linked to one jurisdiction. To address the fact that taxpayers have become more mobile, whilst revenue authorities have not, countries have concluded agreements that provide that tax information may be exchanged across jurisdictions. Even though the exchange of information between countries ensures tax transparency and that taxing rights are correctly allocated, it also makes it difficult for taxpayers to hide their assets and income and prevents tax avoidance and impermissible tax evasion.\textsuperscript{14}

While the benefit of agreements between countries to facilitate efficient exchange of information is apparent, it is important that these exchanges are fair vis-à-vis taxpayers, including to respect a taxpayer’s right to privacy. In this article, I examine the exchange of taxpayer information in relation to the right to information privacy, as given effect to in the TAA, PAIA and POPIA.

I first consider the provisions in the aforementioned pieces of legislation in order to create a framework in respect of the protection afforded to information privacy in South Africa. Thereafter, I expand on what the exchange-of-information process entails. Lastly, I consider whether the measures that are in place to protect a taxpayer’s information privacy when information is exchanged align with the South African privacy framework.

II THE RIGHT TO INFORMATION PRIVACY


Section 14 of the Constitution of the Republic of South Africa (‘Constitution’) provides that ‘[e]veryone has the right to privacy’. In \textit{Bernstein v Bester},\textsuperscript{15} it was held that a person can only rely on this right to privacy where there was a reasonable expectation of privacy. The reasonable expectation of privacy consists of a subjective and objective element.\textsuperscript{16} Currie and De Waal indicate that the first element does not relate only to what feels private. One should also consider whether the person has consented to their privacy being invaded\textsuperscript{17} as the principle of \textit{volenti non fit iniuria} signifies that ‘a willing person is not wronged’\textsuperscript{18}

\textsuperscript{12} Ibid ss 59–63.
\textsuperscript{13} Ibid s 45.
\textsuperscript{14} A Oguttu ‘A Critique on the Effectiveness of “Exchange of Information on Tax Matters” in Preventing Tax Avoidance and Evasion: A South African Perspective’ (2014) 68 \textit{Bulletin for International Taxation} 2, 2. In the 1998 Report of the OECD, titled ‘Harmful Tax Competition – An Emerging Global Issue’, the OECD identified that a lack of transparency in tax havens and jurisdictions with harmful preferential tax regimes are eroding the tax basis of other jurisdictions. Consequently, the OECD recommended that there should be rules in place to foster the exchange of information to ensure tax transparency. Perceived tax havens were required to reform, or they would otherwise be regarded as uncooperative.
\textsuperscript{15} Bernstein & Others v Bester NO & Others [1996] ZACC 2, 1996 (2) SA 751 (CC)(‘Bernstein v Bester’) para 75.
\textsuperscript{16} Ibid.
\textsuperscript{17} I Currie & J de Waal \textit{The Bill of Rights Handbook} (5th Ed, 2005) 318.
The second element is concerned with whether the subjective expectation of privacy is reasonable.\textsuperscript{19} The Court, in \textit{Bernstein v Bester}, provided some insight into how to determine when an expectation of privacy is reasonable when it stated that:

\begin{quote}
[a] very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate core of privacy, no justifiable limitation thereof can take place. But this most intimate core is narrowly construed. This inviolable core is left behind once an individual enters into relationships with persons outside this closest intimate sphere; the individual's activities then acquire a social dimension and the right of privacy in this context becomes subject to limitation.\textsuperscript{20}
\end{quote}

Accordingly, the Court found that in an ‘intimate personal sphere’, it is more likely that there is a reasonable expectation of privacy\textsuperscript{21} as opposed to when one ‘moves into communal relations and activities’.\textsuperscript{22}

An aspect that falls within the right to privacy as contained in s 14 of the Constitution is information privacy.\textsuperscript{23} As indicated earlier,\textsuperscript{24} information privacy is concerned with the control a person has over their information. In \textit{Mistry v Interim National Medical and Dental Council} (‘\textit{Mistry}’), the Court formulated questions that must be considered to determine whether there is a reasonable expectation of privacy pertaining to information privacy, namely: Was the information acquired in an intrusive manner? Does the information pertain to intimate aspects of the person’s life? Did the person provide the information for a particular purpose which is now being used for another purpose? To whom was it disseminated – the press, the general public or a person who is carrying out statutory duties?\textsuperscript{25}

\section*{B The TAA and PAIA}

Section 67(4) of the TAA stipulates that SARS must preserve the confidentiality of taxpayer information and may only in limited circumstances disclose this information. From the perspective of SARS, the benefit of keeping taxpayer information confidential encourages taxpayers to ‘make full and proper disclosure of their income’.\textsuperscript{26} A ‘full and proper disclosure’ may in all probability not occur if taxpayer information can be freely disclosed to third parties.\textsuperscript{27}

One of the instances in which SARS may disclose taxpayer information to the South African Police Service (SAPS) and the National Prosecuting Authority (NPA) is where this information is material to a tax offence.\textsuperscript{28} A ‘tax offence’ is an offence in terms of a tax Act, or fraud.

\textsuperscript{19} Ibid.
\textsuperscript{20} \textit{Bernstein v Bester} (note 15 above) at para 77. See \textit{Mistry v Interim National Medical and Dental Council & Others [1998] ZACC 10, 1998 (4) SA 1127} at para 27 where the court referred to this dictum in \textit{Bernstein v Bester} as a ‘continuum of privacy interests’.
\textsuperscript{21} Currie & De Waal (note 17 above) at 318.
\textsuperscript{22} \textit{Bernstein v Bester} (note 15 above) at para 67.
\textsuperscript{23} Currie & De Waal (note 17 above) at 323.
\textsuperscript{24} Part I above.
\textsuperscript{25} \textit{Mistry} (note 20 above) at para 51.
\textsuperscript{26} \textit{Hall v Welz & Others [1996] ZASCA 147, 59 SATC 49} at 54.
\textsuperscript{27} Ibid.
\textsuperscript{28} TAA s 69(2)(a)(i).
committed against SARS in respect of the administration of a tax Act, or theft of money that is due or paid to SARS.29

When taxpayer information does not relate to a tax offence, the information may only be disclosed to the SAPS and the NPA when a court order authorising such a disclosure has been granted.30 Möller argues that a balance is struck between the administration of tax legislation and taxpayers’ privacy in this respect, as a judge needs to approve of the disclosure of taxpayer information that does not relate to a tax offence.31 She correctly argues that the power of SARS is restrained by the required judicial oversight, which ensures that SARS cannot arbitrarily disclose taxpayer information.32

Bearing in mind that one of the questions identified in Mistry is whether the information is used for the purpose for which it was obtained, it follows that SARS must not be able mero motu to decide to disclose information that does not relate to a tax offence.

Section 35(1) of PAIA, which also relates to confidential information, provides that SARS must refuse to disclose information obtained or held by SARS ‘for the purpose of enforcing legislation concerning the collection of revenue’.33 As this phrase is not defined, there is uncertainty as to what information must be refused to be disclosed in terms of s 35 of PAIA.34 In this respect, Croome and Olivier remark that s 35(1) acknowledges SARS’ obligation to taxpayer secrecy, as contained in s 67(4) of the TAA, by prohibiting SARS from disclosing taxpayer information to any one apart from the specific taxpayer.35

C POPIA

As stated above, POPIA gives effect to the constitutional right to privacy and is concerned with protection against ‘the unlawful collection, retention, dissemination and use of personal information’,36 including that of taxpayers.

One of the purposes of POPIA is to protect personal information when it is processed by a responsible party.37 ‘Processing’ is defined as ‘any operation or activity or any set of operations, whether or not by automatic means, concerning personal information’. These operations or activities include, among others, collection and dissemination by way of transmission or distribution.38 ‘Responsible party’ is defined in s 1 of POPIA to mean ‘a public or private body or any other person which, alone or in conjunction with others, determines the purpose of and means for processing personal information’. Notably, this protection of personal information

29 Ibid s 1.
30 Ibid s 71.
32 Ibid.
33 In terms of PAIA s 35(2), this mandatory prohibition does not apply when the taxpayer is requesting information about herself/himself from SARS.
35 B Croome & L Olivier Tax Administration (2nd Ed, 2015) 620.
36 POPIA Preamble recital.
37 POPIA s 2(a).
38 Ibid s 1.
is not absolute and can be justifiably limited, for instance to protect important interests such as the ‘free flow of information within the Republic and across international borders’.\(^{39}\)

Another purpose of POPIA is to control the sharing of personal information by establishing the minimum requirements for the lawful processing of such information; requirements that must be in line with international standards.\(^{40}\) ‘Lawful processing’ comprises various components,\(^{41}\) including that there must be certain processing limitations.\(^{42}\) For example, the processing of personal information must be adequate, relevant and not excessive in relation to the purpose for which it is processed.\(^{43}\) Another component of ‘lawful processing’ is that the information must be collected for a specific purpose.\(^{44}\) Furthermore, the responsible party must take reasonably practical steps to ensure that the data subject knows that its personal information is being collected, and from which source.\(^{45}\) Also, the responsible party must inform the data subject of the responsible party’s details,\(^{46}\) and why the information is being collected.\(^{47}\) Moreover, the responsible party must indicate whether it intends to transfer the personal information to another country or international organisation.\(^{48}\)

Nevertheless, POPIA provides for instances where the responsible party does not need to inform the data subject of the particulars regarding the processing of personal information. One such instance is where the processing of personal information is required by law or to enforce legislation pertaining to the collection of revenue, as defined in s 1 of the SARS Act.\(^{49}\) In this respect, ‘revenue’ is defined as ‘taxes, duties, levies, fees and any other moneys imposed in terms of legislation, including penalties and interest in connection with such moneys’.\(^{50}\)

POPIA also requires the responsible party to ensure that there are reasonable measures in place so that personal information is treated in a confidential manner to prevent unlawful access or processing of personal information.\(^{51}\)

In limited circumstances, POPIA allows personal information to be transferred to another country. Such a transfer is permitted when the recipient of the information in the other country is subject to ‘a law, binding corporate rules or binding agreement which provide an adequate level of protection’.\(^{52}\) ‘Adequate level of protection’ means that the country to which the information is transferred must have requirements similar to those of POPIA for the processing

\(^{39}\) Ibid s 2(a)(ii).
\(^{40}\) Ibid s 2(b). In this respect, J Botha, MM Grobler, J Hahn & MM Eloff ‘A High-Level Comparison between the South African Protection of Personal Information Act and International Data Protection Laws’ in AR Bryant, JR Lopez & RF Mills (eds) Proceedings of the 12th International Conference on Cyber Welfare and Security (2017) 57–66, 65 compared POPIA with several other data-protection laws in Africa and jurisdictions on other continents. They concluded that POPIA is in line with data-protection laws in these other jurisdictions.
\(^{41}\) POPIA s 4. These components are accountability, processing limitation, purpose specification, further processing limitation, information quality, openness, security safeguards, and data subject participation.
\(^{42}\) POPIA ss 9–12.
\(^{43}\) Ibid s 10.
\(^{44}\) Ibid s 13.
\(^{45}\) Ibid s 18(1)(a).
\(^{46}\) Ibid s 18(1)(b).
\(^{47}\) Ibid s 18(1)(c).
\(^{48}\) Ibid s 18(1)(g).
\(^{49}\) Ibid s 18(4)(c)(ii).
\(^{50}\) Definition of ‘revenue’ in s 1 of the SARS Act.
\(^{51}\) Ibid s 19(1)–(2).
\(^{52}\) Ibid s 72(1)(a). In terms of s 72(2)(a), ‘binding corporate rules’ refers to ‘personal information processing policies, within a group of undertakings, which are adhered to by a responsible party or operator within that group of
of personal information. Moreover, in the event of a further transfer to a third country, the recipient country must require an adequate level of protection from such third country before the recipient country can transfer personal information to that third country.

As s 72 of POPIA only became effective on 1 July 2020, there is no case law in South Africa applying the requirement of ‘adequate level of protection’. Nonetheless, requiring an ‘adequate level of protection’ is not unique to the regulation of cross-border personal information in South Africa. Consequently, it is useful to consider how this requirement is interpreted elsewhere. Article 25(2) of the 1995 European Union Data Protection Directive indicated that the context of the exchange should be considered specifically as regards the nature of the information, the purpose of the processing and the laws and security measures that apply in the recipient country. The General Data Protection Regulation (GDPR), which replaced the European Union Data Protection Directive, also requires an ‘adequate level of protection’ when information is exchanged to a jurisdiction that is not part of the European Union. In terms of art 45(2) of the GDPR, the European Commission must consider, inter alia, whether the other country respects human rights and fundamental freedoms, whether public authorities in that country would have access to personal data, and whether there are data-protection rules and enforceable data rights. Moreover, the European Commission must consider the presence and effective functioning of independent supervisory authorities in the other country that are able to ensure and enforce compliance with data-protection rules. Another aspect the European Commission must consider is the international commitments the other country has made in relation to the protection of personal data.

Section 72 of POPIA also stipulates that a transfer of personal information to another jurisdiction can occur where: (i) the data subject consented to such a transfer taking place; (ii) the transfer is required for the performance of a contract between the data subject and the responsible party; (iii) the transfer is necessary for the performance of a contract between the responsible party and a third party; (iv) the transfer is in the interest of the data subject, it is not reasonably practicable to obtain the consent of the data subject to such transfer, and if it were reasonably practicable to obtain such consent, the data subject would likely have consented.

Arguably, if one of the instances listed in s 72 is present, the exchange of personal information with another country may take place. As a result, a cross-border exchange of personal information can occur even where the other country does not provide an adequate level of protection. However, the transfer of personal information is only permitted if the recipient country provides adequate protection for the personal information transferred. Under the GDPR, the European Commission must consider, inter alia, whether the other country respects human rights and fundamental freedoms, whether public authorities in that country would have access to personal data, and whether there are data-protection rules and enforceable data rights. Moreover, the European Commission must consider the presence and effective functioning of independent supervisory authorities in the other country that are able to ensure and enforce compliance with data-protection rules. Another aspect the European Commission must consider is the international commitments the other country has made in relation to the protection of personal data.

Undertakings when transferring personal information to a responsible party or operator within that same group of undertakings in a foreign country.

53 Ibid s 72(1)(a)(i).
54 Ibid s 72(1)(a)(ii).
58 Ibid s 72(1)(b). POPIA s 1 defines ‘consent’ as ‘any voluntary, specific and informed expression of will in terms of which permission is given for the processing of personal information’.
59 POPIA s 72(1)(c).
60 Ibid s 72(1)(d).
61 Ibid s 72(1)(e).
level of protection. However, failing to demand an adequate level of protection as a prerequisite for any cross-border exchange is contrary to the spirit of s 72, which is to ensure that ‘information will not be transferred to another country if proper safeguards for the protection of the information have not been adopted in that country’.\(^\text{62}\)

## III CROSS-BORDER EXCHANGE OF TAX INFORMATION

Section 3(3)(i) of the TAA deals with instances where SARS is requested by a competent authority, such as a revenue authority, to exchange or spontaneously transmit taxpayer information. SARS must then, in accordance with an international tax agreement, obtain and disclose the information ‘as if it were relevant material required for purposes of a tax act’.\(^\text{63}\) According to s 76(4) of the TAA, SARS must, however, treat such information as confidential.

### A An international tax agreement

For an exchange of tax information to occur, there needs to be an international tax agreement.\(^\text{64}\) This can be a bilateral or multilateral double tax treaty that contains provisions regarding the exchange of tax information, or an agreement specifically concerned with administrative assistance,\(^\text{65}\) either by way of a tax information exchange agreement (TIEA) or a mutual administrative assistance agreement.\(^\text{66}\)

1. **Double tax treaties based on the Organisation for Economic Co-operation and Development Model Tax Convention on Income and on Capital**

Generally, double tax treaties are based on the Organisation for Economic Co-operation and Development (OECD) Model Tax Convention on Income and on Capital (‘MTC’) of 2017 and the United Nations Model Double Taxation Convention between Developed and Developing Countries (‘UN Model’).\(^\text{67}\) Since the UN Model has incorporated the OECD standard in relation to the exchange of information,\(^\text{68}\) I focus on the OECD standard and as such will consider double tax treaties based on the MTC.\(^\text{69}\)

Article 26 of the MTC deals specifically with the exchange of taxpayer information and provides:

The competent authorities of the Contracting States shall exchange such information as is foreseeable relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on

\(^{62}\) National Treasury Explanatory Memorandum on the Objects of the Protection of Personal Information Bill, 2009 para 2.12.

\(^{63}\) TAA s 3(3)(i).

\(^{64}\) Ibid s 3(3)(a).


\(^{67}\) UN Model (2011) vi.


\(^{69}\) The OECD Commentary on Article 26 Concerning the Exchange of Information (2014) para 4 specifies that although a treaty based on the MTC may not use the same word as the MTC, the treaty would still reflect current country practices.
behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention.

When a double tax agreement contains an exchange of information provision based on art 26(1), the parties must exchange information that is foreseeably relevant to the administration or enforcement of the domestic laws pertaining to taxes. While ‘foreseeably relevant’ is rather wide, it is not an opportunity for a ‘fishing expedition’ in which information that is irrelevant to the tax affairs of a taxpayer can be requested. This standard involves that when the request for information is made, there must be a reasonable possibility that the information will be relevant. It is irrelevant whether the information is relevant once it is received. Parties could agree to use a standard different from ‘foreseeably relevant’, such as ‘necessary’ or ‘relevant’.

In the South African tax context, the standard of ‘foreseeably relevant’ in relation to information-gathering is recognised. In terms of s 46(1) read with s 1 of the TAA, SARS may request ‘any information, document or thing that in the opinion of SARS is foreseeably relevant for the administration of a tax Act’. In its Memorandum dealing with the standard of ‘foreseeably relevant’, Treasury indicated that this standard has a low threshold and that, similar to the OECD understanding of ‘foreseeably relevant’, it is beside the point whether the requested material, once received, is indeed relevant. Rather, the question to consider is whether, when the request for information is made, the material requested is reasonably relevant for the purpose it is requested for. Treasury further indicated that the link between the requested material and the purpose for which it is requested does not need to be certain and clear – only a rational possibility of relevance is necessary. As the standard of ‘foreseeably relevant’ is already contained in the TAA, it is unlikely that South Africa would negotiate for higher thresholds such as ‘necessary’ or ‘relevant’ in respect of the provisions pertaining to the exchange of information.

Article 26(2) of the MTC stipulates that the exchanged information should be treated as confidential in accordance with the domestic laws of the receiving country. The information may only be disclosed to authorities or persons involved in assessing, collecting, and enforcing taxes or in prosecutions relating to taxes. The exchanged information may not be disclosed to a third country unless the international tax agreement between the initial countries specifically allows such further exchange.

When two contracting countries conclude an international tax agreement based on art 26 of the MTC, there is no obligation on the requested country to exceed the information-gathering powers it has in terms of domestic laws. Moreover, the requested country does not...
need to use information-gathering powers that are not provided for in the requesting country’s
domestic laws. However, in all probability, different countries will have different information-
gathering powers. Consequently, a broad and pragmatic approach should be used to determine
which powers should be resorted to in order to obtain the relevant information. This approach
requires a country to evaluate whether the difference in information-gathering powers between
the countries means that the requested country, when it is requested to exchange information,
would, overall, have the ability to obtain and provide the requested information. Article 26(3)
(c) of the MTC provides that there is no obligation imposed on a requested state to exchange
information that will reveal any trade, industrial, business, commercial or professional secret
or trade process.

2 Model agreement on exchange of information on tax matters
Exchange of information can also be fostered by way of an agreement dealing only with
exchange of information, ie TIEA, instead of concluding a double tax treaty with an article on
exchange of information. This is crucial in relation to governments of a country that would
very seldom sign a tax treaty such as those of tax havens.

In 2002, the OECD developed a Model Agreement on Exchange of Information on Tax
Matters (TIEA Model) that can be used as a basis for such agreements. Subsequently, in 2005,
art 26 of the MTC and the commentary to art 26 were amended to accord with the changes
that the TIEA Model had brought about. Thus, both the TIEA Model and the MTC reflect
the same OECD standard pertaining to the exchange of information.

3 The Multilateral Convention on Mutual Administrative Assistance in Tax Matters
The cross-border exchange of tax information can also be permitted by way of the OECD
Multilateral Convention on Mutual Administrative Assistance in Tax Matters (amended by the
2010 Protocol) (‘Multilateral Convention’). The object of the Multilateral Convention is to
foster administrative assistance between its parties. In this context, administrative assistances
comprise of the exchange of tax information, assisting in tax recovery or collection and serving
documents.

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80 OECD Commentary (note 69 above) at para 15.
81 Ibid.
82 L Olivier & M Honiball International Tax: A South African Perspective (5th Ed, 2011) 850 define ‘tax havens’ as
‘countries which subject income (or some form of income) or entities (or certain entities) to low or no taxation,
also referred to as ‘low-tax jurisdictions’ or ‘offshore financial centres’. See, also, Oguttu (note 14 above) at 7–9.
83 OECD Commentary (note 69 above) at para 4.
84 M Pankiv ‘Tax Information Exchange Agreements (TIEAs)’ in O Günther & N Tüchler (eds) Exchange of
Information for Tax Purposes (2013) 3. As the TIEA Model reflects the same standard as the OECD MTC
regarding the exchange of tax information, I will not analyse the TIEA Model, as this would be a duplication of
what has already been discussed in the section dealing with treaties based on the MTC. For a general comparison
between art 26 of the MTC and the TIEA Model, see Oguttu (note 14 above) 7. The Global Forum on
Transparency and Exchange of Information for Tax Purposes is tasked with monitoring the implementation of
the OECD standards by conducting peer reviews (Global Forum on Transparency and Exchange of Information
85 OECD Multilateral Convention art 1.
86 Ibid art 2.
Important for purposes of this article, art 4(1) of the Multilateral Convention, like the MTC, sets a standard of ‘foreseeably relevant’ for the administration of domestic tax laws. Furthermore, art 4(3) authorises a party to the agreement to inform a resident or national of the party of an imminent exchange of tax information if it is in accordance with the domestic legislation of such a party.

B Methods of exchanging taxpayer information

Generally, three methods are used to exchange information: on request, spontaneously and automatically.87 The exchange by way of a request involves a specific request where the revenue authority requesting the information has exhausted its domestic information-gathering powers.88 A request for the exchange of information pursuant to an instrument based on the relevant MTC provision should be as comprehensive as possible and should contain relevant information such as the details of the taxpayer who is subject to this request, the purpose for which the information is required, the reasons why it is believed that the requested information can be gathered from the requested state, and the specific information that is required.89

In turn, a request for the exchange of information pursuant to an instrument based on the TIEA Model would need to contain the following information:
(i) the identity of the taxpayer;
(ii) details regarding the information requested, which include the nature of the information and the desired form in which it should be received;
(iii) the tax purpose for which the information is sought;
(iv) the reasons why it is believed that the requested information is held in the requested state or is in the possession of a person who is within the requested state;
(v) a declaration that, if the information was within the requesting state, obtaining the information would have been permitted in terms of the law and administrative practices of the requesting state; and
(vi) a declaration that the requesting state has exhausted all domestic powers at its disposal.90

The Tax Justice Network identifies this as a catch-22, as the specific details required to make such a request are in all probability not known before the information is exchanged.91 As a result, Sawyer questions how a country should go about obtaining the information that is required in order to initiate the request for the exchange of tax information.92 Based on the

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87 OECD Commentary (note 69 above) at para 8.
88 Ibid.
90 TIEA Model art 5(5).
specificity required, the exchange of information is somewhat ineffective, as the exchange simply helps to obtain proof of misconduct but does not identify the misconduct.93

The second method for exchanging information, namely spontaneously, relates to instances where one party to an agreement transfers information to the other party when the information is foreseeably relevant to the last-mentioned party.94 Spontaneous exchange of information is considered to be more effective than exchange of information on request, since the exchanged information is detected and selected by tax officials in the country that has access to the foreseeably relevant information and is then transferred to another country.95

The last method that is generally used to exchange information is automatic exchange, which entails a ‘systematic and periodic transmission of “bulk” taxpayer information’.96 The source country transmits information about different types of income, for example interest, salaries and dividends, which the source country obtained by way of routine reporting by, inter alia, the payers of the income.97 This information enables the resident country to verify if the taxpayer has reported the foreign income.98 Moreover, automatic exchange of information can convey details regarding changes in residence, the disposal of immovable property, and value-added tax refunds.99

There have been substantial developments in relation to the automatic exchange of information held by financial institutions. In terms of an United States of America (USA) Foreign Account Tax Compliance Act (FATCA)100 intergovernmental agreement, the tax administrations of the USA and South Africa automatically exchanges tax information.101 The Standard for Automatic Exchange of Financial Account Information builds on FATCA intergovernmental agreements and extends the reach to all foreign held accounts.102 The Standard for Automatic Exchange of Financial Account Information establishes a Common Reporting Standard (CRS) sets out a minimum standard for the exchange of financial account information pertaining to the financial institutions that must report the various types of accounts and taxpayers covered by the CRS and provides due diligence procedures that financial institutions should follow in this automatic exchange.103

93 Oguttu (note 14 above) at 11. Even though the effectiveness of an exchange by way of request is questioned, the TIEA Model only provides for this way of exchanging information (TIEA Model art 5). Countries wishing to include the other methods of exchanging information in a TIEA may use the wording contained in the OECD Model Protocol for the Purpose of Allowing the Automatic and Spontaneous Exchange of Information under a TIEA (2015).
94 Ibid.
95 Ibid.
96 Ibid.
97 Ibid.
98 Ibid.
99 Ibid.
100 FATCA stipulates that foreign financial institutions and some non-financial foreign entities must report on foreign assets held by USA account holders, otherwise the foreign institution and entities will be subject withholding on payments that can be withheld. See Inland Revenue Service Foreign Account Tax Compliance Act, available at https://bit.ly/3iyDjD0.
101 SARS (note 66 above).
102 Ibid.
103 Ibid.
This CRS is typically implemented by way of an international tax agreement based on the Multilateral Convention on Mutual Administrative Assistance in Tax Matters as it allows for a multilateral approach to facilitate an international exchange framework with all interested parties.\(^{104}\)

### IV RIGHT TO PRIVACY IN THE EXCHANGE OF TAX INFORMATION

#### A An expectation of privacy

An expectation of privacy is a prerequisite for the right to (information) privacy. Consequently, it is important for purposes of this article to establish if there is an expectation of privacy relating to taxpayer information that SARS has in its possession. The questions posed in *Mistry* are useful in this respect.

Firstly, was the information acquired in an intrusive manner?\(^{105}\) This depends on the circumstances, as the information-gathering powers of SARS span a spectrum from somewhat invasive to very invasive. On the one side of the spectrum, a request for relevant information may not be too invasive.\(^{106}\) On the other side of the spectrum, Baker and Groenhagen consider searches to be ‘[t]he most extreme form of interference with a taxpayer’s right to privacy’.\(^{107}\)

In relation to the second question identified in *Mistry*, in terms whereof it must be determined whether the information pertains to intimate aspects of a person’s life,\(^{108}\) taxpayer information inevitably exposes the financial information of the taxpayer. In turn, the financial information reveals intimate details regarding income, spending habits, club membership and loans.\(^{109}\)

In *Mistry*, the Court also stipulates that one needs to consider the purpose for which information was provided originally, as well as the purpose for which the information is now to be used.\(^{110}\) SARS is tasked with the administration of a ‘tax Act’\(^ {111}\) and information is gathered for this purpose. Does this purpose change when the information is transferred to another country? At first glance, it appears that the purpose has changed, as a ‘tax Act’\(^ {112}\) relates only to South African tax legislation.\(^ {113}\) Even so, when the National Executive concludes an international tax agreement with another country and the formalities in relation thereto are disposed of, the agreement will ‘have effect as if enacted’ in the Income Tax Act.\(^ {114}\)


\(^{105}\) *Mistry* (note 20 above) at para 51.

\(^{106}\) TAA s 46.


\(^{108}\) *Mistry* (note 20 above) at para 51.

\(^{109}\) Cockfield (note 4 above) at 437.

\(^{110}\) *Mistry* (note 20 above) at para 51.

\(^{111}\) TAA s 6(1).

\(^{112}\) In terms of s 1 of the TAA read with s 4 of the SARS Act 34 of 1997, a ‘tax act’ includes, inter alia, the TAA, the Transfer Duty Act 40 of 1949, the Estate Duty Act 45 of 1955 and the Income Tax Act 58 of 1962.

\(^{113}\) Möller (note 31 above) at 18.

\(^{114}\) Income Tax Act s 108(2). Section 108(2) of the Income Tax Act, read with s 231(4) of the Constitution, deals with the process of a tax treaty becoming part of domestic law. The debate regarding this process falls outside the scope of this article. See I du Plessis ‘Some Thoughts on the Interpretation of Tax Treaties in South Africa’ (2012) 24 *South African Mercantile Law Journal* 31, 32–41 in this regard.
the exchange of tax information with another jurisdiction still falls within the initial purpose – the administration of a tax Act.

Lastly, as stipulated in *Mistry*, one must consider to whom the information was disseminated. In the case of the exchange of taxpayer information, the information is disseminated to another revenue authority so that the revenue authority can fulfil its statutory duty of gathering information, establishing tax liability, and collecting the relevant taxes. Both art 26 of the MTC and the TIEA Model limit what the exchanged information can be used for. According to art 26 of the MTC, it can only be used for assessing, collecting, and enforcing taxes or in prosecutions related to taxes, whereas art 8 of the TIEA Model adds the determination of appeals to the list of uses. The information may only be disclosed to persons or authorities that are concerned with any of the aforementioned uses.

Based on the above discussion of the *Mistry* questions, a possible expectation of privacy can be discerned. In addition, the confidentiality granted in respect of taxpayer information in terms of the TAA and PAIA shows that a taxpayer would generally have a reasonable expectation that her or his taxpayer information would be kept private. As a result, when taxpayer information is transferred to another country, the taxpayer’s right to (information) privacy is infringed.

**B  Balancing of interests**

The question arises whether the infringement of privacy when tax information is exchanged is reasonable and justifiable in terms of section 36(1) of the Constitution. Section 36(1) of the Constitution provides as follows:

> The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.

When determining if an infringement is reasonable and justifiable, section 36(1) of the Constitution calls for a balancing of interests instead of considering the factors contained in section 36(1)(a)–(e) as a checklist.

The right to privacy is an important right in South Africa. Similarly, permitting the cross-border exchange of tax information is also important as it ensures tax transparency, prevents tax evasion and impermissible tax avoidance, and ultimately ensures the fairness of tax systems. What is more, the exchange of tax information is permitted in other democratic jurisdictions.

As such, the relevant question pertaining to the right to privacy and exchange of tax information is not whether it should be permitted, but rather the scope of what should be permitted.

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115 *Mistry* (note 20 above) at para 51.
Since POPIA aims to balance, on the one hand, the protection of personal information\textsuperscript{117} against the importance of ensuring a flow of information across borders,\textsuperscript{118} on the other, it provides the basis as to how these two interests should be balanced in the South African context. Section 72, which deals with cross-border exchanges, is of specific importance for purposes of this article.

Although I have indicated above\textsuperscript{119} that a plain reading of s 72 of POPIA suggests that only one of the instances provided for in s 72 needs to be present, in my opinion, when we deal with the exchange of tax information with another country, in most instances the only ground on which it could be transferred to that jurisdiction would be when the other country has an adequate level of protection in place.

Firstly, it is doubtful that a taxpayer would provide informed consent for the exchange of tax information,\textsuperscript{120} as this would require the taxpayer to agree to the exchange of tax information whilst understanding the implication of such exchange and the risks associated with it.\textsuperscript{121} In this regard, the risks associated are that another country would have access to private information which could be used to determine the taxpayer’s liability in that country. Nonetheless, in the unlikely event of a taxpayer consenting, the exchange of tax information cannot be considered an unreasonable limitation due to the principle of volenti non fit iniuria.

Secondly, the situation of a transfer taking place to comply with a contract between the data subject and the responsible party does not seem to fit into the scenario of SARS transferring taxpayer information to another country. It is difficult to contemplate any contract between SARS and the relevant taxpayer that would require the exchange of taxpayer information.

Lastly, the other two situations provided for in s 72 of POPIA (namely when the transfer is necessary for the performance of a contract between the responsible party and the third party that is in the interest of the data subject,\textsuperscript{122} and when transferring the personal information is in the interest of the data subject, but it is impracticable to obtain the consent of the data subject and if it was practicable to obtain such consent, the data subject would likely have consented)\textsuperscript{123} both require the transfer to be in the interest of the data subject. Consequently, for purposes of this article, both situations require the exchange of tax information to be in the interest of the taxpayer.

While one can argue that the exchange of tax information is in the interest of taxpayers overall, as the exchanged information is used to levy the correct tax liability against a taxpayer, it would very rarely be in the interest of the taxpayer whose information was transferred. The possibility that the exchange of tax information could lead to a refund for the taxpayer would not be sufficient to argue that it is in the interest of the taxpayer.

\textsuperscript{117} POPIA s 2(a).
\textsuperscript{118} Ibid s 2(a)(ii).
\textsuperscript{119} See paragraph II.C above.
\textsuperscript{120} POPIA s 1 defines consent as ‘any voluntary, specific and informed expression of will in terms of which permission is given for the processing of personal information’.
\textsuperscript{121} The requirements for informed consent emanate from the common law and are: (i) giving consent voluntarily; (ii) being capable of understanding the implication of giving consent; (iii) having complete knowledge of and appreciating the possible extent of the risks; and (iv) giving actual consent. See Neethling & Potgieter (note 18 above) at 111–114 as to how these requirements are applied in delict.
\textsuperscript{122} POPIA s 72(1)(d).
\textsuperscript{123} Ibid s 72(1)(e).
As the exchange of tax information would likely be dependent on whether or not the receiving country has adequate levels of protection in place, it is important to consider whether the international tax agreement terms are aligned with the provisions of POPIA.

C  Cross-border exchange of tax information vs POPIA

1  Threshold for exchanging tax information

As stated above,124 ‘lawful processing’ in terms of POPIA requires the processing of personal information to be relevant in relation to the specific purpose for which it is processed.125 However, both the MTC and the TIEA Model allow for the exchange of tax information when the information is ‘foreseeably relevant’,126 which is a lower threshold than ‘relevant’.127 Despite a request for taxpayer information in terms of either the MTC or TIEA Model requiring a particular level of specificity and that the purpose of the exchange should be for assessing, collecting and enforcing taxes or for prosecutions relating to taxes, this does not detract from the fact that the threshold for exchanging tax information is lower than for lawful processing in terms of POPIA.

The question arises: Which threshold should prevail – ‘relevant’ or ‘foreseeably relevant’? Does an international tax agreement, which in terms of s 108 of the Income Tax Act forms part of the Income Tax Act, override the provisions of POPIA? On the one hand, s 3(2)(a) of POPIA provides that POPIA will prevail over provisions in any other legislation that are contrary to the objective or specific provisions of POPIA. On the other hand, in the matter of Commissioner for the South African Revenue Service v Tradehold Ltd (‘Tradehold’),128 the Supreme Court of Appeal held that a double tax agreement ‘modifies the domestic law and will apply in preference to the domestic law to the extent that there is any conflict.’129 Generally, this modification is necessary to prevent double taxation and, consequently, the double tax agreement allocating taxing rights between the relevant jurisdictions.130 As a result, the court in Tradehold was guided by the purpose of double tax agreements to reach its decision.131 Seemingly contrariwise, in Glenister v President of the Republic of South Africa and Others (‘Glenister’),132 the Constitutional Court held that incorporating an international agreement, in terms of section 231(4) of the Constitution, into domestic law creates ordinary statutory rights and obligations.133 Further in this regard, the minority in Glenister indicated that ‘an international agreement that becomes law in our country enjoys the same status as any other legislation. This is so because it is enacted into law by national legislation and can only be elevated to a status superior to that of other national legislation if Parliament expressly indicates its intent that the enacting legislation should have such status.’134

124 Paragraph II.C.
125 POPIA ss 10 & 13.
126 MTC art 26(1); TIEA Model art 1.
127 National Treasury (note 77 above) 42.
129 Ibid at para 17.
130 Ibid.
133 Ibid at para 102.
134 Ibid at para 101.
As the court in *Tradehold* had to determine the status of a double tax agreement in relation to domestic tax legislation, it follows that preference must be given to the double tax agreement because it sets out to modify the domestic tax provisions. As submitted, however, that in line with the dictum in *Glenister*, this preference that a double tax agreement, or any other type of international tax agreement, enjoys cannot extend to domestic legislation that does not relate to tax. Accordingly, the dicta of the courts pertaining to the status of double tax agreements in relation to tax provisions do not address the question of whether the standard of ‘foreseeably relevant’, as contained in an international tax agreement, would take preference over the standard of ‘relevant’ as envisaged in POPIA.

I argue that, in addition to s 3(2)(a) of POPIA explicitly providing that POPIA must enjoy preference, the maxims of *lex posterior priori derogate* and *generalia specialibus non derogant* point toward POPIA’s ‘relevant’ standard taking preference. Whilst *lex posterior priori derogate* provides that when dealing with two clearly inconsistent and irreconcilable provisions, the later enacted provision takes preference, the *generalia specialibus non derogant* provides that special provisions take preference over general provisions. Thus, when these two maxims are applied together, the later enacted provision takes preference ‘unless the later enacted provision is a general provision and the earlier provision is a special provision’. When applying these two maxims to the current inconsistent standards, POPIA’s standard must take preference as POPIA deals specifically with the protection of personal information irrespective of when an international tax agreement becomes part of South African law. Hence, the appropriate threshold that should apply in relation to cross-border exchange of tax information should be ‘relevant’ and not ‘foreseeably relevant’.

2  Informing the taxpayer of the imminent exchange of tax information

Although ‘lawful processing’ usually requires that data subjects be informed of the processing of their personal information, this obligation does not apply to the exchange of tax information with another country. The reason for this is that the exchange of tax information is undertaken to fulfil an obligation (deriving from the international tax agreement that has been incorporated as part of the Income Tax Act), and to enforce the collection of revenue. Consequently, the exchange of tax information falls within the exception not to notify the data subject (taxpayer) as contained in s 18(4)(c)(ii) of POPIA.

Notwithstanding the fact that POPIA does not require SARS to inform taxpayers when their personal information will be transferred to another jurisdiction, the International Bureau for Fiscal Documentation (IBFD) advocates a minimum standard in terms whereof

> the requesting state should notify the taxpayer of cross-border requests for information, unless it has specific grounds for considering that this would prejudice the process of investigation. The requested state should inform the taxpayer, unless it has a reasoned request from the requesting state that the taxpayer should not be informed on the grounds that it would prejudice the investigation.

In the South African context, some scholars have argued that, based on the right to just administrative action as contained in section 33 of the Constitution and in the Promotion

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135 *Tradehold* (note 128 above) para 17.
136 L Du Plessis ‘Statute Law and Interpretation’ in *LAWSA* (Last update March 2011) 290, 305.
137 Gatuza (note 131 above) at 482.
of Administrative Justice Act 3 of 2000 (PAJA), which was enacted to give effect to the right contained in section 33 of the Constitution, a taxpayer must be informed of an impending exchange of tax information and subsequently be allowed to challenge the exchange of information. Regardless of the fact that I focus on the exchange of taxpayer information vis-à-vis the right to privacy in this article, it is important to further explore this argument pertaining to the right to just administrative action because the extent of the invasion of one’s privacy could be limited if there is a sound argument in law as to why the taxpayer should be notified and be able to challenge the exchange. If the taxpayer can successfully challenge the exchange, there would not be any invasion of privacy. In spite of s 3(2)(a) of POPIA stipulating that, in general, the provisions contained in POPIA prevail over provisions in other pieces of legislation that also regulate the processing of personal information, whenever the conditions for lawful processing of personal information are more extensive, those extensive conditions will apply. Therefore, it is important to scrutinise the provisions of PAJA to establish if PAJA does provide more extensive conditions that should apply when exchanging a taxpayer’s information.

The delineating question when dealing with the right to just administrative action is: What is administrative action? Administrative action is defined in PAJA as

any decision taken, or any failure to take a decision, by –
(a) an organ of state, when –
   (i) …
   (ii) exercising a public power or performing a public function in terms of any legislation;
   … which adversely affects the rights of any person and which has a direct, external legal effect.

The following elements emerge from this definition:
(i) a decision, or failure to make a decision;
(ii) by an organ of state;
(iii) a person’s right(s) must be adversely affected; and
(iv) it (the decision) should have a direct, external legal effect.

As regards the first element, ‘decision’ refers to ‘any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision’. From this definition it is clear that the decision must be of an administrative nature and in terms of an empowering provision. The concept ‘administrative nature’ is not defined in PAJA, but the matter of The President of the Republic of South Africa v South African Rugby Football Union (‘SARFU’) provides some insight in this respect. In this matter, the Court held that ‘administrative in nature’ does not refer to ‘whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or

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Ref: Constitution s 33(3); long title of PAJA.
140 Möller (note 31 above) 45.
141 POPIA s 3(2)(b).
143 PAJA s 1.
144 Ibid.
not. ¹⁴⁶ Burns and Beukes indicate that actions are administrative in nature when they relate to public law and an unequal relationship exists.¹⁴⁷ In turn, ‘empowering provision’ is defined in s 1 of PAJA to be ‘a law, a rule of common law, customary law or an agreement, instrument or other document’.

Arguably, when SARS decides to transfer tax information in terms of an international tax agreement, this does comply with the element ‘decision’. My view is based on the fact that, when SARS exercises its discretion as to whether or not the requested information could be foreseeably relevant in the administration or enforcement of taxes in the other country, and if the transfer of the information could expose any trade, industrial, business, commercial or professional secrets or trade processes, this is done in terms of an empowering provision, namely the Income Tax Act. Moreover, the relationship between SARS and the taxpayer is not equal in this scenario.

Since s 2 of the SARS Act provides that SARS is an organ of state, the second element of ‘administrative action’, namely that the decision must be made by an organ of state,¹⁴⁸ is fulfilled. Moreover, in order for the decision by SARS (to exchange tax information) to ‘adversely affect the rights of any person’, the consequence of the administrative action must be considered.¹⁴⁹ Whenever there is a deprivation of a person’s established rights or when a determination of a person’s rights is not in favour of that person, this third element of administrative action is met.¹⁵⁰ As illustrated throughout this article, when tax information is exchanged, the right to privacy is affected.

The concept ‘legal effect’ as contained in the last element overlaps with the element ‘adversely affect the rights of any person’,¹⁵¹ as ‘legal effect’, similar to ‘adversely affecting rights’, suggests a determination, change or withdrawal.¹⁵² At the same time, the concept ‘direct effect’ as contained in the same element relates to the common law principle in terms whereof a complainant should only seek recourse from the courts when a decision is final. As a result, the court would not have to consider ‘half-formed’ decisions.¹⁵³ Lastly, the ‘external effect’ part entails that the decision must affect someone other than the organ of state that made this decision.¹⁵⁴ An exchange of tax information would comply with this element of direct, external legal effect, since a decision to exchange tax information is final as there is no further process (currently) in terms whereof such decision of SARS can be challenged or needs to be approved by someone else. Moreover, the decision does affect someone other than SARS, namely the taxpayer.

As a result, the decision by SARS to exchange tax information constitutes administrative action, which must be lawful, reasonable, and procedurally fair as stipulated in section 33 of the Constitution. Therefore, when we deal with the exchange of taxpayer information, there

¹⁴⁶ Ibid at para 141.
¹⁴⁸ Subsection (b) of the definition of administrative action in PAJA s 1 stipulates that a decision can also constitute an administrative action if it is made by a juristic or natural person. Subsection (b) of the definition is, however, not applicable to this article.
¹⁵¹ Currie & Klaaren (note 149 above) 75; Burns & Beukes (note 147 above) at 27, 31; C Hoexter Administrative Law in South Africa (2nd Ed, 2012) 229.
¹⁵² Currie & Klaaren (note 151 above) at 82.
¹⁵³ Currie & Klaaren (note 151 above) at 82; Burns & Beukes (note 147 above) at 27, 31; C Hoexter Administrative Law in South Africa (2nd Ed, 2012) 229.
¹⁵⁴ Currie & Klaaren (note 149 above) at 82; Burns & Beukes (note 147 above) at 31.
is an overlap between POPIA and PAJA pertaining to how the task of exchanging information must be administered. Thus, if the provisions in PAJA pertaining to the exchange of the information are more favourable to the taxpayer than those contained in POPIA, the PAJA provisions will take preference in terms of s 3(2)(b) of POPIA. PAJA section 3(2)(b) specifies that 'procedurally fair administrative action' generally means that an administrator should give the affected person

(i) adequate notice of the nature and purpose of the proposed administrative action;
(ii) a reasonable opportunity to make representations;
(iii) a clear statement of the administrative action;
(iv) adequate notice of any right of review or internal appeal, where applicable; and
(v) adequate notice of the right to request reasons in terms of section 5.

Nevertheless, s (4)(a) of PAJA provides that an administrator can depart from these requirements when it is reasonable and just to do so in a specific instance. In this regard, the administrator should, inter alia, consider the purpose of the empowering provision and the possible impact of the administrative action.155 Consequently, SARS has to determine whether it is reasonable and just, when dealing with the exchange of tax information, not to notify the taxpayer thereof. While the exchange of information between countries is important, the possible impact on a taxpayer can be significant. In this respect, I do not deem the possibility that the exchange of information could reveal tax evasion or impermissible tax avoidance by the taxpayer as part of the possible impact on a taxpayer. The reason for this is that the exchange of information is merely exposing the true situation. Rather, SARS, as the administrator, must consider if the exchange of tax information could reveal any trade, industrial, business, commercial or professional secret or trade process. Such a consideration is extremely important, as both art 26(3)(c) of the MTC and art 5(7) of the TIEA Model gives a discretion to a revenue authority as regards revealing this type of information. In most instances, SARS would, however, be ill-equipped to determine if certain taxpayer information relates to any trade, industrial, business, commercial or professional secret or trade process. A taxpayer could make representations in this respect, but, of course, only if the taxpayer is aware that such an exchange of tax information is imminent.

I am not proposing that SARS must in all instances notify a taxpayer and afford the taxpayer the opportunity to make representations. Instead, SARS must follow the approach advocated in s 3(2)(a) of PAJA, in terms whereof the fairness of the process depends on the circumstances of each case. For instance, if SARS is not yet in possession of the requested information and has to use its information-gathering powers, I concede that the taxpayer should not at that stage be informed of the impending exchange of information. Notifying the taxpayer at this point could negate the purpose of exchanging information, as the taxpayer may destroy documents that contain such information. Once SARS is in possession of the required information, it would be prudent to inform the taxpayer of the imminent request so that the taxpayer can make relevant representations. Although this delay would not be ideal for the receiving revenue authority, a taxpayer must still be notified so that she or he can take appropriate steps to protect her or his right to privacy where necessary.

155 PAJA s 4(b).
3 Confidentiality of taxpayer information

An important safeguard that must be in place to ensure that a taxpayer’s right to privacy is not unnecessarily infringed when exchanging tax information, is confidentiality. Confidentiality has two dimensions: Firstly, whether the information is confidential and must not be transferred to the other country; and, secondly, how the exchange and subsequent handling of information must be done.

In relation to the first dimension, s 69(2)(a) of the TAA provides that SARS may disclose information in ‘the course of performance of duties under a tax Act’. Therefore, the TAA allows SARS to exchange tax information with another country, as the international tax agreement will be seen to form part of the Income Tax Act, which falls within the definition of a tax Act. Further confirmation that confidentiality in general would not prohibit SARS from exchanging tax information is found in s 108(5) of the Income Tax Act, which stipulates the following:

The duty imposed by any law to preserve secrecy with regard to such tax shall not prevent the disclosure to any authorized officer of the country contemplated in subsection (1), of the facts, knowledge of which is necessary to enable it to be determined whether immunity, exemption or relief ought to be given or which it is necessary to disclose in order to render or receive assistance in accordance with the arrangements notified in terms of subsection (2).

In view of these South African provisions pertaining to taxpayer confidentiality as well as art 26(5) of the MTC, which stipulates that a country may not decline an exchange of information merely because the information is held by a financial institution or a person acting in a fiduciary capacity, I conclude that confidentiality does not constitute a hurdle regarding whether information must be exchanged. However, art 26(3)(c) of the MTC and art 7(2) of the TIEA Model do point towards some form of hurdle, as there is no obligation on a country to exchange information that will reveal any trade, industrial, business, commercial or professional secret or trade process. Nevertheless, it is debatable whether this really creates a hurdle, as the Commentaries on the TIEA Model and the MTC observe that the issue of trade, business or other secrets does not generally arise during information requests and as such only plays a role in limited instances.

Moving to the second dimension, that is, the manner in which the information is treated, both the MTC and TIEA Model specify for what purpose tax information may be exchanged. There is thus a so-called minimum standard of confidentiality as to how the information must be treated. Moreover, art 26(2) of the MTC provides that the exchanged information should be dealt with in a confidential manner and in accordance with the domestic laws of the country receiving the information.

The fact that the way the taxpayer information will be treated after the actual exchange is dictated by the domestic laws of the receiving country highlights the importance of examining the relevant provisions in another country before concluding an international tax agreement.


\[157\] Ibid para 80; OECD Commentary (note 69 above) at para 19(2).


\[159\] Even though the TIEA Model does not make a similar reference to the domestic provisions of the receiving country, the OECD *Keeping It Safe* (note 158 above) at 10 remarks that there should be very little difference practically between an exchange based on the MTC and one based on the TIEA because of the minimum standards of confidentiality that are required in terms of both.
that facilitates the exchange of tax information. This also links to the requirement in POPIA that the country to which information is transferred should have adequate protection. A proper examination is imperative because, once a taxpayer’s confidentiality has been breached, there is no recourse to undo the impact this has on a taxpayer’s privacy.

V CONCLUDING REMARKS

When dealing with South African taxpayers’ right to privacy in relation to the exchange of tax information, there are two conflicting interests at play. On the one hand, a taxpayer has the right to privacy as enshrined in section 14 of the Constitution and, for the purposes of this article, as given effect to in the TAA, PAIA and POPIA. On the other hand, the flow of information across international borders ensures tax transparency and that taxing rights are correctly allocated, identifies tax avoidance and evasion.

While the exchange of tax information infringes on a taxpayer’s right to privacy, safeguards are built into international tax agreements160 and POPIA. The question that arises, however, is: are these safeguards sufficient to conclude that the infringement of taxpayers’ privacy rights when their tax information is exchanged is reasonable and justifiable as required in terms of section 36 of the Constitution? I argue that some adjustments must be made to the current safeguards, as the exchange of tax information can be achieved by using less invasive means, which is an important consideration in terms of section 36(1)(e) of the Constitution.

Firstly, POPIA’s stricter standard of ‘relevant’ must prevail over the international tax agreement standard of ‘foreseeably relevant’. Limiting the scope of taxpayer information that can be transferred would lessen the impact on a taxpayer’s privacy. Secondly, when the taxpayer information is in the possession of SARS, a taxpayer must be informed that the taxpayer information is subject to an imminent exchange. This is in line with the IBFD recommendation in this respect and with my interpretation of how this administrative action should be dealt with in terms of PAJA. In addition to complying with PAJA, when notifying a taxpayer and allowing the taxpayer to make representations, the confidentiality of a taxpayer’s information is better maintained, as the taxpayer can argue whether or not the relevant information contains any trade, industrial, business, commercial or professional secret or trade process.

160 This is assuming that the specific tax agreement is based on one of the models discussed in this article.
The Jurisdiction of the Constitutional Court

ESHED COHEN

ABSTRACT: This article has three purposes. First, it describes the principles governing the Constitutional Court’s jurisdiction. It claims that there are nine principles that determine whether the Court has jurisdiction over a matter. Second, it critically analyses those nine principles. It argues that most of the principles, properly interpreted, empower the Court to hear all matters. The remaining principles, which limit the Court’s jurisdiction, are difficult to justify. Third, it offers a solution to the Court’s incoherent approach to jurisdiction. The Court could embrace the full breadth of its principles of jurisdiction and move away from the questionable principles it invokes to limit its jurisdiction. The Court could then use the test for leave to appeal to decide which matters it hears. The test for leave to appeal is capable of addressing many of the practical and normative concerns behind limiting the Court’s jurisdiction.

KEYWORDS: civil procedure, constitutional litigation, leave to appeal

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Determining the parameters of this Court’s jurisdiction is complicated, contentious and an evolving area of law.

I INTRODUCTION

Over which matters does the Constitutional Court have jurisdiction? By 2012, fifteen years after the final Constitution commenced, there was no clear answer to this question. Parliament intervened, amending the Constitution in the hope of making the Court’s jurisdiction clear. Yet, as the above quote suggests, the answer remains elusive. For example, in 2019, in Jacobs v S, the Court dramatically split five-five on the issue of jurisdiction. Three judges even held that a previous decision of the Court was decided per incuriam (as they put it, ‘through lack of care’). The effect of the split decision was that the applicants will be in jail for around fifteen years for a murder conviction that, by all accounts, was incorrect. In the same year, in Jiba, the Court unanimously held that it lacked jurisdiction, despite all appearances to the contrary. The effect of this finding was that the Deputy National Director of Public Prosecutions remained on the roll of advocates despite several high court judgments finding that she acted dishonestly.

The purpose of this article is threefold. First, I describe the principles determining the Constitutional Court’s jurisdiction. My claim is that the following nine principles determine when the Court has jurisdiction over a matter:

1. Principle 1: Interpretation, protection, or enforcement of the Constitution.
2. Principle 2: Section 39(2) and legislative interpretation.
5. Principle 5: Fair procedure or courts’ powers.

The first six are positive principles and the last three are negative principles. A positive principle establishes that a matter is within the Court’s jurisdiction. For instance, ‘if a matter involves the interpretation of the Constitution, then it is a constitutional matter’, is a positive principle. A negative principle does not just negate a positive principle. A negative principle determines that a matter is not within the Court’s jurisdiction for reasons other than not falling within the ambit of a positive principle. For instance, ‘if a matter is only a dispute about facts, then it is not a constitutional matter’, is a negative principle.

The principles have not been codified or given formal authority by the Court, either in a single judgment or directive. My claim is that the nine principles are the best way to categorise and understand the Court’s approach to its jurisdiction. I attempt to make clear, throughout this article, what the principles are, so that litigants can plead their cases within the jurisdiction of the Court (or, at least, within the Court’s current approach to its jurisdiction).

The second purpose of this article is to highlight issues with these nine principles. The principles are difficult to justify and fraught with inconsistencies. A recurring issue with the positive principles is that they endow the Court with a jurisdiction broader than the Court

2 Jacobs v S [2019] ZACC 4, 2019 (1) SACR 623 (CC)(Jacobs’).
acknowledges. Meanwhile, the negative principles, which attempt to claw back the Court’s jurisdiction, have unconvincing rationales and are applied unpredictably. As I demonstrate, the most unfortunate upshot of the Court’s ongoing struggle with its jurisdiction is that matters have fallen through the cracks, deprived of the judicial resources they rightly deserved. The issues with the principles must be addressed to prevent further unjustifiable denials of judicial resources, either by the Court or Parliament.

The third purpose of this article is to offer one solution to the Court’s jurisdictional quagmire. The solution is to accept the full breadth of the positive principles and abandon the negative principles. The Court can then rely on leave to appeal to decide which matters to hear, since the test for leave to appeal can accommodate the policy concerns behind many of the negative principles. By offering this solution, I am not claiming that the Court should have jurisdiction over all matters and use leave to appeal as the only filter for matters. There are various policy reasons for why the Court should have specialist, instead of general, jurisdiction. There may be more than one reasonable way of arranging South Africa’s judicial hierarchy. A specialist jurisdiction for the Court is probably one of those reasonable ways. Instead, my claim is more modest: embracing the full breadth of the positive principles, and using leave to appeal as a filter, is a perfectly reasonable way to address the existing problems with jurisdiction. Moreover, it is a solution that is available to the Court. The solution requires only a development of the common law and, as the positive principles demonstrate, would be entirely consistent with the Constitution.

I begin by canvassing the concept of jurisdiction generally. I then discuss the positive principles of jurisdiction. I argue how each principle, given its rationale or application in a given case, implies a breadth at times unappreciated by the Court. After I discuss the positive principles, I turn to the negative ones. I aim to show that these negative principles are inconsistent, either internally or with the positive principles and should, for these reasons, be abandoned. Finally, I discuss leave to appeal to show how this mechanism can address many of the practical and normative concerns behind limiting the Court’s jurisdiction.

II JURISDICTION GENERALLY

Jurisdiction means the power or competence of a court to hear and determine an issue between parties. It has been defined as ‘a lawful power to decide something in a case, or to adjudicate upon a case, and to give effect to the judgment, that is, to have the power to compel the person condemned to make satisfaction’. The jurisdictions of courts are not necessarily limitless. As Watermeyer CJ held, ‘limitations may be put upon such power in relation to territory, subject

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4 By specialist jurisdiction, I mean jurisdiction over a delineated set of matters. For example, the jurisdiction of the Labour Court is specialist. By general jurisdiction, I mean jurisdiction that exists unless there is a rule saying otherwise. For example, s 169(1)(b) of the Constitution provides: ‘The High Court of South Africa may decide [...] any other matter not assigned to another Court by an Act of Parliament’.

5 Geaha v Minister for Safety and Security [2009] ZACC 26, 2010 (1) SA 238 (CC), 2010 (1) BCLR 35 (CC) at para 74, citing Graaff-Reinet Municipality v Van Rynveled’s Pass Irrigation Board 1950 (2) All SA 448 (A), 1950 (2) SA 420 (A) at 424. See further Ewing McDonald & Co Ltd v M&M Products 1991 (1) SA 252 (A) at 256G.

6 Spendiff v Kolektor (Pty) Ltd 1992 2 All SA 50 (A), 1992 (2) SA 537 (A) 551D, citing Wright v Stuttaford & Co 1929 EDL 10 at 42.
matter, amount in dispute, parties’. 7 These limitations can be found in statutes, 8 the common law, 9 or as is the case for the Constitutional Court, in constitutions. 10

The jurisdiction of a court is a question of legal authority: is a court empowered by law to resolve the issue before it? Determining the jurisdiction of a court, especially when that jurisdiction is sourced in a statute, entails interpreting the relevant rules empowering a court with jurisdiction. The rule is then applied to the facts of the case at hand. Once a case falls within the ambit of a jurisdictional rule, the court is empowered to hear the matter. This is perhaps what Zondo DCJ meant in Jacobs when he held that a ‘matter either falls within or outside of a court’s jurisdiction. There is, generally speaking, no discretion involved in deciding that’. 11 In contrast, when granting leave to appeal the court considers an open list of factors that reasonable judges can weigh differently and reach different results.

Without jurisdiction, a court cannot lawfully decide the merits of a matter. If it does so, its order is unlawful. 12 Hence the Constitutional Court has described jurisdiction as a ‘threshold requirement’ before the Court can determine anything in respect of a matter, including leave to appeal. 13 As Jaffa J put it: ‘For what the interests of justice warrant matters not if this Court lacks the authority necessary for entertaining the appeal’. 14

The jurisdiction of the Constitutional Court is delineated in section 167(3), (4), and (5) of the Constitution. Section 167(3)(b) provides for the Constitutional Court’s jurisdiction over constitutional matters and ‘any other matter’. Section 167(4) and (5) deals with exclusive jurisdiction and confirmation proceedings respectively. I do not deal with exclusive jurisdiction and confirmation proceedings. The rules relating to each of these matters have been discussed

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7 Graaff-Reinet Municipality (note 5 above) at 424.
8 The most obvious examples being the jurisdictional limits placed on Magistrates’ Courts by the Magistrates’ Courts Act 32 of 1944
9 For instance, under common law a court’s jurisdiction is generally limited to the territory of the Republic. See Ewing McDonald (note 5 above) at 256G.
10 The extent to which statutory or common law limitations on the jurisdiction of courts, especially Superior Courts, are constitutional is beyond the scope of this article. But, for example, Parliament cannot legislate in a manner that undermines the independence of the judiciary by passing laws that contradict constitutional provisions protecting the independence of the judiciary. It similarly cannot undertake to regulate or usurp functions that fall within the pre- eminent domain of the judiciary. Justice Alliance of South Africa v President of Republic of South Africa & Others, Freedom Under Law v President of Republic of South Africa & Others, Centre for Applied Legal Studies & Another v President of Republic of South Africa & Others [2011] ZACC 23, 2011 (5) SA 388 (CC), 2011 (10) BCLR 1017 (CC) at para 68.
11 Jacobs (note 2 above) at para 161. The exception, which Zondo DCJ might have anticipated, is where the rules of jurisdiction allow for the exercise of discretion. For instance, notionally, a court could have jurisdiction over all matters that are in the public interest.
12 The majority of the Constitutional Court held in Department of Transport v Tasima (Pty) Limited [2016] ZACC 39, 2017 (1) BCLR 1 (CC), 2017 (2) SA 622 (CC) that a court order, even if unlawfully issued, is valid and binding until set aside. The Constitutional Court (at para 190) explained that older case law, which held that an order issued by a court without jurisdiction was a nullity, considered unlawful orders in the context of res judicata (that is, when that unlawful order was being considered by another court).
14 Jiba (note 3 above) at para 37.
by others. They are not as controversial as the principles of jurisdiction on which I intend to focus.

Before 2012, section 167(3) of the Constitution gave the Constitutional Court jurisdiction to ‘decide only constitutional matters and issues connected with decisions on constitutional matters’. Parliament then passed the Constitution Seventeenth Amendment Act 2012, which amended section 167(3) to read:

The Constitutional Court—
(a) is the highest court of the Republic; and
(b) may decide—
(i) constitutional matters; and
(ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court; and

(c) makes the final decision whether a matter is within its jurisdiction.

The Preamble to the Seventeenth Amendment Act provides that the purpose of the amendment to section 167(3) is to make the Constitutional Court the highest court ‘in all matters’. The Court has expressed acceptance of this new role, going so far as to describe itself as ‘a super appellate court’.

The Seventeenth Amendment has extended the Constitutional Court’s jurisdiction beyond only constitutional matters. However, though I query this below, the Court’s jurisdiction appears limited to arguable points of law of general public importance which ought to be considered by the Court. If the Court was meant to be an apex court on all matters, then the limitation in section 167(3)(b)(ii) is difficult to explain. If the Court is an apex court, its jurisdiction should be general, and it should have an unlimited power to decide whether it is in the interests of justice to hear a matter. When the Seventeenth Amendment was introduced as a Bill in Parliament, it reflected this rationale by providing:

(3) The Constitutional Court—
(a) is the highest court of the Republic; and
(b) may decide—
(i) constitutional matters—
(aa) on appeal;
(bb) directly, in accordance with subsection (6); or
(cc) referred to it as contemplated in s 172(2)(c) or in terms of an Act of Parliament; and

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15 S Seedorf ‘Jurisdiction’ in S Woolman & M Bishop (eds) Constitutional Law of South Africa Chapter 4, 4-56 at 4-22. For recent authorities on exclusive jurisdiction, see Land Access Movement of South Africa & Others v Chairperson of the National Council of Provinces [2016] ZACC 22, 2016 (5) SA 635 (CC), 2016 (10) BCLR 1277 (CC) at fn 15.

16 Preamble to the Seventeenth Amendment Act.


19 Part IIIIF.
(ii) any other matter, if the Constitutional Court grants leave to appeal that matter on the grounds that the interests of justice require that the matter be decided by the Constitutional Court.

The parliamentary debate on the Seventeenth Amendment reveals the intention behind extending the Court’s jurisdiction in the limited form of section 167(3)(b)(ii). Ms Smuts, speaking for the Democratic Alliance, explained that her party agreed that there should not be a bifurcation between constitutional matters and other matters, as the old section 167(3)(b) assumed. However, the Democratic Alliance believed that a test narrower than a broad ‘interests of justice test’ was appropriate for the Court’s jurisdiction, namely arguable points of law of significant or general public importance. Mr Swart, speaking for the African Christian Democratic Party, said that the test in the introduced Bill, which was an interests of justice test, ‘was clearly too wide’. He then explained: ‘The test has now been narrowed to allow the Constitutional Court to hear those matters that raise arguable points of law of general public importance. ... The test will require an appellant to carefully formulate this point of law and will, unlike the interests of justice test, prevent an avalanche of appeals to the Constitutional Court’.

Section 167(3)(b)(ii) was drafted as a compromise between introducing a limitless jurisdiction and not amending the jurisdiction of the Court. The majority of Parliament thought that the previous distinction between constitutional and non-constitutional matters was unworkable. The attitude was reflected in a concurring judgment by Froneman J in Mankayi, where he held:

There is an impossible tension between asserting the fundamental supremacy of the Constitution as the plenary source of all law, and nevertheless attempting to conceive of an area of the law that operates independently of the Constitution. The perceived necessity for the attempt to do so arises from the provisions in the Constitution that provide that this Court ‘is the highest court in all constitutional matters’ and that the Supreme Court of Appeal ‘is the highest court of appeal except in constitutional matters’. The suggestion advanced in this judgment is to acknowledge frankly that this jurisdictional tension cannot be overcome by conceptual separation of certain areas of the law from the Constitution.21

Somewhat like the African National Congress, who introduced the Bill, Froneman J went on to suggest that the Court can hear all issues of law and even some facts; and the Court will hear those disputes if it is in the interests of justice to do so.22 But the Democratic Alliance, whose votes the African National Congress needed to reach the requisite two-thirds majority,23 refused to agree to a broad ‘interests of justice test’ to replace the Court’s specialist jurisdiction. The result is the limited extension found in section 167(3)(b)(ii).

Other than introducing section 167(3)(b)(ii), section 167(3)(b)(i) differs slightly from section 167(3)(b) pre-amendment. Section 167(3)(b)(i) does not include a reference to ‘issues connected with decisions on constitutional matters’. The Court has not addressed this discrepancy. Whether any significance should be attached to this difference is unclear. On the one hand, it appears that the Court’s jurisdiction was truncated by the Seventeenth Amendment. The Court can only decide constitutional matters or matters involving arguable points of law of general

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20 NA Debates Col 566 (20 November 2012).
22 Ibid at para 125.
23 The ANC had 264 seats out of 400 in 2012, just three seats shy of two-thirds.
public importance. It can no longer decide on the issues connected with those decisions. On the other hand, as becomes apparent below, the Court’s broad approach to constitutional matters enables the Court to decide on all issues connected to decisions on constitutional matters. There is no need, given this broad approach, for the Constitution to provide expressly for the Court’s ability to decide on issues ancillary to matters within its jurisdiction.

III  POSITIVE PRINCIPLES

The Court’s approach to whether a matter is a constitutional matter, or raises an arguable point of law of general public importance, can be distilled into nine principles. This set of principles can be divided into six positive and three negative principles. With respect to constitutional matters, as envisaged in section 167(3)(b)(i), there are the following five positive principles. If a matter involves a dispute over one of the following, then it is a constitutional matter:

- Principle 1: Interpretation, protection, or enforcement of the Constitution.
- Principle 2: Section 39(2) and legislative interpretation.
- Principle 3: The exercise of public power.
- Principle 4: Constitutionally envisaged legislation.
- Principle 5: Fair procedure or courts’ powers.

As for arguable points of law, the positive principle is straightforward:

- Principle 6: The Court has jurisdiction over arguable points of law of general public importance.

Below, I discuss each principle. The discussion comprises two elements. First, I describe the principle. Second, I demonstrate that the positive principle has a wide breadth, often effectively endowing the Court with jurisdiction over all matters. The second element is important, first, to demonstrate how the Court has failed to analyse the true extent of its jurisdiction in a principled manner. Second, the breadth of the positive principles is important for the solution I later offer for the issues with the Court’s jurisdiction. If the positive principles give the Court general jurisdiction, then the negative principles are the only legal bases for the Court’s denials of jurisdiction. If the negative principles are rejected, then the Court will be empowered by the positive principles, which come straight from the Constitution, to hear all matters. The upshot is that the Court would then be free to use leave to appeal to filter matters that it should not hear.

A  Principle 1: Interpretation, protection or enforcement of the Constitution

If a matter includes the interpretation, protection and enforcement of the Constitution, then it is a constitutional matter. This principle is found in section 167(7) of the Constitution.

Though section 167(7) provides a constitutional definition of constitutional matters, it has received little attention from the Court. In fact, instead of providing guidance on the wording of section 167(7), the Court has repeatedly misquoted the section. The section was first misquoted in Boesak, with the Court holding that ‘[u]nder s 167(7), the interpretation, application and upholding of the Constitution are also constitutional matters’. Section 167(7)

24 Seedorf (note 15 above) at 4-56.
does not mention ‘application’ or ‘upholding’ of the Constitution. The Court’s misquote in Boesak has been cited in subsequent judgments.25

We are left with interpreting section 167(7) invoking general principles of constitutional interpretation. I deal with ‘interpretation’, ‘protection’ and ‘enforcement’ in turn. I then deal with the ‘application’ and ‘upholding’ of the Constitution.

The ‘interpretation’ of the Constitution implies pronouncements on the meaning of constitutional provisions.26 If a case involves a dispute about the meaning of ‘organ of state’,27 or ‘remedial action’ of the Public Protector,28 then the case would raise a constitutional matter. The primary issue will be whether a constitutional rule should be interpreted in a manner such that a given case falls within a provision’s ambit. For instance, whether a sport federation constitutes an organ of state raises issues of interpreting the Constitution, as does whether binding orders constitute ‘remedial action’ of the Public Protector. Another common example is standing, under section 38 of the Constitution – an issue over which the Court has repeatedly asserted its jurisdiction.29

The interpretation of the Constitution is a constitutional matter. But the Court does not have jurisdiction every time it interprets the meaning of ‘constitutional matters’ in section 167(3)(a)(i). If jurisdiction was found in this way, it would result in a contradiction. This argument results in a contradiction. It would mean that the Court both has and lacks jurisdiction over a case. Imagine a case where the Court lacks jurisdiction on an interpretation of ‘constitutional matters’. If the mere interpretation of ‘constitutional matters’ is itself a constitutional matter, then the Court would have jurisdiction, even though on that interpretation the Court does not have jurisdiction. The argument also means, in a circular fashion, that the Court has jurisdiction over all matters, since all matters involve an interpretation of whether that matter is a constitutional matter. These two undesirable implications are a result of assuming that interpretation of the Constitution, as envisaged in section 167(7), includes interpreting section 167(3)(b)(i) and (7). But interpretation as envisaged in section 167(7) must refer to other provisions of the Constitution as well.

It is not as clear what ‘protection’ of the Constitution means. The issue here is what sort of threats to the Constitution trigger the protection envisaged in section 167(7). At one extreme, cases involving conduct or law which threaten the existence of South Africa’s constitutional democracy would be constitutional matters. Protection of the Constitution could then extend to cases involving treason and sedition. More broadly, constitutional matters could include cases involving the Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 (Terrorism Act). Though the Court has considered this Act under

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26 The Court has consistently held that interpretation is the process of attributing meaning to legislation. See Road Traffic Management Corporation v Waymark (Pty) Limited [2019] ZACC 12, 2019 (6) BCLR 749 (CC), 2019 (5) SA 29 (CC) at para 29.
27 Section 239.
28 Section 182(1)(c).
different jurisdictional grounds, the Terrorism Act aims at prohibiting conduct that would, among other things, ‘threaten the unity and territorial integrity of the Republic’. Protection of the Constitution is implied then by cases involving this legislation. Jurisdiction on this ground could extend not only to matters involving the interpretation of the Terrorism Act, but also to matters applying this Act, since its application could easily constitute protecting the Constitution against existential threats.

At the other extreme, not all legal violations constitute threats to the Constitution. Speeding or shoplifting, while illegal and in a sense threaten the rule of law, are not things from which the Constitution requires protection. Between the two extremes lies a large grey area. As the Court has repeatedly acknowledged, corruption, sexual offences, sexism, racism, and poverty, are all threats to the Constitution and its values. Though the Court has not done so explicitly, we could interpret the ‘protection’ of the Constitution to include matters involving these and similar threats. The upshot is that the Court’s jurisdiction is incredibly broad. It can hear all matters relating to current threats to the envisaged constitutional order. The Court’s jurisdiction on this ground would extend both to legal questions pertaining to those threats, but also factual and application disputes around those matters. For example, there is nothing to suggest that the Constitution should not be protected when the dispute in an appeal against a corruption conviction has to do with facts and not law.

Whether the Court will consider a case to involve the protection of the Constitution will depend on a range of factors. Considering what the Court has so far described as a threat to constitutional values, would depend on the prevalence of the threat, its imminence, its link to constitutional rights, and whether the facts of the case allow the Court to vindicate constitutional values. To return to the above example, while ordinary shoplifting might not threaten the Constitution, if certain kinds of theft became systemic, or discriminatory in effect, then the Constitution might need to be protected.

Like ‘protection’, ‘enforcement’ of the Constitution is vague. Enforcement suggests that a remedy giving effect to constitutional duties or rights is a constitutional matter. Matters involving the direct enforcement of constitutional provisions would easily be constitutional matters (since most of these cases would also involve the interpretation of the Constitution). As an example, directing a department to comply with its socio-economic, positive duties would be the enforcement of the Constitution. The issue with ‘enforcement’, however, is whether the

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30 For instance, in *S v Okah* [2018] ZACC 3; 2018 (4) BCLR 456 (CC), 2018 (1) SACR 492 (CC) the Court found jurisdiction because the matter concerned the jurisdiction of South African courts.
31 Section 1 definition of terrorism.
32 *Glenister v President of the Republic of South Africa* [2011] ZACC 6, 2011 (3) SA 347 (CC), 2011 (7) BCLR 651 (CC) at para 166.
33 *Tshabalala v S; Ntuli v S* [2019] ZACC 48, 2020 (3) BCLR 307 (CC), 2020 (2) SACR 38 (CC), 2020 (5) SA 1 (CC), especially the judgment of Khampepe J.
34 *Rahube v Rahube* [2018] ZACC 42, 2019 (1) BCLR 125 (CC), 2019 (2) SA 54 (CC) at para 24.
37 The Constitution may (even necessarily) be in need of protection where it is alleged that government has failed to protect rights, as is required in s 7(2). However, cases alleging a failure to protect rights would easily fall within the Court’s jurisdiction on other grounds. For example, those cases require interpreting rights in the Bill of Rights.
concept extends to indirect enforcements of the Constitution. Sentencing a person convicted of a crime, or awarding damages for defamation, in some sense enforces the Constitution. Perhaps even all constitutionally permissive legal remedies, since they are in accordance with the law, enforce the Constitution. Indeed, in the context of contempt of court, the Court in Matjhabeng held that ‘[s]ince the matters relate to the enforcement of court orders, that too, is a constitutional issue’. 38

As we will see when discussing Principles 2, 3, and 4, the Court has at times adopted the idea of indirect enforcement of constitutional rights to assume jurisdiction. To cohere with these authorities, we would need to interpret ‘enforcement’ as including indirect enforcement. But it is unclear whether the meaning of enforcement can be stretched to include the enforcement of all legal remedies. The reason is that any interpretation of constitutional provisions must be purposive. 39 If we adopt as a starting point that the Court is not a court of general jurisdiction, then enforcement would be limited, either to the direct enforcement of the Constitution or the indirect enforcement of remedies otherwise recognised as constitutional in nature (for instance, damages in defamation disputes). 40 This would give effect to the purpose of the Court’s specialised jurisdiction. However, if the Court truly is a court for ‘all’ matters, then enforcement can be interpreted as broadly as possible. This would give effect to the purpose of section 167(3): to make the Court the highest court in all matters.

As mentioned, the Court in Boesak added the concepts of ‘application’ and ‘upholding’ to section 167(7). Until recently, little significance was attached to this misquote. However, Zondo DCJ in Jacobs expressly relied on the finding in Boesak that section 167(7) gives the Court jurisdiction over the application of the Constitution. 41 Since Jacobs is referred to throughout this article, it is worthwhile to describe its background in some detail here.

Jacobs concerned the murder of Mr Patrick Abakwe Modikanele by three co-accused. The co-accused had been part of a mob that had attacked and killed Mr Modikanele in response to an allegation that he had stolen a cell phone belonging to a daughter of one of the co-accused. The trial court found that the attack had occurred in two stages: Mr Modikanele was first apprehended and assaulted outside a store, and then he was taken to the co-accused’s daughter’s home. The high court made no express finding that all the co-accused were present at the first stage of the assault. The high court also did not pronounce on when Mr Modikanele was fatally struck. The high court nonetheless convicted all the co-accused of murder based on common purpose. On appeal, the full court did the same. Leave to appeal to the Supreme Court of Appeal was refused.

The applicants applied for leave to appeal to the Constitutional Court. They argued that the high court and full court misapplied the doctrine of common purpose and that the application of common purpose raised a constitutional matter. The Court, as has become increasingly common, heard the case with only ten judges. 42 Four judgments were written. The first was by Goliath AJ, with whom four other judges agreed. 43 Goliath AJ dismissed the application,

40 Dikoko (note 20 above) at paras 90–92.
41 Jacobs (note 2 above) at paras 134 and 158.
42 For another example of the Court splitting 5–5, see Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation [2019] ZACC 41, 2020 (1) SA 327 (CC), 2020 (1) BCLR 1 (CC).
43 Cachalia AJ, Froneman J, Khampepe J and Madlanga J.
finding that the Constitutional Court had no jurisdiction over the matter. The second was by Froneman J, essentially finding the same.\(^{44}\) The effect of Goliath J’s and Froneman J’s judgments is that five judges held that the application for leave to appeal should be dismissed. Theron J wrote a third judgment.\(^{45}\) Zondo DCJ wrote a fourth judgment concurring in Theron J’s judgment. Zondo DCJ’s judgment dealt with jurisdiction, finding that the Court did have jurisdiction to hear the appeal. Theron J’s judgment agreed with this finding and dealt with the merits of the application. In the result, five judges would have granted leave to appeal. The Court thus split 5–5, so the full court’s judgment and order stood.

I discuss Goliath J’s and Froneman J’s judgments below, when dealing with disputes of fact and applications of settled principles. For now, the focus is on Zondo DCJ’s finding with respect to section 167(7). Though there was no majority on this point, Zondo DCJ held that section 167(7) gives the Constitutional Court jurisdiction over the application of the Constitution. The finding was a key premise in Zondo DCJ’s judgment that the Constitutional Court had jurisdiction over the application of the doctrine of common purpose. Zondo DCJ held that:

1. The application of common purpose involves the application of public policy;
2. Public policy is founded on the Constitution’s values;
3. So, the application of the doctrine of common purpose involves the application of the Constitution;
4. The Constitutional Court has jurisdiction over the application of the Constitution;
5. So, the Constitutional Court has jurisdiction over the application of common purpose.

Zondo DCJ invoked the misquote in \textit{Boesak} to justify premise 4. The Court in \textit{Boesak} could have provided more reasoning for how it moved from ‘protection and enforcement’ to ‘application and upholding’. However, given the Court’s commitment to interpreting constitutional matters broadly,\(^{46}\) and given that section 167(7) is not exhaustive of constitutional matters,\(^{47}\) it is hard to dispute that the Court has jurisdiction over the application of the Constitution (premise 4). The application of the Constitution, simply, is the use of a constitutional principle to reach a legal outcome on given facts. An application of the Constitution could include many of the matters discussed below, including confirmation proceedings, developing the common law, reviewing public power against the principle of legality, and almost all the matters over which the Court has exclusive jurisdiction. Since \textit{Jacobs}, the Court has confirmed twice that the application of constitutional principles in a matter makes the matter a constitutional one.\(^{48}\)

More controversial is Zondo DCJ’s finding that the application of a doctrine ‘based’ on public policy necessarily entails the application of the Constitution (premise 5). The conclusion equivocates the concept of ‘based’. A rule can be ‘based’ on public policy in that the rule exists for some public policy reason.\(^{49}\) The rule ‘no smoking’ might exist for public policy reasons, like ensuring that non-smokers do not have to endure the smell of smoke. A rule can also be ‘based’ on public policy in that the rule necessarily entails the application of public policy considerations. The rule ‘a contractual term will not be enforced if it is contrary to public

\(^{44}\) Cachalia AJ and Madlanga J concurring.
\(^{45}\) Zondo DCJ, Dlodlo AJ, Jafta J and Petse AJ.
\(^{46}\) \textit{Fraser} (note 12 above) at para 37.
\(^{47}\) It uses ‘including’ when defining constitutional matters.
\(^{48}\) \textit{EFF v Gordhan} (note 18 above) at paras 35–36; \textit{Jiba} (note 3 above) at para 38.
\(^{49}\) Though unnecessary for my argument, I understand a public policy reason to be one which does not relate to the parties before the Court.
policy’ is an example. These two meanings of ‘based’ are distinct. A rule can exist for public policy reasons but not entail a consideration of public policy every time it is applied.

Zondo DCJ relies on authorities saying that common purpose is a rule that exists for public policy reasons to find that its application necessarily entails the application of public policy. But the latter does not follow from the former. The rule in question in Jacobs, that the accused be present at the time the blow was struck, exists for various public policy reasons. But applying that rule does not entail applying public policy. Applying that rule is a matter of determining (a) when the fatal blow was struck and (b) whether the accused was present then. Accordingly, Zondo DCJ’s reliance on various delict and contract cases was misplaced. The cases he invoked dealt with either (a) the invocation of public policy to develop the common law or (b) the application of public policy directly in terms of a rule. As an example of the latter, whether something is wrongful in delict is a question of whether ‘public policy and public interest favour holding the conduct unlawful and susceptible to a remedy in damages’. Similarly, in K v Minister of Safety and Security (‘K’), public policy was held to inform whether an employee’s conduct is sufficiently connected to an employer.

However, in Jacobs the Court was not asked to develop common purpose under section 39(2). Moreover, whether someone is guilty of a crime due to common purpose does not depend directly on an application of public policy considerations. It depends on whether the requirements for common purpose have been met. None of those requirements invoke public policy; certainly, the one in dispute in Jacobs, whether the co-accused were present at the time of the fatal blow, does not. In that sense, unlike wrongfulness and vicarious liability, applying common purpose does not directly entail an application of public policy.

The implication of equivocating, as Zondo DCJ did, was pointed out by Goliath J and Froneman J. It is difficult to think of a rule that is not informed by public policy, in the sense that it exists for public policy reasons. If the application of a rule so informed by public policy is an application of the Constitution, then the application of any rule constitutes the application of the Constitution. This gives the Court a far-reaching jurisdiction, if not limitless. For instance, Zondo DCJ, in response to Froneman J’s concern, posits that disputing whether an accused shot the deceased is not a constitutional matter. But on his approach, it is. The

50 The only exception is Makhubela v S, Matjeké v S [2017] ZACC 36, 2017 (2) SACR 665 (CC), 2017 (12) BCLR 1510 (CC). In that matter, the Court held (at para 24) that the application of common purpose implicates the rights of freedom of the person and the right to a fair trial. Since the judgment of Froneman J in Jacobs holds that Makhubela is per incuriam, Zondo DCJ had to give reasons for why it was right. The argument discussed above explains why Zondo DCJ considered Makhubela to be good law.

51 Thebus & Another v S [2003] ZACC 12, 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC) generally discusses the rationales behind common purpose.

52 Steenkamp NO v Provincial Tender Board of the Eastern Cape [2006] ZACC 16, 2007 (3) SA 121 (CC), 2007 (3) BCLR 300 (CC) at para 42.


54 It might also be that sometimes a second rule mandates that a constitutional right is applied alongside or instead of a first rule. A well-known second rule of this kind arises where the constitutional right is unjustifiably limited by the first rule in question. In that case, the first rule cannot be applied without applying the constitutional right in question and s 36 of the Constitution. But whether the constitutional right applies is not necessarily a function of the first rule, but of the second rule. Hence, Goliath J and Froneman J were at pains to point out that common purpose was held in Thebus not to unjustifiably limit any constitutional rights. The upshot is that there is no second rule engaged that mandates the application of constitutional rights instead of the application of common purpose.

55 Jacobs (note 2 above) at para 155.
rules of evidence for determining whether an accused shot the deceased are informed by public policy;\(^{56}\) so, applying those rules means the matter is constitutional.

Zondo DCJ’s reasoning received the support of four other judges, one shy of a majority. The implication is that the Court was very nearly comfortable with extending its jurisdiction so broadly. While this conclusion might be welcomed, Zondo DCJ’s reasoning should not be about why the Court embraces its general jurisdiction. One reason is the one just explained: the equivocation of ‘based’ in public policy. Another is that the Court had jurisdiction in Jacobs on other, much clearer ground, so it was unnecessary to develop Principle 1 to include the application of all rules giving effect to public policy. The obvious basis for the Court’s jurisdiction was section 167(3)(b)(ii): the matter raised an arguable point of law of general public importance. The question was whether an accused had to be present when the fatal blow was struck to be convicted of murder through common purpose. The matter raised this question because both the high court, the full court, and Supreme Court of Appeal did not seem to think so. The state similarly did not think so. The point was certainly arguable,\(^{57}\) and, since it had never been considered by the Court,\(^{58}\) of public importance. The Court’s jurisdiction was accordingly engaged.

Compare how the Court assumed jurisdiction in Tshabalala.\(^{59}\) That case concerned whether common purpose could be applied to convict an accused of rape under the common law. The Court did not find jurisdiction on the ground that the application of common purpose entails the application of public policy. Instead, the Court held that the matter raised an arguable point of law of general public importance: whether common purpose could be applied to rape. The approach to jurisdiction in Tshabalala could have been taken in Jacobs.\(^{60}\)

The approach of the five judges who granted leave to appeal reflects that the case, in substance, concerned an arguable point of law. Theron J, whose judgment dealt with the merits of the matter, found as a matter of law that the accused had to be present when the fatal blow was struck to be convicted of murder through common purpose.\(^{61}\) She then would have set aside the conviction since ‘[i]n this matter, it has not been established that the applicants were present when the fatal blow was administered’.\(^{62}\) Theron J did not find that the lower courts misapplied the doctrine of common purpose. She found that they were wrong about the requirements themselves. In other words, she resolved a legal question, not a question of application, and then remitted the matter for sentencing.\(^{63}\)

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\(^{57}\) There is Appellate Division authority for the proposition. See S v Mgedezi [1988] ZASCA 135, [1989] 2 All SA 13 (A) and S v Motaung 1990 (4) SA 485 (A).

\(^{58}\) In Thebus (note 51 above) at para 21, the Court expressly left open the question whether common purpose applies in situations other than when the accused is present.

\(^{59}\) Tshabalala (note 32 above) at para 30.

\(^{60}\) Since Jacobs, the Court has refused to follow Zondo DCJ’s reasoning that the application of common purpose necessarily raises a constitutional matter. See Shipalana v S [2019] ZACC 20. Moreover, tellingly, the Court has not attempted to invoke Makhubela (note 50 above) since Froneman J in Jacobs held that it was per incuriam.

\(^{61}\) Jacobs (note 2 above) at para 73.

\(^{62}\) Ibid at para 81.

\(^{63}\) She does so after finding that the applicants were guilty of assault as a competent verdict. Jacobs (note 2 above) at para 82.
So much for the ‘application’ leg of the Boesak misquote. While the application of the Constitution would, generally, easily constitute a constitutional matter, it is less obvious what ‘upholding’ the Constitution means. One issue is that the Constitution can be ‘upheld’ negatively; any law that does not violate the Constitution in a sense upholds the Constitution. Another issue is that the Constitution or constitutional values are upheld through the application of many private law and criminal principles. For instance, the value of dignity might be upheld in defamation cases, while the value of bodily integrity might be upheld in assault convictions. On this interpretation of ‘upheld’, the Court’s jurisdiction is truly limitless. No decision since Boesak has actively relied on the ‘uphold’ leg of its finding, but it is unlikely that the Court intended the word to be so loosely interpreted.64 What the Court might have intended was something along the lines of protect or enforce as discussed above.

Interpretation, protection, enforcement, application, and upholding are not mutually exclusive. Often a single matter might involve all or several. The concepts are also not meant to be exhaustive of constitutional matters, though it is hard to imagine a constitutional matter that would not implicate one of these concepts. On the contrary, it seems like most constitutional matters decided by the Court could be pigeon-holed into at least one of these concepts. The result is that Principle 1 overlaps with Principles 2 to 5, if not swallowing them up completely. Interpreting legislation or developing the common law under section 39(2) (Principle 2) constitutes an application of the Constitution, as does reviewing the exercise of public power based on legality (Principle 3). The Constitution can then be enforced through legislation (Principle 4); the same being true of regulating fair hearings and determining the scope of judicial power (Principle 5).

The advantage of linking each of the below principles back to Principle 1 is that it grounds the Court’s jurisdiction in an express provision of the Constitution: section 167(7). However, the five concepts embedded in Principle 1 are malleable and bleed into each other. The result is that constructing a clear framework for the Court’s jurisdiction on the back of section 167(7) is difficult. Moreover, the section can be interpreted to give the Court jurisdiction over almost all matters, especially if one thinks that the purpose of section 167 is to provide the Court with a general jurisdiction. One solution is to have sub-rules under Principle 1 which are clearer, more concrete, and yet impose limits on the Court’s jurisdiction. The Court has purported to adopt this approach. As we shall see, the Court’s attempt to limit section 167(7) with sub-rules has not worked, since the rules introduced are themselves of immense breadth.

B Principle 2: Section 39(2) and legislative interpretation

Section 39(2) of the Constitution provides: ‘When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights’. The Court has held, and this is Principle 2, that a lower court’s failure in its duty under section 39(2) is a constitutional matter. The Court has held, and this is Principle 2, that a lower court’s failure in its duty under section 39(2) is a constitutional matter. It has done so both in the context of developing the common law and interpreting legislation.

With respect to the common law, the Court has repeatedly held that whether the common law should be developed under section 39(2) is a constitutional matter.65 A constitutional matter arises either when a court reaches the wrong outcome when considering the development

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64 As explained in part IV, Boesak imposed important restrictions on the Court’s jurisdiction.
65 K (note 53 above); Carmichele (note 25 above); Boesak (note 13 above).
of the common law, or fails to consider the possibility of developing the common law at all.\textsuperscript{66} The Court has contrasted ‘developing’ the common law with ‘applying’ the common law, holding that the latter generally is not a constitutional issue. In \textit{K}, the Court explained the difference between applying and developing the common law as envisaged in section 39(2):

1. applying: deciding a case because the facts fall within the established ambit of a legal rule;
2. developing: deciding a case after extending or restricting the ambit of a legal rule to include or exclude a set of facts unlike any set of facts previous adjudicated.\textsuperscript{67}

I discuss the application of rules, and whether they raise a constitutional issue, under Principle 8 below. Principle 8 deals with the application of settled principles, over which the Court does not have jurisdiction. As we shall see, distinguishing between ‘applying’ and ‘developing’ the common law is difficult to do.

Other than contrasting development with application, the Court has highlighted various features of what constitutes the development of the common law under section 39(2). Development generally refers to using the Constitution’s foundational values to draw normative impetus and develop new doctrines that address the common law’s deviation from the spirit, purport, and object of the Bill of Rights.\textsuperscript{68} The distinguishing feature of a ‘development’ case is a proposed change to the common law to harmonise it with the Bill of Rights. Paradigm examples include changing the test for vicarious liability to include an objective leg founded in public policy,\textsuperscript{69} maintaining the \textit{in duplum} rule pending litigation,\textsuperscript{70} and the extension of the common law definition of rape to include non-consensual anal penetration of females.\textsuperscript{71} Thus, the moment a case involves an allegation that the common law should be changed, since its current form deviates from the spirit of the Bill of Rights, then the case is a constitutional matter.

With respect to legislation, the Court has held that challenging the constitutionality of a court’s interpretation of a statute raises a constitutional matter.\textsuperscript{72} A challenge to the constitutionality of an interpretation does not challenge the constitutionality of the act.\textsuperscript{73} Instead, it alleges either that (a) a court has failed in its duty under section 39(2) to interpret legislation in accordance with the spirit, purport and object of the Bill of Rights; or (b) failed to interpret legislation otherwise consistently with the Constitution.

The distinction between these two kinds of interpretation cases is subtle but important for jurisdiction. Legislation must be interpreted consistently with all provisions of the Constitution, not only the Bill of Rights.\textsuperscript{74} If a matter involves the interpretation of legislation in conformity with the spirit, purport and object of the Bill of Rights, it is a constitutional matter.

\begin{thebibliography}{99}
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\item\textsuperscript{66} Ibid \textit{Carmichele} at para 37.
\item\textsuperscript{67} \textit{K} (note 53 above) at para 16.
\item\textsuperscript{68} \textit{Beadica 231 CC v Trustees for the time being of the Oregon Trust} [2020] ZACC 13, 2020 (5) SA 247 (CC), 2020 (9) BCLR 1098 (CC) at paras 74–75.
\item\textsuperscript{69} \textit{K} (note 53 above).
\item\textsuperscript{70} \textit{Paulsen} (note 17 above).
\item\textsuperscript{71} \textit{Masiya v Director of Public Prosecutions Pretoria (The State)} [2007] ZACC 9, 2007 (5) SA 30 (CC), 2007 (8) BCLR 827.
\item\textsuperscript{72} \textit{National Education Health \& Allied Workers Union v University of Cape Town} [2002] ZACC 27, 2003 (2) BCLR 154, 2003 (3) SA 1 (CC) (‘NEHAWU’) at para 15.
\item\textsuperscript{73} A challenge of this nature is obviously a constitutional matter.
\item\textsuperscript{74} \textit{Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd \& Others v Smit NO} [2000] ZACC 12, 2000 (10) BCLR 1079, 2001 (1) SA 545 (CC); \textit{Democratic Alliance v Speaker of the National Assembly} [2016] ZACC 8, 2016 (5) BCLR 577 (CC), 2016 (3) SA 487 (CC) (‘DA \& Speaker’) at para 34.
\end{thebibliography}
with the constitutional imperative to best promote the spirit, purport and object of the Bill of Rights, then that matter raises a constitutional issue that engages the Court’s jurisdiction.\(^{75}\) A classic example of this sort of case is Fraser, where the applicant argued that the Supreme Court of Appeal’s interpretation of the Prevention of Organised Crime Act 121 of 1998 did not promote his fair trial rights. The Court found jurisdiction invoking section 39(2), holding that a constitutional question had been raised in the form of ‘whether the Supreme Court of Appeal’s interpretation ... has failed to promote the spirit, purport and objects of the Bill of Rights in terms of section 39(2)’.\(^{76}\)

On the other hand, if the allegation is that an interpretation is inconsistent with other provisions of the Constitution, then section 39(2) is not triggered.\(^{77}\) The Court could nonetheless have jurisdiction under Principle 1 since the matter will involve the interpretation of a provision in the Constitution. For instance, assuming the matter was not before the Court on confirmation proceedings, the Court would easily have had jurisdiction in Democratic Alliance.\(^{78}\) The case concerned the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 and whether a provision of that Act was, on one interpretation, inconsistent with members’ of parliament right to freedom of speech.\(^{79}\) Since the case turned on interpreting a constitutional provision (that was not in the Bill of Rights), the Court would have had jurisdiction.

A difficult issue for the Court is whether all disputes over statutory interpretation are constitutional matters, even when the constitutionality of an interpretation is not at issue. It is possible for legislative interpretation to be ‘neutral’ with respect to the Bill of Rights and the Constitution, such that a challenge to the interpretation is not based on its constitutionality, but on its validity. The Court appears to have contradictory dicta on whether these challenges are constitutional matters within its jurisdiction.

On the one hand, as Froneman J has pointed out in at least two separate judgments, the Court has never held that the interpretation of legislation necessarily gives rise to a constitutional matter.\(^{80}\) The Court, when dealing with issues of interpretation, looks to link the legislation in question to the Constitution. In the context of section 39(2), the Court finds jurisdiction because the interpretation of legislation ‘implicates’ a right. If interpretation of legislation limits a constitutional right, then the interpretation of that legislation raises a constitutional matter under section 39(2).\(^{81}\) For instance, in Links, the Court held that it had jurisdiction over a contested interpretation of the Prescription Act,\(^{82}\) since the interpretation limited the right to access to courts.\(^{83}\) We should note that this approach significantly extends...
the meaning of a constitutional matter. All that matters is that a right is ‘implicated’ by the interpretation in question. The Court has never held that it makes a difference whether the limitation is justified or trivial.

On the other hand, there are dicta and decisions by the Court suggesting that the interpretation of legislation is necessarily a constitutional matter, even if a constitutional right is not implicated. In *Jordaan*, the Court held that ‘this Court has emphasised that virtually all issues – including the interpretation and application of legislation and the development and application of the common law – are, ultimately, constitutional’. This dictum could be read to have been made in the context of section 39(2). But that would not cohere with the rationale for the dicta, given in *My Vote Counts*, that ‘this is because the Constitution’s rights and values give shape and colour to all law’. The dicta suggest that the interpretation of statute will, necessarily, give rise to a constitutional matter, since all law is coloured by the Constitution.

*Kubyane* also suggests that all disputes over interpretation are constitutional matters. The case concerned a dispute over the interpretation of the National Credit Act 34 of 2005. The Court said the matter was a constitutional one. The reason was novel: ‘the interpretation of the Act’s notice provisions implicates fundamental notions of equity in, and the transformation of, the credit market. Such an interpretation is therefore inherently linked to the constitutional objective of achieving substantive equality’. Unlike previous cases, like *Links*, the Court did not find that the interpretation of the Act contended for by the respondents limited the applicant’s right to equality. On the contrary, equality is only mentioned once in the judgment – to find jurisdiction. The basis of the judgment’s ultimate finding (the Act does not require a credit provider to bring the contents of a s-129 notice to the subjective attention of a consumer) was not based on section 9 of the Constitution, but on a constitutionally neutral interpretation of the Act.

The approach in *Kubyane* appears to be that the interpretation of legislation that is somehow linked to a ‘constitutional objective’ is a constitutional matter. This is a serious expansion of the Court’s jurisdiction over the interpretation of statutes, since all legislation is linked to some constitutionally legitimate purpose. The Court has since applied the reasoning in *Kubyane* to other cases involving the National Credit Act.

Nevertheless, the Court has not fully embraced the approach in *Kubyane*. In contradiction to *Kubyane*, the majority of the Court in *Media 24* refused to hold that the interpretation of the

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84 *Jordaan* (note 75 above) para 8.
85 *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31 at para 51.
86 *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1, 2014 (3) SA 56 (CC), 2014 (4) BCLR 400 (CC) at paras 16–17.
87 Otherwise it is unconstitutional. See s 36 of the Constitution.
88 Act 34 of 2005; *Paulsen* (note 17 above) at para 14; *Sébola & Another v Standard Bank of South Africa Ltd* [2012] ZACC 11, 2012 (5) SA 142 (CC), 2012 (8) BCLR 785 (CC) (‘Sébola’) at para 36.
Competition Act necessarily raises a constitutional matter. Goliath AJ, for the minority and echoing Kubyane, held that the Act ‘implicate[s] the right of equality contained in s 9 of the Constitution. Section 9(2) enjoins the state to take legislative and other measures to advance the equality of previously disadvantaged people and [the relevant sections] of the Competition Act is a legislative measure of this kind’. Therefore, Goliath AJ held that the interpretation of the Competition Act 89 of 1998 was a constitutional matter.

Six judges disagreed with Goliath AJ’s reasoning. Cameron J, Froneman J and Khampepe J, writing for this majority, held that (a) the Competition Act is not the legislation the Constitution mandated to give effect to the right to equality; (b) this was not the basis on which the Competition Commission brought its application; and (c) Goliath AJ did not dispose of the merits of the matter on equality grounds. These three reasons apply with equal force to Kubyane. Yet the Court found jurisdiction in Kubyane for similar reasons to those given by Goliath AJ.

The tension in the Court’s approach to legislative interpretation has mostly been resolved by the introduction of section 167(3)(b)(ii). Questions of statutory interpretation will be arguable points of law of general public importance. An example of this is Media 24. Six judges held that the case raised an arguable point of law of general public importance concerning the meaning of ‘predatory pricing’ in the Competition Act. The Court thus had jurisdiction over a dispute of statutory interpretation that was ‘neutral’ with respect to the Bill of Rights or the Constitution. This effectively gives the Court jurisdiction over all disputes of statutory interpretation.

C Principle 3: The exercise of public power

In the late 1990s and early 2000s, the Constitutional Court and the Supreme Court of Appeal jousted over whether reviews of public power brought under the common law were constitutional matters. The argument was resolved by the Constitutional Court finding that all reviews of public power, including those invoking the older common law grounds of review, are constitutional matters. The conclusion followed from finding that the constitutional principle of legality (found in section 1(c)) underpins the older common law grounds of review, like ultra vires.

Since then, the Court has repeatedly held that the exercise and control of public power is always a constitutional matter. Reviews of administrative action are constitutional matters for this reason (and because those reviews are brought under PAJA, which is constitutionally

90 Ibid at para 30.
91 Who was the author of the above dicta in Jordaan (note 75 above) and My Vote Counts (note 85 above).
93 Steenkamp (note 57 above) at para 20; Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited [2019] ZACC 15; 2019 (6) BCLR 661 (CC), 2019 (4) SA 331 (CC) at paras 35–36.
envisaged legislation). Reviews of non-administrative public power, and ‘self-reviews’ based on legality, are similarly constitutional matters. The Court has also invoked the principle of legality to assert jurisdiction over disputes concerning the Competition Tribunal’s and Competition Appeal Court’s powers under the Competition Act, as well as the Competition Commission’s investigatory powers. The Court has also invoked the ground to assert jurisdiction over reviews of decisions by commissioners and arbitrators in the labour dispute system.

There appears to be a further, more recent development with respect to Principle 3. In Public Protector v SARS, the Constitutional Court assumed jurisdiction over an appeal against a personal costs order against the Public Protector. Its reasoning was novel. It held:

Unwarranted costs orders against the Public Protector in her personal capacity in work-related litigation may have a chilling and deleterious effect on the exercise of her powers. Because of this likely impact on the exercise of constitutional powers, unwarranted — not just any — costs orders engage this Court’s constitutional jurisdiction.

The Court exercised jurisdiction because of the way in which personal costs orders could impact on the exercise of constitutional powers. The Court cited no authority for this proposition, but it follows from Principle 3. If the Court has jurisdiction over the exercise of public power, it should also have jurisdiction over that which impacts on the exercise of public power.

The Court’s jurisdiction on this ground, especially in light of the development in Public Protector v SARS, is broad. The Court’s jurisdiction is engaged when a review is a matter of

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95 Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 25. More recently, see Trustees of the Simcha Trust v Da Cruz and Others; City of Cape Town v Da Cruz & Others [2019] ZACC 8, 2019 (3) SA 78 (CC), 2019 (5) BCLR 648 (CC) at para 19. However, the latter appears to mis-cite Giant Concerts CC v Rinaldo Investments (Pty) Ltd [2012] ZACC 28, 2012 JDR 2298 (CC), 2013 (3) BCLR 251 (CC) at para 27. Giant Concerts concerned standing to bring a review under PAJA, not the review itself.


97 State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited [2017] ZACC 40, 2018 (2) BCLR 240 (CC), 2018 (2) SA 23 (CC); Buffalo City v Asla (note 93 above). These have generated a fair deal of controversy, see L Boonzaier ‘A Decision to Undo’ (2018) 135(4) South African Law Journal 642.


100 Duncanmec (note 35 above) at para 30; South African Revenue Service v Commission for Conciliation, Mediation and Arbitration [2016] ZACC 38, 2017 (1) SA 549 (CC), 2017 (2) BCLR 241 (CC); Sidumo v Rustenburg Platinum Mines Ltd [2007] ZACC 22, 2008 (2) SA 24 (CC), 2008 (2) BCLR 158 (CC).


102 Compare the reasoning in Public Protector v South African Reserve Bank [2019] ZACC 29, 2019 (9) BCLR 1113 (CC), 2019 (6) SA 253 (CC) at para 33, where the Court assumed jurisdiction because of an arguable point of law.

103 Ibid at para 29 (emphasis added.)
applying settled principles of administrative law and even when the only dispute in the review is of a factual nature.\textsuperscript{104}

D Principle 4: Constitutionally envisaged legislation and legislation implementing rights

Principle 2 dealt with the interpretation of legislation in accordance with section 39(2) of the Constitution. The Court has developed another rule concerning legislation. The interpretation and application of legislation that either (a) is constitutionally envisaged or (b) gives effect to a constitutional right, is a constitutional matter. This rule, Principle 4, differs from Principle 2 in two respects. It extends the Court’s jurisdiction to the application of legislation to a set of facts, even when there is no dispute concerning the meaning of that legislation. Additionally, it allows the Court to assume jurisdiction even if no right is limited (or needs to be promoted) by the interpretation of certain legislation.

Constitutionally envisaged legislation could mean one of six things. First, there is national legislation that must be enacted to ‘give effect’ to a constitutional right. Only the rights to access information and just administrative action prescribe the passing of legislation in this way.\textsuperscript{105} Secondly, there are rights in the Bill of Rights that oblige the passing of national legislation. These rights, unlike section 32 and section 33, do not say that the national legislation will ‘give effect’ to the right. They simply provide that national legislation must be passed. These rights are the right to equality\textsuperscript{106} and the right to secure tenure or comparable redress.\textsuperscript{107} Thirdly, there are rights in the Bill of Rights that oblige government to take ‘legislative measures’. These are the right to a safe environment,\textsuperscript{108} the right to property,\textsuperscript{109} the right to housing,\textsuperscript{110} and the rights in section 27.\textsuperscript{111} The last two envisage legislative measures ‘progressively realising’ these rights. Fourthly, the Bill of Rights allows for certain legislation, but does not prescribe its enactment. For example, section 23(5) provides that national legislation may be enacted to regulate collective bargaining, and section 23(6) says that national legislation may recognise union security arrangements contained in collective agreements. Section 9(2) also provides that legislative measures may be taken with respect to affirmative action.

Fifthly, there are provisions outside of the Bill of Rights mandating the passing of legislation. The first is section 3(1) of the Constitution, which provides that national legislation must provide for the acquisition, loss and restoration of citizenship. There are then many other instances of mandated legislation, including legislation providing for an electoral system,\textsuperscript{112} legislation providing for the referral of an order of constitutional invalidity to the Constitutional Court,\textsuperscript{113} legislation ensuring the promotion of the values and principles relating to public

\textsuperscript{104} Camps Bay Ratepayers and Residents Association v Harrison 2011 2 BCLR 121 (CC), 2011 (4) SA 42 (CC) at para 51.
\textsuperscript{105} Sections 32 and 33 of the Constitution.
\textsuperscript{106} Section 9(4) provides that ‘national legislation must be enacted to prevent or prohibit unfair discrimination’.
\textsuperscript{107} Section 25(6) and (9).
\textsuperscript{108} Section 24.
\textsuperscript{109} Section 25(5) provides: ‘The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.’
\textsuperscript{110} Section 26.
\textsuperscript{111} Health care, food, water and social security.
\textsuperscript{112} Section 46(1)(a).
\textsuperscript{113} Section 172(2)(c).
administration,\textsuperscript{114} legislation establishing the powers and functions of the police service,\textsuperscript{115} and legislation establishing a national treasury and prescribing measures to ensure both transparency and expenditure control in each sphere of government.\textsuperscript{116}

Finally, there are provisions outside the Bill of Rights permitting the passing of legislation, but not prescribing it. For example, section 58(2) provides that other privileges and immunities of the National Assembly, Cabinet members and members of the Assembly may be prescribed by national legislation. Similarly, section 180 provides that national legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution, including the training of judicial officers.

Using Principles 1 and 2, one would think that the Court’s jurisdiction over disputes relating to each kind of legislation would differ. Disputes concerning legislation that ‘gives effect’ to a constitutional right are constitutional matters, since the constitutional right is applied and interpreted through the legislation.\textsuperscript{117} As for the second to fourth types of legislation, where the right to which the legislation is related will be limited by or requires promotion through an interpretation of that legislation, the Court will have jurisdiction through section 39(2). The Court’s jurisdiction over the fifth and sixth types of legislation will depend on whether the dispute entails the interpretation of a constitutional provision. Accordingly, only on Principles 1 and 2, would the Court not have jurisdiction over all disputes concerning constitutionally envisaged legislation, especially where the dispute concerns only factual disputes or application of settled legislative meanings to facts.

However, the Court has not approached constitutionally envisaged legislation in this manner. Instead, the Court has held that it has jurisdiction over the interpretation and application of all constitutionally ‘envisaged’ or ‘authorised’ legislation.\textsuperscript{118} It makes no difference which of the above types of legislation the Court is dealing with. The legislation could be giving effect to a constitutional right, or it could be permitted under a provision outside of the Bill of Rights. What matters is that the legislation has a constitutional provision that somehow envisages its enactment. For instance, the Court has jurisdiction over all interpretation and application of PAIA\textsuperscript{119} and PAJA, since those acts are mandated by the Constitution to give effect to constitutional rights.\textsuperscript{120} The Court has jurisdiction over the interpretation and application of ESTA since it is constitutionally mandated under section 25(9).\textsuperscript{121} The same is true of the

\textsuperscript{114} Section 195(3).
\textsuperscript{115} Section 205(2).
\textsuperscript{116} Section 216(1).
\textsuperscript{117} Save to the extent that the dispute concerns the legislation limiting the right, in which case the Court assumes jurisdiction because the right is applied directly.
\textsuperscript{118} National Union of Metal Workers of South Africa v Lufil Packaging (Isithebe) [2020] ZACC 7, 2020 (6) BCLR 725 (CC), (2020) 41 (ILJ) 1846 (CC) at para 27; Waymark (note 26 above) at para 27; Dikoko (note 20 above) at para 29.
\textsuperscript{119} Promotion of Access to Information Act 2 of 2000. See further Standard Bank (note 75 above) at para 38, where the Court assumed jurisdiction over a dispute around the rules of the Competition Tribunal because those rules incorporated PAIA. The implication is that further legislation, or even court rules, incorporating or referring to constitutionally envisaged legislation also fall within the Court’s jurisdiction.
\textsuperscript{120} PFE International Inc (BVI) v Industrial Development Corporation of South Africa Ltd [2012] ZACC 21, 2013 (1) SA 1 (CC), 2013 (1) BCLR 55 (CC) at para 16; Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) at para 25; Jacobs (note 2 above) at para 128.
Restitution of Land Rights Act,122 which is envisaged in its section 25(7).123 The Court has asserted jurisdiction over the interpretation of the PFMA,124 since the PFMA regulates the management of public finances as envisaged s 216 of the Constitution.125 Other legislation, like PIE,126 PEPUDA,127 NEMA,128 and the MPRDA129 have all similarly been considered by the Court given how the Constitution in some way envisages their enactment.

The Court has gone further than asserting jurisdiction over all interpretation and application of constitutionally envisaged legislation. If legislation purports to give effect to a constitutional right, even though the Constitution does not envisage its enactment, then all interpretation and application of that legislation is a constitutional matter. The seminal case making this finding is NEHAWU. The Court held that since the LRA130 purports to ‘give content’ to the right to fair labour practices, its interpretation and application are constitutional matters.131 To be clear, the LRA is not constitutionally mandated or envisaged legislation; section 23 imposes no duty on the legislature to pass laws giving effect to the right to fair labour practices.132 Nonetheless, NEHAWU has been applied since then by the Court to assert jurisdiction over all labour matters.133 As one commentator has suggested, NEHAWU made the Court a ‘Labour Appeal Court’.134

The Court made the rationale behind NEHAWU clear. The Court has jurisdiction over the interpretation and application of constitutional rights. If legislation gives effect to those rights,
it ‘will of course always be subject to constitutional scrutiny to ensure that it is not inconsistent with the Constitution’.\textsuperscript{135} This is in respect of both the interpretation and application of that legislation.\textsuperscript{136} We should note that the rationale is not entirely watertight. Just because the Court has jurisdiction over the interpretation and application of constitutional rights does not mean it has jurisdiction over every dispute relating to legislation giving effect to those rights. Some labour disputes, for instance, might not turn on a purposive reading of the LRA. Parties might agree on the purpose of a provision but disagree on other constitutionally neutral issues (like the text or structure of the LRA). Since there is no dispute about consistency with or promotion of constitutional rights, the Court would not have jurisdiction.

It is not entirely clear how far \textit{NEHAWU} goes. The Court has at times assumed jurisdiction over legislation, albeit alongside other reasons, if one of the legislation’s objects was to give effect to a right in the Constitution. For instance, in \textit{Bengwenyama} the reason the Court had jurisdiction was because the objects of the MPRDA include the promotion of equitable access to mineral resources for historically disadvantaged people and to give effect to the environmental right in section 24.\textsuperscript{137} In \textit{Sishen} this was made even clearer:

There can be no doubt that this case raises constitutional issues of importance. It involves the interpretation and application of a statute that was enacted to discharge a constitutional obligation to redress inequalities caused by past racial discrimination and to create equitable access to mineral and petroleum resources.\textsuperscript{138}

At the same time, the Court in \textit{Media 24} refused to find that the interpretation of the Competition Act is a constitutional matter, despite the Competition Act providing that one of its objects is to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.\textsuperscript{139} More strikingly, the Court distinguished \textit{NEHAWU} from a case involving the BCEA.\textsuperscript{140} The matter turned on whether the respondent was the applicant’s employer under the BCEA, which involved applying the meaning of employer in the BCEA to the facts of the case. A slim majority held that this was a purely factual dispute, despite it clearly involving the application of legislation intended to give effect to section 23 of the Constitution.\textsuperscript{141}

These decisions are difficult to reconcile. On the rationale of \textit{NEHAWU}, it should make no difference whether an act solely gives effect to a right, like the LRA, or has various objects, one of which is to give effect to a right, like the MPRDA. If so, any act that has a single object of giving effect to a constitutional right should be within the Court’s jurisdiction, which makes \textit{Media 24} difficult to explain. In addition, the Court has not explained whether legislation

\textsuperscript{135} \textit{NEHAWU} (note 72 above) para 15.

\textsuperscript{136} Ibid.

\textsuperscript{137} \textit{Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd & Others} [2010] ZACC 26, 2011 (4) SA 113 (CC), 2011 (3) BCLR 229 (CC) at para 42. Cf. the reasoning in \textit{Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC) Limited} [2020] ZACC 5, 2020 (6) BCLR 748 (CC), 2020 (4) SA 409 (CC) at para 38, where the fact that the MPRDA was constitutionally mandated by s 24 was used to assert jurisdiction.

\textsuperscript{138} \textit{Minister of Mineral Resources v Sishen Iron Ore Company (Pty) Ltd} [2013] ZACC 45, 2014 (2) SA 603 (CC), 2014 (2) BCLR 212 (CC) at para 37, recently affirmed in \textit{Magnificent Mile Trading} (note 131 above) para 19.

\textsuperscript{139} Section 2(f).


\textsuperscript{141} The \textit{Basic Conditions of Employment Act 75 of 1997} provides in its s 2 that its purpose is to give effect to and regulate the right to fair labour practices conferred by s 23(1) of the Constitution.
needs to provide expressly that it gives effect to a constitutional right or if implication suffices for jurisdiction. In most cases, the Court has only assumed jurisdiction over legislation that has been express in its object of giving effect to a constitutional right, suggesting that the rule is limited to the former. Most importantly, the Court has repeatedly insisted that it does not have jurisdiction over all criminal matters.\textsuperscript{142} The CPA\textsuperscript{143} clearly ‘gives content’ to the rights in section 35 of the Constitution,\textsuperscript{144} but it does not have an express provision saying that its object is to do so. The Court’s refusal to become a ‘Criminal Appeal Appeal Court’ suggests that the legislation needs to give effect to a constitutional right expressly.

There are exceptions that are difficult to square with the Court’s approach to the CPA. In Robinson, the Constitutional Court held that it had jurisdiction over a dispute relating to whether a magistrate lawfully admitted evidence in an extradition hearing. The Court held: ‘All people who are unlawfully extradited to serve a sentence of imprisonment abroad would have their rights infringed contrary to the provisions of the Constitution’. Accordingly, ‘whether there was proper authentication [of evidence] in the extradition enquiry before the magistrate is a constitutional matter’.\textsuperscript{145} The Court thus assumed jurisdiction over the application of the Extradition Act 67 of 1962, even though the Act only implicitly gives effect to various constitutional rights. But if an unlawful extradition violates constitutional rights, so too does an unlawful conviction. So, all criminal matters are constitutional matters on the reasoning of Robinson.

If the Court’s approach is only to take jurisdiction over legislation that is express in its purpose to give effect to constitutional rights, then the approach is difficult to justify given the NEHAWU rationale. Limiting jurisdiction only to legislation that expressly gives content to constitutional rights seems formalistic and contrary to the imperative to interpret the Court’s jurisdiction broadly.\textsuperscript{146} The Court’s jurisdiction would, absurdly, turn on whether Parliament decides to acknowledge that its legislation is implementing a constitutional right. The only other option is to accept that the Court has widespread jurisdiction over disputes regarding legislation, regarding both meaning and application. If we think that the Court should have jurisdiction over legislation that gives content or effect to constitutional rights, as in NEHAWU, it should make no difference if the legislation does so implicitly. The upshot is that the Court has jurisdiction over most legislation, from the Prescription Ac 68 of 1969\textsuperscript{147} to the Consumer Protection Act 68 of 2008,\textsuperscript{148} and of course the Criminal Procedure Act.

Once again, much of this tension is resolved by section 167(3)(b)(ii). Disputes about the meaning of legislation will invariably raise an arguable point of law. The only aspect of NEHAWU not dealt with by section 167(3)(b)(ii) is the application of legislation. As with labour cases, applicants might want to argue that there is no dispute about the meaning of the law. Yet the application of the legislation, one object of which is to give effect to their constitutional rights, was incorrect. On the plain reading of NEHAWU, and to fully realise

\textsuperscript{142} Boesak (note 13 above).
\textsuperscript{143} Criminal Procedure Act 51 of 1977.
\textsuperscript{144} Seedorf (note 15 above) at fn 334.
\textsuperscript{145} Director of Public Prosecutions: Cape of Good Hope v Robinson [2004] ZACC 22, 2005 (4) SA 1 (CC), 2005 (2) BCLR 103 (CC) at para 20.
\textsuperscript{146} Fraser (note 12 above).
\textsuperscript{147} Right of access to courts.
\textsuperscript{148} The right to equality.
its rationale, the Court should have jurisdiction in such cases. In the end then, the Court will have jurisdiction over most cases involving statutes.

E  Principle 5: Fair procedure or courts’ powers within the judicial system

The Court has assumed jurisdiction over disputes around fair process and judicial power in lower courts. At its broadest, the principle is that disputes about the scope of judicial power are constitutional matters.\textsuperscript{149} For instance, in \textit{Tasima}, the Court assumed jurisdiction over a dispute about whether a court may refuse to adjudicate a review application if there is a court order directing that the impugned decision be implemented.\textsuperscript{150} Similarly, in \textit{ACSA} the Court had jurisdiction over whether a settlement agreement setting aside a previous court order can be made an order of court.\textsuperscript{151} The Court has also held that it has jurisdiction over contempt of court proceedings, since those proceedings relate to the enforcement of court orders.\textsuperscript{152} The rationale for Principle 5 is obvious: the Court has the duty to oversee and ensure the administration of justice in all courts.

The Court has not limited its jurisdiction under this rule to the high court. The Court has exercised jurisdiction over whether the Land Claims Court had the power to appoint a special master.\textsuperscript{153} It also exercised jurisdiction over the scope of the powers of the Competition Appeal Court.\textsuperscript{154} In this context, since the lower court is governed by statute, there is significant overlap with Principle 3. The overlap was made clear in \textit{Standard Bank}, where the Court invoked both the principle of legality and fair litigation to assert jurisdiction over an issue relating to the powers of the Competition Appeal Court.\textsuperscript{155}

The Court has asserted jurisdiction over certain allegations of unfair process and irregularities in a lower court. The Court has held that the question of whether a judicial officer should recuse himself or herself is a constitutional matter.\textsuperscript{156} Although, in \textit{Tjiroze} the Court declined to take jurisdiction because ‘the underlying factual question whether [the allegedly biased judge] was conflicted must first be resolved. In truth, therefore, this is a factual dispute dressed in constitutional garb’.\textsuperscript{157} Unfortunately, \textit{Tjiroze} directly contradicts \textit{Basson}, which held that the question of bias is a legal one, and where the Court considered the record in detail to ascertain whether the judge concerned was biased.\textsuperscript{158}

\textsuperscript{149} \textit{Tasima} (note 12 above) at 62.

\textsuperscript{150} Ibid.

\textsuperscript{151} \textit{Airports Company South Africa v Big Five Duty Free (Pty) Limited} [2018] ZACC 33, 2019 (2) BCLR 165 (CC), 2019 (5) SA 1 (CC).

\textsuperscript{152} \textit{Matjhabeng Local Municipality v Eskom Holdings Limited; Mkhonto v Compensation Solutions (Pty) Limited} [2017] ZACC 35, 2017 (11) BCLR 1408 (CC), 2018 (1) SA 1 (CC) at para 69; Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma & Others [2021] ZACC 18 at para 24 onwards.

\textsuperscript{153} \textit{Mwelase v Director-General for the Department of Rural Development and Land Reform} [2019] ZACC 30, 2019 (11) BCLR 1358 (CC), 2019 (6) SA 597 (CC).

\textsuperscript{154} \textit{Standard Bank} (note 75 above).

\textsuperscript{155} Ibid at para 41.

\textsuperscript{156} \textit{S v Basson} [2004] ZACC 13, 2005 (1) SA 171 (CC), 2004 (6) BCLR 620 (CC) at para 21; \textit{Ramabele v S; Msimango v S} [2020] ZACC 22, 2020 (11) BCLR 1312 (CC) at para 34.

\textsuperscript{157} \textit{Tjiroze v Appeal Board of the Financial Services Board} [2020] ZACC 18 at para 16.

\textsuperscript{158} \textit{S v Basson} [2005] ZACC 10, 2005 (12) BCLR 1192 (CC), 2007 (3) SA 582 (CC) para 19ff.
The Court has assumed, without deciding, that it has jurisdiction over whether judges provided adequate reasoning for decisions relating to leave to appeal.\textsuperscript{159} It similarly assumed, without deciding, that it had jurisdiction to review the Supreme Court of Appeal’s President’s decision to not reconsider a petition for leave to appeal.\textsuperscript{160}

The Court has developed a set of sub-rules with respect to judicial irregularities impacting the right to a fair trial. Most of these cases turn on an interpretation of fairness in section 35(3). These cases could then be Principle 1 type cases. For instance, in \textit{Van der Walt}, the applicant was convicted of culpable homicide. The magistrate decided on the admissibility of various pieces of evidence for the first time in the judgment on conviction. She also introduced medical evidence through her own research in the judgment. The Court held that its jurisdiction is engaged where the alleged irregularity is sufficiently serious to undermine basic notions of trial fairness and justice. Not all procedural irregularities are sufficiently serious to constitute an infringement of the constitutional right to a fair trial, but those that are raise a constitutional matter. On the facts, the pronouncement on admissibility at the stage of conviction and reliance on medical literature not proved in testimony implicated the right to a fair trial, in particular, the right to adduce and challenge evidence.\textsuperscript{161} So, the matter was constitutional.\textsuperscript{162} Similarly, in \textit{Ramabele}, a judgment handed down just after \textit{Van der Walt}, the Court held that the issue of unreasonable delays in criminal proceedings raises a constitutional matter. The Court reiterated that ‘’[t]he right to a trial within a reasonable time is expressly cast as an incident of the right to a fair trial’’.\textsuperscript{163}

But there are some cases that go beyond an interpretation of the right to a fair trial. These cases suggest that the Court exercises its jurisdiction because what is at stake is also the scope of judicial power and the administration of justice. For instance, the Court has held that absent any other constitutional issue, the question of sentence will generally not be a constitutional matter. The Court held that an irregularity in sentencing is insufficient to raise a constitutional matter; there must also be a failure of justice.\textsuperscript{164} The invocation of justice, instead of fairness in section 35(3), suggests that the ground of jurisdiction is not necessarily based on the right to a fair trial, but in the Court’s power to regulate judicial proceedings in lower courts. As another example, in \textit{Makhokha}, the Court set aside a sentencing order that contravened the requirement in the CPA that the maximum period for non-parole is two-thirds of the sentence.\textsuperscript{165} \textit{Makhokha} suggests that the Court will assume jurisdiction over sentencing disputes where it can be shown

\begin{itemize}
\item[\textsuperscript{159}] Mphahlele \textit{v} First National Bank of South Africa Ltd [1999] ZACC 1, 1999 (2) SA 667, 1999 (3) BCLR 253 at para 7.
\item[\textsuperscript{160}] Liesching \textit{v} S [2018] ZACC 25, 2018 (11) BCLR 1349 (CC), 2019 (4) SA 219 (CC) at para 127. Although, in Cloete \textit{v} S; Sekgala \textit{v} Nedbank Limited [2019] ZACC 6, 2019 (5) BCLR 544 (CC), 2019 (4) SA 268 (CC), the Court explained that ordinarily such appeals will not fall within its jurisdiction since they concern factual disputes.
\item[\textsuperscript{161}] Van der Walt \textit{v} S [2020] ZACC 19, 2020 (2) SACR 371 (CC) at para 15.
\item[\textsuperscript{162}] Also see M \textit{v} S; A S B \textit{v} S; September \textit{v} S [2018] ZACC 27, 2018 (2) SACR 592 (CC), 2018 (11) BCLR 1397 (CC) at para 35, which held that whether the failure to include the relevant section of the Criminal Law Amendment Act 105 of 1997’’ in a charge sheet infringes an accused’s right to be informed of the charge with sufficient detail to answer it is a constitutional matter. See further Phakane \textit{v} S [2017] ZACC 44, 2018 (1) SACR 300 (CC), 2018 (4) BCLR 438 (CC) at para 23, which held that whether the state’s failure to provide a record of proceedings on appeal implicates the right to a fair trial and thus raises a constitutional matter.
\item[\textsuperscript{163}] Ramabele (note 156 above) at para 34.
\item[\textsuperscript{164}] S \textit{v} Bogaards [2012] ZACC 23, 2013 (1) SACR 1 (CC), 2012 (12) BCLR 1261 (CC) at para 42. See also Makhokha \textit{v} S [2019] ZACC 19, 2019 (7) BCLR 787 (CC), 2019 (2) SACR 198 (CC).
\item[\textsuperscript{165}] Makhokha ibid.
\end{itemize}
that the sentencing judge contradicted legislation by making the sentencing order concerned.\textsuperscript{166} Again, this speaks to judicial power, not only trial fairness.

The Court has asserted jurisdiction over questions of admissibility of evidence mainly by invoking section 35(3). In \textit{Basson}, the Court held: ‘Fairness during a trial is a requirement of the Constitution. Therefore, the question whether the admission of the bail record would be fair to the accused is a constitutional matter and falls within the jurisdiction of this Court’. Similarly, in \textit{Mhlongo}, the Court exercised jurisdiction over ‘whether the Constitution permits the admission of an extra-curial statement by an accused against a co-accused in a criminal trial’.\textsuperscript{167} The Court’s reasoning was that the question ‘implicates the rights to equality before the law and to a fair trial’.\textsuperscript{168} The Court went on to hold that extra-curial statements by an accused cannot be used against a co-accused.

On the reasoning of both \textit{Basson} and \textit{Mhlongo}, an allegation that the admission of specific evidence renders a trial unfair raises a constitutional matter. While \textit{Mhlongo} dealt with a constitutional challenge to a rule of admissibility, its reasoning was centred on the right in section 35(3), which could be implicated, as \textit{Basson} held, by the admission of inadmissible evidence. So, the Court’s jurisdiction extends not only to challenges to principles of evidence, but also to the application of those principles in respect of specific evidence. This was confirmed by \textit{Molaudzi} which simply applied the post-\textit{Mhlongo} position to rule that the admission of certain extra-curial statements was unconstitutional.\textsuperscript{169}

The upshot of \textit{Molaudzi} is that the Court appears to have significant jurisdiction over criminal matters, despite it saying otherwise.\textsuperscript{170} \textit{Molaudzi} suggests that the application of principles of admissibility necessarily raises constitutional issues, since conviction based on inadmissible evidence implicates the right to a fair trial. \textit{Molaudzi} echoes the rationale discussed earlier in \textit{Robinson}, which held that an unlawful extradition would be contrary to the Constitution, thus giving the Court jurisdiction over the application of the Extradition Act. The rationale of these cases implies that the Court has jurisdiction over the application of all criminal legal principles, since a conviction based on a misapplication of substantive criminal law would undermine the right to a fair trial just as much as a misapplied principle of admissibility. This implication could have been avoided if the Court only invoked the administration of justice as a rationale for intervening in cases of wrongly admitted evidence. The argument would be that the administration of justice only concerns the procedures and powers of a court, like admitting evidence.\textsuperscript{171} The administration of justice, on the other hand, does not justify intervention in matters in which substantive criminal law is misapplied. The issue for this approach, however, is that there is no reason why the administration of

\begin{footnotesize}
\textsuperscript{166} \textit{Klaas v S} [2018] ZACC 6, 2018 (5) BCLR 593 (CC), 2018 (1) SACR 643 (CC), where the failure to consider the relevant minimum sentencing provisions was said to raise a constitutional matter as it implicated the right to a fair trial.


\textsuperscript{168} \textit{Mhlongo} ibid.

\textsuperscript{169} \textit{Molaudzi} (note 167 above) at para 46. See also \textit{Khanye v S} [2017] ZACC 29, 2017 (11) BCLR 1399 (CC), 2017 (2) SACR 630 (CC).

\textsuperscript{170} \textit{Boesak} (note 13 above).

\textsuperscript{171} For example, see s 21 of the Superior Courts Act 10 of 2013, which envisages wrongly admitted evidence as a ground of reviewing a magistrate’s decision.
\end{footnotesize}
justice cannot also include a substantive element, especially since the right to fair trial is constitutionally guaranteed. Put differently, justice is hardly administered if trials are unfair.

The Court has attempted to avoid the implication that it has wide-ranging jurisdiction over criminal matters by introducing the negative Principles 7 and 8, discussed below. As we will see, this introduction is difficult to defend. We should note that even if the Court has jurisdiction, on appeal the Court will be slow to interfere with the decision to admit or not admit evidence.\textsuperscript{172} The decision is considered an exercise of true discretion, which can only be interfered with in limited circumstances.\textsuperscript{173}

F  Principle 6: Arguable point of law of general public importance

I have already mentioned that the Court has ‘jurisdiction’ over arguable points of law of general public importance. This was the basis on which the Court had jurisdiction in \textit{Jacobs}, and this is the basis on which the Court will have jurisdiction over the interpretation of constitutionally neutral legislation. I now deal with this principle in further detail.

Section 167(3)(b) provides:

The Constitutional Court—
(b) may decide—
(i) constitutional matters; and
(ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that
the matter raises an arguable point of law of general public importance which ought to be
considered by that Court (emphasis added.)

The text of section 167(3)(b)(ii) is clear. The Court may decide constitutional matters and ‘any other matter’. One would have thought that section 167(3)(b)(ii) would bring an end to confusion over the Court’s jurisdiction, since the Court may now decide ‘any other matter’. The Court can only decide those other matters if it \textit{grants leave to appeal} for certain reasons. But granting leave to appeal is distinct from jurisdiction. Jurisdiction is thus general and leave to appeal is prescribed. If we adopt this interpretation of section 167(3)(b)(ii), the main issue in this article is resolved: the Court has jurisdiction over all matters. But the Court has not interpreted section 167(3)(b)(ii) this way. For no express reason, and contrary to the plain meaning of section 167(3)(b)(ii), the Court has developed Principle 6 in the context of jurisdiction. The rule developed by the Court is that the Court has \textit{jurisdiction} over arguable points of law of general public importance.\textsuperscript{174} Whether these points ‘ought to be heard’ by the Court is then a question of granting leave to appeal.

The leading case for Principle 6 is \textit{Paulsen}.\textsuperscript{175} The Court undertook a systematic analysis of section 167(3)(b)(ii), explaining each element of its new basis for jurisdiction. The Court held that there are three elements to section 167(3)(b)(ii). First, the matter must raise an arguable point of law. This element is bifurcated: the point must be one of law and it must be arguable. A point is about law when it is not about facts. The Court held that cases about disputes of

172 Basson (note 158 above) at paras 113–114.
175 \textit{Paulsen} (note 17 above).
fact, discussed below under Principle 7, will be instructive in determining this requirement.\textsuperscript{176} A point is arguable if it has some prospects of success. Not all legal arguments are ‘arguable’ then.\textsuperscript{177} Unmeritorious points, even if engineered into seemingly convincing arguments, are not arguable. Instead, the Court will consider a range of factors in determine whether a point is arguable:

1. The Supreme Court of Appeal may have expressed itself on the matter by a narrow majority.
2. A minority view in the Supreme Court of Appeal may be quite forceful.
3. Different divisions of the High Court may have expressed divergent views on the point, with no pronouncement on it by the Supreme Court of Appeal.
4. There may be no authoritative pronouncement on an issue; with available, cogent academic or expert views on it being divergent.
5. The matter may raise a new and difficult question of law; or
6. The answer to the question in issue may not be readily discernible.\textsuperscript{178}

Secondly, the arguable point of law must be of general public importance. After considering the position in Kenya and the United Kingdom, the Court held: ‘for a matter to be of general public importance, it must transcend the narrow interests of the litigants and implicate the interest of a significant part of the general public’. Quoting from an English case, the Court explained that ‘issues do not have to be of importance to all citizens or the whole nation in order to be of “general public importance”, it is enough to be “of importance to a sufficiently large section of the public”’.\textsuperscript{179} The Court warned: ‘It will serve a litigant well to identify in clear language what it is that makes the point of law one of general public importance’.\textsuperscript{180} Thirdly, the arguable point of law of general public importance ‘ought to be considered’ by the Court. The Court in \textit{Paulsen} held that this third element equates to the interests of justice enquiry in deciding to grant leave to appeal in constitutional matters.\textsuperscript{181} I discuss leave to appeal in part V below.

We should note that \textit{Paulsen}, no doubt deliberately, does not say that the Court only has \textit{jurisdiction} over cases that meet the above three requirements. On the contrary, the Court held that ‘[r]educed to bare essentials, this section provides for this Court to \textit{grant leave}’ if the above three requirements are met.\textsuperscript{182} The relevant part of Madlanga J’s judgment in \textit{Paulsen} concludes with the finding that leave to appeal is granted – not that jurisdiction is assumed.\textsuperscript{183} Only in subsequent cases the Court has held, inexplicably, that the Court only has jurisdiction over matters raising arguable points of law of general public importance.\textsuperscript{184} For example in \textit{Mashongwana} the Court held: ‘This Court also derives jurisdiction from the realisation that this

\textsuperscript{176} Ibid at para 20.
\textsuperscript{177} Ibid at para 21.
\textsuperscript{178} Ibid at para 23.
\textsuperscript{179} Ibid at para 26, citing \textit{R (on the application of Compton) v Wiltshire Primary Care Trust} [2008] ECWA Civ. 749; [2009] 1 All ER 978 (\textit{Wiltshire Primary Care Trust}) at para 16.
\textsuperscript{180} Ibid.
\textsuperscript{181} Ibid at para 30. Confirmed in \textit{Tiekiedraai} (note 18 above) at para 12.
\textsuperscript{182} \textit{Paulsen} (note 17 above) at para 16.
\textsuperscript{183} Ibid at para 30.
\textsuperscript{184} Further recent examples include \textit{Big G Restaurants (Pty) Limited v Commissioner for the South African Revenue Service} [2020] ZACC 16, 2020 (6) SA 1 (CC) at paras 10–11 (which was penned by Madlanga J, the author of \textit{Paulsen}); and \textit{Media 24} (note 89 above) at para 42–45; \textit{De Klerk v Minister of Police} [2019] ZACC 32, 2019 (12) BCLR 1425 (CC), 2020 (1) SACR 1 (CC) at para 11.
matter raises an arguable point of law of general public importance’. This is incorrect. The Court has jurisdiction over constitutional matters and all other matters. It can only grant leave to appeal for non-constitutional matters in certain circumstances, but that is different from jurisdiction.

Since Paulsen, the Court has expanded on its approach to section 167(3)(b)(ii). In Tiekiedraai, the Court held that interpreting the parties’ contract did not raise an arguable point of law of general public importance. Interpreting the contract was a legal issue but was not of public importance. The Court held: ‘It might be different if the lease had been a standard form document in widespread use, affecting a large number of consumers’. The Court has since assumed jurisdiction based on section 167(3)(b)(ii) over the interpretation of contracts it finds to be widespread.

As argued in Principle 2 above, section 167(3)(b)(ii) implies that the Court will have jurisdiction over all meritorious disputes concerning the interpretation of legislation. The Court has repeatedly held that the meaning of legislation is a legal issue, and by its nature one of public importance. The only remaining question will be whether the point raised by the applicant has prospects of success, a factor the Court nonetheless considers in deciding leave to appeal. The upshot is that section 167(3)(b)(ii) provides a way out of the conflicting dicta on whether interpretation is necessarily a constitutional matter.

The same is true of interpretations of common law rules. The Court has held that determining wrongfulness in the context of delict raises an arguable point of law of general public importance. In Mashongwa, the applicant was assaulted and thrown off a moving train. He sued the Passenger Rail Agency of South Africa (PRASA) for the damages he sustained. The issue was whether PRASA was delictually liable to the applicant, including whether its omission to have security on the train was wrongful. The Court held: ‘the safety and security of the poor people who rely on our train network to go to work or move from one place to another does raise an arguable point of law of general public importance’. The Court’s finding is significant in two respects. First, it means that the application of the wrongfulness test is an arguable point of law. Secondly, the Court found jurisdiction based on wrongfulness, but

185 Mashongwa v PRASA [2015] ZACC 36, 2016 (2) BCLR 204 (CC), 2016 (3) SA 528 (CC) at para 14.
186 Tiekiedraai (note 18 above) at para 13.
187 Ibid at para 14. The Court distinguished Tiekiedraai from Mokone v Tassos Properties CC [2017] ZACC 25, 2017 (10) BCLR 1261 (CC), 2017 (5) SA 456 (CC) since the latter concerned a contractual clause that was widely used.
188 Big G Restaurants (note 184 above) at para 14.
189 Maswanganyi v Minister of Defence and Military Veterans [2020] ZACC 4, (2020) 41 ILJ 1287 (CC), 2020 (6) BCLR 657 (CC); at paras 32–33; Masemola v Special Pensions Appeal Board [2019] ZACC 39, 2019 (12) BCLR 1520 (CC), 2020 (2) SA 1 (CC) at para 18; Ruta v Minister of Home Affairs [2018] ZACC 52, 2019 (3) BCLR 383 (CC), 2019 (2) SA 329 (CC) at para 12; and Ascendis (note 442 above) at paras 36–37, where the Court held: ‘To answer [the question before the Court], this Court has to ascertain whether the different grounds housed under s 61 of the Act constitute a single cause of action or not. This is an interpretational exercise of provisions contained in legislation, which surely triggers our jurisdiction on its own’ (emphasis added.)
190 See below part V.
191 Interpretation of customary law will also trigger jurisdiction under s 167(3)(b)(ii). The Court has not yet assumed jurisdiction over a customary law matter on this basis.
192 Mashongwa (note 185 above).
193 Ibid at para 14.
194 Wrongfulness can also raise a constitutional matter. The Court held at para 13 that PRASA’s duties under s 7(2) were implicated in the wrongfulness analysis, raising a constitutional matter.
went on to determine negligence and causation, which are factual issues. The upshot of this finding is as suggested above: the Court has interpreted its new jurisdiction as extending to matters connected to arguable points of law of general public importance. This does not imply that the Court will always determine factual matters connected to arguable points of law. But it does mean that the Court can and will do so if the interests of justice so demand.

To conclude, even though section 167(3)(b)(ii) gives the Court jurisdiction over all matters, the Court has refused to make this clear. Instead, it considers its jurisdiction to be determined by the grounds for leave to appeal mentioned in section 167(3)(b)(ii). These grounds are not as wide as a broad interests of justice test. But they have been interpreted broadly by the Court.

G Conclusion on positive principles

The above principles do not paint a picture of a specialist court. The principles imply that the Court has jurisdiction over all disputes involving legislation, whether the dispute is over the meaning of the legislation or the application of legislation (Principles 2, 4, and 6). The Court has jurisdiction over all criminal matters, labour matters, and all matters regulated by legislation. Another implication is that the Court will hear factual disputes relating to constitutional matters or arguable points of law. Given the breadth of both grounds of jurisdiction, this is significant scope to hear factual disputes. The Court could also have jurisdiction over common law disputes, since most common law remedies would ‘enforce’ the Constitution, even if only indirectly. On the reasoning in some cases, notably Zondo DCJ’s in Jacobs, the Court’s jurisdiction is truly general, since all law (either common law or legislation) is aimed at a constitutionally sanctioned objective.

IV NEGATIVE PRINCIPLES

The Court has resisted the conclusion that its jurisdiction is limitless. It has done so by introducing three negative principles on jurisdiction:

• Principle 7: Factual disputes
• Principle 8: Application of settled principles
• Principle 9: Assessment of jurisdiction from pleadings

These principles are discussed in turn. Once again, the discussion has two elements. First, the principle is described; secondly the principle is criticised. As my description of the negative principles reveals, none of the negative principles come directly from the Constitution, unlike most of the positive principles. Instead, the Court has developed these negative principles. My criticism of the negative principles is that the principles cannot be sustained either on their own terms nor given the rationales and implications of the six positive principles discussed above. The implication, which I return to when discussing leave to appeal, is that the negative rules can easily be abandoned. Whatever value the negative rules bring can, moreover, be easily accounted for by the test for leave to appeal.

195 Ibid at paras 31 and 63. It is well-established that both these legs of delictual liability are factual in nature. See most recently Osman Tyres and Spares CC v ADT Security (Pty) Ltd [2020] ZASCA 33 at para 31.

196 Though no express reason is given for why the Court considered negligence and causation in Mashongwa (note 185 above), the only explanation is that the Court considered it in the interests of justice to do so. Presumably, had the facts been harder to determine, for example, the Court might have remitted the matter to the trial court.
A  Principle 7: Factual disputes

The Court has repeatedly refused to hear matters that only concern factual disputes. The seminal case for this principle is Boesak. The applicant challenged the Supreme Court of Appeal’s finding that he was guilty of fraud and theft. He argued that the Supreme Court of Appeal had not evaluated the evidence before it correctly when deciding to convict him. The Court held that it had no jurisdiction to hear the applicant’s appeal. It held that a challenge to a judicial decision on the basis that it is wrong on the facts is not a constitutional matter. It gave three different rationales for this conclusion:

1. otherwise all criminal matters would be constitutional matters;
2. there is a need for finality in criminal matters; and
3. disagreement with the Supreme Court of Appeal’s assessment of the facts is not sufficient to constitute a breach of the right to a fair trial. 197

The first rationale has not been consistently applied by the Court. In other contexts, the Court has no issue with subsuming an entire area of law into its jurisdiction. In NEHAWU, the Court was clear: ‘If the effect of this requirement is that this Court will have jurisdiction in all labour matters that is a consequence of our constitutional democracy’. 198 In administrative law, the Court has gone so far as to render questions of fact as constitutional matters. In Camps Bay Retailers, the Court held that the ‘interpretation and application of PAJA ... will always constitute constitutional matters ...’. This holds true even where the outcome of the issue raised under PAJA depends on the determination of factual disputes’. 199 It is unclear then why criminal law cannot be so subsumed into ‘constitutional matters’. The second rationale begs the question as to why finality ends with the Supreme Court of Appeal. The third rationale might be true; an accused could have a fair trial even when a judge incorrectly assesses evidence. Nonetheless, their right to freedom and security of person would necessarily be limited, and often the right to a fair trial is implicated, when a court incorrectly evaluates evidence and convicts an accused incorrectly. For instance, in De Klerk the Court held that it had jurisdiction over whether an arrest was lawful since the ‘issue as to whether the applicant’s detention was consistent with the principle of legality and his right to freedom and security of the person in s 12(1) of the Constitution is a constitutional matter’. 200 If the legality of an arrest limits the right in section 12(1), so too must an incorrect conviction. So, the three rationales in Boesak are hard to accept.

The Court has applied the principle since Boesak, and has offered a fourth rationale: (4) the Court should not interfere with the factual findings of a lower court. 201 The difficulty with this rationale is that the Court is willing to resolve factual disputes in labour and administrative law contexts, as well as when the factual dispute is linked to a constitutional matter. 202 Moreover, if the concern is interference, then this is addressed by tempering the standard of review for factual findings, not by declining jurisdiction.

197 Boesak (note 13 above) at para 15.
198 NEHAWU (note 72 above) at para 16.
199 Camps Bay Ratepayers (note 104 above) at para 51. See also Koyabe v Minister of Home Affairs [2009] 12 BCLR 1192 (CC), 2010 (4) SA 327 (CC) at para 32.
200 De Klerk (note 184 above) at para 11.
202 Rail Commuters Action Group v Transnet Ltd t/a Metrorail [2004] ZACC 20, 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC) at para 52.
We could try to come up with further rationales. We might argue that factual disputes are necessarily mundane and should not bother the Court, but we know that this cannot be true. Factual disputes are sometimes important, and if they are not important leave to appeal can be refused. We might argue that the Court is not institutionally equipped to deal with facts since it does not hear the evidence itself. But this is inconsistent with how the Supreme Court of Appeal regularly overturns factual findings based on the record of proceedings. Finally, we might say that the Court will be flooded with applications if the Court said it had jurisdiction over factual disputes. But (a) then the Court should never hear factual disputes, including in administrative and labour proceedings; and (b) applications can be deterred if the factors for granting leave to appeal are made clear by the Court.

There is then no cogent rationale for Principle 7. Given Principles 1 to 6, there is no reason why the Court categorically does not have jurisdiction over purely factual disputes. To say so contradicts at least one of the above rules. To say that Principle 7 should be an exception to the above rules, as the Court has tried to do, is hard given the rationales for the rule. Of course, whether leave to appeal should be granted in such cases is a separate issue.

Nonetheless, Principle 7 exists for now. 203 It is worth discussing how the Court has applied the rule, at times struggling to do so consistently. The Court fully discussed the difference between legal and factual disputes in Mtokonya. 204 The discussion did not arise in the context of jurisdiction, but in the context of prescription. The applicant argued that prescription did not start running until he realised that the respondent’s conduct was wrongful. The applicant argued that this is what is meant by s 12(3) of the Prescription Act, which provides that ‘a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises’ (emphasis added). The Court rejected the argument because whether conduct is wrongful is not a question of fact but a question of law. The Court defined a question of fact as being one that is capable of proof 205 A question of law is when a Court is bound to answer in accordance with a rule of law 206 Whether conduct is wrongful, the Court held, is not proven as fact. Wrongfulness is a legal conclusion that follows from applying the legal rules relating to wrongfulness. Hence prescription did not start to run only when the applicant knew of the wrongfulness of the respondent’s conduct.

The Court struggles to apply the distinction between law and fact. Two recent examples are worth noting. First, in Kruger, the Court split 6–4 over whether the applicant’s case was only a factual dispute, with the majority finding that it was. The case concerned whether the applicant’s claim for malicious prosecution against the National Prosecuting Authority (NPA) had prescribed. The issue was whether the applicant had knowledge of the ‘the facts from which the debt arises’ at the time the NPA withdrew its charges or, much later, when he had access to the police docket. If the former, the debt prescribed; if the latter, it had not under s 12(3) of the Prescription Act. Froneman J, writing for the majority, held that the matter only raised the question of when the applicant knew the material facts giving rise to his cause of action. This is a factual question. Zondo DCJ, dissenting, held that the matter involved interpreting the Prescription Act. The interpretative issue was whether ‘knowledge’ in s 12(3)

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203 For recent examples, see Ramabele (note 156 above) at para 33; Buffalo City Metropolitan Municipality v Metgavis (Pty) Limited [2019] ZACC 9, 2019 (5) BCLR 533 (CC).
205 Ibid at para 44.
206 Ibid at para 42.
meant only knowing that charges had been withdrawn. Jafta J, also dissenting, took it a step further, holding that the application of the Prescription Act, since it limits the right in section 34, is necessarily a constitutional matter.

Theron J wrote a separate judgment. She held that given the strong disagreement between the judges, the matter should have been set down for a hearing. She refused to pronounce on jurisdiction. Theron J, in obiter comments, nonetheless exposed the difficulty with the majority’s and minority’s approaches. With respect to the majority’s approach, Theron J pointed out that the case might not have involved a factual dispute; it may have involved an application of legislation that impacts a constitutional right to undisputed facts. In that case, the Court might have had jurisdiction. As for the minority’s approach, Theron J suggested that there was no dispute over the meaning of the Prescription Act. All the judges agreed that if a creditor did not know that a prosecution was malicious, then prescription should not begin to run. So, Zondo DCJ’s interpretative question is hardly an interpretative question. Zondo DCJ’s approach elides the difference between proving knowledge with respect to a fact (withdrawal of charges) and defining the meaning of knowledge in law.

The second example is Media 24. As discussed above, a majority of six judges held that the matter raised an arguable point of law of general public importance. Four judges disagreed, holding that the issue was ‘a mixed one of fact and law’ and not an arguable point of law. The reasoning of this minority was that determining the meaning of predatory pricing entails assessing the relative merits of expert evidence regarding predatory pricing. Doing so, they held, ‘does not fall within the functional competence of this Court’ and ‘is not a purely legal interpretative exercise’.

The reasoning reveals a strong hesitation by some members of the Court to adjudicate complex competition law matters. More generally, the reasoning is difficult to reconcile with the Court’s approach to engage in legal questions that have policy implications over which experts disagree. Makwanyane is the obvious example, but so too are Prince III and New Nation Movement. The reasoning is also opaque on what makes a question ‘mixed’ with facts and law. That there are policy implications to interpreting legislation cannot be what turns a legal question (even partially) into a factual one. In any event, as Theron J noted, in Mtokonya the Court held that if a rule of law must be applied prior to the reaching of a conclusion, then that conclusion is necessarily one of law. It follows that the Court may have jurisdiction to adjudicate matters involving mixed questions of fact and law. Mere ‘mixture’ does not necessarily imply that the matter does not raise legal questions.

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207 Kruger (note 1 above) at para 22.
208 Ibid at para 105.
210 Ibid at para 85.
211 Media 24 (note 89 above) at para 134.
212 Ibid at para 137.
214 Media 24 (note 89 above) at paras 43–44.
215 Ibid at para 144 fn 173.
B  Principle 8: Application of settled principles

There is ample authority for the proposition that the Constitutional Court ordinarily has no jurisdiction over the misapplication of settled legal principles.\(^{216}\) The now seminal case on this principle is *Jiba*. The case concerned the application to strike three advocates off the roll: Nomgcobo Jiba, Lawrence Mrwebi and Sibongile Mzinyathi. All three were senior prosecutors, with Jiba being the Acting National Director of Public Prosecutions at the time of her impugned conduct. All three had been implicated in dishonesty and bad faith in various reviews of their prosecutorial decisions. For instance, in the *Zuma* matter, the Supreme Court of Appeal described Jiba as having been deliberately unhelpful and having ‘been less than truthful’.\(^{217}\) At the request of the NPA, the General Council of the Bar of South Africa (GCB) initiated proceedings to strike them off the roll. They succeeded in the high court, but the decision was overturned on appeal by the Supreme Court of Appeal. The GCB applied for leave to appeal to the Constitutional Court.

The Court refused leave to appeal for want of jurisdiction. Jafta J, for the majority, held:

1. For a constitutional issue to arise the claim advanced must require the consideration and application of some constitutional rule or principle in the process of deciding the matter.\(^{218}\)
2. The GCB sought to have the respondents’ names removed from the roll of advocates because they were no longer fit and proper persons in terms of s 7 of the Admission of Advocates Act 74 of 1964 (Admission Act).
3. The interpretation and application of s 7 of the Admission Act does not of itself alone raise a constitutional issue.
4. So, no constitutional issue arises.

Premise 1 is a summary of the principles discussed above. Premise 2 relates to how the GCB pleaded its case and how jurisdiction is to be determined based on pleadings.\(^{219}\) To justify premise 3, Jafta J held that no constitutional right or value was implicated by the interpretation or application of s 7 of the Admissions of Advocates Act 74 of 1964 in this case.\(^{220}\) Instead, all that was at issue was the application of the test for fitness and propriety. The test was not in dispute, only its application to the facts.\(^{221}\) The application of a settled test to a set of facts does not on its own raise a constitutional issue.\(^{222}\)

There are at least four issues with Principle 8. The first is how it was applied in *Jiba*. The Court acknowledged that on the facts, the application of s 7 of the Admissions Act would result in the removal of the Deputy National Director of Public Prosecutions.\(^{223}\) The Court held that the Admissions Act is separate from the National Prosecuting Authority Act 32 of 1998 and

\(^{216}\) *Booysen v Minister of Safety and Security* [2018] ZACC 18, 2018 (6) SA 1 (CC), 2018 (9) BCLR 1029 (CC) at para 50; *Loureiro* (note 13 above) at para 33; *Mhattha* (note 140 above) at paras 193–194; *Mankayi* (note 21 above) at paras 10–12; *Phoebus Apollo Aviation CC v Minister of Safety and Security* [2002] ZACC 26, 2003 (2) SA 34 (CC), 2003 (1) BCLR 14 (CC) (*Phoebus Apollo*) at para 9.


\(^{218}\) *Jiba* (note 3 above) at para 38.

\(^{219}\) See below on Principle 9.

\(^{220}\) *Jiba* (note 3 above) at para 44.

\(^{221}\) Ibid at para 47.

\(^{222}\) Ibid at para 49.

\(^{223}\) Ibid at para 53.
interpreting one did not entail interpreting the other.\footnote{Ibid.} But this misses the point. The NPA Act is constitutionally envisaged legislation, so the Court would have had jurisdiction over its application based on Principle 4.\footnote{Section 179 of the Constitution.} Moreover, in \textit{Corruption Watch} the Court held that the independence of the NPA, which includes the protection of senior prosecutors from removal, is constitutionally guaranteed.\footnote{\textit{Corruption Watch NPC v President of the Republic of South Africa; Nsasana v Corruption Watch NPC} [2018] ZACC 23, 2018 (10) BCLR 1179 (CC), 2018 (2) SACR 442 (CC) at para 19.} In \textit{Certification II}, the Court held concerning the NPA that ‘[t]here is … a constitutional guarantee of independence, and \textit{any} legislation or executive action inconsistent therewith would be subject to constitutional control by the courts’.\footnote{\textit{Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996} [1996] ZACC 26, 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 146 (emphasis added.)} If the independence of the NPA is a constitutional matter, and independence includes security of tenure, then the form of the removal of NPA senior officials should not matter. If in substance a case entailed the removal of an NPA official, then a constitutional matter arises.\footnote{\textit{In S v Basson} [2004] ZACC 13, 2005 (1) SA 171 (CC), 2004 (6) BCLR 620 (CC) at para 33, the Court considered whether a charge was lawfully quashed because quashing of charges interferes with the NPA’s constitutional duty to prosecute.} Accordingly, \textit{Jiba} was wrongly decided.\footnote{Additionally, we might think that since all advocates owe a duty, which is paramount to the Court, then the Court has jurisdiction over their fitness and propriety to be advocates. Principle 5, which concerned the administration of courts, could be used to assert jurisdiction in this way. Another basis for jurisdiction would be that removal of a senior prosecutor impacts on their exercise of public power. See the discussion of \textit{Public Protector v SARS} (note 101 above) under Principle 5.}

However, the above argument was not pleaded by the GCB. The GCB ‘pithily’ pleaded that the case concerned s 7 of the Admission Act and did not link the case to the independence of the NPA.\footnote{\textit{Jiba} (note 3 above) at para 46.} If the Court assesses jurisdiction based on pleadings, then the Court could not have assumed jurisdiction in \textit{Jiba} because of the GCB’s pleadings. I discuss this principle in the next subsection.

The second issue with Principle 8 is its inconsistent application to laws that entail the application of constitutional values. There is one line of cases holding that the application of a rule that includes a direct consideration of public policy necessarily raises a constitutional issue, since public policy is grounded in the Constitution. This is no matter how ‘settled’ that rule is. A recent example is \textit{EFF v Gordhan; Public Protector v Gordhan}.\footnote{\textit{Economic Freedom Fighters v Gordhan; Public Protector v Gordhan} [2020] ZACC 10, 2020 (8) BCLR 916 (CC), 2020 (6) SA 325 (CC).} The applicant, the Public Protector, appealed the granting of an interim interdict against her by the high court to the Constitutional Court. The Court acknowledged that it generally does not have jurisdiction over an alleged misapplication of established legal tests.\footnote{Ibid at para 39.} However, it held:

\begin{enumerate}
\item Applying the test for granting an interim interdict against a state entity includes considering the impact the interdict could have on the entity’s constitutional functions and ensuring that the order promotes the objects, spirit and purport of the Constitution;
\item An entity’s constitutional functions and the objects, spirit and purport of the Constitution are constitutional matters;
\end{enumerate}

\begin{footnotesize}
\begin{itemize}
\item\footnote{Ibid.}
\item\footnote{Section 179 of the Constitution.}
\item\footnote{\textit{Corruption Watch NPC v President of the Republic of South Africa; Nsasana v Corruption Watch NPC} [2018] ZACC 23, 2018 (10) BCLR 1179 (CC), 2018 (2) SACR 442 (CC) at para 19.}
\item\footnote{\textit{Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996} [1996] ZACC 26, 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 146 (emphasis added.)}
\item\footnote{In \textit{S v Basson} [2004] ZACC 13, 2005 (1) SA 171 (CC), 2004 (6) BCLR 620 (CC) at para 33, the Court considered whether a charge was lawfully quashed because quashing of charges interferes with the NPA’s constitutional duty to prosecute.}
\item\footnote{Additionally, we might think that since all advocates owe a duty, which is paramount to the Court, then the Court has jurisdiction over their fitness and propriety to be advocates. Principle 5, which concerned the administration of courts, could be used to assert jurisdiction in this way. Another basis for jurisdiction would be that removal of a senior prosecutor impacts on their exercise of public power. See the discussion of \textit{Public Protector v SARS} (note 101 above) under Principle 5.}
\item\footnote{\textit{Jiba} (note 3 above) at para 46.}
\item\footnote{\textit{Economic Freedom Fighters v Gordhan; Public Protector v Gordhan} [2020] ZACC 10, 2020 (8) BCLR 916 (CC), 2020 (6) SA 325 (CC).}
\item\footnote{Ibid at para 39.}
\end{itemize}
\end{footnotesize}
3. Therefore, applying the test for granting an interim interdict against a state entity raises a constitutional matter.\(^{233}\)

The logic of *EFF v Gordhan* is not novel. The basic idea is that if applying a rule entails invoking constitutional values, normally through the concept of public policy, then the application of that rule raises a constitutional matter. The reasoning was discussed briefly in paragraph III(B) above, when discussing Principle 2. In the context of contract, the Court has held: ‘Whether the enforcement of a contractual clause would be contrary to public policy, in that it is inimical to constitutional values, is a constitutional issue.’\(^{234}\) In respect of delict, the Court has held: ‘an appeal against a finding on wrongfulness on the basis that it failed to have regard to normative imperatives of the Bill of Rights does ordinarily raise a constitutional issue.’\(^{235}\) In the context of defamation, the Court went so far as to hold that it had jurisdiction over a matter, which amounted to an application of principles of defamation, ‘since it involves a nuanced and sensitive approach to balancing the interests of the media, in advocating freedom of expression, privacy and dignity of the applicants’.\(^{236}\)

Nevertheless, there is a line of cases going in the opposite direction: the application of a settled rule does not raise a constitutional matter even when that rule entails direct considerations of public policy. *Booyzen* is the prime example.\(^{237}\) The applicant’s partner, a police officer, had been dining with the applicant at the applicant’s home. He was doing so while on duty and in uniform. During the meal, he shot the applicant in the face with his police pistol. The applicant sued the Minister of Police for damages. She won in the high court but lost in the Supreme Court of Appeal. She appealed to the Constitutional Court. Her ground of appeal was that the Supreme Court of Appeal was wrong in its normative assessment of whether there was a sufficient link between the policeman’s conduct and the Minister of Police. The Court held that the applicant’s case was nothing more than disputing the application of the settled legal test for vicarious liability, not raising a constitutional issue.\(^{238}\) The Court emphasised how in *K* the Court held that not all applications of vicarious liability will raise constitutional issues.\(^{239}\)

The conclusion and reasoning of the Court in *Booyzen* is difficult to sustain. The Court, despite declining jurisdiction, found that ‘[t]he difference between the reasoning in the Supreme Court of Appeal majority and the minority (and the high court) judgments ultimately comes down to the weight that was attached to the different normative considerations underpinning vicarious liability based on their assessment of the facts’.\(^{240}\) While *K* held that

\(^{233}\) Ibid at para 40.

\(^{234}\) *Beadica* (note 68 above) at para 16; *A M v H M* [2020] ZACC 9, 2020 (8) BCLR 903 (CC) at para 25.


\(^{237}\) Other examples include *Phoebus Apollo* and *Loureiro*, where the Court held: ‘the mere fact that a matter is located in an area of the common law that can give effect to fundamental rights does not necessarily raise a constitutional issue. It must also pose questions about the interpretation and development of that law and not merely involve the application of an uncontroversial legal test to the facts’. This was with respect to the same rules that were considered in *K*. As others have commented, the distinction between *Loureiro* and *K* is unsustainable. See *Seedorf* (note 15 above) at 4-64.

\(^{238}\) *Booyzen* (note 216 above) at para 57.

\(^{239}\) Ibid at para 53.

\(^{240}\) Ibid at para 58.
not all applications of vicarious liability will be constitutional matters, it said that they often
will, especially where the normative assumptions imbedded in the law are at issue.241 If the dispute
was about normative weight, and if normative weight is grounded in the Constitution, then
the matter raises a constitutional issue.242

A third problem with Principle 8 is maintaining a principled distinction between applying
and developing the common law. As mentioned under Principle 2, in K the Court held that
‘applying’ means deciding a case because the facts fall within the established ambit of a legal
rule. ‘Developing’ then means deciding a case after extending or restricting the ambit of a legal
rule to include or exclude a set of facts unlike any set of facts previous adjudicated.243 This
definition means that there are very few cases that will entail the application of common law
rules. No two cases are identical, meaning that judges develop the law every time they apply
common law rules.244 The Court in K accepted this, holding:

The obligation imposed upon courts by s 39(2) of the Constitution is thus extensive, requiring
courts to be alert to the normative framework of the Constitution not only when some startling
new development of the common law is in issue, but in all cases where the incremental development
of the rule is in issue.245

Just before this finding, the Court explained that ‘incremental development’ refers to how
‘the common law develops incrementally through the rules of precedent’.246 The Court
thus accepted that the application of precedent will almost always entail development of the
common law. For instance, the test for fitness and propriety in Jiba was developed by the lower
courts, since, among other novel factors, no other senior prosecutor has ever been struck off
the roll for failure to disclose evidence in review proceedings.

A fourth issue, assuming that we can maintain the distinction between application and
development, is that there is no reason why the application of legislation giving effect to
constitutional rights is a constitutional matter but the same is not true of common law rules.
In Loureiro, the Court held:

The Loureiro family relies on the law of contract and the law of delict to protect their
constitutionally recognised rights. It is well-established that the law of contract and of delict gives
effect to, and provide remedies for violations of, constitutional rights. However, the mere fact that
a matter is located in an area of the common law that can give effect to fundamental rights does
not necessarily raise a constitutional issue. It must also pose questions about the interpretation
and development of that law and not merely involve the application of an uncontroversial legal
test to the facts.247

If we accept, as the Court does, that common law rules give effect to constitutional rights,
then the Court should have jurisdiction over their application. The jurisdiction exists for the
same reason as given by the Court in NEHAWU in the context of Principle 4. The Court has
jurisdiction over the interpretation and application of constitutional rights. If common law

241 K (note 53 above) at para 22.
242 Compare further Mhlantla J’s more recent judgment in A M v H M [2020] ZACC 9, 2020 (8) BCLR 903 (CC)
at para 25, which held that the application of public policy in the context of contract raised a constitutional
matter. If that is so, then it is unclear why there was no jurisdiction in Booyser.
243 K (note 53 above) at para 16.
244 I am of course not the first to make this argument. See Seedorf (note 15 above) at 4-65.
245 K (note 53 above) at para 17.
246 Ibid at para 16.
247 Loureiro (note 13 above) at para 33.
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gives effects to those rights, it ‘will of course always be subject to constitutional scrutiny to ensure that it is not inconsistent with the Constitution’.248

For these reasons, Principle 8 is difficult to justify. Courts are developing the common law when applying precedent to the case before them. It becomes difficult, if not impossible, to draw the line between ready-set application and development. Booysen is an example of what happens when the Court tries to draw this line. The Court ends up arbitrarily and inconsistently deciding that it does not have jurisdiction. Even if we can draw the line, the application of common law ordinarily gives effect to some constitutional right. So, the Court should have jurisdiction over its application.

C Principle 9: Jurisdiction is assessed from the pleadings

In his dissent in Chirwa, which was later endorsed by a unanimous court in Gcaba, Langa CJ held that a court must assess its jurisdiction in the light of the pleadings.249 His rationale was straightforward. The correctness of an assertion cannot determine jurisdiction, because an applicant can raise a constitutional matter ‘even though the argument advanced as to why an issue is a constitutional matter, or what the constitutional implications of the issue are, may be flawed’.250 In other words, the Court cannot assess the correctness of an argument to determine jurisdiction, because to assess the correctness of an argument is to adjudicate on subject matter, something over which the Court must have jurisdiction in the first place. If the correctness of an assertion cannot determine jurisdiction, then what matters is what the applicant pleads and not whether their argument in that regard is valid.

The Court has applied this principle, that jurisdiction must be made out in the pleadings, on numerous occasions since Gcaba.251 For instance, in Jiba, the Court held that since the GCB only pleaded its case under s 7 of the Admissions Act, and made no case for a constitutional matter, the Court did not have jurisdiction. Similarly, in Paulsen the Court decided it had jurisdiction (or granted leave to appeal) under section 167(3)(b)(ii) since the applicants did not plead that their application raised a constitutional matter. This notwithstanding the Court commented that their matter raised a constitutional matter.252

The Court’s approach to applying this principle can be divided into two phases. First, the Court asks what legal basis the applicant purports to find jurisdiction. At a general level, the legal basis can only be a constitutional matter or an arguable point of law. But the Court will look to whether the applicant specifically invokes one of the above positive principles. For example, whether the interpretation in question limits a constitutional right or concerns the scope of judicial power. Secondly, the Court will assess how the pleadings support that purported ground for jurisdiction. The Court will not stop at the mere mention of the words ‘constitutional matter’. As the Court has repeatedly held, a non-constitutional issue cannot ‘somehow morph into a constitutional issue through the simple facility of clothing it in

248 NEHAWU (note 72 above) at para 15.
250 Fraser (note 12 above) at para 40.
251 For example, Nekowkwe v Road Accident Fund [2019] ZACC 11, 2019 (6) BCLR 745 (CC). The Court even applied this rule in the context of exclusive jurisdiction. See My Vote Counts NPC v Speaker of the National Assembly & Others [2015] ZACC 31 at para 131.
252 Paulsen (note 17 above) at para 14.
constitutional garb’, and ‘an issue does not become a constitutional matter merely because an applicant calls it one’. The applicant must demonstrate the existence of a bona fide constitutional question. Normally this is done by linking the issues raised by the application to one of the positive principles. A ‘pithy’ statement that the Court has jurisdiction will not suffice.

Principle 9 has some serious implications. If an applicant fails to plead correctly, the Court will not have jurisdiction, even if the Court clearly does have jurisdiction in substance. For example, if an applicant brings a review of public power, arguing that the matter is ultra vires, but does not plead the principle of legality, Principle 9 would exclude the Court from hearing the matter.

Principle 9 is difficult to defend. The Court’s rationale in Gcaba does not imply that jurisdiction must be determined on the pleadings. The rationale was that the Court must not determine jurisdiction based on the correctness of an applicant’s assertion. Yet the Court can still assume jurisdiction, without assessing the correctness of any assertion, even if jurisdiction is not pleaded. For instance, in Jiba, jurisdiction was effectively not pleaded. The Court, nonetheless, could have assumed jurisdiction because the matter implicated the independence of the NPA. Had the Court done so, it would not have assumed jurisdiction based on whether the allegations made by the GCB against the respondent were correct.

Principle 9 is also hard to square with the generally substantive approach the Court takes to adjudication. The Court has eschewed ‘formalism’ repeatedly in the context of the Labour Court’s jurisdiction, and more generally. The Court’s approach to objective constitutionality, by now well-known, is also hard to reconcile with an approach that considers constitutional matters to arise only if pleaded by applicants. If legislation declared unconstitutional was always unconstitutional, then a constitutional matter exists even though no one has pleaded it.

Moreover, the Court has made exceptions to this rule. In Sarrahwitz, the Court held: ‘It does become necessary at times to read the papers of a party – especially a vulnerable litigant – with a measure of compassion, when it is in the interests of justice to do so’. On the facts, the applicant had not pleaded that her matter raised a constitutional matter. However, since she was a vulnerable litigant – she was unrepresented and faced losing her home – the Court held that ‘in essence’ her case was premised on certain constitutional rights, despite not mentioning these rights in her pleadings. There is nothing wrong with the outcome.

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253 Mbatha (note 140 above) at para 222; Tjiroze (note 157 above) at para 16; Booysen (note 216 above) at para 52.
254 Fraser (note 12 above) at para 40.
255 Ibid.
256 Jiba (note 3 above) at para 46.
259 We could also argue that if courts are under a duty, in s 39(2), to develop the common law and interpret legislation in accordance with the Bill of Rights, then pleadings should not matter. The Court is obliged to consider constitutional issues relating to a matter, regardless of parties raising them in pleadings. Of course, the Court should not decide on those issues without asking parties to lead evidence or submit argument on that point.
260 Sarrahwitz v Martiz NO [2015] ZACC 14, 2015 (4) SA 491 (CC), 2015 (8) BCLR 925 (CC) at para 27.
261 Ibid.
in Sarrahwitz. On the contrary, Sarrahwitz is an example of the Court asking whether, in substance, a matter engages its jurisdiction. It is unclear, however, why the vulnerability of a litigant should determine whether the Court takes a substantive approach. The Court should assess its jurisdiction substantively when litigants are vulnerable, but it also should when litigants are powerful corporations or government entities whose dispute raises important constitutional matters. If what matters is the vindication of constitutional rights and principles, then pleadings alone cannot determine whether the Court has jurisdiction over a matter.

V LEAVE TO APPEAL

In part III, I demonstrated how the positive principles of jurisdiction endow the Court with what is effectively general jurisdiction. In part IV, I examined how the negative principles, designed to narrow down the Court’s jurisdiction, are hard to defend. The upshot of embracing the full breadth of the positive principles, while rejecting the negative principles, is that the Court has a general jurisdiction.

There are various ways of resisting this conclusion. We could argue that the Court should be specialist and not generalist; so maybe there is something wrong with the breadth of the positive principles. The reasons could emerge from normative conceptions about the role of the Court in South Africa. We might prefer a twin-peaks model, where the Supreme Court of Appeal is generally the highest court, while the Constitutional Court specialises in human rights and separation of powers. The reasons could also be practical. The Court comprises eleven judges and must decide each application with at least eight judges. A general jurisdiction would open the floodgates of applications to the Court, demanding from judges that they apply their minds to hundreds of applications each year and reach a majority of at least five on each of those applications. Unlike the lower courts, the time taken for each judge to read and decide on each application is compounded by the time taken to reach a majority on each application. Moreover, ordinarily the sort of cases that the reach the Court require far more of judges.

The result is that judges of the highest court will be stretched thin, leading to mistakes or less thorough judgments. These concerns appear to be behind the limited nature of the Seventeenth Amendment, and the Court’s reluctance to adopt a general jurisdiction.

Rebutting the practical concerns with general jurisdiction is straightforward. As the Court has noted, apex courts of other jurisdictions have general jurisdiction. Those courts manage case flow through various court rules, like prescribing the format of applications, limiting the page number of those applications, employing clerks or court staff to filter or summarise applications, and having clear rules on when the Court will entertain an appeal. The Court

262 In Shaik v Minister of Justice and Constitutional Development [2003] ZACC 24, 2004 (3) SA 599 (CC), 2004 (4) BCLR 333 (CC) at para 25, the Court made another exception, holding: ‘It constitutes sound discipline in constitutional litigation to require accuracy in the identification of statutory provisions that are attacked on the ground of their constitutional invalidity. This is not an inflexible approach. The circumstances of a particular case might dictate otherwise. It is, however, an important consideration in deciding where the interests of justice lie’.

263 Section 167(2) of the Constitution.

264 For instance, the Court has recently been forced to decide complex issues of competition law, an area of law few judges have had experience in.

265 Paulsen (note 17 above) at para 25 regarding Kenya and the United Kingdom.

has adopted some of these internal mechanisms. The Court employs clerks whose job includes writing memoranda on new applications to the Court. The office of the Court’s Registrar refuses to accept applications that do not comply with some requirements, like lateness or the requisite number of copies. The Court could of course adopt more measures. It could limit applications for leave to appeal to a certain number of pages, require applications to have a set format conducive to quick reading, and employ more staff to filter out applications. Practical concerns are not reasons to limit the Court’s jurisdiction.

Addressing normative arguments about the role of the Court is harder. The difficulty is that there is conceivably more than one reasonable way of arranging South Africa’s judicial hierarchy. A twin-peaks model and a generalist apex court both seem plausible. Each has advantages and disadvantages. The former model allows for specialist judges at the Constitutional Court whereas the latter model avoids the difficulty of defining the Constitutional Court’s specialist jurisdiction. I do not propose to resolve this question.

Instead, the balance of this article has a narrower aim: presenting a reasonable solution to the jurisdiction problem. Currently, the Court’s approach to jurisdiction is difficult to justify. One solution is to embrace the full breadth of the positive principles and reject the negative principles. Leave to appeal can then be used to filter cases. This solution is reasonable for two reasons. First, the test for leave to appeal can be used to address many of the practical and normative concerns we may have with general jurisdiction. I focus on this reason below by examining the test for leave to appeal. Secondly, the solution is available to the Court. As I demonstrated above, the positive principles are in the Constitution. The negative principles are judge-made. If the Court developed the common law to abrogate the negative principles, then the Court would not contradict the Constitution. On the contrary, the Court would give effect to the clear meaning of section 167(3)(b); it would accept that it can decide ‘constitutional matters’ and ‘any other matter’. This solution is therefore the quickest and most parsimonious way to fix the Court’s approach to jurisdiction. The alternatives, like redefining the Court’s specialist jurisdiction, require constitutional amendments and parliamentary intervention.

I focus then on the test for leave to appeal. My intention is to show how leave to appeal is a powerful mechanism that could be used to ensure that the Court is not overwhelmed with cases. Leave to appeal can also be used to ensure that the Court, normatively, plays a significant role as a court specialising only in the most important legal issues.

As it stands, jurisdiction is not a sufficient condition for the Constitutional Court to adjudicate a matter. The Constitutional Court must also grant leave to appeal. The Court has held that it will only grant leave to appeal when it is in the interests of justice to do so. Determining the interests of justice is an exercise of discretion, and the Court has considered the following factors:

1. prospects of success;
2. the importance and complexity of the issues raised;
3. public interest in the issues raised;
4. the position of the applicants in society;
5. factual nature of the dispute;
6. mootness;
7. prematurity and interlocutory appeals;

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267 Currently the Court imposes no limit other than to limit heads of argument to 50 pages.
268 Boesak (note 13 above) at para 12.
8. abstract challenges;
9. ventilation of issues before the lower courts; and
10. direct appeals.

These factors are not exhaustive, but they are recurring factors in the Court’s assessment of what the interests of justice entail. No factor is determinative. For instance, just because a case lacks prospects of success does not mean the Court will not hear the matter, and just because a case has prospects of success does not mean that the court will hear it. Similarly, a point might be moot, abstract, or unripe, and the Court could still hear it. The same is true of constitutional points raised on appeal for the first time or direct appeals. Each matter is assessed individually, with the Court balancing the above factors against each other.

For that reason, it is difficult to distil more specific rules for when the Court will grant leave to appeal. Ultimately, the question is what the interests of justice demand. Nonetheless, we can be guided by how the Court has approached each factor.

Starting with prospects of success, the Court has held that an applicant who seeks leave to appeal must ordinarily show that there are reasonable prospects that the Court will reverse the appealed decision. Put differently, the contentions made by the applicant must be ‘reasonably arguable’. As with ‘arguable’ points of law, not all points have reasonable prospects of success just because they are arguable or convincing. The factors mentioned in Paulsen relevant to establishing whether a point is arguable would apply with equal force to deciding whether a point has reasonable prospects of success. An important factor here is whether there are conflicting or no authorities on the point.

Another important aspect of prospects of success is the standard of review or appeal demanded by the appeal. If the appeal is against the exercise of true discretion, then the Court generally will not interfere with the exercise of that discretion. The Court will take this into account when determining whether there are prospects of succeeding on appeal. The applicant will have to show not only that the exercise of discretion was incorrect, but injudicious. The application for leave to appeal must then disclose reasonable prospects of demonstrating that the decision fell afoul of this higher standard.

The Court has repeatedly invoked the importance or complexity of a matter to justify granting leave to appeal. This is not to say all matters in which the public has taken an interest will be granted leave to appeal. Similarly, the Court has refused to hear matters that raise important constitutional matters where resolving the dispute has no practical effect. But the Court will often hear matters if the issues in it are of constitutional import and implicate

\[269\] Ibid.
\[270\] For example, though an argument might have prospects of succeeding, the Court may still decide that it is not in the interests of justice to hear it if it is raised on appeal for the first time. See Tiekiedraai (note 18 above). Alternatively, the point might be moot, unripe or abstract, despite its cogency.
\[271\] Boesak (note 13 above) at para 12.
\[272\] Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd [2013] ZACC 48, 2014 (5) SA 138 (CC), 2014 (3) BCLR 265 (CC) at para 52.
\[274\] EFF v Gordhan (note 231 above) at para 97.
constitutional rights of persons beyond the litigants, even if other factors push against hearing it. For instance, the importance of a matter could trump mootness and abstractness.

The Court has taken note of whether applicants for leave to appeal are vulnerable and whether persons affected by the judgment ordinarily cannot afford to litigate.\(^\text{276}\) The more vulnerable and indigent persons implicated in the matter are, the more the interests of justice speak to granting leave to appeal.

Even if the Court has jurisdiction over the dispute of fact in question,\(^\text{277}\) the Court might still refuse to grant leave to appeal because it is undesirable for the Court to resolve that factual dispute.\(^\text{278}\) We should note that dealing with the factual nature of a dispute under leave to appeal instead of jurisdiction is easier to defend than positing Principle 9. The interests of justice would ordinarily demand that the Court, sitting as an appellate tribunal, not overturn the factual findings of the lower court.\(^\text{279}\) For this reason, the Court should be slow to hear factual disputes. However, there may be exceptions where the interests of justice require otherwise, such as when the factual dispute is easy to resolve or is inextricably linked to an important constitutional issue. Considering the factual nature of a dispute in this way does not create the rigid and inconsistent Principle 9 but uses the interests of justice as a touchstone.

A matter is moot if it no longer raises an existing or live controversy between the parties, such that the Court’s order will have no practical effect or result.\(^\text{280}\) Normally a court will not entertain a moot matter because, simply, there is little practical point in doing so. Nonetheless, the Court will hear a moot matter if it is in the interests of justice to do so.\(^\text{281}\) The Court has recently heard a moot case because (a) it raised important issues relating to children that had a practical impact beyond the litigants; (b) there were conflicting and incorrect judgments on the issue; (c) the Court had heard extensive argument; and (d) persons in applicants’ situation would normally not have the resources to bring a matter before the Court.\(^\text{282}\)

The Court has dealt with several matters that were allegedly premature or concerned appeals against decisions that were not yet final. The general rule is that appeals lie only against final decisions or decisions that are final in effect. The reason is that the Court is loath to interfere with an ongoing decision-making process and create piece-meal litigation. Exceptionally, the Court will hear appeals against interim or interlocutory decisions if the interests of justice so demand.\(^\text{283}\) The Court has repeatedly endorsed the Supreme Court of Appeal’s definition in Zweni of a final decision.\(^\text{284}\) A decision is final if it is determinative of the rights of the parties

\(^{276}\) Most recently \textit{AB v Pridwin Preparatory School} [2020] ZACC 12, 2020 (9) BCLR 1029 (CC), 2020 (5) SA 327 (CC) at para 116.

\(^{277}\) See Rule (7) above.

\(^{278}\) \textit{Rail Commuters} note 208 above at para 54 onwards; \textit{Carmichele} (note 325 above) at para 81; \textit{Barkhuizen v Napier} [2007] ZACC 5; 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC) at para 39; \textit{Maphango} at para 109; \textit{Sarrahwitz} at para 30; \textit{Mighty Solutions} at para 65.

\(^{279}\) \textit{Makate v Vodacom (Pty) Ltd} [2016] ZACC 13, 2016 (6) BCLR 709 (CC), 2016 (4) SA 121 (CC) at paras 38–40.

\(^{280}\) \textit{AB v Pridwin} (note 276 above) at para 110.


\(^{282}\) \textit{AB v Pridwin} (note 276 above) at para 112 onwards. The Court cites \textit{Pillay} (note 127 above) for authority that these factors are relevant to hearing a moot matter.

\(^{283}\) \textit{EFF v Gordhan} (note 231 above) at para 50; \textit{Cloete} (note 160 above) at para 39; \textit{Law Society of South Africa v President of the Republic of South Africa} [2018] ZACC 51, 2019 (3) BCLR 329 (CC), 2019 (3) SA 30 (CC) at para 25.

\(^{284}\) \textit{Zweni v Minister of Law} [1992] ZASCA 197, 1993 (1) SA 523 (A) at 532J-533A.
and has the effect of disposing of a substantial portion of the relief claimed. The Court recently clarified, in the context of an appeal against an interim interdict pending review, the factors it will consider when deciding whether to hear an appeal against an interim order. Other than the factors already mentioned, the Court will consider the potential for irreparable harm if leave is not granted; whether, in deciding an appeal against an interim order, the appeal court would usurp the role of the review court; and whether allowing the appeal would lead to piecemeal adjudication and prolong the litigation or lead to the wasteful use of judicial resources or legal costs.

An abstract challenge refers to a challenge to the constitutionality of legislation removed from a factual matrix. Normally, it is not in the public interest for proceedings to be brought in the abstract. The rationale is obvious: the Court is not there to give advice on hypothetical matters. But the Court will hear abstract challenges if the interests of justice nonetheless demand so. Other than the above factors, the Court will consider whether there is another reasonable and effective manner in which the challenge can be brought, the nature of the relief sought, and the extent to which the challenge is of general and prospective application, and the range of persons or groups who may be directly or indirectly affected by any order made by the court, and the opportunity that those persons or groups have had to present evidence and argument to the court.

It will usually not be in the interests of justice to grant leave to an appeal if the application for leave raises a constitutional matter or point of law for the first time before the Court. The Court has provided various rationales for this rule, including allowing the high court and the Supreme Court of Appeal to exercise their constitutionally endowed jurisdiction to decide on constitutional matters and arguable points of law. However, in exceptional circumstances the Court will hear a matter as a court of first and last instance. The following list of factors (unclosed), which are different to the ones already considered, can be distilled from case law for determining exceptional circumstances:

1. whether the matter relates to the common law or the development thereof;
2. whether the matter relates to the common law or the development thereof;
2. whether parties have changed their arguments before the lower courts;\(^{294}\)
3. whether the matter raised is complex, intricate and of public importance;\(^{295}\)
4. whether opposing or interested parties had sufficient opportunity to contest the points raised and whether considering the point will cause them prejudice;\(^{296}\)
5. whether the applicant was legally represented and received proper legal advice;\(^{297}\)
6. whether dire consequences would ensue if leave to appeal was refused;\(^{298}\)
7. whether the point was contained, or at least foreshadowed, by the pleadings;\(^{299}\)
8. whether parties knew of the point and decided not to raise it in the lower court, or whether the Court raised the point \textit{mero motu} on appeal.\(^{300}\)

Finally, the Court normally requires matters appealed against in judgments of the high court to be pursued first through the Supreme Court of Appeal. Exceptionally, the Court will hear a direct appeal if the interests of justice demand it.\(^{301}\) Relevant factors include whether there are only constitutional issues involved, the importance of the constitutional issues, the saving in time and costs, the urgency, if any, in having a final determination of the matters in issue, the prospects of success, the disadvantages to the management of the Court’s roll and to the ultimate decision of the case if the Supreme Court of Appeal is bypassed.\(^{302}\)

\(^{294}\) \textit{Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd} [2011] ZACC 30, 2012 (1) SA 256 (CC), 2012 (3) BCLR 219 (CC) at para 63.

\(^{295}\) \textit{Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd} [2011] ZACC 30, 2012 (1) SA 256 (CC), 2012 (3) BCLR 219 (CC) at para 63.

\(^{296}\) Ibid at paras 66 and 74.

\(^{297}\) Ibid at para 66 and 74.

The Jurisdiction of The Constitutional Court

The Court’s approach to leave to appeal is fact-sensitive and flexible. The downside is that leave to appeal may be unpredictable for litigants. To a certain extent, this will always be true. Leave to appeal depends on the exercise of a discretion, which depends on each case. However, firstly, the Court’s approach to jurisdiction has hardly been predictable. Secondly, it would assist litigants considerably if the main factors for granting leave to appeal were codified in the Court’s rules or in a single judgment. Other than that, there is nothing problematic about the factors the Court employs to decide leave to appeal. The absence of clear rules may be appropriate for a court of final instance, since, as demonstrated in the first four parts of this article, it can be difficult to craft principles for which matters the Court can hear.

Importantly, the Court’s approach to leave to appeal is nuanced enough to deal with various practical concerns arising from it realising its generalist jurisdiction. The Court can filter out cases that are undesirable for the Court to hear generally, such as simple disputes of fact and misapplication cases. If the Court were to make these rules clear and accessible, then pleadings could be drafted accordingly, reducing the number of applications or the time it takes to process whether leave to appeal should be granted. Leave to appeal can also address some of the normative ideals we expect the Court to achieve. For instance, it can ensure that the Court hears only complex, important matters that effect the public.

VI  ALL MATTERS AND ALL THAT MATTERS

Answering the question posed right at the start of this article is no simple task. The principles governing the Court’s jurisdiction are difficult to present clearly and coherently. My first aim in this article was to do just that. The nine principles I have presented are drawn from the Court’s jurisprudence on jurisdiction. My claim is that these nine principles form the basis of the Court’s approach to jurisdiction. They represent the rules and considerations applied by the Court when deciding whether it has jurisdiction.

My second purpose was to demonstrate how the positive principles have a breadth far greater than the Court appears to realise, and the negative principles are mostly ad hoc and inconsistent. The Court’s approach to jurisdiction, accordingly, is incoherent. Cases are not decided when they should be decided; cases are decided when they should not be decided.

My third aim was to offer a reasonable solution to the problem of jurisdiction. There are many ways of ensuring that the Court hears all that matters, only one of which is empowering it to hear all matters. In the main, deciding between these solutions is a policy-choice, best left to Parliament. But there is at least one option available to the Court. The Court can properly interpret the positive principles concerning its jurisdiction as the relevant principles exist in the Constitution. In particular, the Court can accept that it can decide ‘constitutional matters’ and ‘any other matter’. The Court can move away from the negative principles it developed – unconvincingly – to limit its jurisdiction. The Court can then use its test for leave to appeal to address practical and normative concerns with its general jurisdiction. If the Court did so, it would address the doctrinal difficulties with its approach to jurisdiction, and potentially ensure better allocation of judicial resources.

303 Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch [2019] ZACC 38, 2019 (12) BCLR 1479 (CC), 2020 (1) SA 368 (CC) at para 13.
VII POSTSCRIPT

Just before this article was published, the Constitutional Court handed down its judgment in *Mediclinic*. The matter concerned the merger of two private hospital companies. The Competition Tribunal prohibited the merger for various reasons, including that the merger would impermissibly increase prices. The Competition Appeal Court overturned the Tribunal’s finding. The issue broadly before the Court was whether the Competition Appeal Court was entitled to interfere with the Tribunal’s finding.

Mogoeng CJ wrote for the majority. He held that the Court had jurisdiction to hear the matter for four reasons. First, the matter implicated the right to access health care services. Second, the matter concerned the state’s duty to respect, protect, and promote the rights in the Bill of Rights. Third, the matter concerned section 39(2) of the Constitution. Fourth, determining the circumstances in which the Competition Appeal Court may interfere with the findings of the Tribunal raised arguable points of law of general public importance. Mogoeng CJ then held the following:

Noteworthy are factors that implicate this Court’s jurisdiction. They do not necessarily have to be raised by litigants. It would suffice that ‘the matter raises’ an arguable point of law of general public importance for this Court to have jurisdiction. Meaning, even if an applicant might not have raised an arguable point of law of general public importance, that is manifestly raised by the matter, it would still be open to this Court to consider its jurisdiction as established, based on that point.

Without any references to cases like *Jiba*, and without any explanation, the majority has now overruled Principle 9, at least in respect of arguable points of law of general public importance. If jurisdiction must be assessed from the pleadings, then it cannot also be that jurisdiction could ‘manifestly’ be raised by a matter. Moreover, if arguable points of law can be manifestly raised by a matter, then there is no reason why a constitutional matter cannot be manifest (and instead must be pleaded). By implication therefore, the majority in *Mediclinic* abandoned Principle 9. Whether this signals a new approach to determining jurisdiction remains to be seen.

Theron J, with Khampepe J concurring, dissented. She held that the Court lacked jurisdiction to hear the matter. Theron J held that each of the four grounds invoked by the majority does not establish jurisdiction. The keystone to her dissent was that the Competition Appeal Court held, as a matter of fact, that prices would not go up if the companies merged. If prices would not go up, then the right in section 27 was not implicated. The upshot was that the matter also did not involve sections 7(2) and 39(2) of the Constitution. As for the majority’s finding that the matter raised a point of law, Theron J held that the matter only concerned whether the Competition Appeal Court properly interfered with the Tribunal's

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304 *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd & Another* [2021] ZACC 35 (*Mediclinic*).
305 Ibid at para 36.
306 Ibid.
307 Ibid at para 38.
308 Ibid at paras 103–104.
309 Ibid paras 105–108. In particular, Theron J held that the questions of statutory interpretation raised by the Competition Commission were premised on a finding that prices would go up after merger. Since that was not the case, the questions did not arise.
finding of facts. This is not a question of law but involved a question of fact or the application of a settled test.\textsuperscript{310}

The difference between the majority and minority highlights the tension in Principle 4 discussed above. There is one line of authority, stemming from \textit{NEHAWU}, saying that the interpretation and application of legislation implementing constitutional rights are constitutional issues. The Competition Act, as the majority emphasises in \textit{Mediclinic}, was enacted to give effect to various constitutional rights, in this case the right to access to healthcare.\textsuperscript{311} On the rationale of \textit{NEHAWU}, the Court has jurisdiction over the application of the Competition Act, including whether a merger should be prohibited and the Competition Appeal Court could interfere with the Tribunals findings. The majority was correct in that sense.

On the other hand, the Court has not been consistent in its application of \textit{NEHAWU}. I discussed above how \textit{NEHAWU} cannot be squared with \textit{Media 24}. I also discussed how \textit{NEHAWU} cannot be reconciled with the Court’s approach to the common law. The minority draws on this side of the tension in Principle 4, invoking cases like \textit{Loureiro} to deny jurisdiction.\textsuperscript{312} In this sense, the minority was also correct.

\textit{Mediclinic} is a neat example of the Court’s inconsistent approach to its jurisdiction. There is authority supporting both the majority and the minority approaches. Those authorities do not cohere, in that they lead to different conclusions on whether the Court has jurisdiction.

The two judgments in \textit{Mediclinic} represent some of the normative concerns that lie behind the Court’s lack of coherence in its approach to jurisdictional questions. The majority, especially in its abandonment of Principle 9, eschews the formalism accompanying the negative principles that purportedly constrain the Court’s jurisdiction.\textsuperscript{313} The minority, on the other hand, laments the majority’s approach arguing that ‘our doors would be thrust open to adjudicate any and all disputes’.\textsuperscript{314} One lesson from \textit{Mediclinic} is that a judge’s normative preferences for the Court’s jurisdiction might influence which of the conflicting authorities they will choose to invoke when determining jurisdiction. Another lesson is that insofar as the Court’s jurisdictional approach remains unaddressed, its judges will continue to differ sharply and unpredictably on whether the Court has jurisdiction. It is thus time for the Court, and if not the Court then Parliament, to address its approach to jurisdiction.

\textsuperscript{310} Ibid at para 119.

\textsuperscript{311} As I discuss above, Goliath AJ made the same finding in \textit{Media 24} (note 89 above). However, the majority in that case refused to concur with her.

\textsuperscript{312} \textit{Mediclinic} (note 304 above) at para 98. See the fourth issue I raise with Principle 8 above and note 247 above.

\textsuperscript{313} It is no surprise that Mogoeng CJ abandoned Principle 9 given his judgment in \textit{Sarrahwitz} (note 260 above).

\textsuperscript{314} Ibid at para 99. Although Theron J had no issue concurring in Zondo DCJ’s judgment in \textit{Jacobs}. As I demonstrated above, Zondo DCJ’s judgment similarly opens the Court’s jurisdiction to all matters.
Acting in Reliance upon the Wrong Empowering Provision: Reconsidering the Principle in *Harris*

PIET OLIVIER

ABSTRACT: Under South African law, if an administrator makes a decision citing an empowering provision that does not grant her the power to make that decision, and another provision exists which does, then whether the decision is lawful depends on whether she cited the incorrect provision deliberately or inadvertently. If the former, her mistake renders the decision unlawful. If the latter, the decision survives. This article examines the development of the rule and argues that it should not be retained for the following reasons: the line between inadvertent and deliberate misreliance is not clearly drawn; the rule does not fit comfortably with orthodox administrative-law principles; the rule creates the perverse incentive for administrators not to cite the source of their powers; and the application of the rule can result in the courts not grappling with what may be substantively wrong with an administrative decision. The rule should be replaced with what this article describes as a first-principles approach: one that treats an administrator’s reliance upon an incorrect empowering provision like any other potential administrative irregularity and applies orthodox administrative-law principles to it. To this end, a court must ask whether the misreliance constitutes a reviewable irregularity under PAJA, if it is applicable, or otherwise the principle of legality. Did the misreliance, for example, cause the administrator to consider irrelevant factors or fail to consider relevant ones, or to misconstrue the nature of her powers? Did it render the decision procedurally unfair? Did the administrator fail to comply with peremptory requirements attaching to the correct provision? Did the misreliance render the decision irrational? If the misreliance is a reviewable irregularity, the court must then consider whether it should use its remedial discretion to set aside the decision.

KEYWORDS: administrative law, *Howick*, incorrect empowering provision, *Latib*, *Quid Pro Quo*

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I INTRODUCTION

An administrator makes an administrative decision. In the public notice of it, she specifies an empowering provision (section X of statute Y) as the source of her power to have made the decision. The decision is taken on review. It turns out that the provision on which she relied is no good – it does not empower her to make the decision she purports to have made. A different provision exists, however, that does empower her to make the decision, but to which she did not refer.

Is the decision lawful? Under South African law, it depends on whether she invoked the incorrect empowering provision inadvertently or deliberately. While the line between the two concepts is not clear (as set out in part IV) for present purposes it is sufficient to say that an administrator invokes an incorrect empowering provision inadvertently if the invocation is the result of an administrative error. She does so deliberately, however, if she intends to invoke the incorrect provision because she (incorrectly) thinks it empowers her to act. If the administrator invoked the incorrect provision inadvertently, her mistake would not render the decision unlawful. If she did so deliberately, however, the decision would be unlawful and invalid.

Part II of this article explains the distinction in more detail.

Part III outlines the development of the distinction. First articulated in the 1977 Appellate Division decision of Administrateur, Transvaal v Quid Pro Quo Eiendomsmaatskappy (Edms) Bpk,1 it constituted a departure from the more forgiving approach that had prevailed before. The distinction was first approved by the Constitutional Court in Minister of Education v Harris.2 It has since hardened into an inflexible rule: in recent years, the Constitutional Court and the Supreme Court of Appeal have both reasoned that if an administrative decision is made in deliberate reliance upon the wrong empowering provision, it will be unlawful for that reason alone, even if another empowering provision exists.

In part IV, I argue that this inflexible rule is not a good one. The line between deliberate and inadvertent misreliance is not clear and different courts understand these concepts differently. The distinction does not fit comfortably with orthodox administrative-law principles under the Constitution. It can set up unnecessary tripwires in the way of otherwise unobjectionable decisions and creates a perverse incentive for an administrator not to state any authority for her decision at all so as to avoid the risk of that decision later being invalidated for deliberate misreliance.

A better approach, outlined in part V, is a first-principles approach: one that treats an administrator’s reliance upon an incorrect empowering provision like any other potential administrative irregularity and applies orthodox administrative-law principles to it. To this end, a court must ask whether the misreliance constitutes a reviewable irregularity under PAJA, if it is applicable; or otherwise whether it is reviewable under the principle of legality. Did the misreliance, for example, cause the administrator to consider irrelevant factors or fail to consider relevant ones, or to misconstrue the nature of her powers? Did it render the decision procedurally unfair? Did the administrator fail to comply with peremptory requirements attaching to the correct provision? Did the misreliance render the decision irrational? If the misreliance is a reviewable irregularity, the court must then consider whether it should use its remedial discretion to set the decision aside.

1 Administrateur, Transvaal v Quid Pro Quo Eiendomsmaatskappy (Edms) Bpk 1977 (4) SA 829 (A).
2 Minister of Education v Harris [2001] ZACC 25, 2001 (4) SA 1297 (CC).
As we shall see, a first-principles approach would often reach the same outcome as the current approach. However, the advantage of a first-principles approach is that it requires a court to grapple with whether an administrative decision suffers from substantive flaws – rather than setting the decision aside on the basis of an issue which may be a technicality.

II THE LAW TODAY

The current state of the law can be summarised as follows. When an administrator acts, she might choose to state the provision that empowers her to act, or she might not. If she chooses to state an empowering provision, she might make a mistake and state a provision that does not grant her the power to act as she did. Whether this visits her act with invalidity depends on the circumstances. If no law exists, anywhere, that empowers her to so act, then her decision is invalid.3 If, however, she is empowered by a provision other than the one stated, whether the act is invalid depends on whether she invoked the incorrect provision inadvertently or deliberately. If inadvertently, the act is not invalid. If, on the other hand, she relied on the incorrect provision deliberately, the act is invalid for this reason alone.4 If the empowering legislation does not require the correct empowering provision to be stated, the administrator can escape the risk of reliance by not stating the empowering provision at all. In such a situation, her act is not invalid.

III THE DEVELOPMENT OF THE PRINCIPLE

The development of the treatment of reliance can be divided into three periods. The first is the period prior to *Quid Pro Quo* in 1977 – prior to the articulation of the distinction between deliberate and inadvertent reliance. During this period, the courts followed a permissive approach: if an administrator relied upon an incorrect empowering provision, the courts would ask only whether another provision granted her the power, and whether the requirements for the exercise of that power had been met. If so, the decision was valid. The courts did not consider whether the reliance was deliberate or inadvertent.

The second period began with *Quid Pro Quo*. From that decision onwards, the courts considered the primary question to be whether the reliance was deliberate or inadvertent. If the former, the decision would generally be invalid and, if the latter, it generally would not be. Nevertheless, the cases sometimes intimated that this might not be the end of the enquiry.

The third period is the hardening of the distinction into an absolute rule: if reliance is deliberate, the decision is invalid without exception. The beginning of this period is marked by the 2008 SCA decision in *Shaikh v Standard Bank*,5 and exemplified by Jafra J’s treatment of the principle in the Constitutional Court in *Tulip Diamonds*6 and *Liebenberg*,7 as well as by the Supreme Court of Appeal in the 2018 decision of *Zuma v Democratic Alliance*.8

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3 Head of Department, Department of Education, Free State Province v Welkom High School & Another [2013] ZACC 25, 2014 (2) SA 228 (CC) at para 1.
4 Harris (note 2 above) at para 17.
8 Zuma v Democratic Alliance & Others; Acting National Director of Public Prosecutions & Another v Democratic Alliance & Another [2017] ZASCA 146, 2018 (1) SA 200 (SCA).
A The first period: *Macrobert to Latib* and the permissive approach

The permissive approach began with the decision of De Villiers JP in 1910 in the TPD in *Macrobert v Pretoria Municipal Council*, the first in a series of cases in which municipal authorities passed bylaws under incorrect empowering provisions. The appellant, a solicitor, had been charged with riding a bicycle without a licence in contravention of s 151 of the Pretoria traffic bylaws. One of the appellant’s arguments was that the council had enacted s 151 in reliance upon the wrong empowering provision: it had relied on s 19 of Proclamation 7 of 1902, which did not give the council the power to enact a provision like s 151, when instead it should have relied upon s 42 of Ordinance 58 of 1903, which did. De Villiers JP held that, even if the municipality had deliberately relied upon the wrong provision, this did not visit s 151 with invalidity, because (a) ‘there was no obligation on the part of the town council to state by virtue of what section of the statute they framed the bylaws’, (b) s 42 of Ordinance 58 contained the necessary authority, and (c) the council had complied with the procedural requirements for passing bylaws.

Three points deserve emphasis. First, the approach of De Villiers JP was solely one of *vires*. He asked simply whether an empowering provision existed and whether all of the requirements for its exercise were met. Given that they were, and because the correct empowering provision did not require it to be expressly cited, the decision was lawful. Secondly, De Villiers JP reasoned on the assumption that the misreliance was deliberate – and, even though it was, the decision was lawful because the requirements for the invocation of the correct empowering provision had been met. Thirdly, he noted that it is generally a good thing for a public functionary to state the source of a power when purporting to exercise it: it is ‘a matter of convenience to know under what statutory provision a municipality purports to act in framing bylaws’.

Four years later, De Villiers JP followed his own decision in *Macrobert* in *Rex v Milman*. As in *Macrobert*, the accused had been charged with contravening a bylaw (this time with selling ‘sixteen loaves of bread not being fancy bread, which was deficient in weight’). The bylaw had been approved by the administrator in reliance upon his powers under Ordinance 9 of 1912, which did not give him the power to approve bylaws on the subject-matter in question, namely, assize matters. The accused argued that this rendered the bylaws invalid. De Villiers JP rejected this argument and held, with reference to *Macrobert*, that because the power to legislate assize matters existed under an earlier ordinance (Ordinance 2 of 1906) ‘an error of the nature contemplated does not invalidate bylaws otherwise valid’.

*Farah v Johannesburg Municipality* is the third in the series of TPD cases dealing with bylaws promulgated under an incorrect empowering provision. The appellant had been convicted of criminal loitering under the Johannesburg Hawkers and Pedlars Bylaws. On appeal, the appellant claimed that the bylaws were enacted *ultra vires*. In the notice under which the bylaws were promulgated, the local authority had relied on s 41(19) of the Johannesburg Municipal Ordinance of 1906, which enabled the council to make bylaws ‘for regulating and licensing pedlars and hawkers’. Citing *Macrobert*, Feetham J held that:

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9 *Macrobert v Pretoria Municipal Council* TS 931.
10 Ibid at 940–941.
11 *Rex v Milman* 1914 TPD 632.
12 Ibid at 634.
13 *Farah v Johannesburg Municipality* 1928 TPD 169.
powers granted to the council under the same Ordinance to make bylaws for ‘regulating and controlling traffic’ (s 41[59]) and ‘for preventing persons from congregating with others and thus causing an obstruction in any thoroughfare’ (s 41[62]) can also be relied on if necessary as powers enabling the council to make these bylaws, though they are not referred to in the Government Notice, and were not expressly relied upon by the local authority when making the bylaws.

This is because, as long as the power exists somewhere, it does not matter that the decision-maker relied upon a different power, nor whether it did so deliberately or inadvertently.

Similarly, in *Rex v Standard Tea and Coffee*, the accused had been charged with supplying too much tea to dealers in contravention of wartime measures. The regulation containing the relevant prohibition had been made by the Director of Food Supplies and Distribution relying upon s 3(1)(e) of War Measure 55 of 1946. The accused argued that s 3(1)(e) did not contain the necessary power. Again relying on *Macrobert*, Murray J held that the existence of the necessary power elsewhere could save the prohibition: ‘[f]or even though the Director purported to rely on s 3(1)(e) for his power to make Reg. (a), and even if s 3(1)(e) did not authorise the making of the Regulation, the Regulation would still be valid if the Director did possess power elsewhere, under s 3(1)(i) to make the Regulation’.

It is also worth noting that Murray J held that the similarity of the language used in s 3(1)(i) to that used in s 3(1)(e) ‘inevitably shows that the Director when deciding to make Reg. (a) must have had in contemplation the considerations which should have been in his mind when making a regulation on the lines contemplated by s 3(1)(i)’. The Director had not, in other words, failed to take into account relevant circumstances.

In *R v Foley*, the respondents were convicted of contravening the regulations relating to streets in Grahamstown. In the notice in which the regulations were promulgated, the administrator sourced his authority explicitly in s 245 of Ordinance 19 of 1951. The respondents argued that the administrator had relied upon the wrong provision – his power of approval lay in s 243(2) and not s 245 – and that the regulations were therefore invalid. Jennet J rejected this argument. Because there was ‘no provision which requires such notice to contain a reference to the section under which the administrator has given his approval … the reasoning in the case of *Macrobert* … applies to a case like the present and the reference to the administrator’s approval, empowered under s 243(2), as having been given in terms of s 245 does not affect the validity of the promulgation’.

The last case of the first period is the 1969 decision of *Latib v Administrator, Transvaal* – the seminal decision which replaced *Macrobert* as the *locus classicus* of the permissive approach. In *Latib*, the administrator had declared a public main road through the applicant’s farm in reliance upon s 5(3)(b) of the Roads Ordinance 22 of 1957. Section 5(3)(b) empowered the administrator to declare a public road, but only over farmland. Because a portion of the applicant’s farm over which the road had been declared had been incorporated into the Pretoria Municipality, the applicant contended that the declaration was invalid. The administrator argued in response that he had the power to declare a public road over municipal land under

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14 *Rex v Standard Tea and Coffee Co (Pty) Ltd* 1951 (1) SA 641 (T).
15 Ibid at 644A.
16 *R v Foley* 1953 (3) SA 496 (E).
17 Ibid at 488F–G.
18 *Latib v Administrator, Transvaal* 1969 (3) SA 186 (T).
s 5(3)(c) of the Roads Ordinance, and that the failure to refer to that subsection had been an ‘oversight’.19

Galgut J agreed with the administrator. Citing MacRobert, *R v Foley* and ‘other authorities to the same effect’, he held as follows:

It seems clear, therefore, that, where there is no direction in the statute requiring that the section in terms of which a proclamation is made should be mentioned, then, even though it is desirable, nevertheless there is no need to mention the section and, further, that, provided that the enabling statute grants the power to make the proclamation, the fact that it is said to be made under the wrong section will not invalidate the notice.

The Administrator here had the power in terms of ss 3 of s 5 to do what he did in Administrator’s Notice 616; he acted in terms of the enabling section. The fact that he inadvertently omitted to mention paragraph (c) of ss 3 does not invalidate the Notice.20

The permissive approach of the first period can thus be summarised as follows. If an administrative decision is made in reliance upon the incorrect empowering provision, that decision will not be invalid because of this misreliance if an empowering provision exists elsewhere and if the requirements of that provision have been satisfied. That the wrong empowering provision may have been deliberately relied on does not on its own invalidate the decision. In all these cases, it is either clear that the decision-maker deliberately relied on the wrong provision, or the court did not consider the issue important.

**B The second period: *Quid Pro Quo, Harris*, and the deliberate/ inadvertent distinction**

The permissive approach ended with the Appellate Division’s decision in *Quid Pro Quo*.21 Like *Latib*, it concerned a dispute over roads. The administrator had relied on s 3 of the Roads Ordinance to widen a road reserve around an existing bypass. It was common cause that he had done so to obtain additional space to build new roads; namely approach – and exit-roads to link the bypass with another road. The widened road reserve encroached on *Quid Pro Quo*’s property, and so *Quid Pro Quo* took the administrator’s decision on review.

On appeal, Wessels JA held that s 3 of the Roads Ordinance did not grant the administrator the power to widen a road reserve to obtain space to build new roads. Relying on *Latib*, the administrator argued that s 5 granted him the power to declare new roads and thus clothed his decision with authority. Wessels JA was not convinced:

In my opinion, however, *Latib*’s case offers no support for the alternative argument [that the administrator could rely on s 5]. In the present case, the respondent did not in the impugned Notice claim that a public road existed on the applicant’s property and by mistake neglect to name the source of his power. According to *Latib*’s case, such a failure to refer to the relevant empowering provision would not affect the validity of a notice. The question is solely whether the Administrator is empowered to do what he did. In this case the papers show most clearly that the respondent did not wish to declare a public road (namely, the on- and-off-ramp). He takes the stance that he deliberately exercised the power granted by section 3 of the Ordinance in order to widen the existing road reserve of the bypass. According to his approach, it was unnecessary to make any declaration in terms of the provisions of section 5(2)(b) of the Ordinance in order to authorise the

19 Ibid at 189.
20 Ibid at 190H–191A.
21 *Quid Pro Quo* (note 1 above).
construction of the relevant on- and off-ramps. The alternative argument thus cannot be accepted.

… The appeal thus cannot succeed.\textsuperscript{22}

In subsequent cases, this (somewhat cryptic) passage has been interpreted to mean that if a decision-maker deliberately cites an empowering provision that does not empower her to do what she did, the decision will be invalid even if a different provision exists which does in fact give her such a power.

In the 1999 case of \textit{Pinnacle Point Casino},\textsuperscript{23} the Western Cape High Court for the first time expressly recognised the distinction between inadvertent and deliberate misreliance:

There is on the one hand a line of cases in which it was held that it does not matter that the functionary referred to an incorrect enabling provision provided there is in fact an enabling provision which granted the power in question to him. See, for example, \textit{[Macrobert]}, \textit{[Latib]}. The situation is different, however, where the functionary deliberately acted in terms of a particular enabling provision. If that provision is found to be invalid then the validity of the action cannot be saved by the existence of a valid enabling provision elsewhere. This proposition is supported by the decisions in \textit{[Quid Pro Quo, among others]}.\textsuperscript{24}

In \textit{Pinnacle Point}, the administrator had rejected an application for a gambling licence on the basis of a requirement in a policy determination that turned out to be invalid. Because the administrator had acted in deliberate reliance upon the invalid policy determination, the fact that he might have been able to impose the requirement using a different power was irrelevant.\textsuperscript{25}

What is notable about the quoted passage is that it is unequivocal. If the administrator inadvertently relied on the wrong empowering provision, there is no issue. If she did so \textit{deliberately}, however, then the decision is invalid. On appeal,\textsuperscript{26} Harms JA held that he had ‘some reservations’ regarding ‘the formulation and scope’ of this principle but was not required to decide the issue because he held that no provision existed anywhere which contained the power to impose the relevant requirement.\textsuperscript{27} These reservations have never been cited by another court.

\textsuperscript{22} Ibid at 841D–G. This is my translation of the original Afrikaans: ‘Na my mening, egter, bied Latib se saak geen steun vir die alternatiewe betoog nie. In die onderhawige geval het respondent nie in die gewraakte Kennisgewing voorgegee nie dat ‘n openbare pad bestaan op applikant se eiendom en per abuis nagelaat het om die bron van sy bevoegdheid om so ’n verklaring te doen te noem. Volgens Latib se saak sou ‘n versuim om te verwys na die betrokke wetsbepaling wat die bevoegdheid skep, nie die regsgeldigheid van ‘n kennisgewing affekteer nie. Die vraag is slegs of aan die Administrateur die bevoegdheid verleen is om te doen wat hy gedoen het by die publikasie daarvan. In die onderhawige geval blyk dit ten duidelikste uit die stukke dat die respondent nie die bestaan van ‘n openbare pad (nl., die op-en afrit) wou verklaar nie. Hy stel hom op die standpunt dat hy bewustelik die bevoegdheid wat by art. 3 van die Ordonnansie verleen word uitgeoefen het ten einde die breedte van die bestaande padreserwe van die verbypad te vermeerder. Volgens sy benadering was dit onnodig om enige verklaring kragtens die bepalings van art. 5(2)(b) van die Ordonnansie te doen ten einde die aanlé van die betrokke op- en afrit te magtig. Die alternatiewe betoog kan dus nie gehandhaaf word nie. … Die appèl kan derhalwe nie slaag nie.’

\textsuperscript{23} \textit{Pinnacle Point Casino (Pty) Ltd v Auret NO} 1999 (4) SA 763 (C).

\textsuperscript{24} Ibid at para 16.

\textsuperscript{25} Ibid at paras 17–18.

\textsuperscript{26} \textit{Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd} [2001] ZASCA 59, 2001 (4) SA 501 (SCA).

\textsuperscript{27} Ibid at para 8. The passage in full: ‘It then becomes unnecessary to deal with that part of its judgment … dealing with the principle – the formulation and scope about which I have some reservations — that, where a functionary deliberately acted in terms of a particular enabling provision and that provision is found to be invalid, then the validity of the action cannot be saved by the existence of a valid enabling provision elsewhere.’
The Constitutional Court first endorsed the distinction between inadvertent and deliberate misreliance in *Minister of Education v Harris*.

In this case, the Minister purported to enact a rule prohibiting children under the age of seven from beginning Grade 1 at private schools. This was done in express reliance on s 3(4)(i) of the National Education Policy Act 27 of 1996. Sachs J, writing for the Court, held that s 3(4)(i) did not permit the Minister to impose binding age requirements on independent schools. Relying on *Latib*, the Minister argued that the rule was saved from invalidity because s 5(4) of the South African Schools Act 84 of 1996 granted him the power to ‘determine age requirements for the admission of learners to a school’. Sachs J rejected this argument. Referring to *Quid Pro Quo* and *Pinnacle Point Casino*, he held that ‘the applicability of this line of reasoning must depend on the particular facts of each case, especially whether the functionary consciously elected to rely on the statutory provision subsequently found to be wanting’.

In the case before the Court, there was ‘no suggestion in the affidavits filed by the Minister of an administrative error’ and there could ‘be little question then that the provision [s 3(4)(i)] was deliberately chosen’. As such, ‘[t]he otherwise invalid notice issued under the National Policy Act [could] not be rescued by reference to powers which the Minister might possibly have had but failed to exercise under the Schools Act’. This was, again, an inflexible application of the rule in *Quid Pro Quo*, and while Sachs J stated that the result ‘must depend on the particular facts of each case’, the outcome made it clear that he considered that the Minister’s deliberate misreliance to be fatal without more.

A more nuanced approach to these issues appears in the judgment of Cameron JA (as he then was) in *Howick District Landowners’ Association v uMngeni Municipality*. The appellant ratepayers challenged a rates assessment for their land – rural land that had not previously been rated. The municipality had resolved to levy rates in reliance on s 75A of the then-new Local Government: Municipal Systems Act 32 of 2000 (‘Systems Act’), but later discovered that s 75A had not yet been in effect at the time of the resolution. The municipality then purported to amend the suite of resolutions and notices to refer to the correct provision – s 10G(7) of the Local Government Transition Act 209 of 1993 (‘LgTA’) – but by mistake failed to amend the initial resolution and its incorrect reference to s 75A of the Systems Act. The appellant ratepayers argued that this failure rendered the rating decision invalid. They argued further that the permissive approach had been overturned by the Constitutional Court in *Harris*, and thus, notwithstanding the referral to s 75A of the Systems Act being clearly inadvertent, the ratings resolution was invalid. Cameron JA disagreed. He endorsed both *Latib* and *Harris*, describing the former’s import thus: ‘*Latib* does not license unauthorised legislative or administrative acts. It licenses acts when authority for them exists, and when the failure expressly or accurately to invoke their source is immaterial to their due exercise.’ Later in the judgment, he described the relationship between *Latib*, on the one hand, and *Quid Pro Quo* and *Harris*, on the other, as follows:

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28 *Minister of Education v Harris* (note 2 above). The Constitutional Court had, in *Executive Council, Western Cape Legislature v President of the Republic of South Africa* [1995] ZACC 8, 1995 (4) SA 877 (CC) at paras 22 & 68, left open ‘the question of applicability of the rule in *Latib*’.

29 Ibid at paras 14–16.

30 Ibid at para 17.

31 Ibid at para 18.


33 Ibid at para 20.
The doctrine does not validate action taken in deliberate reliance on a provision that does not authorise it, even where another provision exists that may warrant it: *Quid Pro Quo* ... In *Harris*, as in *Quid Pro Quo*, there was no question of a mere administrative error or oversight: the decision-maker deliberately chose to act in terms of a provision that did not authorise what was sought to be done. In dealing with an argument based on *Latib*, the CC pointed out that its applicability ‘must depend on the particular facts of each case, especially whether the functionary consciously elected to rely on the statutory provision subsequently found to be wanting’. Applying *Quid Pro Quo*, the CC held that it was not open to the decision-maker now to rely on a different provision to validate what had been invalidly done under the provision invoked: the otherwise invalid notice could not be rescued by reference to powers the decision-maker might possibly have had but failed to exercise. I do not read *Harris* as putting *Latib* in doubt, but as confirming the proper scope of its application.34

Because the remaining reference to s 75A of the Systems Act was ‘the result of a simple slip-up’ – in that the municipality had intended to invoke s 10g(7) of the LGTA but had failed to amend the resolution properly – the reference to s 75A did not render the resolution invalid.

Two things are notable about Cameron JA’s approach. The first is that his description of the import of *Latib* implies that what matters is materiality – whether the misreliance is ‘immaterial’ to the ‘due exercise’ of the correct power. But the second is that he thereafter falls back on *Harris*’s unequivocal dichotomy between validity in inadvertent-misreliance cases and invalidity in deliberate-misreliance cases. This tension can be resolved by concluding that the deliberate reliance on an incorrect empowering provision always visits the relevant decision with invalidity because deliberate misreliance is always material to the due exercise of the correct power, but it is not entirely clear whether this is what Cameron JA meant.

C  The third period: the deliberate-misreliance principle hardens

In the Supreme Court of Appeal and the Constitutional Court judgments following *Howick*, the unequivocal dichotomy between deliberate-misreliance and inadvertent-misreliance cases has hardened. If misreliance is inadvertent, misreliance does not render the decision invalid. If misreliance is deliberate, the decision is invalid without more.

In *Shaikh v Standard Bank*,35 the South African Revenue Service (SARS) had instructed Standard Bank to pay customs duty and VAT that Mr Shaikh owed SARS out of his bank account. In the relevant two notices, SARS relied solely on s 114A of the Customs and Excise Act 91 of 1964 (‘Customs Act’), which permitted SARS to order a bank to hand over a taxpayer’s outstanding customs duty, and did not rely on s 47 of the Value-Added Tax Act 89 of 1991 (‘VAT Act’), which permitted SARS to do the same in relation to outstanding VAT. It is important to note that the two provisions were identical in all material respects save that they referred to different taxes: s 114A of the Customs Act referred to ‘any amount of duty, interest, fine, penalty or forfeiture payable by such other person under this Act [i.e., the Customs Act]’ and s 47 of the VAT Act referred to ‘any amount of tax, additional tax, penalty or interest payable by such other person under this Act [i.e., the VAT Act]’.36

34 Ibid at para 22.
35 *Shaikh* (note 5 above).
36 Section 114A of the Customs Act (referred to in para 3 of *Shaikh* (note 5 above)) reads as follows: ‘The Commissioner may, if he thinks it necessary, declare any person to be the agent of any other person, and the person so declared an agent – (a) shall for the purposes of this Act be the agent of such other person in respect of the payment of any amount of duty, interest, fine, penalty or forfeiture payable by such other person under
The sole issue before the Supreme Court of Appeal was whether SARS could use notices which only referred to s 114A of the Customs Act to extract VAT from a taxpayer’s bank. Mhlantla AJA (as she then was) held that SARS could. Without enquiring into why SARS had referred to s 114A only, she held that SARS had ‘erroneously’ omitted to refer to s 47 of the VAT Act. She did not explain what she meant by ‘erroneously’. With reference to Howick and Quid Pro Quo, Mhlantla AJA held that the omissions ‘did not affect the validity of the notices insofar as they related to the collection of VAT’ and ‘[t]o conclude otherwise would be to elevate form above substance’.37

In two subsequent judgments of the Constitutional Court, Jafta J (for the minority) cast the distinction between inadvertent-misreliance and deliberate-misreliance cases in stark terms (neither majority considered the issue). In Tulip Diamonds,38 Jafta J wrote:

If a functionary consciously chooses a particular provision as authority for the function he or she performs and it turns out that the chosen provision does not authorise the performance of the function concerned, the purported exercise of power will be invalid. It cannot be rescued by the claim that the same functionary is granted the power exercised but by a different provision.39

Similarly, in Liebenberg,40 Jafta J noted that:

In our law, administrative functions performed in terms of incorrect provisions are invalid, even if the functionary is empowered to perform the function concerned by another provision. … This general rule admits of only one exception. This is where it is clear from the facts that the functionary had elected to rely on the correct provision but mistakenly referred to an incorrect provision.41

In two cases dealing with royal succession under the Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA) a unanimous Constitutional Court endorsed something like this relatively inflexible understanding of Harris. In Sigcau,42 the President had stripped the applicant of the kingship of the amaMpondo aseQaukeni and awarded it to the fourth respondent. The President had done so in reliance on the TLGFA as amended in 2009 – apparently deliberately. This was a mistake. The applicable procedure at the time was in the TLGFA prior to its amendment, which differed from the post-amendment procedure. The Constitutional Court held that this rendered the President’s decision invalid:

Because of the material differences between the old Act and the new Act, some of which have been highlighted, it cannot be said that a notice issued under the new Act can be taken to have been issued under the old Act. In any event, such an argument would be inconsistent with the decision of this Court in Harris.43

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37 Ibid at paras 17–18.
38 Tulip Diamonds (note 6 above).
39 Ibid at para 122. Jafta J relied upon Quid Pro Quo and Harris.
40 Liebenberg (note 7 above).
41 Ibid at paras 93–94, relying upon Latib, Quid Pro Quo, Howick, & Harris.
42 Sigcau v President of the Republic of South Africa & Others [2013] ZACC 18, 2013 (9) BCLR 1091 (CC).
43 Ibid at para 27.
In *Nxumalo*, the President had also made a decision under the amended TLGFA in circumstances where the unamended TLGFA was applicable. With reference to *Harris*, the Court held that ‘[t]he principle upon which *Sigcau* is based is that, if a functionary purports to exercise under one Act a power that that Act does not confer upon him or her, that exercise of power is unlawful even if there is another Act that confers such power on the functionary.’

The last case in this line to note is *Zuma v DA*, a 2017 judgment of the Supreme Court of Appeal. In April 2009, the acting National Director of Public Prosecutions (NDPP), decided to discontinue the prosecution of Mr Jacob Zuma shortly before he became President, a prosecution the NDPP had himself decided to institute. The NDPP relied upon section 179(5)(d) of the Constitution as authority for his decision to discontinue the prosecution. This was a mistake. In the earlier *National Director of Public Prosecutions v Zuma*, Harms JA had held that section 179(5)(d) did not empower the NDPP to review his own decision to prosecute – it permitted him to review the decisions of provincial Directors of Public Prosecutions.

The NDPP argued that this mistake did not invalidate the decision to discontinue the prosecution because section 179(2) of the Constitution empowered him to review his own decision to institute a prosecution. Navsa ADP, relying upon *Harris* and Jafta J’s minority judgment in *Liebenberg*, held that a decision made by ‘a decision-maker who [has] consciously made an election to rely on a statutory provision found wanting’ is ‘liable to be set aside’, even if an empowering provision exists elsewhere. As a result, the decision by the NDPP fell to be set aside for this reason alone. While not necessary for the outcome of the case, Navsa ADP went on to hold that the decision suffered from numerous other irregularities that were unrelated to misreliance: that the decision was irrational, that the NDPP had failed to consider relevant factors, and that he had made a material error of law.

The current state of the law is thus the following: if an administrative decision is made in express reliance upon an empowering provision that does not contain authority for that decision, and that reliance is deliberate, the administrative decision is invalid without more. In what follows, I call this the ‘deliberate-reliance rule’.

### IV ASSESSING THE DELIBERATE-RELIANCE RULE

In this section, it is argued that the deliberate-reliance rule is not a good one. It should be abandoned. In the following section, I describe the approach that should replace it.

#### A The line between deliberate and inadvertent misreliance is not clear

The first flaw in the deliberate-reliance rule is that what it means for misreliance to be deliberate or inadvertent differs between the cases – the line between the two concepts is not clear.

One potential definition of inadvertent misreliance is this: An administrator wishes to do administrative act X. Empowering provision A contains the power to do X. The decision-maker

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44. *Nxumalo v President of the Republic & Others* [2014] ZACC 27, 2014 (12) BCLR 1457 (CC).
45. Ibid at para 14.
46. *Zuma v DA* (note 8 above).
49. Ibid at para 84.
50. Ibid at paras 86–87.
51. Ibid at para 88.
intends to invoke A to do X and intends to cite A in the notice of her decision, but through an administrative (i.e., clerical) error, she cites empowering provision B, which does not contain the power to do X. This can be called the ‘strict’ definition of inadvertent misreliance. In other words, the error must be, in the words of Cameron JA in Howick, no more than an administrative ‘slip-up’.

The mistake in Howick is an example of this type of inadvertent misreliance. The municipal council had initially (and deliberately) relied upon s 75A of the Systems Act to rate the properties at issue but discovered that it could not do so because the Systems Act had not yet come into effect. The council then attempted to amend the relevant resolution to refer instead to s 10G(7) of the LGTA, which was in effect and did contain the power to make the ratings decision. However, the council did not amend the resolution properly and it continued to refer to s 75A of the Systems Act. Put in the structure of the strict definition of inadvertent misreliance set out above: the council wished to rate the relevant properties. Section 10G(7) of the LGTA contained the power to do so. The attempted amendment showed that the council intended to invoke s 10G(7) and intended to cite it. However, because the amendment was bungled, the council cited s 75A of the Systems Act instead. It had thus made an error in the strict sense and its error did not visit the ratings decision with invalidity.

The courts do not always require strictly inadvertent misreliance for a decision to escape invalidity. An alternative definition of inadvertent misreliance is this: an administrator wishes to do administrative act X. Empowering provision A contains the power to do X but unlike with strict inadvertent misreliance, the administrator incorrectly thinks that empowering provision B contains the power to do X. The administrator intends to invoke B, intends to cite B and in fact cites B. This can be called the ‘lenient’ understanding of inadvertent misreliance. Shaikh can be interpreted as an example of a case where the Supreme Court of Appeal applied a lenient understanding of inadvertent misreliance. While Mhlantla AJA did not delve into why SARS had cited only s 114A of the Customs Act to collect both outstanding customs duty and VAT, the relevant notice seemed to indicate that SARS thought that s 114A contained the power to extract outstanding VAT from a taxpayer’s bank:

The abovementioned is indebted to this department for Customs Duty, VAT, Forfeiture and Interest of R1 245 724.33. In terms of s 114A of the Customs and Excise Act 91 of 1964, as amended, the Commissioner for the South African Revenue Services is empowered to appoint an agent who may be in custody or control of income, money etc of the client, to hold such money or assets for the payment of Duty, VAT, Forfeiture, fine, penalty and interest upon the request of the department.

In terms of this section [the] Commissioner appoint[s] you as agent and requests that you hold and not dispose of any monies or assets, whether capital or interest to the client or to any other person. You are requested to pay such money referred to above to the Commissioner by close of business tomorrow.

Put in the structure of the above definition of the lenient understanding of inadvertent misreliance: SARS intended to collect Mr Shaikh’s VAT liability from Standard Bank. Section 47 contained the power for SARS to do so. But SARS incorrectly thought that s 114 of the Customs Act contained this power, SARS intended to invoke and cite the section and actually cited it.

52 Howick (note 32 above).
53 Ibid at para 23.
54 Shaikh (note 35 above).
55 Ibid at para 10 (my emphasis).
In *Zuma v DA*, however, the NDPP did not obtain the benefit of the lenient understanding of inadvertent misreliance. The power he intended to exercise was the power to review his own decision to institute a prosecution. He thought that section 179(5)(d) of the Constitution contained this power, so he intended to invoke and cite the section and in fact did so. Under the lenient understanding of inadvertent misreliance, his decision would not have been visited with invalidity as a result of the misreliance. He would have obtained the same treatment as SARS did in *Shaikh*. Instead, Nava SA invalidated the NDPP’s decision through the application of the deliberate-reliance rule.

Whether a court adopts a strict or lenient understanding of inadvertent misreliance affects what deliberate misreliance means. If strict inadvertent misreliance is required to save a decision from invalidity, then deliberate misreliance constitutes anything from lenient inadvertent misreliance – in other words, the administrator thinking that the incorrect empowering provision contains the necessary power – to a host of more serious legal errors. If lenient inadvertent misreliance is sufficient to save a decision from invalidity, then the meaning of deliberate misreliance is narrower.

B The deliberate-reliance rule does not fit comfortably with the orthodox administrative-law principles

The second problem with the deliberate-reliance rule is that it does not fit comfortably with orthodox administrative-law principles. Section 33 of the Constitution grants everyone the right to administrative action that is lawful, reasonable and procedurally fair; a right which is particularised in PAJA. As is explored below, a decision made through deliberate reliance on the wrong empowering provision can be all of these things. If another empowering provision exists and the requirements for the invocation of that provision have been met, then it is difficult to claim that the decision is not lawful, in the sense that the administrator did nothing other than exercise a power granted to her by the law.

A decision that would fall afoul of the deliberate-reliance rule can also be perfectly reasonable. It can be rationally related to the purpose for which the power was given, and it can be proportionate. There is also no reason that it cannot be procedurally fair. A decision-maker can hold an unbiased hearing with judicial levels of *audi* and follow it up with a decision that refers to the wrong empowering provision.

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56 *Zuma v DA* (note 8 above).
57 Ibid at para 55.7.
That the deliberate-reliance rule does not fit comfortably within the orthodox paradigm of public-law review is borne out by the fact that academic writers struggle to classify it. Hoexter tentatively classifies it as an aspect of lawfulness, writing that s 6(2)(f)(i) of PAJA, which allows for review where the action is ‘not authorised by the empowering provision’, ‘seems capable of accommodating’ the deliberate-reliance rule.61 Baxter, on the other hand, appears to interpret Quid Pro Quo as a procedural-fairness case. He writes that it is an example of where ‘a statement of the source of authority [was] necessary in order to alert potential objectors as to the public authority’s true objectives’.62

Of course, and as is argued in detail below, deliberate reliance by a decision-maker on an incorrect empowering provision can be symptomatic of – or paired with – conventional grounds of review. A decision-maker could rely on an incorrect empowering provision because she has entirely misconstrued her powers, or such reliance could result in her not complying with the requirements of the correct empowering provision, or her misreliance could result in the administrative act being procedurally unfair. But this does not mean that deliberate misreliance is problematic in and of itself.

To illustrate the point, some examples are apposite. Shaikh63 is a case in which it is difficult to argue that the administrator’s misreliance generated an orthodox ground of review. SARS had invoked a provision of the Customs Act to extract VAT from a bank when it was questionable whether SARS could use this provision to extract VAT rather than customs duty. But statutory authority for extracting VAT from the bank clearly existed – in the corresponding provision in the VAT Act. There was no indication that SARS had failed to comply with the requirements for invoking that provision. Indeed, the two provisions were identical in all material respects. Moreover, SARS’s misreliance did not result in it misconstruing its powers. SARS knew what it wanted to do – it wanted to extract the VAT Mr Shaikh owed from his bank account, and this is what it did. The misreliance also did not render the decision irrational or unreasonable, nor did it result in SARS considering irrelevant factors or failing to consider relevant ones. This is because the reasons for extracting customs duty from a taxpayer’s bank account are the same as the reasons for extracting VAT; namely that the taxpayer owes the relevant tax and that it is in the public interest for SARS to collect it. The misreliance was unlikely to have rendered the decision procedurally unfair because the procedure attaching to both provisions was the same.

An example in which misreliance generated orthodox grounds of review is Harris.64 There, the Minister’s misreliance had resulted in him doing something that he could not do: impose a binding age requirement on Grade 1 learners at private schools through a policy. He had fundamentally misconstrued his powers and thus exercised a power that did not exist anywhere in law. The same occurred in Quid Pro Quo.65 The administrator thought that s 3 of the Roads Ordinance empowered him to widen a road reserve to build a new road, but it did not, and no provision existed that empowered him to do such a thing.

A further reason why the deliberate-reliance rule does not fit comfortably with orthodox administrative-law principles is that, after invoking it, the courts generally ignore their

61 Ibid at 260–261.
63 Shaikh (note 5 above).
64 Harris (note 2 above).
65 Quid Pro Quo (note 1 above).
remedial discretion. Under the common law,66 PAJA,67 and the constitutional principle of legality,68 a court may hold that an administrative decision suffers from a reviewable irregularity but nevertheless refrain from setting it aside.69 Recent descriptions and invocations of the deliberate-reliance rule by the Supreme Court of Appeal and the Constitutional Court appear to ignore this remedial discretion: if a decision is made in deliberate reliance upon an incorrect empowering provision, it is invalid and must be set aside. Nowhere in Harris,70 Sigcau,71 Nxumalo,72 or Zuma v Democratic Alliance73 did the relevant court consider whether to exercise its remedial discretion not to set the relevant decision aside even though it was unlawful for violating the deliberate-reliance rule.

C Perverse incentives

If there is one thing the cases make clear, it is that a decision-maker can avoid the risk of falling afoul of the deliberate-reliance rule simply by not stating the statutory provision she is relying on at all, provided that the correct empowering provision does not require its citation.74 If she is unsure about the source of her power, it is better for her not to share what she thinks it is. This is a perverse incentive. It is a good thing for an administrator to state the source of her power when making an administrative decision. As De Villiers JP held in Macrobert, ‘it certainly is a matter of convenience to know under what statutory provision a municipality purports to act in framing bylaws’.75 In the words of Baxter: ‘[the administrator] need not state the authority for the action, although this is usually done in practice and the provision of such information is a principle of sound administration.’76 If an administrator states the source of her power, it is easier for those affected to determine whether the decision is lawful and what their remedies might be. An administrator that states the source of her power furthers the ‘culture of justification’ the Constitution seeks to foster.77

67 PAJA, s 8(1). See also Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency [2013] ZACC 51, 2014 (1) SA 604 (CC) (‘Allpay merits’) at paras 25, 56, 96; and Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2) [2014] ZACC 12, 2014 (4) SA 179 (CC) (‘Allpay remedy’).
68 Constitution, s 172(1)(b). See also Corruption Watch NPC v President of the Republic of South Africa [2018] ZACC 23, 2018 (10) BCLR 1179 (CC) at paras 68–90.
69 For a recent account of the conceptual divide between lawfulness and remedy (in the context of public procurement), see R Cachalia and L Kohn ‘The quest for “reasonable certainty”: refining the justice and equity remedial framework in public procurement cases’ (2020) 137 South African Law Journal 659.
70 Harris (note 2 above)
71 Sigcau (note 42 above).
72 Nxumalo (note 44 above).
73 Zuma v Democratic Alliance (note 8 above).
74 Macrobert (note 9 above) at 940; Latib (note 18 above) at 190H–191A; Shaikh (note 35 above) at para 19.
75 Macrobert (note 9 above) at 940.
76 Baxter (note 62 above) at 366.
D The deliberate-reliance rule can ignore substantive irregularities

An inflexible application of the deliberate-reliance rule can also result in a decision being invalidated that has nothing wrong with it – other than that it violated the deliberate-reliance rule. This is especially so when paired with a strict understanding of what constitutes inadvertent misreliance.

A decision-maker can, for example, make a decision in reliance upon empowering provision A, incorrectly thinking that it provides authority for the decision. The decision can otherwise be perfectly regular – empowering provision B exists which authorises the decision; all of the requirements for the exercise of empowering provision B have been met; the decision was procedurally fair; the decision-maker considered all relevant circumstances (and only such circumstances); and the decision was rational and reasonable. The decision would nevertheless be invalid because the decision-maker deliberately relied upon the wrong empowering provision. We should be wary of this. As the Constitutional Court noted in *Joseph*, administrative review should not be done in a way that erects unnecessary tripwires in the way of efficient administration:

> The spectre of administrative paralysis raised by the respondents is a legitimate concern. Administrative efficiency is an important goal in a democracy, and courts must remain vigilant not to impose unduly onerous administrative burdens on the state bureaucracy. … The practical concerns raised by the respondents thus … must inform the content of procedural fairness.

By invalidating administrative decisions that are otherwise unproblematic, the inflexible application of the deliberate-reliance rule can therefore unnecessarily stymie efficient administration. A related point is that the deliberate-reliance rule can result in courts not grappling with substantive irregularities attaching to a decision under review. This is what happened in *Harris*. The matter raised ‘complex constitutional questions’ involving the school attendance, the right to equality, children’s rights and the interaction between national and provincial powers to regulate schooling. The High Court considered them. The Constitutional Court, having invalidated the decision under review using the deliberate-reliance rule, refrained from considering or deciding these issues. This species of constitutional avoidance imposes costs: constitutional provisions are not given meaning, undermining the clarity of the law and the rule of law.

The same could have happened in *Zuma v DA*. Navsa ADP could have refrained from deciding whether the decision to withdraw the prosecution of Mr Zuma was irrational or otherwise substantively unlawful, and could have invalidated the decision solely because it

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79 Ibid at para 29 (footnotes omitted). See also *Premier, Mpumalanga & Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* [1998] ZACC 20, 1999 (2) SA 91 (CC) at para 41: ‘In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly.’
80 *Harris* (note 2 above).
81 Ibid at paras 2, 19.
82 Ibid at para 19.
83 Accounts of the costs of this sort of constitutional avoidance are legion. See, for example, S Woolman ‘The amazing, vanishing Bill of Rights’ (2007) 124 South African Law Journal 762, 763–766.
84 *Zuma v DA* (note 8 above).
violated the deliberate-reliance rule. While this might have furthered judicial economy, it would have left unresolved one of the major legal and political controversies of the Zuma era, and would have made it easier for a pliant NDPP again to withdraw the decision to prosecute Mr Zuma. Indeed, it is not inconceivable that this was why the NPA raised the applicability of *Harris*, in supplementary heads filed a week before the hearing in the Supreme Court of Appeal. It could have been an attempt by the NPA’s legal team to bait the Supreme Court of Appeal into not deciding the substantive lawfulness of the decision not to prosecute Mr Zuma.

V A BETTER APPROACH

I therefore propose that the strict deliberate-reliance rule be abandoned. What should it be replaced with? In short, the application of orthodox principles of administrative review under the Constitution – a first-principles approach. Whether a decision based on an incorrect empowering provision is lawful should not depend on whether the mistake was inadvertent or deliberate but, in the words of Cameron JA in *Howick*, whether ‘the failure expressly or accurately to invoke [the decision’s] source is immaterial to [its] due exercise’. Such an approach would work as follows. An administrator makes a decision and cites either the incorrect empowering provision or cites no empowering provision. Whether the decision should be reviewed and set aside depends on the answers to the following questions:

(a) First, the court must determine whether an empowering provision exists at all. If not, the decision is unlawful, because ‘[s]tate functionaries, no matter how well-intentioned, may only do what the law empowers them to do.’

(b) Secondly, if an empowering provision exists, the court must ask whether the requirements for its invocation have been met. If not, the decision is similarly unlawful.

(c) Thirdly, if the requirements for the exercise of the correct empowering provision have been met, the court must consider whether the citation of the incorrect empowering provision, or the failure to cite an empowering provision at all, gives rise to any of the other grounds of review in PAJA or under the principle of legality. Did it, for example, cause the decision-maker to consider irrelevant circumstances, or did it render the decision irrational? Did the decision-maker misconstrue her powers? If no other ground of review exists, the misreliance does not itself render the decision unlawful.

(d) Finally, if the decision is unlawful under steps (b) or (c), the court must consider whether to exercise its remedial discretion to set aside the decision.

This approach can lead to the same result as the application of the deliberate-reliance rule, but would require the court to grapple more deliberately with whether there is anything substantively wrong with the decision at issue. The deliberate-reliance rule can, in other words, reach the right destination – but along a route that obscures rather than illuminates. Applying a first-principles approach to some of the cases considered above illustrates how it works.

In *Harris*, the Minister would fail at leg (a), in that no empowering provision existed that empowered the Minister to do what he wished to do. The Minister attempted to impose a

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85 Ibid at para 54.
86 *Howick* (note 32 above).
88 *Welkom* (note 3 above) at para 1.
binding age requirement on Grade 1 learners at private schools through a policy. Section 3(4)(i) of the Policy Act did not permit this because it did not permit the enactment of policy that was legally binding. While s 5(4) permitted the Minister to impose binding age requirements, it did not permit him to do so through a policy. No provision existed, therefore, that permitted the Minister to impose binding age requirements through a policy, and the decision was unlawful for this reason.

The administrator in *Quid Pro Quo* would also fail at leg (a) in a similar way. He attempted to widen a road reserve in order to build new roads. No provision existed that empowered him to do this. Section 3 empowered him to widen a road reserve (but not in order to build new roads) and s 5 empowered him to declare new roads (but not through widening a road reserve). The administrator fell between two stools and his decision was without any legal authority at all.

*Sigcau* is an example of a decision that would fail at leg (b). The President intended to recognise a new king of the amaMpondi aseQaukeni. He relied on the TLGFA as amended, but he could not do so because the amendment was not yet in force. The power to recognise a new king existed under the unamended TLGFA, but the President did not comply with the requirements for the exercise of that power because ‘of the material differences between the old Act and the new Act’.

In *Shaikh*, on the other hand, SARS intended to order Standard Bank to pay over the VAT Mr Shaikh owed from his bank account. A provision existed that permitted precisely this – s 47 of the VAT Act. The requirements for the exercise of s 47 were met because they were exactly the same as the requirements for the exercise of the power under s 114A in relation to customs duty – the only material difference between the two sections being that the former referred to VAT and the latter referred to customs duty. The fact that SARS incorrectly thought that s 114A contained the power to order the payment of VAT did not give rise to any other ground of review under PAJA. SARS’s misreliance did not, for example, cause it to act for an ulterior purpose, take into account irrelevant circumstances, or act irrationally. Mr Shaikh owed SARS VAT and SARS was entitled to extract it from his bank.

*Zuma v DA* is one example of a case where a first-principles approach would lead to a different result. The NDPP’s misreliance should not have invalidated the decision – although it was still unlawful for other reasons. The NDPP intended to review his own prosecutorial decision; namely to prosecute Mr Zuma. The section he cited (section 179(5)(d) of the Constitution) did not empower him to review his own decisions. But another section did – section 179(2). He thus passed hurdle (a). There is no indication that he did not comply with any requirements attaching to section 179(2), and he therefore passed hurdle (b) as well. His misreliance did not cause him to commit any other irregularity. The misreliance did not, for example, lead to him acting irrationally or considering irrelevant factors (he did do those things, but for other reasons). He therefore also crossed hurdle (c).

As such, the NDPP’s decision was not unlawful because he cited section 179(5)(d) of the Constitution when he should have cited section 179(2). He intended to review his own prosecutorial decision, section 179(2) gave him the power to do so and he complied with the requirements of that section. His decision was, to be clear, unlawful – but it was unlawful for reasons unrelated to the misreliance.

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89 *Sigcau* (note 42 above) at para 27.
VI CONCLUSION

Why have the courts, including the Constitutional Court, adopted the strict deliberate-reliance rule, despite its flaws? It may be because deliberate misreliance stands as a proxy for orthodox grounds of review. An administrator who in some sense deliberately relies upon the wrong empowering provision often ends up making a decision for which no empowering provision exists as a result – as in *Quid Pro Quo* and *Harris*. Or she may take into account irrelevant circumstances, she may misconstrue the nature of her powers, or she may act procedurally unfairly – all as a result of the misreliance.

But this is not always the case. While deliberate misreliance can render a decision substantively problematic, it does not necessarily do so, as cases such as *Shaikh* and *Zuma v DA* illustrate. As such, the courts should not, as a rule, set aside decisions made in deliberate reliance upon the wrong empowering provision. It would be better for them to grapple with whether the administrator’s misreliance infected the decision with any of the more orthodox grounds of review under PAJA or the principle of legality. Only if this is the case should the decision be invalidated by virtue of the administrator’s misreliance.

Such an approach would relieve the courts from having to draw a line between deliberate and inadvertent misreliance, something which is not always easy to do. It would prevent otherwise unobjectionable decisions from being set aside based on what can be a technicality. It would encourage courts to consider what is substantively wrong with decisions under review. In addition, it would take away the incentive for administrators not to state the source of the power they are attempting to exercise. It would make for better law and better administration.
Buying Democracy: The Regulation of Private Funding of Political Parties and the Press After My Vote Counts

IDDO PORAT

ABSTRACT: Private funding of political parties and candidates has been recognized by many countries as a source of corruption and as distorting the democratic process. Solutions to the problem include restrictions on private funding, and the supply of public funding so that candidates and parties would not have to depend on wealthy individuals, corporations, or even foreign countries to cover the high costs of political campaigning. The My Vote Counts (2018) decision of the South African Constitutional Court showed the dangers of unregulated private funding of political parties and candidates to the South African political system and brought about a new legislative regime of transparency and regulation. This article describes the history of the case and tries to assess some of the features of this new regime, comparing it to funding regimes in other countries. It also argues that the My Vote Counts decision can be taken to represent something larger than political funding only; it is based, so this article argues, on a general theory against ‘buying’ democracy that can be extended to another democratic institution in danger of being ‘bought’ – the press. The corrupting and distorting effects of private money on the press – a crucial element of the democratic system – are also recognized by many countries, including South Africa; especially so in the internet age which deprived the press of much of its income. The article surveys the different ways in which economic interests affect the impoverished press, from direct bribery of journalists to subtle economic deals of reporting in exchange for favour. The article uses the theory against ‘buying’ democracy and the analogy to political parties to argue for applying transparency, regulation, and public funding to the funding regime of the press as well.

KEYWORDS: campaign finance, corruption, freedom of the press, free speech, political funding, political parties, social media, the right to vote

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I INTRODUCTION

The My Vote Counts case of 2018 is a rare example of a successful litigation campaign that went to the heart of politics. Together with the cases preceding it and a civil society campaign, it managed to transform the South African political system from a system that did not impose any regulation on private funding of political parties to a system that, like systems in many other countries, dictates requirements of transparency and limitations on party funding.

In My Vote Counts the South African Constitutional Court ruled that the Promotion of Access to Information Act 2 of 2000 (‘PAIA’) was constitutionally invalid to the extent that it failed to provide for the ‘recordal, preservation and reasonable disclosure’ of information on the private funding of political parties and independent candidates and mandated Parliament to amend the law accordingly within 18 months. The decision emphasized the importance of disclosing donor identity as part of the information necessary for the voter, so that the right to vote is ‘exercised meaningfully or with understanding,’ and the importance of transparency in order to prevent corruption and the influence of capital on the political process.

Although the case mandated only one legislative change, it brought about two. In April 2021, three years after the case was decided, two pieces of legislation finally came into operation – the Political Parties Funding Act 6 of 2018 (‘PPFA’) (which was a Bill when the case was decided); and the Promotion of Access to Information Amendment Act 31 of 2019 (the amendment required by the case). Together these two pieces of legislation provide for a new regulatory regime for political party funding. At the time of writing in November 2021, it was yet to be seen to what extent and in what degree of success these new laws would be implemented, but their final approval provided a good opportunity to look at this case through comparative lenses and place the new funding regime among similar models of political funding regimes in other countries.

In my opinion, the My Vote Counts case did not only provide a constitutional framework for regulating party funding, it also provided for a general theory of democratic funding that could be extended to other democratic institutions. At the heart of the case is the recognition that private sources of money provided to democratic institutions by wealthy individuals, corporations, or foreign states corrupt and distort the democratic process. Moreover, when the sources of funding are hidden from the public, voters cannot properly exercise their right to vote if they do not know the sources of influence on the information they receive. As much as this applies to political parties, I will argue that it also applies to another vital democratic institution – the press. The press (which also includes online newspapers and many forms

1 My Vote Counts (www.myvotecounts.org.za) was registered in 2014 as a civil society organisation to act as a ‘watch dog’ over political party funding. My Vote Counts NPC v Minister of Justice and Correctional Services & Another [2018] ZACC 17, 2018 (5) SA 380 (CC) (‘My Vote Counts’).

2 Ibid at para 9.

3 The decision was based on the right of access to information, protected by section 32 of the Constitution of South Africa, and the right to vote protected by section 19 of the Constitution. The right to vote is coupled with the duty of the state to ‘respect, protect, fulfil and promote’ all rights in the Constitution as provided by section 7(2).

4 My Vote Counts (note 1 above) at para 8.
of social media reporting)\(^5\) is probably the primary source of information about government and all matters that affect the vote. When private money affects the way news is framed and communicated and influences the choice of news and contents to be delivered, this distorts the democratic process. When voters are unaware of these distortions, the problem is exacerbated. The threat of corruption is also not to be dismissed when it comes to private sources of money funding the press. Admittedly, the press is in many ways different from political parties, both formally (for example, it is not recognized by legislation and constitutions as a political institution) and practically (it has always operated as a private business, unlike parties which have always been regulated by law and have a semi-public status). However, the press too is often regarded as a semi-public institution, vital to democracy. I will try to argue that the general theory of democratic funding which underlies the *My Vote Counts* case has relevance to the press as well.

I call this general theory of funding the theory against ‘buying’ democracy; it applies to the two institutions discussed in this article – political parties and the press. In part II, I review the background and the litigation leading to the *My Vote Counts* case, as well as the case itself, and outline the theory that can be deduced from it regarding private funding and the democratic process. Part III outlines different models of political funding regimes and compares them to South Africa’s new regime and to the theory against buying democracy. I concentrate on the comparison of two extreme examples of funding regimes: the USA and Israel. Part IV then describes the application of my theory to the press. It reviews the radical changes the press has undergone and the different ways in which it can be, and is, bought. Part III ends with a suggestion about the public funding of the press and the way it can be adapted to South Africa. Here too, most of the examples will be drawn from the USA and Israel.

II  *MY VOTE COUNTS AND A THEORY OF DEMOCRATIC FUNDING*

A  Background to the case

For many years, South Africa was relatively exceptional in the international landscape for not regulating private funding for political parties and candidates in any way.\(^6\) South African law not only did not require transparency of private donors, it also did not limit the amount of the donations amounts, nor the donor identities.\(^7\) Thus, banks, international companies, foreign governments, and wealthy businesspersons all donated large sums of money to parties and candidates without political parties being required to disclose any of these donations nor reveal them to the public. On many occasions, incidents of corruption by donations, in money or in

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5. ‘The press’ refers to journalism generally. It includes all online press, whether the newspaper has a printed version or not. It also comprises of journalism which appears in social media or other internet forms. Later on I will address the issue of such avenues of journalism. As I explain later, the emphasis in this article is more on printed and digital journalism (which is more directly associated with the term ‘the press’ than on broadcast journalism (radio and television), as the latter are less susceptible to the damaging economic processes affecting the former. In general, though, I do not engage here with ‘non-news’ media (for example, entertainment and culture) which are outside the scope of the argument here.


7. This statement was still true at the time of writing this article in November 2021, despite two new pieces of legislation, since both had not yet taken effect.
kind, to candidates and top party officials in return for governmental favours were reported by the press; and some led to indictments.\(^8\)

The South African Constitution contains provisions that have the effect of regulating private funding. First, the Constitution in section 236 mandates the enactment of legislation regarding the provision of public funding for political parties, and indeed such legislation was enacted and provides for relatively generous public funding for political parties in South Africa. In its Public Funding of Represented Political Parties Act 103 of 1997, South Africa provided for public funding of political parties in amounts relative to their size in Parliament, with the African National Congress (the ANC), for example, receiving around ZAR 60 million (USD 4.3 million), and the Democratic Alliance (DA) around R16 million (USD 1.2 million) in 2015.\(^9\)

Secondly, in section 32(2) the Constitution also provides that legislation be enacted to give effect to the right of access to information, protected by section 32(1), which could be interpreted to include information regarding political parties and their sources of funding.\(^10\) However, the ensuing legislation left out political parties from its ambit. In its Promotion of Access to Information Act 2 of 2000 (PAIA), South Africa provided for access to information from a variety of governmental and non-governmental bodies. However, PAIA did not cover political parties.\(^11\) The outcome was, therefore, that despite providing for public funding, South African law did not expressly impose any restrictions on private money for parties and, in addition, allowed parties to conceal the sources and amounts of private money they receive, and the way they use it.

It is not quite certain why South Africa chose not to include limitations on political party funding in its Constitution, which in many other respects was very carefully crafted. One suggestion is that at the time the Constitution was drafted the ANC relied heavily on foreign funding and did not want to jeopardise this source of support.\(^12\) In any case, the outcome was, not surprisingly, an influx of murky donations and cases of corruption, and the situation has become the source of much concern in South Africa. Furthermore, it is conceived as a central element in one of its prime social problems – state corruption.\(^13\)

The lack of transparency of donations allowed for corruption in the guise of money transfers, or gifts in kind, from corporations, billionaires, and even entities associated with crime, to party officials and members of parliament. For example, during the proceedings of the Zondo Commission of Inquiry into State Capture, in 2019, Angelo Agrizzi, former chief operating officer at African Global Operations (AGO), revealed that AGO spent between

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\(^10\) Constitution, sections 32(1), 32(2), 236.

\(^11\) My Vote Counts (note 1 above) at para 8 (Referring to the High Court’s decision according to which ‘PAIA neither applies to political parties nor to independent candidates nor to all records on private funding’).

\(^12\) See My Vote Counts Report (note 8 above)(Documenting the donations that ANC received from foreign countries under President Mandela).

\(^13\) Transparency International Corruption Perceptions Index (2018), available at https://www.transparency.org/country/ZAF (assigned South Africa an index of 43 out of 100, ranking South Africa 73 out of 180 countries. Countries with scores below 50 are believed to have serious corruption problems).
ZAR 4 million and ZAR 6 million monthly on cash bribes to senior government officials on the company’s payroll. This included Nomvula Mokonyane, a former minister and Premier of Gauteng province who allegedly received monthly payments of R50 000 from 2002 to 2016, security upgrades, 12 cases of frozen chicken, 200kg of beef braai packs, eight lambs, and specialty alcohol including cases of premium brandy. In return, between 2003 and 2019, AGO received around ZAR 12 billion in government contracts.\(^{14}\)

Even without evidence of direct corruption, the list of contributors to political parties raises much concern of undesirable influence on political activity in South Africa through donations of money to parties. The 2019 report by My Vote Counts, a non-profit organization advocating for more transparency and accountability in South Africa’s political and electoral system (the same organization that initiated the petitions to be discussed shortly), stated that among the contributors to political parties are leading banks, consulting companies, and billionaires. Many of these entities donate to more than one party.\(^{15}\) In addition, it is reported that, over the years, foreign governments and foreign political entities donated large sums of money to the ANC including China, Saudi Arabia, the United Arab Emirates, the Indian National Congress, and Libya.\(^{16}\) International corporations are also on the list of donors.

**B  The My Vote Counts litigation and decision**

The litigation in the *My Vote Counts* case was the last in a series initiated by the My Vote Counts organisation. In the first round of litigation, My Vote Counts launched an application to the Constitutional Court\(^{17}\) requiring Parliament to initiate legislation that would compel political parties to disclose the sources of their donations, but the application was denied in 2015, mainly because of a technical matter – subsidiarity.\(^{18}\) The Court (in a 7:4 decision) asked that an application be made first to the High Court, frontally attacking the constitutionality of PAIA, which the application did not do. Some commentators viewed this as a missed opportunity,\(^{19}\) and others criticised it as an evasion on part of the Court.\(^{20}\) It was delivered

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\(^{14}\) My Vote Counts Report (note 8 above).

\(^{15}\) Ibid.

\(^{16}\) Ibid.

\(^{17}\) *My Vote Counts v Speaker of the National Assembly* [2015] ZACC 31 (CC), 2016 (1) SA 132 (CC) (*My Vote Counts 2015*).

\(^{18}\) Subsidiarity is the principle according to which matters must be referred first to a lower court before filing an application to the Constitutional Court as long as the Constitutional Court does not have exclusive jurisdiction on the matter.


\(^{20}\) R Cachalia ‘Botched Procedure, Avoiding Substance: A Critique of the Majority Judgment in My Vote Counts’ (2017) 33 *South African Journal on Human Rights* 138; J Fowkes ‘Dominant Assumptions: Reading Between the Lines of a New South African Party Funding Decision’ Blog of the *International Journal of Constitutional Law* (26 July 2018), available at http://www.iconnectblog.com/2018/07/dominant-assumptions-reading-between-the-lines-of-a-new-south-african-party-funding-decision-i-connect-column/ (refers to the fact that the Court in the later, 2018, case implied that legislation does not have to be in the form of amending PAIA as evidence that its earlier ruling was an evasion). See *My Vote Counts* (note 1 above) at para 17 (‘Parliament enjoys functional independence in the discharge of its law-making obligations even in relation to the regulation of private funding. Whether it does so through one, two or more pieces of legislation falls squarely within its discretionary powers. It may for example meet that obligation through an appropriately recalibrated PAIA alone, PAIA and another legislation or a different mechanism altogether.’).
during a time (towards the end of the Zuma presidency) when the Court was under increased criticism from the government and applied more restraint, and the issue of funding did not have political support.\textsuperscript{21} Nevertheless, the minority opinion did provide important rhetoric that would serve as background for the second and decisive \textit{My Vote Counts} case:

In a democratic society such as our own, the effective exercise of the right to vote also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined.\textsuperscript{22} Prior to the second round of litigation, viz, \textit{(My Vote Counts NPC in the High Court)} that gave rise the current case in the Constitutional Court, My Vote Counts (the organisation) requested information from political parties about their private sources of funding and some of the parties rejected these requests, referring to the fact that PAIA did not cover political parties.\textsuperscript{23} Subsequently, My Vote Counts brought an application in the Western Cape Division of the High Court, Cape Town, frontally challenging the constitutionality of PAIA. In 2017 the High Court issued an order of invalidity with respect to PAIA to the extent that it did not cover political parties\textsuperscript{24} and in 2018 the Constitutional Court confirmed this decision unanimously.\textsuperscript{25}

When the Constitutional Court handed down its 2018 decision, Mogoeng CJ delivered an extensive and strongly worded judgment for the unanimous Court. The judgment opened with a general statement on the importance of transparency in the political process, citing the well-known US Supreme Court case on campaign finance, \textit{Buckley v Valeo}.\textsuperscript{26} The judgment continued with a call against public sector corruption in South Africa:

The need for efficiency and effectiveness in the prevention, containment and elimination of corruption linked to the private funding of political parties and independent candidates seems to cry out for urgent intervention. For, corruption that flows from secret private funding could otherwise stealthily creep into our political and governance space, toxify it and fossilise itself to our detriment, if it has not already done so.\textsuperscript{27}

As to its legal basis, the decision is based on two rights protected by the Constitution read together: the right to access to information protected by section 32 of the Constitution, and the right to vote, protected by section 19 of the Constitution.

Section 32 of the Constitution provides that: ‘(1) Everyone has the right of access to – (a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise or protection of any rights.’ The Court maintained that the words ‘another person’ in section 31(1)b apply to political parties as well, and then went on to maintain that the right for which such information is required is the right to vote in section 19. ‘By its very nature’ argued Mogoeng CJ ‘the proper exercise of the right to vote is largely

\begin{itemize}
\item \textsuperscript{21} Fowkes ibid. At the time, the opposition parties also objected to transparency regarding the source of their donations received, probably for fear that revealing their donors would subject those donors to harm or harassment from the ruling ANC party.
\item \textsuperscript{22} \textit{My Vote Counts (2015)} (note 17 above) at para 35 where the minority quoted from an earlier decision in \textit{President of the Republic of South Africa v M&G Media Limited} [2011] ZACC 32, 2012 (2) SA 50 (CC) at para 10.
\item \textsuperscript{23} \textit{My Vote Counts} (note 1 above) at para 18.
\item \textsuperscript{24} \textit{My Vote Counts NPC v President of the Republic of South Africa} [2017] ZAWCHC 105, 2017 (6) SA 501 (WCC) (High Court judgment).
\item \textsuperscript{25} \textit{My Vote Counts} (note 1 above).
\item \textsuperscript{26} \textit{Buckley v Valeo} 424 US 1 (1976).
\item \textsuperscript{27} \textit{My Vote Counts} (note 1 above) at para 4.
\end{itemize}
dependent on information.  

As the right to vote includes the right to vote meaningfully according to reliable information, the inability to access information about donations to parties makes a vote based on reliable information impossible. Mogoeng CJ wrote:

This case is after all about establishing a principle-based system that will objectively facilitate the meaningful exercise of the right to vote… For this reason, any information that completes the picture of a political party or an independent candidate in relation to who they really are or could be influenced by, in what way and to what extent, is essential for the proper exercise of the voter’s “will” on which our government is constitutionally required to be based… what is implicitly envisioned by section 19 is an informed exercise of the right to vote.  

The operative conclusion of the judgment was that ‘Parliament must amend PAIA and take any other measure it deems appropriate to provide for the recordal, preservation and facilitation of reasonable access to information on the private funding of political parties and independent candidates within a period of 18 months.’ While the Court’s ruling pertains only to the issue of transparency, some of the strong language of the decision seems to apply with equal force to the need for restrictions on the donations themselves. The Court was forthright as to the potential danger of ‘buying’ the democratic process:

The reality is that private funders do not just thoughtlessly throw their resources around. They do so for a reason and quite strategically. Some pour in their resources because the policies of a particular party or independent candidate resonate with their world-outlook or ideology. Others do so hoping to influence the policy-direction of those they support to advance personal or sectional interests. Money is the tool they use to secure special favours or selfishly manipulate those who are required to serve and treat all citizens equally.

Although the Court is bound by the limits of the application and its aims, which revolves around PAIA and the access to information, the words of Mogoeng CJ lead to the conclusion that unrestricted donations pose a serious problem to democracy, whether disclosed or not:

Unchecked or secret private funding from all, including other nations, could undermine the fulfilment of constitutional obligations by political parties or independent candidates so funded, and by extension our nation’s strategic objectives, sovereignty and ability to secure a ‘rightful place’ in the family of nations. Our freely elected representatives must thus be so free that they would be able to focus on their core constitutional mandate. They cannot help build a free society if they are not themselves free of hidden potential bondage or captivation.  

C General theory against ‘buying’ democracy

Historically, the primary concern of violation of human rights and democracy arose from fear of the tyranny of the ruler and the oppressive powers of the state over the individual – be it the monarch, the tyrant, or even the elected parliament and government. Public force was the opponent of individual liberty and the rights of the people. However, as early as the beginning of the twentieth century, the distinction between the private and the public spheres was questioned, and a new kind of danger to democracy and human rights began to

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28 My Vote Counts (note 1 above) at para 37.
29 Ibid at para 33.
30 Ibid at para 41.
be acknowledged – the tyranny of private power and especially private wealth of individuals and corporations.\(^{31}\)

The *My Vote Counts* decision is based, to my mind, on one manifestation of this concern against the tyranny of the private sector – the threat of ‘buying’ democracy. It relates in particular to the threat posed by wealthy individuals and corporations who wish to ‘buy’ institutions that are vital to the democratic process and yet are not fully public because they are historically dependent on private money. The decision can be read therefore as relying on a general theory against buying democracy. As I mentioned in the introduction, while the *My Vote Counts* decision applies this theory only to one democratic institution of such nature – political parties and candidates – I believe its ramifications are larger and should be applied at least to one more democratic institution – the press. I will also briefly discuss the possibility of extending it to other democratic institutions which are not at the centre of this article.

Two major principles related to the theory against buying democracy can be found in the *My Vote Counts* decision: transparency and non-bondage. Together with accountability, transparency is obviously a basic element in the general framework and ethos of the South African Constitution, as South Africa’s past was pervaded by non-transparency and secrecy in the service of the apartheid regime.\(^{32}\) In *My Vote Counts*, transparency is connected to the democratic process through the right to vote, and through the importance of understanding the factors that can skew and manipulate the information citizens receive from political parties (and by analogy also from the press). If we know that private interests are involved in the way we get our information, we can offset some of that bias in our minds and be more cautious before accepting that information at face value. We are reminded of Mogoeng CJ’s strong words: ‘any information that completes the picture of a political party or an independent candidate in relation to who they really are or could be influenced by, in what way and to what extent, is essential for the proper exercise of the voter’s “will”’.\(^{33}\) One can find similar strong rhetoric in the minority opinion of *My Vote Counts* (2015): ‘[T]he right to vote does not exist in a vacuum. Nor does it consist merely of the entitlement to make a cross upon a ballot paper. It is neither meagre nor formalistic. It is a rich right – one to vote knowingly for a party and its principles and programmes.’\(^{34}\)

Non-bondage, the second major principle in *My Vote Counts*, affirms that democratic institutions, such as political parties (and by analogy, the press), must be free from the bondage of private sponsors and donors so that they are able to administer their democratic functions unfettered and unobehden to anyone for the sake of public good. Again, the words of Mogoeng CJ echo strongly this principle: ‘Our freely elected representatives must thus be so free that they would be able to focus on their core constitutional mandate. They cannot help build a free society if they are not themselves free of hidden potential bondage or captivation.’\(^{35}\)

Non-bondage can be achieved by either immunising the democratic institutions from the


\(^{32}\) T van Wick ‘“Don’t Blame the Librarian if No One Has Written the Book”: My Vote Counts and the Information Required to Exercise the Franchise’ (2016) 8 *Constitutional Law Review* 97.

\(^{33}\) *My Vote Counts* (note 1 above) at para 33.

\(^{34}\) *My Vote Counts* (2015) (note 17 above) at para 41.

\(^{35}\) Ibid at para 41.
influence of private funding or through the provision of public funding that makes private funding unnecessary, or both. A host of mechanisms can be used for the first purpose, such as: complete denial of access to private money, or putting caps on it; the creation of effective ethical standards that water down the funding’s effects; or making available general funding from the public by subscriptions or payment for the service. I explore these options in the next two parts, both with regard to political parties and candidates, and to the press. The facts presented in these two parts show that in many countries, not only in South Africa, some traditional, non-regulatory immunization mechanisms have also been critically eroded, both with regard to political parties and to the press. Therefore, with both the press and political parties, a need for state regulation and funding to ward off dependency and bondage and provide for transparency has arisen.\(^{36}\)

The following are a few characteristics of the theory against buying democracy as derived from the context of the *My Vote Counts* decision. Note that these are mainly initial explorations outlining what such a theory could look like. It is not my intention here to provide anything more than a conceptual understanding of the theory.

First, the theory is not only about corruption. Corruption has always haunted politics and good governance. The concern over buying democracy however is larger and may exist when no direct corruption is present. For one thing, buying a democratic institution can be motivated ideologically rather than merely by pure greed or the quest for power. In addition, buying democratic institutions can happen in various indirect or even unintended ways, many of which appear quite innocent, such as donations or help without an immediate or even a concrete request for return. Therefore, our concern with such funding stems sometimes from the potential of influence, even if no direct influence can be proved.\(^{37}\)

Secondly, buying democratic institutions may be regarded as part of the liberty of a person to do with her money as she pleases; it can be regarded as part of political freedom, as when a person promotes his ideological and political goals through funding; or it can be regarded as part of freedom of expression, as when a person uses her money to promote her ideas. The principle against buying democracy should therefore overcome some perceived infractions against liberty that would view regulations against providing funds for political parties as restrictive and even oppressive.\(^{38}\)

Finally, the kind of democratic institutions covered by this theory are, on the one hand, private, or at least non-governmental, and thus often dependent on private donations and funding, but, on the other hand, they are public in the sense that they operate in the public sphere and provide a vital democratic function as a check on government. Political parties and the press are of such a nature. The primary threat to these institutions has always been, and still is, that the government would interfere with their independence and take them over. However, they are also under the threat of harm to their independence and of takeover by powerful

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\(^{36}\) See generally parts III & IV below.

\(^{37}\) One of the ways in which donations effect the democratic process without involving corruption is by making some issues get to the front of the line in terms of politicians’ preferences. See I. Lessig *Republic Lost* (2011) chapter 1.

\(^{38}\) See the discussion on the American conception of free speech (Part IIIA2 below).
money interests, wealthy individuals and corporations, and even wealthy foreign states. This double threat is one of the characteristics of the theory against buying democracy.\textsuperscript{39}

Following this last characteristic of the theory against buying democracy one may think of other institutions that may fit this double nature as both public and private described above, and where protection against private money may be required. Such institutions may include civil society institutions, such as non-profit and non-governmental organizations; universities, research institutions, and purveyors of knowledge; and maybe even cultural institutions such as theatre, cinema, museums, and so on. Commentators have recently attempted to group similar institutions under the heading of ‘guarantor institutions’, or ‘fourth branch institutions’, and have mentioned similar concerns regarding private money control over them.\textsuperscript{40} It is even possible to view the internet and social media as part of this group. This list of institutions is not set in stone, and one can think of many reasons why some should not belong to the list, and state many differences among them, or between them and political parties. As mentioned, this is an initial exploration. I spell out below the differences between the press and political parties, which are germane to this article.

### III PRIVATE FUNDING FOR POLITICAL PARTIES

#### A Political funding in comparative perspective

Whereas corruption has always been part of politics, fending off private funding and providing public funds to political parties is relatively new and dates back to the beginning of the twentieth century and, in most countries, only to the past few decades.\textsuperscript{41} There are two main reasons for this new concern. The first is the decline in revenue from party memberships. For a variety of reasons, membership declined dramatically over the years and membership fees ceased to be a substantial source of funding for parties. If we take for example the UK, in the mid-1950s there were approximately three million members of the Conservative Party and one million members of the Labour party, whereas in 2015 these numbers fell dramatically to 150,000 and 270,000 respectively. Today only 1.3 per cent of the population in Britain has party membership.\textsuperscript{42} The second reason is the dramatic increase in the expenses of parties in the modern age. The cheaper ways of campaigning for elections such as rallies, gatherings and

\textsuperscript{39} See the following assertion regarding ‘guarantor institutions’: ‘Therefore, in most democratic contexts, guarantor institutions will typically need independence from the ruling party/coalition; in other words, in order to be sufficiently independent to provide credible and enduring guarantees, guarantor institutions typically need to be constitutionally entrenched (whether legally or politically). Depending on the norm in question, independence from other actors – such as large corporations – may also be required.’ T Khaitan ‘Guarantor Institutions’ (forthcoming 2022) Asian Journal of Comparative Law 1, 5, available at https://ssrn.com/abstract=3766137.

\textsuperscript{40} M Tushnet The New Fourth Branch: Institutions for Protecting Constitutional Democracy (2021); Khaitan ibid (‘Actors most likely to have a vested interest in the sound functioning of guarantor institutions include the political opposition, civil society organisations, sub-state or supra-state political organisations, independent media and others.’). Both Tushnet and Khaitan take as their primary examples institutions that are strictly public, such as ombudspersons, and corruption watchdogs. However, both refer to the independent media, and civil society institutions, as democracy protecting institutions as well.


speeches have become less effective, and new methods are much more expensive – in particular TV and newspaper advertisements, and more recently, the use of polling and outreaching through social media and the internet.

As a result, many countries felt the need to supplement the income of parties by providing them with public funds and, on the other hand, to fend off the increasing dependency of parties on private donors by restricting private donations.

The next part of this article will concentrate on the regulation of private funding of political parties in two countries, representing different models of regulation, and then compare South Africa’s new regime with the two. But first, it is important to briefly sketch some comparative methods for regulating the control of private funding and the provision of public funding.

Extensive international research to survey restrictions on private funding of political parties and candidates of the members of the Organisation for Economic Cooperation and Development (OECD) was conducted by the Institute for Democracy and Electoral Assistance (IDEA) in 2012. The findings for the OECD countries were as follows:

- no anonymous donations (84%);
- no foreign donations (73%);
- no donations from government contractors or government-owned or partially-owned corporations (70%);
- a cap on party spending – either in an election year or generally (52%);
- a cap per donor in an election year (47%);
- no donations from unions (39%);
- a general cap per donor (39%);
- no donations from corporations (38%).

The same research also examined the prevalence of the different models of public funding for parties and candidates and came out with the following results:

- direct public funding during elections (85%);
- free or subsidized airtime (76%);
- tax exemptions (64%);
- direct public funding between elections (53%);
- indirect funding from other sources (24%);
- storage space for election campaigns materials (18%);
- free venues for election meetings (18%);
- free or subsidized mail (15%);
- free or subsidized public transportation (6%).

Both surveys attest, first, to the great variety of mechanisms both for curbing private donations and for the provision of public funding. Secondly, they attest to the large variety and methods for providing donations. For example, a large majority of OECD countries adopted direct public funding during elections, and a similar percentage adopted a prohibition on anonymous donations (transparency). Other restrictions such as on foreign donations and government

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44 Ibid at 154.
corporations are also very frequent. Caps on spending and caps on individual donors are not uncommon but less so than are those on foreign and government corporations.

These data should be born in mind when we take an in-depth look at the funding regimes in the two model countries we have chosen to compare with the new regime in South Africa.

1 Israel

Israel has one of the highest levels of spending on public funding for political parties, per voter, in the world. For many years, it used to top most world surveys on election spending per voter, and currently it is considered the highest spender on elections among all OECD countries.45 In parallel, Israel has one of the most restrictive legal regimes regarding private funding of political parties and candidates.46 Israel restricts both direct and indirect donations to political parties and permits them only to persons who are eligible to vote in Israel.47 This means that no corporations (either local or foreign), no foreign citizens, or foreign countries and entities may donate to political parties in Israel, either directly or indirectly. The amount allowed for a donation is also very low – approximately 1000 Israeli new shekel (ILS) (~USD 290) during a regular year per household, and ILS 2300 (~USD 650) in an election year. Both the donor giving the donation and the party receiving it must report the donation. Anonymous donations are not allowed, and failure to report is a criminal offence, with a penalty of up to three years imprisonment, so is receiving donations of more than the maximum amount. The state comptroller oversees the implementation of the regulations and can issue fines as well. In addition, donations are viewed as if they were donated to a party if they were donated to any institution that is related to the party. These institutions are also under similar restrictions regarding the amount of money they may receive from donations, and what the source of the money is. Recently this has been extended to persons and institutions that are not related to party if their actions can reasonably be conceived as campaigning for a party. To conclude, since membership fees in parties have dropped dramatically in recent decades and, as mentioned above, authorized private funding is very low (while public funding is very high) the result is that for 99 per cent of political parties in Israel, spending comes from the government.48

45 Political Parties Financing Law 5733-1973 (Israel). The funding of each party depends on the number of members of Knesset the specific party has in the outgoing Knesset and the incoming Knesset. Each parliamentary group is entitled, pursuant to the provisions of this law, to financing for election expenses, financing for ongoing expenses each month, as well as for financing the salaries for parliamentary staff. English version available at the Israel Ministry of Foreign Affairs website: https://mfa.gov.il/MFA/AboutIsrael/State/Law/Pages/Party%20Financing%20Law.aspx.

46 The rules for funding candidates in Israel are more complex than those of funding parties, and may, in some instances, allow for donations of relatively large amounts of money. However, these rules are of lesser importance as Israel’s general elections involve only parties, and not individual candidates. Private funding for candidates happens only during primaries that exist only for some of the political parties.

47 Article 8(d1) Parties Financing Law 1973 (‘A parliamentary party group or a party shall receive a donation directly or indirectly only from a registered voter’).

2 The USA

The USA is at the opposite extreme in terms of private versus public funding of political parties and candidates. While in Israel 99 per cent of funding for political parties and candidates comes from public money, in the USA federal elections the figure is much below one per cent. On the other hand, private funding is almost the only mode of financing parties and politicians, and reaches staggering levels. One person alone, Sheldon Edelson, contributed more than 120 million dollars to the Republican Party campaign in the 2016 elections; another person, Michael Bloomberg, contributed more than 95 million dollars to the Democratic Party campaign in the same elections. All in all, the amount of private money poured into the US 2016 federal elections was 6.5 trillion dollars, which is more than double the amount spent in the 2000 elections.

Several factors in the current US regime allow for, and foster, such a high level of private expense on political parties and candidates. First, election campaigns in the US are very long – including primaries, they total almost a year and a half – and there are no restrictions on their duration. In comparison, many countries limit their electoral campaigns to a few months or less (three months in Israel, 50 days on average in Canada, and just two weeks in Japan). They restrict political advertisement in the media to that period only, or even to a limited time within that period, and to limited slots of airtime (e.g. in the UK, Brazil, and Japan). Secondly, US law does not restrict party and candidate spending on elections, while many countries do. This allows for a spiral race of spending between parties and candidates. Thirdly, though US law does restrict private contributions to relatively small amounts – roughly USD 2000 per person per election year – these restrictions have many loopholes making them virtually ineffective. Thus, indirect spending is largely unrestricted, allowing for unlimited private funding of ‘independent expenditures’ – for example, spending on television ads and other activities supporting a candidate that are not coordinated or controlled by the candidate or party. Moreover, donations by corporations and trade unions to such independent expenditures are allowed and individual contributors can coalesce into Political Actions Committees that can amass together unlimited sums of money raised by individual donors, corporations and trade unions. Fourthly, while public funding for parties and candidates does exist, it comes together with restrictions on the use of private money. At first, public funding was extensively used by parties and candidates, however, once private money amounts reached very high levels, it became more profitable not to use public money in order not to be restricted in the use of private money. Thus, in the last elections the two big parties and the two leading candidates did not use any federal funds and a mere 1.5 million dollars was used (compared to 6.5 trillion dollars spent by private entities).

49 In 2016 only 1.5 million dollars of federal funding were used by candidates (none by parties), compared to 6.5 trillion dollars spent by private entities. Open Secrets Center for Responsive Politics Top Individual Contributors: All Federal Contributions, 2019–2020, available at https://www.opensecrets.org/overview/topindivs.php.
50 Ibid.
53 IDEA (note 48 above).
dollars in private contributions) – all of it by independent candidates for the presidential campaign.54

This has not always been the case in the US. In the wake of the Watergate affair there arose a bipartisan political will to correct the corruption that had polluted American politics through a scheme of regulations on private funding and provision of public funding for parties and candidates. Despite that, this bipartisan agreement was basically circumvented by the Supreme Court. In 1976 the US Supreme Court ruled that certain limitations on campaign financing – those on independent expenditures – are unconstitutional, because they contradict the First Amendment’s protection of free speech.55 According to the Court’s doctrine, limiting a person’s spending on political advertisements, constitutes a limitation on his right to free speech as it limits his abilities to further his speech and his ideas. This partial strike down in effect created enough loopholes to make the entire arrangement ineffective. Subsequent case law widened these loopholes even more, especially when the Court ruled in 2010 that corporations also enjoy the right to free speech and may donate to political parties in the same way as individuals do, resulting in the situation described above.56

The idea that limiting spending on political advertisements amounts to an unconstitutional infringement of speech is unique to the US. Australia,57 Canada,58 England59 and Israel, among others, have ruled the opposite. In these countries, the limitations on private funding for parties are themselves viewed as a protection against the distortion of free speech by money, and thus as enhancing rather than limiting free speech. The American conception, however, is based on an absolutist version of the marketplace of ideas principle,60 according to which the state should step out of the market of ideas and not attempt to regulate it in any way, lest it subvert the vital free exchange and flow of ideas in a democracy. However, this free market conception of speech received a particular and new interpretation once it was applied not to the regulation of the contents of speech, but to the funding of speech, and the amounts of money spent on it. Several commentators equate the American Supreme Court’s doctrine on campaign financing to the infamous Lochner decision of the early twentieth century.61 In that decision, the court’s conception of liberty from state intervention and of the individual’s freedom to engage in economic activity, disregarded the harmful effects of power inequality in the private sector, and the state’s legitimate role in correcting them.62

57 For example, McCloy v NSW (2015) 257 CLR 178 (upholding provisions that imposed caps on some political contributions, prohibited indirect campaign contributions, and banned political contributions from property developers. The Court upheld these provisions maintaining that they are necessary to fight corruption.).
58 Harper v Canada (AG) (2004), 1 SCR 827 (upholding the 1974 Election Expenses Act’s restrictions on third party spending on political advertisements).
60 The term is associated with Justice Oliver Wendell Holmes’ dissent in Abrams v United States 250 US 616, 630 (1919).
62 For example, R Post & A Shanor ‘Adam Smith’s First Amendment’ (2015) 128 Harvard Law Review 165, 182 (arguing that the Supreme Court’s expansive free speech jurisprudence ‘threatens to revive the long-lost world of Lochner’).
Lehman et al. summarise these harmful effects:

When we think about the operation of elections in America, we focus on the essential equality among voters, each of whom has one vote. We rarely incorporate the fundamental insight … that year after year, decade after decade, and from one generation to the next, the affluent and well educated have participatory megaphones that amplify their voices in American politics. These class-based participatory inequalities shape what politicians hear about political needs, concerns, and preferences.63

Indeed, the system creates a vicious circle in which the more politics depends on the money of the wealthy and of corporations, the more politicians will further the interests of the wealthy, creating more wealth in the hands of the few, and allowing for another step up on the amounts of money they donate. The concern with the situation is well represented in the title of Larry Lessig’s influential 2011 book Republic, Lost: How Money Corrupts Congress – and a Plan to Stop It.64

B Political funding in South Africa

South Africa used to resemble the US model rather than the Israeli one in that there was no regulation of private donations. Indeed, it went even further than the US model as it did not even require transparency of private donations, as opposed to strict transparency requirements in the US. However, this has changed following My Vote Counts.

Shortly after the My Vote Counts decision, the President of South Africa signed into law the Political Parties Funding Act 6 of 2018 (PPFA), which was a Bill during the time when the My Vote Counts decision was being written and was mentioned in the decision.65 In addition, as of 3 June 2020, PAIA itself had been amended to comply with the Court’s ruling.66 The amendment corrects PAIA and includes within its scope political parties. Thus, for example, the amendment inserts ‘political parties’ under the PAIA’s definition of a ‘private body’ that is subject to PPFA’s requirements of transparency and adds a new section (s 52A) that mandates a head of a party to ‘create and keep records of any donation exceeding the prescribed threshold. [referring to the threshold set in PPFA]’.

For a few years, neither PPFA nor the PAIA amendment took effect as they were both awaiting the Presidential commencement declaration for which no date had been set.67 Finally the commencement was declared in April 2021 and both laws took effect.

PPFA addresses some of the concerns raised by the My Vote Counts judgment and follows some of the two main principles of what I described as the theory against buying

63  K Lehman Schlozman, S Verba, & HE Brady The Unheavenly Chorus: Unequal Political Voice and the Broken Promise of American Democracy (2012) 232. See also M Gilens Affluence and Influence: Economic Inequality and Political Power in America (2012)(finds a strong correlation between the preferences of the affluent and actual policy decisions, and a weak correlation between the preferences of the middle class and the poor and policy).
64  Lessig (note 37 above).
65  Political Party Funding Act 6 of 2018 (‘PPFA’).
66  Promotion of Access to Information Amendment Act 31 of 2019 (‘PAIA Amendment 2019’). See also President Signs the Promotion of Access to Information Amendment Act Altadvisory Public Interest Advisory Services and Activism for the Information Age (5 June 2020), available at https://altadvisory.africa/2020/06/05/president-signs-the-promotion-of-access-to-information-amendment-act/.
democracy – transparency and non-bondage, but some important aspects remain unattended or problematic, especially if compared to the variety of means described earlier in the comparative section. The following are the main features of PPFA.

In terms of limiting the actual donation amount, PPFA addresses only direct private donations, and imposes the following limitations: first, no donation can be given by foreign governments and foreign persons (except for the purpose of training, skills or policy development, nor from state-owned enterprises, organs of state and proceeds of crime. Secondly, the maximum amount any person or entity can donate in a financial year is ZAR 15 million.68 Thirdly, no donations can be made directly to a party member unless received on behalf of the party and for political purposes.69

In terms of transparency, PPFA together with PAIA require the disclosure of all donations above ZAR 100 000, and their publication on a quarterly basis.70 PPFA imposes accounting and reporting obligations on political parties and gives the Independent Electoral Commission (IEC) monitoring and inspection powers and authority to suspend payments of money and recover money received or spent irregularly. The Electoral Court is given the power to review decisions of the IEC and to impose administrative fines.71

The following are the important advantages of the PPFA and, in contrast, its important omissions in comparative perspective. In terms of its advantages, PPFA prohibits donations not only from foreign governments, but also from organs of the state, and state-owned entities. This provision, which does not exist in many other countries,72 addresses ruling-party corruption, where the ruling party transfers public money of the state to its organisations and people. The limitation on receiving the proceeds of crime will also make it difficult to receive money from entities that donated to political parties in the past and were associated with bribery and other allegations. Another important feature of the PPFA is the prohibition of donations paid directly to a party member for non-political purposes, such as the donations of security systems, frozen chickens and cash payments to party members documented above. In terms of transparency and accountability, the law requires quarterly reports on donations as well as accounting reports and allows for meaningful enforcement by empowering the IEC to recover money and suspend the transfer of money. It also authorizes the Electoral Court to impose administrative fees.

There are however also important omissions. First, only direct contributions are regulated, and a vast range of donations remain unregulated, such as buying political advertisements in favour of the party, which in the US currently accounts for the bulk of private money spent on elections.73 This could potentially become a serious loophole. Secondly, corporations, including international corporations, are permitted to donate.74 This too could become a serious loophole, given the pessimistic US experience. The review by IDEA mentioned above showed that 38 per cent of OECD countries prohibited donations from corporations, and the review of Israel showed that it was among those who did so.75 In the past, foreign corporations in particular have proven to be great donors of money to South African parties, and PPFA

68 PPFA s 8 and Schedule 2 s 7.
69 PPFA s 10.
70 PPFA s 9 and Schedule 2 ss 9.
71 Ibid.
72 See comparative discussion part IIIA2 above.
73 See discussion on campaign finance laws ibid.
74 Compare the US debate on contributions from corporation and the situation in Israel which does not allow it.
75 Defty (note 42 above).
would not bar them from doing so in the future (subject to the cap on the sum). Thirdly, the maximum donation sum of ZAR 15 million by person or corporation is still very high and will give the donor substantial influence over the donee. Fourthly, party spending is not regulated at all, so that the measure of inspection and restriction does not apply. The IDEA review showed that 52 per cent of OECD countries did regulate party spending, either during the election year, or also between elections. Finally, PPFA only covers donations extended directly to parties and allows them to bypass the restrictions by receiving donations through entities associated with them, or controlled by them, and through third party entities that support a party or candidate but are not associated with them. As mentioned previously, in Israel these donations are forbidden, and experience has shown that this too could be a serious loophole in terms of the regulation of private money. Finally, the transparency requirements apply only to sums of money that exceed ZAR 100 000 which still allows for the transfer of non-negligible sums of money without record.

IV PRIVATE FUNDING FOR THE PRESS

The second argument in this article is that “the theory against buying democracy” that is underlying the My Vote Counts decision can be extended to another vital democratic institution — the press. The press has undergone processes similar to those of political parties: it has witnessed increased dependency on private money and has consequently suffered from corrupting and distorting effects on reporting. These, in turn, affects and distorts the democratic process.

I will begin with a description of the changes that have taken place in the press and then go on to describe their effects in terms of the dependency of journalists and newspapers on private sources of money through direct bribery, or, much more often, exchanges of money for reporting. The US and Israel provide examples of these processes. I will then discuss the similarity between funding the press and funding political parties and the implication of applying the theory against buying democracy to the press and, in the end, with some insights about the South African press.

A The changes in the press

The history of the press goes hand-in-hand with the history of democracy in the modern age. The development of democracy can hardly be detached from the concurrent development of the press, and the causal connection between them can run both ways in that the development of the press advanced the development of democracy just as much as democracy empowered the press. In England, for example, one of the first manifestations of free speech was the abolition of government licences required for printing newspapers and books, which had been

76 Ibid.

77 For example, TP O’Mahony ‘The Press and Democracy’ (1974) 63 Studies: An Irish Quarterly Review 47 (‘The correlation between the growth of a free press and of democracy is now at a stage where the latter has become unthinkable and practically unworkable without the former’).
advocated by John Milton as early as 1664. In the USA, the struggle for independence and the
democratic process of the ratification of the Constitution were both facilitated by the press.

An unknown fact is that public funding has been part of the press in the USA since the
colonial age. In England and in the USA, the main advancement of the press was undertaken
by private entrepreneurs, and from the start newspapers were developed as businesses based
on the sale of a product – newspapers. Newspapers, like books, were viewed as commodities
that were financed by their sale. This created biases in reporting in favour of news items that
‘sell’ – a fact which has always been part of the debate over the value and integrity of the press.

In the twentieth century, advertisements became another important source of income and
introduced further economic bias. Pressures from governments are a third source of concern
for the independence of journalism.

In order to defend itself against economic and political pressure, journalism developed a
set of formal and informal self-regulating mechanisms. In terms of informal self-regulation,
the press established itself as a prestigious profession, with an ethical and professional ethos
of serving the public interest, uncovering corruption, and criticizing governments and big
businesses. Schools of journalism have been established in prestigious universities which
provide the integrity and moral weight to serve as role models for journalists. The cultivation
of these role models is rewarded through national recognition such as the Pulitzer Prize. Formal
mechanisms were developed for self-regulation included ethical codes, press organizations,
and press ethical tribunals, that monitored deviations from ethical and professional standards
and protected the prestige of the profession.

78 J Milton Areopagitica: A Speech of Mr John Milton for the Liberty of Unlicensed Printing, to the Parliament of
England (1644). Licensing was abolished 50 years later in 1694.
79 For example, the famous trial of John Peter Zenger, for publishing satirical attacks against the British governor
of New York, in 1734, which became a central event in American struggle for independence.
for the press during the colonial age through the mid-19th century).
81 For example, G Schneebaum & SJ Lavi ‘The Riddle of Sub-judice and the Modern Law of Contempt’ (2015)
2 Critical Analysis of Law 173, 186. (‘The eighteenth-century press created a new public sphere but, as we have
seen, one which is governed not by freedom of expression, but rather by opinion produced for mass consumption.
The press strives to draw public attention and thrives on public scandal.’).
82 For example, SJA Ward The Invention of Journalism Ethics: The Path to Objectivity and Beyond (2005).
83 For example, International Federation of Journalists (IFJ) Global Charter of Ethics for Journalists, available at
asp?pl=24&sl=171&contentid=171; The Press Complaints Commission’s Code of Practice (UK) (currently outdated),
available at https://accountablejournalism.org/ethics-codes/UK-Press-Complaints; See generally, Accountable
Journalism website https://accountablejournalism.org/about (journalism ethic codes from around the world).
84 For example, the Independent Press Standards Organisation (https://www.ipso.co.uk/) which is a voluntary
self-regulating body existing of representative of major newspapers. This body took the place of the
previous Press Complaints Commission (PCC). The PCC closed after receiving extensive criticism for its lack
of action in the ‘News of the World’ phone hacking affair. In that affair journalists were accused of engaging
in phone hacking, police bribery, and exercising improper influence in the pursuit of stories. See O Wright,
I Burrell, M Hickman, C Milmo & A Grice. ‘Hacking Scandal: Is this Britain’s Watergate?’ The Independent
(9 July 2011), available at https://www.independent.co.uk/news/uk/crime/hacking-scandal-is-this-britain-s-
watergate-2309487.html.
The business model based on subscriptions and advertisement has lasted a long time. However, the model now faces serious challenges that bring its future viability into question.\textsuperscript{85} The reasons are primarily technological, though not solely so. Radio and television were the early technological changes that affected the press by providing additional avenues for the dissemination of news and information, and for advertisements. However, the crucial change came with the advent of the internet which introduced three changes in the provision of information: free, non-centralized, and immediate information. The internet facilitates the ability to receive news, for free, and immediately as it occurs, and especially with the advent of smart phones, it has considerably reduced the importance of the printed press as the supplier of news. According to recent surveys, most people in the USA receive their news from the internet, either through news websites or through social media. Television and radio are graded as the second and third sources and printed media the fourth, with only 16 per cent of the population being users of print media.\textsuperscript{86} Traditional newspapers still have an important function as a platform for analysing, filtering, and making news accessible, but this too can now be provided by non-traditional platforms, such as blogs, social media and free online newspapers.

Over past decades, revenues from subscriptions and from advertisement have declined dramatically.\textsuperscript{87} Many newspapers have closed; the number of journalists has dropped considerably, as many were retrenched, and salaries were reduced. According to the American Bureau of Labor, from 1990 to 2016, the number of newspaper employees in the United States dropped from 456300 to about 183000 – a decline of almost 60 per cent.\textsuperscript{88} According to a Pew research report, in the decade between 2008 and 2018, there was a drop of 45 per cent in the number of newsroom employees in US newspaper firms.\textsuperscript{89} In the same period, newsroom employment figures in broadcast television remained relatively stable, whereas the number of digital-native newsroom employees increased by 82 per cent.\textsuperscript{90} According to another Pew study,

\textsuperscript{85} The titles of the following books and articles attest to this phenomenon (as well as the discussion below): J Lepore 'Does Journalism Have a Future?' \textit{The New Yorker} (21 January 2019); M Grabar & T Trent \textit{The News About the News: American Journalism in Peril} (2003); L Downie Jr & RG Kaiser \textit{The Crisis in American Journalism and the Conservative Response} (2013); S Waldman & C Sennott 'The Crisis in Local Journalism has Become a Crisis of Democracy' \textit{The Washington Post} (11 April 2018).


\textsuperscript{87} For example, 'Who Killed the Newspaper?' \textit{The Economist} (24 April 2006). (In Denmark, Switzerland and the Netherlands newspapers have lost half of their classified advertising to the internet).


\textsuperscript{90} Ibid.
36 per cent of the largest newspapers across the USA experienced layoffs between January 2017 and April 2018.91

The printed media tried – and is still trying – to adapt to this change,92 for example, through advertisements in online editions of the newspaper and online subscription fees. However, novel technologies are not the only threat to newspapers. Vulture capitalists pose another large threat: for decades such investors have bought papers and gradually stripped them of both expensive personnel – writers and editors – and other standard operating costs (for example, space and tools).93 At the same time, these new owners maintained the subscription costs at the standard rates for as long as possible and increased the profitability of what has always been a rather marginally profitable enterprise. However, these papers ultimately fail while their owners could accept their death after turning a nice return on investment. Whatever the cause – technological or strictly economic – the inevitable result is the death or the significantly diminished quality of a product as well as the lowering of ethical and professional standards.94

B Additional sources of income and susceptibility to economic pressure

This section will document some of the avenues through which newspapers and journalists are susceptible to corruption. It will dwell on the influence of money in their reporting, the business models and ‘deals’ struck between them and interest-holders willing to pay for favourable reporting. These avenues are not new, and many have been part of the business for many years. The extent of these ‘deals’ varies from country to country: in some they are outright bribery deals of money transferred in envelopes to reporters – ‘envelope journalism’.95 Studies have shown correlations between the bribery of journalists and factors such as the level of democracy, economic development, and the existence of codes of ethics for journalists in a country.96

However, even in countries where direct bribery is uncommon, and an ethical and professional ethos of journalism is well entrenched, there has been a change in the ethics of

92 For example, RH Giles ‘New Economic Models for US Journalism’ (2010) 139(2) Daedalus 26 (presenting ideas for new business models for the press based on online entrepreneurship, but also shows skepticism whether any of them would be able to replicate the previous business model of the newspaper).
94 For example, the scandal that broke in the UK over the News of the World phone hacking affair. The conclusions of the Levison Inquiry that followed that affair were that ethical standards in journalism had deteriorated and that newspaper self-regulation became ineffective, requiring a new, independent and legally authorized regulatory body for journalism ethics. See Leveson Inquiry – Report into the Culture, Practice and Ethics of the Press (29 November 2012), available at https://www.gov.uk/government/publications/leveson-inquiry-report-into-the-culture-practices-and-ethics-of-the-press.
journalists and a rise in the threat to objective journalism. This change is attributed, among others, to the economic crises of the press and the rise in its reliance on alternative means of finance. The change seems to be in the degree of reliance that reporters have on economic deals with interest-holders, the weakening of internal defence mechanisms against them, and this becoming common in journalism.

Economic deals may be cut with individual journalists, or with a newspaper as a whole, namely with its owners and editors. Some are evident and easy to detect, but some are more indirect and sophisticated and therefore more difficult to uncover.

1 Economic deals and incentives involving individual journalists

aa Good reviews in exchange for gifts and perks

The most obvious and simple trade-off between reporting and economic interest are personal gifts, perks and honoraria given to journalists as part of their reporting jobs, with the tacit understanding that they will report favourably on, or at least refrain from criticizing, their contributor. Common examples are journalist reporting on consumer products such as cosmetics, clothing, the food industry, or on tourism, and technology. Such reporters who are usually viewed by readers as giving an unbiased opinion or evaluation of these products, receive packs of cosmetics, clothes, free travel abroad, free lodging in hotels, free electronic merchandise, and more from commercial companies. They may also be rewarded with invitations to events or conferences organized by commercial companies, sometimes in lucrative locations and in high-end hotels.

Though ethical codes against corrupting transactions do exist, they have waned substantially as a matter of practice. Furthermore, they do not apply to freelancers, bloggers and other online writers who now comprise a large share of reporting. Moreover, due to the economic difficulties of newspapers, only some of the larger media outlets can afford paying travel expenses for journalists, and less so for freelancers. Asked about the ethics of such practices in a conference of science journalists a common answer was that ‘fees for freelancers have remained stagnant for decades and when media companies don’t pay expenses, reporters miss out on stories’.

bb PR articles concealed as objective reporting

Deals and exchanges somewhat less obvious, but rising in importance, are public relations articles concealed as objective reporting. In this type of exchange, favourable reporting is not given in return for a perk or a gift but for the work done by the PR agency in writing the article. Since the reporter (especially the online reporter) is underpaid and overworked, she does not have time and is not rewarded for her own investigative reporting, and is expected

97 For example, K Tsetsura & K Aziz ‘Toward Professional Standards for Media Transparency in the United States: Comparison of Perceptions of Non-Transparency in National vs Regional Media’ (2018) 44 Public Relations Review 180. (‘Results showed direct media bribery is not a pressing issue in the USA; however…Indirect media bribery is common at the local and regional media levels in the USA.’).


99 See notes 81 to 83 above.

to provide news that will sell, or increase ‘clicks’ in the online media, with minimum costs. A blogger reviewing computers and designs describes the temptations of his trade: ‘I can… rehash the material presented to each of us, painstakingly and carefully prepared for me by a diligent PR team who has worked hard to provide press releases, product information, even graphics and captions, bios of the execs and case histories. Some of this material is ready-to-use. I could do a cut-and-paste article, with little thought of my own.’\textsuperscript{101} Therefore when a public relations person of a commercial company feeds the journalist with a news item, adapted to look like a genuine piece of reporting, and including interesting pieces of information, this is a profitable exchange to both sides.\textsuperscript{102} The phenomenon of PR material concealed as regular reporting is increasing dramatically, as are the creative ways in which it operates in the digital age. Such reporting has recently acquired the name of ‘Native Advertisement’ or ‘Embedded Advertisement’.\textsuperscript{103}

News provided through PR persons can come not only from commercial companies, but also from professionals, such as lawyers and law firms, doctors, actors and so on, who have their own PR persons promoting their interests.\textsuperscript{104} It can also come from politicians.\textsuperscript{105} The PR persons of the lawyer or politician would provide the reporter with news items already edited, packaged and ready to print, with little work required on the part of the reporter, and the expectation of return would be in the form of publishing the news item unreflectively.

Along the spectrum of favourable reviews in return for perks, and the publication of PR articles in return for the provision of free and ready to print news items, one can find the provision of free and exclusive news by leaks. Such reporting is not based on independent investigation but on news provided by elected officials and government functionaries, either directly or through leaks. The sources of information can be ministers, MPs, police officers, the attorney general’s office, army generals and many more.

In a recent Pew Research Center analysis, it was reported that:

As the press scales back on original reporting and dissemination, reproducing other people’s work becomes a bigger part of the news media system. Government, at least in this study, initiates most of the news. In the detailed examination of six major storylines, 63 per cent of the stories were initiated by government officials, led first of all by the police. Another 14 per cent came from the press. Interest group figures made up most of the rest.\textsuperscript{106}

\begin{flushright}
\textit{104} The realization that public relation professionals are integrated into the work of lawyers is already commonplace, see M DeStefano Beardslee ‘Advocacy in the Court of Public Opinion, Installment One: Broadening the Role of Corporate Attorneys’, (2009) 22 \textit{Georgetown Journal of Legal Ethics} 1259, 1283 (‘Lawyers must ensure that the right information is disclosed in the proper manner and PR executives help the lawyer determine what a consumer or stockholder might consider “material” and therefore necessary to disclose.’). The extent of PR integration into lawyers’ work is manifest in the legal question whether PR professionals are entitled to lawyer client privilege.
\textit{105} See below the discussion on leaks from government.
\end{flushright}
The exchange can be of a general nature: providing easy access to news in return for publishing it. It can also be of a more personal nature. Over time, the reporter may develop personal and professional ties with particular sources of news, such as police officers, district attorneys, or MPs, so that they will give him exclusivity in new information and leaks, in return for publishing the articles in a way that serves the interests of the person or organisation that provided the news.\textsuperscript{107} These news items often have valid reporting value, but obviously, they receive priority over other stories, and the way they are packaged serves the interests of the source.\textsuperscript{108} The free speech protection of \textit{journalist privilege and source protection} is an invaluable component in such deals, as it protects the sources of leaks from being revealed. In addition, since both the police and the public attorney’s office often use leaks, sometimes to promote genuine investigatory concerns and sometimes to promote personal prestige or gain advantages over defendants, it is unlikely that these leaks, that often constitute an offence, will ever be investigated or charged.\textsuperscript{109} See the following frank assessment of prosecutor culture in the USA:

\begin{quote}
Every day, federal prosecutors… leak negative information about ongoing investigations. They do so for a variety of reasons: self-aggrandizement; to put pressure on potential witnesses and defendants; to curry favor with the media; to attempt to influence the jury pool; to generate favorable public opinion for their office.\textsuperscript{110}
\end{quote}

\textbf{cc Second careers}

Other indirect ways of compensating reporters for favourable reporting are through second career opportunities. One of the most telling statistics in this regard is a graph showing the changing proportion of the number of journalists in relation to the number of PR people over the years. According to the Bureau of Labor Statistics Occupational Employment Survey, there are today six PR people for every journalist in the USA.\textsuperscript{111} In 2000 there were only twice as many PR professionals as journalists; forty years ago the proportion was in reverse. It is noticeable that in the USA, PR people get paid today on average 16 000 dollars more than journalists, while in 2000 they earned only 6 000 dollars more than PR professionals.


\textsuperscript{108} See E Schor ‘Why Does the Media so detests the Chief of Police, Roni Alsheich?’ Nrg (13 Jan 2016) (‘journalists are in panic. The new Chief of Police closed their sources… What do you do? Move to an attack regardless of the merits of his decisions’) (Hebrew), available at https://www.makorrishon.co.il/nrg/online/1/ART2/748/212.html; Compare with SY Oei & D Ring ‘Leak-Driven Law’ (2018) 65 UCLA Law Review 532 (discussing tax laws that are triggered by leaks and warning that ‘Leak-driven lawmaking has clear benefits, but it also carries distinctive risks, …including agenda setting by third parties with specific interests in the leaks’).


\textsuperscript{110} AM Dershowitz \textit{Sexual McCarthyism} (1998) at 172. See RG Morvillo & RJ Anello ‘Proposals for Grand Jury Reform’ (1 August 2000) New York Law Journal 3. (‘Grand jury leaks are a pervasive problem that can cause damage to the reputation of an individual who even the prosecutor later determines is not properly the subject of criminal charges. In other cases, such leaks by law enforcement can cause prosecutors whose investigations have become public to pursue criminal charges in a controversial matter when they might otherwise use their discretion to decline charges’).

\textsuperscript{111} M Rosenberg ‘America now has nearly 5 PR people for every reporter, double the rate from a decade ago’ Muck Rack (14 April 2016), available at https://muckrack.com/blog/2016/04/14/americanaow-has-nearly-5-pr-people-for-every-reporter-double-the-rate-from-a-decade-ago.
A journalist’s career path often moves from journalism to PR and sometimes back. This means that journalists have a strong incentive to maintain good relations with commercial companies that will someday hire them as PR persons, and little interest in engaging in damaging investigations of powerful companies. Financial and legal reporters, and other professionals, may attain second careers in big commercial firms as economists, lawyers etc. They too may have an incentive to develop good ties in their field, and be careful in their reports, with an eye to a second career.\(^\text{112}\)

2 Economic deals and incentives involving the newspaper as a whole

Deals and exchanges with individual reporters may also help the business model of the newspaper as a whole, since they allow paying journalists lower salaries and encourage them to rely on such deals for their supplement income. However, in this section I will focus on exchanges that provide sources of income and benefits to the newspaper, and usually involve deals with the editors or the owners of the newspaper, or both.

aa Using the paper as a platform to promote owner’s business interests

The first most obvious exchange is the watering down of what used to be a holy cow of journalism – editorial discretion and editorial independence from the publisher and owner. Owners are today involved in editorial decisions, or there is a tacit understanding between the editor and the owner about the kinds of reporting that are favoured and those that are not. An owner can be a large corporation or business group, or a media mogul, who has a large array of businesses, and therefore have many business interests to promote other than the newspaper’s. The editors, and through them the individual journalists, are expected not to publish news that harms the owner’s business interests and to publish news that advances these interests.\(^\text{113}\)

One extreme economic transaction of this nature involves the owner ‘buying’ the reporting platform of the paper. This becomes apparent when an investor buys a newspaper, which is clearly not profitable; a newspaper that is losing money and has almost no chance of surviving. What may make such a transaction sound, even if the newspaper does eventually fail, is the use of the newspaper as a platform to promote other business interests of the owner, or other non-economic interests of his, such as protecting the owner from possible criminal charges.\(^\text{114}\)

\(^{112}\) Compare D Starkman *The Watchdog that Didn’t Bark: The Financial Crisis and the Disappearance of Investigative Journalism* (2014), back cover (The author ‘exposes the critical shortcomings that softened coverage in the business press during the mortgage era and the years leading up to the financial collapse of 2008. He locates the roots of the problem in the origin of business news as a market messaging service for investors in the early twentieth century’).

\(^{113}\) For example, in Israel. S Ran & O Barzohar, “Keshet” in Response to the Item in “Yediot Aharonot”: They are Using News Items in the Newspaper for a Commercial Battel Against Us’ *The Marker* (24 Nov 2010) (Hebrew) available at https://www.themarker.com/advertising/1.583902. (‘In Keshet there are claims that “Yediot Aharonot” published an article on Channel 24 with the intent to hurt its commercial adversary, and that it did not notify the readers about its business interests in the matter as it should have’).

\(^{114}\) In Israel, the example for such deal was the buying of the failing newspaper Maariv, by the business mogul Nohi Dankner. There was no reasonable economic plan to save the newspaper and it closed within two years, but in the meanwhile, the newspaper was used to promote the business interests of the owner.
Another related phenomenon is newspapers that are funded with personal resources from the owner, or from donations, to promote political or ideological purposes. Such is the case of the Israeli newspaper *Israel Today*, currently the largest newspaper in Israel in terms of readership of the print editions, which is owned and funded by the American Jewish billionaire Sheldon Adelson and distributed free of charge. Adelson was a close friend and admirer of the former Israeli Prime Minister, Benjamin Netanyahu. Though he was not directly involved in the editorial decisions of the newspaper, Adelson’s purpose from the start has been to provide a platform for views associated with the political right in Israel, led by Prime Minister Netanyahu, and to counter the perceived, or real, left-oriented mainstream media in Israel. Ideological orientation of newspapers is not a new or unique phenomenon. Big papers in the US, such as the *New York Times*, publish their support for certain political candidates and are clearly associated with a political view. However, to the extent that such newspapers are still funded by the public, their subscribers in effect also support their political causes by choosing to buy them, and thus their political influence is backed by public support for their ideological line. When a wealthy person, that may not even be living in the relevant country, donates the money for political purposes, his influence is not distributed in a way that reflects the democratic forces in the country, but rather by his economic resources. Large donations to newspapers, direct or indirect, are therefore possible sources of influence of private money on a newspaper’s political contents.

Making exchanges of reporting for favour at the level of the newspaper as a whole

The owner of a newspaper may also use it indirectly to promote his business or personal interests, by ‘selling’ the platform to people of influence, who, in return, would promote the owner’s interests. The Israeli newspaper *Yediot Aharonot* had much to benefit from a Bill to make the distribution of free newspapers such as *Israel Today*, its main competitor, illegal. The publisher of *Yediot Aharonot*, Noni Moses, reportedly ordered the editors of *Yediot Aharonot* to favour those MPs who supported the Bill, and disfavour those who opposed it, as a way of pressuring more MPs to support the Bill. Since Prime Minister Netanyahu was very much opposed to the Bill and exerted his influence to prevent it, *Yediot Aharonot* has reportedly used its platform to create bad press about Netanyahu, especially during election time, in order to help remove him from office.¹¹⁵

There are several other versions of such exchanges at the level of the newspaper as a whole. One example is contracts for publishing government announcements in a newspaper. Such publications have become increasingly common and take the form of ministerial announcements regarding campaigns on health, environment, safety issues, et al, to make the public aware of recent reforms or programmes. The more there is a drop in revenues from private advertisement, the more newspapers become dependent on these governmental sources of income, a situation that can lead to dependency relations. The newspaper that can offer the

¹¹⁵ N Toker ‘The Moses Method: The Secret is Revealed: The Black Lists of “Yediot Aharonot”’ *The Marker* (7 Sept 2016) (in Hebrew) (‘The battle between prime minister Netanyahu and the publisher of “Yediot Aharonot” Noni Moses is not a battle between Right and Left, but about power, influence and money. Top people at Ynet tell for the first time on the orders to censor items, silence the “social protest”, and on the aggressive attack against Netanyahu.’).
politician or officeholder the best overall ‘deal’, including promoting her interests on the pages of the paper through favourable reporting, would keep receiving these lucrative contacts.\(^{116}\)

C \textbf{The theory against ‘buying’ democracy and the press}

The analogy between the influence of private money funding of political parties, and of the press should be clear by now. Both have a dramatic impact on the political process. Both channel the flow of political information to the public, and both can affect the promotion or the hindering of policies and initiatives. Both can also be ‘bought’ by private money – either through corrupt personal deals, or through more systemic and large-scale deals. The outcome in both cases is a substantial distortion of the political process. It decreases the influence and participation of the large body of voters in favour of a select group of people or corporations of wealth who derive ‘extra votes’ in the political process.\(^{117}\) Mogoeng CJ’s words, ‘[t]hey cannot help build a free society if they are not themselves free of hidden potential bondage or captivation,’\(^{118}\) therefore, seem to apply with equal force to the press as they do to political parties.

There are of course also important differences between the press and political parties. The most obvious difference is that political parties are official elements of the political system and are governed by the legislation and the constitutions of most countries. The press on the other hand does not receive the same kind of formal recognition and is not a formal institution of the democratic process. Secondly, the independence of the press from government and the separation of the press from government are of paramount importance for its function and success as a democratic institution. Regulating the press therefore is inherently suspect of encroaching on political freedoms to a greater extent than regulating political parties, which, as mentioned, are traditionally institutions of the political system and subject to regulation. For the purposes of the theory against buying democracy however, I hope the review above provides sufficient evidence for the analogy.

Accepting the analogy, how would the theory against buying democracy and the two principles that were derived from it – transparency and non-bondage – be applied to the press? The following are some initial suggestions for possible implications. The principle of transparency may require the press to report on any of the exchanges discussed above, including reporting sources of influence on particular news items. Journalists are already asked to report on any interest they may have in the contents of a news item or any personal relationship with the people or contents of the news item. In addition, they are required to report on news items that are directly sponsored. However, such requirements are not always

\(^{116}\) S Keler ‘The Silenced Watchdogs: When the Government Buys Ads’ \textit{Mida} (13 March 2014), available at https://mida.org.il/2014/03/13/ (Hebrew) (describing tens of millions of advertisement contracts of three ministries headed by ministers of the same party, all with the same newspaper. The head of the party used to work for that newspaper as a journalist, and received favourable reporting in that newspaper.).


\(^{118}\) \textit{My Vote Counts} (note 1 above) at para 41.
enforced, and, in addition, more indirect transactions such as PR items that are copied as a whole from PR agencies are not even required to be reported.\textsuperscript{119}

The implication of the non-bondage principle in the press may mean, on the one hand, imposing immunities from private sources of money and influence and, on the other hand, the provision of public funding to the press. Several types of immunities from the influence of private money already apply to many newspapers, either embedded in ethical codes or in legislation. These include restrictions on ownership of newspapers stemming from anti-monopoly laws; ethical codes imposing editorial independence from the owner; and ethical codes prohibiting journalists from receiving money or perks from commercial entities about which they report. However, as mentioned above, many of those have been radically eroded due to economic pressures. Thus, the principle of non-bondage may require more formal and extensive immunities and restrictions.

Finally, state funding of the press can be a solution to its dependency on private money in the same way it has been a solution to the dependency of political parties on private money. This idea might seem radical, especially to the English-speaking world, but in fact it is already incorporated in many countries and, as mentioned above, was not alien to the US press as well. Thus, a very common measure for state sponsorship of the press is tax exemptions, such as a full or partial exemption from value-added tax. Some countries, however, fund newspapers directly according to established criteria. For example, Sweden, whose press has a very long and established history, sponsors its newspapers according to a ratio which depends on the number of subscribers of each paper. Other European countries also sponsor the press to various degrees.\textsuperscript{120} It seems to me that the successful experience with funding political parties shows that it is possible to avoid the danger of state control despite state funding, provided there are clear and manageable criteria for the funding and an independent mechanism to impose these criteria. As the Swedish example shows, this goal is not unattainable.

Does the application of the principles of the theory against buying democracy apply to South Africa? The My Vote Count decision portrays a grim reality of political corruption in South Africa. The press in South Africa, on the one hand, has had a crucial role in exposing corruption.\textsuperscript{121} Exposing the Gupta affair is one example of successful and courageous investigatory reporting. Its importance to South African democracy cannot be overemphasised.

On the other hand, the press is not immune from corruption either; and recent revelations show the extent to which it is possible to ‘buy’ the press in South Africa. The Guptas were after all media moguls and used their media business as a platform for state capture. Indeed, the phenomenon of PR articles concealed as reporting or public discourse came to an ugly head in South Africa with the Bell Pottinger scandal. The public relations firm worked for


\textsuperscript{121} J Campbell ‘South African Media Recognized for Exposing Zuma Corruption’ Africa in Transition (12 April 2018), available at https://www.cfr.org/blog/south-african-media-recognized-exposing-zuma-corruption (‘The 2017 Taco Kuiper Award for Investigative Journalism went to a group of three media outlets that investigated and reported on the Gupta brothers, cronies of Jacob Zuma and widely accused of exercising improper influence or “state capture”.’).
the Gupta family who were situated at the heart of state capture corruption in South Africa. The firm effectively provided ‘reputation laundering’ through both mainstream press outlets, including those owned by the Guptas (such as African News Network 7 television channel and the New Age daily newspaper) and, perhaps more significantly, through a coordinated social media campaign that saw the creation of over a hundred fake Twitter accounts with the express aim of rehabilitating the Guptas’ name, and redirecting public conversation. More broadly, the Zondo Commission has unravelled a scheme for buying favourable reporting using state money and the secret service. Another revelation, regarding the Sunday Times, shows how the press can easily be manipulated by feeding it with distorted information once its economic impoverishment lowers the bar for independent investigation and verification. These instances exemplify some of the sharpest dangers of buying democracy, and a need for extending regulation of private funding to the press. The My Vote Counts decision can therefore be used as an alarm call against corruption in the press and as an indication that South Africa too may benefit from the immunities and restrictions on journalism suggested above and from the provision of state funding to the press.

State funding of the press may prove more difficult to provide in countries, such as South Africa, that are economically struggling and have more urgent needs that require state resources. Suggestions for state funding of the press may therefore seem unfeasible for South Africa. This can be a general concern for the Global South countries. One possible solution could be international funding for the local press in such countries. Again, the fear of influence and control – this time of international institutions and wealthy countries – is obvious. However, monetary institutions such as the World Bank that provide loans and relief for Global South countries in order to strengthen democracy and the rule of law, should also consider the sponsoring of an independent local press as another measure to support democracy.

One cannot conclude a discussion on regulating and funding the press without mentioning social media (and in South Africa, this is acutely so in the wake of the Bell Pottinger/Gupta scandal). Social media has become a central source of news consumption, at times even surpassing online newspapers, and especially printed newspapers. In addition, bloggers and other independent reporters take their place among journalists and provide news and coverage that is not part of the established press. It may seem that some of the discussion above is no longer relevant as it deals with the print media rather than contemporary social media. This is not necessarily so. Most commentators agree that whatever the new configuration of the news media may be, there is no alternative to organised and institutionalized reporting and journalism that still constitutes the cornerstone of news production today.


often rehashes and distributes news produced by organized news agencies and newspapers. Admittedly some of the principles suggested and discussed here may need adjustment. The task of fleshing out these adjudgments is beyond the scope of the article. However, the basic principles, so it seems, would remain the same. As long as citizens depend on a mechanism that would filter, organize, and analyse the information they receive, there will be a press.

V CONCLUSION

The My Vote Counts decision has had a profound effect on the South African political system. It exposed the dangers of unregulated private funding of political parties and candidates; and brought about a new legislative regime of transparency and regulation of political funding. This article described and tried to assess the effectiveness of some of the features of this new regime, comparing it to funding regimes in other countries. It also argued that the My Vote Counts decision is based on a general theory against buying democracy and extended the implications of this theory to another democratic institution that is in danger of being bought – the press. Buying democracy will remain an urgent problem in need of correction for the foreseeable future, whether in South Africa or elsewhere. It is my hope that this article helped shed some light on this problem using the important insights from My Vote Counts.

SAFURA ABDOOL KARIM & PETRONELL KRUGER

ABSTRACT: The relationship between the guarantee of human rights and the provision of public health is complex and characterised by tensions between states’ obligations that are often framed as incompatible or mutually exclusive. The COVID-19 pandemic has brought this tension to the fore once again since the emergence of the HIV pandemic in the 1980s. It offers an opportunity to understand how this relationship has evolved during a contemporary epidemic. Since the 1829 Cholera pandemic, and the resulting missions to investigate pandemics, many public health interventions were implemented without any regard for human rights and public health objectives were prioritised at any cost. However, the creation of a right to health through various documents such as the Universal Declaration of Human Rights and World Health Organisation’s Constitution initiated a shift towards greater consideration of human rights within the public health space. The most profound shift in the relationship between public health and human rights came with the adoption of instruments such as the Siracusa Principles and Declaration of Alma-Ata, which placed human rights at the fore of public health responses. The next major development came from the framework conceived by Mann et al who defined the role of human rights and health as complementary. This article utilises this history as a lens through which to analyse the approach to human rights and public health adopted by South Africa’s judiciary over the first year of the COVID-19 pandemic when a diversity of decisions emerged. This COVID-19 jurisprudence offers scholars the opportunity to investigate how the relationship between public health and human rights functions during a pandemic, and to determine whether the conceptual development that has evolved over five centuries has translated into judicial decision-making.

KEYWORDS: communicable diseases, pandemic response, public health law, right to health

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I THE COVID-19 PANDEMIC AND SOUTH AFRICA’S RESPONSE

Following the first reports of the SARS-CoV-2 virus in December 2019, the COVID-19 pandemic has had a drastic impact on how societies function globally. Many countries introduced stringent public health interventions such as quarantines, travel restrictions and national lockdowns to try and contain the spread of the virus. However, government actions and their efficacy in responding to the pandemic have varied considerably, particularly in light of the lack of information about the virus and the drastically changing epidemiological and data landscape. In this context, evaluating the impact of public health responses, and determining whether the human rights limitations that accompanied them were justified, has been challenging.

South Africa’s response to the COVID-19 epidemic was swift. On 15 March 2020, just ten days after the country’s first case was diagnosed, the government announced its plan to implement a national lockdown under powers provided by the Disaster Management Act 57 of 2002. The regulations promulgated under this Act provided for the adoption of expansive public health measures during the course of the lockdown. They include the prohibition of public gatherings, the suspension of most economic activity other than essential services, the introduction of mandatory testing, with compulsory isolation and quarantine for those who test positive or have been in contact with others who have tested positive. Regulation 111(2) makes provision for the imposition of a fine and/or six months imprisonment for the contravention of specified lockdown regulations. The government response to the pandemic was couched almost entirely within the Disaster Management Act.

The government’s decision to utilise the Disaster Management Act rather than declaring a state of emergency in terms of the Constitution meant, importantly, that constitutional rights were not suspended during the state of disaster. Consequently, limitation of these rights resulting from the COVID-19 pandemic needed to be justified in terms of section 36 of the Constitution. In terms of the section, all the limitations need to be reasonable and justifiable.

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1 T Burki ‘China’s Successful Control of COVID-19’ (2020) 20 Lancet Infectious Diseases 1240, 1240.
2 Ibid.
6 Ibid.
7 Declaration of a National State of Disaster.
8 Section 37(1)(a)–(b) of the Constitution of the Republic of South Africa, 1996 (‘Constitution’).
9 Section 36 of the Constitution provides that: ‘(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—(a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.’
in an open and democratic state based on values such as democracy, human dignity, equality and freedom.

The first case challenging the validity of the national lockdown was brought by the Hola Bon Renaissance Foundation. It was filed in the Constitutional Court within a few days of the implementation of the first lockdown.\textsuperscript{10} The case was swiftly dismissed by the Court. However, it was the first of a slew of cases related to the lockdown and its implications for constitutional rights.

The terrain of the contest over the implication for human rights of public health responses has been fraught with complexity and uncertainty that has evolved over time and developed further with each human rights crisis. Just as the HIV epidemic significantly shaped the relationship between public health and human rights during most of the last four decades, it is likely that the COVID-19 pandemic will become the crucible in defining the role of human rights in modern infection control. This article considers the jurisprudence that has emerged from the South African courts over the course of the government’s response to COVID-19, particularly during the national lockdown, with a view to understanding how courts respond to pandemics and what the future may hold for human rights in pandemic responses.

This article begins by sketching out the history of public health measures and human rights, defining three phases of their relationship and pinpointing which of these phases align most closely with South Africa’s constitutional dispensation. We then provide an overview of judicial decisions in COVID-19 cases, categorising the cases within each of the three phases and analysing what these decisions indicate about South Africa’s current approach. Finally, we conclude by highlighting some of the shortcomings and strengths of the judiciary’s response, focussing on what lessons can be learnt for future public health emergencies.

\section*{II \hspace{1em} THE ROLE OF HUMAN RIGHTS IN PUBLIC HEALTH RESPONSES TO COMMUNICABLE DISEASES: AN OVERVIEW}

Tensions often exist between individual human rights and the achievement of public health objectives. Sometimes measures adopted in response to outbreaks can limit human rights in the attempt to achieve public health objectives;\textsuperscript{11} for example, restrictions on freedom of movement and trade during a lockdown to reduce human mobility and thereby limit the spread of disease constitute violations of human rights. This was particularly prevalent in traditional public health responses to communicable diseases.\textsuperscript{12} Examples of the extreme measures that give rise to these tensions are illustrated by the isolation of ships and the people on board for 40 days to prevent the spread of the Black Death during the 1300s, which included preventing access to food and water.\textsuperscript{13} Another example is the creation of stigmatised and under-serviced leper colonies.\textsuperscript{14} However, modern approaches to disease control recognise that human rights and public health efforts can complement each other, especially where efforts work towards realisation of the


\textsuperscript{11} BM Meier, DP Evans & A Phelan ‘Rights-Based Approaches to Preventing, Detecting, and Responding to Infectious Disease’ (2020) 82 Infectious Diseases in the New Millennium 217, 253.


right to health. This can result in improved access to health care and infrastructure; improved disease surveillance and reporting; and the implementation of improved methods to control the spread of disease. States have obligations under human rights principles, including the right to health, to respond to and control epidemics and outbreaks within their borders and, some argue, beyond their borders. Consequently, efforts to realise human rights to health can be understood as complementary to public health responses to communicable diseases. After all, where public health goals are achieved, healthy individuals are enabled to enjoy their right to health, life, bodily integrity and dignity more fully.

In other respects, however, certain human rights and modern public health goals – and related mechanisms – may yet create tension between human rights and public health measures. In South Africa, where the spreading of fake news concerning COVID-19 is considered a criminal offence, an individual’s right to freedom of expression is constrained, though this limitation is justifiable under section 36 of the Constitution, given the potential harms caused by the spread of misinformation, including the threat to public health. A public health measure therefore has to be justifiable according to the domestic laws of the implementing country. Public health measures therefore interact with the existing legal frameworks consisting of everyday laws, policies, behaviours and freedoms. In this way, public health measures have the effect of promoting certain rights, but also sometimes limiting or even infringing other human rights.

In recent years, the international spread of diseases has been a particular concern and has often caused panic in areas trying to prevent an outbreak. This has led to the implementation of disproportionately aggressive public health measures such as trade and travel restrictions, and the placement of invasive quarantines on travellers. During the COVID-19 epidemic, the South African government also introduced criminal offences that sanctioned those who exposed people to the SARS-CoV-2, a measure that had a disproportionate impact on poorer communities who could not observe social distancing and hygiene measures due to overcrowding and poor sanitation infrastructure. If not adopted correctly, measures such as these can often perpetuate the stigmatization of and discrimination associated with outbreaks of communicable diseases. Further tensions exist in the realm of public health measures aimed at detection of diseases. The use of compulsory testing can run counter to the principles of informed consent; and disclosure of such information can infringe the right to privacy. This

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16 Meier, Evans & Phelan (note 11 above) at 253.
17 Ibid.
18 Ibid.
21 Abdool Karim (note 5 above) at 110, 112.
raised concern during the COVID-19 epidemic when there were efforts to scale up testing in South Africa that included compulsory testing.22

So far, we have discussed how interventions to control the spread of communicable diseases can infringe or limit individual rights. However, it is important to recognise that these measures, while limiting the individual rights of affected individuals, also work to protect a number of other rights, particularly, those linked to the social determinants of health such as the right to work, education, dignity and life as well as the collective right to health of the broader population.23 The right to health places certain obligations on states to respect, protect and fulfil the health of individuals.24 Part of a state’s duties under this framework is to prevent, detect and control outbreaks of infectious diseases within its borders; to assist in preventing them from spreading outside its borders and arguably; to assist other states to prevent, detect and control outbreaks within their borders where assistance is needed.25 These duties require states to have the capacity to detect outbreaks; to report these outbreaks at the local, regional, national and international levels, as well as respond to the outbreaks with treatments, vaccines and other public health measures. However, there is a need to also consider the human rights implications of these public health measures. Given the fundamental role of states in realising the human right to health, a critical component of ensuring that any public health measures enacted are complementary to human rights obligations by ensuring that an optimum level of restrictive measures are adopted to achieve the necessary public health goal while limiting their impact on individual rights. This includes implementing measures that respect individual rights as far as possible by adopting measures based on evidence. This approach not only ensures minimal interference with human rights; it also minimizes the effects of human rights infringements that can serve to undermine public health efforts such as stigma and mistrust in public health systems.26

III THE THREE PHASES OF THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND PUBLIC HEALTH RESPONSES

When reflecting on the history of public health responses to epidemics and human rights, it is possible to view this history as having three distinct phases. These three phases can be used to understand the different ways in which human rights and public health responses interact and how judicial systems may approach tensions between them. The three phases are discussed chronologically in this part, but as will become apparent in later parts of this article, their application to real world public health crises is not homogeneous; and often courts and governments can apply these phases simultaneously or even regressively within epidemics.

The first phase, which we have termed the ‘non-recognition of human rights phase’ can be understood as an approach to public health divorced from human rights concerns more broadly. In this approach, public health objectives are given primacy with no regard to their impact on human rights in general. Public health goals are not linked to the promotion of any human rights; they are seen as an exception to or separate from human rights. This approach

23 Mann et al (note 15 above) at 8.
26 Meier, Evans & Phelan (note 11 above) 253; Mann et al (note 15 above) at 8.
persisted from the 14th century through to a large part of the twentieth century where public health measures were imposed to prevent the spread of disease without consideration for their impact on human rights.27

The second phase, which we have termed the ‘conflict between rights and public health’, emanates from advocacy surrounding the HIV epidemic which placed the rights that could be negatively affected by these measures in the foreground of the public health response.28 In some instances, one could argue that public health objectives became secondary to human rights, particularly civil and political rights, with the efficacy of measures being diluted to ensure greater respect for the rights of infected persons. Broadly speaking, this conceptualisation of public health and human rights sees the two concepts as mutually exclusive and in tension or conflict with one another. The fulfilment of human rights may lead to compromises in public health responses or vice versa.

The third phase does not have its origins in the application of human rights to epidemic responses per se, but to a theoretical model which proposes viewing public health and human rights as complementary and mutually reinforcing.29 Given the interdependence of constitutional rights,30 and specific interdependence between the right to health and other determinants of health,31 we argue, later in this article, that this complementary approach is most closely aligned with South Africa’s constitutional dispensation and ought to be the approach adopted by our judiciary.

A Non-recognition of human rights

Efforts to control the spread of diseases date back over many centuries. Quarantine was initially used in efforts to combat the Black Death, yellow fever and other communicable diseases dating back to the 14th century by separating infected individuals from the general population.32 Even before Louis Pasteur proposed germ theory that explained the science behind the way in which diseases move from person to person, ports in Europe had been imposing quarantines on sailors entering their cities as a means of controlling the spread of disease.33 Sailors would be held in isolation on neighbouring islands and observed to see whether they would develop symptoms.34 Similar measures, were adopted in cities to prevent the spread of cholera and yellow fever during the 19th century.35 However, these measures did not involve a coordinated response to outbreaks implemented by a government but were instead implemented on an ad hoc basis.36 The use of sanatoriums for the treatment and control of diseases such as tuberculosis also began

27 Fidler (note 20 above) at 392.
28 Gostin et al (note 25 above) at 2732.
29 Mann et al (note 15 above) at 23.
32 Gostin & Wiley (note 12 above) at 16.
34 Ibid.
35 Ibid.
36 Ibid.
during the mid-19th century. They were used to isolate infected individuals from society.\textsuperscript{37} Despite their historic origins, the use of restrictive measures such as isolation, quarantine and travel restrictions continue to form part of the modern armamentarium of public health responses, all of which were key interventions during both the Ebola and COVID-19 epidemics.\textsuperscript{38} While the use of quarantine and isolation still occur today, historically, little consideration has been given to the infringement of individual rights such as freedom of movement, individual autonomy and privacy in their implementation.

In the early and mid-19th century, there were attempts by several nations to establish a base level of responses required from governments in dealing with outbreaks of disease, particularly cholera. In 1851, the International Sanitary Regulations (the ISR) were adopted at the International Sanitary Conference in Paris and laid the foundation for the creation of the World Health Organization.\textsuperscript{39} However, given that there had been little or no recognition of human rights during this time, the interplay between human rights and public health was not considered in the formation of these documents. In this sense, though this first phase had its origins in the 14th century, it may find itself resurrected in public health crises.

B Recognition of a right to health

The 1946 World Health Organisation Constitution provided the first recognition that health was a human right, stating ‘the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being’. Even in this early conceptualisation of the right, the WHO Constitution recognised the right to health as more expansive than simply the ‘absence of disease’ but instead an entitlemente to ‘the highest attainable standard of physical and mental health’. The Universal Declaration of Human Rights was then adopted in 1948 and created a set of universal rights which should be achieved for all nations and their citizens. Article 25 stated that ‘[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family’ which envisioned health as part of a set of interdependent human rights such as access to food, clothing, housing and social security. The International Covenant on Economic, Social and Cultural Rights (the ICESCR) developed the right to health even further, recognising ‘the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’ and mandating that states take steps to achieve the full realization of these rights, including steps in relation to the ‘prevention, treatment and control of epidemic, endemic, occupational and other diseases’.\textsuperscript{40}

At the same time that the ICESCR was established, the International Covenant on Civil and Political Rights, which included a range of civil and political rights including the right to self-determination and the right to the protection of physical integrity, liberty and security of persons, was concluded. While it made provision for these rights to be limited, they could only be limited in a time of public emergency which threatened life. Consequently the development of the right to health ran parallel with a growing realization that public health measures, particularly those taken during public health emergencies, could limit other human rights.

\textsuperscript{37} JR Bignall ‘Treating Tuberculosis in 1905: The First Patients at the Brompton Hospital Sanatorium’ (1977) 58 \textit{Tubercle} 43, 52.
\textsuperscript{38} Ibid.
\textsuperscript{39} Fidler (note 20 above) at 392.
\textsuperscript{40} Article 12 of the International Covenant on Economic, Social and Cultural Rights, 1996.
specifically civil and political rights. In 1984, the Siracusa Principles gave greater definition to the circumstances under which rights granted under the International Covenant on Civil and Political Rights could be limited. Specific provision was made for using public health as a ground for limiting rights when there was a serious threat to the health of the population or individual members in that population.

C Rights in conflict with public health

Following the Declaration of Alma-Ata on Primary Health Care at Alma-Ata in the USSR on 12 September 1978, which reaffirmed the centrality of the right to health in responding to public health crises, and the burgeoning HIV epidemic in the 1980s, there was a transformation in the way human rights were linked to public health responses. When the HIV epidemic initially began, the virus was largely an unknown. The modes of transmission were unclear and there were no means to treat it. Groups already marginalized and stigmatized in society, such as sex workers, people who inject drugs and men who have sex with men were at high risk of infection. Fear pervaded the public discourse and intense stigma developed around the disease. Discrimination against HIV-positive individuals continued to grow. This discrimination and stigma led to many people avoiding HIV tests. Because there were no treatments, emphasis was placed on preventing the disease from spreading. Interventions for prevention focused on individual behaviours and, in some instances, placed limits on individual autonomy such as compelling individuals to get tested as well as laws that compelled HIV positive persons to disclose their status to sexual partners.

As the epidemic progressed, a multiplicity of rights were infringed and violated, often with the effect of undermining public health objectives. For example, many countries introduced laws that criminalized the non-disclosure of HIV status to sexual partners or made HIV a notifiable condition which required national health authorities to be informed of any positive patients immediately. This increased the stigma around HIV. Once treatments were developed, further difficulties emerged around which individuals were able to access treatment, which often depended on their economic status. Governments in low resource settings would have to prioritize which patients could have access to treatment. The stigma

41 Goslin et al (note 25 above) at 2735; Meier, Evans & Phelan (note 11 above) at 253.
43 Ibid at article 25.
44 Goslin et al (note 25 above) at 2735.
and fear surrounding the disease made people unwilling to be tested or disclose their status. The adoption of criminalization statutes, and the fact that workplace discrimination was permissible, also disincentivised individuals from being tested. These issues were compounded by the fact that the disease disproportionately affected vulnerable populations. As a result, protecting the rights of vulnerable populations and the rights of HIV positive persons became closely linked with achieving public health objectives. Later, when effective treatments were developed, their inaccessibility to a majority of those affected defeated both public health and human rights objectives. In response to the challenges faced by marginalised groups and the way in which stigma and fear undermined efforts to control the epidemic, activists advocated for public health responses that respected human rights. This ultimately reshaped the relationship between public health and human rights from one of inherent juxtaposition to a complementary approach where public health and the advancement of human rights were often linked. As a result, the goals of public health began to intersect and align with those of human rights during the progression of the epidemic. In this context, rights were seen as something that needed to be prioritised, even if they undermined the efficacy of traditional, restrictive public health interventions.

Even the formulation of the right to health started to follow this more nuanced approach. For example, in 2000, the Committee on Economic Social and Cultural Rights emphasized that the right to health includes concrete steps to prevent, control and treat epidemic diseases like education programmes, epidemiological surveillance, data collection and implementation and enhancement of immunization programmes. Placing public health measures not as limitations on rights, but as mechanisms – and even obligations – within the ambit of recognised rights.

**D A new way of thinking: public health and human rights as complementary?**

The interrelationship between public health and human rights that emerged during the HIV epidemic laid the foundation for viewing the two concepts as complementary, but in practice, many continued to view public health interventions, particularly restrictive interventions, as being in conflict with human rights. However, in 1994, Jonathan Mann et al proposed considering human rights as a dimension of public health goals. The three-part framework they developed explicitly included human rights as part of the effort to address the epidemic and cemented the marriage of human rights and public health. Since its publication, this

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51 Burris & Cameron (note 48 above) at 580.
52 Mark Harrington ‘From HIV to Tuberculosis and Back Again: A Tale of Activism in 2 Pandemics’ (2010) 50 Clinical Infectious Diseases 260.
55 For example, General Comment. No 34 on Article 19 of the ICCPR, the Human Rights Committee is quite clear in protecting opinions on all matters including scientific opinions and denounces the criminalization of such opinions (para 9). This conflicts clearly with government restrictions and penalties on dis- and misinformation campaigns which adversaries and challengers have unleashed against the COVID-19 response globally.
56 Mann et al (note 15 above) at 6.
57 Ibid at 5.
A comprehensive framework of a complementary relationship has become the touchstone for conceptualising a modern relationship between public health and human rights.\(^{58}\)

The first part of the framework outlines the relationship between a state’s actions in respect of public health – such as policies, programmes and actions – and human rights.\(^{59}\) A state’s responsibility in public health matters consists of three functions; assessing the health needs and problems of the population, developing and implementing responses to address these problems and needs.\(^{60}\) The manner in which the state fulfils these functions can, however, result in violations of human rights. A state may be deemed to infringe the right to physical integrity and security of the person through mandatory testing and treatment. The right to privacy may be violated through the release of personal information. A state’s actions can even amount to discrimination where it fails to address the health problems of particularly vulnerable populations or denying these populations access to care – and can adversely impact the realization of rights by marginalized groups.\(^{61}\) The second part of the framework considers the health impacts of human rights violations, illustrated most clearly in the context of severe human rights violations such as torture or executions.\(^{62}\) However, Mann et al contend that virtually all human rights violations can also have a negative impact on a person’s health, whether directly (such as unsafe working conditions that can violate a right to work under ‘just and favourable conditions’ and result in serious injury, or even death, to employees) or more indirectly (such as the way in which violations of the right to dignity may have more diffuse, but still significant, impacts on the health of individuals and communities).

The third part of the framework, which is the particularly novel component, argues that health and human rights are complementary approaches to addressing and promoting human well-being. This link is particularly important when it comes to addressing the social determinants of health such as poverty and inequality. In this way, Mann et al argue that the promotion and protection of human rights is intrinsically linked to the protection and promotion of health.\(^{63}\)

This ‘Mannian’ understanding of the link between public health and other rights has seen some uptake by international bodies. The African Commission on Human and Peoples’ Rights have acknowledged that ‘COVID-19 carries profound human rights consequences in the short to the long term’,\(^{64}\) linking public health interventions with rights in the African Charter on Human and People’s Rights including the protection of the right to life (art 4) and the right to enjoy the best attainable state of physical and mental health (art 16),\(^{65}\) but also the right of access to information (art 9),\(^{66}\) the right to be free from discrimination (art 2) by taking into

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\(^{58}\) Gostrin & Wiley (note 12 above) at 15.

\(^{59}\) Mann et al (note 15 above) at 5.

\(^{60}\) Ibid.

\(^{61}\) Ibid.

\(^{62}\) Ibid.

\(^{63}\) Ibid.


\(^{65}\) Ibid.

account the disproportionate impact of COVID-19 on the poor and unhoused, and even acknowledging some of the longer term socio-economic impacts on society such as access to food. Similarly, the United Nations Human Rights treaty bodies similarly acknowledged the impact of COVID-19 not only on the right to life, bodily integrity and health, but the exacerbation of discriminatory practises against women (specifically the girl-child) and refugees in the realms of social assistance, labour and education, the rights of persons with disabilities to access food and supportive services which might be interrupted by COVID-19, general disruptions to the food system and consequent price hikes, and even the impact on community and cultural life.

By using the framework of Mann et al to consider the interplay between health and human rights in the context of communicable diseases, the importance of adjusting public health measures to include human rights as a means of improving health overall is shown clearly. Practically, this concept of complementarity does not always function as Mann et al conceptualised it and, in certain instances, public health measures may conflict with certain rights, and not just function to realise them.

There is an underlying thread that can also enable one to localise the broader conceptual model described above to the South African context, namely the operation of proportionality in each of the phases. At a conceptual level, the three phases are concerned with the manner in which the proportionality of a public health response is assessed in terms of section 36 of the Constitution, the limitation clause. Phase 1 focuses primarily on the severity of the epidemic or public health concern and perhaps, to a limited extent, on whether the interventions will be effective in addressing the threat. The second phase, which can also be understood to link to the section 36 limitations analysis which takes place when rights are limited, is concerned with whether the public health benefits can justify incursions on human rights – framing this in terms of requiring a justification for the infringement of rights. The third phase may not be

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67 Ibid.
68 A Dersso ‘Statement by Commissioner Solomon Ayele Dersso, Chairperson of the African Commission on Human and Peoples’ Rights’ (12 August 2020), available at https://www.achpr.org/pressrelease/detail?id=529 which states: ‘Forth, it has become clear that the unprecedented nature of the impact of COVID-19 not only on health but also other areas of life means that this pandemic is not a temporary event that will easily pass in a short time. Most notably, the socio-economic and humanitarian fall out of COVID-19 is widespread and severe. For us, the African Commission, perhaps this is one of the most serious and more enduring challenges that can have catastrophic human rights consequences as tens of millions are pushed to extreme poverty and many others face hunger and starvation.’ Although it should be noted that it is unclear whether the Commissioner was referring solely to the impact of the COVID-19 response.
72 Ibid.
incompatible with a section 36 analysis of phase 2 but does not frame the issues as rights versus health, but rather as balancing competing rights against each other or perhaps weighing them collectively as mutually reinforcing. The next part of this article considers how health-related cases have managed this relationship and whether there is support for a particular framing of this relationship within our jurisprudence.

IV APPLICATION OF THE PHASES OF PUBLIC HEALTH AND HUMAN RIGHTS IN SOUTH AFRICAN JURISPRUDENCE

While the COVID-19 pandemic is often labelled unprecedented, it is not the first time that South African courts have been required to adjudicate the government’s response to an epidemic. Before delving into the jurisprudence related to COVID-19, it is worthwhile to consider the role human rights have played in other public health responses and pandemics in South Africa. Though the rights implicated in any public health response can be expansive, this part focusses specifically on case law related to the HIV epidemic in South Africa.

The jurisprudence developed during the HIV epidemic became a touchstone for a human rights-based approach to the epidemic and played a significant role in concretising the role of human rights in public health responses globally. In Treatment Action Campaign, the Court recognised both the severity of the HIV epidemic as well as the government’s competing duties to realise other socio-economic rights, stating:

We are also conscious of the daunting problems confronting government as a result of the pandemic. And besides the pandemic, the state faces huge demands in relation to access to education, land, housing, health care, food, water and social security. These are the socio-economic rights entrenched in the Constitution, and the state is obliged to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of each of them.

In the context of this case, these rights were, to some extent viewed as competing rather than complementary and mutually reinforcing. However, the case was nonetheless of significant importance with the judiciary intervening to compel the state to provide treatment. Though the Court recognised the need to defer to the other branches of the government, it also definitively rejected the applicability of the ‘non-recognition of rights’ phase in the context of South Africa’s democracy. The Court outlined its responsibility to uphold the Constitution, even in the context of a pandemic, as follows:

The primary duty of courts is to the Constitution and the law, “which they must apply impartially and without fear, favour or prejudice”. The Constitution requires the state to ‘respect, protect, promote, and fulfil the rights in the Bill of Rights’. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so.

K Young ‘The Right-Remedy gap in Economic and Social Rights Adjudication: Holism Versus Separability’ (2019) 69 University of Toronto Law Journal 124 which has a comprehensive discussion of how rights may be considered holistically when adjudicating rights-based challenges.


Ibid at para 99.
In *Minister of Health, Western Cape v Goliath*, the high court had to consider the definition of healthcare services, albeit as per the definition of the Health Act 61 of 2003, and whether it could order the forced isolation of a patient with extensively drug-resistant TB (XDR-TB) who had refused to be voluntarily isolated. The court adopted a purposive interpretation of the Act to allow the ‘involuntary isolation of patients with infectious diseases at a State-funded healthcare facility’. In determining whether to order the isolation of the patient, it recognised that justifying an order for forced isolation required balancing the individual’s rights against the broader society’s rights, including the protection of the lives and health of those who could contract XDR-TB from the respondent. The court acknowledged that compulsory isolation would amount to a deprivation of freedom. In conducting its section 36 limitations analysis, the court placed significant weight on international and foreign laws that allowed compulsory isolation as well as the public health consequences of allowing XDR-TB to spread and the seriousness of the illness.

The decision *Goliath* has been subject to criticism, not only for its section 36 limitations analysis, but even for its definition of healthcare services, with some authors contending that isolation serves the purpose of infection control and does not constitute the provision of healthcare services. This critique, however, also highlights an additional shortcoming of the *Goliath* decision that renders this definitional challenge of negligible impact – the failure to situate the broader public health crisis *Goliath* responds to within the positive obligations emanating from section 27(1)(a) of the Constitution. Pieterse & Hassim contend that the XDR-TB crisis in South Africa at that time implicated two constitutional rights:

The right to have access to health care services in s 27(1)(a) of the Constitution obliges the state, in s 27(2), to take reasonable legislative and other measures to achieve its progressive realization, within its available resources. Section 24(a) of the Constitution entitles all citizens to ‘an environment that is not harmful to their health or well-being’, whereas s 7(2) requires of the state to ‘respect, protect, promote and fulfil’ these rights, alongside all the other rights guaranteed by the Bill of Rights (including the right to freedom and security of the person).

Though the authors lay the blame for the pandemic on the state for its failure to deliver on its obligations, these obligations are framed as including a variety of public health interventions including contact tracing, testing, education and ‘efforts to improve the living conditions of those susceptible to the disease’ – thus including a range of public health interventions within the ambit of section 27(1)(a) read with section 24(a).

However, other decisions, such as the *S v Nyalungu* and *Phiri v S* judgments adopt an approach which fails to recognise any role for human rights in public health issues. In *Nyalungu*, the court was asked to consider whether an HIV-positive man who raped a woman was also guilty of the crime of attempted murder. It held that Mr Nyalungu was guilty of the crime of attempted murder and imposed a life sentence. The court recognised that it was presented with a novel issue and, in effect, was developing common law principles relating to

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77 *Minister of Health, Western Cape v Goliath* & Others [2008] ZAWCHC 41, 2009 (2) SA 248 (C).
78 Ibid at para 37.
79 Ibid.
81 Ibid at 244.
82 *S v Nyalungu* 2013 2 SACR 99 (T) 1.
83 *Phiri v S* 2013 ZAGPPHC 279; 2014 (1) SACR 211.
criminal law. Section 39(2) of the Constitution clearly mandates courts when ‘interpreting any legislation, and when developing the common law or customary law [to] promote the spirit, purport and objects of the Bill of Rights.’ Despite this clear injunction and the court’s recognition of the novelty and precedent-setting value of the judgment, the court failed to consider the rights of the accused, while also failing to consider the broader public health implications of criminalising the transmission of HIV as attempted murder. In Phiri, Mr Phiri appealed against a conviction of attempted murder after he failed to disclose his status as HIV positive to a sexual partner. The high court did not comment or show any concern for its further development of the crime of attempted murder and merely stated erroneously that it seemed that a misreading of the Nyalungu judgment had occurred because ‘it was established over a decade ago by this court that such conduct constitutes attempted murder.’

When exploring the impact that HIV measures have on human rights, Hoffmann v South African Airways highlighted the role of human rights in addressing stigma and discrimination against HIV positive persons. The Court, recognised HIV as a ground of discrimination and then highlighted how the courts should address a conflict between a human right to equality and what South African Airways alleged to be an effort to protect Hoffman’s health, stating:

The appellant is living with HIV. People who are living with HIV constitute a minority. Society has responded to their plight with intense prejudice. They have been subjected to systemic disadvantage and discrimination. They have been stigmatised and marginalised. As the present case demonstrates, they have been denied employment because of their HIV positive status without regard to their ability to perform the duties of the position from which they have been excluded. Society’s response to them has forced many of them not to reveal their HIV status for fear of prejudice. This in turn has deprived them of the help they would otherwise have received. People who are living with HIV/AIDS are one of the most vulnerable groups in our society. Notwithstanding the availability of compelling medical evidence as to how this disease is transmitted, the prejudices and stereotypes against HIV positive people still persist. In view of the prevailing prejudice against HIV positive people, any discrimination against them can, to my mind, be interpreted as a fresh instance of stigmatisation and I consider this to be an assault on their dignity. The impact of discrimination on HIV positive people is devastating. It is even more so when it occurs in the context of employment. It denies them the right to earn a living. For this reason, they enjoy special protection in our law.

A similar approach, prioritising the rights of HIV positive persons, was adopted in NM v Smith which concerned how the right to privacy of HIV positive persons was infringed when their names were disclosed in a book written by the respondent. The Court highlighted the interrelationship between this private information and other rights such as the right to bodily integrity and personal autonomy. The Court again highlighted the context of HIV in South...
Africa and the stigma faced by HIV positive persons. However, the Court went further and recognised the complementary role that protecting privacy rights may have in encouraging people to seek treatment and thus improving public health, stating:

The disclosure of an individual’s HIV status, particularly within the South African context, deserves protection against indiscriminate disclosure due to the nature and negative social context the disease has as well as the potential intolerance and discrimination that result from its disclosure. The affirmation of secure privacy rights within our Constitution may encourage individuals to seek treatment and divulge information encouraging disclosure of HIV which has previously been hindered by fear of ostracism and stigmatisation. The need for recognised autonomy and respect for private medical information may also result in the improvement of public health policies on HIV/AIDS.

From these cases, the Constitutional Court has explicitly rejected a non-recognition approach to human rights in the context of a pandemic. Broadly, more recent decisions appear to adopt a complementary approach to human rights and public health that aligns closely to the Mann et al framework. This framework aligns closely with the broader view of the Court, which conceptualises constitutional rights, particularly socio-economic rights, as interdependent. We now turn to consider whether the courts have followed this line of jurisprudence in the context of the COVID-19 epidemic.

V THE ROLE OF HUMAN RIGHTS IN SOUTH AFRICA’S COVID-19 JURISPRUDENCE

A Overview of COVID 19 litigation

Following the declaration of the national state of disaster and the implementation of a lockdown, several cases had been launched against the government. Initially, many cases were either dismissed, such as the application by Hola Bon Renaissance challenging the lockdown; or settled, such as the case of doctors being forcibly quarantined in Limpopo. This means, firstly, that, in the early stages of the pandemic, there was little judicial intervention in the public health response to the COVID-19 epidemic and, secondly, that some litigation that did influence policies and public health responses may not have resulted in formal judgments. Despite this, there remains a rich and extensive set of decisions related to COVID-19. It should be highlighted at the outset that the categorisation of the cases does not per se speak to the correctness of their outcomes or reasoning. This article does not purport to assess the correctness of these individual decisions but rather to critique the approach adopted with regard to the relationship between human rights and public health. Furthermore, though there are several other components to the COVID-19 response which implicate further rights, our discussion of the response is confined to the case law related to the pandemic as outlined below.

89 Ibid at para 40.
90 Ibid at para 42.
B Non-recognition of human rights

The earliest decisions on issues related to the COVID-19 pandemic adopted a decidedly non-interventionist approach whereby the judiciary deferred to the government’s decisions without any consideration of the human rights implications of the regulations. Each case makes much of the uncertainty and novelty of the pandemic as justification for the court’s non-intervention.

Decided on 27 March 2020, Ex Parte: van Heerden was probably the first COVID-19 related judgment dealing with the South African judiciary’s response to the COVID-19 lockdown regulations. Shortly after the announcement of the nation-wide lockdown, the applicant’s grandfather passed away in a home fire and wished to travel inter-provincially to assist his mother with funeral arrangements. The applicant approached the high court to be granted a limited exception to travel under the lockdown rules. The court dismissed the application. The court’s reasoning was terse and communicated clearly its unwillingness to evaluate or assess the government’s decision to limit freedom of movement in such a radical manner, stating: ‘I have extreme sympathy for the applicant but I must uphold the law. Unfortunately, presently, the law prohibits that which the applicant wants to do however urgent and deserving.’

Similar levels of deference can be observed in Gcilitshana v Director of Public Prosecutions, a case that arguably concerned an even greater infringement of rights and impacted public health negatively. The applicant had been unable to finalise his bail proceedings with hearings being delayed due to the pandemic. The case outlined in detail that COVID-19 outbreaks in the prison, and that a magistrate and a prosecutor had been required to quarantine, had meant that he was unable to obtain bail. The high court had to determine whether ‘a grave injustice could occur if there is no lawfully justifiable reason to detain an arrested person.’ The high court intervened only in so far as ordering the magistrate to expedite the bail proceedings that would occur within the same week of the judgment. The court did not find the delay unjust, stating: ‘[t]his fact has to be viewed in the light of the fact that the outbreak was new, nobody has had an opportunity to deal with the situation before. It was a national disaster.’

This approach failed to engage with the human rights implications of detainees being unable to access bail as well as failing to consider the public health benefits of utilising bail to reduce overcrowding in prisons. In addition, the case appeared to exceptionalise the COVID-19 pandemic as justification for adopting an approach to constitutional rights that deviated considerably from previous jurisprudence.

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93 Ibid at para 16. Roelofse AJ expanded somewhat on the exceptionalism of COVID-19 at paras 1–3, stating: ‘Coronavirus disease (COVID-19) has taken a terrible grip of the World – it is described as an invisible enemy […] The media keeps live count the numbers of those who have perished. The drive to curb the COVID-19 menace, its global health and economic effects is unprecedented. South Africa is not spared. […] Here, the death toll is expected to rise dramatically as elsewhere in the world.’
94 Gcilitshana v Director of Public Prosecutions [2020] ZAECGH 32.
96 Gcilitshana (note 94 above) at para 28.
C Conflicts between public health and human rights

Despite the fact that constitutional rights were not suspended during the lockdown, and substantial infringements of civil and political rights that emanated from the lockdown and ensuing COVID-19 response were made, there were only a few cases that framed public health objectives as being in conflict with rights.

The decision *Mohamed v The President of the Republic*,\(^{97}\) was one of the first judgments in which the COVID-19 lockdown was at the front and centre of the issue. A group of applicants approached the court claiming their rights to freedom of movement, freedom of religion, freedom of association and dignity were being violated by the prohibition on religious gatherings. The applicants submitted that their religion involved daily prayers in congregation and that the regulations presented them with a ‘Hobson’s Choice.’ The respondent maintained that the prohibition on gathering was ‘necessary to curb the infection rate and to manage the healthcare system to prevent it from being wholly overwhelmed and collapsing.’ The court refused to grant an exemption permit for the applicants stating that –

> [T]he world over, entire countries of people have had to suffer similar inroads to their civil liberties and way of life – in this respect, South Africa is not unique or alone in its efforts. In some countries, these restrictions were placed too late and others have suffered criticism of being too draconian. What they all have in common is the presence of COVID-19 and the toll it has taken on human life in so many ways.\(^{98}\)

The court formulated the applicants’ individual exercise of their religion in opposition to the ‘greater good’ and held that –

> [E]very citizen is called upon to make sacrifices to their fundamental rights entrenched in the Constitution. They are called upon to do so in the name of ‘the greater good’, the spirit of ‘ubuntu’ and they are called upon to do so in ways that impact on their livelihoods, their way of life and their economic security and freedom. Every citizen of this country needs to play his/her part in stemming the tide of what can only be regarded as an insidious and relentless pandemic.\(^{99}\)

The court juxtaposed the applicant’s right to freedom of religion with the rights of the public to enjoy their rights to life, access to health care, access to an environment that is not harmful to their health and wellbeing, and their rights to dignity.\(^{100}\)

The case of *De Beer v Minister*,\(^{101}\) was a heavily criticised judgment that invalidated the state of disaster regulations wholesale, even those provisions which may have justifiably limited certain rights, or which did not limit rights at all. The applicant in the case challenged the validity of the declaration of a national state of disaster and the pursuant regulations. The court held that the regulations ‘go beyond the mere issue of saving lives, some of which, with the greatest degree of sensitivity, international experience has shown, may inevitably be lost.’\(^{102}\) Broadly, the court failed to consider the implications the regulations had on rights such as the right to life and health – paying lip service with a brief reference to these rights and immediately framing the matter as an ‘anguishing conundrum [of the] choice between “plague

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\(^{97}\) *Mohamed v The President of the Republic* 2020 (5) SA 553 (GP).

\(^{98}\) Ibid at para 76.

\(^{99}\) Ibid at para 75.

\(^{100}\) Ibid at para 44.

\(^{101}\) *De Beer & Others v Minister of Cooperative Governance and Traditional Affairs* [2020] ZAGPPHC 184, 2020 (11) BCLR 1349 (GP).

\(^{102}\) Ibid at para 6.
and famine”. \textsuperscript{103} Yet, despite the court’s categorisation of these rights as conflicting, it did very little to investigate the limitation of rights caused by the lockdown restrictions – simply stating that ‘lack of rationality would result in such a measure not constituting a permissible limitation of a Constitutional right in the context of section 36 of the Constitution’. \textsuperscript{104} With this in mind, the court proceeded to apply the rationality test to certain regulations. The court considered a series of alternative formulations to provisions to promote other rights. For example, it questioned why night vigils were not permitted where social distancing between participants and a mandatory closed casket could render such practices safer. If restrictions on the time people could be permitted to exercise were challenged, especially if limiting the size of groups exercising together seemed more effective, the court held that restrictions on visiting spaces like parks could be replaced by regulating those visits more carefully.

The court stated ‘the cautionary regulations relating to education, prohibitions against evictions, initiation practices and the closures of night clubs and fitness centres, for example, as well as the closure of borders’ could pass muster. Despite recognising that such regulations could withstand challenges, by limiting its review to a handful of the regulations, the court declared the regulations to be unconstitutional and invalid \textit{in toto}. Though the effect of this finding was mitigated by a suspension of invalidity and ultimately successfully appealed,\textsuperscript{105} the approach of the court reflected a prioritisation of civil and political rights to a degree that undermined the totality of the public health response to COVID-19.

In \textit{FITA v President of the Republic},\textsuperscript{106} the applicant challenged the banning of the sale of tobacco products in response to the COVID-19 pandemic on the basis that the ban was irrational and breached the principle of legality. The Minister of Cooperative governance and Traditional Affairs argued that the ban on tobacco products served to promote and protect the rights to life and healthcare.\textsuperscript{107} The court agreed with this characterisation, upholding the ban on the basis that it served to protect these rights:

\begin{quote}
We hold the view that a vigorous attempt to contain the spread of the virus at all costs had to be made especially bearing in mind the high COVID-19 mortality rates and the fact that, as a developing country with limited resources as well as an already overwhelmed healthcare system, South Africa is ill-equipped to survive the full brunt of the pandemic at its peak if no concerted efforts are made to contain the virus. In line with its constitutionally mandated duties to preserve life and provide adequate health care, the State was under a duty to adopt measures to ensure that the already fragile healthcare system was not overwhelmed even further.\textsuperscript{108}
\end{quote}

The Court provided that it was –

\textsuperscript{103} Ibid.
\textsuperscript{104} Ibid.
\textsuperscript{105} Minister of Cooperative Governance and Traditional Affairs \textit{v De Beer} [2021] ZASCA 95, 2021 (3) All SA 723 (SCA).
\textsuperscript{107} Ibid at para 43 where the court stated: ‘In our view, the medical material and other reports, inclusive from the WHO, considered by the Minister, though still developing and not conclusive regarding a higher COVID-19 virus progression amongst smokers compared to non-smokers, provided the Minister with a firm rational basis to promulgate regulations 27 and 45, outlawing the sale of tobacco products and cigarettes. This in our view is a properly considered rational decision intended to assist the State in complying with its responsibilities of protecting lives and thus curbing the spread of the COVID-19 virus and preventing a strain on the country’s healthcare facilities.’
\textsuperscript{108} FITA (note 106 above) at para 42.
persuaded by the Minister’s submission that FITA’s argument is misconceived as it ignores the context under which the regulations were promulgated. Given that an unprecedented disaster had just hit South Africa requiring swift and effective action from the State, it would be illogical to require the Minister to meet a higher threshold (that is ‘strictly necessary’) and require her to jump through proverbial hoops when the enactment of the regulations was for a laudable purpose.  

The inconsistency in framing and the different jurisprudential approaches were perhaps highlighted most clearly in the two judgments dealing with the tobacco ban. The British American Tobacco South Africa (Pty) Ltd decision found the tobacco ban unconstitutional, directly conflicting with the decision in FITA which upheld the constitutionality of the ban. Departing substantially from the deferent approach in FITA, Mlambo JP highlighted the need to weigh constitutional rights against public health imperatives, stating:

> It can hardly be contested that the COVID-19 global pandemic resulted in a national disaster that gave rise to the need to take urgent action. This urgent action must be contextualised against the constitutional obligation to secure the well-being of the people of South Africa.

The schools and education of children has been a particularly contentious issue, particularly as the evidence on how COVID-19 affected children solidified. On 1 July 2020, in One South Africa Movement and Another v President of the Republic of South Africa and Others, the applicants attempted to stop the re-opening of schools. The applicants argued that re-opening the schools would compromise public health and their application sought to avoid children being placed ‘on the altar of economic and financial interests.’ They relied on the rights to life and dignity to justify their relief. Regarding the applicants’ contention that the lockdown should revert to a higher level, the court commented that the ‘measures the state adopts to deal with the threat posed to the right to life must in turn safeguard and protect other constitutional rights which are also affected by the COVID-19 crisis.’ The court’s approach was one which sought to balance public health objectives against other rights and, in its outcome, held that it would be permissible to adopt less stringent public health objectives to support the realisation of other rights:

> Thus, while the initial concern and response to the virus was largely and understandably a public health one, with time the impact of the virus on issues such as the economic survival of nations and their citizens, and the simple ability to live a meaningful and decent life, has come sharply into focus. The ability of governments, in particular those in the developing world, to respond holistically to the needs and well-being of their citizens has come under increased pressure. This has been exacerbated by the inevitable recognition over time that the virus will be with us for some time and that a cure in the form of a vaccine is still somewhere in the future.

The court also endorsed the view that ‘it was possible to protect both lives and livelihoods, without choosing one over the other’ in justifying the adoption of a less restrictive public health measure. The court’s view of the relationship between public health and human

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109 Ibid at para 85.  
110 British American Tobacco South Africa (Pty) Ltd & Others v Minister of Co-operative Governance and Traditional Affairs & Others [2020] ZAWCHC 180, 2021 (7) BCLR 735 (WCC) at para 212.  
112 Ibid at para 131.  
113 Ibid at para 2.  
114 Ibid at para 98.
rights generally saw the pandemic, and consequently public health measures, of less urgent importance than the competing economic interests and other civil and political rights such as—

the right to reasonable access to health care services for all the population, and not only for COVID-19 patients; the right to freedom of movement; the right to dignity which attaches to the ability to earn a living and feed one's family; the right to free choice of one's trade, profession and occupation; and the right to property. Moreover, the measures that the state adopts must also not hinder its ability to meet its constitutional obligations progressively to provide access to housing, social-welfare, health care and education. The health of the economy and fiscus are central to its ability to do so.\textsuperscript{115}

The court clearly viewed the right to education and the right to food as standing in conflict with the right to health and the right to life and accordingly approached the section 36 limitation test as follows:

\begin{quote}
In our view it must follow that in the balancing exercise between the competing rights, the balance was appropriately struck between the right to life and other implicated rights, such as the right to education, and the right to food.\textsuperscript{116}
\end{quote}

This approach should be contrasted with the \textit{Equal Education} case as discussed below, where the rights to health, food and education were aligned with the public health COVID-19 restrictions.

In \textit{Esau}, the Supreme Court of Appeal had to decide on the constitutionality of the state of disaster regulations that applied on level 4.\textsuperscript{117} Specifically, the court had to consider whether the limitations on the rights to dignity, freedom of movement and trade could justifiably be limited to prevent COVID-19. The Minister argued that the COVID-19 regulations worked to promote the rights to life, freedom and security of person and access to healthcare system – not of a particular person but of broader South African society.\textsuperscript{118} The court accepted the argument that these nonpharmaceutical interventions served to protect societal rights, specifically the right to life, stating:

\begin{quote}
At its most basic, the purpose of the limitation of the fundamental right to freedom of movement and of trade, occupation and profession was the protection of the health and lives of the entire populace in the face of a pandemic that has cost thousands of lives and has infected hundreds of thousands of people. In a sense, there has been something akin to a trade-off: the rights to freedom of movement, to dignity and to pursue a livelihood were limited to prevent the spread of COVID-19 and that, in turn, protected the right to life of many thousands of people, who would have died had the disease had the opportunity to run unchecked through the country.\textsuperscript{119}
\end{quote}

However, this recognition also placed public health objectives at odds with other fundamental rights and framed the goals of public health as diametrically opposed to the protection of other

\footnotesize{\textsuperscript{115} Ibid at para 90.}

\footnotesize{\textsuperscript{116} Ibid at para 165.}

\footnotesize{\textsuperscript{117} \textit{Esau} \& Others \textit{v} Minister of Co-Operative Governance and Traditional Affairs \& Others [2021] ZASCA 9, 2021 (3) SA 593 (SCA).}

\footnotesize{\textsuperscript{118} Ibid at para 121 which reads: ‘The COgTA Minister’s starting point in justifying the regulations under attack was that the State was under an obligation to respect, protect, promote and fulfil the fundamental rights of everyone to life, to freedom and security of the person and to access to health care services. These rights were threatened by the pandemic. In order to arrest the spread of COVID-19, it was necessary to compel people to remain at home. The logic is clear: “Uninfected persons who stay at home minimize their contact with infected persons and infected surfaces. Infected persons who stay at home reduce the occasions upon which they may infect others or public surfaces.”’}

\footnotesize{\textsuperscript{119} Ibid at para 132.}
civil and political rights, with the realisation of one being mutually exclusive to the realisation of the other.

At the same time, an easing of those strict restrictions was envisaged as and when appropriate. But that easing came at a cost. Even though the COgTA Minister described level 4 as being ‘largely a success’, she said that it ‘resulted in the increased spread of the virus, albeit within acceptable parameters’. By way of example, she said that an increase in the doubling rate of the disease was noted, from 15 days under level 5 to 12 days under level 4. By ameliorating the harshness of the lockdown and moving to level 4, the COgTA Minister sought to strike a balance ‘between saving lives and saving livelihoods’. For the most part, I am satisfied that the means chosen – and the limitation of rights that those choices brought about – were objectively rational. They were also proportional in the sense that, in the circumstances, those means were necessary to deal with the exigencies faced by the country, struck appropriate balances between the adverse and beneficial effects of the response to the pandemic and were suitable for their intended purpose.¹²⁰

In Democratic Alliance, the high court had to consider the constitutionality of the Disaster Management Act and whether there was sufficient parliamentary oversight of the COgTA powers exercised under the COVID-19 pandemic.¹²¹ In this case the court specifically acknowledged the need to ensure the protection of rights within the Bill of Rights, even during a pandemic, and that limitations of these rights ought to be justified in terms of section 36 of the Constitution. It held:

We must not lose sight of the fact that rights enshrined in the Bill of Rights must be protected and may not be unjustifiably infringed. It is for the legislature to ensure that, when necessary, guidance is provided as to when limitation of rights will be justifiable. It is therefore not ordinarily sufficient for the legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of the constitutional obligations placed on such officials to respect the Constitution. Such an approach would often not promote the spirit, purport and objects of the Bill of Rights. Guidance will often be required to ensure that the Constitution takes root in the daily practice of governance. Where necessary, such guidance must be given. Guidance could be provided either in the legislation itself, or where appropriate by a legislative requirement that delegated legislation be properly enacted by a competent authority.¹²²

D Public health and human rights and complimentarity

Despite the initial approach of the judiciary in exercising a high level of deference to the government’s response to the COVID-19 pandemic, the courts began to hand down judgments that melded human rights with public health.

One of the most significant judgments concerning the COVID-19 response was Khosa and Others v Minister of Defence and Military Defence and Military Veterans and Others¹²³ which marked a significant turning point in the judiciary’s willingness to scrutinise state responses to the pandemic. The applicants approached the high court, amongst others, to restate the entitlement of all persons to enjoy rights in the context of the state of disaster. The Khosa case

¹²⁰ Ibid at para 142.
¹²¹ Democratic Alliance v Minister of Co-operative Governance and Traditional Affairs & Others [2021] ZAGPPHC 168.
¹²² Ibid at para 75.
was centrally about incidences of torture and brutality perpetrated by members of the South African security forces against citizens in the course of the state’s response to Covid19.\textsuperscript{124}

The court also ordered the creation of a mechanism for citizens to report allegations of torture or cruel, inhumane, or degrading treatment or punishment committed during the state of disaster; and, more specifically, to Mr Khosa: the court required investigations to be completed and the results provided to the court. The \textit{Khosa} judgment outlines the tension between human rights and public health objectives that is the centre point of South Africa’s COVID-19 response succinctly:

\begin{quote}
I must emphasize that all counsel were in agreement that a lock-down was necessary, and I must add that I am of the same view less there be any doubt about that. The public is however entitled to be treated with dignity and respect whether rich or poor. Section 7 of the Bill of Rights makes this abundantly clear and there is no doubt about that.\textsuperscript{125}
\end{quote}

However, it is also worth noting that the precise dichotomy between rights and public health objectives that was exposed in \textit{Khosa} is distinct from many other instances of conflict between human rights and public health. The brutality at the centre of the \textit{Khosa} case serves no public health goal and can be categorized without doubt as an abuse of power. Fabricius J, recognised the importance of protecting human rights in the context of the pandemic response, stating:

\begin{quote}
[I]f the Government is held to these Constitutional obligations and the citizens trust is restored, and lawful rational Regulations are obeyed, the expected flood of litigation will retreat and the spread of the virus will be contained until the appropriate vaccine is found. The fact of the matter is thus simply the following: Communality or failure.\textsuperscript{126}
\end{quote}

Some of the other cases that attempted to adopt a complimentary approach to public health and human rights focussed specifically on whether different groups of people could be excluded from accessing COVID-19 social safety nets. The broader objective of addressing poverty and historical inequities highlighted in \textit{TAC} was reiterated in the \textit{Solidarity} case.\textsuperscript{127} Here, the applicants sought an order to review and set aside a decision by the Minister of Tourism to introduce race-based criteria to emergency assistance given due to COVID-19. The high court commented that pursuing equality goals should not be seen as contrary to effectively providing a COVID-19 response, but that it is important to understand that COVID-19 impacts the poor and disadvantaged to the greatest extent, and that government calibrating its response to factor in historical disadvantage ‘is not only permissible at the level of principle but warranted and necessary.’ The court also heeded that ‘in a time of crisis when people are at their most vulnerable context matters perhaps even more so than in a time of normality and the policy response must factor that into its dynamics.’ In addition, poorer individuals were more affected by the lockdown and suspension of economic activity than middle- and upper-class individuals who were able to continue work remotely. In this sense, the judgment’s prioritisation of historically disadvantaged groups supported efforts that worked to assist groups most affected by the pandemic.

The case of \textit{Scalabrini Centre of Cape Town v Minister of Social Development}\textsuperscript{128} was concerned with whether asylum seekers and social permit holders could be lawfully excluded

\begin{footnotes}
\item[124] Ibid at para 24.
\item[125] Ibid at para 19.
\item[126] Ibid at para 9.
\item[127] \textit{Solidarity obo Members v Minister of Small Business Development \& Others; Afriforum v Minister of Tourism \& Others [2020] ZAGPPHC 519.}
\item[128] \textit{Scalabrini Centre of Cape Town v Minister of Social Development [2020] ZAGPPHC 308; 2021 (1) 553 (GP).}
\end{footnotes}
from receiving the COVID-19 distress grant. The court considered that these persons were ‘locked-in’ by the pandemic and that the lockdown impacted their ability to secure food and basic necessities. The court found that a person’s immigration status is an irrational and unreasonable ground for exclusion. The court held that the interrelatedness of their rights to equality, dignity and access to social assistance could not be overemphasised, and that ‘[w]hilst it cannot be disputed that the COVID-19 pandemic must be fought by all means necessary, it must be constantly borne in mind that the Constitution and the Bill of Rights in particular, ought to be the touchstone against which the formulation and implementation of regulations is measured.’

The complementary approach can also be observed in the case of *South African Human Rights Commission and Others v City of Cape Town and Others*, which concerned the right to housing and the suspension of evictions during COVID-19. The South African Human Rights Commission was able to successfully interdict the City of Cape Town from evicting persons or demolishing informal housing structures. The high court condemned the City’s conduct as ‘inhumane, heartless and done with scant regard to safety, security and health particularly in the light of the COVID-19 pandemic’ and, importantly, recognised that vulnerability is exacerbated during the pandemic. The court reiterated that the purpose of judicial oversight over evictions and demolitions of homes is to protect the right to dignity, housing, safety and security of the person and life which are interrelated.

In *CD and Another v Department of Social Development*, the applicants approached the high court for an order to enable them to travel from Cape Town to Bloemfontein and back to fetch their children aged 7 and 10 from their grandparents home. The court took an approach which not only considered the best interests of the child but the children’s well-being and physical health during the pandemic, stating:

> The well-being and physical health of the children in these turbulent times are being placed at risk. The situation is clearly an urgent and troubling one, and the issues raised by the Respondent pertaining to the failure to move the children before the lockdown or the fact that the application was brought on 6 April, does not detract from the urgency. The best interests of the children would undoubtedly be served if permission were to be granted for them to be fetched to travel from Bloemfontein to Cape Town.

In *Equal Education v Minister of Basic Education*, the suspension of the National Schools Nutrition Programme (NSNP) during lockdown was challenged. The high court went to great lengths to explain the interrelationship and interdependence of the rights to education, nutrition and health. The court noted that in government policies on the NSNP, the link between the rights to education, health and food are made clear, with the stated purposes of the NSNP being ‘to contribute to the improvement of education quality by enhancing … learning capacity, school attendance and punctuality… [and] general health development by alleviating

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129 Ibid at para 41.
131 Ibid at para 47.
132 *CD & Another v Department of Social Development* [2020] ZAWCHC 25.
133 Ibid at para 13.
135 Ibid at paras 34–41.
The court also highlighted the role of food insecurity and hunger in contributing to adverse health conditions, including obesity and micronutrient deficiencies, something which the NSNP assisted in ameliorating. The court went on to find that the NSNP was part of the state’s constitutional obligations under the children’s right to basic nutrition.

E The approach of COVID-19 jurisprudence

The above cases illustrate a highly variable and at times inconsistent jurisprudence on COVID-19. More interestingly, despite the richness of decades of development in the relationship between public health and human rights, as well as South Africa’s own section 36 jurisprudence, one can see the historical phases of this history woven in throughout these cases as though the jurisprudence began afresh in the pandemic.

The answer to how the courts should manage their role, and the role of human rights during a pandemic, is perhaps best expressed by the Supreme Court of Appeal in *Esau* when it posed the question ‘what is the role of the courts in circumstances such as these’ and answered powerfully by referring to the 1879 case of *In re Willem Kok and Nathaniel Balie*, “in times of national disaster… ‘the laws are not silent’. ‘(T)hey speak the same language in war as in peace’”. Continuing on, the court noted ‘that even in times of upheaval, the courts’ first and most sacred duty is to administer justice to those who seek it’.

This judgment, laden with the jurisprudence dating more than 140 years prior to the COVID-19 pandemic, resoundingly emphasized that the duty of the courts in times of crisis is the same as its duty in times of normality. Against this backdrop, the cases which adopted a non-interventionist approach became even more divorced from the chain of jurisprudence that underpins our legal system. These cases, subsumed with the severity of the COVID-19 pandemic, saw courts essentially abrogate their duties to safeguard and promote the realisation of human rights during the earlier phases of the pandemic. Though these cases upheld strong public health responses, they did not adequately consider the reasonableness and justifiability of the resulting human rights limitations. Whilst the COVID-19 pandemic was novel, there was clear direction from previous cases, such as the *TAC* case, which would have compelled courts to intervene when the public health response interfered with human rights. Again, *Esau* offers guidance to the judiciary over the duty it bears in times of crisis such as COVID-19, viz, the duty of oversight and guidance to other branches of government.

In other words, even in times of national crisis, as this undoubtedly is, the executive has no free hand to act as it pleases, and all of the measures it adopts in order to meet the exigencies that the nation faces must be rooted in law and comply with the Constitution. The rule of law, a founding value of our Constitution, applies in times of crisis as much as it does in more stable times.

But this duty is not unlimited, it requires a balancing between allowing the executive the flexibility and freedom to respond to the crisis while still maintaining and upholding the

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137 Ibid at para 30 which reads: “The severity of high levels of unemployment leads to poverty and consequently to food insecurity. Even when employed, the income is not adequate with the informal sector employment totaling 5 million, who in turn supports 16 million people. The parents can accordingly not provide sufficient food and nutrition to their children. Children who suffer from hunger are at risk of various forms of malnutrition which include wasting, stunting, obesity and micronutrient deficiencies.”

138 Ibid at para 42.

139 *Esau* (note 117 above) at para 4.

140 Ibid at para 5.
rule of law.\textsuperscript{141} While the conflict approach to human rights and public health is not the most desirable in Mann’s framework, it is not an inherently flawed approach to the need to assess public health measures in the context of a constitutional democracy, particularly one such as ours where section 36 remains a touchstone to any limitation of rights.

Whilst the complementary approach is a desirable one, there will undoubtedly be instances in which public health efforts do act to limit human rights. However, in such instances, it is imperative that the courts follow an approach of balancing competing rights and justifying limitations of these rights. Of concern in the conflict phase of the COVID-19 jurisprudence is the lack of recognition of many socio-economic rights, such as the right to health, as competing rights and values to be balanced against the civil and political rights infringed by the lockdown regulations and broader public health measures. In particular, the \textit{De Beer} case signalled a troubling lack of regard for the competing rights to health and life against the rights to freedom of movement and autonomy discussed so extensively.

The careful balancing between public health and other rights was perhaps most clearly outlined in \textit{One South Africa} which was one of the few cases that engaged with section 36 in detail and offers a clear pathway to consider how best to balance rights in a pandemic situation. In fact, \textit{One South Africa} offers a counter-point to Mann’s approach of reading the rights to health as complementary to other rights as, within the context of COVID-19, there were instances in which socio-economic rights were competing with the rights to health and life.\textsuperscript{142}

At the outset, the court recognised that there is no hierarchy of rights within the Bill of Rights and there can be no hierarchy applied when undertaking a section 36 analysis.

In exercising this power, the executive must obviously respect, protect, promote and fulfil all fundamental rights implicated. But even this involves a range of choices as to how best to do it. Therefore, it is not useful, and may indeed be misleading, to appeal to the logicality of a decision of this nature in challenging its constitutional validity. Instead, this Court must look to the relevant principles of law that apply. In the first place, it is well settled in our law that there is no hierarchy of rights under the Bill of Rights, and that different rights may compete against each other.\textsuperscript{143}

Importantly, the court recognized that rights may not be complementary in some situations and that these competing goals must be balanced in terms of section 36. In addition, measures that protect other rights ought to be upheld and even within the context of the COVID-19 pandemic there may be other rights which require protection, albeit not to the exclusion of public health objectives:

In this case, the constitutional issue implicates a range of fundamental rights, which pull in different directions. The measures the state adopts to deal with the threat posed to the right to life must in turn safeguard and protect other constitutional rights which are also affected by the COVID-19 crisis. Section 7(2) expressly requires this of the state. These include, for example, the right to reasonable access to health care services for all the population, and not only for COVID-19 patients; the right to freedom of movement; the right to dignity which attaches to the ability to earn a living and feed one’s family; the right to free choice of one’s trade, profession and

\textsuperscript{141} Ibid at para 6. ‘That is not to say that the courts have untrammelled powers to interfere with the measures chosen by the executive to meet the challenge faced by the nation. Judicial power, like all public power, is subject to the rule of law. Perhaps the most obvious constraint on the power of the courts is the doctrine of the separation of powers, a principle upon which our Constitution is based, and which allocates powers and responsibilities to the three arms of government – the legislature, the executive and the judiciary.’

\textsuperscript{142} \textit{One South Africa Movement} (note 111 above) at 86–87.

\textsuperscript{143} Ibid at para 88.
occupation; and the right to property. Moreover, the measures that the state adopts must also not hinder its ability to meet its constitutional obligations progressively to provide access to housing, social-welfare, health care and education. The health of the economy and fiscus are central to its ability to do so.\textsuperscript{144}

Despite the value of the ‘conflicting’ phase of the case law and the importance of engaging with section 36 of the Constitution, the complementary cases represent a robust approach to human rights within the context of a pandemic. Framing the goals of public health as mutually reinforcing for the promotion of certain rights has enabled the courts to comprehensively weigh and balance competing interests as required by section 36. It is interesting to note that the first non-interventionist case was the \textit{Khosa} case where, undoubtedly, the public health objectives were not compromised but rather enhanced by the protection of individual liberties and rights. The \textit{Equal Education} case also contained a richness from its holistic reading of rights and broader public health imperatives that allowed the court to make an order that not only upheld other rights but was ultimately beneficial to the health of children – a health and human rights issue that was not erased but rather made all the more important by the pandemic. Importantly, these complementary cases were also most responsive to historical fault lines of inequality based on, among others, race and gender and realities of poverty that vulnerable and marginalised groups contend with, and which were exacerbated by the pandemic.

The COVID-19 case law and the shortcomings of its efforts to protect constitutional rights during a public health crisis has exposed a broader issue within the response, viz, lack of guidance from the Constitutional Court. The inconsistency in the approach of the judiciary was, in part, driven by the lack of guidance from the Constitutional Court which, on several occasions declined to entertain matters central to the question of how constitutional rights should be handled in a state of disaster. This has led to, among others, conflicting decisions from high courts that have yet to be resolved and a lack of clarity about the jurisprudential approach to be taken in times of public health crises. However, the inconsistency we observed in the case law is also indicative of broader shortcomings in all branches of the state. The non-recognition of human rights and lack of observance of both constitutional rights and the Siracusa principles prompts, in the first place, challenges to the regulations and government action. For example, the high court’s ability to interfere with the regulations in the \textit{Van Heerden} case was, to some extent, due to the formulation of the regulations which made no allowance for exceptions. There is also a deeper and underlying concern with the executive’s use of the Disaster Management Act – interpreted to give the executive extremely broad and wide-ranging powers with little or no oversight by the legislature. The judiciary was often at the forefront of addressing tensions between constitutional rights and public health due to the executive’s disregard for the fact that constitutional rights had \textit{not} been suspended during the state of disaster and correspondingly, parliament’s abdication of its oversight responsibilities. A great deal of resources and time were spent challenging the validity, scope and execution of the national state of disaster, and particularly the lockdown.

\textbf{VI CONCLUSION}

Though the non-recognition cases prioritised public health, the complementary cases demonstrate how rights and public health objectives are interlinked and may be framed as

\textsuperscript{144} Ibid at para 91.
mutually supportive. The complementary approach described by Mann et al aligns with our modern understanding of human rights and our Constitution’s conceptualisation of the socio-economic rights, such as the right to health as well as the interdependent and interrelated nature of constitutional rights. By adopting a complementary lens, courts are better placed to adequately weight public health benefits against potentially conflicting rights and the conceptualisation of health and public health as a component of human rights enriches the balancing exercise undertaken when rights are implicated by a public health response. Most importantly, in times of crisis, framing public health as a human rights imperative enables courts to intervene more strongly in public health emergencies and substantively assess the human rights implications of a state’s response.
Constitutional Court Review
Instructions for Authors

The Constitutional Court Review (CCR) is an international journal of record that tracks the work of the Constitutional Court of South Africa. The long essays, replies, articles and case comments use recent decisions to navigate more general currents in the Court’s jurisprudence. The Journal follows a strict double-blind, peer-reviewed editorial process. The CCR invites contributions from outstanding scholars but also considers unsolicited submissions that fit with the aims and scope of the Journal. It is published annually.

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I. EDITORIAL POLICY

Submission of a manuscript implies that the material has not previously been published, nor is being considered for publication elsewhere. Contributions are accepted on the understanding that the authors have the authority for publication. Contributions must conform to the principles outlined in Ethical considerations in research publication <https://www.nisc.co.za/products/97/journals/constitutional-court-review>. The Journal has a policy of anonymous (double-blind) peer review. Authors’ names are withheld from referees; authors and the editors must ensure that any identifying material is removed from the manuscript. The Editor reserves the right to revise the final draft of the manuscript to conform to editorial (house style) requirements.

Articles accepted for publication will attract an article processing charge (APC) of ZAR 12 000 (excl. VAT). The Journal has an APC waiver policy for authors whose funding arrangements are inadequate to cover the amount of the APC. The APC waiver-policy and procedures for applying for a waiver can be found at <https://www.nisc.co.za/openaccess>. Applications, which are considered on a case-by-case basis, must be made prior to submission via email to <journals@nisc.co.za>. Note that the Journal has an annual quota for APC waivers. It may not be possible to accommodate all APC waiver requests made during the year.

I. CONTRIBUTION FORMAT & LENGTH

As a general rule, the Constitutional Court Review accepts submissions in the following formats:

- **Lead Essays and Responses:** Essay length will vary depending upon the nature of the contribution. We have had lead essays that range from 65 to 80 pages. Thus, these lead essays – commissioned as such – may run over 30 000 words. Responses to lead essays – commissioned as such – may range from 10 000 to 25 000 words. Replies have been, on occasion, longer than the Lead Essay.

- **Articles:** Articles, commissioned as such or received by open call, should fall within a range of 12 000 to 25 000 words. As with all pieces, exceptions can and will be made.

- **Comments:** The distinction between articles and case comments can be somewhat artificial. Case comments will often have a range and depth that outstrip articles (at which point we often call them articles.) However, for pieces that narrow their focus to a single case and its more limited ramifications, we would expect between 6 000 to 10 000 words.
Where exceptions are required, they will be negotiated between editors and authors. Consult recent copies of the journal at <https://www.nisc.co.za/products/97/journals/constitutional-court-review> for examples of each type of contribution.

III. MANUSCRIPT PRESENTATION & SUBMISSION

Manuscripts should be emailed to the Editor-in-Chief, Professor Stu Woolman at: <stuart.woolman@wits.ac.za>. Manuscripts should be in English and prepared in MS-Word format. Submissions should include a title page (as a separate file) with the following information:

- **Title.** The title should be short and descriptive, bearing in mind the need for discoverability using standard search terms.
- **Abstract** of 200 to 300 words
- **Keywords.** These four to six terms can be single words or phrases of more than one word. However, phrases tend to be less helpful as search terms in isolating groups of similar articles because the phrases are often *unique* (to that particular piece). The keywords facilitate discovery of the article and so should be chosen with care. Keywords should not repeat words/terms that are already in the title, since the title will already be parsed by search engines
- **Author details.** Full name, title, institutional (or other) affiliation(s), and email address
- **Acknowledgements.** (e.g. ‘I thank X, Y, Z, the editors and anonymous reviewers for their helpful comments on this piece.’)

The body of the article should be in a separate document. Please remove names and other identifiers to facilitate anonymous peer review. Prepare the manuscript according to the format and style conventions below. Manuscripts that do not conform to the Journal’s style and format conventions may be returned to the author for remedy without further evaluation. In general, authors should strive to present their arguments clearly and should avoid repetition and padding. We ask authors to be ruthless with their own prose.

IV. MAIN TEXT

The CCR house font style is Garamond size 11. Quotations of more than five lines/two sentences must be indented and in a smaller font size 10.

- Use UK English such as ‘s’ rather than ‘z’ spellings, e.g. recognise, nationalise.
- Numbers from one to ten are spelt out in words unless they refer to section or schedule numbers in statutes.
- Dates: 1 January 1999; the 1980s and 1990s (not 1990’s).
- Use per cent not % (e.g. eight per cent or 38 per cent).

1 Subheading levels

- **Level one heading:** bold, all capitalised, numbered I, II, III etc.
- **Level two heading:** bold, sentence case, numbered A, B, C etc.
- **Level three heading:** italic, sentence case, numbered 1, 2, 3 etc.
- **Level four heading:** plain, sentence case, numbered aa, bb, cc etc.
- **Level five heading:** italic, sentence case, numbered i, ii, iii etc.
For example:

I INTRODUCTION

A Understanding what the Constitution requires

1 The meaning of the right to vote
   aa Democracy and the right to vote
     i South African cases

2. Case law

Depending on author preference, it is possible to either include the full case name (excluding the citation) in the main body of the text the first time it is referred to, for example Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg & Others (‘Olivia Road’), or to provide the full case name and citation in a footnote and refer only to the abbreviated case name in the main body of the text, for example Olivia Road.

3. Statutes

The full name of the statute including its number and year needs to appear in the main text. In other words, do not place the number and year of an Act in a footnote. This can be followed by an abbreviation in brackets, e.g. Promotion of Administrative Justice Act 3 of 2000 (PAJA), subsequent references are to ‘PAJA’.

Use ‘s’ or ‘ss’ (plural) instead of ‘section(s)’ unless it is the beginning of a sentence.

4. Quotations

Quotations should be clearly indicated by single quotation marks, with double quotation marks used for quotes within quotes. Where a quotation is two sentences long or runs to more than five lines, it must be in a smaller font, indented as a separate paragraph, with a line space above and below, and with no quotation marks or leader dots. Pay attention to accuracy when quoting directly.

5. Abbreviations

Abbreviations may be used for case names, eg (Olivia Road). However, the case name must be set out in full with full double-barreled citation the first time it is referred to, followed by an italicised abbreviation in brackets. If a case is abbreviated in a footnote (rather than in the main text), it is preferable for it to appear at the end of the sentence. The abbreviation can then be used throughout the main text and for cross referencing purposes in footnotes, eg the Court in Olivia Road held or the Olivia Road Court held.

• Abbreviated references to legislation can also be used in the body of the text (e.g. PAJA, PAIA or the Administrative Justice Act, the Information Act).
• Council for Conciliation, Mediation and Arbitration (CCMA) can occur within the text itself.
• The Constitutional Court is always abbreviated as ‘the Court’; all other courts are referred to as ‘the court’.
6. Avoid awkward or archaic turns of phrase

- Avoid polite legal clichés and wasted words such as ‘the learned judge’, ‘the learned author’, ‘with respect’, ‘with the greatest respect’, ‘it is submitted’ or ‘the authors humbly submit’.
- Judges can be referred to as Judge or Justice, preferably should be referred to as ‘Smith J’ or ‘Smith JA’ or ‘Smith LJ’. Avoid formulations such as ‘his Lordship’ or ‘the honourable’.
- Please eschew archaic uses of the first person. So, ‘it is my view’ or ‘I argue’ is preferable to ‘it is the view of the present author’, ‘it is this writer’s argument’. We know it’s your well-grounded belief.
- Write in the active voice. In short, ‘is’ can almost always be eliminated by a dynamic verb often found in adjectival form in the same sentence.

V. FOOTNOTES

The Journal makes use of footnotes, not parenthetical references. All articles, notes, comments, book reviews and contributions to the current developments section must make use of footnotes. Footnotes are in Garamond size 9.

1. Case law – South African cases

We expect double-barrelled citations for all South African cases. In most instances, this would mean SAFLII’s (ZACC, ZASCA or, if a High Court, something like ZAKZNHC) followed by Juta’s SALRs (e.g. 2008 (3) SA 208 (CC))

- Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg & Others [2008] ZACC 1, 2008 (3) SA 208 (CC) (‘Olivia Road’).

Case names in italic with ‘v’ for versus.

In the absence of an SALR citation, it is acceptable to use a Butterworths citation:


However, triple-barrel citations are fine.

- Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg & Others [2008] ZACC 1, 2008 (3) SA 208 (CC), 2008 (5) BCLR 475 (CC).

- use commas rather than semi-colons between various citations (e.g. [2008] ZACC 1, 2008 (3) SA 208 (CC)).

Cross referencing cases

- Olivia Road (note 8 above) at para 45. (Where the case is not cited in the immediately preceding footnote).
- Use ‘Ibid.’ (Where the case and the paragraph reference (or the page reference in the case of a book or a journal) is the same as that in the immediately preceding footnote).
- Use ‘Ibid at para 45.’ (Where the case cited is identical, but the paragraph is not.)

Use paragraphs rather than page references wherever possible. This should always be possible for South African cases in roughly the last decade. All South African Constitutional Court decisions and most Supreme Court of Appeal, Land Claims Court and High Court decisions follow this practice.
2. Case law – foreign cases

Use US citations rather than S Ct or another citation form. Again, double-barrelled citations are welcome. Try to avoid: *Romer v Evans* 116 S Ct 1620, 1627 (1996). Please look up the US citation; it is always available online. Avoid using abbreviated names of litigants, eg use Regents of the University of California not Regents of the Univ. of Cal.

Examples:


3. Bracketing

We encourage the use of brief parenthetical explanations of case holdings and quotations.

Examples:

- *S v Makwanyane* [1995] ZACC 3, 1995 (3) SA 391 (CC)(Court holds that death penalty constitutes a violation of rights to life and human dignity.)
- *Wisconsin v Yoder* 406 US 205, 123 SCt 456 (1972)(Supreme Court finds that compulsory school attendance for children of Amish religious community impairs right to free exercise of religion under 1st Amendment.)
- If you are quoting from a text, then provide both the page number and use quotation marks where appropriate:
  - E Mureinik ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 *South African Journal of Human Rights* 31 (Mureinik argues that: ‘The drafters designed the Bill of Rights, and the Constitution as a whole, to foster a culture of law based upon justification, and no longer on mere authority and coercion.’)

Capitalise the first word inside a bracket (Court holds …) or (Dworkin contends …) Do not use spaces in between brackets.

- *S v Makwanyane* [1995] ZACC 3, 1995 (3) SA 391 (CC)(Court holds that death penalty constitutes a violation of rights to life and human dignity.)

2. Journal articles

When citing journal articles give author’s initial and name, full title in quotation marks, year in parenthesis, volume number, full (not abbreviated) title of journal (italicised), first page of article, page referred to. Avoid the use of ‘at’ between first page and page referred; use a comma instead, e.g. 315, 325 (not 315 at 325).

The *SAJHR* should be cited as *South African Journal on Human Rights*. The *Columbia LR* should be cited as *Columbia Law Review*.

3. Books

When citing books, give author’s first initial and name, full title (italicised), edition, year, page reference. There is no need to state the place of publication and publisher. Page numbers should not be preceded by ‘p’ or ‘pp’.

Co-authors must be joined by an ampersand (&) rather than ‘and’.


Translations should be indicated thus: K Marx *Das Capital* (1867)(trans J Mander, 1976) 121.

4. Chapters in books

Author’s initial and name, full title in quotation marks, initial and name of editor(s), full title (italicised), year, first page of article, and specific page referred to in the text.


Subsequent references:

• Ibid at 9–12.
• Cohen (note 1 above) at 9–10.

5. Statutes

• Promotion of Administrative Justice Act 3 of 2000 (PAJA)
• Local Government: Municipal Finance Management Act 56 of 2003 (MFMA)
• Childrens Act 38 of 2005

Depending on author preference, it is possible to use the abbreviation for the name of an Act in subsequent references. If referring to a specific section/s, use the abbreviation ‘s’ or ‘ss’ except at the beginning of a sentence.

• PAJA s 6
• MFMA s 3
• Childrens Act s 1

6. The Constitution


The Interim Constitution requires a footnote. ‘The Interim Constitution has been repealed.’ Thereafter, ‘Constitution’ or ‘Final Constitution’ and ‘Interim Constitution’ may be used in the text and notes.

Subsequent references

• Constitution s 181(1)
• IC s 50
7. **Law Reform Commission papers**


8. **Parliamentary debates**

- NCOP Debates col 125 (24 February 1999)

9. **Treaties & international instruments**

Give ILM reference where available, failing which give UNTS reference or full UN Doc or OAU Doc reference.

- General Agreement on Tariffs and Trade, 30 Oct 1947, Protocol Amending the General Agreement to Introduce Part IV on Trade and Development and to Amend Annex I (8 Feb 1965) 572 *UNTS* 320.

For most *well-known multilateral treaties*, there’s no need for a bibliographical reference.

- Universal Declaration of Human Rights (1948)
- International Covenant on Civil and Political Rights (1966)

10. **Newspaper articles and Internet sources**

Newspaper articles and many internet sources can be treated much like other written sources: Author ‘Article Name’ *Newspaper/Internet Source* (Date), available at http://www.xxx. It is not necessary to record the date that the site was last visited.

VI. MORE GENERAL RULES

1. Eliminate ‘See’ from the beginning of all footnotes.

Exceptions:
We allow ‘see’ when they are buried in a footnote.

- For more on the contention that the idea of self-government should be considered to be the core component of a Constitution, even one with a justiciable Bill of Rights, see F Cachalia ‘Separation of Powers, Active Liberty and the Allocation of Public Resources: The E Tolling Case’ (2005) 132 South African Law Journal 285.

We allow ‘See also’ after primary citations.


2. Use ‘&’ rather than ‘and’ in footnotes


3. Titles are in first letter caps, no matter whether they are articles, books, newspaper articles or online documents.


4. On the use of ‘Section’, ‘section’ or ‘s’ with respect to the Constitution.

Write out ‘Section’ (capital S as in ‘Section 25 of the Constitution) to begin a sentence. Lower case ‘section’ is used in other instances (e.g. ‘In FNB, the Constitutional Court provided its first full length analysis of section 25 of the Constitution). However, it is not necessary to keep
repeating ‘section 25 of the Constitution’ throughout the text. The idea is to make it clear that we are talking about the Constitution, as opposed to another form of law. However, to repeat ‘section 25 of the Constitution’ each time would be truly unwieldy, cumbersome and just plain ol’ bad writing. In footnotes, the preferred form is Constitution s 25.

5. Please don’t forget to use ‘at’.
   • AB CC (note 4 above) at para 197.

6. Some footnotes are complicated.

We still try to make each component part as simple as style allows. Some citations warrant a brief description in a parenthetical; some require a number of sentences; some require only a prior reference such as “(note x above)” and a page number.

Example:
55 Gerrand (note 52 above) at 142 (Observes that ‘in terms of ancestral beliefs, family systems have rigid boundaries based on blood ties.’) Gerrand’s view is echoed by the KwaZulu-Natal Commissioner for Traditional Leadership Disputes and Crimes, Professor Jabulani Mphalala, who has stated that ‘it would take years before there was a flexibility of mind about adoption among most South Africans. […] Ancestral spirits look after their relatives and no-one else. In our religion, in our culture, this thing is ring-fenced.’ C Dardagan ‘Red-Tape Slowing down Adoptions’ IOL (21 February 2014), available at https://www.iol.co.za/lifestyle/family/parenting/red-tape-slowing-down-adoptions-1650829. See also Mokomane & Rochat (2010)(note 52 above) at ix; Rochat, Mokomane & Mitchell (note 52 above) at 124 (A study participants remarks: ‘When you are born, there are certain things that ancestors require of us. They know who our child is and where he is. Just imagine if you adopt a Biyela child and join the child to the Mthembus. There will be war between the Biyela and Mthembu ancestors, both ancestors will fight over who owns the child.’)