

**THE ROLE OF THE JUDICIARY IN A MODERN
STATE WITH A TRADITION OF LEGISLATIVE
SUPREMACY**

by

MASHAU SILAS RAMAITE

submitted in accordance with the requirements
for the degree of

DOCTOR OF LAWS

at the

UNIVERSITY OF SOUTH AFRICA

PROMOTER: PROF G CARPENTER

15 JUNE 1996

ACKNOWLEDGEMENTS

I am profoundly grateful to Professor Gretchen Carpenter, my promoter, whose detailed criticism of earlier drafts, valuable suggestions and wise counsel have proved most invaluable to me. The views expressed and any errors are attributable to me.

I am greatly indebted to my colleagues, Adv. Bruce Morrison SC and Adv. Bethuel Manyuha, whose encouragement and co-operation have sustained me throughout the preparation of this work.

I am particularly grateful to my parents, Samuel and Florence, who have taught me to persevere and prepared me to face challenges with faith and humility.

Mostly, I thank my wife Rosemary, who has been a constant source of love, support and strength, our children Nkhesani, Hlamalani, Tshinondiwa and Mukona and our grandchild Rhulani, who have always maintained their love despite the many hours they spent without me during the preparation of this work.

Finally, I thank God for having made it possible for me to complete this work.

SUMMARY

The legislative supremacy of Parliament, a dominant characteristic of the Westminster system of government, has for a long time been the basic norm of South African constitutional law. In line with the Westminster prototype, the South African judiciary did not have the power to review the substantive validity of legislation. The creation of a new order, based on a supreme Constitution which entrenches fundamental rights and gives the courts the power to review not only the procedural validity but also the substantive validity of legislation, has brought about a significant change.

This thesis examines the role of the South African judiciary during the transition from a system of legislative supremacy to one of constitutional supremacy and judicial review. The thesis is based on the interim Constitution of 1993.

The entrenchment of fundamental human rights in the Constitution implies a greater role for the judiciary. The judiciary has to apply and interpret the human rights provisions vigorously and fearlessly. The human rights provisions have to be applied and interpreted with a keen awareness that a system of constitutional supremacy differs materially from one of legislative supremacy. In a system of legislative supremacy the intention of the legislature is paramount; in a system of constitutional supremacy the Constitution is supreme and overrides all laws, including Acts of Parliament, which are in conflict with it

The doctrine of legislative supremacy has in the past led to a literalist and mechanical application of law; this has had a negative impact on the constitutional role of the South African judiciary. The provisions of a Constitution, especially its human rights provisions, are framed in wide and open ended terms; these need to be elaborated before they can be applied; the nature of these provisions, their purpose and the larger objects of the

Constitution are important. The interpretation of the provisions of a supreme Constitution is incompatible with a literalistic and mechanical approach. A purposive and liberal or generous approach is called for. A framework and approach to the interpretation and application of South Africa's Bill of Rights are suggested in the thesis.

Key Words

Constitution; Legislative supremacy; Legal positivism; Constitutional supremacy; Bill of Rights; Judiciary; Judicial review; Constitutional interpretation; Purposive approach; Purposive and generous approach.

TABLE OF CONTENTS

ACKNOWLEDGEMENTS.	i
SUMMARY.	ii
KEY WORDS.	iii
CHAPTER 1	1
INTRODUCTION	1
1. General	1
2. Purpose and Approach.	10
3. Theoretical Framework.	14
CHAPTER 2	23
CONCEPTUAL PERSPECTIVE.	23
1. The Concept of the State.	23
1.1. The Development of the State.	24
1.2. The Modern State.	26
2. The Doctrine of Parliamentary Sovereignty.	28
2.1. The Origin of the Doctrine of Parliamentary Sovereignty.	30
2.2. The Emergence and Development of the Modern Doctrine of Parliamentary Sovereignty.	32
2.3. The Development of Parliamentary	

	Sovereignty in England.	36
2.3.1.	The Concept of Parliamentary or Legislative Supremacy.	39
3.	The Judiciary.	42
4.	Judicial Review of Legislation.	44
CHAPTER 3	49
	HISTORICAL SURVEY OF SOUTH AFRICAN CONSTITUTIONAL DEVELOPMENT.	49
1.	Constitutional Development before 1910.	50
1.1.	The Legislative Authority before Union.	53
1.2.	The Relationship between the Legislature and the Judiciary before Union.	57
2.	Constitutional Development from 1910 to 1961.	64
2.1.	The Status of the Union Parliament.	65
2.2.	The Entrenched Provisions.	66
3.	The 1961 Constitution.	68
4.	The Westminster Tradition in the South African Constitutional System.	69
4.1.	The Nature of the Westminster System.	69
4.2.	The Judiciary and the Protection of Human Rights under the Westminster System.	73
5.	The 1983 Constitution.	79
5.1.	Legislative Authority under the 1983 Constitution.	82
5.2.	Judicial Review of Legislation under the 1983 Constitution.	85
CHAPTER 4	88
	LEGISLATIVE SUPREMACY AND THE JUDICIARY	

	IN SOUTH AFRICA PRIOR TO 1994.	88
1.	Legislative Supremacy and Judicial Review of Legislation.	89
1.1.	The Nature and Limits of Legislative Supremacy.	89
1.2.	The 'Continuing' View of Legislative Supremacy.	91
1.3.	The 'Self-embracing' View of Legislative Supremacy.	94
2.	Legislative Supremacy and Judicial Review of Legislation in South Africa before 1994.	97
2.1.	The Entrenched Sections Trilogy.	102
2.1.1.	Harris v Minister of the Interior	105
2.1.2.	Minister of the Interior v Harris	110
2.1.3.	Collins v Minister of the Interior	116
2.1.3.1.	The Majority Opinion.	118
2.1.3.2.	The Judgment of Schreiner JA.	122
2.1.4.	An Evaluation of the Entrenched Sections Trilogy.	128
2.2.	The Section 114 Decisions.	130
3.	Legislative Supremacy, Legal Positivism and Judicial Control of Legislation.	136
4.	Judicial Review of Executive Acts.	148
	CHAPTER 5	154
	THE JUDICIARY AND THE SEPARATION OF POWERS.	154
1.	The Principle of the Separation of Powers.	154
1.1.	The Early Foundations of the Principle.	155

1.2.	The Modern Concept of the Separation of Powers.	159
1.3.	The Separation of the Judicial Branch.	162
1.4.	The Separation of Powers in Systems of Legislative Supremacy and Constitutional Supremacy.	164
1.5.	The Importance of the Separation of the Judicial Branch.	169
2.	Judicial Independence.	174
2.1.	The Development of the Concept of Judicial Independence.	175
2.2.	The Meaning of Judicial Independence.	182
2.3.	The Attributes of Judicial Independence.	185
2.3.1.	The Independence of Individual Judges.	185
2.3.1.1.	Substantive or Functional Independence.	186
2.3.1.2.	Personal Independence.	188
2.3.2.	Collective Independence.	190
2.4.	Judicial Appointments and the Independence of the Judiciary.	195
3.	The Separation of Powers and Judicial Independence under the 1993 Constitution.	202
4.	Constitutional Supremacy and the Independence of the Judiciary.	208
 CHAPTER 6		210
 A COMPARATIVE SURVEY OF THE ROLE OF THE JUDICIARY IN CANADA.		210
1.	A Brief Constitutional History of Canada	210
2.	Legislative Supremacy and the Judiciary before 1982.	215

3.	Judicial Review under the Constitution Act of 1982.	220
3.1.	Legislative Supremacy and the 1982 Constitution.	222
3.2.	Judicial Determination of Constitutionality in Canada.	226
3.2.1.	Procedural Requirements for the Determination of Constitutionality.	229
3.2.2.	Statutory Denial of a Right of Action (Ouster Clauses).	231
3.2.3.	Legislative Pre-determination of Judicial Decisions.	236
3.3.	Judicial Interpretation of the Canadian Charter of Rights and Freedoms.	237
3.4.	Interpreting Equality/Inequality Issues.	255
3.5.	Judicial Activism and Judicial Self-Restraint in Canada.	265
CHAPTER 7		274
THE BOPHUTHATSWANAN EXPERIMENT.		274
1.	The Constitution of Bophuthatswana.	274
2.	The Judiciary and the Declaration of Fundamental Rights.	276
2.1.	The Formative Years: <i>S v Marwane</i> and <i>Smith v Attorney-General, Bophuthatswana</i>	276
2.1.1.	<i>S v Marwane</i>	276
2.1.2.	<i>Smith v Attorney-General, Bophuthatswana</i>	280
2.2.	The Later Decisions.	286

2.2.1.	S v Chabalala	287
2.2.2.	Segale v Government of Bophuthatswana and Government of Bophuthatswana v Segale.	294
2.2.3.	The General Division Follows Suit: Monnakale and Others v Government of the Republic of Bophuthatswana and Others and Lewis v Minister of Internal Affairs	300
2.2.4.	Mfolo and Others v Minister of Education, Bophuthatswana and Nyamakazi v President of Bophuthatswana	307
2.2.5.	The Spectre Returns: Mokwele v Government, Republic of Bophuthatswana and Others	319
 CHAPTER 8		 327
 THE NAMIBIAN EXPERIENCE.		 327
1.	The Namibian Constitution.	330
2.	Judicial Interpretation and Application of the Constitution.	333
2.1.	Interpretation and Application of the Transitional Constitution.	334
2.1.1.	The Formative Decisions.	336
2.1.2.	The Later Decisions.	339
2.1.2.1.	The Eins Case.	341

2.1.2.2. The Chikane Case.	342
2.1.2.3. The Namibian National Students' Organisation (NANSO) Case.	349
2.1.2.4. The Advisory Opinion.	357
2.2. The Interpretation and Application of the Constitution of Namibia.	361
2.2.1. The Acheson Case.	362
2.2.2. The Minnies Case.	363
2.2.3. Ex Parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State.	366
2.2.4. The Mwandingi Cases.	373
2.2.5. Government of the Republic of Namibia and Another v Cultura 2000 and Another.	378
2.2.6. Djama v Government of the Republic of Namibia and Others.	384
2.2.7. S v Heita: The Court's view of Judicial Independence.	387
 CHAPTER 9	 391
 THE SOUTH AFRICAN CONSTITUTION OF 1993.	 391
1. Introduction.	391
2. The 1993 Constitution.	394
2.1. The Nature of the Constitution.	397
2.2. The Entrenchment of Fundamental Rights.	401

2.3.	Justiciability.	413
3.	Constitutionalism and the New Constitution. . .	417
4.	The Jurisdiction of the Courts under the 1993 Constitution	420
4.1.	Abstract Review	420
4.2.	Direct Review.	422
 CHAPTER 10		 434

**THE ROLE OF THE SOUTH AFRICAN JUDICIARY UNDER
THE NEW CONSTITUTION. 434**

1.	Judicial Review and the "Higher Law" Nature of the New Constitution.	434
2.	Interpreting the New Constitution.	437
2.1.	The Intention of the Framers.	438
2.2.	Constitutional Interpretation and Fundamental Values.	444
2.2.1.	Personal Judicial Values.	446
2.2.2.	Constitutionalism and Libertarian Values. . . .	447
2.2.3.	International Law and Foreign Law as Sources of Constitutional Values.	450
2.2.4.	The Common Law as a Source of Fundamental Values.	458
2.3.	Purpose, Rationality and Teleological Reasoning in the Interpretation of the Constitution.	461
2.3.1.	Purpose and Rationality.	462
2.3.2.	The Teleological Approach.	467
3.	The Scope of Judicial Review of Constitutionality.	476

3.1.	Judicial Self-Restraint.	477
3.1.1.	Institutional or Jurisdictional Limits.	481
3.1.2.	Political Limits.	486
3.1.2.1.	The 'Political Question' Doctrine.	488
3.1.2.2.	The Presumption of Constitutionality, Non- imputation of Illegal Motives and Legislative Wisdom	492
3.1.3.	Judicial Self-restraint and a Policy of Avoidance.	496
3.2.	Judicial Activism, Creativity and the Proper Role of the Judiciary.	498
4.	Judicial Approaches to the Interpretation of the New Constitution.	509
CHAPTER 11		558
CONCLUSION.		558
1.	Crossing the Bridge: From Legislative Supremacy to Constitutional Supremacy.	560
2.	The Lessons from Comparative Constitutional Law.	567
3.	Balancing Conflicting Interests.	580
3.1.	Constitutional Adjudication and Balancing Conflicting Interests.	581
3.2.	Balancing Individual Interests and State Interests in a State of Emergency.	586
4.	Democracy and Judicial Responsibility.	591
4.1.	Democracy and the Judiciary.	591
4.2.	Judicial Responsibility.	593
5.	Interpreting and Applying the Bill of Fundamental Rights: A Suggested Framework	

	and Approach.	597
5.1.	Proposed Framework.	598
5.2.	Proposed Approach.	605

CHAPTER 1

INTRODUCTION

1. General

"The world must construe according to its wits. This court must construe according to the law."¹

These words, spoken by Sir Thomas More during his trial, epitomise the nature of the judicial function. Sir Thomas More was reminding his triers that the process of judicial construction must be based on the law.² This reminder, however, also begs the question as to what law the court must regard as paramount in carrying out its task of judicial construction: Is it the law handed down to society by the ruler,³ or is there some other superior law according to which the court must construe?

To refuse to enforce the law of the ruler is to question its validity; it is to question the ruler's exercise of his power. It is to subject his law to some higher norm with which it must conform in order to be valid law.

Questions surrounding the exercise of state authority and the control of the exercise of such authority are not of recent origin. They are closely associated with the idea of constitutionalism or limited government and have featured

¹Robert Bolt *A Man for All Seasons* (1962) 152.

²Sir Thomas More went on to remind the court that "the law is a causeway upon which so long as he keeps to it a citizen may walk safely".

³The ruler in this sense may either be a single person, such as a monarch, or a body of persons, such as Parliament.

prominently in the development of Anglo-American constitutional law.

The development of the state from an ancient entity into a modern state⁴ with increased legislative and executive functions accentuated the need to limit the exercise of state authority and to afford the individual a life of freedom within a state governed by law.⁵ The principle of constitutionalism or limited government came to be regarded as a means whereby the exercise of government authority could be restricted by law, as opposed to being arbitrary.⁶

In England, John Locke was the first theorist to advocate the limitation of the exercise of government authority when he reacted against royal absolutism.⁷ According to Locke the state came into existence when man in his natural condition of freedom, entered into a social contract of society. In entering into this contract man did not transfer his rights to the state; the state was entitled to demand obedience only as long as it respected man's natural rights and did not abuse its power.⁸

Central to Locke's idea of limited state power was the distribution of state

⁴See in this regard Chapt. 2, **infra**.

⁵Klaus Stern "The Genesis and evolution of European-American constitutionalism : some comments on the fundamental aspects" 1985 **CILSA** 187 at 188.

⁶See C.H McIlwain **Constitutionalism and the Changing World** (1939) at 266 **et seq.**

⁷J. Locke **Two Treatises of Government**, Peter Laslett **ed** (1967).

⁸**Op cit.** at 324.

functions. As Locke put it,

"... whoever has the legislative or supreme power of any commonwealth, is bound to govern by established standing Laws, promulgated and known to the people and not by Extemporary Decrees; by Indifferent and upright Judges, who are to decide Controversies by those Laws and to employ the force of the Community at home only in the Execution of such Laws, or abroad to prevent or redress Foreign Injuries, and to secure the Community from Inroads and Invasions".⁹

Although Locke referred to the function of judging, he did not regard this function as a separate power within the state authority; this function was to him rather " a general attribution of the state."¹⁰ Moreover, Locke's thesis of the distribution of state functions did not amount to a theory of the separation of powers as it is understood to mean today, namely as one of the pillars of modern constitutionalism.¹¹ He instead regarded the legislative power as supreme over the executive and judicial functions, both of which, according to him, had to be utilised in the execution of the laws adopted by the legislative authority.¹²

The idea that the legislature was supreme was taken up and propagated by English constitutional law writers, notably Blackstone¹³ and Dicey;¹⁴ these

⁹**Ibid.** at 371.

¹⁰**Ibid.** at 118.

¹¹**Ibid.** at 117-118.

¹²**Ibid.** at 118.

¹³Sir William Blackstone **Commentaries on the Laws of England** (1765).

¹⁴A.V Dicey **An Introduction to the Study of the Law of the**

writers were influenced by Austin's theory of unlimited sovereignty and formulated the concept of parliamentary sovereignty.¹⁵ Dicey stated, emphatically, that the British Parliament can make or unmake any law whatsoever,¹⁶ including the laws which constitute the Constitution itself.¹⁷

In England the sovereignty of Parliament came to be associated with the incompetence of the courts to override or set aside laws made by Parliament;¹⁸ it was reasoned that were the courts to have the competence to set aside Acts of Parliament, Parliament would no longer be sovereign. Courts of law are bound to apply Acts of a sovereign Parliament, irrespective of whether they affect the rights of individuals negatively or are considered by the courts to be constitutionally indefensible or unjust.¹⁹

Circumstances prevailing in the Americas were much different from those in England. The colonists had resisted British authority and displayed a distrust of unrestrained government. Great documents like Magna Carta, though not

Constitution 10th ed (1975).

¹⁵See Chapt. 4 for a discussion of the development of the doctrine of parliamentary sovereignty.

¹⁶Dicey **op cit.** at 39. See also E.C.S Wade, G. Phillips and A.W Bradley **Constitutional and Administrative Law** (1977) at 59.

¹⁷For an analysis of the meaning of "constitution" see K.C Wheare **Modern Constitutions** (1966) Chapt. 1; C.F Strong **Modern Constitutions** (1966) at 11-12.

¹⁸Dicey **op cit.** at 39; Wade, Phillips & Bradley **op cit.** at 59.

¹⁹See T.R.S Allan "Legislative Supremacy and the Rule of Law : Democracy and Constitutionalism" 1985 **CLJ** 111 at 116.

coconstitutionally entrenched, provided the antecedent of a written fundamental law²⁰ through which the exercise of state authority could be limited; French writers such as Rousseau, however, largely influenced American ideas. The United States of America which emerged from the Constitutional Convention of 1787 was based on a written Constitution. The supremacy of the Constitution of the United States was expressly provided for in article VI, para. 2, of the Constitution of the United States.²¹ Article VI(2) provides that the Constitution of the United States is

"the supreme law of the land; and judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding".

There had, however, been earlier instances where the courts of some states which later became part of the United States of America had declared certain state laws to be invalid on the basis that they were in conflict with the state Constitution.²² However, neither the Constitution of the United States nor the Judiciary Act of 1789, which created the national judiciary, specifically gave the judiciary the power to invalidate legislation. The power to review legislation and to invalidate legislation was later developed by the United States Supreme Court.

Antecedents concerning judicial control of acts of Congress existed even before the Supreme Court asserted its power of judicial review. In

²⁰Coke had regarded Magna Carta as the "fountain of all fundamental laws of the realm". It was according to him fundamental "... not for the length or largeness of it ... but ... in respect of the great weightiness and weighty greatness of the matter contained in it".

²¹Article VI is known as the supremacy clause.

²²E.g. **Holmes v Walton** (New Jersey, 1780) ; **Trevett v Wheeden** (Rhode Island, 1786).

Hayburn's case²³ the Pennsylvanian circuit court had refused to enforce a statute of Congress which it deemed to be contrary to the Constitution. In **Van Horne's Lessee v Dorrance**²⁴ Justice Paterson was more specific when he held, with reference to the nature of the British Constitution²⁵, that "[w]hatever may be the case in other countries, ... there can be no doubt that every act of the Legislature repugnant to the Constitution, is absolutely void."²⁶ A similar view was expressed in **Cooper v Telfair**²⁷.

It was, however, not until the celebrated judgment of Chief Justice Marshall in **Marbury v Madison**²⁸ that the principles of the supremacy of the Constitution and the courts' power to review legislation on the basis thereof became firmly established in the United States of America.

Marbury v Madison²⁹ was concerned with the question whether the

²³2 **Dallas** 409 (1792).

²⁴2 **Dallas** 304 (1795).

²⁵Justice Paterson referred specifically to the supreme power of Parliament, the incompetence of the courts to question or inquire into the validity of Acts of Parliament and the fact that the British Constitution was largely unwritten and did not enjoy any supremacy above other laws.

²⁶At 308.

²⁷2 **Dallas** 14 (1800) at 19.

²⁸1 **Cranch** 137 (1803).

²⁹**Supra**. For a detailed analysis of **Marbury v Madison** see Harold Burton "The Cornerstone of Constitutional Law : **Marbury v Madison**" 1950 **Am. Bar Ass. J** 805.

Supreme Court could, in accordance with the Constitution, exercise the power given to it by the Judiciary Act, 1789 to issue writs of **mandamus** to public officials.³⁰ Chief Justice Marshall held that the issue of the writs would not be in accordance with the Constitution. He reasoned that, by incorporating the writ into the Judiciary Act, Congress had through its legislation increased the original jurisdiction of the Supreme Court, something which was not sanctioned by the Constitution and therefore contrary to it.³¹ In his view the Constitution was supreme and any Act of Congress which was contrary to it was void.

Chief Justice Marshall found that the principle of the supremacy of the Constitution was based on the "original right" of the people to determine and to establish the fundamental principles according to which they wished to be governed. These principles organised the state, prescribed its functions and determined and delimited the sphere of the state's authority in relation to the citizens³². According to Chief Justice Marshall these fundamental principles defined and limited the legislative powers of Congress.

The principle of the supremacy of the Constitution, as opposed to the supremacy of the legislature, provided a sound basis for Chief Justice Marshall to come to the conclusion that, in terms of the Constitution, the court was empowered to review legislation in order to determine whether such

³⁰A writ of **mandamus** has its origin in English law. It is a judicial order directed to a public official, commanding him to perform his official, ministerial, non-discretionary duty.

³¹Article III, the relevant article of the Constitution which dealt with the judicial branch and prescribed the jurisdiction of the Supreme Court did not include the issuing of writs of **mandamus**.

³²See Stern **op cit.** at 187.

legislation was enacted in accordance with the Constitution. Chief Justice Marshall reasoned that since the Constitution is supreme law,

"[i]t is emphatically the province of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret the rule ... A law repugnant to the Constitution is void; ... courts as well as other departments are bound by that instrument".³³

The nature of the Constitution of the United States as alluded to, its supremacy and the power of the judiciary, as a separate and co-equal branch of government, to keep in check the exercise of state authority illustrate the concept of modern constitutionalism, namely the idea of a government which is limited by a supreme Constitution in accordance with which the courts can declare to be invalid laws which are in conflict with its provisions. The inclusion of a justiciable Bill of Rights which sets out the rights and freedoms of citizens³⁴ resulted in the judiciary having to play a fundamental role in the process of constitutionalism; this fundamental role involves the resolution of conflicts between the state authority in the exercise of its power and the citizen in the exercise of his constitutional rights and freedoms, and implies that the courts can strike down any legislation which is in conflict with the provisions of the Bill of Rights.

³³**Marbury v Madison (supra).**

³⁴The Bill of Rights was incorporated into the Constitution by means of amendments brought about in terms of article V of the Constitution. The first 10 amendments which constitute the Bill of Rights were proposed on 25 September 1789 and ratified on 15 December 1791. The 14th amendment, ratified in 1868, introduced the 'due process of law' clause in respect of life, liberty and property. The 15th and 19th amendments, ratified in 1870 and 1920 respectively, extended the franchise to people of all races and colour and to both sexes.

The nature of the British and American constitutional systems illustrates two different positions concerning the role of the judiciary in a modern state. Within the context of the British constitutional system, Parliament is supreme and the courts do not have the power to question, inquire into or override legislation enacted by Parliament. Within the context of the American constitutional system, the Constitution is supreme and the court has the power to review legislative and executive acts and to strike down such acts which are in conflict with the Constitution.

The British constitutional tradition has had a profound impact on the constitutional development of South Africa. The doctrine of legislative supremacy and the absence of judicial review of parliamentary legislation were virtually transplanted into South Africa.³⁵

The role of the judiciary under a system of legislative supremacy and a system of constitutional supremacy respectively is of particular significance for the future constitutional development of South Africa. A study of the role of the judiciary within the context of a tradition of legislative supremacy, in comparison with a transition from such a tradition to a system of constitutional supremacy, becomes particularly relevant in the light of the new constitutional dispensation, which is based on the supremacy of the Constitution and the protection of human rights and freedoms in a justiciable Bill of Rights.

2. Purpose and Approach.

The purpose of this thesis is to examine the role of the South African judiciary, in particular, in the light of a tradition of legislative supremacy and a shift from this tradition to a system of constitutional supremacy and judicial

³⁵See in general C.J.R Dugard **Human Rights and the South African Legal Order** (1978) at 27-28.

review of legislative and executive acts in terms of the Constitution and its guarantee of fundamental rights and freedoms, and to attempt a prognosis of the future role of the judiciary.

Much has already been written about the performance of the judiciary within the context of the South African legal order. Corder³⁶ and Forsyth,³⁷ for example, have written pioneering works on the South African judiciary. Although both works cover a wide range of subjects, they are confined mainly to the role and attitudes of the judiciary during certain specific periods³⁸ and do not deal specifically with the constitutional role of the judiciary and the influence of the doctrine of legislative supremacy in relation to this role.

³⁶ H. Corder **Judges at Work - The Role and Attitudes of the South African Appellate Judiciary** (1984).

³⁷C.F Forsyth **In Danger for their Talents - A Study of the Appellate Division of the Supreme Court of South Africa** (1985).

³⁸Corder's work covers the period 1910 to 1950, Forsyth's the period 1950 to 1980. The importance of these works lies in the fact that the period 1910 to 1950 constitutes the formative era of the role of the South African Appellate Division, while the period 1950 to 1980 covers the performance of the South African Appellate Division after the coming into power of the National Party Government and the manifestations of grand apartheid. With the abolition of appeals to the Privy Council in 1950 the Appellate Division became the final court of appeal. At the close of the 1970s the South African judiciary had acquired a 'pro-executive' label : see Forsyth **op cit.** at 37 and 225-226.

Many of the other available assessments of the judiciary have focused largely on the credibility of the judiciary³⁹ and the associated theme of the moral dilemma facing a judiciary which operates within a system considered to be unjust.⁴⁰

The studies that have focused on the attitudes,⁴¹ policies⁴² and backgrounds⁴³ of the judiciary have shed much light on the influence these factors have had on the process of judicial decision-making. There is still, however, a dearth of studies on the constitutional role of the judiciary in South Africa, particularly with regard to the relationship between the legislature and

³⁹See for example E. Cameron "Nude Monarchy : The Case of South Africa's Judges" 1987 **SAJHR** 338; A. Lubowski "Democracy and the Judiciary" in H. Corder (ed) **Democracy and the Judiciary** (1989) 13.

⁴⁰See for example R. Wacks "Judges and Injustice" 1984 **SALJ** 266; C.J.R Dugard "Should Judges Resign? A Reply to Professor Wacks" 1984 **SALJ** 286; R. Wacks "Judging Judges : A Brief Rejoinder to Professor Dugard" 1984 **SALJ** 295; D. Dyzenhaus "Judges, Equity and Truth" 1985 **SALJ** 295; M.K Robertson "The Participation of Judges in the Present Legal System" in Corder(ed) **op cit.** (1989) 67.

⁴¹See for example Corder and Forsyth's studies of the Appellate Division **op cit** notes 36 and 37.

⁴²See for example C. Hoexter "Judicial Policy in South Africa" 1986 **SALJ** 436.

⁴³See Corder **op cit.**(1984) at 13-17 and Chapt. II; Forsyth **op cit.** at 38-46.

the judiciary in the light of the constitutional protection of individual rights and liberties and factors which affect the role of the judiciary in a politically sensitive atmosphere.⁴⁴

This thesis attempts to explore judicial trends and approaches in constitutional adjudication. In order to stimulate constitutional development, the exploration takes into account the constitutional system within which the judiciary has operated in the past, as well as other factors which affect the constitutional role of the judiciary; with the help of a comparative study of other countries, a prognosis of the role of the South African judiciary in a new constitutional dispensation is then given. Important aspects which form the core of the thesis are the doctrine of legislative supremacy, the doctrine of the separation of powers and the associated principle of judicial independence, the concept of modern constitutionalism, the constitutional guarantee of individual rights and freedoms and judicial review of legislation.

The approach which is followed is both analytical and normative. The study

⁴⁴For an allusion to some of these factors see M.K. Robertson in Corder(ed) **op cit.**(1989) at 72-73. See also E. Mureinik "Dworkin and Apartheid" in H. Corder(ed) **Essays in Law and Social Practice in South Africa** (1988) 181. In another article Mureinik draws attention, for example, to the fact that "in legal reasoning the convictions available for interpretation are not the convictions of private scruple, or communal practice, or sacred text, but the convictions of the legal system itself" and that "such convictions take the shape of decisions; usually legislative and judicial decisions". ("Law and Morality in South Africa" 1988 **SALJ** 457 at 459).

is preceded by a brief analysis of the theoretical concepts which form the core and subject matter of the thesis. A historical survey of the constitutional tradition within which the formative role of the South African judiciary in constitutional adjudication began is then presented, with particular reference to the Westminster tradition, the doctrine of legislative supremacy as a dominant characteristic of South African constitutional development and the role of the judiciary in relation to this. This tradition is contrasted with the feature of constitutional entrenchment as a means of making provision for constitutional guarantees, and the role of the judiciary in this context.

A comparative survey of the role of the judiciary in countries which have a tradition of legislative supremacy but have moved away from this tradition to a system of constitutional supremacy and judicial review of legislation is also undertaken. The countries which are surveyed are Canada, the former Bophuthatswana (now part of South Africa once again) and Namibia. These countries were chosen because, like South Africa, they share a common tradition of legislative supremacy but moved to a system of constitutional supremacy, the entrenchment of fundamental human rights and judicial review.

The comparative survey is aimed at affording a realistic assessment of the opportunities available to, and the difficulties which may face, the South African judiciary as it makes a transition from a system of legislative supremacy to a new constitutional dispensation which has as its main features the supremacy of the Constitution, the entrenchment of fundamental human rights and judicial review. The solutions to problems encountered by the judiciary in those countries that have already made a transition from a system of legislative supremacy to one of constitutional supremacy, the entrenchment of fundamental human rights and substantive judicial review provide a starting point for our judiciary in the resolution of the problems that we may encounter.

3. Theoretical Framework.

The essence of the judicial function is the adjudication of concrete legal disputes in accordance with the rules of an existing legal system. The process of judicial adjudication involves an identification of the rule or rules applicable in a given case and the application of the rule or rules so identified to the case. These rules are existing, expressed or primary normative principles.⁴⁵ The difficult task which faces the judiciary is to determine which rule is applicable in a given case.

According to Kelsen's hierarchy of rules a legal system is premised upon an ultimate rule, the **Grundnorm**, on which all other rules are based.⁴⁶ It is essentially the **Grundnorm** which prescribes the constitutional role of the judiciary within a legal system. Where the supremacy of the legislature

⁴⁵H.L.A Hart has constructed a system of rules which consists of what he terms "primary rules" and "secondary rules". Primary rules are those rules which are actually applied to the facts of a specific case in order to arrive at a decision; secondary rules are those rules which prescribe how a judge should act in deciding which primary rule he will apply to the case at hand : H.L.A Hart **The Concept of Law** (1961) at 77-96.

⁴⁶See W.J Hosten, A.B Edwards et al. **Introduction to South African Law and Legal Theory** (1995) at 153-161. For a critical analysis of Kelsen's theory of law see R.W.M Dias **Jurisprudence** (1970), Chapt. 15. Although Kelsen propounded his 'pure theory of law' along positivistic lines, it provides a useful description of a legal system : see Hosten, Edwards et al. **op cit.** at 91.

constitutes the **Grundnorm**, the courts are constrained to apply the enactments of the legislature without questioning their validity; where the supremacy of the Constitution is the **Grundnorm**, the courts have to give the provisions of the Constitution precedence and can on that basis declare any law or act which is inconsistent with such provisions to be invalid.⁴⁷

The fact that the **Grundnorm** prescribes the constitutional role of the judiciary does not, however, tell much about the actual role of the judiciary in constitutional adjudication. This role is better understood in the light of the theory of constitutional interpretation.

Past South African literature on constitutional adjudication has largely not exhibited any specific theory of constitutional interpretation.⁴⁸ There has been a tendency to regard a process such as constitutional interpretation as being self-evidently embodied in existing constitutional forms and institutions. This may be explained in terms of the operation of the doctrine of legislative supremacy and the inability of the courts to play a significant role in the substantive review of legislation. The fact that previous Constitutions did not enjoy supremacy over ordinary legislation resulted in their interpretation being subject to the ordinary rules of interpretation.⁴⁹ Approaches to the interpretation of the Constitution have therefore tended to focus on the literal

⁴⁷This aspect is discussed in detail in Chapt. 10, *infra*.

⁴⁸See M. Wiechers "The Fundamental Laws Behind Our Constitution" in E. Kahn (ed) **Fiat Justitia - Essays in Memory of Oliver Deneys Schreiner** (1983) at 383 and 384.

⁴⁹See C.J.R Dugard "Judicial Power and a Constitutional Court" in L. Boule & L. Baxter (eds) **Natal and Kwazulu : Constitutional and Political Options** (1981) at 196.

meaning of words in a statute,⁵⁰ with little or no consideration of the values of the society within which the Constitution and statutes operate.⁵¹ A supreme Constitution on the other hand, especially one which contains a

⁵⁰There have been some authorities, however, who have advocated a purposive, rather than a literal interpretation even in ordinary legislation: see D. Basson & H. Viljoen **South African Constitutional Law** (1988) at 264-266; C.J.R. Dugard "Some Realism about the Judicial Process and Positivism: A Reply" 1981 **SALJ** 372; E. Cameron "Legal Chauvinism, Executive-mindedness and Justice - L.C. Steyn's impact on South African Law" 1982 **SALJ** 38 at 59-60. See Chapt. 10 for a detailed discussion of this approach and the authorities who have advocated it.

⁵¹ A number of publications on constitutional interpretation in the light of constitutional values and norms have appeared in the past few years; before that there was virtually nothing: see *inter alia* C.F. Forsyth "Interpreting a Bill of Rights: The Future Task of a Reformed Judiciary" 1991 **SAJHR** 1; S.M. Trengove "Judicial Ideologies in the Interpretation of a Bill of Rights in South Africa" 1992 **Responsa Meridiana** 118; L.M. Du Plessis & J.R. De Ville "The Bill of Rights: Interpretation in the South African Context - Diagnostic Observations" 1993 **Stellenbosch LR** 59; L.M. Du Plessis "The Interpretation of Bills of Rights in South Africa: Taking Stock" in J. Kruger & B. Currin (eds) **Interpreting a Bill of Rights** (1994) at 1; J. Kruger "Towards a new Interpretive Theory" in J. Kruger & B. Currin (eds) **Interpreting a Bill of Rights** (1994) at 103.

justiciable Bill of Rights⁵², would require judges to make value judgments, which would in turn lead to a crystallisation of specific theories of constitutional interpretation in terms of which constitutional values ought to be identified, defined, evolved and applied.⁵³

⁵²The (interim) Constitution of the Republic of South Africa Act, 200 of 1993 contains a justiciable Bill of Fundamental Rights in Chapter 3. In terms of section 4 the Constitution is the supreme law of the Republic and binds the legislative, executive and judicial organs of state at all levels of government.

⁵³Basson & Viljoen have laid a sound basis for the development of a theory of constitutional adjudication. According to them the approach to constitutional issues should be value-oriented and should take into account the existing circumstances within a particular dispensation at a given time: Basson & Viljoen **op cit.** at 1-13. See also D.A Basson "Staatsregteorie en werklikheid" 1983 **De Jure** 307. In his work on the interpretation of statutes, Devenish also provides a theoretical framework to statutory interpretation which could be helpful in developing a theory of constitutional interpretation: see G.E Devenish **Interpretation of Statutes** (1992) Chapt. 2. One of the most important works to appear in the past few years on constitutional interpretation is that of T.J Kruger, **Die Wordingsproses van 'n Suid-Afrikaanse Menseregtebedeling**, unpublished LLD thesis, PU for CHE (1990). Kruger (at 249-256) proposes a step by step approach to the interpretation of a supreme Constitution's Bill of Rights; this approach takes into account the special nature of a Constitution as the supreme law of the land and as a system of values and norms against which all other

A theoretical perspective adopted in relation to constitutional adjudication subsumes a theory of the role of the judiciary in government, as well as the nature and extent of judicial review of state action. In his duty to apply the law the judge must of necessity interpret and expound the rules that constitute the law. Within the context of legislative supremacy, the judicial role is limited by the will of the legislature; the judge is not empowered to interpret and expound the law in such a way that the will of the legislature of the legislature is overridden. On the other hand, within the context of constitutional supremacy and substantive judicial review, the judge must interpret and expound the law in such a way that the superior law of the Constitution is carried out, because **lex superior derogat legi inferiori**.

The central problem surrounding a theory of constitutional adjudication is that of clearly defining and ascertaining the boundaries of permissible interpretation. Since it is mainly the interpretation of the Constitution which determines the limits and extent of the exercise of state authority in relation to the rights and freedoms of the individual and the interests of the community as represented by the state, a proper solution to this problem is essential.

In American constitutional law there are three main schools of thought which dominate theories of constitutional interpretation, namely the 'original intent' school, the 'democratic principles' school and the 'living document' school.⁵⁴

According to the 'original intent' school of thought, the court must in construing the Constitution seek and give effect to the intent of those who

laws must be weighed.

⁵⁴See H. Bownes "The Interpretation of the Constitution and the Bill of Rights : The Role of the Judge and the Lawyer" 1987 **New Hampshire Bar J** 301 at 303-304.

drafted and ratified or adopted it.⁵⁵ The main thrust of this approach is that in determining a constitutional issue, the court must analyse the relevant clause of the Constitution in order to find what the framers thought about the issue and then carry out such intention.⁵⁶ A number of problems arise here, the most serious ones being, first, that it is not always easy to ascertain what the intention of the framers was and secondly, that issues which come up for consideration may be issues that the framers may never even have thought of. The shortcoming inherent in the original intent approach is that while it may be a noble idea to adhere to the original intention of the framers of a Constitution and to be guided by such an intention, the intention may have fallen far behind the modern day realities with which the court has to deal.⁵⁷

The second school of thought, the political process school, is based on democratic principles. According to this approach, the fundamental values which regulate the affairs of society must be determined by the people's

⁵⁵In the South African context this approach corresponds to the approach which requires the courts to give effect to the intention of the legislature, without a consideration of fundamental societal values : See in this regard **Venter v R** 1907 T.S 910 at 913; **Seluka v Suskin and Salkow** 1912 TPD 256 at 265-266. For extra-curial support of this approach in South African statutory interpretation see L.C Steyn "Regsbank en Regsfakulteit" 1967 THRHR 101 at 106-107; N. Ogilvie Thompson "Centenary Celebrations of the Northern Cape Division of the Supreme Court" 1972 SALJ 23 at 32-34.

⁵⁶Bownes 1987 **New Hampshire Bar J** at 303.

⁵⁷The 'original intent' approach is discussed in detail in Chapt. 10,

infra.

elected representatives and not by the courts. In terms of this view it is therefore improper to leave the determination of important constitutional issues entirely in the hands of an unelected branch of government.⁵⁸ The justification advanced in support of this school of thought is that it is a tenet of representative democracy that value judgments which regulate the affairs of society should be left in the hands of elected representatives, who can be voted out of office if their selection of values is not popular; the courts ought therefore, as a result, to defer to the will of the elected organs of government.⁵⁹ The fallacy inherent in this view is that it seeks to leave constitutional issues which affect entrenched rights to a major party to the dispute, namely the legislature or the executive. Appointed judges, on the other hand, stand aloof from party politics and do not have a personal interest in the outcome of cases; they are therefore in a better position to make an objective assessment of competing claims between state organs and the individual.

The third school of thought views the Constitution as a living document which embodies fundamental values that are applicable to issues which arise as society develops.⁶⁰ According to this school, the meaning of a Constitution is not fixed but changes over time; a constitutional clause, especially one which deals with individual rights and freedoms, is open to various interpretations; it is the function of the judge to seek out and apply that meaning which most accords with the provisions of the Constitution and the

⁵⁸Bownes 1987 **New Hampshire Bar J** at 303.

⁵⁹For a defence of this justification and a criticism of judicial creativity and law-making in constitutional interpretation see J.H Ely **Democracy and Distrust : A Theory of Judicial Review** (1980). Ely is the main representative of the political process school of thought.

⁶⁰Bownes **loc cit**.

circumstances prevailing at the time of interpretation. The Constitution is viewed as an enduring document which accommodates changing circumstances and the values of society as it evolves.⁶¹ Within this context the function of the judiciary, as an institution to which the application of the law is entrusted, is to discover, define, proclaim and apply society's fundamental values as embodied in the Constitution.⁶²

It will be argued in this thesis that a value-oriented approach to constitutional adjudication and interpretation, that is, one which regards the Constitution as a living document intended to deal with the affairs of society in accordance with the values, ideals and aspirations of society as embodied in the Constitution, at any given time, takes into account the purpose of law in society and seeks to harmonise such purpose with the whole legal system is the proper approach to the interpretation of a new Constitution which has as its features the principle of constitutional supremacy, the entrenchment of fundamental human rights and judicial review of legislative and executive acts.

A value-oriented approach, as will be shown, does not allow excessive legalism and encourages the interpretation of the Constitution in the light of society's fundamental values as embodied in the Constitution and discoverable from its provisions and its larger objects, and not according to a strict literal

⁶¹See T. Sandalow "Constitutional Interpretation" 1981 **Michigan LR** 1033.

⁶²Sandalow 1981 **Michigan LR** at 1037. For a discussion of judicial constitutional interpretation and fundamental values see Chapt. 10, **infra**. The value-oriented approach which is advocated by Basson & Viljoen **op cit.** at 1-4 is consistent with the approach which regards constitutional interpretation as a discovery of fundamental values of society.

meaning of constitutional and statutory provisions. It takes into account the importance of constitutional values and the ideals and aspirations of society; it recognises that a supreme Constitution is a deliberately enacted document which contains human rights provisions which are based on fundamental values such as justice, fairness and freedom. It enables the judiciary to interpret the Constitution in such a way that results which foster fundamental societal values are striven for.⁶³

⁶³For a detailed discussion of these aspects see Chapt. 10.

CHAPTER 2

CONCEPTUAL PERSPECTIVE.

The existence of a state presupposes a community of people within a specific territory and organised in a particular way, over whom the state exercises authority. The exercise of authority is a fundamental feature of the state¹ and is associated with the idea of law as a medium through which the state exercises its authority. State authority is not completely unified but is divided into the legislative, the executive and the judicial authority,² i.e the law-making authority, the law-implementing authority and the law-enforcing authority.

The idea of authority within the state postulates a relationship and an interplay between the state, law and society, and the question of the existence and desirability of boundaries between the spheres of state authority and the interests of society's individual members is central to this relationship. The fundamental role of the judicial authority within this relationship is adjudicative or dispute resolving. Many administrative organs of the state, however, also exercise an adjudicative or dispute-resolving function, for example administrative tribunals and regulatory agencies.

1. The Concept of the State.

The concept of the state is of interest not only to the jurist but also to scholars of political, social and economic theory; to each one of these scholars the

¹D. Basson & H. Viljoen **South African Constitutional Law** (1988) at 21.

²See Chapt. 4.

state is "a comprehensive concept with many facets"³. The layman also attaches a certain meaning to the state; to him it may appear to be a colossal entity which exercises authority that affect him in his daily life, and though he may sometimes feel that it exacts undue obedience from him, imposes duties on him and encroaches upon his private domain, he also consciously or unconsciously realises that he cannot live outside the framework of its organisation.

Of particular interest to the constitutional lawyer is the meaning of the state as an institution which through its various organs stands in a specific relationship to legal subjects. The relationship between the state and legal subjects is better understood in terms of the development of the state.

1.1. The Development of the State.

Assertions about the origin of the state are based largely on conjecture. The world's oldest known 'state' is probably Jericho⁴. More well-known and well documented 'states' are the Greek **polis**⁵ and Rome⁶. Although these political entities were in reality not states in the modern sense of the word, but were rather city-states consisting of large clusters of people brought together by social, military and economic exigencies, some relationship existed between the city-state and its citizens. The citizens owed allegiance to the city-state and the city-state was in turn obliged to offer its citizens protection in times of war. The citizens had a say in law-making. The concept of **state** had

³Basson & Viljoen **op cit.** at 16. See also I.M Rautenbach & E.F.J Malherbe **Constitutional Law** (1994) who point out (at 1) that "every meaning of the word 'state' represents a particular feature or element of the state".

⁴See J. Mellaart **The Dawn of Civilisation** (1962) at 41-58.

⁵See in general L.J Du Plessis **Die Moderne Staat** (1941) at 9-10.

⁶Du Plessis **op cit.** at 11-13.

not yet, however, developed at this stage.

The origin of the state can be traced back to medieval times. The emergence of the state as a distinctive impersonal institution persisting in time and place, with a binding authority and demanding the loyalty of all subjects residing within its territory falls between the period 1100 and 1600⁷. The word 'state' itself dates back to the Renaissance, between the 14th and 15th century⁸, and is derived from the Latin word *status*⁹; it was also at this stage that the state began to emerge as an institution exercising jurisdiction over a specific territory, over an identifiable community of people, with authority exercised on its behalf by an organised government consisting of specific persons who hold defined official positions.¹⁰

With the culmination of its development the state emerged as a network of structural relationships, with a more clearly defined set of institutional arrangements for rule. In this development its organisation and its relationship with subjects became more complex; as a result it became clearly distinguishable from the ancient state. It increasingly became charged with the making of law as a means of governing, the maintenance and execution of laws, the promotion of the common good and public order and the administration of public affairs through its various organs. As the only

⁷See J. Strayer **On the Medieval Origins of the Modern State** (1973) at 12 **et seq.**

⁸Basson & Viljoen **op cit.** at 16-17; L.G Baxter "The State and other Basic Terms in Public Law" 1982 **SALJ** 212 at 216-218.

⁹G. Carpenter **Introduction to South African Constitutional Law** (1987) at 3; Baxter **op cit.** at 214 and 216.

¹⁰The idea of the state as a seat of government developed after the appearance of Machiavelli's political works on government: Carpenter **op cit.** at 3; Baxter **op cit.** at 217. See also in this regard J.P VerLoren van Themaat **Staatsreg** 3rd ed. by M. Wiechers (1981) at 5.

institution with authority over all people within its territory, its laws affected all sections of society. In the end, the relationship between the state and the people within its territory became one of sovereign and subject¹¹.

1.2. The Modern State.

The development of the state over the years into a complex network of institutional arrangements and structural relationships brought with it a diversity and multiplicity of state functions. The extent to which these functions affected the individual in turn became so complex that it became necessary and desirable to set out clearly the structure, organisation and mode of operation of the authority of the state, and to delineate the relationship between the state and its citizens¹². It is this distinctive pattern which marks out today's state as the modern state.

An important characteristic feature of the modern state is that its existence is based on a clearly defined framework of fundamental principles which determine its structure, its functions and its relationship with the individual¹³. This framework is usually deliberately formulated and often owes its existence to an act of collective will and deliberation. In many instances the framework is embodied in a comprehensive constitutional enactment¹⁴.

The idea of a constitutional framework which determines the structure and

¹¹Du Plessis **op cit.** at 71.

¹²See J.D van der Vyver "The State, the Individual and Society" 1977 **SALJ** 291 at 297.

¹³Klaus Stern "The genesis and evolution of European-American constitutionalism : Some comments on the fundamental aspects" 1985 **CILSA** 187.

¹⁴See G. Poggi **The Development of the Modern State** (1978) at 95.

functions of the state and its relationship with the individual is the foundation of the concept of constitutionalism. According to this concept, the exercise of state authority should be limited by a constitutional framework which defines and limits the extent of state power.

The constitutional framework may be based on a single enactment¹⁵ or a number of enactments¹⁶, but no matter what form it takes, the state operates in accordance with, and with reference to, the principles embodied in it; these principles usually represent some end or function to which the state is instrumental. The end or function does not, however, entirely encompass all facets of social existence; in other instances the state co-ordinates and harmonises ends or functions which are of a private nature¹⁷. The state is able to co-ordinate and harmonise these private ends and functions through its adoption, execution and control of policies¹⁸.

The state harmonises and co-ordinates the ends and functions to which it is instrumental through its governing components, namely the legislature, the executive and the judiciary. The importance of the legislature is that it enacts the policies which represent the ends or functions to which the state is instrumental into laws; the judiciary controls these policies by adjudicating disputes, arising from these policies, between individuals and the state and between individuals among themselves.

¹⁵As in the case of the Constitution of the United State of America, 1787.

¹⁶As in the case of the British Constitution which consists of a conglomeration of customs or conventions and a number of acts, such as the Act of Settlement, 1701, the Representation of the People Acts, the Judicature Acts and the Parliament Acts of 1911 and 1949.

¹⁷Private ends or functions are catered for in, for example, the family, religious, cultural, social and economic organisations, which the state then harmonise and complement: see **Poggi op cit.** at 96-97.

¹⁸**Poggi op cit.** at 96-98.

In South Africa the control function of the judiciary became watered down as a result of the adoption of the doctrine of parliamentary sovereignty. In consequence of this doctrine, it was accepted that courts of law did not have the power to override an Act of Parliament where an individual alleged that the Act violated any of his rights.

As in England, parliamentary sovereignty became the **Grundnorm** of the South African Constitutional system. Dicey,¹⁹ referring to the British constitutional system, called the 'sovereignty' of Parliament "the very 'keystone' of constitutional law in this country."

2. The Doctrine of Parliamentary Sovereignty.

Etymologically, the word 'sovereignty' means superiority. Sovereignty as a concept owes its origin to the idea that within and outside the area of its authority the state has no superior and is subject to no other authority. This means that internally the state is the ultimate political institution, with final and absolute authority;²⁰ externally, it is independent and is not subject to the authority of other states.²¹

The term 'sovereignty' is open to more than one interpretation. As a concept indicating the absence of any other external authority it is a concept of international law which denotes the relationship between a state and other

¹⁹A.V Dicey **Introduction to the Study of the Law of the Constitution** 10th ed (1975) at 70. See also W.I Jennings **The Law and the Constitution** (1959) at 144; O. Hood Phillips **Constitutional and Administrative Law** 6th ed. (1978) at 27.

²⁰See F.H Hinsley **Sovereignty** (1986) at 26.

²¹See L. Openheim **International Law - A Treatise** Vol. 1, 8th ed.(1985) at 118; H. Booyesen **Volkereg en sy Verhouding tot die Suid-Afrikaanse Reg** (1989) at 135.

states.²² As a concept relating to the exercise of authority within the state it is a concept of constitutional law which implies the existence of some superior person or organ wielding authority on behalf of the state. In England the monarch in earlier times wielded real political power and as a result came to be known as the 'sovereign'.²³ When Parliament finally emerged as the only organ with power to make any law whatsoever and whose enactments no other person or body could question or override, the word 'sovereignty' came to be associated with the supreme legislative power of Parliament.

According to Hood Phillips,²⁴

"[t]he doctrine of sovereignty in the theory of municipal law as opposed to international law, however, is now out of fashion ... A body may have supreme (highest) power without necessarily being sovereign (unlimited)..."²⁵

In his view the use of the term 'sovereignty' in relation to the legislature tends to prejudice a discussion of its law-making powers. For this reason he prefers the phrase 'the legislative supremacy of Parliament'.

Parliamentary sovereignty means that Parliament or the legislature is a supreme legislative body which has the competence to legislate on **any matter whatsoever**; it also implies that since it is an omnipotent body, no other organ can declare Acts of Parliament to be invalid.²⁶ There is, however, also another aspect of the legislative supremacy of Parliament, namely that, as the only organ of the state which is charged with making of laws, there is no

²²**Idem.**

²³W. Blackstone **Commentaries on the Laws of England** 4th ed. (1876) at 164.

²⁴**Op cit.** at 42.

²⁵**Idem.**

²⁶Dicey **op cit.** at 70.

other organ which is superior to Parliament in the making laws for the governance of the state.²⁷

2.1. The Origin of the Doctrine of Parliamentary Sovereignty.

The origin of the doctrine of parliamentary sovereignty is associated with the development of the concept of sovereignty. Authority, a fact on which the doctrine of sovereignty is based, is as old as society itself.²⁸ Questions about who wields final authority within the state could, however, only begun to arise after the emergence of the state.

Rationalisations about authority within the state were not rife in Greece, the most well-known ancient 'state'. It was generally accepted that individual interests did not take precedence over those of the 'state'.²⁹ Aristotle, the prominent Greek political philosopher, did not concern himself with the question of who wielded final and absolute authority within the 'state'; he was more concerned with the classification of governments according to the numbers of those who exercised state authority.³⁰ Greek political theory did not make any distinction between society and state,³¹ so that questions about who actually wielded authority on behalf of the 'state' could hardly have arisen. The Greek word **polis**, which is today rendered as 'state', represented city, state and society combined. In Greek political theory the political community was the highest form of human association which embraced all institutions and pursued the common good.

²⁷See Carpenter **op cit.** at 330; Boule, Harris & Hoexter **op cit.** at 126.

²⁸Hinsley **op cit.** at 1.

²⁹See Carpenter **op cit.** at 134.

³⁰Hinsley **op cit.** at 27-28.

³¹See G.H Sabine **A History of Political Theory** 3rd ed. (1961) at 100-101.

The idea that there must be some supreme power within the political community, had its early origin in the Hellenistic monarchies³², where territorialism and imperialism led to an association between the community and a leader or ruler³³. The latter came to be seen as a personification of law, with the result that he ultimately also came to be regarded as being supreme and above the law. However, there was at this stage as yet no clear distinction between the community and the state; the idea of sovereignty had not yet emerged³⁴.

The concept of sovereignty began to emerge in the period of the Roman Empire. The Romans regarded the authority of the state as having been vested in the **populus Romanus**³⁵; the **imperium** or authority was at first exercised by the **comitia** and later, during the imperial period, by the **princeps**³⁶. In theory, final and absolute authority resided in the Roman people, who in turn delegated it to the emperors³⁷. The theory about the origin and seat of authority later changed under the influence of Christianity; sovereignty came to be regarded as deriving not from the people but from God. The idea that sovereignty was based on law only came later³⁸.

After the fall of the Roman Empire, Byzantium alone retained the notion that

³²These monarchies consisted of the Kingdom of Ptolemy in Egypt, the Kingdom of the Seleucids in Syria and Mesopotamia and a conglomeration of Macedonia and mainland Greece : see Hinsley **op cit.** at 32.

³³Hinsley **op cit.** at 32-36.

³⁴**Idem.**

³⁵Hinsley **op cit.** at 37; VerLoren van Themaat - Wiechers **op cit.** at 14; Carpenter **op cit.** at 134.

³⁶Carpenter **op cit.** at 134.

³⁷**Idem.**

³⁸**Idem.**

the emperor wielded authority on behalf of the people.³⁹ In contrast, the Germanic view in the West was that authority was based solely on law, which was regarded as immutable and supreme.⁴⁰ The application of the law by the state was, however, limited; the individual was allowed to take the law into his own hands, except in times of peace, either the peace of the assembly (**ding, fylkisting, folk-moot**) when all the men came together to discuss the law or to take important decisions, or the peace of the family or household, or when war had been declared.⁴¹ Actual state authority was as yet unknown and only developed later.

2.2. The Emergence and Development of the Modern Doctrine of Parliamentary Sovereignty.

The struggle between the Pope and the emperors during the early Middle Ages did not provide sufficient fertile ground for the emergence of a distinctive doctrine of sovereignty. Although there was general consensus that state authority is derived from God, there was no unanimity regarding the bearer of the authority within the state.⁴² While the Pope claimed absolute authority in ecclesiastical matters, the emperors claimed absolute authority in all earthly matters, including the church and the clergy.

The struggle between the Pope and the emperors culminated in a victory for

³⁹Hinsley **op cit.** at 45-46.

⁴⁰VerLoren van Themaat - Wiechers **op cit.** at 14; Carpenter **op cit.** at 134. In its modern day form the idea that the authority of the state is based on law is found in the doctrine of the rule of law and the **Rechtsstaat** idea : see Chapt. 9 **infra**.

⁴¹VerLoren van Themaat - Wiechers **op cit.** at 14-15. The prohibition of self-help during wartime was probably aimed at concentrating all efforts on the war at hand, which would ensure victory and therefore peace for the tribe.

⁴²Carpenter **op cit.** at 135.

the emperors. The emperors had based their claim of absolute authority on Roman law, maintaining that they were the sole universal authority; they claimed that the Empire alone, which they represented, was a true **respublica**, with a true public law.⁴³ The emperors' claims were taken up by imperial propagandists and bolstered by the views of anti-papal thinkers. According to Bartolus, an imperial propagandist, the emperor was vested with supreme authority and was subject only to natural law;⁴⁴ on the other hand, anti-papal thinkers, among them Dante, Marsilius of Padua, William of Occam and Nicholas of Cusa, propagated the view that the church was simply a body of the faithful and that the Pope, as its head, was merely an administrator of sacraments, with no power over temporal matters.⁴⁵ The anti-papal thinkers argued that the basis of all political power was natural law as embodied in divine reason.⁴⁶

With the rise of independent nation states during the middle of the 13th century, national writers began to propagate the view that the monarch was the supreme authority within the state and that he was vested with the power to interpret existing law and to make new law.⁴⁷ This view was associated with the idea that the monarch was a representative of the community and governed with the consent of the community; the community was bound to

⁴³Hinsley **op cit.** at 79.

⁴⁴Hinsley **op cit.** at 81-82; VerLoren van Themaat -Wiechers **op cit.** at 16; Carpenter **op cit.** at 135.

⁴⁵Hinsley **op cit.** at 83.

⁴⁶Hinsley **op cit.** at 84. Anti-papal thinkers could not, however, develop a doctrine of sovereignty mainly because of their inconsistencies regarding the nature of the empire; they assumed that Christendom was a body politic in respect of which the Empire retained supremacy : Hinsley **op cit.** at 84-86.

⁴⁷Hinsley **op cit.** at 87-88. In England Bracton wrote in his **De Legibus et Consuetudinibus Angliae** (1260-1260) that the King was subordinate to no man but subject only to God and the law.

obey him as long as he observed the law.⁴⁸

The concept of sovereignty acquired a new meaning when it came to be associated with the state itself during the 17th century. Although the monarch was in earlier times regarded as the sovereign, he was not necessarily sovereign in the legislative sense; he was merely an organ of the state, so that sovereignty resided in the state itself.⁴⁹ The idea that the state is the ultimate bearer of sovereignty has its origin in the notion that the people who reside within the state and to whom it owes its existence are the real sovereign.⁵⁰ According to Rousseau, the state came into being as a result of a compact between individual members of society and the state, whereby members of society relinquished a part of their natural freedom and transferred their sovereignty to the state in return for greater security and a better life.⁵¹

The modern understanding of the concept of sovereignty is generally attributed to the French political philosopher, Jean Bodin. With the appearance of Bodin's work, **Six Livres de la Republique**, in 1577, the concept of sovereignty acquired a new meaning. According to Bodin, it was the presence of a sovereign within a state that distinguished it from other social institutions.⁵² He defined sovereignty as the power to exercise the highest authority in the state, unrestrained by any other authority, or by human law

⁴⁸Hinsley **op cit.** at 102-103.

⁴⁹Lord Dennis Lloyd **The Idea of Law** (1987) at 172.

⁵⁰This view later found universal favour and was adopted by the founding fathers of the United States as the core of the American Constitution. During the early development of South Africa the Boer Republics also ascribed sovereignty to 'the people'.

⁵¹Even before Rousseau, political thinkers like Hobbes and Locke had attempted to trace the origin of the political community to some form of an agreement between individual members of the community and a ruler : See Sabine **op cit.** at 417-419 and 467-473.

⁵²VerLoren van Themaat - Wiechers **op cit.** at 23.

or by time; the sovereign was subject only to the **ius divinum** and the **ius naturale**.⁵³ Sovereignty therefore became an absolute concept which implied freedom from the laws; it no longer referred to 'superanus' or 'superior' but to 'supreme'.⁵⁴ In Bodin's view the sovereign was a single person or a group of persons;⁵⁵ sovereignty therefore, according to him, did not vest in a state but in a specific person or group of persons.⁵⁶

There has been no unanimity among modern political thinkers about the exact nature and extent of Bodin's doctrine of sovereignty. According to Dooyeweerd⁵⁷, Bodin's doctrine advocates a concept of absolute sovereignty; according to him it signifies, a sovereign endowed with sole and absolute power to make any law, restrained only by divine law and natural law. On the other hand, McIlwain's view⁵⁸ is that Bodin made a fundamental distinction between the ordinary laws, which did not bind the sovereign and were alterable by him, and the fundamental principles which constituted the government and upon which the sovereign's authority rested, so that the sovereign in Bodin's doctrine could not exceed the limits set out in these fundamental principles without destroying the very foundation of his authority. It would seem, however, that Bodin's doctrine was no more than an earnest attempt to harness the hitherto legally unfettered authority of the sovereign within permissible limits in accordance with what he and his contemporaries

⁵³**Ibid.**

⁵⁴Carpenter **op cit.** at 136.

⁵⁵**Idem.**

⁵⁶**Idem.**

⁵⁷H. Dooyeweerd **De Crisis in die Humanistische Staatsleer** (1931) at 28, 149 and 169; H. Dooyeweerd **Die Strijd om het Soewerenteitsbegrip** (1950) at 5, quoted by Carpenter **op cit.** at 136.

⁵⁸C.H McIlwain **Constitutionalism in a Changing World** (1939) at 73, quoted by Carpenter **op cit.** at 136.

considered to be right and proper.⁵⁹

The significance of Bodin's doctrine of sovereignty is that it facilitated a clear distinction between the state and all other institutions of human existence; it helped to secularise and to concentrate state authority in a juridical sense and thus gave impetus to the emergence of the modern state. In a wider sense, it gave rise to the idea of the unity and indivisibility of the sovereign and, in the final analysis, the unity of the state. More importantly, however, it gave rise to the idea that the positive law was the express or implied will of the sovereign and that all legislative power ultimately depended on the will of the sovereign.⁶⁰

Bodin's doctrine of sovereignty was well received both on the continent of Europe and in England but did not develop along similar lines in the two continents. The reception of the doctrine on the continent of Europe led to a period of absolutism.⁶¹ In England, however, its reception culminated in the sovereignty of Parliament.

2.3. The Development of Parliamentary Sovereignty in England.

In England the idea that the King was sovereign had already taken root by the 13th century. According to Bracton, the King had no equal or superior in temporal matters; he was subject only to God and the law.⁶² The King continued to wield exclusive supreme power until the emergence of Parliament as a representative of the people and contender to the exercise of state

⁵⁹H. Quaritsch **Staat und Souverinitat** (1970) at 393, quoted by Carpenter **op cit.** at 136.

⁶⁰Carpenter **op cit.** at 137.

⁶¹See Hinsley **op cit.** at 87-88 and 92.

⁶²F.W Maitland **Constitutional History of England** (1941) at 100.

authority.⁶³

In its rudimentary form, 'Parliament' was not fully representative; it was rather a Council (the Great Council or **Magnum Concilium**) which represented the interests of the feudal and clerical nobility. Four representatives from each county were later added to the Great Council by King John in 1213.⁶⁴

In reaction to the tyranny of John, the Great Council forced him to sign the famous **Magna Carta** at Runnymede in 1215. **Magna Carta** was later interpreted by Sir Edward Coke and others as a means of putting the King under the law, of limiting the exercise of his authority by the collective will of the people and of ensuring parliamentary control of the King's power, particularly through Parliament's consent in regard to taxation.

The first true Parliament developed out of the reconstituted Great Council during the 13th century.⁶⁵ It consisted of the three estates of the realm, namely the clerical nobility, the secular aristocracy and the communities or commons. Although Parliament could control the King through its consent for the levying of taxes, it still did not have full legislative powers at that stage.

The recession of the feudal order during the 14th century brought with it the emergence of Parliament as a strong contender to the exercise of authority. Parliament began to assert its authority over the King, and the King's powers were in turn steadily curtailed. By the end of the 15th century Parliament had already gained an upper hand in legislative matters, especially in relation to

⁶³See A.F Pollard **The Evolution of Parliament** 2nd ed. (1926), Chapt. 2.

⁶⁴See F.W Maitland **Selected Essays** (1936) at 68.

⁶⁵See J. Bryce **Studies in History and Jurisprudence** (1901) at 763.

taxation.⁶⁶

The idea that Parliament was supreme had already begun to emerge during the 16th century. Sir Thomas Smith wrote in his **De Republica Anglorum**, written in 1565 and published in 1583, that the Parliament of England, which represented the whole nation, possessed power over the whole realm, both the head and the body of the realm.⁶⁷ However, although some writers on English constitutional law have taken the view that Sir Thomas Smith's writings on the power of Parliament constituted a theory of parliamentary supremacy,⁶⁸ it would seem that he was not referring to Parliament as a legislative body but to 'Parliament' as it was then, namely a court against whose decisions no further appeal lay.⁶⁹

The supremacy of Parliament in England became firmly established after the struggle between Parliament and the Stuart Kings. This struggle was triggered off by the Stuart monarchs' claim to rule by divine birthright; they rode roughshod over the rights and will of Parliament. The struggle was brought to an end by the Glorious Revolution of 1688, a bloodless revolution which brought about a new constitutional order.

The new order was given greater legitimacy by the adoption of a Declaration

⁶⁶See J.E.A Joliffe **The Constitutional History of Medieval England** 4th ed. (1961) at 490.

⁶⁷**De Republica Anglorum**, Book 2 (edited by Alston, 1906) at 48-49. See also F.W Maitland **op cit.** note 62 at 225.

⁶⁸See F.W Maitland **Constitutional History** (1911) at 255 and 298; F. Pollock **The Science of Politics** (1911) at 57 *et seq.*

⁶⁹See O. Hood Phillips **op cit.** at 43; Sabine **op cit.** at 449-450. The English Parliament of the Middle Ages was not a purely legislative body; it was in reality a High Court of Parliament : C.H McIlwain **The High Court of Parliament and Its Supremacy** 2nd ed. (1934) at 109.

of Rights which was statutorily embodied in the Bill of Rights of 1689.⁷⁰ The Bill of Rights provided, *inter alia*, that it was illegal for the royal authority to suspend laws or the execution of laws without the consent of Parliament; that it was illegal for the royal authority to levy money without the grant of Parliament; that the freedom of speech and debates or proceedings in Parliament ought not to be questioned in any court or out of Parliament and that it was obligatory for sessions of Parliament to be held frequently to ensure that grievances were redressed and laws amended, strengthened and preserved. The effect of the Bill of Rights was that Parliament became the dominant partner in the exercise of state authority.

2.3.1. The Concept of Parliamentary or Legislative Supremacy.⁷¹

Early opinions about the supremacy of Parliament did not always subscribe to the view that Parliament was the bearer of absolute sovereignty. In his famous judgment in **Bonham's case**⁷² Coke expressed the view that Acts of Parliament could be controlled by the common law:

"[I]n many cases, the common law will control acts of Parliament, and sometimes adjudge them to be utterly void; for when an act of Parliament is against common right and reason or repugnant or impossible to be performed, the common law will control it and adjudge such act to be void".⁷³

⁷⁰This Bill of Rights was not a bill of fundamental rights in the modern sense of the term; it was not procedurally entrenched and was mainly intended to curtail the King's powers and to secure the position of Parliament as an important component of government.

⁷¹See Chapt. 4 for a detailed discussion of the nature of legislative supremacy.

⁷²**Bonham v Atkins** (1610) **Coke's Reports** 113b at 118a (77 E.R 646 at 652).

⁷³**Coke's Reports** at 118a; 77 E.R at 652. For a commentary on Coke's dictum see J.W Gough **Fundamental Law in English Constitutional History** (1955) at 31-35.

Coke's opinion in **Bonham's case** was, however, *obiter* and did not represent the view prevailing at the time.⁷⁴ Although **Bonham's case** was referred to and approved in the later case of **Rowles v Mason**,⁷⁵ the view that the common law was supreme over Acts of Parliament did not take hold in English constitutional law. Further propagation of the view, per Chief Justice Hobart in **Day v Savadge**⁷⁶, that "... even an Act of Parliament made against natural equity, as to make a judge in his own case, is void, for *jura naturalia sunt immutabilia* and they are *leges legum*,"⁷⁷ and a further reference to **Bonham's case** in **City of London v Wood**,⁷⁸ some twelve years after the Glorious Revolution, did not do much to dampen the prevailing view that Parliament was vested with supreme legislative authority. The supreme legislative authority of Parliament was judicially affirmed in **Lee v Bude and Torrington Railway**.⁷⁹

The formulation and popularisation of the doctrine of parliamentary sovereignty was, however, largely the work of English constitutional law scholars.⁸⁰ The work of Dicey⁸¹ is perhaps the most outstanding on the

⁷⁴See L.B Boudin **Government by the Judiciary** (1932), Vol. I at 485-517. Coke himself later acknowledged in his **Institutes** that Parliament was vested with supreme legislative authority and that its legislation was inviolable : 4 **Institutes** 36.

⁷⁵(1612) 2 **Brownl.** 192 at 198; 123 E.R 892 at 895.

⁷⁶1615 **Hob.** 85.

⁷⁷Chief Justice Hobart stated this view without directly referring to **Bonham's case**.

⁷⁸(1701) 12 Mod. 669 at 687; 88 E.R 1592 at 1602.

⁷⁹(1871) L.R 6 C.P 576 at 582.

⁸⁰See R.F.V Heuston **Essays in Constitutional Law** 2nd ed. (1964) at 1-4.

nature of parliamentary sovereignty.

Dicey explained parliamentary sovereignty in the following terms:

"The principle of parliamentary sovereignty means neither more nor less than this, namely that Parliament has under the English constitution the right to make or unmake any law whatever; and, further, that no person or body is recognised by the Law of England as having the right to override or set aside the legislation of Parliament."⁸²

In accordance with this view the legislative supremacy of Parliament means that Parliament has absolute legislative power and that its legislative competence is not subject to any legal limitations. Parliament can legislate on any subject and the courts are incompetent to question the validity of Acts of Parliament and to declare them invalid.⁸³

The view propounded by Dicey is absolutist. He subscribed to the view that Parliament cannot bind its successors.⁸⁴ This view is based on the reasoning that a successor Parliament would no longer be supreme if limitations on its legislative competence were imposed by a predecessor Parliament.⁸⁵ It is still held by some English constitutional law authorities.⁸⁶

There are, however, other English constitutional law authorities who do not

⁸¹A.V Dicey **Introduction to the Study of the Law of the Constitution** 10th ed. (1975).

⁸²Dicey **op cit.** at 39-40.

⁸³E.C.S Wade, G. Phillips & A.W Bradley **Constitutional and Administrative Law** (1977) at 59.

⁸⁴Dicey **op cit.** at 67-68.

⁸⁵Wade, Phillips & Bradley **op cit.** at 59.

⁸⁶See H.W.R Wade "The Basis of Legal Sovereignty" 1955 CLJ 172; P. Mirfield "Can the House of Lords Lawfully be Abolished?" 1979 LQR 36.

subscribe to the absolutist view of parliamentary supremacy. According to Gray,⁸⁷ successor Parliaments are bound by the rules regarding their composition and legislative procedure imposed by a predecessor Parliament. Jennings⁸⁸ is also of the view that Parliament is bound to legislate in accordance with the procedure prescribed by the law; it is supreme only in so far as it legislates in accordance with the procedure prescribed by the law.

The more recent debate about the nature of the legislative supremacy of Parliament is centred around the 'continuing' and 'self-embracing' views.⁸⁹ According to these views, if the supremacy of Parliament is 'continuing' then Parliament cannot bind its successors, either as regards the scope of future legislation or as regards its composition or manner of legislating. If, on the other hand, the supremacy of Parliament is 'self-embracing', then Parliament may limit its legislative competence or that of future Parliaments as regards its composition or manner of legislating, although not as regards the scope of legislation. The latter view implies that the judiciary may review Acts of Parliament as regards their form or the manner in which they were enacted.⁹⁰

3. The Judiciary.

In its ordinary sense the term judiciary has a narrow scope and refers to the higher courts, such as the Supreme Court of a country. The judiciary, in this

⁸⁷W. Gray "The Sovereignty of Parliament Today" 1953 **CLJ** 54.

⁸⁸J. Jennings **The Law and the Constitution** (1959) at 163.

⁸⁹See Chapt. 4, **infra**, for a detailed discussion of these views. On the terms 'continuing' and 'self-embracing' see H.L.A Hart **The Concept of Law** (1961) at 146.

⁹⁰See G. Winterton "The British Grundnorm : Parliamentary Supremacy Re-examined" 1976 **LQR** 591 at 608.

sense, is an institution of government which consists of appointed judges⁹¹.

According to Shetreet⁹² the judiciary is

"an organ of government not forming part of the legislative organs of government, which is not subject to personal, substantive and collective controls and which performs the primary function of adjudicating legal disputes between the state and legal subjects and between individuals among themselves".

The function of adjudication may be by way of a direct resolution of disputes, by way of review of other adjudicative decisions or by means of hearing an appeal from other adjudicative judicial organs. This definition excludes magistrates, military tribunals and officers who preside in administrative tribunals from the scope of the term 'judiciary'. The judiciary may be specifically defined in a Constitution⁹³. The Constitution may also outline the extent and scope of judicial power⁹⁴.

The judgments of Greenberg J.A and Schreiner J.A in **Minister of Interior v Harris**⁹⁵ provide some indication of some of the attributes of

⁹¹L. Boule, B. Harris & C. Hoexter **Constitutional and Administrative Law** (1989) at 18.

⁹²S. Shetreet "Judicial Independence : New Conceptual Dimensions and Contemporary Challenges" in S. Shetreet & J. Deschenes(eds) **Judicial Independence : The Contemporary Debate** (1985) 590 at 597-598.

⁹³For example, section 68(1) of the Republic of South Africa Constitution Act, 110 of 1983; article III, section 1 of the Constitution of the United States. Section 96(1) of the Republic of South Africa Constitution Act, 200 of 1993 defines the judiciary as "the courts established by this Constitution and any other law"; however, the emphasis seems to fall on the Constitutional Court and provincial and local divisions of the Supreme Court, all of which are staffed by appointed judges.

⁹⁴For example, article III, section 2 of the Constitution of the United States.

⁹⁵1952(4) SA 769 (A).

a court of law. According to Schreiner J.A, a court is

"manned by full-time judges trained in law, who are outside party politics and who have no personal interest in the cases that come before them; whose tenure of office and emoluments are protected by law and whose independence is a major source of the security of the state. [Its jurisdiction] is general as to subject matter; [it is] available to all disputants who claim they have legal rights to maintain and before [it] all interested parties are entitled to present their evidence and their arguments".⁹⁶

In his judgment Greenberg J.A emphasised the impartiality of members of the judiciary and the principle that no one should be a judge in his own cause as important attributes of a judiciary⁹⁷.

The judiciary does not, however, operate as an isolated branch of government. Its existence and operation are largely dependent on other branches of government. The legislature makes laws which the judiciary has to execute; the remuneration of members of the judiciary, their conditions of service and other related matters are dealt with by the legislature. More importantly, the judiciary relies on the executive branch for the enforcement of its judgments.

4. Judicial Review of Legislation.

Judicial review of legislation refers to the power of the judiciary to inquire into and pronounce upon the validity of legislation, whether procedural or substantive validity or both.⁹⁸ Judicial review of legislation constitutes one of the effective ways of checking the exercise of authority by the legislature.

⁹⁶At 789A-C.

⁹⁷At 786B-C. See also Centlivres C.J's analysis of the 'High Court of Parliament' and the glaring differences between this 'court' and a court of law : at 783E-784C.

⁹⁸There are other forms of judicial review, namely review by a court of law of administrative action and review by a superior court of the proceedings of inferior courts.

Judicial review of legislation does not exist in a system where the absolutist point of view or the 'continuing' view of parliamentary supremacy is followed. The courts in England have, for example, time and again held that they are incompetent to inquire into and pronounce upon the validity of Acts of Parliament.⁹⁹

On the other hand, the relative or 'self-embracing' view of parliamentary supremacy permits limited judicial review of Acts of Parliament. According to this view the courts are competent to inquire into the question whether Parliament has, in enacting legislation, followed the procedure prescribed for legislating and to invalidate an instrument which has been enacted contrary to the prescribed procedure; they are not competent, however, to inquire into and pronounce upon the substantive validity of Acts of Parliament.¹⁰⁰

Judicial review of legislation is closely related to the nature of the Constitution. A supreme Constitution which requires all legislative acts to accord with its provisions opens the door to judicial review of the substantive validity of legislation. This form of judicial review constitutes the backbone of the American constitutional system.¹⁰¹

Judicial review within the American context means that the courts have the power to "pass (judgment) upon the constitutionality of legislative acts which fall within their normal jurisdiction to enforce ... to refuse to enforce such as

⁹⁹See *inter alia* **Lee v Bude & Torrington Railway** (1871) (supra) at 582; **Mortensen v Peters** (1906) 8 S.C 93 at 100-101; **R v Electricity Commissioners** [1924] 1 K.B 171.

¹⁰⁰Basson & Viljoen **op cit.** at 101.

¹⁰¹The 1993 Constitution (Act 200 of 1993) introduces the concept of judicial review, both substantive and procedural, into the South African constitutional system : sections 98(2)) and 101(3), read with sections 4 and 7(4)(a).

they find to be unconstitutional and hence void."¹⁰² Although the Constitution of the United States did not expressly establish the power of judicial review, this power was deduced from the nature of the Constitution in **Marbury v Madison**¹⁰³. In this case, the fact that the Constitution was a supreme and fundamental law which was superior to all other laws was held to imply that in interpreting and applying laws, judges were bound to refuse to enforce laws which were in conflict with the provisions of the Constitution.¹⁰⁴ The power of judicial review in the American context vests the judiciary with supremacy in regard to the constitutionality of all acts of congress, Constitutions and statutes of the states, all acts of the government and of the administration and even of the judiciary itself.¹⁰⁵

A Constitution need not, however, be supreme to permit judicial review of legislation. The presence of constitutional entrenchments which make provision for a special, as opposed to the ordinary, procedure or mechanism of amending or repealing the Constitution, may render legislative instruments reviewable, even though the Constitution is not supreme. This form of judicial review is purely procedural; it does not permit judicial review into the substantive validity of legislation.

Pursuant to the entrenched provisions of the South Africa Act, 1909 the Appellate Division of the Supreme Court of South Africa, in **Harris v**

¹⁰²E.S Corwin "Judicial Review" **Encyclopaedia of Social Sciences** (1932) at 457.

¹⁰³1 **Cranch** 137 (1803).

¹⁰⁴E.S Corwin "**Marbury v Madison** and the Doctrine of Judicial Review" 1914 **Michigan LR** at 538. See also **United States v Butler** 297 U.S 1 (1936).

¹⁰⁵A.R Brewer-Carias **Judicial Review in Comparative Law** (1989) at 138.

Minister of the Interior,¹⁰⁶ **Minister of the Interior v Harris**¹⁰⁷ and **Collins v Minister of the Interior**¹⁰⁸, inquired whether Parliament had followed the special prescribed procedure or mechanism when passing certain legislation.¹⁰⁹ This form of judicial review is not necessarily inconsistent with the legislative supremacy of Parliament.¹¹⁰ Its importance lies in the task of the judiciary to ensure that Parliament legislates in accordance with the procedure prescribed in the Constitution.

The entrenchment of a special procedure or mechanism for legislating does not, however, on its own constitute an effective way of limiting the exercise of legislative authority, in particular with regard to the rights and freedoms of individuals. Such rights and freedoms are effectively protected through their entrenchment in a Constitution which operates as the supreme law of the land.¹¹¹

The entrenchment of individual rights and freedoms in a Constitution affords individuals effective judicial protection against government excesses. As guardians of the Constitution, the courts would be able to inquire whether a legislative or executive act is in conflict with constitutional provisions which guarantee individual rights and freedoms and to invalidate any Act of Parliament which is found to be in conflict with the constitutional provisions. This form of judicial review enables the judiciary to fulfil the fundamental

¹⁰⁶1952 (2) S.A 428 (A).

¹⁰⁷1954 (4) S.A 769 (A).

¹⁰⁸1957 (1) S.A 552 (A).

¹⁰⁹See Chapt. 4 for a full discussion of these cases.

¹¹⁰See Chapt. 4 **infra**.

¹¹¹See Chapt. 9 and Chapt. 10 **infra**.

role of ensuring that the legislative and executive authorities stay within their constitutional limits in relation to the rights and freedoms of individuals.¹¹²

CHAPTER 3

HISTORICAL SURVEY OF SOUTH AFRICAN CONSTITUTIONAL DEVELOPMENT.

In this chapter the constitutional development of South Africa is analysed. The purpose of this analysis is to trace the development of the doctrine of legislative supremacy in South Africa and the role of the judiciary in the light of this development. An interesting phenomenon in this development is the active role of the judiciary during the period of the Boer Republics, especially in the Transvaal and the Orange Free State.

The constitutional development of South Africa may be divided into four main periods, namely the period before 1910, the period between 1910 and 1961, the period between 1961 and 1983 and the period between 1983 and 1993. All these periods are marked by a particular trend concerning the role of the judiciary and the influence which a tradition of legislative supremacy has had on the role of the judiciary.

Before the occupation of the Cape by the Dutch-East India Company in 1652, parts of what has become South Africa were inhabited by indigenous Black people. The occupation of the Cape by the Dutch-East India Company was not for the establishment of a government but mainly for commercial purposes.¹ Jan van Riebeeck, who effected the occupation, was not a representative of the

¹The occupation was for the establishment of a refreshment station for the Company's ships en route between Holland and the East Indies : See C.F.J Muller **Five Hundred Years: A History of South Africa** (1971) at 21; D. Marais **Constitutional Development of South Africa** (1987) at 4.

Dutch government but of the Company.² Until the Batavian period,³ the government or rule that obtained in the Cape was confined mainly to servants of the Company.⁴

Between 1652 and 1795 the Cape was governed by a Governor, who was the chief representative of the Dutch-East India Company. Legislative, executive and judicial authority vested in a single body, the Political Council.⁵ The Political Council performed its judicial functions as the Council of Justice. A High Court, which replaced the Council of Justice, was established in 1785.⁶

Constitutional development began in earnest with the second occupation of South Africa by the British in 1806, after which, and until 1910, the Cape of Good Hope became, without interruption, a British Colony.⁷ During this period the British system of government gradually found its way into South Africa and eventually became the cornerstone of the South African constitutional system.⁸

1. Constitutional Development before 1910.

²Marais **loc cit.**

³The Batavian Government (1803-1806) was a popular government which replaced the monarchy in Holland after the French conquest. During this period the Cape ceased to be a trading post; it was regarded as a Colony, governed by officials with public responsibility regarding legislative and executive matters: Marais **op cit.** at 11.

⁴See in general Marais **op cit.** at 4-5.

⁵Marais **op cit.** at 7.

⁶Marais **ibid.** at 6-7.

⁷Marais **op cit.** at 12.

⁸**Idem.**

Real constitutional development in the Cape of Good Hope began in 1825 with the establishment of a nominated Advisory Council, consisting of the Chief Justice and some leading officials. Legislation was by way of ordinances of the Governor-in-Council. However, the Council enjoyed very limited control over the Governor and was far from being a representative body.⁹

In 1834 the new Governor, Sir Benjamin D'Urban, introduced a new Constitution. In terms of the new Constitution, government was by an Executive Council, consisting of the four most senior officials and the Governor; the Governor presided at meetings of the Council. The same officials, together with the Attorney-General and from five to seven nominees of the Governor, also constituted the Legislative Council.¹⁰ The legislative powers of the Council were, however, very limited; these powers were restricted to a limited number of topics.¹¹

From 1836 onwards the Voortrekkers gradually began to leave the Cape and settled in Natal, the area between the Orange and Vaal rivers, and in the Transvaal.¹² At an assembly held in 1836 at Thaba'nchu, the Voortrekkers elected seven 'judges' to act as a court of **landdrost** and **heemraden**; they also established a legislature which was to be bound by the rules made at a general meeting of the people.¹³

⁹See H.R. Hahlo & E. Kahn **The Union of South Africa: The Development of its Laws and Constitution** (1960) at 51; G. Carpenter **Introduction to South African Constitutional Law** (1987) at 59.

¹⁰**Idem.**

¹¹**Idem.**

¹²Marais **op cit.** at 21.

¹³Hahlo & Kahn **op cit.** at 59; Carpenter **op cit.** at 61.

In 1838 the Voortrekkers established the Republic of Natalia. Although there was a House of Assembly (the Volksraad), supreme authority was exercised by the people at mass meetings.¹⁴ Elected representatives and government officials were directly responsible to the people.¹⁵ Natal was annexed by the British in 1843 and remained a British colony until Union.¹⁶

A new Constitution, founded on letters patent of 1850, came into force in the Cape Colony in 1853.¹⁷ The new Constitution was based on the British model; it made provision for a Parliament consisting of the Governor, an upper House (the Legislative Council) and a lower House (the House of Assembly). The upper House consisted of the Chief Justice, who acted as its president, and fifteen members elected in single electoral divisions; the lower House consisted of forty-six elected representatives. As the Constitution was based on the British model, parliamentary legislation enjoyed a higher status; courts of law were incompetent to override or set aside parliamentary legislation.

The area between the Orange and Vaal rivers, the Orange River Colony, was annexed by the British in 1849. It gained its independence from British rule in 1854, in terms of the Bloemfontein Convention. Its Constitution provided for a unitary state with a popularly elected unicameral legislature composed only of white adult males. The President was elected by popular vote; he was the head of the executive but not a member of the legislature; although he

¹⁴Marais **op cit.** at 21.

¹⁵See E.W.F Gey van Pittius **Staatsopvatting van die Voortrekkers en die Boere** (1958) at 12.

¹⁶Natal was initially (from 1843 to 1856) governed as an extension of the Cape. It was then later, from 1856 to 1893, governed as a Crown Colony: see Marais **op cit.** at 21.

¹⁷The Constitution was in the form of Ordinance No. 2 of 1852, as amended and confirmed by Order-in-Council of 11 March 1853. The Constitution took effect as from 1 July 1853.

could initiate legislation, he had no power to veto its enactment.¹⁸

The South African Republic (Transvaal), which was established in 1853, did not have a clearly identifiable Constitution. Some form of a 'constitutional' document was produced in 1860. There was no certainty as to whether this 'Constitution' enjoyed the status of fundamental law, with supremacy over enactments of the legislature; neither was any express provision made for its amendment. Indications were that supremacy was vested in the people and not in the legislature.¹⁹ The 'Constitution' made provision for inequality between whites and non-whites; only adult white males were eligible to elect the unicameral legislature. The State President was elected by popular vote. No provision was made for the constitutional guarantee of civil rights.²⁰

There had already been some indications of a unification of the colonies at the turn of the century. Some movement towards a federation of the Orange River Colony and the Transvaal had occurred.²¹ It was not until 1910, however, that the four colonies were unified, after the National Convention of 1908 and the adoption of the South Africa Act, 1909.²²

1.1. **The Legislative Authority before Union.**

The legislative authority in the Cape colony had been based on the British model since 1853.²³ Parliament consisted of a Governor and two houses, the

¹⁸Carpenter **op cit.** at 64.

¹⁹Carpenter **op cit.** at 67.

²⁰Carpenter **op cit.** at 68.

²¹Hahlo & Kahn **op cit.** at 115-118.

²²9 Edw. 7 C.9.

²³The system was parliamentary in nature.

Legislative Council and the House of Assembly. Since the Cape was a British colony its Parliament was, however, not sovereign in the international sense. However, save for the fact that the Cape Parliament was subordinate to the British Parliament it could legislate with a free hand; no court of law was competent to inquire into or to question the validity of acts of the legislature. A similar position also obtained in Natal.

The position in the Orange Free State and the South African Republic (Transvaal) was quite different. The constitutional systems of these two colonies were a marked departure from the British constitutional model. While the Orange Free State Constitution was rigid and consistently adhered to, the Transvaal Constitution was less rigid and constantly flouted.

The Orange Free State Constitution, having been adopted by a Volksraad (people's assembly) specially elected for that purpose, was accepted as a supreme law.²⁴ Although the Volksraad was not supreme it possessed "the highest legislative authority".²⁵ Its function was "to make the law, to regulate the government and the finances of the country".²⁶

The Volksraad's legislative power was limited in two respects. In the first place, amendments to the Constitution had to be adopted by a three-quarters majority at three successive annual sittings (later amended to two sittings in 1866).²⁷ Secondly, there was a guarantee of certain rights, which could not be abrogated by means of ordinary legislation as long the law was not contravened in their exercise. The rights which were guaranteed were the right

²⁴L. M Thompson "Constitutionalism in the South African Republics" 1954 **Butterworths SA Law Rev.** 49 at 51.

²⁵Article 3 : "Het hoogste wetgewend gezag berust bij den Volksraad" : see Thompson 1954 **Butterworths SA Law Rev.** at 52.

²⁶Hahlo & Kahn **op cit.** at 76; Carpenter **op cit.** at 65.

²⁷Carpenter **op cit** at 65.

to peaceful assembly and petition, the right to equality before the law, the right to property and freedom of the press.²⁸ Although freedom of worship was not precluded, it was restricted in that those who stood for public office had to belong to the 'Nederlandsche Hervormde Kerk'.²⁹

Although the legislature was subject to constitutional limitations, no effective machinery existed for the enforcement of these limitations. There was no provision for a trained independent judiciary. Cases were tried by the courts of **landdrosts** and **heemraden**; no specific qualifications were required for appointment as judicial officers in these courts. The **landdrosts** were appointed by the President, subject to the approval of the Volksraad; they could be suspended from office by the President and tried and sentenced for a number of crimes by the Volksraad.³⁰ The President and the Volksraad could therefore in theory override the constitutional limitations without fear of any effective control by the courts; this, however, rarely happened in practice. Although the independence of the courts was not entrenched in the Constitution, it was recognised and respected.

The Constitution of the Transvaal was strikingly different from that of the Orange Free State, both in the manner of its establishment and its form.³¹ Unlike the Orange Free State Constitution, the Transvaal Constitution was not in the form of an ordinary or superior law created by a recognised supreme law-making body. According to Thompson, the Transvaal Constitution

"had rather the nature of a contract between hostile factions, prescribing the conditions of their amalgamation into a single political society; and it derived its authority from its approval

²⁸Thompson 1954 **Butterworths SA Law Rev.** at 53.

²⁹Carpenter **op cit.** at 65.

³⁰Thompson 1954 **Butterworths SA Law Rev.** at 53.

³¹See Thompson 1954 **Butterworths SA Law Rev.** at 58-59; Hahlo & Kahn **op cit.** at 84-90.

by bodies specially convened for that purpose - the **Krygsraad**, the **Committee Raad** and the **Volksraad**".³²

Originally, legislative authority vested in the Volksraad, which consisted of 'representatives of the people'.³³ The Volksraad was the 'highest authority in the country'.³⁴ Its power was, however, restricted in a number of respects. In the first place, legislation had to be enacted in a prescribed manner. Draft laws had to be published in the **Government Gazette** three months before their introduction to the Volksraad; this was intended to give people an opportunity to air their views on the proposed legislation. Proposals for the adoption of legislation were made by the President; a three-quarters majority of recorded votes was required for all decisions of the Volksraad. Laws could only come into force a month after publication.³⁵ Secondly, members of the Volksraad were obliged to take an oath to adhere to the Constitution. Thirdly, there were indications that supremacy in reality vested in the people and not in the Volksraad.

It can be argued, from the nature of the Volksraad, that although this body was the highest legislative authority it was not supreme. It owed its legislative authority to an implied delegation from the people.³⁶ In essence, the authority of the Volksraad emanated from an agreement of the people to unite in a Republic (a **pactum unionis**) and to delegate the power of making laws to a national assembly; the Volksraad could therefore legitimately exercise its

³²Thompson 1954 **Butterworths SA Law Rev.** at 59.

³³The 'representatives' were male burghers of between the ages of thirty and sixty years, enfranchised for three years and belonging to the Nederduitsch-Hervormde Church and possessing immovable property in the Republic : see Hahlo & Kahn **op cit.** at 91.

³⁴Thompson 1954 **Butterworths SA Law Rev.** at 60.

³⁵**Idem.**

³⁶Gey van Pittius **op cit.** at 14-16.

authority only as long as it respected the agreement. The Constitution, which was an actualisation of the agreement, was therefore in principle superior to the legislature.

The constitutional system of the Transvaal underwent a radical change in 1890, when a second Volksraad was created; the old legislature was transformed into a First Volksraad. Of the two bodies, the First Volksraad had more power. The second Volksraad could legislate only on a limited number of topics; its legislation was subject to approval by the First Volksraad. In addition, the President was granted the power to veto legislation.³⁷

1.2. The Relationship between the Legislature and the Judiciary before Union.

The Cape and Natal did not produce any noteworthy cases of constitutional importance concerning the relationship between the legislature and the judiciary. This can largely be ascribed to the fact that the constitutional system in these colonies was based on the British model, with specific emphasis on the legislative supremacy of Parliament and the incompetence of the courts to question or inquire into the validity of acts of Parliament. Sufficient opportunity therefore did not arise for the judiciary to express itself on constitutional issues touching upon the exercise of legislative authority. The position in the Orange Free State and the Transvaal was, however, quite different.

In the Orange Free State judicial authority was at first vested in the courts of **landdrosts** and **heemraden**; these courts were, however, inferior courts which were not manned by trained judicial officers. The Executive Council acted as

³⁷See Hahlo & Kahn **op cit.** at 104 et seq; Carpenter **op cit.** at 69.

a court of appeal from the **landdrosts'** circuit court.³⁸ A High Court, manned by trained judicial officers, was later established by Ordinance No. 2 of 1875.³⁹ The ordinance was not part of the Constitution and could therefore be amended with ease, just like any other ordinary law. The judiciary, however, enjoyed a large measure of independence and did not hesitate to inquire into the validity of legislation when the opportunity arose.⁴⁰ Moreover, the rigidity of the Constitution provided a sound basis for judicial activity in constitutional matters. The position of the judiciary was strengthened further when the Constitution was amended to recognise the courts as the sole judicial authority.⁴¹

The first indication of judicial activity in relation to the exercise of legislative power came after the Volksraad had adopted Rules of Order in which it was proposed to give the Volksraad the power to arrest, try and imprison members of the public for breach of its privilege; it was also proposed to exclude the jurisdiction of the courts. Legislation to give effect to the proposal was abandoned when Chief Justice Melius de Villiers pointed out to the Chairman of the Volksraad that the proposed legislation would be unconstitutional.⁴²

In 1890 the Volksraad passed a law which prohibited Asiatics from settling in the Free State. The validity of this law was challenged in **Cassim and Solomon v The State**.⁴³ It was argued that the law was in conflict with

³⁸Thompson 1954 **Butterworths SA Law Rev.** at 54.

³⁹This Ordinance was later substituted by Ordinance No. 1 of 1887.

⁴⁰Hahlo & Kahn **op cit.** at 77.

⁴¹Article 48 : see Thompson 1954 **Butterworths SA Law Rev.** at 55.

⁴²Thompson **op cit.** at 55.

⁴³1892 **Cape LJ** 58.

article 58, which guaranteed equality before the law, and therefore unconstitutional. The court rejected this argument and held that "the article of the Constitution that 'the laws were equal for all' had not the meaning contended for, and that the Ordinance was not *ultra vires* of the Constitution."⁴⁴ The court's view was clearly based on fact that the Boer Republics did not recognise the rights of persons other than white; the Constitution accommodated whites only.⁴⁵

Chief Justice Melius de Villiers had from the outset made his views on the constitutional role of the judiciary clear. He was a firm believer in respect for, and submission to, constitutional principles. In his view the Constitution had the force of law; it was, according to him, the function of the courts to interpret the Constitution, just as it was the function of the courts to interpret any other law:

"The law-giver wills, the judge interprets. To the business of interpreting the laws the judge has been educated; he is an expert in it; and thereto he is appointed".⁴⁶

The question whether the Volksraad possessed untrammelled legislative power came up for decision in **The State v Gibson**.⁴⁷ In this case the accused had published some material which severely criticised the Volksraad; he was as a result charged with *crimen laesae majestatis*. In giving judgment in favour of the accused, Hertzog J held that the Volksraad did not possess *majestas*. Hertzog J's view was that although the Volksraad was the highest

⁴⁴1892 **Cape LJ** 58, as quoted by Thompson 1954 **Butterworths SA Law Rev.** at 55.

⁴⁵This was also the attitude which prevailed in the Transvaal and at the National Convention which led to the formation of the Union of South Africa.

⁴⁶Melius de Villiers "The Relation of the Judiciary to the Legislative Authority" 1897 **Cape LJ** at 38-39, as quoted by Thompson 1954 **Butterworths SA Law Rev.** at 56.

⁴⁷1898 **Cape LJ** 1.

law-making body in the republic, it was not supreme since it was controlled, and its legislative power limited, by the Constitution. The Constitution was an embodiment of the sovereign will of the people; it was therefore morally and legally superior to the institutions which it had created.⁴⁸

The constitutional tradition of the Orange Free State therefore exhibited substantial constitutionalism. The legislative authority of the Volksraad was limited by the Constitution. This limitation was strengthened by the active role of the judiciary in ensuring that the legislature stayed within the limits of the Constitution.

The position in the Transvaal was somewhat different. Although the independence of the judiciary was recognised, the relationship between the legislature and the judiciary was unstable. The High Court often found itself faced with the task of deciding whether resolutions of the Volksraad were valid laws.

Starting with **Nabal v Bok**⁴⁹ the court had held, per Burgers J, that it was not competent to determine the validity of a resolution of the Volksraad. This decision was based on a strict interpretation of article 2 of the 1859 **addendum** to the Constitution, which required the courts to regard all resolutions of the Volksraad as law. Following this interpretation the court had also held in **McCorkindale's Executors v Bok**⁵⁰ (per Kotze C.J, with Burgers J concurring) that a resolution of the Volksraad had the force of law. The Court's view was that although the judiciary was free and independent in carrying out its functions, it had no authority to reject a resolution of the Volksraad which had been duly adopted as law.

⁴⁸See Thompson 1954 **Butterworths SA Law Rev.** at 57.

⁴⁹(1883) 1 S.A.R 60.

⁵⁰(1884) 2 S.A.R 202.

A subtle change in the Court's view regarding the validity of resolutions of the Volksraad became noticeable in **Dom's Trustees v Bok**⁵¹. Although the majority opinion (Kotze C.J and Esselen J) was that resolutions of the Volksraad had the force of law, Jorissen J gave a dissenting opinion. As an advocate in **McCorkindale v Bok**⁵² Jorissen J had argued that a resolution of the Volksraad did not have the force of law. He pursued this argument in the **Dom's Trustees case**, holding that the Volksraad was bound by the Constitution and that the Court was entitled to inquire into the question whether the provisions of the Constitution had been complied with. He came to the conclusion that the resolution of the Volksraad in issue was not law and therefore invalid.

An **obiter dictum** of Kotze C.J in **Hess v The State**⁵³ carried with it the first sign of the Court's willingness to exercise the power to declare legislation invalid on the ground that constitutional procedures for the passing of legislation had not been followed.⁵⁴ **Obiter dicta** by Ameshoff and Jorissen JJ in **Snuif v The State**⁵⁵ similarly indicated that legislation which was passed contrary to constitutional procedures would be invalid.

⁵¹(1887) 2 S.A.R 187.

⁵²**Supra.**

⁵³(1895) O.R 112.

⁵⁴Kotze C.J had held, however, that the proper course to take was to leave the matter with the legislature to decide whether the procedure in issue, namely three months notice before the adoption of a resolution, could be dispensed with on the ground of urgency. This view was also the **ratio** of the majority judgment in the later case of **Langermann v Johannesburg Liquor Licensing Board** (1897) 4 O.R 137. However, Ameshoff J had held in a dissenting judgment that the court was entitled to decide that issue too.

⁵⁵(1895) 4 O.R 294.

The court finally expressed an unequivocal opinion in **Brown v Leyds**.⁵⁶ It declared a resolution of the Volksraad invalid. According to Kotze C.J the people alone possessed supreme power which they had, in a specified and limited manner, entrusted to the legislature, the executive and the judiciary as set out in the Constitution. The Constitution was, according to the Chief Justice, a fundamental law which laid down the procedure to be followed for the enactment of valid legislation. The Court was, in his opinion, competent and obliged to invalidate legislation which had been passed contrary to constitutional procedures. The procedure had not been modified by the 1859 **addendum**, because any subsequent law which was in conflict with the Constitution had to yield to the fundamental law.⁵⁷

The Court's opinion was not well-received by either the executive or the legislature. The decision of the court not only placed a question mark on the authority of the Volksraad⁵⁸ but also meant that the 1858 Constitution, which made no provision for a method of amendment, could not be validly amended by means of ordinary law. According to Thompson,⁵⁹ "there were no legal means by which the situation could be remedied".

The decision of the Court in **Brown v Leyds**⁶⁰ precipitated a confrontation between President Kruger and Chief Justice Kotze. The Volksraad passed a law which declared that resolutions of the Volksraad were valid laws; the law also expressly excluded the jurisdiction of the courts in

⁵⁶(1897) 4 O.R 17.

⁵⁷Thompson 1954 **Butterworths SA Law Rev.** at 65.

⁵⁸According to a commentator who wrote in the **Cape LJ** 15 (1898) at 107 "[t]he second Volksraad was swept into the limbo of vanities" : see Hahlo & Kahn **op cit.** at 108.

⁵⁹1954 **Butterworths SA Law Rev.** at 65.

⁶⁰**Supra.**

cases where the validity of resolutions of the Volksraad was in issue.⁶¹ Thenceforth, all judges and **landdrosts** were required to swear an oath, before taking office, that they would not test the validity of legislation of the Volksraad.⁶²

In reaction to the violation of their judicial independence, the judges adjourned the High Court **sine die** and, despite mediation by Chief Justice Sir Henry de Villiers of the Cape judiciary, President Kruger eventually triumphed over the judiciary.⁶³

The constitutional history of the Cape, the Orange Free State and the Transvaal illustrates different traditions concerning the relationship between the judiciary and the legislature, and the role of the judiciary within the context of that relationship. In the Cape the doctrine of legislative supremacy prevented the judiciary from inquiring into the validity of legislation; the judiciary did not therefore play any significant constitutional role.

The tradition prevailing in the Orange Free State shows that a rigid written Constitution can serve to limit the exercise of legislative authority and that the judiciary can fulfil the fundamental role of ensuring compliance with the Constitution. Like the United States judiciary, the Orange Free State judiciary played a significant role in the review of legislation in terms of constitutional principles. The Orange Free State Constitution was to a large extent a

⁶¹Law 1 of 1897.

⁶²President Kruger later showed his extreme dislike of judicial review of legislation at the swearing in of the new Chief Justice when he said that "[t]he testing right is a principle of the Devil." : J.G Kotze **Memories and Reminiscences** (1949) at xli - xlii.

⁶³Thompson 1954 **Butterworths SA Law Rev.** at 108-109; J. Dugard **Human Rights and the South African Legal Order** (1978) at 21-22; E. Kahn "The History of the Administration of Justice in the South African Republic" 1958 **SALJ** 294 at 397; 1959 **SALJ** 46.

reflection of the American Constitution and, to a lesser extent, of the French Constitution of 1848 which was in turn to some extent influenced by the American Constitution.⁶⁴

The tradition prevailing in the Transvaal, on the other hand, illustrates the uncertainty that may arise when the Constitution is flexible and is not respected by both the legislature and the executive; judicial control of the exercise of legislative power is not encouraged and there is a tendency to lean towards the supremacy of the legislature as opposed to the supremacy of the Constitution. Although influenced by the Orange Free State Constitution to some extent, the Transvaal Constitution was largely based on the Constitution of the Batavian Republic of 1798 and early Voortrekker legislation;⁶⁵ it did not have the strong roots of American constitutionalism.

2. Constitutional Development from 1910 to 1961.

The formation of the Union of South Africa under the South Africa Act, 1909⁶⁶ brought into existence a new constitutional order. With effect from 31 May 1910 South Africa became a unitary state with responsible government. The system of government was moulded along the lines of the British model. There was a constitutional or ceremonial head of state,⁶⁷ an executive council (the Cabinet) whose members held seats in Parliament and were charged with the administration of state departments, and a legislature (Parliament) consisting of two houses, namely an upper house (the Senate) and a lower house (the House of Assembly).

⁶⁴Hahlo & Kahn **op cit.** at 72-73.

⁶⁵Hahlo & Kahn **op cit.** at 84-85.

⁶⁶9 Edw. 7, c9.

⁶⁷The constitutional or ceremonial head of state was the King of the British Empire, who was represented in South Africa by the Governor-General.

A Supreme Court was established for the whole of the Union, with the former colonial upper courts becoming provincial and local divisions of the Supreme Court of South Africa; an appeal lay from decisions of the provincial and local divisions to an Appellate Division, sitting in Bloemfontein. Final appeal lay to the Privy Council in Britain. The incompetence of courts of law to override or set aside Acts of Parliament ensured that Parliament remained supreme in the sphere of legislation.

2.1. The Status of the Union Parliament.

The Union Parliament was internally supreme in the sense that it could make laws for the peace, order and good government of South Africa. It was, however, still subject to certain limitations and was to that extent a subordinate legislature. In theory, the British Parliament could legislate for the Union; it could also repeal or amend any legislation of the Union Parliament.⁶⁸ The South Africa Act was a creature of the British Parliament and that Parliament could abolish it at any time.

The fact that the South Africa Act was a statute of the British Parliament also constituted a limitation; the Union Parliament could not legislate contrary to provisions of the South Africa Act. The entrenched provisions, which laid down a special procedure for legislation, constituted a serious impediment to the legislative powers of the Union Parliament; Parliament was bound to follow the prescribed procedure when legislating on matters that related to the entrenched provisions.

⁶⁸See **R v McChlery** 1912 AD 199 at 218 where Innes J.A. declared: "The British Parliament is a sovereign body entitled to legislate for the whole Empire. Unfettered by a written Constitution, it is clothed with supreme legislative capacity ... But all other law-giving bodies within the Empire are subordinate. They derive their authority, not from an ancient right, but from the instruments which create them."

The Statute of Westminster of 1931⁶⁹ removed the fetters to which the Union Parliament had hitherto been subject;⁷⁰ it elevated the status of the Union Parliament and removed all doubts there may have been concerning the supremacy of the Union Parliament. The Status of Union Act of 1934⁷¹ formally incorporated the Statute of Westminster into South African law and declared that the Union Parliament was the 'sovereign legislative authority' in and over the Union.⁷²

The elevation of the status of the Union Parliament to a 'sovereign legislative authority' raised the question whether Parliament could ignore the special procedure for legislating in relation to matters concerning the entrenched provisions and the related question whether courts of law were competent to inquire into or pronounce upon the question whether Parliament was competent to ignore the entrenched provisions.⁷³

2.2 The Entrenched Provisions.

The South Africa Act contained two sections which protected the voting rights of certain Blacks and Coloureds, then existing in the Cape,⁷⁴ and the equality

⁶⁹The Statute of Westminster was an Act of the British Parliament which, *inter alia*, gave a dominion Parliament the power to repeal or amend any legislation of the British Parliament which was applicable in that dominion.

⁷⁰The doctrine of repugnance, in terms of which laws of a colonial legislature which were in conflict with an Act of the British Parliament were invalid, was removed by the Colonial Laws Validity Act of 1865. In terms of the Colonial Laws Validity Act a colonial legislation would be invalid on the ground of repugnancy to an Act of the British Parliament only if that Parliament had intended the Act to apply in that colony.

⁷¹Act 69 of 1934. This Act was enacted by the Union Parliament.

⁷²Section 2 of the Act.

⁷³See Chapt. 4 for a discussion of these questions.

⁷⁴Section 35 of the South Africa Act, 1909.

of the English and the Dutch languages.⁷⁵ These sections were entrenched by section 152 of the South Africa Act, 1909, which provided that no law which sought to repeal or alter the two sections would be valid unless it was agreed to by a two thirds majority of all members of Parliament at a joint sitting of both Houses of Parliament. Section 152 itself could only be repealed or altered by following the same procedure.

The concept of constitutional entrenchment as a means of restraining the legislative competence of Parliament was a feature which was foreign to the British constitutional tradition, a tradition which the Union of South Africa followed.⁷⁶ The entrenched provisions of the South Africa Act, 1909, raised two important questions concerning the supremacy of the Union Parliament and the relationship between the Union legislature and the judiciary. First, the question arose whether the Union Parliament was fully supreme, just like the British Parliament and could, if so, override constitutional restraints on its legislative competence. Second, whether the courts were competent to declare that laws which were passed in contravention of constitutional restraints were invalid and of no force and effect.

The questions concerning the effect of the entrenched provisions, the legislative competence of the Union Parliament and the relationship between Parliament and the judiciary became the main features of the constitutional crisis of the 1950s. This constitutional crisis, and the decisions of the courts associated with it, is discussed in a separate chapter.⁷⁷

The constitutional crisis of the 1950s culminated in the abolition of the voting rights of Coloured persons; these rights were still entrenched in section 35 of

⁷⁵Section 137 of the South Africa Act, 1909.

⁷⁶The British Parliament had never been subject to any constitutional restraints.

⁷⁷See Chapter 4, *infra*.

the South Africa Act, 1909.⁷⁸ The Union of South Africa continued to exist until the adoption of a new Constitution in 1961. The new Constitution, the Republic of South Africa Constitution Act⁷⁹ established a Republic of South Africa.

3. The 1961 Constitution.

The legislative supremacy of Parliament was a **fait accompli** at the end of the constitutional crisis of the 1950s. The 1961 Constitution merely formalised the status of Parliament as a sovereign law-making body. In terms of section 59(1) of the Constitution, Parliament was the sovereign legislative authority in and over the Republic and had full power to make laws for the peace, order and good government of the Republic. Section 59(2) provided that no court of law was competent to inquire into or pronounce upon the validity of an act of Parliament, save only in relation to the question whether the prescribed procedure had been followed in instances where an Act of Parliament had the effect of amending or repealing sections 108 and 118 of the Constitution. Section 108 guaranteed the equality of the English and Afrikaans languages; section 118 was the entrenching provision.

Apart from sections 108 and 118 the 1961 Constitution did not contain any other entrenched provisions which required a special procedure for their amendment or repeal. However, the Constitution did contain certain unentrenched provisions in respect of which a special procedure of legislating was imposed. Section 114(a) provided that Parliament could not alter the boundaries of a province, unless the province whose boundaries were affected had requested the alteration; section 114(b) provided that Parliament could not abolish any provincial council or abridge its powers, except at the request of

⁷⁸The voting rights of those Black persons who qualified to vote had been effectively abolished by the Representation of Natives Act, 1936.

⁷⁹Act 32 of 1961.

the provincial council concerned.⁸⁰

The fact that the South African constitutional system was largely a transplantation of the British constitutional system characterised it as a Westminster prototype. A parliamentary system of government, the legislative supremacy of Parliament and the protection of basic human rights by the ordinary courts applying the ordinary law of the land, as opposed to a protection of fundamental rights in a justiciable bill of rights, constituted the most important features of the Westminster system of government.

4. The Westminster Tradition in the South African Constitutional System.

4.1. The Nature of the Westminster System.

The Westminster system is capable of being understood in two senses, namely the narrow sense and the broad sense.⁸¹ In its narrow sense it is the British system of government.⁸² In its broad sense it is a system which is largely based on the British system of government; such a system has the characteristic features of the British constitutional system.⁸³ The previous South African constitutional system was regarded as falling within the latter

⁸⁰See Chapt. 4 for a discussion of the unentrenched procedural provisions of the 1961 Constitution.

⁸¹See S.A de Smith **The New Commonwealth and its Constitutions** (1964) at 77-78; G. Carpenter **op cit.** at 74; D. Basson & H. Viljoen **South African Constitutional Law** (1988) at 207. According to Boule **South Africa and the Consociational Option** (1984) at 4, no precise constitutional or political meaning can be attached to the term 'Westminster system'.

⁸²Carpenter **op cit.** at 74; Basson & Viljoen **op cit.** at 207.

⁸³**Idem.**

category.⁸⁴

De Smith⁸⁵ has identified the following as some of the features of the Westminster system in the narrow sense:

- 1) a constitutional head of state who is not the effective head of government;
- 2) a Prime Minister who is the effective head of government and presides over a Cabinet composed of Ministers; the Prime Minister has a substantial measure of control in the appointment and removal from office of Ministers;
- 3) a parliamentary government, in the sense that Ministers must be members of the legislature;
- 4) collective and individual responsibility of Ministers to a freely elected and representative legislature.

The following characteristic features of the Westminster system in the narrow sense can be added to those mentioned by de Smith:

- 1) the legislature is composed of two chambers, an upper House and a lower House. The upper House is non-elected, while the lower House is elected. Members of the lower House are elected on the basis of territorial representation in single member constituencies, with voters electing their representatives on the basis of universal franchise;
- 2) the Prime Minister is the leader of the party which has the majority support in the lower House; the party with the second largest support in the lower House becomes the official opposition;
- 3) there is a distinction between the legislative, executive and judicial authorities, although the principle of the separation of powers is not maintained with consistency;

⁸⁴See for example the reports of the Theron Commission (RP 38/1976, para. 178) and the Schlebusch Commission (RP 68/1980 at 4).

⁸⁵De Smith **op cit.** at 77-78. See also D.H van Wyk "The Westminster System" in D.J Van Vuuren & D.J Kriek (eds) **Political Alternatives for South-Africa: Principles and Perspectives** (1983) at 259-273.

4) the legislature (Parliament) is supreme; its legislative competence is virtually unrestricted and courts of law are incompetent to inquire into or pronounce upon the validity of enactments of the legislature. Parliament is, however, bound to observe non-enforceable conventions;

5) basic human rights are protected by the ordinary courts applying the ordinary law of the land; there is no formal protection of fundamental human rights and freedoms in a rigid Constitution.⁸⁶

According to Boule⁸⁷ the Westminster system in the broad sense is a reflection of the main elements of the British system of the government as it underwent a process of evolutionary development. In this sense, the Westminster system of government is characterised by a constitutional head of state, a bicameral legislature, parliamentary government, an independent judiciary and a politically neutral civil service. The most important characteristic feature of government, however, is the legislative supremacy of Parliament.⁸⁸

The constitutional system which was introduced in South Africa after the second British occupation of the Cape in 1806 was essentially based on the Westminster system as it obtained in Britain. The Westminster tradition continued under the 1909 Constitution (the South Africa Act, 1909) and the 1961 Constitution (the Republic of South Africa Constitution Act, 1961).⁸⁹

⁸⁶See Carpenter **op cit.** at 75-78; J.D van der Vyver **Die Grondwet van die Republiek van Suid-Afrika** (wet 110 van 1983) at 3-5.

⁸⁷Boule **op cit.** at 217-218; L.J Boule "The Second Republic: Its Constitutional Lineage" 1980 **CILSA** at 1-34.

⁸⁸D.A Basson & H.P Viljoen **South African Constitutional Law** (1988) at 207; Boule, Hoexter & Harris **op cit.** at 117.

⁸⁹According to Van Wyk "Westminsterstelsel - requiescat in pace? of: kan 'n luiperd sy kolle verander?" 1980 **THRHR** 105 at 107, the Westminster system was established in South Africa in a fairly untainted form.

The characteristic features of the Westminster system as it obtained under the 1961 Constitution were that there was a State President who was not the effective head of the government; the effective head of government was a Prime Minister who was the leader of the party with a majority of members in Parliament and who presided over a Cabinet consisting of Ministers appointed by him; there was a bicameral Parliament which consisted of a House of Assembly and a Senate, with members of the House of Assembly being elected on the basis of territorial representation in single member constituencies; there was a distinction between the co-ordinate branches of government, namely the legislative, executive and judicial authorities, although the principle of the separation of powers was not consistently maintained; the relationship between the co-ordinate branches of government was largely determined by conventions; and, most importantly, the principle of legislative supremacy operated.⁹⁰

The South African constitutional order, however, manifested a number of deviations from the Westminster system of government in the narrow sense. In the first place, the South African constitutional order was largely based on a written Constitution.⁹¹ Secondly, the entrenched provisions of the South Africa Act and the Republic of South Africa Constitution Act, 1961 restricted the legislative competence of Parliament in that a special and more difficult procedure was required for the amendment or repeal of some of the constitutional provisions.⁹² A further deviation occurred when, after the abolition of the Senate in 1980, Parliament was made up of only one House from 1980 to 1984. All these features are completely foreign to the Westminster system in the narrow sense. The provincial system of government, which was not a deviation *per se*, was also another feature which

⁹⁰See Carpenter *op cit.* at 80.

⁹¹Although written, the Constitution took the form of an ordinary statute and did not have the status of supreme law.

⁹²See Boule 1980 *CILSA* 9-30.

differentiated the South African prototype from the Westminster system in the narrow sense.

Boulle⁹³ mentions some other important deviations from the Westminster system proper, namely the restriction of the parliamentary franchise to whites only, communal representation for those excluded from the parliamentary franchise, separate development within the same constitutional unit for different population groups, and a disregard for the rule of law. It may be argued that the features mentioned by Boulle were in essence not only deviations from the Westminster system but also deviations from recognised democratic principles.

The South African electoral system had been racially based since the abolition of the voting rights of Coloured persons. Only persons classified as white in terms of South Africa's race classification laws were entitled to vote.⁹⁴

4.2. The Judiciary and the Protection of Human Rights under the Westminster System.

The doctrine of legislative supremacy, as a central characteristic feature of the Westminster system limits the role of the judiciary in the protection of basic human rights and freedoms against legislative encroachment. The legislature, as the supreme law-making body, can freely enact legislation that has the effect of abolishing or curtailing basic human rights; the judiciary would in such instances be incompetent to inquire into or pronounce upon the substantive validity of such legislation.

Traditionally, the protection of human rights under the Westminster system of

⁹³**Idem.**

⁹⁴Sections 2 and 3 of the Electoral Act, 45 of 1979.

government is enhanced by the operation of the rule of law.⁹⁵ Dicey⁹⁶ lists three characteristic features of the rule of law, namely (i) the adjudication of legal disputes by the ordinary courts of the land before a person can be punished or his rights may be violated; (ii) the subjection of everybody to the law as a means of ensuring equality of treatment and (iii) the protection of citizens' rights through the processes of the ordinary courts of the land.

Dicey regarded the rule of law as an important safeguard against the violation of the rights of citizens by those who exercise the authority of the state. His formulation of the rule of law is, however, inadequate in relation to the protection of the individual's rights and freedoms. As a doctrine which complements parliamentary sovereignty, its application is limited by the fact that any rule upon which it is based may be abolished by Parliament. The common law of the land, which Dicey viewed as the most important vehicle through which the courts can protect the rights of individuals, can be made ineffective by enactments which take away or limit those rights which are recognised at common law.⁹⁷

In the United Kingdom the operation of the rule of law in relation to the protection of human rights is facilitated by at least two constraints which indirectly regulate the content of legislation. Firstly, civil rights are generally respected; the British public has generally exercised tolerance and political compromise. Secondly, the United Kingdom has a good track record of participatory democracy based on universal suffrage; an unpopular government is unlikely to be voted back into office. This has not always been the case in

⁹⁵A.V Dicey **Introduction to the Study of the Law and the Constitution** (1975) at 183 *et seq.* See Chapt. 4 for a discussion of Dicey's view of parliamentary sovereignty.

⁹⁶**Loc cit.**

⁹⁷See Wade's introduction to Dicey **op cit.** at (i) *et seq.*; Basson & Viljoen **op cit.** at 222.

South Africa. According to Boule⁹⁸ the rule of law in South Africa "has not performed the crucially important role of qualifying the doctrine of parliamentary supremacy as should be the case in the Westminster system of government."

The traditional protection of human rights under the common law has, however, been found to be inadequate even in Britain. There has in recent times been an increasing support for the protection of human rights in a justiciable bill of rights.⁹⁹ The United Kingdom's entry into the European Economic Community (established by the Treaty of Rome), and its ratification of the European Convention on Human Rights has strengthened the protection of human rights and may very well lead to a new constitutional order in the United Kingdom, with legal guarantees of fundamental human rights.¹⁰⁰

The provisions of the European Convention on Human Rights can be enforced by the European Court for Human Rights; the British Parliament has without exception changed the law so as to bring it in line with those decisions of the Court in which it was decided that English law is in conflict with the provisions of the European Convention on Human Rights.¹⁰¹

⁹⁸Boule 1980 **CILSA** at 30.

⁹⁹See L. Scarman **English Law - The New Dimension** (1974), especially at 18-21; M. Zander **A Bill of Rights?** (1979), Chapt.1.

¹⁰⁰Scarman **op cit.** at 9-27; L. Scarman "Fundamental Rights: The British Scene" 1978 **Columbia LR** 1575 at 1580 **et seq.**; A. Lester "Fundamental Rights in the United Kingdom : The Law and the British Constitution" 1976-1977 **Univ. of Pennsylvania LR** 337 at 356 **et seq.**

¹⁰¹N. Bratza **European Convention for the Protection of Human Rights - Selected Cases**, paper delivered at the International Human Rights Seminar, Magaliesburg, 27-29 July 1986 Background Materials, Legal Resources Centre, University of the Witwatersrand, vol. 2

Modern writers have developed an expanded or dynamic concept of the rule of law. This concept attempts to free the rule of law from the limits implicit in Dicey's view.

According to Beinart¹⁰² the rule of law is a political rather than a juridical concept. In his view the rule of law has two meanings; firstly, in a formal sense, it is synonymous with law and order within a state and, secondly and most importantly, it implies legality in the sense that the creation of legal rules must be in terms of acceptable legal rules. In this sense the rule of law does not constitute a mechanism for the effective protection of the rights and freedoms of the individual but merely provides a code of conduct in relation to those rights which the government thinks are worth protecting. Van der Vyver¹⁰³ also shares the view that the rule of law merely implies legality.¹⁰⁴ He feels that the rule of law is inadequate in the protection of fundamental individual rights and freedoms; all it does is to require that both the government and the citizens must be subject to law.

According to Mathews,¹⁰⁵ the rule of law is characterised by, firstly, the absence of arbitrary exercise of power over individuals, secondly, equal liability before the law for both individuals and those who exercise the authority of the state and lastly, the presence of effective legal remedies which provide protection for the individual.

at 51 *et seq.*

¹⁰²B. Beinart "The Rule of Law" 1962 *Acta Juridica* 99.

¹⁰³J.D van der Vyver *Seven Lectures on Human Rights* (1976) at 106 *et seq.*

¹⁰⁴Legality in this sense implies adherence to acceptable legal rules.

¹⁰⁵A.S Mathews "A Bridle for the Unruly Horse?" 1964 *SALJ* 312 *et seq.*

Mathews¹⁰⁶ has identified four theoretical approaches to the rule of law. The first approach, the law enforcement approach, is no more than rule by law in a legally ordered society; the second approach, the procedural justice approach, sets out certain standards of legality in terms of which the state authority must function; the third approach, the material justice approach, seeks to attain social and political justice. The fourth approach, the protection of basic rights approach, affords the citizen full protection of his basic rights and freedoms.

Mathews rejects the first two approaches as falling short in the protection of the rights of the individual; he regards the material justice approach as insufficient in that it is too all-embracing.¹⁰⁷ He supports the protection of basic rights approach because it recognises the vulnerability of human rights in relation to the exercise of state authority and seeks to provide a full protection of these rights.

Mathews bases his support for the protection of basic rights approach on the relationship between basic rights and legality or formal justice.¹⁰⁸ In terms of this relationship legality means more than a formal adherence to rules; it means that basic rights must be equally guaranteed to all and protected by regular courts applying pre-announced, general, durable and reasonably precise rules; it also means that basic rights must be limited only in terms of rules which conform to the requirements of legality. The scope of restrictions on the rights and freedoms must furthermore be limited.¹⁰⁹

¹⁰⁶A.S Mathews **Freedom, State Security and the Rule of Law** (1986), Part I.

¹⁰⁷Apart from being too all-embracing, the material justice approach, if not premised on principles of a material **Rechtsstaat**, would encourage too much policy-making on the part of the judiciary.

¹⁰⁸**Op cit.** (1986) at 16-17.

¹⁰⁹**Ibid.** at 20.

Mathews's reformulation of the rule of law recognises the intrinsic worth of rights and freedoms and the values inherent in them. According to him, the basic rights which the reformulated rule of law seeks to realise and protect through adherence to legality are "simultaneously substantive rights to be realised for their own sake and instrumental rights through which social objectives can be expressed and achieved."¹¹⁰ He views legality not only as a set of rules but also as something which "facilitates constant reassessment of current policies and the re-evaluation of social purposes, needs and consequences."¹¹¹

Sanders¹¹² views the rule of law as a legal-political code of conduct with respect to fundamental claims of subjects; it is characterised by, inter alia, legal certainty, restricted government, equality before the law, effective legal remedies, minimum standards of justice and an independent judiciary.

Viewed in the sense of legality, the rule of law therefore means that basic standards of clarity, certainty, accessibility, generality, equality etc must be observed by those who exercise the authority of the state when the rights and freedoms of individuals are in issue. In its modern extrapolated sense, the rule of law therefore means that "human rights should be protected by the rule of law".¹¹³ This is the more dynamic concept of the rule of law.

The rule of law does not **guarantee** the protection of fundamental individual

¹¹⁰**Idem.**

¹¹¹**Idem.**

¹¹²A.J.G.M Sanders "Die Rule of Law - 'n Gemeenregtelike Westerse gedagskode" 1971 **THRHR** 164 **et seq.**

¹¹³Preamble to the Universal Declaration of Human Rights. The International Commission of Jurists adopted the concept of 'rule of law' as a collective term for those legal principles which it regards as essential for the implementation of the doctrine of human rights: Van der Vyver **op cit.** at 112.

rights and freedoms even in its modern extrapolated sense. Its significance is that it serves as a procedural mechanism through which the protection of individual rights and freedoms can be enhanced. In this sense it means, in relation to a supreme Constitution which guarantees fundamental rights, that when the authority of the state is exercised in relation to fundamental rights which are guaranteed in the Constitution standards of clarity, certainty, accessibility, generality, equality etc must be observed.¹¹⁴

The function of the rule of law in relation to judicial interpretation of a supreme Constitution is that it requires the judiciary to be committed to the primacy of law, especially the law of the Constitution. Law in this sense means the totality of legal rules, principles and fundamental values which constitute the whole legal system and are necessary for the attainment of man's basic needs and happiness in society. These are rules, principles and values which materially or tangibly, and not merely sufficiently, enhance the life of man in society.

5. The 1983 Constitution.

The 1983 Constitution¹¹⁵ was adopted with the intention of moving away from the Westminster system of government and of accommodating persons classified as 'Coloureds' and 'Indians' in decision-making in matters affecting the interests of these population groups.¹¹⁶ It made provision for three racially based legislatures, namely the House of Assembly for Whites, the House of Representatives for Coloureds and the House of Delegates for

¹¹⁴D. Beatty "The Rule (and Role) of Law in a new South Africa : Some Lessons from Abroad" 1992 **SALJ** 409 at 423.

¹¹⁵Republic of South Africa Constitution Act, No. 110 of 1983.

¹¹⁶See the speech of the Minister of Constitutional Development and Planning at the second reading in Parliament of the Constitution Bill **Hansard, House of Assembly Debates** No. 15, 16-20 May 1983, col. 7053.

Indians. The three Houses legislated together on matters of general interest but legislated independently on matters which were the exclusive concern of the population groups they represented.

The Constitution brought about some changes to the Westminster tradition in South Africa. It introduced a somewhat feeble form of consociationalism. Properly understood the concept of consociationalism has four main characteristic features, namely government by a grand coalition of all political leaders who enjoy the support of the significant political sections of the community, the existence of a right of veto, the principle of proportionality in representation, value allocation and appointments to the civil service, and a high degree of autonomy for each segment of the community in matters of own affairs.¹¹⁷

Under the 1983 constitutional dispensation some consociational features were reflected, firstly, in the tricameral Parliament. The coalition element was, however, restricted to the leaders of the majority parties representing three population groups and did not encompass all leaders of the significant political segments of the community. Secondly, the distinction between 'own affairs' and 'general affairs'¹¹⁸ was based on the principle of segmental autonomy. The principle of proportionality and the veto right were virtually absent from the dispensation. The 1983 Constitution did not, therefore, successfully introduce a consociational democracy.¹¹⁹

¹¹⁷See A Lipjart **Democracy in Plural Societies : A Comparative Exploration** (1977) at 25 et seq; Boule "Federation and Consociation : Conceptual Links and Current Constitutional Models" (**op cit.**) at 236 et seq.

¹¹⁸Sections 14 and 15 of the Republic of South Africa Constitution Act, 110 of 1983.

¹¹⁹See J.D van der Vyver **Die Grondwet van die Republiek van Suid-Afrika** (**op cit.**) at 74-83; Basson & Viljoen **op cit** at 201-206.

Under the Westminster system proper a distinct line is drawn between the leader of the party which enjoys majority support in Parliament and forms the government of the day, and the leader of the opposition party, which is the party with the second largest majority in Parliament; coalitions rarely occur. The principles of proportionality and segmental autonomy are completely foreign to the Westminster system of government.

There is no general consensus whether the consociational element in the 1983 constitutional dispensation amounted to an abandonment of the Westminster tradition. According to Van der Vyver,¹²⁰ the 1983 Constitution completely abandoned the Westminster system. He points out to the comprehensive competences of the executive State President in the executive and legislative spheres¹²¹ and the unqualified power of judicial review in respect of all procedural requirements contained in the Constitution Act¹²² as factors which undermined the important Westminster notion of the legislative supremacy of Parliament.

Booyesen and Van Wyk¹²³, on the other hand, are of the view that the 1983 Constitution did not completely abandon the Westminster tradition but retained it, especially in relation to own affairs. They point to the fact that, as is the case under the Westminster system, the State President acted on the advice of the three own-affairs cabinets (the Ministers' Councils) in the exercise of his executive powers in regard to own affairs and the fact that the concept of ministerial responsibility still remained. A strong element of the Westminster

¹²⁰Van der Vyver **ibid.** at 6-8.

¹²¹See section 5.1 **infra.**

¹²²See section 5.2 **infra.**

¹²³H. Booyesen & D. van Wyk **Die '83 Grondwet** (1984) at 61 **et seq.** and 78 **et seq.** See also Carpenter **op cit** at 282-285; L. Boule, B. Harris & C. Hoexter **Constitutional and Administrative Law** (1989) at 167-168; D.H van Wyk "The new Constitution" 1983 **SAYIL** 111.

system which still remained, albeit in a watered-down form, was the concept of legislative supremacy; the Constitution still did not enjoy the status of 'higher law' in relation to other statutes. Territorial representation, a high degree of overlap between the legislature and the executive, and unitary characteristics¹²⁴ were also retained.

It seems proper to regard the 1983 Constitution as representing a marked departure from the Westminster system. Boule¹²⁵ points out that the South African version of the Westminster system has always deviated from the Westminster-proper model. The 1983 Constitution continued with this traditional deviation, albeit in a more pronounced way than in the past; it contained both Westminster and non-Westminster characteristics.

The 1993 Constitution¹²⁴, on the other hand, represents a clear departure from the Westminster System. It is a supreme Constitution which entrenches fundamental human rights and freedoms and largely follows the American and German constitutional traditions;¹²⁵ the protection of fundamental human rights and freedoms in a supreme Constitution is foreign to the Westminster system.

5.1. Legislative Authority under the 1983 Constitution.

Legislative authority was vested in the State President and Parliament, consisting of the three Houses.¹²⁶ The distinction between own and general

¹²⁴The distinction between own affairs and general affairs and the degree of autonomy enjoyed by the various population groups in matters affecting each group exclusively were the only traits of federalism.

¹²⁵Boule 1980 **CILSA** at 1-2.

¹²⁴The Constitution of the Republic of South Africa Act, 200 of 1993.

¹²⁵See Chapter 9 for a discussion of the 1993 Constitution.

¹²⁶Section 30.

affairs,¹²⁷ however, essentially amounted to a division of the legislative authority of Parliament. Legislative authority in regard to general affairs was shared by the three Houses; legislative authority in regard to own affairs was vested exclusively in the House concerned. Each House had exclusive 'supreme' legislative authority in the sphere of own affairs. Despite the division of its legislative authority, Parliament nevertheless remained, in terms of section 30, the "sovereign legislative authority in and over the Republic." The 'sovereignty' of Parliament still affected the courts' power to review parliamentary legislation.¹²⁸

The supremacy of Parliament was, however, watered down in that the State President and the President's Council had pivotal roles in the legislative process.¹²⁹ More importantly, however, the nature and extent of constitutional entrenchment limited the legislative supremacy of Parliament in regard to the procedural and structural requirements for legislating.

Unlike the 1961 Parliament the 1983 Parliament was fettered by a large number of justiciable procedural provisions.¹³⁰ The power to repeal or

¹²⁷Section 14 and section 15.

¹²⁸See *infra*.

¹²⁹In terms of section 16(1)(a) the State President was empowered to decide whether a matter was an own affair or a general affair, so that he had a crucial role in determining whether an issue falls within the legislative competence of Parliament or not. The President's Council, which was neither part of the legislature nor a representative body, could act as a substitute legislature in instances where the Houses disagreed whether a bill should become a law or not; in such instances the State President was empowered to refer the bill to the President's Council and once the Council had made its decision the bill was deemed to have been a law passed by Parliament and could be presented to the State President for his assent: section 32(4).

¹³⁰In terms of section 34(2)(a) of the 1983 Constitution any division of the Supreme Court was competent to inquire into and pronounce upon the question whether the provisions of the Constitution have been complied with. The reference to the provisions of the Constitution was a reference to the procedural provisions and not to the substantive validity of legislation: see

amend these provisions was restricted by two types of entrenchment; both the procedural provisions and the entrenchments essentially placed upon the courts the fundamental role of ensuring that Parliament legislated in accordance with the prescribed procedures.¹³¹ These procedures did not, however, serve any meaningful purpose in the protection of individual rights.

The first type of entrenchment was more rigid and required a two-thirds majority of members of every House¹³². The second type of entrenchment was less rigid and required more than half the total number of members of each House for the repeal or amendment of some 45 procedural provisions.¹³³ In essence, these provisions implied that each House of Parliament had a veto right to prevent the repeal or amendment of any one of the entrenched provisions.¹³⁴ However, the entrenchments amounted to merely a restriction as to the manner and form of legislation; Parliament retained its supremacy in respect of the area of its power.

The protection of basic human rights had been proposed but rejected. The President's Council had stated in its second report that the entrenchment of human rights "runs counter to the concept of the sovereignty of Parliament". The rejection of the protection of human rights in a Bill of Rights was based on three main considerations. First, it was considered that there was no acceptable judicial standard in terms of which basic human rights could be classified; secondly, it was thought that the entrenchment of human rights would amount to the imposition of stringent restrictions on future generations;

infra.

¹³¹See **infra.**

¹³²Section 99(2). This section entrenched itself and section 89; section 89 guaranteed the equality of the English and Afrikaans languages.

¹³³Section 99(3).

¹³⁴Basson & Viljoen **op cit.** at 197.

and thirdly, it was thought that the determination of the constitutionality of legislation in terms of a Bill of Rights would be time consuming and would lead to legal uncertainty.¹³⁵

5.2. Judicial Review of Legislation under the 1983 Constitution.

Section 34(2)(a) of the Constitution provided that the Supreme Court was, subject to the provisions of section 18,¹³⁶ competent to inquire into and pronounce upon the question whether the provisions of the Constitution had been complied with. In terms of section 34(3) no court of law was competent to inquire into or pronounce upon the validity of an Act of Parliament, save as provided in section 34(2)(a).

Section 34(2) cannot be construed as also having empowered the courts to inquire into and pronounce upon the substantive validity of Acts of Parliament. A proper reading of section 34(2)(a) and a consideration of the position before the 1983 Constitution suggest that the reference to 'the provisions of this Act' in the section was a reference to those provisions of the Constitution that dealt with the manner and form of legislation and not to the content of legislation.¹³⁷ An intention to include judicial inquiry into the

¹³⁵See H.J Coetsee "Hoekom nie 'n Verklaring van Menseregte nie" 1984 **TRW** 5 et seq. For a critique of these objections to the entrenchment of human rights see D.H van Wyk "The New Constitution" 1983 **SAYIL** 111 et seq.

¹³⁶Section 18(1) empowered the court to inquire into the question whether the State President had consulted the Speaker of Parliament and the Chairmen of the respective Houses before issuing a certificate in respect of a Bill of own affairs; section 18(2) provided that except for the competence provided for in section 18(1) the court was not empowered to inquire into a decision by the State President that a matter is an own affair. These sections did not relate to 'supremacy' issues but to the exercise of executive power.

¹³⁷See J.D van der Vyver "Judicial Review under the new Constitution" 1986 **SALJ** 236 at 238. According to van der Vyver "the verb used by the legislature in the phrase 'whether the provisions of this Act were complied

content of legislation would have been expressed in clear and unambiguous terms. Section 34(3) also clearly showed an intention to exclude judicial inquiry into the content of Acts of Parliament, including the Constitution itself.

The absence of a Bill of Rights and the exclusion of judicial inquiry into the content of legislation resulted in a very limited role of the judiciary in controlling legislation which violated basic human rights. The only 'right' in respect of which the courts would have been able to exercise a power of review, and only with regard to the question whether the prescribed procedure had been followed, was the provision guaranteeing the equality of the English and Afrikaans languages.¹³⁸

The 1983 Constitution did, however, remove the uncertainty that existed regarding the question whether the courts' testing right was restricted only to the entrenched provisions of the Constitution or included the unentrenched procedural provisions as well. The approach of the courts has been extremely formalistic in this regard.¹³⁹ Section 34(2)(a) of the 1983 Constitution extended the courts' testing right to all the procedural provisions of the Constitution. These provisions, however, largely dealt with governmental structures and did not in any way protect fundamental human rights and freedoms.

The guarantee of fundamental human rights in a Bill of Rights under the 1993 Constitution places the protection of individual rights and freedoms on firmer ground. Under the new constitutional dispensation the judiciary has a cardinal role to play in ensuring that the legislature and the executive respect

with' (my emphasis) has a procedural connotation".

¹³⁸Section 89. Section 89 was entrenched by section 99(2).

¹³⁹See Chapt. 4 for a discussion of the relevant cases and the views of some of the writers.

constitutional guarantees.¹⁴⁰ The cardinal role of the judiciary in controlling the exercise of legislative and executive power and ensuring compliance with the provisions of the Constitution is a clear indication of the abandonment of the Westminster system of government.

¹⁴⁰See Chapt. 9 *infra*.



CHAPTER 4

LEGISLATIVE SUPREMACY AND THE JUDICIARY IN SOUTH AFRICA PRIOR TO 1994.

Within the context of the concept of the separation of powers and checks and balances,¹ the fundamental function of the judiciary is to control the exercise of authority by the legislature and the executive.² This control function stems from the fact that both the governed and those who govern must obey the law; to ensure that this goal is achieved the judiciary must interpret and apply the law. The controlling function of the judiciary therefore implies that the judiciary may be called upon to look into the question whether a piece of legislation complies with the law.

Legislation has constitutive and procedural components as well as a substantive component. The constitutive and procedural components relate to the form and manner in which legislation is enacted, that is the structural composition of the legislative organ and the prescribed procedures which the legislature has to follow when legislating; the substantive component relates to the content of legislation, that is whether it is reasonable or unreasonable, fair or unfair, moral or immoral.³ Whether, in a given constitutional system, the judiciary has the control function in relation to any of these components

¹See Chapt. 5 **infra** for a discussion of the separation of powers.

²D. Basson & H. Viljoen **South African Constitutional Law** (1988) at 169.

³**Idem.**

depends on the nature of the Constitution and the relationship between the legislature and the judiciary.

In this chapter, the relationship between the legislature and the judiciary in South Africa, before the coming into operation of the Republic of South Africa Constitution Act of 1993⁴, as it pertains to the courts' power to review the validity of legislation is examined. Cases relevant to this relationship, in particular those cases which fall within the period of the constitutional crisis of the 1950s, and the views of some leading constitutional writers, are examined. This examination is aimed at illustrating a strain that exists between the doctrine of legislative supremacy and the constitutional guarantee of the rights of individuals, as well as the role of the judiciary in easing this strain.

1. Legislative Supremacy and Judicial Review of Legislation.

By its very nature, the doctrine of legislative supremacy is not compatible with the courts' power to inquire into and pronounce upon the substantive validity of legislation. Were the courts to have the power to review the substantive validity of legislation, it would mean that the legislature is not omniscient and does not possess supreme law-making powers.⁵

The question whether, in a system of legislative supremacy, the courts have the power to inquire into and pronounce upon the validity of legislation is essentially associated with the nature and limits of legislative supremacy.

1.1. The Nature and Limits of Legislative Supremacy.

The original understanding of the doctrine of legislative supremacy is

⁴Act No 200 of 1993.

⁵Basson & Viljoen **op cit.** at 170.

generally associated with the absence of legal restraints on the legislative competence of Parliament. This implies, first, that Parliament is competent to legislate on any matter whatsoever and secondly, that courts of law are incompetent to pass judgment upon Acts of Parliament.⁶

The idea that Parliament can legislate on any matter whatsoever is, however, not completely true. The concept of law contains within it certain essential limitations on the regulatory powers of law-creating agencies. In the first place, the legislature cannot legislate beyond the characteristic essence of the aspect of reality; the legislature cannot, for example, pass a law which alters the natural characteristics of things. Secondly, the efficacy of legislation is limited by certain fundamental substrata that constitute an integral part of the structural make-up of the law, such as territorial limits, a basic power structure to support the implementation of law, and a social setting. Thirdly, external stipulations of legality, such as geographical setting, prevailing social conditions and economic structure may affect the feasibility of legislation. Lastly, Parliament may itself impose, or have imposed upon it by another superior body, substantive or procedural restraints.⁷

The last type of limitation, namely the imposition of substantive or procedural restraints, constitutes a major doctrinal problem in the doctrine of legislative supremacy. A legislature with restraints imposed on its legislative powers can no longer be said to have supreme legislative powers. The imposition of substantive restraints, in particular, materially impairs the supremacy of Parliament, in the sense that Parliament is not allowed to pass legislation

⁶A.V Dicey **An Introduction to the Study of the Law of the Constitution** (1975) at 39; E.C.S Wade, G. Phillips & A.W Bradley **Constitutional and Administrative Law** (1977) at 59.

⁷J.D van der Vyver "Parliamentary Sovereignty, Fundamental Freedoms and a Bill of Rights" 1982 **SALJ** 557 at 565-566.

which is in conflict with the substantive limitations.⁸

In its modern context, the concept of legislative supremacy is amenable to two views, namely the absolutist or 'continuing' view and the relativist or 'self-embracing' view. The expressions 'continuing' and 'self-embracing' are used in current English constitutional law literature and are therefore preferable.⁹

1.2. The 'Continuing' View of Legislative Supremacy.

The assertion that Parliament cannot be subject to legal restraints essentially means that the legislative competence of successor Parliaments cannot be limited by enactments of a predecessor Parliament; if such a limitation were possible it would mean that future Parliaments would no longer have legislative omnipotence.¹⁰ Legislative supremacy is therefore said to reside in Parliament as a **continuing** institution.¹¹

The 'continuing' view of legislative supremacy has the effect of limiting the control function of the judiciary. According to Wade¹², a strong proponent of the 'continuing' view, legislative supremacy is a political fact. Proponents of the 'continuing' view argue that, since legislative supremacy is a political fact, the courts are constrained to enforce whatever Parliament enacts, without

⁸See Chapt. 9 for a discussion of the entrenchment of fundamental human rights and the effect it has on the legislative powers of Parliament.

⁹The expressions 'continuing' and 'self-embracing' derive particularly from H.L.A Hart **The Concept of Law** (1961) at 146.

¹⁰Dicey **op cit.** at 67 and 68; Wade, Phillips and Bradley **op cit.** at 59. See also H.W.R Wade "The Basis of Legal Sovereignty" 1955 **CLJ** 172 at 190.

¹¹L. Boule, B. Harris & C. Hoexter **Constitutional and Administrative Law** (1989) at 127.

¹²Wade 1955 **CLJ** at 188.

questioning whether such an enactment is good or bad, procedural or unprocedural.¹³ It is also said that the rule that the courts cannot question Acts of Parliament can only be altered by a revolution, when the courts refuse to give effect to Acts of Parliament.¹⁴ In essence, therefore, according to the 'continuing' view, the legislative supremacy of Parliament is illimitable and unalterable;¹⁵ Parliament is unable to limit either the area of power or the manner and form of legislation of future Parliaments - each Parliament has exactly the same powers as its predecessor.¹⁶ According to this view, the only instance where a subsequent expression of the will of Parliament will have superior authority over an earlier expression of the same will is when the earlier expression is repugnant to the subsequent expression.¹⁷

The 'continuing' view not only has an impact on the competence of the courts to inquire, in any manner whatsoever, into the validity of Acts of Parliament; neither can Parliament itself pass an Act which would have the effect of empowering the courts to inquire into or to pronounce upon the validity of Acts of Parliament; such an empowerment would have the effect of limiting the legislative omnipotence of Parliament and its successors.

¹³**Idem.** See also P. Mirfield "Can the House of Lords Lawfully be Abolished?" 1979 **LQR** 36 at 42.

¹⁴**Idem.**

¹⁵Wade 1955 **CLJ** at 190. O. Hood Phillips **Constitutional and Administrative Law** (1973) at 69; W.A Weynes **Legislative, Executive and Judicial Powers in Australia** (1976) at 546.

¹⁶Dicey **op cit.** at 67 and 68; Wade, Phillips & Bradley **op cit.** at 59.

¹⁷**Cf Government of the Republic of South Africa v Government of Kwazulu** 1983 (1) SA 164 (A).

Mirfield¹⁸, another proponent of the 'continuing' view, has examined this view in relation to the question whether the House of Lords, a component of the British Parliament, can lawfully be abolished, the effect of which would be to alter the composition of Parliament. He comes to the conclusion that the composition of the British Parliament cannot lawfully be abolished, either under the procedure of the Parliament Acts of 1911 and 1949 or through an ordinary bill purporting to abolish it. He opines that such an abolition could only be possible by means of a technical revolution.¹⁹ Mirfield does concede, however, that Parliament can redefine itself²⁰ or transfer its legislative supremacy to another body.²¹

The concession by proponents of the 'continuing' view that an omnipotent Parliament can transfer its legislative supremacy to another body is inherently paradoxical. It raises the question whether a Parliament which has entirely transferred or abdicated its power over a portion of its territory can later enact legislation through which it takes back the power it has transferred or abdicated.²² Wade²³ has recognised the paradox inherent in the concession that Parliament can transfer its supremacy over a portion of a territory over which it has legislative authority. He has, with reference to Dicey²⁴,

¹⁸Mirfield 1979 **LQR** at 36 et seq.

¹⁹Mirfield 1979 **LQR** at 45 and 47.

²⁰**Ibid.** at 38.

²¹**Ibid.** at 39.

²²See G. Winterton "The British Grundnorm : Parliamentary Supremacy Re-examined" 1976 **LQR** 591 at 600-603.

²³Wade 1955 **CLJ** at 196.

²⁴Dicey stated that although Parliament cannot bind its successors it can abdicate or transfer its 'sovereignty' altogether : Dicey **op cit.** at 69.

acknowledged that "freedom once conferred cannot be revoked."²⁵

The rigidity of the 'continuing' view of the legislative supremacy of Parliament limits Parliament's capacity to adapt the Constitution to current exigencies.²⁶ Wade²⁷ has suggested that this rigidity could be overcome by requiring judges to take a new judicial oath in terms of which they are bound to recognise and give effect to the new constitutional order. Although this solution does not deviate from the 'continuing' view of the legislative supremacy of Parliament, it does not resolve the difficulties inherent in it. Winterton²⁸ points out that such a solution would be ineffective because the Act requiring judges to take a new judicial oath could itself either be expressly or impliedly repealed or amended. He also points out that requiring judges to take a new oath could in the long run lead to a weakening of judicial independence.²⁹

1.3. The 'Self-embracing' View of Legislative Supremacy.

The concession that Parliament can legally abdicate or transfer its power altogether essentially amounts to admitting that Parliament can bind itself in at least one area. If Parliament can bind itself in one area, there seems to be no reason why it should not be able to bind itself or its successors in other areas.³⁰

²⁵See **Ndlwana v Hofmeyr** 1937 AD 229 at 237.

²⁶See G. Winterton "Parliamentary Supremacy and the Judiciary" 1981 **LQR** 265 at 270.

²⁷H.W.R Wade **Constitutional Fundamentals** (1980) at 37.

²⁸Winterton 1981 **LQR** at 271.

²⁹**Ibid.** at 273.

³⁰See Winterton 1976 **LQR** at 603.

In contrast to the 'continuing' view, the 'self-embracing' view permits limitations of a juridical nature on legislative supremacy. According to the 'self-embracing' view, Parliament is not altogether precluded from imposing limitations on itself or its successors;³¹ it can impose limitations as regards the constitutive and procedural components of legislation. The essence of this view is that the legislative supremacy of Parliament includes the power to prescribe the composition of Parliament and the manner and form of legislating.³²

The 'self-embracing' view has as its basis the distinction between the area and scope of Parliament's legislative powers on the one hand, and the manner and form of legislating on the other.³³ Without detracting from the illimitability of Parliament's powers in so far as the area and scope of those powers are concerned, the 'self-embracing' view recognises the possibility that Parliament may redefine itself for the purpose of legislating about certain matters or subjects.³⁴ It may do so by prescribing a special manner and form of legislating, as opposed to the ordinary manner, in relation to certain specified matters or subjects.³⁵

³¹See Winterton 1976 **LQR** at 604-608; G. Winterton "Is the House of Lords Immortal?" 1979 **LQR** 386 at 389.

³²**Idem.**

³³ A distinction is made between the content of legislation and the procedure for its enactment.

³⁴Winterton 1976 **LQR** at 604.

³⁵The view that Parliament may redefine itself for the purpose of legislating in relation to certain matters or subject matters came about as a result of the sovereignty problem in the former British colonies, where the Constitutions prescribed certain procedural requirements for legislating. In the Irish case of **Moore v Attorney-General for the Irish Free State** 1935 AC 484 and the Canadian case of **British Coal Corporation v the King** 1935 AC 500 the Privy Council decided that Parliament was not bound to follow the prescribed procedure; in contrast, the Privy Council decided in the Australian case of **Attorney-General for New South Wales v**

By recognising that Parliament may prescribe a specialised manner and form of legislating over and above the ordinary manner, the 'self-embracing' view is more flexible than the 'continuing' view. However, as Winterton³⁶ points out, the dividing line between the manner and form of legislating and the area and scope of the legislative power of Parliament is one of degree only. Parliament may effectively limit the legislative power of future Parliaments by imposing stringent procedural requirements.³⁷ Whether these would be effective would, however, depend on the courts' approach to the question whether they have the power to inquire into and pronounce upon the validity of legislation which was passed contrary to the prescribed procedure.

This question arises pertinently in relation to the 'self embracing' view. It is a recognised rule that, in applying the law to cases before them, the courts must ensure that what purports to be an Act of Parliament has in fact been enacted by the prescribed components of Parliament.³⁸

The rule that in applying what purports to be an Act of Parliament the courts must satisfy themselves that the instrument in issue has been passed by an

Trethowan 1932 AC 526 that Parliament was bound to follow the prescribed procedure; a similar conclusion was arrived at by the South African Appellate Division in the **Harris** cases (see **infra** for a discussion of these cases). No sovereignty problems arose in Britain until the move to join the European Community.

³⁶1976 **LQR** at 605.

³⁷A requirement that legislation must be approved by 99 per cent of the electorate would effectively limit the area and scope of Parliament's legislative power.

³⁸Winterton 1976 **LQR** at 608. See also **The Prince's Case** (1606) 8 Coke's Reports 1a at 20b; 77 ER 481 at 505; **Stockdale v Hansard** (1839) 9A & E 1 at 108; 112 ER 1112 at 1153-1154; **Bowles v Bank of England** (1913) 1 Ch. 57.

authorised body is part of the rule of law.³⁹ Winterton cautions, however, against readily assuming that the courts will necessarily do what the rule of law requires them to do.⁴⁰

The question whether an instrument which purports to be an Act of Parliament has been passed by an authorised body, revolves around the definition of Parliament for the purpose of legislating. The manner and form of legislating on any specific matter or subject does not restrict the legislative competence of Parliament in so far as the content of legislation is concerned; it merely determines what Parliament is for the purpose of legislating on that specific subject.⁴¹ A rule which prescribes the manner and form in which Parliament must legislate merely determines how Parliament must function in order to declare its supreme legislative will; such a rule is not directed at Parliament as a supreme legislator but at the non-supreme constituent parts of Parliament.⁴²

2. Legislative Supremacy and Judicial Review of Legislation in South Africa before 1994.

The question whether Parliament can ignore procedural provisions laid down for legislating, and the role of the judiciary to review legislation passed contrary to these provisions, arose pertinently in relation to the entrenched provisions of the South Africa Act, 1994.⁴³

³⁹Winterton 1976 **LQR** at 608-609.

⁴⁰**Idem.**

⁴¹B. Beinart "Sovereignty and the Law" 1952 **THRHR** 101 at 126-134.

⁴²Basson & Viljoen **op cit.** at 175.

⁴³See Chapt. 3 for a discussion of the entrenched provisions of the South Africa Act.

However, before the decisions concerning the entrenched provisions of the South Africa Act, 1909 there had been some South African decisions, decided before the formation of the Union, in which South African courts had indicated that the court would be competent to inquire into and pronounce upon the validity of legislation. In **Hess v The State**⁴⁴ Kotze CJ had in an **obiter dictum** intimated that the court could declare that an instrument which had not been passed according to constitutional procedures was not valid law. The same Chief Justice also held in **Brown v Leyds**⁴⁵ that a **besluit** (informal decision) of the legislature (the Volksraad) which had not been adopted in accordance with the provisions of the Constitution had no force of law.⁴⁶

Although the first important constitutional case that followed after the coming into operation of the South Africa Act, 1909, namely **R v Ndobe**⁴⁷, was concerned with the entrenched provisions of that Act, it did not deal pertinently with the question whether Parliament could ignore the procedure prescribed for legislating. Parliament had in fact followed the prescribed procedure. The case did indicate, however, that the court would be competent to inquire into and pronounce upon the question whether an Act of Parliament had been passed in accordance with the law.

⁴⁴(1895) 2 OR 112.

⁴⁵(1897) 4 OR 17.

⁴⁶For a discussion of **Hess v The State** (*supra*) and **Brown v Leyds** (*supra*) see Chapt. 3. It should be noted, however, that the old Transvaal 'Constitution' was completely different, both in form and content, from the South Africa Act; the old Transvaal and Orange Free State judiciary had been exposed to the idea of substantive judicial review of legislation.

⁴⁷1930 AD 484.

R v Ndobe⁴⁸ was concerned with the validity of the Native Administration Act, 1927, an Act of the Union Parliament which empowered the government to appoint a Commission to investigate into and determine the right of occupation of land granted to Africans under certain titles. Ndobe, an African who owned land under such title, was subpoenaed by the Commission to give evidence and to produce his title-deeds; he refused to comply with the subpoena, contending that the appointment of a Commissioner under the Act was *ultra vires* of the Parliament of the Union. He was charged before a magistrate for failing to produce his title-deeds and convicted. In a later appeal to the Appellate Division against the conviction, it was contended on behalf of Ndobe that since, under the Native Administration Act, 1927, his grant of title could be revoked and a substituted deed of grant containing new conditions be issued, his voting rights, based on land ownership, would be affected.⁴⁹ The essence of the contention was that the new conditions that might be inserted could have the effect of disqualifying Ndobe from being registered as a voter on the ground of his race or colour, contrary to the provisions of section 35 of the South Africa Act.

Section 35 of the South Africa Act protected the voting rights of those Africans and Coloureds who were qualified to vote; a two-thirds majority of members of both Houses of Parliament at a joint sitting was required for its amendment or repeal.⁵⁰ It was contended on behalf of Ndobe that since the Native Administration Act, 1927 could have the effect of disqualifying him as a voter on the basis of his race or colour, it should have been passed in accordance with the prescribed procedure. The Appellate Division considered itself competent to inquire into and to pronounce upon the question whether the Native Administration Act, 1927 had been passed legally, and came to the

⁴⁸**Supra.**

⁴⁹The voting rights of certain Africans were based on a property qualification.

⁵⁰Section 152 of the South Africa Act, 1909.

conclusion that the Union Parliament was bound to follow the procedure prescribed in the South Africa Act. The Appellate Division decided, however, that the Native Administration Act did not fall within the scope of section 35 of the South Africa Act.

It is submitted that in coming to the conclusion that the Native Administration Act did not fall within the scope of section 35, the Appellate Division adopted a narrow view of the right to vote. Although the Act did not directly impair the right to vote, its effect was that its provisions could be used by the government to revoke Ndobe's title deed and to substitute for it a deed of grant containing conditions which disqualified him from being registered as a voter simply on the ground of his race or colour.⁵¹ The right to vote involves an exercise of the franchise in an unimpaired, free and fair manner; the Native Administration Act treated Ndobe unfairly and as a result impaired, albeit indirectly, his right to exercise the franchise.

The question whether the Union Parliament, as a supreme law-making body, was bound to follow the procedure prescribed in the South Africa Act arose pertinently for the first time in **Ndlwana v Hofmeyr**,⁵² after the passing of the Statute of Westminster.

The question in **Ndlwana v Hofmeyr** was whether the Representation of Natives Act, 1936, the effect of which was to remove from the common voters' roll certain Africans who were entitled to vote, had been validly passed by Parliament. The Act had been passed at a joint sitting of the two Houses of Parliament, with a two-thirds majority of both Houses as prescribed

⁵¹In **Collins v Minister of the Interior** 1957(1) SA 552 (A) Schreiner JA also took the view that if Parliament may not do something directly, it may not do it indirectly either: see **infra** for a discussion of the **Collins** case.

⁵²1937 AD 229.

in the South Africa Act, 1909.⁵³

It was argued somewhat ingeniously on behalf of Ndlwana, one of the disenfranchised Africans, that since the Statute of Westminster had removed all the fetters to which the Union Parliament was subject, the Representation of Natives Act should have been passed in accordance with the ordinary procedure which required a simple majority of the two Houses sitting separately. The argument was, in essence, that a Parliament with supreme and omnipotent legislative competence was not bound to follow a special procedure laid down for legislating.

In dealing with the argument thus raised, the Appellate Division opted not to follow its earlier decision in **R v Ndobe**⁵⁴. Stratford ACJ held that the decision in **R v Ndobe** was no longer applicable. The decision was, in Stratford ACJ's opinion, rendered inapplicable by the passing of the Statute of Westminster. The Union Parliament had with the passing of the Statute of Westminster become fully 'sovereign' and could therefore adopt any procedure it liked.

Stratford ACJ squarely faced the question whether the courts were competent to inquire into and to pronounce upon the validity of legislation and declared:

"Parliament's will, as expressed in an Act of Parliament cannot now in this country, as it cannot in England, be questioned by a court of law whose function is to enforce that will, not to question it."⁵⁵

⁵³Sections 35 and 152 of the South Africa Act, 1909.

⁵⁴**Supra**.

⁵⁵At 237. Stratford ACJ confused the sovereign power within a state and the sovereignty of the state itself: see D.V Cowen **The 'Entrenched Sections' of the South Africa Act** (1949); B. Beinart "Sovereignty and the Law" 1952 **THRHR** 101 at 123.

Stratford ACJ's approach is consistent with the 'continuing' view of legislative supremacy and inconsistent with the 'self-embracing' view. In accordance with the 'continuing' view, a Parliament with supreme and omnipotent legislative competence cannot be bound by its predecessors; Parliament could therefore, as Stratford ACJ stated, "adopt any procedure it thinks fit; the procedure implied (in the South Africa Act, 1909) in so far as the courts of law are concerned is at the mercy of Parliament like everything else ...".⁵⁶ Such a conclusion was, according to Stratford ACJ, logical because, if Parliament possessed omnipotent legislative competence, "it is obviously senseless to speak of a sovereign law-making body as **ultra vires**. There can be no exceeding of power when that power is limitless".⁵⁷

The idea that the legislative power of Parliament is limitless is inconsistent with the modern concept of legislative supremacy, namely that supremacy in this sense refers to the position of Parliament as the only highest law-making body in the country and not to Parliament as an omnipotent law-making body. Since the entrenched sections imposed procedural limitations on the Union Parliament in respect of its manner of legislating, its legislative power was in essence not limitless. This position was recognised by the Appellate Division in the entrenched sections trilogy.⁵⁸

2.1. The Entrenched Sections Trilogy.

The decision of the Appellate Division in **Ndlwana v Hofmeyr**⁵⁹ came

⁵⁶**Idem.**

⁵⁷**Idem.**

⁵⁸**Harris v Minister of the Interior** 1952(2) SA 428 (A); **Minister of the Interior v Harris** 1952(4) SA 769 (A); **Collins v Minister of the Interior** 1957(1) SA 552 (A).

⁵⁹**Supra.**

to be regarded as having settled beyond doubt the status of the Union Parliament and the relationship between it and the judiciary.⁶⁰ The Union Parliament was 'sovereign'; it possessed supreme and omnipotent legislative competence and no court of law was competent to inquire into or pronounce upon the validity of its legislation. It was generally accepted that the entrenched provisions of the South Africa Act had lost their efficacy and that Parliament could as a result adopt any procedure it liked.

The government's law advisers had also advised that the entrenched provisions no longer constituted an impediment and that Parliament could adopt any procedure it liked. The National Party government, who had won the 1948 general election, then proceeded to initiate legislation which was aimed at removing Coloured voters residing in the Cape Province from the common voters' roll; this was in pursuance of the National Party's policy of racial segregation.

In 1951 the Union Parliament passed the Separate Representation of Voters Act.⁶¹ The Act was passed by both Houses sitting separately and with a simple majority, and not in accordance with the special two-thirds majority procedure at a joint sitting of the two Houses of Parliament. It made provision for the compilation of two separate voters' rolls, one for whites and one for non-whites; whites were entitled to elect members of the House of Assembly and Provincial Councils whereas non-whites were entitled to elect, separately, only four white representatives in the House of Assembly and two representatives in the Provincial Council.

The validity of the Separate Representation of Voters Act was challenged in

⁶⁰See H.J May **The South African Constitution** (1955) at 48; G. Marshall **Parliamentary Sovereignty and the Commonwealth** (1957) at 151.

⁶¹No. 46 of 1951.

the Cape Provincial Division by one Harris, a Coloured voter.⁶² The full bench of the Cape Provincial Division felt itself bound by the decision of the Appellate Division in **Ndlwana v Hofmeyr**⁶³ and held that as long as the enrolled Act showed that the constituent parts of Parliament had functioned, the courts were bound to accept the instrument as an Act of Parliament; they were not competent to question its validity.⁶⁴ Harris appealed to the Appellate Division.

There had been convincing argument by some writers which suggested that the view held by the government's law advisers was wrong and that **Ndlwana v Hofmeyr** was wrongly decided. Cowen,⁶⁵ in particular, had argued in a brief but forceful essay that the entrenched provisions of the South Africa Act were still binding on the Union Parliament. While Cowen did not deny the essence of the legislative supremacy of Parliament and the incompetence of the courts to question the substantive validity of duly enacted Acts of Parliament, the gist of his argument was that Parliament could only declare its supreme will in accordance with the rules which prescribed the manner and form of legislating.⁶⁶

⁶²**Harris v Donges NO** 1951 (4) SA 707 (C).

⁶³**Supra**.

⁶⁴**Ndlwana's** case was in fact distinguishable. In that case Parliament had followed the prescribed procedure, so that there was really no question of Parliament having acted **ultra vires**. Stratford ACJ's conclusion that the legislative power of Parliament was limitless and that it could therefore adopt any procedure it liked was unfortunate.

⁶⁵D. V Cowen **Parliamentary Sovereignty and the Entrenched Sections of the South Africa Act** (1951). This essay was an expansion of the views expressed by the same author in an earlier article entitled "The 'Entrenched Sections' of the South Africa Act", which appeared in **The Commercial Law Reporter**, June 1949 at 359 et seq.

⁶⁶**Ibid.** at 42.

The entrenched provisions did not, according to Cowen's argument, limit the legislative power of Parliament but merely prescribed the manner in which Parliament should exercise its supreme legislative power; in other words, the entrenched provisions merely described what Parliament was for the purpose of exercising its supreme legislative power in certain instances.⁶⁷ As Cowen⁶⁸ put it:

"It is of the essence of the doctrine of Parliamentary Sovereignty that when the constituent elements of Parliament have duly declared their will in an Act of Parliament, the authority of that Act, no matter what it decrees, cannot be questioned in the Courts. But this result follows only when the constituent elements of Parliament have observed the rules which prescribe what must be done in order that their will may be duly declared."

2.1.1. **Harris v Minister of the Interior**⁶⁹

There were two major issues with which the Appellate Division was faced in **Harris v Minister of the Interior**, namely the nature of the Union Parliament, that is its structure, its manner of legislating and its powers, and the relationship between the Union Parliament and the courts. Both these issues were relevant to a determination of the validity of the Separate Representation of Voters Act.

Counsel for the Minister had advanced two lines of argument. It was argued, in the first instance, that the removal of Coloured voters from the common voters' roll did not amount to a disqualification within the meaning of section 35 of the South Africa Act. The gist of this argument was that the Separate Representation of Voters Act did not prejudice any voter in the exercise of his voting right but merely made provision for an alternative and more generous

⁶⁷See Marshall **op cit.** at 156.

⁶⁸**Op cit.** at 42.

⁶⁹**Supra.**

form of representation. The court did not have any difficulty in rejecting this argument. It was clear, the court found, that by removing Coloured voters from the common voters' roll and placing them in a separate and inferior roll, the Act disqualified voters on the ground of race or colour in contravention of the provisions of section 35 of the South Africa Act.⁷⁰ The Separate Representation of Voters Act sanctioned the drawing of separate registers drawn on the basis of race or colour. Section 35, on the other hand, made provision for "a guarantee of defined rights, not their equivalents".⁷¹

The second line of argument advanced by counsel for the Minister was that even if the Separate Representation of Voters Act did in fact disqualify voters on the basis of race or colour, Parliament had acted within its powers in passing the Act without following the prescribed special procedure. It was contended that, with the passing of the Statute of Westminster, the entrenched provisions of the South Africa Act had lost their efficacy and that the Union Parliament could as a result adopt any procedure it liked. The court was urged to follow the decision in **Ndwana v Hofmeyr**.⁷²

The thrust of the second line of argument was that the efficacy of the entrenched provisions of the South Africa Act depended entirely on the Colonial Laws Validity Act, 1865; it was argued that since the Statute of Westminster had rendered the Colonial Laws Validity Act no longer binding in so far as the Union Parliament was concerned, all fetters to which the latter was hitherto subject had fallen away;⁷³ the Union Parliament, so ran the argument, was free to amend the entrenched provisions either expressly or by

⁷⁰At 454-455.

⁷¹At 455.

⁷²**Supra**.

⁷³See Chapt. 3 for a discussion of the effect of the Statute of Westminster in so far as the Union Parliament was concerned.

implication; it could amend the entrenched provision by implication by simply not following the procedure laid down in section 152 of the South Africa Act.

The implication of the second line of argument was two-fold. It implied, in the first instance, that the passing of the Statute of Westminster had rendered the Union Parliament fully 'sovereign', so that its status was much the same as that of the British Parliament. As a body with supreme and omnipotent legislative competence, the British Parliament could make any law whatsoever, and the courts would be incompetent to inquire into and pronounce upon the validity of such law. Secondly, if the status of the Union Parliament was similar to that of the British Parliament, it followed that the relationship between the Union Parliament and the judiciary had become identical to that between the British Parliament and the judiciary in England; the South African judiciary would therefore be incompetent to inquire into and pronounce upon the validity of acts of the Union Parliament.

The court approached the question of the effect of the Statute of Westminster from the viewpoint of the meaning of 'Union Parliament'. The meaning of 'Parliament' in relation to the Union had to be sought in the South Africa Act:

"When it [the Statute of Westminster] refers to a law made by a Dominion, such law means in relation to South Africa a law made by the Union Parliament functioning bicamerally or unicamerally in accordance with the requirements of the South Africa Act⁷⁴ ... It is [the South Africa Act] and not the Statute of Westminster which prescribes the manner in which the constituent elements of Parliament must function for the purpose of passing legislation."⁷⁵

The court found that although the Statute of Westminster had in a number of respects increased the powers of the Union Parliament, it had not altered the definition of Parliament and its manner of legislating as prescribed in the

⁷⁴At 462.

⁷⁵At 464.

South Africa Act.⁷⁶ Once it became clear that 'Union Parliament' meant Parliament functioning in accordance with the South Africa Act, the Statute of Westminster did not take the matter any further.⁷⁷

The court did not find the decision in **Ndlwana v Hofmeyr** to be an obstacle. A survey of the authorities⁷⁸ showed that the court would be entitled to depart from its previous decision if it was convinced that the decision was wrong.⁷⁹ Centlivres CJ found that **Ndlwana v Hofmeyr** was wrongly decided and that the court was not bound to follow it. It is submitted, however, that the court could simply have distinguished the **Ndlwana** case. In the **Ndlwana** case Parliament had in fact followed the prescribed procedure, so that Parliament had within that context properly exercised its supreme legislative powers; no court of law was therefore competent to question the exercise of such powers.⁸⁰ In **Harris v Minister of the Interior**, on the other hand, Parliament had not followed the prescribed procedure and was thus, as then constituted, not empowered by the South Africa Act to exercise its supreme and omnipotent legislative powers

⁷⁶At 460-462.

⁷⁷At 465.

⁷⁸At 452-454.

⁷⁹At 452-454.

⁸⁰In the **Ndlwana** case Stratford ACJ had opined that Parliament could "adopt any procedure it thinks fit...". This opinion was unfortunate; the learned Acting Chief Justice could simply have disposed of the matter by holding that the Union Parliament was, in terms of the South Africa Act, bound to enact the Representation of Natives Act, 1936 in accordance with the prescribed special procedure. Contrary to the argument advanced by counsel for Ndlwana, the prescribed special procedure was in fact necessary for a disqualification of Ndlwana on the basis of his race or colour. This view is consistent with the decision of the court in **Harris v Minister of the Interior** (*supra*): see in particular the remarks of Centlivres CJ at 470G-H.

in relation to the entrenched provisions.

In **Harris v Minister of the Interior** the Appellate Division directly considered the question whether the prescribed special procedure had been followed and found itself competent to inquire into this question. The court, however, simply found that it was competent to inquire into and pronounce upon the question whether an Act of Parliament had been passed in accordance with the prescribed procedure, without analysing or stating the origin of this competence.

It is clear that had the court boldly stated its competence to test the validity of legislation it would have opened itself to a charge of controlling the exercise of legislative power; all that the court purported to do was to declare and apply the law as laid down in the South Africa Act.

Centlivres CJ simply relied on **R v Ndobe**⁸¹ for the proposition that the courts were competent to inquire into and pronounce upon the question whether an instrument which purported to be an Act of Parliament had been passed in accordance with the prescribed procedure. According to the Chief Justice, once it became clear that the Statute of Westminster had left the entrenched provisions intact, it followed that

"the principles enunciated in **Rex v Ndobe** [were] still sound law, namely that courts of law have the power to declare Act 46 of 1951 invalid on the ground that it was not passed in conformity with the provisions of secs. 35 and 152 of the South Africa Act."⁸²

The Appellate Division ordered, in terms of the appellant's prayer, that "the measure known as Act 46 of 1951 is invalid, null and void, and of no legal force in terms of and by virtue of section 35 and 152 of the South Africa Act, 1909, as amended".

⁸¹Supra.

⁸²At 469E.

2.1.2. **Minister of the Interior v Harris**⁸³

The decision of the court in **Harris v Minister of the Interior**⁸⁴ was not well received by the government. Shortly after the decision of the court the Prime Minister, Dr Malan, issued a statement which was not only a denunciation of the judgment of the court but also brought into sharp focus the relationship between the Union Parliament and the courts.

In his statement the Prime Minister made known the government's intention to introduce, as soon as possible, legislation which would ensure, first, that the 'sovereignty' of Parliament would be placed beyond all doubt, secondly, that the courts of the country would not have the right to test the validity of acts of Parliament and thirdly, that the courts of the country would not be involved in constitutional issues of a political nature.⁸⁵

It was clear that the government's intention was to reverse the position brought about by the judgment of the Appellate Division in **Harris v Minister of the Interior** and to reinstate the effect of the judgment in **Ndlwana v Hofmeyr**.⁸⁶

Following upon its resolve to reverse the judgment of the court in **Harris v Minister of the Interior**, and to remove Coloured voters from the common voters' roll, the government proceeded to enact, through the ordinary

⁸³Supra.

⁸⁴Supra.

⁸⁵May **op cit.** at 57.

⁸⁶Supra.

bicameral procedure, the High Court of Parliament Act, 1952.⁸⁷ The Act created a High Court of Parliament, which was composed of members of Parliament; its function was, *inter alia*, to review any past or future judgment of the Appellate Division in which an Act of Parliament was declared invalid.⁸⁸ In due course the High Court convened to review the decision of the court in **Harris v Minister of the Interior**; it reversed the decision of the court and upheld the validity of the Separate Representation of Voters Act, 1951.⁸⁹

The validity of the High Court of Parliament Act was challenged in the Cape Provincial Division by the successful parties in **Harris v Minister of the Interior**. The judges of the Cape Provincial Division felt themselves bound by the judgment of the Appellate Division in **Harris v Minister of the Interior** and held that the High Court of Parliament Act was invalid as it in effect undermined the efficacy of the provisions of the entrenched provisions of the South Africa Act. Ironically, the government appealed to the very same Appellate Division whose testing right it had sought to deny.

The question which the Appellate Division had to consider in **Minister of the Interior v Harris** was whether the Union Parliament had, in enacting the High Court of Parliament Act through the ordinary bicameral procedure, acted in contravention of the provisions of the South Africa Act. It also became necessary, however, to decide whether the court was in fact entitled to inquire into and pronounce upon the validity of the High Court of Parliament Act.

⁸⁷Act 35 of 1952.

⁸⁸Section 2, Act 35 of 1952.

⁸⁹See in general May **op cit** at 60.

The validity of the High Court of Parliament Act was associated with the nature of the High Court of Parliament. The court did not have any difficulty in finding that the High Court of Parliament was not a court of law but simply Parliament in disguise; it did not possess any of the recognised qualities of a court of law.⁹⁰ Parliament could not, by passing an Act giving itself the name of a court of law, take any decision the effect of which would be to destroy the efficacy of the entrenched provisions of the South Africa Act without following the prescribed procedure. The court unanimously decided that the High Court of Parliament Act was invalid.

In **Harris v Minister of the Interior** the courts' testing right had been implicitly acknowledged in Centlivres CJ's judgment, but had not been explicitly stated. In **Minister of the Interior v Harris** the judges of appeal openly expressed the view that the courts were entitled to inquire into and pronounce upon the question whether an Act of Parliament had been passed in accordance with the prescribed procedure.

Centlivres CJ found the basis of the courts' testing right in the constitutional entrenchment of certain rights. In the Chief Justice's opinion, the constitutional entrenchment of the right to vote gave an affected individual

"the right to call on the judicial power to help him resist legislative or executive action which offends against [the entrenchment]."⁹¹

By making provision for a special procedure for the amendment or repeal of the right to vote the Constitution (the South Africa Act), also implicitly enjoined the courts to ensure that the prescribed procedure was followed; this they did by reviewing the legislation in issue and declaring it invalid if it was found to have been passed without following the prescribed procedure. The

⁹⁰See in particular the judgments of Centlivres CJ, at 783 and Greenberg JA, at 786.

⁹¹At 779.

Constitution envisaged the sanction of invalidity as a means of making a constitutional safeguard effective; this sanction could only be applied by a court of law.⁹² Until legislation which was validly passed took away the duty of the courts to protect and render effective the entrenchment of rights contained in the Constitution, that duty remained to be fulfilled.⁹³

The Chief Justice sought support for his assertion of the courts' testing right in his earlier opinion in **Swart NO v Garner and Others**⁹⁴ and in the opinion of Lord Wright, sitting in the Privy Council, in **James v Commonwealth of Australia**.⁹⁵ In **Swart's** case Centlivres CJ had held that section 137 of the South Africa Act, one of the entrenched provisions, conferred rights and privileges which were enforceable in courts of law.⁹⁶ In the **James** case Lord Wright had quoted⁹⁷ from a judgment of Lord Selborne in **The Queen v Burah**⁹⁸, a case dealing with the powers of the Indian Legislature under the Act of the Imperial Parliament; there it was stated that

"the established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question."⁹⁹

Greenberg JA's view was that "under section 152 the citizen is entitled to

⁹²At 779-780.

⁹³At 779.

⁹⁴1951 (3) SA 589 (A).

⁹⁵1936 AC 578.

⁹⁶At 602 and 611.

⁹⁷**James v Commonwealth of Australia** (supra) at 613.

⁹⁸[1878] 3 AC 889.

⁹⁹At 904.

have recourse to courts of law for a decision as to whether any legislation is invalid because of that section...".¹⁰⁰ It was, in his opinion, implicit in section 152 that the authors of the South Africa Act provided the safeguard of recourse to courts of law and that they must have had in mind courts which formed part of the existing judicial system. Although Greenberg JA based his opinion on what he considered to be what the authors of the Constitution (the South Africa Act) must have had in mind, he made no attempt, however, to examine what exactly was the original intention of the authors.¹⁰¹

Van den Heever JA essentially based his assertion of the courts' testing right on the doctrine of the **trias politica** or the separation of powers and checks and balances. In his opinion the South Africa Act created a system of checks and safeguards.¹⁰² Section 152 made provision for a check upon the exercise of legislative power in relation to constitutionally protected rights;¹⁰³ this check was safeguarded and made effective through the courts' right to test the validity of legislation which affected the entrenched provisions.

Van den Heever JA found the doctrine of the **trias politica** and judicial power to enforce the entrenched provision implied in the second preamble of the South Africa Act.¹⁰⁴

"From the second preamble of the South Africa Act it is clear that the authors of our constitution had in mind the doctrine of the **trias politica** and the existence of some judicial power to enforce the constitutional guarantees. That seems to follow by necessary intendment."

It could have been that the authors of the South Africa Act did not

¹⁰⁰At 785.

¹⁰¹For a discussion of the concept 'original intent of the framers' see Chapt. 10 **infra**.

¹⁰²At 790.

¹⁰³At 791.

¹⁰⁴At 792.

contemplate that the judicial power to safeguard the entrenched provisions would forever be exercised by courts constituted in a specific manner; it could also have been contemplated that Parliament would have absolute freedom in the creation of the courts; however, whatever Parliament created, it had to be a court, that is a body other than Parliament and capable of passing judicial judgment on disputes between Parliament as ordinarily constituted, or even in joint session, and subjects who complain that they have been unconstitutionally deprived of their rights.¹⁰⁵

In his judgment Van den Heever JA showed a keen awareness of the fundamental difference between the constitutional protection of individual rights and the operation of the doctrine of legislative supremacy and the role of the judiciary in relation to it. The judge expressed the following view:

"It is quite another matter, however, if the statute we have to interpret expressly applied curbs on legislative powers in the interest of the subject and has entrusted to the courts, if their aid be invoked, the duty of protecting the rights of the subject against the enactment of measures which purport in excess of such power to deprive citizens of guaranteed constitutional rights. In such a case the Court would not be doing its duty if by mechanical adherence to words it allowed the patent intention of the constituent legislature to be defeated and the rights to be proscribed."¹⁰⁶

Hoexter JA found that "the testing right is the very essence of the constitutional guarantee contained in section 152. Without the testing right there is no protection whatever for the citizen whose entrenched rights are being assailed".¹⁰⁷

Schreiner JA found that the South Africa Act made no express provision for a determination of the validity of legislation as regards the entrenched

¹⁰⁵Idem.

¹⁰⁶At 794A.

¹⁰⁷At 794F.

provisions; this meant, in his opinion, that such a determination was left to the ordinary courts of the land.¹⁰⁸ In Schreiner JA's view the entrenched provisions were capable of protection only through the sanction of invalidity implemented by a court of law exercising judicial review.¹⁰⁹

It is significant to note that the assertion of the courts' testing right by all five judges of appeal was mainly confined to the question whether the High Court of Parliament Act was passed in accordance with the prescribed procedure. The nature and structure of the High Court of Parliament as created by the Act was examined in order to determine whether the High Court of Parliament was a court of law for purposes of dealing with legislation falling within the purview of the entrenched provisions. The substantive validity of the Act was not in issue; what the court was called upon to do was to look at the procedure followed for its enactment.

2.1.3. **Collins v Minister of the Interior**¹¹⁰

The government's reaction to the decision of the court in the **Harris** cases¹¹¹ was that the cases had been wrongly decided; it maintained that the correct position was that laid down in **Ndlwana v Hofmeyr**¹¹². Some

¹⁰⁸Schreiner JA's judgment is reminiscent of Chief Justice Marshall's approach in **Marbury v Madison** 1 Cranch 137 (1803). Although the Constitution of the United States did not expressly confer the testing right on the Supreme Court, Chief Justice Marshall reasoned that the court possessed the power to review acts of Congress because the function of applying the law, including the law of the Constitution, to cases at hand was entrusted to the courts.

¹⁰⁹At 787.

¹¹⁰**Supra.**

¹¹¹**Supra.**

¹¹²**Supra.**

constitutional law writers, notably VerLoren van Themaat¹¹³ and Wade¹¹⁴, also took the view that the **Harris** cases were incorrectly decided.

The argument for criticising the decision of the court in the **Harris** cases was that the question whether the entrenched sections were still entrenched after the passing of the Statute of Westminster was not a legal one but a political one which could only be resolved by the legislature itself; it was contended that the court invalidated the legislation in issue by creating "new law in a situation which should strictly be called revolutionary".¹¹⁵

In 1955 the government introduced legislation to increase the number of judges of the Appellate Division and the number of members of the Senate, the upper House of Parliament. The Appellate Division Quorum Act¹¹⁶, which was passed by a simple majority of members of the two houses of Parliament sitting bicamerally, increased the quorum of the Appellate Division from five to eleven in any case where the validity of an Act of Parliament was in issue. The Senate Act¹¹⁷, which was also passed by a simple majority of members of the two houses of Parliament sitting bicamerally, increased the number of members of the Senate from 48 to 89. The government's intention was, according to Marshall¹¹⁸ to "fix the courts" and then to 'fix Parliament'.¹¹⁹

¹¹³J.P verLoren van Themaat **Staatsreg** (1956) at 450-451.

¹¹⁴Wade 1955 **CLJ** at 173.

¹¹⁵**Idem**.

¹¹⁶Act 27 of 1955.

¹¹⁷Act 53 of 1955.

¹¹⁸Marshall **op cit.** at 232.

¹¹⁹The Senate was 'packed', largely through the nomination of additional members, in such a way that the government would have a clear two-thirds

The reconstituted Parliament proceeded to pass the South Africa Act Amendment Act¹²⁰ through the special unicameral procedure prescribed in section 152 of the South Africa Act; a comfortable two-thirds majority of all members of both houses of Parliament was obtained. The Amendment Act consisted of only five sections; it retroactively validated the Separate Representation of Voters Act¹²¹ and effectively precluded the courts from inquiring into or pronouncing upon the validity of an Act of Parliament, save one which sought to amend or repeal section 137 (the equality of the English and Afrikaans languages provision) and section 152 (the entrenching provision) of the South Africa Act.¹²²

The validity of the Senate Act and the South Africa Act Amendment Act was challenged by one Collins and one Brikkels, Coloured voters who claimed that the Senate Act, either read on its own or read together with the Amendment Act, had the effect of abolishing their voting right contrary to the provisions of sections 35 and 152 of the South Africa Act.

The application to have the two Acts declared invalid was dismissed by the Cape Provincial Division. Collins and Brikkels appealed to the Appellate Division. The enlarged Appellate Division considered the appeal and upheld, by a majority of ten to one, the validity of the Senate Act and the Amendment Act. Schreiner JA delivered the lone dissenting judgment.

2.1.3.1. The Majority Opinion.

majority at a joint sitting of the two houses of Parliament: see **May op cit.** at 73-75.

¹²⁰Act 9 of 1956.

¹²¹Section 1, Act 9 of 1956.

¹²²Section 2, Act 9 of 1956.

The judgment of the majority was delivered by Centlivres CJ. Hoexter , Fagan, De Beer, Reynolds, De Villiers, Brink, Beyers and Hall JJA concurred; Steyn JA delivered a separate but concurring judgment.

There was little doubt that the object of enacting the Senate Act was to provide the government with the required two-thirds majority to pass an Act, the effect of which was to abolish the voting rights of persons classified as 'Coloureds'. However, the majority of the judges of appeal decided that neither the Senate Act nor the South Africa Act Amendment Act was invalid. They held that the Senate Act did not repeal or amend the entrenched provisions; the Amendment Act was passed in accordance with the prescribed procedure.¹²³

The real issue, however, was not whether the Senate Act directly repealed or amended the entrenched provisions but what its ultimate effect, taken together with the Amendment Act, was. Although Centlivres CJ was throughout conscious of the fact that the purpose of enacting the Senate Act was to provide the government with the required two-thirds majority at a joint sitting of the two houses of Parliament to validate the Separate Representation of Voters Act¹²⁴, he held that such a purpose was not relevant because Parliament possessed the power to legislate on any matter.¹²⁵

Counsel for the appellants had argued that it could never have been the intention of the framers of the Constitution (the South Africa Act) that Parliament could, by means of a legislative scheme, side-step the prescribed procedure to abolish the rights of voters on the basis of colour; it was argued that such an abolition could only take place by means of a genuine two-thirds majority at a joint sitting of both houses of Parliament as originally composed.

¹²³At 564.

¹²⁴**Idem.**

¹²⁵At 565.

Centlivres CJ found, however, that the Senate Act did not purport to affect the appellants' voting rights and that it did not therefore abolish those rights. A further legislative step was necessary to abolish the appellants' rights, but such a step was in conformity with the provisions of section 152 of the South Africa Act.¹²⁶

The possibility that the framers of the South Africa Act might well have been aware that Parliament could try to circumvent the entrenched provisions by reconstituting either or both of the houses of Parliament for the sole purpose of obtaining the required two-thirds majority at a joint sitting was not ruled out; Centlivres CJ opined, however, that it was possible that the framers of the South Africa Act realised that

"the supreme legislative power (of Parliament) in relation to any subject is always capable of abuse, but it is not to be presumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the legislature is elected."¹²⁷

Centlivres CJ's opinion that the framers could have intended that the remedy for abuse of legislative power should be with the electorate is open to criticism. It is equally arguable that the framers of the South Africa Act envisaged that any amendment or repeal of the entrenched provisions would be effected through the prescribed procedure in a single legislative process and not through a multiple legislative scheme whereby the government first reconstituted the composition of the houses of Parliament and then proceeded to do what it had previously failed to achieve.

It may be argued that it was also the function of the court, and not only of the electorate, to ensure that Parliament did not abuse its powers in so far as the procedural exercise of such powers was concerned. Had the court adopted a

¹²⁶At 569.

¹²⁷At 567. In his judgment Centlivres CJ did not make any distinction between purpose and motive. See *infra* for a discussion of this distinction.

purposive or teleological approach it would have found that the purpose of enacting the entrenched provisions was to provide a real protection of the Cape franchise; the purpose of the Senate Act, which was to take away the franchise indirectly, was completely inconsistent with the purpose of the entrenched provisions.¹²⁸

If the framers of the South Africa Act indeed envisaged that a government would be able to side-step the entrenched provisions through a multiple legislative scheme then it becomes difficult to see why in the first place they chose to enact these provisions as a guarantee of the Cape Coloured voting rights. It is submitted that to argue that the framers envisaged that Parliament could indirectly abolish the Cape franchise amounts to acknowledging that the efforts of the framers to preserve this franchise was not a serious exercise intended to have a binding effect.¹²⁹

Moreover, the abolition of the voting rights of Collins and Brikkels took away the very same remedy which Centlivres CJ spoke of when he said that the framers of the South Africa Act could have intended that the only remedy would be an appeal to the electorate; in so far as the appellants' voting rights had been taken away they could no longer show their disapproval, in an election, of Parliament's conduct.

Centlivres CJ's approach was a marked departure from his earlier approach in **Minister of the Interior v Harris**.¹³⁰ While in that case he meticulously examined whether the High Court of Parliament was a court of law for purposes of dealing with the entrenched provisions and concluded that

¹²⁸See **infra** for a discussion of the judgment of Schreiner JA, who followed the teleological approach.

¹²⁹See C.R.M Dlamini "The Senate Case Revisited" 1988 **SALJ** 470 at 473.

¹³⁰**Supra**.

it was clearly not a court of law, he was reluctant in the **Collins** case¹³¹ to find that the reconstituted Senate was not the real Senate, as envisaged by the framers of the South Africa Act, for purposes of dealing with the entrenched provisions.¹³²

The majority of the judges of appeal took the view that the court was not competent to question the propriety of legislation or the policy of the legislature where the provisions of the law were clear; the duty of the court was to interpret and administer the law as it was.¹³³

Steyn JA gave different reasons for his supporting judgment. He based his decision purely on an interpretation of the proviso to section 152 of the South Africa Act. In his opinion the reconstituted Senate was a 'House of Parliament' within the meaning of section 152; there was no room for reading into the section words such as 'as ordinarily constituted' so as to qualify 'House of Parliament'. According to Steyn JA, no matter what the purpose of reconstituting the Senate was, the body so created was a Senate competent to perform its functions at a joint sitting with the House of Assembly in terms of the proviso to section 152. The purpose for which the legislation reconstituting the Senate was enacted was, in Steyn JA's opinion, irrelevant.

2.1.3.2. The Judgment of Schreiner JA.

The judgment of Schreiner JA stands in sharp contrast to the judgment of the majority and is more in line with the approach of the Court in **Minister of**

¹³¹**Supra.**

¹³²See C.F Forsyth **In Danger for their Talents** (1985) at 75; Dlamini 1988 **SALJ** at 472.

¹³³At 567.

the Interior v Harris.¹³⁴ As opposed to the formalistic approach of the majority, Schreiner JA adopted a functional or teleological approach which underlies the essence of the role of the judiciary in relation to the question whether legislation has been constitutionally enacted.¹³⁵ Instead of merely inquiring into the manner and form in which the Senate Act was enacted, Schreiner JA felt it necessary to inquire into the purpose, as opposed to the motive,¹³⁶ for which the Senate Act was enacted and the circumstances surrounding its enactment in order to determine whether the reconstituted Senate was a House of Parliament within the meaning of section 152 and for purposes of dealing with the entrenched provisions.

In Schreiner JA's opinion, the crucial question was whether 'Houses of Parliament' in the second proviso to section 152 included a House created by Parliament *ad hoc*, a House created with the main aim of obtaining by nomination or similar device a two-thirds majority at a joint sitting in mind.¹³⁷ Schreiner JA took the view that the reconstituted Senate was *prima facie* not a House of Parliament within the meaning of the proviso. He found that

"the proviso was intended to furnish a real and not merely a theoretical protection against parliamentary majorities acting bicamerally. *Prima facie* the framers of the Constitution did not intend that Parliament, that is in effect the government acting through its majority, should have the power by bicameral legislation to convert an insufficient majority in a joint session into a sufficient one, merely by invoking the procedure of nomination or its equivalent."¹³⁸

¹³⁴**Supra.**

¹³⁵See Chapt. 9.

¹³⁶See **infra** for a discussion of the distinction between purpose and motive.

¹³⁷At 571.

¹³⁸At 574pr-A.

It would have been quite in order for Parliament to reconstitute the Senate for general purposes; however, to reconstitute it as part of a clearly preconceived scheme to bypass the protection contained in section 152 amounted to a subversion of the entrenched provisions, something which the framers of the South Africa Act could never have intended to be achieved indirectly.

The gist of Schreiner JA's judgment was that the Senate Act was enacted with the specific purpose of setting in motion the removal of Coloured voters from the common voters' roll; this purpose was achieved by reactivating the Separate Representation of Voters Act. Although the enactment of the individual Acts was perfectly within the powers of Parliament they were, viewed jointly, a subversion of the entrenched provisions because "once legislation in the one field is used as a stage preparatory to legislation in the other, there ceases to be real separation and in substance they become one field".¹³⁹ It was therefore the purpose behind the enactment of the Senate Act which rendered it invalid. In Schreiner JA's opinion the Senate was reconstituted **ad hoc** for the purpose of subverting the entrenched provisions; it was therefore not a House of Parliament within the meaning of section 152 and for the purpose of dealing with the entrenched provisions.

According to Wiechers¹⁴⁰, the judgment of Schreiner JA was correct in principle. When the government unilaterally reconstituted the Senate in order to increase its own majority it went against the fundamental rule on which Parliament was based and from which it derived its ultimate legitimacy, namely that the people who conferred power on Parliament should be freely represented in the legislature to participate through their representatives in the

¹³⁹At 575B-C.

¹⁴⁰M. Wiechers "The Fundamental Laws Behind our Constitution-Reflections on the Judgment of Schreiner JA in the Senate Case" in E. Kahn (ed) **Fiat Justitia - Essays in Memory of Oliver Deneys Schreiner** (1983) at 383.

exercise and distribution of that power.¹⁴¹ In essence, the legislative supremacy of Parliament was limited by the grant of power which it received from the people, who are the political sovereign. In granting power to Parliament as constituted by the Senate and the House of Assembly, the people intended that the Senate would be a body of revision and control, the composition of which could not be altered for the first ten years after Union and whose proportional structure would reflect the electoral support both in the provinces and in the House of Assembly.¹⁴² To reconstitute the Senate by nominating additional members or by means of some such similar process amounted to exceeding the powers conferred by the political sovereign.

There is no authoritative source to which reference can be made to ascertain the nature and scope of the rule that Parliament is bound by the grant of power from the people or the political sovereign;¹⁴³ it is a rule of political morality which developed during the evolution of medieval, absolute monarchies into modern representative governments; the basic tenet of a representative government is that since the government exercises its authority on behalf of the people, the people must be freely represented in the decision-making process.¹⁴⁴ Should the government not comply with the popular demands of the people, they are able to replace it in periodic elections.¹⁴⁵

¹⁴¹**Ibid.** at 389. This rule is one of the basic rules of democratic government : see **infra**.

¹⁴²**Idem.**

¹⁴³The existence of fundamental rules such as these can be gleaned from "works on constitutional law or on constitutional or political history or the biographies of public figures, more especially where they deal with crises of one type or another" : Halsbury **Laws of England** 4th ed (1973) 8 818.

¹⁴⁴See Basson & Viljoen **op cit.** at 82.

¹⁴⁵See J.D van der Vyver "Political Power Constraints and the American Constitution" 1987 **SALJ** 416 at 418.

Fundamental rules of the Constitution such as the one that the people who conferred power on Parliament should be freely represented in the legislature are generally not enforceable by the courts;¹⁴⁶ they owe their existence and validity to general acceptance.¹⁴⁷ Their importance lies in the fact that they ensure the continuity of the foundations on which the Constitution rests.¹⁴⁸ They are found in all types of Constitution.

It has been opined that the judgment of the majority in the **Collins** case was in reality inevitable¹⁴⁹; a further invalidation of an Act of Parliament would have dragged the courts into a political controversy, especially in the light of the government's firm resolve to remove Coloured voters from the common voters' roll.

According to Wiechers,¹⁵⁰ although the judgment of Schreiner JA was correct in principle in that it sought to enforce a fundamental rule behind the Constitution, the issue it sought to address was a political question¹⁵¹ which

¹⁴⁶Certain fundamental rules of the Constitution may be enshrined in a justiciable Constitution, in which event they become enforceable. Section 6 of the Republic of South Africa Act, 200 of 1993 in essence enshrines the rule that the people who conferred power on Parliament should be freely represented in the legislature.

¹⁴⁷See in general Verloren van Themaat - Wiechers **op cit** at 172-178 and G. Carpenter **Introduction to South African Constitutional Law** (1987) at 175-179 where conventions are discussed.

¹⁴⁸Wiechers (Kahn (ed)) **op cit.** at 389-390.

¹⁴⁹See H.W.R Wade "The Senate Act and the Entrenched Sections of the South Africa Act" 1957 **SALJ** 160 at 166.

¹⁵⁰Wiechers in E. Kahn (ed) (1983) **op cit.** at 393-394. Wiechers prefers the judgment of Steyn JA.

¹⁵¹See Chapt. 10 **infra** for a discussion of the 'political question' doctrine and the role of the judiciary in the determination of constitutionality in cases which raise 'political questions'.

could only be properly resolved by the electorate and not by the courts. Dlamini¹⁵² argues that this view ignores, in relation to the South Africa Act, the fact that both the electorate and legislature were not truly representative of all the people of South Africa, a situation which justified judicial intervention. Although this argument has some merit in it, in the sense that in a democratic state the judicial authority has the decisive function of controlling the exercise of government authority, it loses its force if regard is had to the fact that the view of the court itself in relation to the question whether Parliament had acted constitutionally or not was decisive.¹⁵³

Wiechers¹⁵⁴ submits that since judges are not representatives of the nation or the political sovereign and do not control armies or other forces of coercion, they cannot be protectors of the state and its fundamental laws. It may be argued, however, that although judges are not true representatives of the nation or the political sovereign, they are an integral part of the state machinery and as such representatives of the state; they have down the ages been charged with interpreting and applying the law and, in a constitutional state, play the fundamental role of resolving disputes, not only between citizens among themselves but also between citizens and all organs of the state; in performing this fundamental role they protect the interests of both the citizens and the state and help to maintain the integrity of the state.¹⁵⁵

¹⁵²See Dlamini 1988 **SALJ** at 473.

¹⁵³In the light of the relationship between Parliament and the courts in the Westminster-type system of parliamentary sovereignty, it is doubtful whether any other court would have departed from the view of the majority. Schreiner JA was simply far ahead of his time: see VerLoren van Themaat-Wiechers **op cit.** at 317 and 319.

¹⁵⁴Wiechers in E. Kahn (ed) (1983) **op cit.** at 394.

¹⁵⁵See Chapt. 11 where the legitimacy and democratic character of judicial review are discussed.

2.1.4. An Evaluation of the Entrenched Sections Trilogy.

Judicial review of legislation has in the past not been readily accepted in South Africa; this has been so despite the fact that the Appellate Division has on previous occasions exercised the power to review parliamentary legislation.¹⁵⁶ Although the Appellate Division had in **Harris v Minister of the Interior** exercised the power to review an act of Parliament, the court did not examine or deal with the basis and the nature of its power of judicial review.¹⁵⁷

The subsequent judgment of the court in **Minister of the Interior v Harris** was significant in that the court explicitly acknowledged for the first time that the courts were vested with the power to inquire into and pronounce upon the question whether Parliament had legislated in accordance with the procedure prescribed in the Constitution; this power to review legislation was implicit in the constitutional provisions which guaranteed certain rights. The court in essence acknowledged that the judiciary has the fundamental role of ensuring that Parliament respects constitutional guarantees.

The court's acknowledgement of its power to inquire into the question whether Parliament had legislated in accordance with the prescribed procedure did not in any way amount to a new approach to the validity of legislation. In both the **Harris** cases the court adopted a positivistic and legalistic approach which

¹⁵⁶Cf **Ndlwana v Hofmeyr (supra)**. In line with the earlier decision of the Appellate Division in **R v Ndobe (supra)** the government took the view that the courts were incompetent to review Acts of Parliament.

¹⁵⁷The court simply inquired into the validity of the Separate Representation of Voters Act and declared that the Act was invalid on the basis that Parliament did not follow the prescribed procedure, without laying any foundation or basis for its power to test the validity of legislation.

involved a mechanical application of known legal rules to the facts of the case.¹⁵⁸ In both cases the court avoided a policy-based interpretation.

However, once the court had assumed the role of constitutional adjudicator in relation to constitutionally protected rights, it might as well have engaged itself in a policy-based interpretation. Indeed, the courts do in fact perform a policy-making function in the process of developing the law and adjusting it to the ever-changing needs and aspirations of society.¹⁵⁹ According to Bell¹⁶⁰ "the judge as a representative of the State has to pay some attention in resolving the dispute to the fairness and social consequences of his decision, and this amounts to giving direction to society to some extent". By following a narrow and legalistic approach in the **Harris** cases the court foreclosed a creative policy oriented approach for itself.

Schreiner JA's judgment in the **Collins** case, on the other hand, introduced a fresh approach to the constitutional role of the South African judiciary. The judgment transcends the purely mechanical and legalistic approach of the court in the two **Harris** cases and of the majority in the **Collins** case. Schreiner JA adopted a functional or purposive approach which epitomises the role of the judiciary in relation to constitutional guarantees;¹⁶¹ this approach seeks to give effect to the essence of constitutional guarantees, rather than merely giving effect to known legal rules in a mechanical fashion.

¹⁵⁸See Chapt. 10 for an analysis of this approach.

¹⁵⁹See M.M Corbett "Aspects of the Role of Policy in the Evolution of the Common Law" 1987 **SALJ** 52 at 54; P.C.A Snyman "Public Policy in Anglo-American Law" 1986 **CILSA** 220; C. Hoexter "Judicial Policy in South Africa" 1986 **SALJ** 436. See also Chapt. 10 for a discussion of this aspect.

¹⁶⁰J. Bell **Policy Arguments in Judicial Decisions** (1983) at 7.

¹⁶¹See Chapt. 10 for a discussion of the purposive approach.

A possible explanation of the majority's refusal to examine the purpose of the government's legislative scheme in the **Collins** case is that they failed to make a distinction between purpose and motive and therefore refused to examine purpose. In relation to legislation, purpose refers to what the legislature is directly aiming at; motive, on the other hand, refers to the reasons for so aiming.¹⁶² In determining the validity of the legislative scheme it was the scheme itself and what Parliament was aiming at, and not the reasons behind the scheme, which were relevant. Motive was irrelevant simply because there is a presumption that the legislature acts in good faith.¹⁶³

The reluctance of the court to engage in a policy interpretation is not difficult to understand. The Constitution was not rigid and only made provision for a procedural guarantee, as opposed to a substantive one. The Constitution did not contain any extensive value-based justiciable guarantees upon which the court could have properly engaged in a policy interpretation; a direct policy interpretation could have dragged the court into political controversies.¹⁶⁴ Yet, the question may be asked whether the court could have succeeded in making the entrenched provisions effective without at least looking into the purpose of legislation which affected these provisions; it was after all the purpose of the legislation which was more likely to determine its nature and effect.¹⁶⁵

2.2. The Section 114 Decisions.

¹⁶²Marshall **op cit** at 243.

¹⁶³See Chapter 10 for a discussion of this presumption.

¹⁶⁴See Chapt. 9 for a discussion of the new constitutional dispensation which includes a justiciable Bill of Rights containing fundamental human rights and freedoms.

¹⁶⁵See Chapt. 10.

The provisions of section 114 of the 1961 Constitution¹⁶⁶ also became relevant in relation to the courts' testing right. As was the case with the entrenched provisions of the South Africa Act, the courts' testing right in relation to section 114 of the 1961 Constitution was confined to whether the procedural requirements of the Constitution have been complied with.

In terms of section 59(2) of the 1961 Constitution, no court of law was competent to inquire into or pronounce upon the validity of an Act of Parliament, save in so far as it concerned whether the special procedure for legislating in relation to the entrenched provisions was followed was.¹⁶⁷ The courts' incompetence to inquire into and to pronounce upon the validity of Acts of Parliament was in line with the idea that Parliament was 'sovereign'.¹⁶⁸

Section 114 of the 1961 Constitution contained a procedure which had to be followed for the alteration of the borders of a province of South Africa¹⁶⁹ or for taking away the legislative competences of a Provincial Council.¹⁷⁰ In terms of section 114 a petition of the Provincial Council concerned was required for the alteration of the borders of a province in respect of which such Provincial Council had jurisdiction or for taking away its legislative competences. Section 114 was not entrenched.

The question whether the South African Parliament could alter the borders of a province without following the procedure laid down in section 114 arose

¹⁶⁶The Republic of South Africa Constitution Act, 32 of 1961.

¹⁶⁷The 1961 Constitution contained only two entrenched provisions, namely section 108 which made provision for the equality of the English and Afrikaans languages and section 118, the entrenching provision.

¹⁶⁸Section 59(1) of the 1961 Constitution.

¹⁶⁹Section 114(a).

¹⁷⁰Section 114(b).

pertinently after the alteration of the borders of the Cape Province when the then Bophuthatswana was created as an 'independent state'. This question also raised the further question whether the courts were competent to inquire into and pronounce upon the validity of legislation the effect of which was to alter the borders of a province.

In Nasopie (Edms) Bpk en andere v Minister van Justisie¹⁷¹

the court held that Parliament could disregard the procedure laid down in section 114 since the section was not entrenched. This view was based on the argument that a Parliament with supreme and omnipotent legislative competence was not bound to follow the procedure laid down in section 114 and could impliedly repeal the section by simply ignoring it.¹⁷² It implied that the court would in such an event have been incompetent to declare an act of Parliament passed contrary to the provisions of section 114.

In Cowburn v Nasopie (Edms) Bpk¹⁷³ Van den Heever J (as she then was) seemed to favour the view that Parliament could not ignore the provisions of section 114 when she stated that it could be argued that as long as Parliament left section 114 unamended, it was bound by the rules which it itself had determined in connection with the alteration of the boundaries of the provinces; it would therefore be open to the courts, notwithstanding the provisions of section 59(2) of the Constitution Act, to decide in suitable circumstances that legislation which was passed contrary to the provisions of section 114 was invalid. According to Van den Heever J section 59(2), in so

¹⁷¹1979 (4) SA 438 (NC).

¹⁷²See C.W.H Schmidt "Section 114 of the Constitution and the Sovereignty of Parliament" 1962 SALJ 315 at 319-321; E. Kahn "Republic Outside the Commonwealth" 1961 **Annual Survey of SA Law** at 12-14. See also May **op cit.** at 385 in regard to section 149 of the South Africa Act, which was similar to section 114 of the 1961 Constitution.

¹⁷³1980 (2) SA 547 (NC).

far as the procedure for legislating was concerned, placed a limited restriction on the courts. This was unfortunately an **obiter dictum**.

Implicit in Van den Heever J's opinion are the fundamental laws of democracy¹⁷⁴ which limit the legislative supremacy of Parliament and also give the courts the right to inquire into and pronounce upon the question whether Parliament has legislated in accordance with the procedure laid down in the Constitution.¹⁷⁵ The judge laid down a basic framework for a system of fundamental constitutional principles in terms of which the courts should play a key role in ensuring that, in the interests of justice, Parliament adheres to fundamental constitutional law principles.¹⁷⁶

However, Van den Heever J later held, in **Mpangele v Botha and others**(1),¹⁷⁷ that since section 114 was not entrenched, Parliament could ignore its provisions; in her opinion the observance of the provisions of section 114 depended on good faith, the electorate and public opinion; the courts were incompetent to ensure its observance. It is significant to note, however, that what was in issue in **Mpangele v Botha (1)** was section 114(b), which dealt with the taking away of the legislative competences of a Provincial Council; the operation of section 114(b) was limited by section 85 of the Constitution Act in that the legislation of a Provincial Council was only

¹⁷⁴See Wiechers in E. Kahn (ed) (1983) **op cit.** at 389.

¹⁷⁵**Cowburn v Nasopie (supra)** at 554H-555B.

¹⁷⁶The judge mentioned an example of Parliament enacting a law which suspends all future elections and makes the State Presidentship a lifelong and hereditary office, with unlimited legislative, executive and judicial powers and stated that there would be no doubt that the courts will be able to declare such a 'law' invalid on the basis that Parliament acted in contempt of a fundamental constitutional rule. See **supra** for a discussion of fundamental constitutional law rules.

¹⁷⁷1982 (3) SA 633 (C).

valid as long as it was not in conflict with any Act of Parliament, so that section 114(b) could not properly be compared with section 114(a) in its operation.

In **Mpangele and another v Botha and others(2)**¹⁷⁸ De Kock J also came to the conclusion that the provisions of section 114 were not binding on Parliament. De Kock J held that since Parliament possessed supreme legislative powers, it could impliedly repeal or amend section 114 by simply ignoring it. He found that the principles applicable to the entrenched provisions were not applicable to section 114.

Beinart¹⁷⁹ had earlier expressed a contrary view regarding the question whether Parliament could ignore prescribed procedural requirements and whether the courts were incompetent to invalidate legislation which was passed contrary to such requirements. According to him, although the courts were incompetent to review the reasonableness, wisdom, policy, morality and motives of legislation, they were nevertheless competent to inquire into the question whether procedural requirements laid down in the Constitution have been complied with or not. Section 114 contained rules of procedure which conferred upon Provincial Councils rights outside the four walls of Parliament; Parliament could not therefore simply ignore these procedures.

Van der Vyver¹⁸⁰ also criticised the view that Parliament was not bound by the provisions of section 114 and that the courts were not competent to invalidate legislation which was passed contrary to these provisions. He

¹⁷⁸1982 (3) SA 638(C).

¹⁷⁹B. Beinart "Parliament and the Courts" 1954 **Butterworths LR** 134.

¹⁸⁰J.D van der Vyver "The Section 114 Controversy and Government Anarchy" 1980 **SALJ** 363.

dismissed this view as "a mockery of the Constitution".¹⁸¹ Instead he distinguished between, on the one hand, material or substantive provisions and procedural provisions on the other hand. According to him the courts were competent to inquire into and pronounce upon the question whether Parliament had in legislating followed "all legally enacted requirements that constitute the process of law-making".¹⁸²

As in the **Harris** cases and the **Collins** case, the approach of the courts to the section 114 provisions was a narrow and formalistic one. The courts in essence took a narrow view of legislative supremacy and, in conformity with this doctrine, denied themselves the right to inquire into the question whether Parliament had followed the legally enacted constitutional requirements for legislating. It was only van den Heever J's **obiter dictum** in **Cowburn v Nasopie**¹⁸³ which, like the lone dissenting judgment of Schreiner JA in the **Collins** case, broke away from the narrow and formalistic approach.

Van den Heever AJ considered **Mpangele v Botha(2)**¹⁸⁴ and declined to follow it; he held that it was wrongly decided. He held that a supreme legislative authority cannot simply ignore a valid procedural requirement regarding the manner and form of legislation, even if the requirement is not entrenched. The legislative authority is bound to comply with the requirement unless and until it has been expressly or impliedly amended or repealed.¹⁸⁵ Any instrument passed contrary to the procedural requirement is invalid and of no force and effect.

¹⁸¹**Ibid.** at 368.

¹⁸²**Idem.**

¹⁸³**Supra.**

¹⁸⁴**Supra.**

¹⁸⁵At 130G-I.

3. Legislative Supremacy, Legal Positivism and Judicial Control of Legislation.

The judicial function is closely associated with the meaning of law and theoretical approaches to the solution of legal problems. Friedman¹⁸⁶ illustrates the relationship between legal theory and the administration of justice by referring to the English case of **Baylis v Bishop of London**¹⁸⁷ where Lord Summer (then Hamilton L.J) intimated that the courts are not "free to administer that vague jurisprudence which is sometimes attractively styled justice between man and man". Friedman makes the point that Lord Summer's attitude was itself a profession of a particular jurisprudential approach.

In the South African context a consideration of the role of the judiciary in the light of legal theory becomes particularly relevant when the judicial function under a system of constitutional supremacy and the guarantee of fundamental human rights has to be contrasted with the judicial function under a system of legislative supremacy, which is lacking in the area of constitutional guarantees and judicial review of the substantive validity of Acts of Parliament. A consideration of this nature becomes imperative especially in the light of the indictment that the South African judiciary has in the past adopted a narrow, purely mechanical or phonographic approach to its interpretive function.¹⁸⁸

¹⁸⁶W. Friedman **Legal Theory** (1976) at 436.

¹⁸⁷[1913] 1 Ch. 127.

¹⁸⁸See C.J.R Dugard "The Judicial Process, Positivism and Civil Liberty" 1971 **SALJ** 181 at 182. Dugard has been criticised for explaining judicial behaviour in terms of legal theory and for his argument that the past performance of the South African judiciary can be explained in terms of the judiciary's positivist premise : see J. Gauntlett "Aspects of the Value Problems in Judicial Positivism" 1972 **Responsa Meridiana** 204; C. Forsyth & J. Schiller "The Judicial Process, Positivism and Civil Liberty II" 1981 **SALJ** 218. See, however, **infra** on the relationship between positivism

According to Dugard¹⁸⁹ the judicial process under the Westminster-type system of legislative supremacy follows the "positivist legal tradition of Dicey". The import of this charge is that the judicial function is reduced to a mere mechanical interpretation and application of the intention of the legislature, without regard being had to legal values and moral standards in terms of which a choice can be made in favour of an interpretation which fosters the protection of individual rights and freedoms.¹⁹⁰

Legal positivism is closely associated with Austin's command theory of law.¹⁹¹ In terms of this theory, law is a command of the sovereign; the sovereign is either a person or body who does not obey the command of any other. According to this theory, therefore, law exists when the sovereign's commands, backed by a sanction of punishment, are habitually obeyed by the people of a country; its content is identifiable by tests which rest on factual considerations alone.¹⁹² This theory is often used as a theoretical justification for the view that Parliament is sovereign and therefore not bound by restrictions which it has imposed upon itself.¹⁹³

Legal positivism as a doctrine about the nature of law rests on a strict separation between law as an expression of the will of the sovereign and law

and the administration of justice.

¹⁸⁹J. Dugard **Human Rights and the South African Legal Order** (1978) at 373.

¹⁹⁰**Idem.** See also J. Dugard 1971 **SALJ** at 182.

¹⁹¹For a discussion of Austin's theory of law see **inter alia** G.W Paton **A Textbook on Jurisprudence** (1951) at 274 **et seq.**; J.D Finch **Introduction to Legal Theory** (1970) at 37 **et seq.**

¹⁹²See D. Dyzenhaus **Hard Cases in Wicked Legal Systems : South African Law in the Perspective of Legal Philosophy** (1991) at 6.

¹⁹³See Basson & Viljoen **op cit.** at 171.

as it ought to be.¹⁹⁴ It strongly advocates a separation of law and morality.¹⁹⁵ Its claim, and the major fear of its proponents, is that the infusion of moral standards and value considerations into law as it is may lead to bad law and wrong value-laden results.

This doctrine can be contrasted to the value-oriented or normative approach to constitutional law; in terms of the value-oriented or normative approach, constitutional law is the bearer of higher legal values which reflect fundamental libertarian concepts in terms of which positive law must be tested.¹⁹⁶

The meaning of legal positivism in South Africa and, in particular, its influence on the judicial process, has given rise to varying academic viewpoints which tend either to support it as a theory of law or to criticise its negative impact, especially in the area of judicial protection of fundamental human rights.

Dugard's analysis of legal positivism follows the traditional view of positivism as a theory of law which has as its basis two major premises, firstly, that law is a command of a political superior and secondly, that law as it is should be distinguished from law as it ought to be.¹⁹⁷ This conception of law, according to Dugard, gives pre-eminence to the will of the legislature as expressed in legislation and inhibits, as a result, judicial interpretation of

¹⁹⁴See R.W.M Dias **Jurisprudence** (1970) at 382; Lord Lloyd **Introduction to Jurisprudence** (1979) at 184.

¹⁹⁵For a comprehensive discussion and argument on the separation of law and morals see H.L.A Hart "Positivism and the Separation of Law and Morality" 1958 **Harv. LR** 593.

¹⁹⁶Basson & Viljoen **op cit.** at 1-4 and 216-219. See also D.M Davis "Positivism and the Judicial Function" 1987 **SALJ** 103 at 110.

¹⁹⁷Dugard **op cit.** (1978) at 373.

legislation in the light of higher legal values. Dugard charges that legal positivism reduces the judicial function to a purely mechanical application of the intention of the legislature.¹⁹⁸

Dugard's view of legal positivism and its impact on the judicial function has not escaped criticism. Forsyth & Schiller¹⁹⁹ have accused Dugard of misinterpreting legal positivism. According to them, legal positivism is not a theory of law which judges use to avoid their judicial responsibility; they assert that positivism is merely descriptive, and not prescriptive, of law. Their approach is that since legal positivism merely describes the law and helps to accumulate knowledge about the law, it cannot help judges to avoid value considerations in judicial decision-making.

Van Blerk²⁰⁰ has also sharply criticised Dugard's view of legal positivism and its impact on the judicial function and accused him of clothing his view in "jurisprudential garb".²⁰¹ She charges that Dugard's criticism of the South African judiciary is in essence based on the social backgrounds of the judges and the fact that they are predominantly white.

In reply to his critics Dugard has pointed out that one should distinguish between positivism as a legal philosophy and its understanding by the ordinary legal practitioner, who would understand it as a simple and unsophisticated concept consisting of the two basic principles of Austinian theory.²⁰² In his

¹⁹⁸See in particular 1971 **SALJ** 181.

¹⁹⁹Forsyth & Schiller 1981 **SALJ** at 218 et seq.

²⁰⁰A van Blerk **Judge and be Judged** (1988) at 153-154.

²⁰¹At 155.

²⁰²J. Dugard "Some Realism about the Judicial Process and Positivism : A Reply" 1981 **SALJ** 372 at 374-376. See also A.J.G.M Sanders "Legal Philosophy as a Political Tool in South Africa" 1990 **THRHR** 203 at 203-204. Sanders points out that the concept of legal positivism was seized upon

view, it is this understanding of legal positivism which has led to a mechanical interpretation and application of law and "a rigid adherence to the distinction between law and legal values, with a neglect of human dignity and freedom of speech that together with similar principles comprise the value system of the South African common law".²⁰³

However, Dugard later qualified his earlier criticism of legal positivism and its influence on the judicial function by asserting that his critique was directed at the command theory of law and not at contemporary positivism, which recognises that judges do in fact have a discretion to interpret the law in favour of individual liberty.²⁰⁴

In an illuminating study of the judicial function in what he calls 'wicked' legal systems, Dyzenhaus²⁰⁵ has averred that Dugard was wrong in moving away from his original view of positivism and its impact on the judicial function. He shows that the Austinian command theory may in fact provide an answer to the charge that the South African judiciary's approach to the interpretation of laws smacked of a mechanical application of the law.

by some scholars and jurists to legitimise social oppression.

²⁰³Dugard 1981 **SALJ** at 376.

²⁰⁴J. Dugard "Review of Forsyth" 1986 **SALJ** 303. The view that judges have a discretion in the interpretation and application of law is a rejection of the Blackstonian theory which holds that judges cannot make law but can only discover it. Centred around these opposing views is the debate concerning 'judicial creativity' and 'naked usurpation of the legislative function': see B. Dickson "The Judiciary - Law Interpreters or Law-makers?" 1982 **Manitoba LJ** 701. In the British judicial scene Lord Denning has been a strong proponent of judicial creativity in the interpretation of law (see Lord Denning **The Discipline of Law** (1979)), while Lord Devlin has strongly opposed judicial creativity (see Lord Devlin **The Judge** (1979) and "Judges and Lawmakers" 1976 **MLR** 7).

²⁰⁵Dyzenhaus **op cit.** at 217.

Dyzenhaus's claim is not that South African judges were positivists. His charge is that they have at times espoused a conservative doctrine of judicial responsibility which is akin to the positivist view of law.²⁰⁶ This judicial approach, which he calls the 'plain-fact' approach, concentrated more on the will of the legislature and excluded moral and value considerations.²⁰⁷ The 'plain-fact' approach is mainly based on what Dyzenhaus calls the counterpointer and historical design tests; whereas the historical design test focuses on the intention of the legislature as to policy, the counterpointer test focuses on the intention of the legislature as to who should determine policy; the counterpointer test thus encourages the pre-eminence of the executive's determination of policy.²⁰⁸ Both tests underplay the relevance of value considerations in the interpretation and application of laws.

Dyzenhaus's explanation of legal positivism and its influence on the judicial function in South Africa is attractive in that he does not simply claim that legal positivism was the central theory which the judiciary followed in fulfilling its role of interpreting and applying the law but shows that the positivists' creed that law is a command of the law-maker lent itself to, and encouraged, the 'plain-fact' approach, in terms of which the role of the judiciary is to interpret and apply the law as it is, without the infusion of moral and value considerations. In following the 'plain-fact' approach, the judiciary therefore created room for and opened itself to the charge that it simply deferred to the will of the legislature and the executive, without exercising its discretion to choose libertarian interpretations.

The view taken in this thesis is that although legal positivism is not *per se* a theory of law which the South Africa judiciary has adopted in the past, it has

²⁰⁶**Ibid.** at 58 and 217-218.

²⁰⁷**Ibid.** at 57 and 217-218.

²⁰⁸**Ibid.** at 75.

influenced judges to adopt a mechanical approach to the interpretation and application of law and contributed to judicial deference to the will of the legislature and judicial executive-mindedness. Its influence closed the door to the infusion of libertarian and value considerations into the interpretation and application of the law.

The South African judiciary was on many previous occasions, under the old system, called upon to interpret and apply oppressive and counter-libertarian laws. Objections to these laws were largely based on libertarian values and principles of justice and fairness. A number of studies show that the judiciary by and large refrained from choosing a libertarian, value-oriented approach and instead adopted a pro-executive and pro-legislature approach.²⁰⁹ This exclusion of value considerations contributed to the erosion of fundamental human rights.

Coupled with the fact that legislative supremacy operated as a principal rule of the South African constitutional-juridical system, legal positivism essentially implied that effect must be given to the intention of the legislature in the interpretation and application of law. The courts accepted the view that their exclusive task was to determine the intention of the legislature and to apply it to cases at hand, without a consideration of fundamental values such as equality, justice and fairness.

The acceptance of the view that the exclusive task of the courts is to determine

²⁰⁹See H. Corder **Judges at Work - The Role and Attitudes of the South African Judiciary 1910-1950** (1984) ; C.F. Forsyth **In Danger for their Talents - A Study of the Appellate Division of the Supreme Court of South Africa** (1985); H.J Erasmus **Regspleging in die gedrang**, paper read at the University of Stellenbosch, February 1986 at 26 *et seq* and 52-60; A.S Mathews "The South African Judiciary and the Security System" 1985 **SAJHR** 199; J. Dugard "Some Realism about the Judicial Process and Positivism -A Reply" 1981 **SALJ** 372 at 383-386.

the intention of the legislature led in some instances to imputed legislative intent prevailing over identifiable principles of the common law such as reasonableness, justice and fairness. These principles contain legal values²¹⁰ which, although not specifically embodied in the Constitution or legislation, are inherent in the common law. Dyzenhaus²¹¹ explains these principles as standards of reason which are "the coherent products of a process of reasoning by lawyers and judges over time, and express certain commonly shared values and conceptions of reasonableness and the common good".

The case of **S v Meer**²¹² is a good example of judicial imputation of legislative intent and a corresponding rejection of principles of the common law which carry within them certain fundamental values.²¹³ It had been argued on behalf of the appellant that a banning order which forbade her to attend any gathering as described in section 9(1)(b) of the Internal Security Act, 44 of 1950 was unreasonable, manifestly unjust and an oppressive curtailment of her rights. Despite the fact that the concept of reasonableness was a principle of the common law, Rumpff CJ rejected this argument and instead imputed to the legislature an intention to empower the Minister to act drastically. There was very little in the legislation, however, to suggest that that was the clear intention of the legislature; there was, on the contrary,

²¹⁰See A.W.G Raath "Jural Freedom and Legal Principles : Their Nature and Role in Public Law" 1987 **S.A Public Law** 21. Raath makes use of the concept of jural freedom to illustrate the nature and role of principles which embody legal values. These principles find expression in concepts such as justice, fairness, 'proper' administration, etc.

²¹¹Dyzenhaus **op cit.** at 3. Dyzenhaus also points out that to understand the role of law in society one must also examine how notions such as justice are involved in attitudes towards validity: see D. Dyzenhaus "Positivism and Validity" 1983 **SALJ** 454 at 467.

²¹²1981(4) SA 604 (A).

²¹³See also **S v Adams**; **S v Werner** 1981(1) SA 187 A); **S v Christie** 1982(1) SA 464(A).

sufficient room for a libertarian interpretation, namely that the legislature could not have intended to empower the Minister to act in a manifestly unjust or highly oppressive way.²¹⁴ Rumpff CJ's approach, and his conclusion that the court was powerless to do anything, is in line with the counter-pointer approach, in terms of which pre-eminence is given to the executive's determination of policy, even if such policy is manifestly counter-libertarian and oppressive and can hardly be justified on some other universally acceptable ground.

Rumpff CJ's approach smacks of a pure mechanical application of law which is akin to legal positivism. Although the judge was not specifically espousing a positivistic approach, one finds it difficult to escape the conclusion that he viewed the role of the court as one of purely giving effect to the intention of the legislature, even if the legislation in issue was open to a libertarian and value-oriented interpretation. This view, namely that the function of the court is one of purely giving effect to the intention of the legislature, seems to proceed on the basis that the intention of the legislature enjoys precedence over common sense and everything else.²¹⁵ A fear of judicial involvement in politics, coupled with an avoidance of inviting the wrath of the politicians, above all, runs central to this view.²¹⁶

The judicial function is by no means completely apolitical. The judiciary, as part of the machinery of the state, resolves legal disputes in the light of the

²¹⁴Cf **Minister of Posts and Telegraphs v Rasool** 1934 AD 167 at 173; **Sinovich v Hercules Municipal Council** 1946 AD 783 at 802; **R v Abdurahman** 1950(3) SA 136 (A) at 143D.

²¹⁵See for example **In re Duma** 1983(4) SA 469 (N) at 475G-476A; **S v Nel** 1987(4) SA 276 (O) at 288I-289A.

²¹⁶See for example L.C Steyn "Regbank en Regsfakulteit" 1967 **THRHR** 101 at 107; N. Ogilvie-Thompson "Centenary Celebrations of the Northern Cape Division of the Supreme Court of South Africa" 1972 **SALJ** 23 at 32.

fairness and social consequences of its decisions, and in this way gives direction to society; where the dispute involves the exercise of government authority by the legislature and the executive, the judicial role necessarily becomes political.²¹⁷ It is therefore essentially the function of the judiciary to employ all applicable principles in order to arrive at decisions which are fair and just.

It would be incorrect to ascribe the courts' reluctance to control the exercise of legislative power in general only to the narrow and legalistic approach which often manifested itself in judicial decisions. In essence, the overriding factor was the doctrine of legislative supremacy as inherited from English constitutional law. The operation of this doctrine has effectively served to preclude the courts from testing the reasonableness or morality of Acts of Parliament. All that the courts could do was to inquire into and pronounce, within the scope of the entrenched provisions, upon the question whether Parliament had legislated in accordance with the prescribed special procedure. The courts' incompetence to test the substantive validity of legislation logically followed from the view that as long as Parliament followed the procedure for legislating, it could exercise its supreme and omnipotent power as it liked.

An important question which arises in relation to the operation of the doctrine of legislative supremacy and the role of the judiciary in the light of this is whether the courts had any room to offer an effective protection to the individual whenever his rights and freedoms were threatened by Parliament's exercise of its supreme legislative power.

Within the context of the principle of the separation of powers²¹⁸ the South African judiciary indeed had the role and duty to protect the rights and

²¹⁷See J. Bell **Policy Arguments in Judicial Decisions** (1983) at 7.

²¹⁸See Chapt. 5 for a discussion of the separation of powers.

freedoms of individuals from government excesses;²¹⁹ in terms of this principle the judiciary, as an independent and impartial co-ordinate branch of government, has the function of controlling the exercise of government authority. The extent to which it could have succeeded in protecting the rights and freedoms of individuals largely depended, however, on the relationship between the other branches of government, in particular the legislature, as well as the courts' own approach.

In a system of legislative supremacy the relationship between the courts and the legislature is clearly determined by the legislature's status as a supreme body with omnipotent legislative powers. The status of the legislature as a supreme body with omnipotent legislative powers reduces the courts to instruments for implementing the supreme will of the legislature, without questioning the reasonableness, wisdom or justness of legislation. Nevertheless, the courts do not implement the will of the legislature mechanically; the courts must interpret such will before implementing it.

In its interpretation and application of the law the court often has a choice.²²⁰ The interpretation of the law involves giving meaning to words and principles; in many instances more than one meaning can be attached. Vague legislation, in particular, is open to a number of acceptable interpretations.²²¹ In choosing between more than one acceptable interpretation the judge has a latitude within which he may choose an interpretation which promotes the protection of individual rights and freedoms or the one which is the least oppressive.

In interpreting and applying the law judges do not, therefore, act merely

²¹⁹Basson & Viljoen **op cit.** at 264.

²²⁰**Idem.** See also Chapt. 10 where the creativity of constitutional interpretation is discussed.

²²¹**Idem.**

mechanically. The interpretation of a statute is essentially a creative and discretionary exercise.²²² The judicial function does not involve merely discovering the intention of the legislature; it is a creative process whereby meaning is given to a set of words and sentences in the context of principles which operate within the whole legal system.²²³ The interpretation and application of the law involves finding an acceptable meaning which strikes a balance between the rights of the individual and the interests of society at large.

According to Cowen,²²⁴ legislation does not exist in a vacuum; it is an integral part of the whole body of law, consisting of the common law and all other statutes. When interpreting legislation, judges must not only be concerned with simply dispensing justice but must also seek a meaning which harmonises the legislation in issue with the rest of the legal system. In doing this, judges should therefore take into account those principles within the legal system which enhance the protection of the individual's rights and freedoms.²²⁵

In the interpretation of legislation, presumptions of interpretation also have to be taken into account. These presumptions are a reflection of certain basic tenets of the legal system which the legislature ought to follow;²²⁶ they are

²²²See **Ebrahim v Minister of Interior** 1977(1) SA 665 (A) at 678A. See Chapt. 10 for a discussion of judicial creativity in constitutional interpretation.

²²³See E. Cameron "Legal Chauvinism, Executive-mindedness and Justice - L.C Steyn's impact on South African Law" 1982 **SALJ** 38 at 59-60.

²²⁴D.V Cowen "The Interpretation of Statutes and the Concept of 'the Intention of the Legislature'" 1980 **THRHR** 374 at 378.

²²⁵See Dyzenhaus **op cit.** at 155 on the harmonisation of the interpretation and application of law with principles of the common law such as reasonableness, fairness and justice.

²²⁶See G.E Devenish **Interpretation of Statutes** (1992) at 156.

fundamental principles of the legal system which "provide, in effect, a common law bill of rights - a protection for the civil liberties of the individual against invasion by the state".²²⁷

In interpreting and applying the law judges have the responsibility and duty to dispense justice in accordance with the principles and values which operate within the legal system; this responsibility and duty implies that the interpretation of law involves not only the norms applicable to the process of interpretation but also those norms which constitute and form part of the whole legal system. As an interpreter of the law, the judge has to bring to bear to the process of interpretation all the principles and values of the legal system which is the very basis of the judicial function; to do so is to fulfil his judicial duty. The 1993 Constitution, in particular, places a high normative responsibility and judicial duty on the judiciary; the fundamental rights entrenched in it are based on value-laden concepts which call for greater judicial creativity in order to give pre-eminence to the supreme law of the Constitution.

4. Judicial Review of Executive Acts.

Judicial review of executive or administrative acts is largely a matter of administrative law.²²⁸ It is an important form of control over the powers, organisation and actions of the state administration.²²⁹ The Supreme Court has an inherent power to review all administrative acts irrespective of their

²²⁷D.C Pearce **Statutory Interpretation in Australia** (1991) at 81, as quoted by Devenish **op cit** at 156.

²²⁸The scope of this thesis does not permit a detailed discussion of all the relevant aspects of administrative law.

²²⁹M. Wiechers **Administrative Law** (1985) at 259.

character.²³⁰

In the past the South African judiciary was accused of being executive-minded, shying away from a libertarian approach and interpreting subordinate legislation and dealing with administrative action in a way which suggests judicial acquiescence in the government's policy of racial segregation and the practice of oppression. Basson & Viljoen²³¹ attribute judicial executive-mindedness in South Africa to positivism, the influence of legal education and the backgrounds and personalities of the judges.

Despite charges of executive-mindedness the courts have, especially during the states of emergency of July 1985 and July 1986, handed down libertarian judgments.²³² Where a member of the police force was empowered to arrest and detain a person, if **in his opinion** such an arrest and detention was necessary for the purposes as provided in the regulations proclaimed with regard to the state of emergency,²³³ it was held in **Nkwinti v Commissioner of Police and Others**²³⁴ that, notwithstanding the subjective nature of the opinion, there must be a jurisdictional prerequisite for the arrest; in essence, the police officer must apply his mind to the matter; the

²³⁰Wiechers **op cit** at 266.

²³¹Basson & Viljoen **op cit.** at 266.

²³²See D.A Basson "Judicial Activism in a state of emergency: an examination of recent decisions of the South African Courts" 1987 **SAJHR** 28.

²³³Proc. R121 in Government Gazette 9877 of 21/07/1985 and Proc. R109 in Government Gazette 10280 of 12/06/1986, especially regulation 3(1).

²³⁴1986(2) SA 421 (EC) at 430I-J. See also **Radebe v Minister of Law and Order & another** 1987(1) SA 586 (W) at 591I-592C; **Dempsey v Minister of Law and Order** 1986(4) SA 530 (C) at 531H-I; **The State President & others v Tsenoli; Kerchoff & another v The Minister of Law and Order & others** 1986(4) SA 1150 (A) at 1181-1182.

arrest and detention must be based on an honest opinion that it is necessary for the purposes of the regulations, for example that it is necessary for the maintenance of public order.

In **Buthelezi v The Attorney-General of Natal**²³⁵ the court applied the **audi alteram partem** rule as a prerequisite before the Attorney-General could issue an order, in terms of section 30 of the Internal Security Act 74 of 1982, preventing the courts from granting bail.²³⁶ The **audi alteram partem** rule is one of the rules of natural justice; these rules protect the interests of individuals by ensuring that they are treated fairly and justly in the administrative decision-making process.²³⁷ The rules of natural justice are ancient and universal rules of fairness which should never be abolished or excluded.

The operation of the doctrine of legislative supremacy can, however, affect the operation of the rules of natural justice and the ability of the courts to come to the aid of individuals who are affected by executive or administrative acts. In the first place, Parliament may pass legislation which excludes or abolishes the rules; secondly, Parliament may confer wide-ranging powers on the executive and preclude the courts from determining the validity of the exercise of such powers.

²³⁵1986(4) SA 377 (D).

²³⁶At 379-381 and at 383B-C. See also the minority judgment of Stegmann J in **S v Baleka & others** 1986(1) SA 361 (T) at 383-384 and that of Hoexter JA in **Omar & others v Minister of Law and Order & others; Fani & others v Minister of Law and Order & others; State President & others v Bill** 1987(3) SA 857 (A) at 907A-F.

²³⁷See M. Wiechers **Administrative Law** (1985) at 208-228 for a discussion of the rules of natural justice.

For example, the Appellate Division held in the **Omar/Fani/Bill** case²³⁸ that an amendment which eliminated the applicability of the **audi alteram partem** rule completely abolished this rule as a jurisdictional prerequisite before the Minister of Law and Order could issue an order for the continued detention of a person.

The courts themselves have sometimes been reluctant to come to the aid of the individual because of self-imposed restraints. According to **Wiechers**²³⁹ one of the major reasons why the courts have been reluctant to exercise their power to control executive or administrative acts is their application of the rule that a court which reviews the discretionary exercise of administrative powers may not substitute its opinion for that of the administrative organ; the effect of this rule is that the court becomes reluctant to consider the merit of the administrative decision.²⁴⁰ The courts often relied on the assumption that the administrative organ had acted in good faith, even if there was a proven mistake of fact or law.²⁴¹

There have been instances, however, where the courts have jealously guarded their power to control executive acts and subordinate legislation in conformity with their role to protect the rights and liberties of subjects in terms of the

²³⁸**Supra**. Rabie ACJ delivered the judgment of the majority.

²³⁹**Wiechers op cit** at 287.

²⁴⁰In terms of the doctrine of separation of powers, the court does indeed have no jurisdiction to examine the merits of an administrative discretion; this does not mean, however, that the courts may not examine the administrative action to ensure that all legal requirements for validity have been met. Constitutionalism dictates that the courts must ensure that administrative acts comply with the principle of legality: **Wiechers op cit**. at 297.

²⁴¹See for example **Theron v Minister van Justisie** 1961(3) SA 298 (T); **Rajah and Rajah (Pty) Ltd v Ventersdorp Municipality** 1961(4) SA 402 (A); **Bunting v Minister of Justice** 1963(4) SA 531 (C).

principle of the separation of powers. In **Minister of Law and Order v Hurley**²⁴² it was held, for example, that the so-called ouster clause, which prohibited the court from inquiring into the existence of a jurisdictional fact or the proper exercise of a discretion, did not preclude the court from deciding upon the validity of an administrative act. What was issue in that case was the power of a policeman to arrest and detain in terms of section 29 of the Internal Security Act.²⁴³ The rationale for the court's decision that it was not precluded from deciding the validity of the arrest and detention was that action in terms of the section was **ultra vires** and therefore in reality not action in terms of that section at all; an **ultra vires** action did not activate the ouster clause.

Hurley's case is also important because it introduced a libertarian approach to the interpretation of section 29 and the court's power of judicial review. Section 29 authorised detention without trial for questioning if a police officer above the rank of lieutenant-colonel had 'reason to believe' that a person (the detainee) had committed the statutory crime of terrorism or subversion or had the intention to do so. The court interpreted the words 'reason to believe' to mean that there should be **reasonable grounds** for the belief that a person was indeed guilty of the stipulated actions and also held that these reasonable grounds were also justiciable by the court.

This libertarian approach of the courts in the control of executive acts represents a development away from executive-mindedness on the part of our courts;²⁴⁴ it bodes well for their role of interpreting a supreme Constitution and provides a sound foundation for the development of a libertarian and

²⁴²1986(3) SA 568 (A) at 584 and 586H-I.

²⁴³Act 74 of 1982.

²⁴⁴See in general D. Basson "Judicial Activism in a State of Emergency: An Examination of Recent Decisions of the South African Courts" 1987 **SAJHR** 28.

generous approach in the interpretation and application of the fundamental human rights.²⁴⁵

²⁴⁵Section 24 of the 1993 Constitution, in particular, entrenches the right to administrative justice. This section incorporates the basic elements of judicial review of administrative action.

CHAPTER 5

THE JUDICIARY AND THE SEPARATION OF POWERS.

The constitutional law principle of the separation of powers is relevant to a discussion of the role of the judiciary in a modern democratic state. This principle requires that the legislative, the executive and judicial branches of government must be distinct from one another. This distinction is mainly based on a difference in function. The function of the legislature is to make laws; the function of the executive is to carry out the laws; and the function of the judiciary is to adjudicate legal disputes and, as part of the process of adjudication, to interpret the law. Within the context of this distinction, the concept of the separation of powers postulates that while each of the three branches must confine itself to its area of operation, the branches are at the same time co-ordinate components of the state.

The significance of the principle of the separation of powers in relation to the role of the judiciary is that it constitutes the basis for the independence of the judiciary from the other branches of government. Judicial independence is a necessary and important ingredient of the role of the judiciary in the adjudication of legal disputes. Its importance lies in the fact that only a judiciary which is independent, impartial and free from undue influence, either from the parties to the dispute or some other person or body, including the legislative and executive branches, can perform its functions effectively.

1. The Principle of the Separation of Powers.

1.1. The Early Foundations of the Principle.

The principle of the separation of powers has its origin in the related principle of mixed authority and the concept of limitation of authority. The principle of limitation of authority is as old and ubiquitous as authority itself. The essence of the principle of mixed authority was that the exercise of state authority could be limited by permitting a combination of diverse political inclinations in such a way that the various inclinations would balance each other.¹

The principle of mixed authority can be traced back to Plato's concept of the mixed state. In the **Laws**² Plato postulated a state based on moderation and harmony through obedience to law. The state which Plato postulated was a mixed state which was a combination of the monarchic element and the democratic element. According to Plato, the wisdom inherent in the monarchic element is balanced by the freedom inherent in the democratic element.³

Aristotle's construction of the best practicable state also contained elements of a mixed state.⁴ It combined the oligarchic element and the democratic element. The wealth and status inherent in the oligarchic element was balanced by the sheer weight of numbers inherent in the democratic element.⁵

Both Plato and Aristotle were, however, not concerned only with the concept of the mixed state. They were also concerned with the distinction of functions within the city-state. According to Plato reciprocal needs gave rise to an exchange of services and the division of labour; the farmers produced food for the city, the soldiers defended the city and the rulers attended to the day-to-

¹See M.J.C Vile **Constitutionalism and the Separation of Powers** (1967) at 33 and 34-35.

²E.B England (ed) **The Laws of Plato** (1921).

³G.H Sabine **A History of Political Theory** (1966) at 77 and 79.

⁴**The Politics of Aristotle**, translated by E. Barker (1946).

⁵Sabine **op cit.** at 113.

day administration of the city.⁶ Plato's division of functions was, however, related to the satisfaction of reciprocal needs rather than to the exercise of authority.

Aristotle's concern with the distinction between functions appears from his division of political science into legislative science, which was concerned with the function of law-giving, and politics, which was concerned with the function of policy-making;⁷ his distinction between the functions of law-giving and policy-making was related to a division of these functions in the exercise of the authority of the state.

Aristotle's distinction between functions becomes clearer when he distinguishes between the deliberative element, the element of the magistracies and the judicial element. Although the deliberative element was dominant in the making of laws and also concerned with common affairs, it did not refer to the legislative function as we know it today; the legislator was rather a divinely inspired person whose function was to set the foundations of the legal system.⁸

Despite the apparent concern of Plato and Aristotle with the division of functions, both were, however, not directly concerned with the separation of functions in the exercise of the authority of the state. The great Greek philosophers were mainly concerned with attaining a balance between the various social classes and not with the balance of actual political power. Theirs was rather a theory of mixed government based on the composition of

⁶**Ibid.** at 48-50.

⁷Vile **op cit.** at 21.

⁸**Ibid.** at 22.

Greek society and not a theory of separation of powers.⁹

The analysis of the Roman Constitution¹⁰ by Polybius, a stoic philosopher and historian, helped to lay a foundation for the development of the concept of the balance of power. Polybius attributed the strength of Rome to its Constitution, which was based on a division of authority between the consuls, the senate and the popular assemblies. The Constitution was a mixed form which allowed the three political powers to balance and check one another.¹¹

Polybius's analysis of the Roman Constitution was based largely on the theories of the mixed Constitution of Plato and Aristotle and on their classification of Constitutions. The consuls represented the monarchic element, the senate the aristocratic element and the popular assemblies the democratic element.

The principle of the separation of powers in relation to the exercise of state authority began to emerge clearly with the distinction between the legislative and the executive functions. This distinction arose from the distinction between divine law and human law by Marsilius of Padua, an Italian philosopher.¹² Marsilius regarded divine law as a command of God; it was intended to attain the best end for man in the world to come; its sanction did not involve earthly penalty but rather involved rewards or punishments which

⁹Vile **op cit.** at 23; K. von Fritz **The Theory of the Mixed Constitution in Antiquity** (1954) at 205.

¹⁰'Constitution' in this sense does not refer to a Constitution embodied in a single document or in a number of statutes but to the manner in which the state was organised and regulated.

¹¹Sabine **op cit.** at 154.

¹²Marsilius of Padua made this distinction in his **Defensor Pacis**, translated by A. Gerwith as **Marsilius of Padua, the Defender of the Peace** (1956).

would be meted out by God in a future life. Human law, on the other hand, derived its authority from human enactment; it could only be enforced through earthly penalty.¹³ The legislative function was, as a result of the distinction between divine law and human law, associated with a human legislator. The legislative function therefore came to be regarded as implying the power to make laws and to exact obedience to these laws as well as the power to execute these laws, coupled with the sanction of pain or punishment for those who disobeyed the laws.¹⁴

It is significant to note that at this stage there was as yet no inclusion of the judicial function as a separate and distinct function. Marsilius regarded the judicial function as an integral part of the executive function. For him the 'executive power' included the administration of justice under the law.¹⁵ The notion that the 'executive' was also responsible for the administration of justice did not disappear until the seventeenth century.

In England the King exercised executive and judicial power through the Privy Council, a body which originated from the permanent committee or council of the Great Council.¹⁶ The judicial power of the Privy Council was terminated in 1641,¹⁷ after which it became, as far as England was concerned, a purely executive organ. During Charles II's reign (1660-1685) the Privy Council became a small and trusted executive committee of the

¹³Sabine **op cit.** at 295.

¹⁴Vile **op cit.** at 27.

¹⁵Sabine **op cit.** at 297; Vile **op cit.** at 28-29.

¹⁶The committee or council (**concilium regis**) was strictly speaking a parliamentary body which changed to an extra-parliamentary body. Its composition was decided solely by the King.

¹⁷See **infra**.

King; it came to be known as the Cabinet Council (or Cabal).¹⁸ The three-fold division of powers between the legislature, the executive and the judiciary emerged clearly during the mid-eighteenth century.¹⁹

The classical concept of mixed government, and the distinction between the legislative function and the executive function during the medieval period, helped to provide ideas for the development of the modern concept of the separation of powers. The concept of mixed government also laid the foundation for the need to prevent a concentration of power in one organ of government and to achieve a balance of power between the organs of government in order to avoid or minimise arbitrary rule. The importance of the distinction between the legislative and the 'executive' function, on the other hand, lies in its attribution of distinct functions to the various organs of government. Until then the English King wielded both legislative and executive powers; judges were regarded as the King's deputies.²⁰

1.2. The Modern Concept of the Separation of Powers.

The work of the English philosopher John Locke on civil government, **Two Treatises on Government** (1690), provided a basis for the later development of the modern concept of the separation of powers. According to Locke, freedom within the state could only be maintained if there was a separation of government powers. He identified these powers as the legislative authority, which vested in the King in Parliament, the executive authority and

¹⁸The Cabinet, as an executive arm of government, developed from this body.

¹⁹Vile **op cit.** at 30. See **infra** for a discussion of the development of judicial independence in England.

²⁰**Ibid.** at 36.

the federative authority, both of which vested in the King and his council.²¹ The federative authority was concerned with the security of the state and the conduct of foreign affairs.²² Locke did not regard the function of judging as a distinct function; this function was to him "not a separate power, but a general attribution of the state".²³ Although Locke admitted that a balance could be achieved if the powers were placed in different hands,²⁴ nothing can be inferred from his work to suggest that he envisaged that freedom could be achieved through placing the exercise of state authority in different hands and through an overlap of powers between the branches of government.²⁵

The formulation of the modern concept of the separation of powers is in general attributed to the French philosopher Montesquieu.²⁶ His formulation was, however, not original but largely based on the ideas of John Locke.²⁷ According to Montesquieu, political freedom was only possible in a state in which the power of the state, and all corresponding functions, were not concentrated in the same person or organ.²⁸ Following Locke's example, Montesquieu identified three functions or powers of the state, namely the

²¹J. Locke **Two Treatises of Government**, edited by P. Laslett (1967), at 117. See also C.J Friedrich **Constitutional Government and Democracy** (1968) at 175.

²²Locke (Laslett) **op cit.** at 117.

²³**Ibid.** at 118.

²⁴**Ibid.** at 107 et seq.

²⁵**Ibid.** at 117-118.

²⁶See G. Carpenter **Introduction to South African Constitutional Law** (1987) at 156.

²⁷Carpenter **op cit.** at 156. Montesquieu formulated his concept of the separation of powers in his work **L 'esprit des Lois** (1748).

²⁸Sec A. Passerin d'Entreves **The Notion of the State - An Introduction to Political Theory** (1967) at 120.

legislative authority, the executive authority and the power to judge. He specifically identified the power of judging, or the 'judicial' power, as a distinct power; according to him, "there is no liberty as yet if the power of the judge is not separated from the legislative and executive power".²⁹

Montesquieu's formulation of the principle of the separation of powers has given rise to two broad lines of interpretation. The one line of interpretation, namely the "pure" separation of powers or formalist approach, advocates a demarcation of powers and functions in accordance with the tripartite division of government organs. The other line, namely the "partial" separation of powers doctrine or functional approach, permits some overlapping of powers and functions, while at the same time maintaining a system of checks and balances;³⁰ it allocates government tasks to those organs most likely to perform them well and also prevents the concentration of power in one organ.

The doctrine of the separation of powers is particularly prominent in the United States of America; there is a clear distinction of powers and functions between the executive, the legislature and the judiciary. It has been recognised, however, that the concept of the separation of powers is "necessarily ambiguous and will tolerate some overlap of functions among the branches so that the entire government can operate effectively".³¹

²⁹Montesquieu **L'esprit des Lois**, edited by G. Truc (1949), vol. I, Book XI, Chapt. 4 at 164 and Book XI, Chapt. 6.

³⁰See Vile **op cit.** at 85-86. The 'pure doctrine of the separation of powers' is usually associated with continental constitutional systems, while the 'partial separation of powers doctrine' is associated with the American constitutional system.

³¹I.R Kaufman "The Essence of Judicial Independence" 1980 **Columbia LR** 671 at 689 and the cases and authorities cited by the author at footnote 104. See also R.H Nelson "Separation of Powers: An Historical Review from **Marbury to Bowsher**" 1987 **Illinois Bar J** 484; M. Yoder "Separation of Powers: No Longer Simply Hanging in the Balance" 1990 **Georgetown LJ** 173.

The system of checks and balances seems logically incompatible with the idea of separation of powers but is practically indispensable to it. Checks and balances are necessary because they serve to prevent any branch from dominating the others; they ensure limited but effective exercise of powers. While the basic powers of the executive, the legislature and the judiciary are separate and unique, the three branches nevertheless interact; the executive (the President) has the power to recommend and to veto legislation; the legislature has the power to confirm important appointments made by the executive, to ratify treaties and to appropriate money; the judiciary has the power to invalidate executive and legislative acts if they are unconstitutional.³²

The significance of Montesquieu's formulation of the doctrine of the separation of powers, in relation to the role of the judiciary, lies in its identification of the judicial branch as a separate branch of government.

1.3. The Separation of the Judicial Branch.

Montesquieu did not refer specifically to the judicial authority; he instead referred to the 'power to judge'.³³ It is clear, however, from his description of the functions of this third branch as the punishment of crimes or the settlement of disputes³⁴ that he was in fact referring to the judicial authority as we understand the expression to mean today.

Before the appearance of Montesquieu's work the tendency was to fuse the

³²Checks and balances do not mean that one branch usurps the functions of other branches; they merely serve to ensure that the function has been constitutionally performed by the other branch; they also serve to ensure balance in order to guard against one branch becoming excessively powerful.

³³Montesquieu (Truc, ed) **op cit** vol. I, Book XI, Chapt. 4 at 164.

³⁴**Ibid.**

executive with the judicial authority. By distinguishing between the legislative, the executive and the judicial authority, Montesquieu bridged the gap between early modern and later modern terminology associated with the branches of government.³⁵ He treated the judicial authority as on a par with the legislative and the executive authority;³⁶ he introduced a distinction between the supreme judicial authority which was fused with the executive authority and the ordinary courts that had emerged at a more elementary level. It is therefore clear that by detaching the elementary judicial authority from the other branches of government, he regarded it as independent of these other branches.

Montesquieu also dealt with two other aspects which later became significant in relation to the role of the judiciary in a modern state. First, in his treatment of the judicial authority in a republican government he insisted that judges must abide by the letter of the law.³⁷ This raises the question whether judges must only confine themselves to interpreting and applying the law, or whether they can also, in interpreting the law, make law; if judges can also make law, the further question that arises concerns the permissible limits of judicial law-making or the extent to which judges can make law without actually encroaching on the sphere of authority of the legislature.³⁸ The crucial consequences of judicial law-making is that if judges were to encroach on the sphere of authority of the legislature, there would no longer be a separation of powers between the legislature and the judiciary.³⁹ Montesquieu's view

³⁵Vile **op cit.** at 87.

³⁶**Ibid.** at 88.

³⁷Vile **op cit.** at 89.

³⁸This question is crucial in states with supreme Constitutions but not so much in a system of legislative supremacy.

³⁹See Chapt. 10 and Chapt. 11 **infra** on the question of judicial law-making and its limits.

was that the judiciary should only pronounce the law without moderating either its force or rigour.⁴⁰

Secondly, Montesquieu believed that judicial procedures play an important role in the protection of the individual.⁴¹ In modern times the insistence that procedures and formalities must be adhered to where a person's rights are involved, or before they can be taken away has come to be known as 'due process of law' and is one of the cornerstones of the rule of law and constitutionalism.

1.4. The Separation of Powers in Systems of Legislative Supremacy and Constitutional Supremacy.

The nature of the Westminster system of government is such that, apart from the legislative supremacy of Parliament, members of the executive are also members of the legislature.⁴² In Britain the Law Lords sit in the House of Lords both as members of the judiciary and as members of the legislature; the head of the judiciary, the Lord Chancellor, is a member of the executive and also serves as a member of the House of Lords when it sits as part of the legislature.

It may at first sight appear that the principle of separation of powers does not apply in Britain and that the judiciary, especially the House of Lords, is not independent. There is, however, in fact a dividing line between the functions of the judiciary and the other two branches of government. The judicial and legislative functions of the House of Lords are completely separate; only those

⁴⁰Vile **op cit.** at 89. In modern legal theory this view corresponds to the positivistic approach : See Chapt. 4 **supra**.

⁴¹Vile **op cit.** at 89-90.

⁴²See Chapt. 4 **supra**.

members of the House of Lords who are professional judges (the Law Lords) can perform judicial functions; they are also as a rule precluded from participating in politically controversial debates when the House of Lords performs its legislative functions; moreover, full-time judges are precluded from sitting in the House of Commons and may not be subjected to political pressure. However, since the Constitution is unwritten, the independence of the judiciary is not completely protected;⁴³ Parliament can, for example, easily reconstitute the courts or pass legislation which somehow interferes with their independence.⁴⁴

In South Africa the executive has always been part of the legislature. Under the 1993 Constitution, members of the executive are appointed by the President from members of the legislature, with preference being given to members belonging to the party which he leads.⁴⁵ Having been drawn from the party with the majority in the legislature, the executive has in the past been able to assume a dominant role in the making and implementation of laws.

The judiciary has, however, always been separate from the other two branches of government; its impartiality, integrity and independence have never been

⁴³See S.A De Smith **Constitutional and Administrative Law** (1981) at 32-33.

⁴⁴See Van den Heever JA's judgment in **Minister of the Interior v Harris** 1952(4) SA 769 (A), discussed in Chapt. 4.

⁴⁵In terms of section 88(2) of the Constitution of the Republic of South Africa Act, 200 of 1993 a party holding at least 20 seats is entitled to be allocated one or more of the portfolios in the executive (the Cabinet) in proportion to the number of seats it holds in the legislature (the National Assembly) relative to the number of seats held by other parties participating in the government.

seriously questioned.⁴⁶ Neither has the legislature, especially after the decision of the Appellate Division in **Minister of the Interior v Harris**,⁴⁷ performed or attempted to perform a judicial function.⁴⁸ The operation of the doctrine of legislative supremacy has, however, had the effect of limiting the role of the judiciary in mitigating the rigour of legislation which violated human rights and freedoms.⁴⁹

Although there may be a degree of overlapping concerning the persons who constitute the government organs in a system of legislative supremacy, the principle of the separation of powers does operate, albeit in a limited sense. There is a clear dividing line as regards the functions of the three organs of government. More importantly, the exercise of judicial authority is clearly separate and distinguishable from the exercise of the legislative authority and the executive authority.

In a system of constitutional supremacy the judiciary is more separate from the legislative and executive branches and more substantially insulated than in a system of legislative supremacy. This stems from the fact that the judiciary exercises a greater check on legislative and executive acts through its power of judicial review. One of the major arguments against judicial review of legislative and executive acts as a means of checking the exercise of legislative and executive power is that it offends against the separation of powers as well

⁴⁶Criticisms of the judiciary have largely centred around its legitimacy and impartiality in the light of the judges' socio-economic backgrounds: See the authorities cited in Chapt. 1, footnotes 39-44.

⁴⁷1952(4) SA 769 (A).

⁴⁸See Chapt. 4 for a discussion of this case.

⁴⁹See M.G Cowling "Judges and the Protection of Human Rights in South Africa: Articulating the Inarticulate Major Premise" 1987 **SAJHR** 177. See also Chapt. 4 for a discussion of the effect which the doctrine of legislative supremacy has had on the role of the judiciary in the protect individuals against government excesses.

as against the principle that the will of the people, as exercised through their elected representatives, must prevail.

In the United of America the debate concerning judicial review and the separation of powers usually centers around resolving the tension between judicial review and democratic theory. According to substantive judicial review theory,⁵⁰ it is the function of the judiciary to set aside **any** majoritarian decision which is inconsistent with the values embodied in the Constitution.

The problem with substantive judicial review, however, is that it encourages judicial activism and often results in judicial undermining of important government decision-making and value choices.⁵¹

One of the major critics of substantive judicial review, John Hart Ely, argues that it is unacceptable for appointed judges to set aside decisions and value choices of elected representatives. According to him the judiciary should confine itself to policing the mechanisms by which the system of representation seeks to ensure that the elected representatives will actually fulfil the function of representing those who elected them.⁵² Judges, according to this view, are only called upon to ensure that representative democracy is maintained and to prevent the tyranny of the majority.

It has been argued, however, that a separation of powers based theory is

⁵⁰See J. Ely **Democracy and Distrust: A Theory of Judicial Review** (1980) at 43-72; A. Bickel **The Supreme Court and the Idea of Progress** (1978) at 45-100; L. Tribe "The Puzzling Persistence of Process-Based Constitutional Theories" 1980 **Yale LJ** 1063 for a discussion of this theory.

⁵¹See I. Jenkins "Judicial Activism and Constitutional Government" 1984 **American J of Jur.** 169.

⁵²Ely **op cit.** at 102.

capable of reconciling the tension between judicial review and democratic theory. According to Neuborn⁵³ the dilemma of proponents of judicial review is that of harmonising the traditional function of the judiciary with the interpretation and application of constitutional values.⁵⁴ Critics of judicial review argue that it lacks legitimacy because there are no 'demonstrably correct' pre-existing criteria in terms of which fundamental constitutional values can be identified, defined and proclaimed.⁵⁵

Neuborn argues that the tension between judicial review and democratic theory is best resolved by following the process-based theory of judicial review. This theory seeks to ensure that value choices be made by an "an appropriate government body pursuant to appropriate rules".⁵⁶ The rationale for this theory is that, in the first place, the likelihood of making incorrect value judgments is minimised by channelling difficult decisions to the most appropriate bodies and, secondly, 'secondary rules' pursuant to which value choices can be made ensure certainty and legitimise any choice that is made.

The process-based theory implies that the court must, before deciding whether a legislative or executive decision is constitutional or not, first examine the nature and extent of functions, powers and responsibilities granted to each branch in order to determine the limits on legislative, executive and judicial behaviour. It must examine, in the second place, which functions are specifically allocated to each branch and which branch is most likely to perform a specific task well.

⁵³B. Neuborn "Judicial Review and Separation of Powers in France and the United States" 1982 **New York Univ. LR** 363.

⁵⁴**Ibid.** at 364.

⁵⁵See Ely **op cit.** Chapt. 3.

⁵⁶Neuborn 1982 **New York Univ. LR** at 365. Neuborn's argument is based on the French model of separation of powers and judicial review and decisions of the **Conseil Constitutionnel**.

Although the process-based theory is consistent with the functional separation of powers doctrine, it is not free of difficulties. Justice Brennan, in **Baker v Carr**,⁵⁷ alluded to the delicate nature of an examination of ill-defined limits of the functions, powers and responsibilities of government organs:

"Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and it is the responsibility of this Court as ultimate interpreter of the Constitution".

1.5. The Importance of the Separation of the Judicial Branch.

According to Nwabueze⁵⁸, not even the most vocal critics of the separation of powers principle would deny its importance as regards the judicial function. The authoritative interpretation and application of laws requires a separate, independent and impartial agency. The judiciary is composed of judges who have received extensive specialised training, both academic and practical, in the interpretation and application of law with impartiality and finality; it is the only branch which is unlikely to have the self-interest and consequent bias inherent in the legislature and the executive in upholding their own action.⁵⁹ The doctrine of precedent and a tradition of self-restraint provide sufficient safeguards against the possibility of judges acting arbitrarily in the interpretation and application of laws.⁶⁰

The separation of the judicial branch is an important constitutional safeguard of the rights and freedoms of citizens, which should be determined with

⁵⁷369 U.S 186 (1963) at 211.

⁵⁸B.O Nwabueze **Constitutionalism in the Emergent States** (1973) at 14.

⁵⁹Nwabueze **op cit.** at 15.

⁶⁰See Chapt. 10 **infra.**

finality by an independent and impartial judicial organ.⁶¹ The legislature and the executive, which, by virtue of the nature of their functions and their acts, are more likely to infringe upon the rights and freedoms of individuals, are not the best agencies to be entrusted with the determination of disputes concerning the infringement of these rights and freedoms.

According to Marshall⁶², the distinguishing characteristic of the exercise of judicial authority is the procedures which are applied in the determination of rights and duties. A judicial procedure is characterised by the notion of the independence of the deciding officers, the finality of their decisions and their respect for the procedural aspects of natural justice.⁶³

Judicial authority can only be exercised within, or in relation to, a specific area of operation, namely the determination of legal disputes. However, as Marshall⁶⁴ points out, the principle of the separation of powers does not resolve the question of the scope of the area of operation of the judiciary.⁶⁵ All that the principle does is to tell us that there ought to be a separation of powers between the legislature, the executive and the judiciary; it does not specifically inform us, for example, whether the judiciary can in interpreting the law also make law.

In practice the scope of the area of operation of the judiciary is usually stipulated, either explicitly or implicitly, in the Constitution or some other

⁶¹G. Marshall **Constitutional Theory** (1971) at 119.

⁶²Marshall **op cit.** at 119-120.

⁶³Marshall **op cit.** at 120.

⁶⁴**Idem.**

⁶⁵The problem of the scope of the area of operation of the judiciary is related to the question regarding the permissible limits of judicial review of legislation: see Chapt. 10 **infra**.

statute. Where no such provision is made, the scope of the area of operation will most probably have been established by custom. Undue legislative or executive interference, as opposed to legitimate checks and balances, in the judiciary's area of operation would amount to a violation of the principle of the separation of powers and offend against the independence of the judiciary.⁶⁶ This view is supported by a number of decisions of the Privy Council.

In **Liyanage v R**⁶⁷ the Privy Council held that certain statutes of Ceylon which empowered the Minister of Justice, and later the Chief Justice, to nominate judges in cases relating to certain offences, amounted to legislative usurpation of the judicial power or interference with the exercise of judicial power and that their enactment was therefore a violation of the principle of the separation of powers. The court found that the Constitution of Ceylon envisaged a separation of powers; the statutes were held to be **ultra vires** the Constitution and therefore invalid.

Although the Constitution of Ceylon did not expressly vest judicial power in the courts, the Privy Council found that the judicial system which had been established by the Charter of Justice of 1833, and in terms of which the courts had been operating since then, continued to operate even after the coming into operation of the Constitution in 1946. In terms of clause 4 of the Charter, the entire administration of justice, civil and criminal, was vested exclusively in the courts as established and constituted by the Charter.⁶⁸

⁶⁶See **infra**.

⁶⁷[1966] 1 ALL E.R 650 (PC). For a discussion of this case see G.N Barrie "The Separation of Powers Doctrine" 1967 **SALJ** 94 and Marshall **op cit.** at 120-123.

⁶⁸At 651. The operation of the Charter was reaffirmed by a Royal Instruction which directed the Governor to comply with the rules in terms of which the Charter separated the judicial function from the legislative and executive functions.

Since the area of judicial authority was established by the Charter, the legislature could not usurp the exercise of the authority or encroach upon its area of operation without violating the principle of the separation of powers, even though it had plenary legislative powers. Abolition of the judiciary by the legislature, usurpation of the exercise of judicial authority, the exercise of legislative power to punish offenders and definition of offences **ex post facto** by the legislature would therefore amount to a violation of the principle of the separation of powers.⁶⁹

In another Privy Council decision, **Hinds v The Queen**,⁷⁰ Lord Diplock held that a discretion to vary the severity of punishment vested in the Governor-General by a Jamaican Act of Parliament, violated the principle of the separation of powers in that it amounted to an exercise of judicial authority by the executive.⁷¹ In terms of the Act the Governor-General acted on the advice of a Review Board consisting of a superior judge, the Director of Prisons, the Chief Medical Officer, a nominee of the Jamaican Council of Churches and a qualified psychiatrist nominated by the Prime Minister after consultation with the leader of the opposition. In the opinion of the Privy

⁶⁹See Marshall **op cit.** at 122.

⁷⁰[1976] 2 W.L.R 366 (PC).

⁷¹The discretion which was in issue in the **Hinds** case must be distinguished from the traditional prerogative of mercy exercised by the executive. In the **Hinds** case the discretion was conferred by legislation specifically enacted for that purpose; the discretion not only concerned the reduction of sentences but also their increase. Traditional prerogatives are powers which the executive exercises under the common law and generally on the advice of a minister. Although the prerogative of mercy appears at first glance to be a judicial prerogative, it is in essence a power of an executive rather than a judicial nature. A judicial discretion, unlike an executive discretion, is exercised in the settlement of legal disputes only and not disputes about moral issues (such as mercy or kindness); legal disputes, unlike moral issues, relate to rights, privileges, powers or duties, or prohibitions or decrees laid down or recognised by law: see M. Wiechers **Administrative Law** (1985) at 97.

Council the transfer of the power to punish offenders to an executive body whose members were not appointed in accordance with the constitutional provisions for the appointment of members of the judiciary was inconsistent with the principle of the separation of powers. Three of the members of the Judicial Committee of the Privy Council were of the view that the separation of powers was implied in the Jamaican Constitution; two of the members were of the view that the written terms of the Constitution gave effect to the principle of the separation of powers.

In **Duport Steels Ltd v Sirs**⁷² Lord Diplock emphatically stated that the British Constitution was also based on the separation of power between the legislature and the judiciary:

"At a time when more and more cases involve the application of legislation which gives effect to policies that are subject to bitter public and parliamentary controversy, it cannot be too strongly emphasized that the British Constitution, though largely unwritten, is firmly based on the separation of powers: Parliament makes the laws, the judiciary interprets them".⁷³

The importance of cases such as **Liyanage**, **Hinds** and **Duport Steels** is that although they do not assert judicial supremacy and in fact acknowledge the legislative supremacy of Parliament in a Westminster-type system of government, they emphasise the separateness and independence of the judiciary. There may be no express or explicit vesting of judicial authority in the judiciary, but the principle of the separation of powers nevertheless requires that in a modern state the judiciary should be separate from the legislative and executive branches and be independent of them.⁷⁴

Whereas Westminster-based jurisprudence distinguishes between judicial

⁷²[1980] 1 W.L.R 142.

⁷³At 157.

⁷⁴See B.O Nwabueze **Judicialism in Commonwealth Africa** (1977) at 193.

supremacy and judicial independence, the tendency in American jurisprudence is to define the two concepts as synonymous. This tendency can be ascribed to the greater separateness of the judiciary and its substantial power to check and balance the legislature and the executive through judicial review in a system of constitutional supremacy.

2. **Judicial Independence.**

The concept of judicial independence is theoretically founded on Montesquieu's doctrine of the separation of powers.⁷⁵ Montesquieu's view that there can be no freedom if the judicial authority is not separate from the legislative and executive powers paved the way for the later development of the concept of judicial independence.⁷⁶

The division of public decision-making into the legislative, executive and judicial authority is based on the idea that each of these three acting parts must have a certain degree of independence in relation to the exercise of the powers allotted to each one of them.⁷⁷ Although the principle of the separation of powers does permit some overlapping of persons and functions for the effective carrying out of government services, it does not permit undue interference by one branch in the sphere of operation of another branch.⁷⁸ Checks and balances are not regarded as undue interference because they help to reduce a concentration of power in one branch and ensure effective government.

⁷⁵Discussed above.

⁷⁶Vile **op cit.** at 87-88.

⁷⁷See S. Shetreet "Judicial Independence: New Dimensions and Contemporary Challenges" in S. Shetreet & J. Deschenes (eds) **Judicial Independence: The Contemporary Debate** (1985) 590 at 595.

⁷⁸See I.R Kaufman "The Essence of Judicial Independence" 1980 **Columbia LR** 671 at 688-689.

Judicial independence is an important aspect of the role of the judiciary in society.⁷⁹ It enables the judiciary to resolve legal disputes between parties in an independent and impartial way and as a result makes judicial judgments acceptable to rival parties. Judicial independence becomes absolutely necessary when one of the parties to a dispute is the government or one of its agencies; in order to resolve disputes impartially and effectively under such circumstances the judiciary must be independent of the other branches of government and be free from pressure or influence emanating from these other branches.⁸⁰

2.1. The Development of the Concept of Judicial Independence.

Judicial independence in the Anglo-American legal system had its early origins in the courts' struggle to free themselves from royal and parliamentary control.⁸¹ The English courts' struggle to free themselves from royal and parliamentary subjection in fact predates Montesquieu's doctrine of the separation of powers and his insistence that there should be a separation of the judicial branch from the legislative and executive branches.

In early times justice was dispensed by the King in his own court.⁸² It was only at a later stage, but still very early in British constitutional history, when a system of law requiring specialised knowledge of the law had developed, that the delegation of the determination of legal disputes to trained judges became inevitable.⁸³ Once the judicial function fell in the hands of trained

⁷⁹Shetreet **op cit.** at 590.

⁸⁰Shetreet **op cit.** at 591.

⁸¹Kaufman 1980 **Columbia LR** at 672.

⁸²See E.C.S Wade & G.G Phillips **Constitutional Law** (1957) at 243.

⁸³**Idem.** The administration of justice was a royal prerogative which was exercised by the King by virtue of his position as a feudal lord. During the

judges, it became the role of the judges to ensure that the law was complied with. This function could, however, only be effectively carried out if the judiciary was free from the control of the King or his agencies.

In England royal attempts to undermine the independence of the judges, and the subsequent struggle by the courts to free themselves from royal subjection, became evident after James I's accession to the throne in 1603. James I claimed that he could dispense justice. He contended that the judges were merely his delegates and that he had the right to determine to which court a case should go.

In the **Case of Prohibitions**⁸⁴ the judges of the common law courts, led by Chief Justice Coke, declared that they possessed the power to prohibit an ecclesiastical court from hearing cases which ought to be heard by the common law courts. Chief Justice Coke held that the King could not dispense justice by determining to which court a case should go; the function of dispensing justice was, according to him, the function of the judges:

"The King in his own person cannot adjudge any case, either criminal, or treason, felony etc; or betwixt party and party, concerning his inheritance, chattels or goods etc, but this ought to be determined and adjudged in some court of justice according to the law and custom of England. God has endowed His Majesty with excellent science and great endowments of nature, but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods or fortunes of his subjects, are not to be decided by natural reason but by judgment of law, which law is an art which requires long study and experience, before that a man can attain to the cognizance of it".⁸⁵

reign of Edward I (1272-1307) the administration of justice passed to three courts of justice, namely the 'Common Bench', the 'King's Bench' and the 'King in Council': see Carpenter **op cit.** at 172.

⁸⁴(1607) 12 Coke's Reports 63.

⁸⁵**Case of Prohibitions (supra)**, as quoted in Wade & Phillips **op cit.** at 243.

When the King attempted to alter the law by means of a proclamation, Chief Justice Coke held, in the **Case of Proclamations**⁸⁶, that the King did not have the power to alter the law or to create an offence by proclamation; the King's prerogative was that which had been conferred on him by the law of the land.

When a question arose in the **Case of Commendams**⁸⁷ whether a bishop was entitled to receive an income by virtue of his office, the King issued an instruction through his Attorney-General, directing the judges not to proceed with the case before consulting him. This was clearly an encroachment upon the independence of the judges. Chief Justice Coke and his fellow judges decided to proceed with the case. The judges were summoned by the King, who then demanded an undertaking from them that they would in future not proceed with the case if requested by him not to proceed with it. Although the other judges acceded in to the King's demand, the Chief Justice refused to do so and was subsequently suspended and then dismissed.⁸⁸

Chief Justice Coke's refusal to accede to the King's demand, and his resistance to royal interference in judicial matters, was in essence an assertion of the independence of the judges. Chief Justice Coke had in fact elsewhere claimed that judges alone were authorised to interpret and apply the laws and customs of England.⁸⁹

Lord Coke was also instrumental in an attempt to subject the King to the law

⁸⁶(1611) 12 Coke's Reports 74.

⁸⁷**Colt and Glover v Bishop of Coventry** Hobart 140.

⁸⁸See verLoren van Themaat-Wiechers **Staatsreg** (3rd ed. 1981) at 87; Carpenter **op cit.** at 37.

⁸⁹**Nicholas Fuller's Case** (1608) 12 Coke's Reports 41 at 42a; 77 ER at 1323.

through the adoption of the Petition of Right in 1628. The Petition, which listed various autocratic practices of the King, was aimed at refuting and curtailing the King's claim of sovereign power; the King reluctantly approved it after it was accepted by both Houses of Parliament.⁹⁰

Attempts to subject the King to the law during Charles I's reign did not, however, succeed in the long run. Charles dissolved Parliament, which was then the leading force behind the attempts to curtail the King's power, and ruled without it for the next eleven years. Fearing dismissal, the judges did as the King wished. Thus, in the **Case of Shipmoney**⁹¹, the judges upheld the validity of the King's writs whereby he demanded the amount of money which ships from maritime counties would cost (the so-called ship money).⁹²

In 1641 Parliament forced Charles I to approve a number of laws, among which was the Act for the Regulating of the Privy Council and for Taking Away the Court Commonly called the Star Chamber. The Act terminated the civil and the criminal jurisdiction of the Privy Council in England⁹³ and abolished the Star Chamber, the King's special court.⁹⁴ The civil jurisdiction

⁹⁰The House of Lords had initially proposed an amendment which sought to preserve the King's sovereign power; this amendment was however rejected by Lord Coke.

⁹¹1637(3) State Trials 825.

⁹²In terms of an ancient royal privilege the King was entitled to issue writs to maritime counties, commanding them to supply him with ships. Instead of demanding the supply of ships the King demanded the amount of money which each ship would cost: See *verLoren van Themaat-Wiechers op cit.* at 89; *Carpenter op cit.* at 39.

⁹³The Privy Council remained the highest court of appeal for the British Colonies and Dominions. Its appellate jurisdiction is so far as South Africa was concerned was terminated in 1950.

⁹⁴*VerLoren van Themaat-Wiechers op cit.* at 90; *Carpenter op cit.* at 39.

of the Star Chamber was confined to maritime matters and disputes between foreign traders; its criminal jurisdiction was confined to cases of fraud and crimes of a public nature. It was empowered to impose any sentence except the death sentence and was notorious for its excessive fines and cruel punishments, including torture.⁹⁵ The abolition of the Star Chamber was therefore a positive step towards the independence of the common law judges. The King also undertook to appoint judges for life **quamdiu se bene gesserint**, that is as long as they behaved.

Charles I continued to impose his will upon Parliament. The civil war, which broke out in 1642 and lasted for seven years, culminated in the defeat of Charles; he was tried and executed in 1649. The Republic which Oliver Cromwell attempted to introduce thereafter was shortlived and lasted only until 1660. The monarchy was restored, under Charles II (1660-1685); unlike his predecessors, Charles II largely managed to avoid an open confrontation with Parliament.

After James II ascended the throne in 1685, he succeeded in obtaining a judicial decision which vested him with the power to dispense with or to suspend a legal provision. The independence of the judges was once again at stake. James subsequently removed from office all the judges who were likely to oppose him; he then proceeded to test his dispensing power by charging Sir Edward Hales⁹⁶, a holder of a military office who had converted to Catholicism, with non-compliance with a statutory provision which obliged a holder of a military office to take an oath renouncing Catholicism. Having been granted a dispensation from the operation of the statutory provision by the King, Hales had answered the case brought against him by contending that he was exempt from the operation of the provision. The court upheld the contention and decided that the King indeed had the prerogative to grant a

⁹⁵See F.W Maitland **Selected Essays** (1936) at 221.

⁹⁶**Godden v Hales** (1686) 11 State Trials 1165.

dispensation from the operation of a statute. The court based its decision on the absolute nature of royal discretionary powers.⁹⁷

When seven bishops who had initiated a petition against an order of the King promoting Catholicism were tried before the King's Bench, the nation protested, resulting in the bishops' acquittal. The Glorious Revolution which followed in 1688 led to James II's flight. Although the Declaration of Right, which was adopted after the joint ascension of William and Mary to the throne⁹⁸, did not specifically declare that the judges were independent, it declared, *inter alia*, that royal grant of a dispensation from laws, with the exception of instances such as the royal prerogative to pardon offenders or to reduce sentences, was illegal⁹⁹; the creation of *ad hoc* courts was also declared illegal.

The Act of Settlement of 1701¹⁰⁰ is generally regarded as the watershed for the recognition of judicial independence. Among other matters, the Act made provision for the appointment of judges at a fixed salary, as long as they behaved themselves. As appropriately stated in a Canadian case, the Act

"provided a practical means of ensuring that neither the King nor Parliament would be capable of attaining their particular political objectives or ambitions by exercising control over the decisions of the judiciary. The King could no longer hold over every judge's head the very real threat of immediate dismissal from an office held at his pleasure, nor could Parliament attain its own ends by an equally pre-emptory and almost as effective menace of withdrawal of livelihood".¹⁰¹

⁹⁷VerLoren van Themaat-Wiechers **op cit.** at 92.

⁹⁸Bill of Rights 1 William and Mary sess. 2 c2 (1689), reproduced in VerLoren van Themaat-Wiechers **op cit.**, Appendix 2 at 528-530.

⁹⁹VerLoren van Themaat-Wiechers **op cit.** at 529.

¹⁰⁰12 & 13 William III c2, 1701.

¹⁰¹**Beauregard v The Queen** 130 (1981) D.L.R. (3d) 433 (Canada Federal Court) at 446.

The overlap of functions between the judiciary and the other branches of government in England did not, however, completely disappear. A phasing out of the overlap of functions between the judiciary and the executive began after the appointment of Chief Justice Ellenborough to a cabinet post in 1805 led to a public outcry.¹⁰² The distinct nature of executive, legislative and judicial functions eventually crystallised. Since 1803 no common law judge has sat in the House of Commons; neither has any superior judge sat in the House of Commons after the enactment of the Judicature Acts of 1873 and 1875.¹⁰³

The independence of the English judiciary as a whole was finally statutorily placed on a sound basis with the enactment of the Judicature Act of 1925.¹⁰⁴ Section 12(1) of this Act provided that

"all the judges of the High Court and of the Court of Appeal, with the exception of the Lord Chancellor, shall hold office during life, subject to a power of removal by His Majesty on an address to His Majesty by both Houses of Parliament".

Judicial appointments for life were later replaced by statutory ages of retirement.¹⁰⁵

¹⁰²See S. Shetreet **Judges on Trial** (1976) at 14-15. The only exception in this regard is the Lord Chancellor, who is a member of the Cabinet and also presides as a judge over the highest court in England, the House of Lords; he is also a member and speaker of the House of Lords when it performs its legislative functions. The Lord Chancellor, however, rarely sits at the hearing of appeals and avoids sitting at hearings of appeals which involve one of the government departments or agencies as a party: see E.C.S Wade & A.W Bradley **Constitutional and Administrative Law** (10th ed, 1985).

¹⁰³Shetreet **op cit.** at 13-15.

¹⁰⁴15 & 16 George V c49, 1925.

¹⁰⁵The retirement of judges in England is presently governed by the Judicial Pensions Act, 1981, Schedule 2, para. 1(1) and the Supreme Court Act, 1981, section 11(8)(9). In South Africa the retirement of judges is regulated by section 3(1)(a) of the Judges Remuneration and Conditions of Employment Act, 88 of 1989; in terms of this section a judge retires from active service on attaining the age of 70, or after completing 10 years'

2.2. The Meaning of Judicial Independence.

The concept of judicial independence or 'an independent judiciary' is best understood from the viewpoint of the various approaches to which it is amenable. Three main approaches to judicial independence can be discerned, namely the **substantive independence** approach, the **behavioural independence** approach and what may appropriately be called the **multi-faceted independence** approach. The first two approaches make use of a single dominant attribute or a single group of closely related attributes of the judiciary as a basis for defining judicial independence; the last-mentioned takes into account all the relevant attributes of the judiciary which might have a bearing on, or may affect, the independence of the judiciary to inform us what judicial independence is all about.

According to the substantive independence approach, judicial independence is defined in terms of the reality and uniformity of the judicial decision-making process. In accordance with this definition, Sir Ninian Stephen¹⁰⁶ defines an independent judiciary as

"a judiciary which dispenses justice according to law without regard to the policies or inclinations of the government of the day".

Another jurist, Erkki-Juhani Taipale¹⁰⁷ finds the hallmark of an independent

service, whichever comes later. In terms of section 4 of the Judges Remuneration and Conditions of Employment Act a judge has the option of continuing in active service until he has served a total period of 15 years or has reached the age of 75, whichever comes sooner, at which stage he must retire from active service.

¹⁰⁶"Judicial Independence - A Fragile Bastion" in Shetreet & Deschenes **op cit** 529 at 531.

¹⁰⁷"Judicial Independence from a Lawyer's Point of View" **Report of the Symposium on the Independence of Judges and Lawyers** (Nov. 1980, Helsinki) at 118, as quoted in Shetreet & Deschenes **op cit.** at 594-595.

judiciary in the fact that the organs administering justice should be subordinate only to the law and that only the law ought to influence the content of the decisions made by these organs. No other state authority, not even the highest, is allowed to influence the decisions of judicial organs. In this sense judicial independence is seen as a guarantee for the fulfilment of the legal security of the individual.

By focusing only on the actual decision-making process, the substantive independence approach does not fully take into account other aspects of judicial independence such as observable judicial behaviour, likely legislative, executive and other influences which may affect the independence of the judiciary, and other factors, such as political affiliation, personal predilections and working conditions, which may affect the personal independence of individual judges.

The behavioural independence approach, on the other hand, focuses on observable judicial behaviour in order to determine whether the judiciary is actually independent from the other branches of government or some other outside source. This approach does not, however, adequately address other relevant aspects of judicial independence, such as those not readily observable attributes which relate to the internal and collective independence of the judiciary.

The behavioural independence approach is closer to the substantive approach in that it takes into account substantive attitudes, values and actions relative to judicial decisions and strategies. The only difference between the two approaches is that the behavioural independence approach emphasises degrees of independence by distinguishing between control and influence. Thus, according to Becker¹⁰⁸

¹⁰⁸T.L Becker **Comparative Judicial Politics : The Political Functioning of the Courts** (1970) at 144.

"judicial independence is (a) the degree to which judges believe they can decide and do decide consistent with their own personal attitudes, values and conception of judicial role (in their interpretation of the law), (b) in opposition to what others, who have or are believed to have political or judicial power, think about or desire in like matters, and (c) particularly when a decision adverse to the beliefs or desires of those with political or judicial power may bring some retribution on the judges personally or on the power of the court".

A more comprehensive exposition of judicial independence, one which not only focuses on the substantive and behavioural aspects of judicial decision-making but also on all other aspects, both observable and latent, is the multi-faceted independence approach. This approach encompasses both the substantive and behavioural approaches and also takes into account all aspects, whether observable or not observable, which may affect judicial independence.

In addition to the substantive and behavioural aspects of judicial decision-making the multi-faceted approach also takes into account the nature of the constitution, the traditions prevalent within the legal system, the social climate obtaining within the country, as well as the nature, character, background and ideologies of the legislature, the executive and the judiciary in order to determine the extent to which judicial independence is affected or is likely to be affected.¹⁰⁹ In essence, the multi-faceted independence approach looks not only at the substance and nature of judicial decision-making but also at the whole legal system in order to determine the extent of judicial independence.

2.3. The Attributes of Judicial Independence.

Judicial independence refers not only to the personal independence of judges but also to their collective independence.¹¹⁰ Judges perform their functions individually and collectively. Although the judiciary is made up of individual

¹⁰⁹See in general Shetreet in Shetreet & Deschenes **op cit.** at 596.

¹¹⁰**Idem.**

judges it is, viewed properly, a collective unit consisting of the whole corporate body of judges. It is therefore appropriate to make a distinction between individual and collective independence when considering the attributes of judicial independence. Another important aspect is that judges must not only be nominally independent but must also be perceived to be independent by the society which they serve.

2.3.1. The Independence of Individual Judges.

In the determination of disputes between parties, be it disputes between citizen and citizen or between citizen and state, the judge first and foremost performs his function as an individual, in the sense that he must bring to bear on the decision the full power of his intellect and understanding of the facts of the case and the law applicable to the dispute. When doing this the judge must be independent and free of any interest or pressure that may affect the result of the case.¹¹¹

The independence of the individual judges has two types of essential attributes, namely those attributes which relate to the substantive or functional independence of the judges and those which relate to their personal

¹¹¹Section 10(2)(a) of the Supreme Court Act, 59 of 1959 (S.A), for example requires a judge, upon appointment, to take an oath in terms of which he is obliged to "administer justice to all persons alike without fear, favour or prejudice, and ... in accordance with the law ...". Section 104(3) of the 1993 Constitution also requires a judge to make and subscribe to an oath in terms which he is obliged to "uphold and protect the Constitution of the Republic and the fundamental rights entrenched therein and in doing so administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the Law of the Republic". The oath obliges a judge to decide disputes before him on factual and legal merits, without showing either favour or disfavour to the parties to the dispute: See L. Boule, B. Harris & C. Hoexter **Constitutional and Administrative Law** (1989) at 201.

independence.¹¹² Both these types of attribute are fundamental aspects of the role of the judiciary within the state.

2.3.1.1. Substantive or Functional Independence.

Substantive or functional independence is based on the substantive independence approach.¹¹³ As an attribute of judicial independence, substantive or functional independence focuses on the independence of the individual judge in relation to his impartiality or neutrality in the actual adjudication of legal disputes between parties. It requires that in performing his function as an adjudicator of legal disputes a judge must be free of any outside influence or control and must interpret and apply the law on the basis of his understanding of the facts before him as well as the relevant legal principles.

Substantive judicial independence may be achieved in a number of ways; these may be divided into protective means and restrictive means. Protective means are those which are aimed at insulating individual judges from possible partiality by protecting them from certain practices or conduct which are likely to give rise to partiality. Restrictive means are those means whereby judges are restricted from participating in certain activities or the hearing of certain matters which are likely to give rise to partiality.

Protective means include the immunity of judges from liability for acts done or words spoken in their official capacity,¹¹⁴ protecting judges from criticism

¹¹²See Shetreet **op cit.** at 598.

¹¹³**Supra.**

¹¹⁴See Lord Denning "The Independence and Impartiality of Judges" 1954 **SALJ** 345 at 355-357. Such protective means are usually dealt with in case law and in statutes pertaining to the judiciary. Thus, in **Penrice v Dickenson** 1945 AD 6 it was held that delictual damages will not be

in Parliament and the prohibition of undue comments on matters that are still being heard by the court;¹¹⁵ the prohibition of comment on matters that are still being heard is known as the **sub judice** rule.

Restrictive means include the disqualification of judges from serving on legislative bodies or in executive office, prohibiting judges from becoming involved in party politics, the prohibition on judges holding an office of profit or receiving remuneration in respect of services rendered, other than the salary they receive as judges¹¹⁶ and the exclusion of judges from adjudicating in matters in which they have a personal interest. The last-mentioned exclusion is also known as the rule against bias and finds expression in the maxim **nemo iudex in sua causa**.¹¹⁷

The rule against bias not only means that a judge must be free of personal prejudice but also that it must be apparent to a reasonable man that a judge is free of bias.¹¹⁸ There need not be real likelihood of bias; a reasonable

awarded against a judicial officer unless it was shown that he acted with malice. Similarly, in **May v Udwin** 1981(1) SA 1 (A) the court came to the conclusion that a judicial officer can raise the defence of qualified privilege to an action based on defamation; the privilege would be lost only if it were to be shown that the judicial officer acted with malice. Section 25(1) of the Supreme Court Act, 59 of 1959 also provides that no civil summons or subpoena can be issued against a judge without the permission of the court out of which the process is to be served; the purpose of this section is to ensure that only a summons or a subpoena which is based on a genuine claim will be issued.

¹¹⁵See B.R Bamford "Aspects of Judicial Independence" 1956 **SALJ** 380 at 382-384.

¹¹⁶See section 11 of the Supreme Court Act, 59 of 1959.

¹¹⁷Bamford **op cit.** at 384; Denning **op cit.** at 352-355.

¹¹⁸**R v Sussex Justices, ex parte McCarthy** [1924] 1 KB 256 at 259: "... [J]ustice should not only be done, but should manifestly and undoubtedly be seen to be done." (per Lord Hewart).

suspicion of bias will suffice.¹¹⁹ Thus, in **S v Tyebela**¹²⁰ the Appellate Division set aside proceedings of the court **a quo** after having found that the sarcastic and hostile interventions of the judge had given the impression that he had not been fair and unbiased in his conduct of the case.

2.3.1.2. Personal Independence.

Personal independence is concerned with adequate security of judges in relation to their office and tenure as well as with the provision of adequate remuneration and other conditions of service. Undue interference, especially by the legislature or the executive, with judicial office, tenure and terms and conditions of service is likely to affect the independence of judges as individuals adversely .

The personal independence of the judiciary may be affected by the fear that a judge will be removed from office or that one or other condition of service will be withdrawn, such as a threat to withdraw the provision of an official vehicle, should he give a decision which is adverse to the interests of the legislature or the executive.

In general, the personal independence of the judiciary is secured by appointing judges for as long as they behave themselves properly (**quamdiu se bene gesserint**) and up to a specified retirement age,¹²¹ in addition, the remuneration of judges and other conditions of service are usually statutorily

¹¹⁹See L Baxter **Administrative Law** (1984, 1989 reprint) at 558-560.

¹²⁰1989 (2) SA 22 (A).

¹²¹ In terms of section 104(4) of the 1993 Constitution a judge may only be removed from office by the President on the grounds of misbehaviour, incapacity or incompetence established by the Judicial Service Commission and upon receipt of an address from both the National Assembly and the Senate calling for such removal.

protected.¹²²

Under the previous constitutional dispensation the provisions protecting the security of tenure, remuneration and terms and conditions of service of judges were contained in ordinary legislation.¹²³ In theory there was nothing which prevented the legislature from amending or repealing these provisions and interfering with the security of tenure, salaries and terms and conditions of employment of judges; however, since the independence of the judiciary is one of the cornerstones of the Westminster system, it may be argued that such interference would have been invalid. The removal of judges and the protection of their remuneration is now regulated by the 1993 Constitution,¹²⁴ which is rigid and therefore difficult to repeal or amend.¹²⁵ The supremacy of the Constitution also essentially entrenches the security of tenure and remuneration of judges; in terms of section 4(1) any law which is inconsistent with the provisions of the Constitution shall be of no force or effect to the extent of the inconsistency.

Personal judicial independence is, however, not threatened only by undue legislative or executive interference. Potential pressures from parties to a case or other persons may also pose a threat; it is for this reason that judges are granted immunity from liability for any words uttered or acts or omissions

¹²²In terms of section 104(2) of the 1993 Constitution the remuneration of judges shall not be reduced during their continuation of office.

¹²³Judges' Remuneration and Conditions of Employment Act, 88 of 1989.

¹²⁴Apart from guaranteeing judicial independence (section 96(2)), the 1993 Constitution protects the remuneration of judges (section 104(2)).

¹²⁵In terms of section 62(1) of the 1993 Constitution a Bill which amends the Constitution must be adopted at a joint sitting of the National Assembly and the Senate by a majority of at least two-thirds of the total number of members of both Houses.

performed in the discharge of their judicial functions.¹²⁶

An effective means of protecting judges from pressures from sources other than the legislature and the executive is to maintain the prestige of judges through the rules governing the offence of contempt of court.¹²⁷ Any act which impugns the integrity and dignity of a judge and thereby brings into disrepute the standing of the judiciary or the court constitutes a punishable offence.¹²⁸ The **sub judice** rule also protects the personal independence of the judiciary by prohibiting the discussion and speculation in the media of a matter which a judge is still hearing. Criticism of judicial action and of decisions taken in good faith is, however, allowed; the criticism will constitute contempt of court only if improper motives, partiality or unfairness are imputed to a judge.

2.3.2. Collective Independence.

Although attributes of personal independence serve to insulate individual judges from real or potential prejudice in the discharge of their judicial function, they are not sufficient to ensure that judges are independent as a corporate branch of government. Interference with the judiciary as a corporate branch of government may adversely affect judges collectively; it may also affect individual judges in the discharge of their judicial function. The traditions and sense of corporate judicial responsibility serve to strengthen the personal independence of individual judges.¹²⁹

¹²⁶See Shetreet **op cit.** at 623; Boulle, Harris & Hoexter **op cit.** at 203.

¹²⁷See Carpenter **op cit.** at 258.

¹²⁸P.M.A Hunt **South African Criminal Law and Procedure** Vol. II (1982) at 185; C.R Snyman **Criminal Law** (1983) at 291.

¹²⁹Shetreet **op cit.** at 643.

As a corporate body which administers the law on behalf of the state, the judiciary by and large depends on the executive or the legislature for the provision of administrative personnel, the provision of court equipment and stationery, the erection of court buildings and the preparation of court budgets. The provision of these services makes it possible for the executive or the legislature to interfere with the collective independence of the judiciary.

The collective independence of the judiciary may be undermined where the central administration of the courts is placed entirely in the hands of the executive branch. Problems associated with the administration of the courts, and which are likely to affect the collective independence of the judiciary, were highlighted by a judge of the Supreme Court of South Africa when he was giving evidence before the Hoexter Commission:¹³⁰

"...[T]he structure, as it exists, is one which the people who administer it [do not] fully understand it or are [not] equipped to understand the problems of the Supreme Court ... [T]hese problems are often looked at as though the Supreme Court were an adjunct or appendage of the Department and was perhaps a bit of a problem, because it did not conform to the ordinary convenient standards that obtained throughout the whole of the particular department ... There are sorts of problems that judges have. They relate to quite major matters and to quite minor matters, like getting essential books for libraries and getting practical things that a judge needs to do his work properly."

The position of the judiciary could even be worse where an executive who is entirely responsible for the central administration of the courts becomes hostile or antagonistic when judicial decisions that are unfavourable to it are made; such an executive could, for example, deliberately replace well-trained and competent court administration personnel with incompetent or inefficient ones, supply insufficient or poor court equipment and stationery or neglect to maintain court buildings properly. Such conduct would in the long run clearly demoralise judges and affect their collective independence.

¹³⁰Commission of Inquiry into the Structure and Functioning of the Courts RP 78\83, para. 4.2.4.

Possible executive manipulation of the central administration of the courts could be avoided through the participation of the judiciary itself, the extent of which may range from consultation, sharing responsibility with the executive (or the legislature) to exclusive judicial responsibility.¹³¹

In Britain, possible manipulation of the administration of the courts by the executive and the legislature is mitigated by the position of the Lord Chancellor who, apart from being a member of the cabinet and a member of the House of Lords, is the head of the judiciary.¹³² The Lord Chancellor is responsible for the administrative business of the Supreme Court; the appointment of court officials is partly his responsibility and the responsibility of the presidents of the various divisions of the Supreme Court.¹³³ It may be that the position of the Lord Chancellor as a member of both the executive and the judiciary is a deviation from the separation of powers; this deviation, however, serves a positive purpose in that it acts as a check against possible manipulation of the administration of the courts by the executive; on the other, hand possible manipulation of the administration of justice by the Lord Chancellor is mitigated by the fact that the Lord Chancellor rarely sits as a judge in cases in which an organ of the state is involved as a litigant.

Coetzer¹³⁴ has put forward an acceptable and workable solution which could mitigate possible manipulation of the central administration of the courts under the new South African constitutional dispensation. He has suggested, first, that the central administration of the courts should be divorced from the public service; secondly, that an office similar to that of the Lord Chancellor,

¹³¹See Shetreet **op cit.** at 644 *et seq.*

¹³²J.P.J Coetzer "Die Regsadminstrasie en Verwante Sake in 'n Nuwe Bedeling" 1991 **Consultus** 104 at 106-107.

¹³³Wade & Phillips **op cit.** at 233.

¹³⁴Coetzer 1991 **Consultus** at 110.

suitably adapted, should be established; thirdly, that a Council of Justice along the lines suggested by the Hoexter Commission¹³⁵ should be created; and lastly, that the Chief Justice should play a larger out-of-court role.¹³⁶

A more serious threat to collective judicial independence is the possibility of the abolition of the established courts and the creation of *ad hoc* tribunals. Although the abolition of the courts would rarely occur, there is nothing to stop a legislature with supreme and omnipotent law-making powers from abolishing the courts and replacing them with some other form of tribunal; such a course of action would be easy to take where the courts are established by ordinary legislation and not in terms of a rigid Constitution.

The creation of the High Court of Parliament by the South African legislature in 1952 provides an example of the creation of an *ad hoc* tribunal which

¹³⁵The Hoexter Commission recommended the establishment of a Council of Justice which would advise the Minister of Justice on matters pertaining to the administration of Justice. The Council would be under the chairmanship of the Chief Justice, would sit at least once a year and would have to table a report before the State President at least once a year. The Department of Justice would have to place at the disposal of the Council a permanent secretariat which would be staffed by qualified statisticians, researchers and secretarial personnel: RP 78\83, vol. I, Chap. 4, part II. The establishment of the Judicial Services Commission in terms of section 105(1) of the 1993 Constitution is in line with the idea of ensuring the independence of the judiciary; the participation of the Judicial Service Commission in the appointment of judges reduces the risk of purely executive appointments: see *infra* for a discussion of the functions of the Judicial Service Commission.

¹³⁶The Chief Justice's out-of-court role would include, *inter alia*, chairmanship of the Council of Justice, contact with members of the government to ensure that the government is constantly kept informed about problems facing judges in the exercise of their functions, and addressing parliamentary committees whenever legislation affecting the courts is under consideration : Coetzer *op cit.* at 109. See *infra* for a discussion of the role of the Chief Justice under the 1993 Constitution.

posed a threat to collective judicial independence.¹³⁷ The High Court of Parliament was constituted by members of Parliament and was empowered to review certain decisions of the Appellate Division, the highest court in the country. It was subsequently declared unconstitutional by the Appellate Division in **Minister of the Interior v Harris**.¹³⁸

In declaring the High Court of Parliament unconstitutional the Appellate Division concluded that the High Court was not a court of law but simply Parliament masquerading as a court of law. In his judgment Van den Heever JA outlined the power of a legislature with supreme law-making powers to create new tribunals. Van den Heever JA opined that Parliament possessed the power to create tribunals which may not satisfy certain criteria of independence, competence and justness;¹³⁹ he went on, however, to state that no matter what Parliament created, the creation must be a court capable of adjudicating disputes between parties to a dispute, including disputes between Parliament and individuals; it had to be a body other than Parliament or an extension of Parliament and capable of passing judgment on issues arising from the dispute.¹⁴⁰

Collective judicial independence may also be affected by the legislature's pre-empting and frustrating decisions. Discussion and criticism of judicial proceedings which are still pending would amount to pre-empting the decision of the court; such conduct may affect the independence of not only the

¹³⁷Mr J.G.N Strauss, the leader of the Opposition, described the creation of the High Court of Parliament as a move which was "calculated to undermine the independence of the law courts and to smash the Constitution." 78 **House of Assembly Debates**, col. 4136 (22 April 1952).

¹³⁸**Supra**. See Chapt. 4 for a full discussion of this case.

¹³⁹It is submitted that the legislature would not have such a power if the Constitution is supreme.

¹⁴⁰At 792.

individual judge but also of the judiciary as a whole; it may result in judges feeling that their judicial function is futile.

The legislature may also frustrate judicial decisions by passing an Act which reverses a decision and restores the position as it was before a decision was given. The frustration of judicial decision is best prevented by means of a constitutional provision which prohibits the retrospective reversal of decisions by the legislature.¹⁴¹

2.4. Judicial Appointments and the Independence of the Judiciary.

Implicit in the concept of judicial independence is the underlying assumption that judges must, as far as possible, be appointed purely on merit and not on political grounds.¹⁴² The involvement of politics in the appointment of judges can materially affect the independence of the judiciary and jeopardise its role as an independent and impartial umpire in the resolution of disputes between parties, especially when one of the parties is the government which was responsible for the appointment. The politicisation of judicial appointments does not, however, necessarily result in lack of judicial independence. In the United States of America, for example, confirmations of nominees for judicial office by the Senate Judiciary Committee are often excessively politicised,¹⁴³ the United States judiciary is nevertheless well-known for its fearless independence.

¹⁴¹Such a provision would positivise the presumption against retrospectivity and at the same time prevent the government from making use of its legislative muscle to interfere with vested rights and the administration of justice. See G.E Devenish **Interpretation of Statutes** (1992) at 186 et seq. for a discussion of the presumption against retrospectivity.

¹⁴²See S. Kentridge "Telling the Truth about Law" 1982 **SALJ** 648 at 651.

¹⁴³See G. Nienaber "United States Supreme Court Appointments: Implications for a Future Constitution in South Africa" 1991 **Consultus** 19.

Whether judicial appointments are likely to affect the independence of the judiciary will depend on who is responsible for such appointments. Where the executive is solely responsible for judicial appointments and there is no mechanism through which purely political appointments can be prevented, the appointment of a judge purely on the ground that he is sympathetic to the government cannot be excluded.¹⁴⁴ Judicial appointments by the executive do not, however, necessarily result in pro-executive judgments. It is not uncommon for an appointee to disappoint the hopes of those who expected him to follow the political views of the appointer.¹⁴⁵

South Africa has had its fair share of controversial judicial appointments.¹⁴⁶ One such appointment, and later promotion, was that of Mr Justice L.C Steyn. Prior to his appointment to the bench Mr Justice Steyn was Attorney-General for South West Africa (now Namibia) and later a Senior Government Law Advisor; he had never practised at the bar.¹⁴⁷ Mr Justice Steyn was later

¹⁴⁴See **infra**. for a discussion of judicial appointments under the 1993 Constitution.

¹⁴⁵Mr Justice Oliver Wendell Holmes Jr of the United States Supreme Court disappointed President Roosevelt with his 'anti-administration' opinions in anti-trust cases, notably in **Northern Securities v United States** 193 US 197 (1904) : see H.J Abraham **The Judicial Process** (1986) at 76-78 for an account of judicial appointments and subsequent disappointments in the United States.

¹⁴⁶See A van Blerk **Judge and be Judged** (1988), Chapt. V.

¹⁴⁷Traditionally, judges in England and South Africa have been appointed from the ranks of practising Senior Counsel. The role of the Judicial Service Commission under the new Constitution has certainly opened the room for the appointment of competent, independent and qualified lawyers (such as lecturers in law and attorneys) as judges, even if they are not Senior Counsel. Examples are the appointments of Mr Justice John Hlophe and Mr Justice Edwin Cameron, former professors of law (appointees need not even be professors), as judges and Ms Justice Navi Pillay, an attorney, as an acting judge. Sections 99(2)(b) and 104(1) of the 1993 Constitution require that the appointee shall be a fit and proper person. While the appointment of academics as judges is to be welcomed, it is desirable, however, that appointees should have sufficient practical experience to be able to deal with

elevated to the position of Chief Justice over judges considered to be more senior and deserving.¹⁴⁸

The packing of the Appellate Division in the 1950s provides a local example of judicial appointments which have raised suspicions of political motivations. The six additional judges of the Appellate Division were appointed pursuant to the enactment of the Appellate Division Quorum Act¹⁴⁹, an Act which increased the quorum of the Appellate Division to eleven judges in appeals dealing with the validity of any Act of Parliament. At the time the government was involved in a process of removing Coloured voters from the common voters' roll; it was anticipated that the Appellate Division would in due course consider the validity of legislation effecting the removal of Coloured voters from the common voters' roll. The additional appointments were made without the customary consultation with the Chief Justice;¹⁵⁰ the new appointees were not readily accepted by their colleagues.¹⁵¹

intricate practical aspects of the resolution of legal disputes. The appointment of magistrates from the ranks of public prosecutors has never been seriously questioned; it is important, however, that their independence should be statutorily recognised and protected.

¹⁴⁸For a criticism of L.C Steyn's appointment and later elevation to the position of Chief Justice see E. Cameron "Legal Chauvinism, Executive-mindedness and Justice - L.C Steyn's Impact on South African Law" 1982 SALJ 38 at 41-43; C Forsyth **In Danger for their Talents - A Study of the Supreme Court of South Africa from 1950-1980** (1985) at 25-26.

¹⁴⁹Act 27 of 1955.

¹⁵⁰Forsyth **op cit.** at 15. Traditionally, judicial appointments were made in consultation with the Bench and the Bar. Under the new dispensation the Judicial Service Commission plays a pivotal role in the appointment of judges: See **infra**.

¹⁵¹Forsyth **op cit.** at 23. According to Forsyth the new appointees, whom he refers to as 'the second team', "were denied **inter alia**, participation in the bowls games on Wednesday afternoons, which were an Appellate Division tradition".

Controversial appointments may not always glaringly affect judicial independence because only a proportion of cases are politically sensitive; the majority of cases are decided by judges who are, above all, competent, regardless of their political leanings. There can be no doubt, however, that controversial appointments are disturbing and do not go unnoticed by other members of the judiciary and in legal circles. In his evidence before the Hoexter Commission Mr Justice Didcott noted that such appointments are

"commonplace as a topic of conversation whenever lawyers gather ... Things have got so bad that some advocates and attorneys who claim political influence, and visibly relish the role of wheeler-dealers, boast openly of their successes in securing the appointment and promotion of so and so, and spoiling the prospects of what's-his-name. Their arrogance and cynicism is distressing enough. Much more is the harm they do to the status and reputation of the judiciary, and for that matter the executive itself".¹⁵²

Purely political appointments are generally intended to give the appointer leverage with which to influence the outcome of judicial decisions; such appointments therefore violate the independence of the judiciary.¹⁵³ A political appointment may instil in the appointee a sense of obligation towards the appointer, with the result that he may become personally dependent. Such appointments may in the long run also cause loss of confidence in the judiciary as a collective branch of government.

The fact that executive appointments have the potential to affect judicial independence does not necessarily mean that the executive ought not be involved in the appointment of judges. The executive does have a responsibility in the administration of justice and, therefore, the appointment of judges. This responsibility stems from the principle of responsible

¹⁵²"The Didcott Memorandum and other Submissions to the Hoexter Commission" in 1980 **SALJ** 651 at 661.

¹⁵³See Z. Motale "Independence of the Judiciary, Prospects and Limitations of Judicial Review in terms of the United States Model in a New South African Order : Towards an Alternative Judicial Structure" 1991 **CILSA** 285 at 295.

government in a parliamentary system.¹⁵⁴

Executive participation in the appointment of judges requires, however, an effective mechanism or some constitutional check through which political and controversial appointments can be prevented. Associated with the doctrine of the separation of powers is the principle of 'checks and balances';¹⁵⁵ there ought to be a measure of control over the exercise of governmental powers if there has to be good government.

Various mechanisms have been devised to minimise the danger of purely political judicial appointments. In the United States of America judicial appointments by the President have to be confirmed by the Senate; confirmation is preceded by hearings and a vote of the Judiciary Committee of the Senate.¹⁵⁶ The American Bar Association also plays a significant role in the evaluation of qualifications of actual or potential nominees during the pre-formal nomination stage.¹⁵⁷

Nienaber¹⁵⁸ is of the view that in the absence of the participation of the legislature, judicial appointments by a body which consists of members of the executive, the judiciary and the legal profession would not be politically legitimate. His suggestion is that a mechanism which is similar to that which

¹⁵⁴Shetreet **op cit.** at 651.

¹⁵⁵See **supra.**

¹⁵⁶Art II s. 2 of the Constitution of the United States. The Judiciary Committee consists of members representing the party-political division in the full Senate. The nominee's political views are usually perceived to be crucial: Nienaber 1991 **Consultus** at 20-21; Abraham **op cit.** at 23-26.

¹⁵⁷Abraham **op cit.** at 26-29. The Bar Association's Committee on Federal Judiciary does not directly participate in the nomination process but evaluates the qualifications of actual or potential nominees and reports to the Justice Department on the qualifications and ratings of the nominees.

¹⁵⁸Nienaber 1991 **Consultus** at 23-24.

is employed in the United States should be applied. In his view judicial appointments should be assigned solely to the legislature in order to ensure public accountability; the legislature could then assign the pre-appointment process to a legislative committee whose function would be to propose candidates selected from a pool of potential candidates; recommendations to the legislature would be preceded by committee hearings. Under such a system the judiciary and the legal profession could play the useful role of identifying and evaluating potential candidates; the evaluation could then serve as a guide to the legislative committee when it selects candidates.

Although the method of appointment suggested by Nienaber promotes and ensures public accountability, it is submitted that it does not reduce the risk of political appointments to a meaningful degree; where a political party enjoys the support of a large majority of the members of the legislature, it would be easy for it to ensure the appointment of only those candidates who are likely to be sympathetic to its cause; it would also be easy for the majority party to load the legislative committee with members from its party and for the committee to recommend the appointment of candidates who are more likely to support its cause and leave out those who are less likely to support it. This method has the propensity to politicise the process of judicial appointments; the interview of candidates by a legislative committee may be conducted along political lines and engage potential judges in politics.¹⁵⁹

In the former Federal Republic of Germany the consent of the Minister of Justice and the majority of the electoral council for judges was necessary for the appointment of judges to the Supreme Court.¹⁶⁰ In Portugal judges of the

¹⁵⁹The controversy which surrounded the appointment of Mr Justice Clarence Thomas to the United States Supreme Court serves as a good example of an interview along political lines.

¹⁶⁰Art. 95, 11 GG, Section 1 ff of the Law for the Election of Judges. The electoral council consisted of the eleven Ministers of Justice of the states and eleven members of the German Parliament : see P Schlosser & W Hobscheid "Federal Republic of Germany" in Shetreet & Deschenes *op cit.* at 85.

Constitutional Court are elected **en bloc** by the Assembly by a two-thirds majority from both the ranks of judges of the ordinary courts and academics.¹⁶¹

In Namibia judicial appointments are assigned to an independent body consisting of members of the executive, the judiciary and the legal profession. In terms of article 82 of the Namibian Constitution all appointments of judges of the Supreme Court and the High Court are to be made by the President on the recommendation of the Judicial Service Commission. The Judicial Service Commission is an independent body consisting of the Chief Justice, a judge appointed by the President, the Attorney-General and two members of the legal profession nominated in accordance with the provisions of an Act of Parliament by the professional organisation or organisations representing the interests of the legal profession in Namibia.¹⁶²

3. The Separation of Powers and Judicial Independence under the 1993 Constitution.

Like previous Constitutions, the 1993 Constitution makes provision for a formal division of state authority among the legislature, the executive and the

Otherwise than in common law systems, judges in civil law systems are usually professional career judges. The idea of professional career judges is more suited to civil law systems, where there is a more strict reliance on written **statutes** and the judge plays an active role in the proceedings; the specialised training of judges is geared towards the application of systematised legal codes and a discovery of the truth through the interrogation of witnesses. In the common law system the judge relies more on precedent and authorities and plays a neutral role in the examination and cross-examination of witnesses; judicial experience is usually gained in practice rather than in the lecture-hall.

¹⁶¹See the account by M. Seligson (untitled) in 1991 **Consultus** 27 at 28.

¹⁶²Art. 85(1) of the Constitution of the Republic of Namibia. See **infra** for a discussion of judicial appointments under the 1993 Constitution.

judiciary.¹⁶³ There is, however, some fusion of functions and personnel between the legislature and the executive; the President, Deputy Presidents and members of the cabinet are also members of the legislature and are accountable to it for their actions. The judiciary, on the other hand, is completely separate from both the legislature and the executive.

What is significant about the 1993 Constitution is that it formally recognises the importance of the principle of the separation of powers and of checks and balances. In terms of Constitutional Principle VI "[t]here shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness".¹⁶⁴ The formal recognition of the principle of separation of powers and of checks and balances reflects the position of the courts as a separate and independent organ of the state.

An important feature of the 1993 Constitution is that it places formal limitations on the powers of the legislature and the executive and vests in the courts the power to test legislative and executive acts; the testing power operates as a means of ensuring that these formal limitations are adhered to. The first formal limitation is contained in section 4(1); in terms of this section the legislature, the executive and the judicial organs of state at all levels of government are bound by the Constitution. The second formal limitation is contained in section 7(1); in terms of this section the legislative and executive organs of state at all levels of government are bound by the Chapter on Fundamental Rights (Chapter 3).

¹⁶³See sections 37, 75 and 96(1).

¹⁶⁴The Constitutional Principles are contained in Schedule 4. In terms of section 71(1)(a) a new constitutional text must comply with the Constitutional Principles contained in Schedule 4; in terms of section 71(2) the Constitutional Court must certify that the provisions of the new constitutional text comply with the Constitutional Principles.

Chapter 3 entrenches the fundamental human rights and freedoms of individuals and protects them against infringement by the legislature and the executive. The rights and freedoms entrenched in Chapter 3 are enforceable in a court of law. The Constitution therefore gives the courts the fundamental role of checking the exercise of power by the legislature and the executive. In order to be effective in this role, the courts ought to be independent; section 96(2) of the Constitution therefore provides that "the judiciary shall be independent, impartial and subject only to this Constitution and the law"; section 98(3) also explicitly prohibits interference with judicial officers in the performance of their functions by any person or organ of state.

The Constitution also protects the security of tenure and the remuneration of judges. In terms of section 104(2) the remuneration of judges shall not be reduced during their continuation in office; in terms of section 104(4) a judge may only be removed from office by the President on the grounds of misbehaviour, incapacity or incompetence established by the Judicial Service Commission and upon receipt of an address from both the National Assembly and the Senate praying for such removal. The import of section 104(4) is that neither the executive nor the legislature can on their own remove a judge from office; the Judicial Service Commission¹⁶⁵ must first establish that a judge is guilty of misbehaviour, is incapacitated or is incompetent before he can be removed from office.¹⁶⁶

The Judicial Service Commission also plays an important role in the

¹⁶⁵The Judicial Service Commission is composed of the Chief Justice, the President of the Constitutional Court, a Judge President designated by the Judges President, the Minister of Justice or his representative, four legal practitioners representing the advocates and attorneys' professions, a professor of law representing all the law faculties at South African Universities, four senators designated by the Senate and four persons, two of whom are practising attorneys or advocates, designated by the President in consultation with the Cabinet: section 105(1).

¹⁶⁶Section 104(5) makes provision for the suspension of a judge pending investigation by the Judicial Services Commission.

appointment of judges. Its composition and its role in the appointment process reduces the risk of purely political appointments; otherwise than in the past the executive can no longer decide on its own who to appoint as a judge.

The 1993 Constitution does not, however, make provision for a consistent method of appointment of judges. The Chief Justice is appointed by the President in consultation with the Cabinet and after consultation with the Judicial Service Commission.¹⁶⁷ The President of the Constitutional Court is appointed by the President in consultation with the Cabinet and **after** consultation with the Chief Justice;¹⁶⁸ four judges of the Constitutional Court are appointed from among judges of the Supreme Court by the President in consultation with the Cabinet **and with** the Chief Justice.¹⁶⁹ The remaining six judges of the Constitutional Court are appointed by the President in consultation with the Cabinet and after consultation with the President of the Constitutional Court.¹⁷⁰

¹⁶⁷Section 97(1).

¹⁶⁸Section 97(2)(a).

¹⁶⁹Section 99(3).

¹⁷⁰A judge of the Constitutional Court must, in addition to being a fit and proper person, be a South African citizen and either be a judge of the Supreme Court or a person qualified to be admitted as an advocate or attorney and has, for a cumulative period of at least 10 years after having so qualified, practised as an advocate or an attorney or lectured in law at a university or be a person who, by reason of his or her training and experience, has expertise in the field of constitutional law relevant to the application of the Constitution and the law of the Republic; a judge of the Supreme Court, on the other hand, need only be a 'fit and proper person'. The additional qualifications for judges of the Constitutional Court seem to be based on the rationale that members of a specialised Constitutional Court ought to be South African citizens who have extensive experience and sufficient expertise to be able to interpret and apply fundamental constitutional values. There seems to be no reason, however, why judges of the Supreme Court, who also often interpret and apply the provisions of the Constitution during litigation, should not be subject to the additional qualifications.

In terms of section 99(5)(a) the appointment of the President of the Constitutional Court and of the six judges of the Constitutional Court who are not appointed from among the judges of the Constitutional Court shall only be made from the recommendations of the Judicial Service Commission.¹⁷¹ The appointing authorities are enjoined to inform the Judicial Service Commission and to furnish it with reasons if they decide not to accept any or some of the recommendations, after which the Judicial Service Commission must make further recommendations; the appointing authorities are thereafter obliged to make appointments from the recommendations as supplemented.¹⁷² The Judicial Service Commission is, on the other hand, directed to have regard to "the need to constitute a court which is independent and representative in respect of gender and race" when making its recommendations.¹⁷³

It is clear from the definition of "in consultation with" in section 233(3) that the appointments of the Chief Justice, the President of the Constitutional Court and judges of the Constitutional Court require consensus between the President and the Cabinet before a valid decision can be taken; in other words, the President and the Cabinet must make the decision together. In terms of section 233(3), "where ... any functionary is required to take a decision in consultation with any functionary, such decision shall require the concurrence of such other functionary..."

The words "after consultation with" do not have the same meaning as "in consultation with".¹⁷⁴ Section 233(4) stipulates that a decision taken after consultation with a functionary shall be a decision taken in good faith after consulting and giving serious consideration to the views of the functionary.

¹⁷¹Section 99(6) makes provision for an exception in respect of the appointment of the first President of the Constitutional Court.

¹⁷²Sections 99(5)(b) and (c).

¹⁷³Section 99(5)(d).

¹⁷⁴**Colonial Secretary v Molteno School Board** 27 SC 96.

The words "after consultation with" mean that the decision-maker must provide the person or body with whom he must consult with all the relevant information, but the parties need not agree on the final decision.¹⁷⁵ This means that the President and the Judicial Service Commission, in the case of the appointment of the Chief Justice, or the President and the Chief Justice, in the case of the appointment of the President of the Constitutional Court, or the President and the President of the Constitutional Court in the case of the six judges of the Constitutional Court who are not appointed from among judges of the Supreme Court¹⁷⁶ need not agree on the final decision. In view of the section 233(4) requirement that the President must give serious consideration to the views of the Judicial Service Commission, it seems unlikely that the President will ignore its recommendation. Sections 99(5)(b) and (c) in essence oblige the President to make the appointments from the recommendation of the Judicial Service Commission.

Judges of the Supreme Court are appointed by the President acting on the advice of the Judicial Service Commission. However, the Constitution does not define the words "acting on the advice of". The words logically mean something other than "after consultation with"; they suggest in reality that the President is obliged to seek, and act according to, the advice of the Judicial Service Commission.¹⁷⁷ This means that President cannot simply

¹⁷⁵See D.H Basson & H. Viljoen **South African Constitutional Law** (1988) at 56; D. Basson **South Africa's Interim Constitution : Text and Notes** (1994) at 116.

¹⁷⁶There is a difference between the appointment of the four judges as provided in section 99(3) and the appointment of the six judges as provided in section 99(4); whereas the President is required to make the decision to appoint the four judges together with the Cabinet and the Chief Justice, he is required to make the decision to appoint the six judges, from the recommendations of the Judicial Service Commission, together with the Cabinet and only to consult President of the Constitutional Court; the final decision rests with the President and the Cabinet. The Judicial Service Commission does not play any role in the appointment of the four judges.

¹⁷⁷Basson **op cit.** at 139.

appoint anyone he likes as a judge; he can only appoint persons recommended by the Judicial Service Commission.¹⁷⁸ In essence, he has little or no discretion. Indeed, if he is to avoid charges of making political appointments, he would hardly ignore the advice of the Judicial Service Commission.

Otherwise than in the United States, there is no participation of a special committee of the legislature in judicial appointments under the 1993 Constitution. The Judicial Service Commission, which has seventeen members, is dominated by persons who are not members of either the executive or the legislature. It is instead dominated by members of the legal profession, namely judges, a professor of law and legal practitioners. The legislature is represented by only four senators who are designated by the Senate; the executive is represented by the Minister of Justice or his representative.

4. Constitutional Supremacy and the Independence of the Judiciary.

In the constitutional sense, the independence of the judiciary depends on the normative level of the legal system with regard to the position of the judiciary, and the extent to which this position can be altered through the exercise of

¹⁷⁸The words 'on the advice of' bear a similar meaning to 'on the recommendation of': **The Oxford Paperback Dictionary** (J.M Hawkins, 2nd ed. 1983) q.v **advise; recommend** ; **The New American Roget's College Thesaurus** (A.H Morehead, 1962) q.v **advice**. Under the 1961 Constitution the State President was obliged to act on the advice of the Executive Council when he exercised certain powers which were mainly inherited by him as the successor to the British Monarch and 'new' powers specifically conferred on him in terms of the Constitution and other statutory enactments; in exercising these powers the State President had no discretion to act according to his own inclination but was obliged to act on the advice or recommendation of the Executive Council.

legislative or executive power.¹⁷⁹ The extent to which the position of the judiciary can be altered will depend on the constitutional limits which are imposed on the exercise of legislative or executive power in relation to the judiciary. In the absence of a constitutional guarantee of judicial independence, the principle of the separation of powers can at best serve as a reminder to the legislature and the executive that the judiciary is a separate branch of government whose independence ought to be respected.

In a normative sense, the constitutional position of the judiciary is determined by the legal norms which provide for the establishment of the courts, the jurisdiction of the courts, the appointment, terms of office and tenure of the judges. These legal norms may be divided into two categories, namely supreme constitutional norms and ordinary statutory norms.

Supreme constitutional norms are those which are contained in a supreme Constitution. The Constitution is supreme in the sense that it constitutes fundamental law which cannot be repealed or amended through the ordinary legislative process. Ordinary statutory norms, on the other hand, are those which are contained in ordinary statutes; such statutes do not have any special status and can be repealed or amended through the ordinary legislative process.

The regulation of the position of the judiciary by constitutional norms ensures greater judicial independence; judicial independence is in essence constitutionally guaranteed, because the supreme provisions of the Constitution insulate the establishment of the courts, their jurisdiction, the appointment of judges, their terms of office and tenure against legislative or executive interference; legislative changes regarding the position of the judiciary would require constitutional amendment or repeal, which would not be easy to effect if the Constitution is sufficiently rigid.

¹⁷⁹See *Shetreet op cit.* at 610.

The regulation of the position of the judiciary by ordinary statutory norms, on the other hand, may not always safeguard judicial independence, because the ordinary statutes in which these norms are contained do not enjoy any supreme status and may be repealed or amended with ease. It is also possible, however, to guarantee judicial independence by making express provision for judicial independence in a supreme Constitution and then regulating the establishment of the courts, their jurisdiction, the appointment of judges, their terms of office and tenure through ordinary statute. In such an instance, undue legislative or executive interference with the courts or the appointments, terms of office and tenure of judges would offend against the constitutional guarantee of judicial independence and would therefore be unconstitutional.

CHAPTER 6

A COMPARATIVE SURVEY OF THE ROLE OF THE JUDICIARY IN CANADA.

1. A Brief Constitutional History of Canada

Canada was established by the British North America Act, 1867.¹ The Act created the Dominion of Canada by uniting the four original provinces, namely Ontario, Quebec, Nova Scotia and New Brunswick.² It also outlined the elements of the central government and made provision for a distribution of powers between the central government and the provinces.

As a dominion Canada was, like the Union of South Africa, subject to certain legal handicaps which restricted the legislative powers of its Parliament. In terms of the Colonial Laws Validity Act of 1865, the legislature of a dominion could not pass laws which would be in conflict with an Act of the British Parliament. A further handicap was that the legislature of a dominion could not pass laws with extra-territorial effect. These legal restraints were removed by the Statute of Westminster of 1931.³

Although prior to the passing of the Statute of Westminster the position of

¹30 & 31 Vict. c 3.

²Sections 3 and 5. Other provinces were incorporated later; at present Canada consists of 10 provinces and 2 territories.

³See Chapt. 3 for a discussion of the effect of the Statute of Westminster on the legislative competence of dominion parliaments. On the Statute of Westminster in relation to Canada in particular see G. Marshall **Parliamentary Sovereignty and the Commonwealth** (1957) at 94-102; R.M Dawson **The Government of Canada** (1957) at 61.

Canada as a dominion was similar to that of the Union of South Africa, the two dominions had different constitutional orders. The purpose of the British North America Act was to create a federal system of government, characterised by a distribution of powers between the central government and the provincial governments. The provincial governments were given a moderate list of powers which were essentially concerned with local matters;⁴ the central government was given comprehensive powers "to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects ... assigned exclusively to the legislatures of the provinces" as well as a long list of specific powers which were for the most part concerned with national matters.⁵ Provision was also made for concurrent powers in relation to certain matters.⁶

Legislative power at central level was vested in the Queen, the Senate and the House of Commons.⁷ A Governor-General acted as the Queen's representative. Legislative power at provincial level was vested in the Lieutenant-Governor and a Legislative Assembly.⁸

Prior to 1949 the power of the central legislature to amend the Constitution (the British North America Act) was limited. The established tradition was that constitutional changes were made by the British Parliament at the request

⁴Sect. 4, British North America Act, 1867.

⁵Sect. 91, British North America Act, 1867.

⁶Originally these matters were immigration and agriculture (sect. 95). A 1951 amendment created a third concurrent power, namely the enactment of laws in relation to old age pension (section 94A, British Statutes, 14 & 15 George VI c 32).

⁷Sect. 17, British North America Act, 1867.

⁸Sects. 67, 71, and 88, British North America Act, 1867.

of the Canadian Parliament.⁹ The limitation of the power of the Canadian Parliament to amend the Constitution was, however, relaxed by the British North America (No. 2) Act, 1949.

The British North America Act of 1949 left only certain matters, affecting for the most part the relationship between the central government and the provincial governments, to be amended by the British Parliament at the request of the Canadian Parliament. The Act granted the Canadian Parliament the power to amend the Constitution, with the exception of certain matters which fell within the legislative competence of the provincial parliaments in terms of the 1867 Act, the rights and privileges of the provinces acquired by them in terms of the 1867 Act or any other constitutional act and the rights of any class of persons pertaining to schools or the use of the English or French languages.¹⁰ These exceptions were in the nature of a constitutional entrenchment; constitutional provisions relating to them could only be amended with the consent of the provinces or by the British Parliament at the request of the Canadian Parliament.¹¹

Although the Canadian provinces were structured along federal lines, the British North America Act, 1867 was intended to create a united dominion "with a constitution similar in principle to that of the United Kingdom".¹² The basic principle of the United Kingdom has been that of the legislative supremacy of Parliament¹³ and an exclusion of the jurisdiction of the courts

⁹Dawson **op cit.** at 80 and 142-143. The British North America Act, 1867 did not itself make provision for an amendment mechanism.

¹⁰Marshall **op cit.** at 89.

¹¹Marshall **op cit.** at 89-90.

¹²Preamble to the British North America Act, 1867.

¹³See C.H McIlwain **The High Court of Parliament and its Supremacy** (1934) at 336-346; G. Winterton "Parliamentary Supremacy and the Judiciary" 1981 **LQR** 265 at 273.

over the validity of parliamentary legislation.¹⁴ In conformity with the principle of legislative supremacy, the British North America Act did not make any provision for the protection of individual rights and freedoms in terms of which the validity of legislation could be reviewed by the courts.

Until 1960 the only basis on which the courts could review the validity of legislation was the **ultra vires** doctrine in relation to the distribution of powers between the central government and the provincial governments.¹⁵ The courts could declare federal legislation invalid if the federal Parliament had in enacting the legislation exceeded the powers granted to it by the Constitution; similarly, a provincial statute could be declared invalid if the provincial legislation had in enacting it exceeded its legislative powers in terms of the Constitution.¹⁶

In 1960 the federal Parliament of Canada enacted the Canadian Bill of Rights.¹⁷ The Bill of Rights was, however, not a fully-fledged constitutional document. It was not part of a supreme Constitution, nor was it entrenched; it was rather a quasi-constitutional document in terms of which certain fundamental human rights and freedoms were recognised and protected.¹⁸

¹⁴See A.V Dicey **Introduction to the Study of the Law of the Constitution** 10th ed. (1975) at 60-61.

¹⁵V.S Mackinnon "Dicey and New Dispensations: the Canadian Charter of Rights and Freedoms" 1985 **CILSA** 404 at 405.

¹⁶**Idem.**

¹⁷**An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms** S.C. 1960, c 44, reprinted in R.S.C 1970, App. III (the 1960 Bill of Rights). For a discussion of the events leading to the enactment of 1960 Bill of Rights see M. Mandel **The Charter of Rights and the Legalization of Politics in Canada** (1989) at 9-15.

¹⁸See **Singh v Minister of Employment and Immigration** [1985] 1 S.C.R 177 at 224.

The Bill of Rights was enacted by the federal government unilaterally and was applicable only to the federal organs of government.¹⁹

Largely because it did not form part of a Constitution with supreme legal effect, the 1960 Bill of Rights did not in the long run prove to be effective in the protection of human rights and freedoms. The courts' cautious and reticent application of the Bill of Rights contributed to its ineffectiveness.²⁰

Dissatisfaction with Canadian representative politics, the influence of United States institutions and culture on Canadian life and the government's promise to transfer power to the people by giving them the right to approach the courts for the enforcement of their rights against government excesses ushered in a new era in Canadian law and politics.²¹ A new Constitution was introduced in 1982. The new Constitution was introduced by way of the enactment of the Canada Act by the British Parliament.²² Section 1 of the Canada Act enacted the Constitution Act, 1982. Section 52 of the Constitution Act made the Constitution of Canada the supreme law of Canada; the Constitution Act contained a justiciable Charter of Rights and Freedoms.²³ In terms of section 2 of the Canada Act the British Parliament expressly renounced its

¹⁹Mackinnon 1985 **CILSA** at 408. The application of the Bill of Rights to the provincial governments would have affected their powers and would as a result have required a consultation with them and their consent. In addition, a subsequent amendment of the Constitution by the British Parliament, in terms of section 91(1) of the British North America Act (No. 2) of 1949, would have been required.

²⁰See **infra**.

²¹See Mandel **op cit.** Chapt. 1 for a discussion of the events which preceded the introduction of the new Constitution.

²²1982, c 11 (UK).

²³The various rights and freedoms are specified in sections 2 to 23 of the Charter. Section 24 of the Constitution Act renders the rights and freedoms specified in the Charter justiciable.

authority to legislate for Canada in any way.²⁴

In so far as the Canadian Charter of Rights and Freedoms forms part of a supreme Constitution and is justiciable, any federal or provincial legislation which is in conflict with its provisions may be reviewed and declared invalid by the courts. The supremacy of the Constitution implies that it operates as the supreme law of Canada; it has superior force over federal and provincial laws and any such law which is inconsistent with it would be unconstitutional.²⁵

2. Legislative Supremacy and the Judiciary before 1982.

Until the late 1930s the view that was held by Canadian lawyers and politicians about the constitutional position of the Canadian Parliament was that Parliament possessed absolute legislative supremacy; it was, according to this view, for Parliament to make laws and for the courts to apply these laws without questioning their validity.²⁶

As early as 1899 the Judicial Committee of the Privy Council, Canada's highest court of appeal until 1949, had held, in **Union Colliery of British Columbia v Bryden**,²⁷ that it was not the function of the courts to question the wisdom or fairness of parliamentary legislation. In the opinion of the Privy Council, the legislative authority of Parliament was unfettered; all that the courts could do was to determine what the limits of the legislative

²⁴Section 2 provides as follows: "No Act of Parliament of the United Kingdom passed after the Constitution Act, 1982 comes into force shall extend to Canada as part of its law".

²⁵See B.L Strayer **The Canadian Constitution and the Courts** (1988) at 43.

²⁶Mandel **op cit.** at 4.

²⁷[1899] A.C 580, per Lord Watson at 585.

authority granted were, and, once that point had been settled, courts of law had no right whatever to inquire whether legislative authority had been exercised wisely or not.

The only limit on the legislative authority conferred by the British North America Act, 1867 was the division of powers between the federal government and the provincial governments.²⁸ In terms of this limitation, the courts could inquire whether the federal Parliament or the provincial legislatures had acted **ultra vires** the powers granted to them by the British North America Act. Provided that the federal and the provincial authorities did not infringe on each other's powers, the courts were not competent to question the validity of either federal or provincial legislation.²⁹

The courts' competence to inquire into the question whether the federal or provincial legislatures acted **ultra vires** the powers granted to them in terms of the British North America Act was in reality not an inquiry into the validity of legislation. When Parliament acted **ultra vires** the powers granted to it, the ensuing instrument was no law at all, since the enacting organ had no legal power to make the 'law'. The instrument in question was null and void from the moment of its enactment.³⁰

An inquiry into the question whether Parliament had acted **ultra vires** the powers granted to it in terms of the British North America Act essentially amounted to an inarticulate application of the Colonial Laws Validity Act.³¹ The British North America Act was a statute of the British Parliament; an enactment of the federal or provincial Parliament which was **ultra vires** the

²⁸Sections 91 and 92 of the British North America Act, 1867,

²⁹Strayer **op cit.** at 4-5.

³⁰Dawson **op cit.** at 81-82.

³¹Strayer **op cit.** at 7.

powers prescribed in a statute of the British Parliament would be repugnant to that statute and therefore in conflict with the Colonial Laws Validity Act.³² The Colonial Laws Validity Act continued to operate in relation to statutes of the British Parliament extending to Canada, which were for the most part the British North America Acts, until 1982.³³

The enactment of the Canadian Bill of Rights of 1960 by the federal legislature did not affect the legislative supremacy of Parliament. The Bill of Rights was applicable only to enactments of the federal Parliament; it was more of an interpretative mechanism than a full guarantee of fundamental human rights and freedoms.³⁴ As a statute which was unilaterally enacted by the federal Parliament, it was binding only on that legislature; it did not in law form part of the body of the Constitution of Canada.

However, the 1960 Bill of Rights provided the Supreme Court of Canada with a basis for the review of federal legislation, even if the doctrine of legislative supremacy continued to operate. In terms of section 2 of the Bill of Rights, laws of the federal Parliament were to be construed and applied as not to abrogate, abridge or infringe or to authorise the abrogation, abridgement or infringement of any of the rights or freedoms recognised and declared in it, unless an Act of the Canadian Parliament had expressly declared that such Act shall operate notwithstanding the Bill of Rights.

³²See Chapt. 4 for a discussion of the effect of the Colonial Laws Validity Act on acts of dominion Parliaments.

³³Although the Colonial Laws Validity Act ceased to operate in relation to legislation of the federal and provincial legislatures after the adoption of the Statute of Westminster, 1931, section 7 of the Statute of Westminster preserved the applicability of the Colonial Laws Validity Act in relation to the British North America Acts; section 7 was repealed in respect of Canada by virtue of item 17 of the schedule to the Constitution Act, 1982.

³⁴See **R v Drybones** (1969) 9 D.L.R. (3d) at 491; **Curr v The Queen** (1972) 26 D.L.R. (3d) 603 at 613.

Section 2 of the Bill of Rights raised two important questions regarding its applicability. The first was whether the court could apply a statute even if such a statute was in conflict with the provisions of the Bill of Rights; the second was whether the court could hold a statute inoperative if it could not construe such a statute so as to avoid a conflict with the provisions of the Bill of Rights.³⁵

The applicability of the Bill of Rights was considered for the first time in **R v Drybones**.³⁶ The question was whether the Indian Act was compatible with the Bill of Rights. The Indian Act, a federal statute which was exclusively applicable to Indians, made provision for stiffer penalties for liquor-related offences; it was theoretically applicable to offences committed in private places and, in contrast to Northwest Territories liquor laws which were restricted to intoxication in a public place, therefore operated unequally. Drybones, a Canadian Indian, had been convicted of being "intoxicated off a reserve" and sentenced to a fine of \$10. A Territorial Court judge had found that the Indian Act operated unequally and that the relevant section of the Act was incompatible with the Bill of Rights and therefore invalid. The British Columbia Court of Appeal unanimously confirmed the decision of the Territorial Court. The matter went to the Supreme Court of Canada in a further appeal.

The Supreme Court overruled the Indian Act and held that the effect of section 2 of the Bill of Rights was to render inoperative, and therefore to override, federal statutes which were inconsistent with the Bill of Rights. The court did not, however, exercise full power of judicial review but used section 2 as no more than a canon of interpretation.³⁷ This form of 'judicial review' has

³⁵See Mackinnon 1985 **CILSA** at 409.

³⁶**Supra**.

³⁷Mackinnon 1985 **CILSA** at 409.

variously been described as 'indirect judicial review'³⁸ and 'judicial braking'.³⁹ In essence, the Canadian Bill of Rights of 1960 was an interpretative statute which enabled the court to interpret federal legislation in favour of the rights and freedoms recognised and declared in it.⁴⁰

Apart from the decision in **R v Drybones**⁴¹ there has been no other decision where the court accorded the Bill of Rights greater credence. The decision was watered down in **Attorney-General, Canada v Lavell**.⁴² In this case the court upheld a section of the Indian Act which disenfranchised Indian women (but not Indian men) who married non-Indians, despite the fact that the statute operated unequally and was therefore incompatible with the Bill of Rights; the conflict could also not be avoided by interpretation.

The practical, direct impact of the Canadian Bill of Rights of 1960 has been described as 'almost nil'.⁴³ Although the Bill of Rights substantially affected the doctrine of legislative supremacy,⁴⁴ the Supreme Court largely adopted an extremely cautious approach.⁴⁵ According to Lyon⁴⁶ the court's cautious

³⁸J. Jaconelli **Enacting a Bill of Rights** (1980) at 34.

³⁹E. McWhinney **Judicial Review** (1968) at 13.

⁴⁰See Jaconelli **op cit.** at 42; D.A Schmeiser **Civil Liberties in Canada** (1964) at 52.

⁴¹**Supra.**

⁴²(1974) S.C.R 1349.

⁴³P. Brett "Reflections on the Canadian Bill of Rights" 1969 **Alberta LR** 294.

⁴⁴See **Attorney-General, Canada v Lavell (supra)** at 1374.

⁴⁵See for example **Rebrin v Bird** (1961) 130 C.C.C 55; **Robertson and Rosentanni v The Queen** (1963) 41 D.L.R (2d) 485;

approach reflected a commitment to the legislative supremacy of Parliament and a belief that the common law provided sufficient protection of the rights and liberties of individuals; in terms of this belief the Bill of Rights was no more than an embodiment of the rights and freedoms which were already protected under the common law. The doctrine of legislative supremacy in essence continued to operate until the coming into operation of the Constitution Act of 1982.

3. **Judicial Review under the Constitution Act of 1982.**

The cornerstone of judicial review under the 1982 Constitution is the supremacy of the Constitution. Section 52(1) of the Constitution Act provides that

"[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is to the extent of the inconsistency of no force or effect".⁴⁷

The Constitution Act contains a Charter of Rights and Freedoms; a reference to 'the provisions of the Constitution' in section 52(1) is therefore also a

O'Connor v The Queen (1966) 57 D.L.R (2d) 123; **Attorney-General, Canada v Lavell** (*supra*). There were instances, however, where a broad approach, which sought to give the Bill of Rights greater credence, was adopted : see for example the dissenting opinions of Laskin J (later Chief Justice of Canada) in **Attorney-General, Canada v Lavell** (*supra*), **Mitchell v The Queen** 24 C.C.C (2d) 241 and **Morgentaler v The Queen** (1975) 20 C.C.C (2d) 449.

⁴⁶N. Lyon "The Teleological Mandate of the Fundamental Guarantee: What to do with Vague but Meaningful Generalities" (1982) 4 **Supreme Court Rev.** 57 at 58.

⁴⁷It has been expressly stated that section 52 adopts the principle of the supremacy of the Constitution: see **R v Currie** (1983) 33 C.R (3d) 227 at 233 (N.S.C.A); **Re Martin : Children's Aid Society of Winnipeg v Martin et al** (1983) 25 Man. R (2d) 143 (CA) at 149.

reference to the provisions of the Charter of Rights and Freedoms. The inclusion of the rights and freedoms specified in the Charter in a supreme Constitution elevates them to a status which is above ordinary legislation, so that these rights and freedoms take precedence over ordinary legislation; any legislation which is inconsistent with these rights and freedoms may be declared invalid. The entrenchment of the rights and freedoms enumerated in the Charter may not, however, be construed as denying the existence of any other rights or freedoms that exist in Canada.⁴⁸

Section 24(1) of the Constitution ensures the efficacy of the Charter of Rights and Freedoms. Section 24(1), which forms part of the Charter, renders the rights and freedoms specified in the Charter justiciable. It provides that

"[a]nyone whose rights and freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate".

Section 52 of the Constitution provides for the sanction of invalidity where the court finds that a legislative or executive act has infringed a right or freedom guaranteed by the Charter. According to Strayer⁴⁹, section 24(1), on the other hand

"assures a role for the courts and seemingly contemplates a wide range of judicial remedies based on findings that rights or freedoms have been infringed, not just (as in s. 52) a finding of invalidity because laws relied on by a party are inconsistent with the Constitution".

3.1. Legislative Supremacy and the 1982 Constitution.

Although the 1960 Canadian Bill of Rights provided the courts with a mechanism for protecting individual rights and freedoms, it left the **Grundnorm** intact; the ultimate norm in Canadian constitutional law remained

⁴⁸Section 26.

⁴⁹Strayer **op cit.** at 33.

the legislative supremacy of Parliament. The Constitution Act of 1982 introduced a new **Grundnorm**; it made the Constitution of Canada the supreme law of the land and made provision for a Canadian procedure for constitutional amendment.

Before 1982 the concept of legislative supremacy in Canada was strengthened by Canada's acceptance of the supremacy of the British Parliament. However, the British Parliament expressly renounced, in terms of section 2 of the Canada Act of 1982, its authority to legislate for Canada.⁵⁰ The British Parliament's renunciation of its authority to legislate for Canada and the introduction of a new **Grundnorm** meant that Canadian courts no longer had to regard the federal Parliament and the provincial legislatures as 'sovereign' in the same sense as the British Parliament.

Canadian courts could, in accordance with the new **Grundnorm**, decide cases in such a way that provisions of the Constitution would override ordinary laws which were inconsistent with these provisions. This meant that ordinary laws which were in conflict with the provisions of the Constitution, including those which infringed the rights and freedoms specified in the Charter, could be declared invalid.

However, despite the fact that the Constitution Act introduced a new **Grundnorm** in terms of which the Constitution was the supreme law of the land, it has attempted to preserve the concept of legislative supremacy while at the same time protecting, through the Charter, individual rights and freedoms as effectively as possible.⁵¹ In terms of section 33(1), Parliament

⁵⁰The Canada Act is a statute of the British Parliament which was enacted at the request of the Canadian Parliament and brought into existence the Constitution Act, 1982.

⁵¹B.L Strayer "Life under the Canadian Charter: Adjusting the Balance Between Legislatures and the Courts" 1988 **Public Law** 347 at 353; Strayer **op cit.** at 61.

or the legislature of a province may expressly declare in an Act of the federal Parliament or of a provincial legislature that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of the Charter.

Section 2 of the Charter deals with fundamental freedoms;⁵² sections 7 to 15 deal with legal rights⁵³. The implication of section 33(1) of the Constitution is that , in so far as these rights and freedoms are concerned, the federal Parliament and the provincial legislatures remain, to some extent, supreme. Section 33(1) permits the federal Parliament and the provincial legislatures to override these freedoms and rights.⁵⁴ It is noteworthy that the Constitution of the Republic of South Africa of 1993 does not, except for section 33(5) which provides for the continued operation of certain labour legislation, have a provision similar to section 33(1) of the Canadian Charter.

Section 33 does not, however, give the federal Parliament and the provincial legislatures absolute legislative supremacy. In terms of section 33(3) a declaration that an Act or a provision thereof shall operate notwithstanding a provision of the Charter mentioned in section 33(1) can have effect for five years only, after which it may be renewed only after debate and vote.⁵⁵ The overriding power must also apparently be exercised with particularity; this implies that the government invoking section 33(1) must take responsibility

⁵²These are freedom of conscience and religion, freedom of thought, belief, opinion and expression, freedom of peaceful assembly and freedom of association.

⁵³The legal rights guaranteed in sections 7 to 15 are those relating to life, liberty and security of the person, search and seizure, detention or imprisonment, proceedings in criminal and penal matters, treatment or punishment, self incrimination and the assistance of an interpreter and equality.

⁵⁴Strayer *op cit.* note 25 at 63.

⁵⁵See Strayer 1988 **Public Law** at 353.

before the legislature and the voters for overriding any specific Charter guarantee.⁵⁶

A section 33(1) override is unlikely to be deemed justifiable by the legislature and the voters unless it is based on some existing valid grounds, such as, for example, national emergencies where section 1 of the Charter⁵⁷ does not provide an adequate means of abridging individual rights and freedoms.⁵⁸ Section 33 also does not permit an override of those rights which are an integral part of parliamentary democracy, such as the requirement of regular legislative sessions and elections⁵⁹, mobility rights⁶⁰ and linguistic rights⁶¹; the absolute protection of these rights serves to enhance the democratic process.⁶²

There has also been another attempt to reconcile the entrenchment of individual rights and freedoms with parliamentary democracy. Section 1 of the Charter permits "such reasonable limits (to individual rights and freedoms) prescribed by law as can be demonstrably justified in a free and democratic society". By permitting limits "prescribed by law" section 1 preserves legislative power in relation to rights and freedoms guaranteed by the Charter, provided, however, that the limitations imposed can be shown to be "justified

⁵⁶**Idem.**

⁵⁷Section 1 of the Charter provides that the rights and freedoms guaranteed in the Charter are "subject ... to such limits prescribed by law as can be demonstrably justified in a free and democratic society".

⁵⁸Strayer **op cit.** note 25 at 61.

⁵⁹Sections 3 to 5 of the Charter.

⁶⁰Section 6 of the Charter.

⁶¹Sections 16 to 23 of the Charter.

⁶²See Strayer **op cit.** note 25 at 64.

in a free and democratic society".⁶³

A limitation clause such as the one contained in section 1 of the Charter sets out a criterion in terms of which courts should determine when the will of elected representatives of the people can be declared invalid on the basis that it is unconstitutional.⁶⁴ The criterion operates as a secondary rule pursuant to which the legislature, the executive and the courts should make value choices. It preserves the democratic principle that it is the function of elected representatives to make important value choices but qualifies it by stating that the values chosen must be reasonable and justifiable in a free and democratic society. To a large extent the criterion therefore eases the tension between substantive judicial review and the fundamental principle of majority rule rooted in the democratic process. In deciding whether to vote again for a particular government, voters are more likely to gauge the performance and acts of elected representatives by the standard of what is reasonable and justified in a free and democratic society.

The limitation criterion is available to the courts to determine whether elected representatives have made permissible value choices. In the absence of such a criterion the legislature, the executive and the judiciary in particular lack a principled mechanism which limits the making of value choices; this invites, as in the United States, judicial activism and frustrates democratic value choices by elected representatives. Instead of deciding cases and controversies according to a laid down criterion, judges usually make qualitative assessments of values and as a result engage in social engineering.⁶⁵

⁶³**Ibid.** at 59-60.

⁶⁴Section 33(1) of the Republic of South Africa of 1993 contains a provision which is similar to section 1 of the Canadian Charter.

⁶⁵See Chapt. 10 for a discussion of the permissible limits of judicial review.

There are indications that section 1 of the Canadian Charter must be applied strictly and that it has qualified legislative power in a major way.⁶⁶ The section only permits a limitation and not a direct denial or negation of a right or freedom guaranteed by the Charter; such a denial or negation can only be effected under section 33.⁶⁷ Section 1 does not, therefore, grant absolute legislative power in relation to the rights and freedoms guaranteed by the Charter.

3.2. Judicial Determination of Constitutionality in Canada.

Judicial determination of constitutionality in Canada is centred around section 52 (the supremacy clause) and section 24 (the justiciability clause) of the 1982 Constitution. Taken together, these sections provide that whenever an individual approaches the court with a complaint that his right or freedom as guaranteed by the Charter has been infringed, the court has the power to determine whether the legislative or executive act complained of actually infringes the guaranteed right or freedom and to give effect to the superior law of the Constitution if the act complained of is found to be inconsistent with it.

Section 24(1) of the Constitution assigns the determination of constitutionality to a "a court of competent jurisdiction". In **Singh et al v Minister of Employment and Immigration**⁶⁸ it was held that section 24(1) "premises the existence of jurisdiction to a source external to the Charter itself". The constitutive statute as to the parties to the suit, the subject-matter of the cause of action and the remedy being sought will determine whether a

⁶⁶Strayer **op cit.** note 25 at 60.

⁶⁷**Attorney-General Quebec v Quebec Association of Protestant School Boards et al** [1984] 2 S.C.R 66 at 84; **R v Big M Drug Mart Ltd** [1985] 1 S.C.R 295 at 353.

⁶⁸[1985] 1 S.C.R 177 at 222.

court is of competent jurisdiction.⁶⁹ The Charter itself does not directly confer upon any specific court jurisdiction to adjudicate any matter which arises under it.

The question arises, however, whether provisions of the Charter apply only to disputes where one of the parties is a government organ or also to those involving only private individuals, that is, whether they apply only vertically or both vertically and horizontally. Section 32(1) of the Charter makes its provisions applicable only to Parliament, the provincial legislatures, the government of Canada and the governments of the provinces. The question whether the Charter also applies horizontally was considered in **Retail, Wholesale & Department Store Union Local 580 v Dolphin Delivery Ltd.**⁷⁰

The question in issue in **Dolphin Delivery** was whether the application by the court of the common law rule according to which secondary picketing is considered to be a civil wrong and may give rise to an order of damages for breach of contract constituted a form of governmental action which obliged the court to apply the provisions of the Charter, even if none of the legislative or executive organs of state was involved. The Supreme Court of Canada held that a court order could not be regarded as a form of governmental action. In the court's view the word 'government' as used in section 32 does not refer to government in its generic sense - meaning the whole of the governmental apparatus of the state - but to a branch of government.⁷¹ It rejected the approach that the Charter applies to the common law in litigation between

⁶⁹Strayer **op cit.** note 25 at 71; **Mills v The Queen** [1986] 1 S.C.R. 863. In general the Supreme Court of Canada and the higher provincial courts have jurisdiction to determine the constitutionality of legislative and executive acts.

⁷⁰[1986] 2 S.C.R. 573.

⁷¹Per McIntyre J at 598.

private individuals. According to McIntyre J the Charter

"will apply to the common law ... only in so far as the common law is the basis of some governmental action which, it is alleged infringes a guaranteed right or freedom".⁷²

The position in Canada, therefore, is that provisions of the Charter apply vertically and not also horizontally. Section 35(3) of the 1993 South African Constitution, which obliges the court to have due regard to the spirit, purport and objects of the Bill of Rights (Chapter 3) in the application and development of the common law, on the other hand, gives some of the entrenched rights a horizontal dimension.⁷³

Where the exercise of legislative power is concerned, the Canadian Constitution contains competing principles which may limit both the exercise of such power and judicial determination of constitutionality. On the one hand, the judiciary may limit the exercise of legislative power through a determination of constitutionality and a finding that legislation that violates the provisions of the Constitution is invalid. On the other hand, Parliament and the provincial legislatures may deny rights to individuals in terms of section 33 of the Charter, or impose limits on rights guaranteed by the Charter in terms of section 1, the effect of which would be to restrict judicial determination of constitutionality.

There are also various other ways in which judicial determination of constitutionality may be restricted. It may be restricted by means of procedural requirements or through statutory denial of a right of action or

⁷²At 599. McIntyre J recognised that the Charter would apply to private relations where there is an exercise of, or reliance upon, governmental action and one private party invokes or relies upon it to produce an infringement of the Charter rights of another: see also **Re Blainey and Ontario Hockey Association** (1986) OR (2d) 513 (Ont. CA); **McKinney v University of Guelph** (1991) 76 D.L.R (4th) 545.

⁷³See Chapt. 10 for a discussion of this aspect.

through legislative pre-determination of judicial findings.

3.2.1. Procedural Requirements for the Determination of Constitutionality.

Procedural requirements for the determination of constitutionality are those requirements which have to be met before the court can engage in a determination of constitutionality. The most common requirement is the service of a notice on the appropriate Attorney-General, advising him of an intention to challenge the validity of legislation.⁷⁴ This requirement is based on the fact that the Attorney-General, as a representative of the government which is a participant in the intended constitutional litigation, should be made aware of the impending challenge of the validity of legislation and be given an opportunity to intervene and participate in the hearing.⁷⁵

Various provincial enactments make provision for the notice requirement.⁷⁶ Although there is no federal statute which requires notice of an impending challenge of the validity of legislation to be given to the federal government, the rules of the Supreme Court of Canada have since 1905 required that notice be given to the Attorney-General where the validity of federal legislation is challenged.⁷⁷ Rule 32(1) has broadened the notice requirement by laying down that a party raising a question as to the constitutionality of legislation must apply to the Chief Justice or a judge for the purpose of stating that question. The rule also makes provision for service of the stated question to the Attorney-General of Canada and the Attorneys-General of all the

⁷⁴Strayer **op cit.** note 25 at 73.

⁷⁵See **Northern Telecom Ltd v Communication Workers of Canada** [1980] 1 S.C.R 115 at 139-140.

⁷⁶See Strayer **op cit.** note 25 at 74-77.

⁷⁷Supreme Court Rules, 1945, rules 18 and 19 as originally promulgated.

provinces, who may intervene.⁷⁸

However, in so far as the notice requirement in respect of a challenge of the validity of federal legislation is contained in rules laid down by the Supreme Court itself and not in a federal or provincial statute, it is self-imposed and therefore does not constitute a real legislative restriction on judicial determination of constitutionality. The Supreme Court rules are, just like the provincial statutes requiring notice to the Attorneys-General, simply intended to facilitate government participation in constitutional litigation.⁷⁹

Although the notice requirements contained in the various provincial statutes are intended to facilitate government participation in constitutional litigation, they may, to a certain extent, restrict judicial determination of constitutionality, especially where the requirement is couched in such a way that not only notice to an Attorney-General but also his consent is required. The Supreme Court of Canada has, in **Thorson v Attorney-General of Canada**⁸⁰, expressed its views on conditions precedent laid down by the legislature:

"Any attempt by Parliament or a Legislature to fix conditions precedent, as by requiring the consent of some public officer or authority, to the determination of constitutionality of legislation cannot foreclose the courts merely because the conditions remain unsatisfied."

⁷⁸Supreme Court Rules, SOR/83-74; SOR/84-821; SOR 87-292. See **Strayer op cit.** note 25 at 77-78.

⁷⁹**Strayer op cit.** note 25 at 83. The Rules of the Federal Court of Appeal are not peremptory with regard to the notice requirement; they simply provide that where "any constitutional question or any question of general importance" is raised before the court a party **may** serve notice on any interested Attorney-General, or the court **may** bring the matter to the attention of any Attorney-General, and in such a case, or independent of such notice, any Attorney-General **may** apply for leave to intervene and participate in the hearing: **Strayer ibid.** at 79.

⁸⁰[1975] 1 S.C.R 138 at 151.

What the court apparently meant was that conditions or requirements which are impossible for a litigant to comply with, and which do not facilitate effective judicial consideration of constitutional issues, will not preclude the court from determining the constitutionality of legislation.⁸¹ In particular, where the notice requirement in relation to a challenge of the validity is contained in the Rules of the Supreme Court, the court can dispense with the requirement where it becomes difficult for a litigant to comply with it; this also explains why the notice requirement in terms of the Rules of the Federal Court of Appeal is not peremptory. In essence, full compliance with the notice requirement will be required only where it facilitates effective and proper judicial determination of constitutionality.

3.2.2. Statutory Denial of a Right of Action (Ouster Clauses).

Judicial determination of constitutionality may be restricted or excluded by federal or provincial statutory provisions which either limit or abolish the right of action in instances where a constitutional point may be raised. Provincial legislatures, in particular, have in the past attempted to interfere with the substantive rights which fell outside their legislative powers and then barred enforcement of these rights in provincial courts through a purported exercise of their jurisdiction over 'Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts ... including Procedure in Civil Matters' and over 'Property and Civil Rights in the Province'. The courts have, however, generally held that the legislatures were not empowered to restrict access to the courts so as to avoid a determination of constitutionality.⁸²

Federal or provincial statutes may, however, legitimately restrict or deny a right of action in respect of acts done under an invalid legislative or executive

⁸¹Strayer **op cit.** note 25 at 86.

⁸²**Ibid.** at 97-98 and the cases discussed.

act.⁸³ Such statutes are aimed at ensuring the efficient functioning of the public service and the courts and are therefore not designed to maintain constitutionally invalid projects. According to Strayer,⁸⁴ as long as the legislature does not restrict access to the courts "in such a way as to permit it colourably (sic) to accomplish ends otherwise denied it by the Constitution", it may restrict or deny access to the courts where constitutional issues are involved.

Federal denial of a right of action is potentially limited by the provisions of section 101 of the Constitution Act, 1867, which restricts Parliament's power to "the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the establishment of any additional Courts for the better Administration of the Laws of Canada". The effect of a federal statute denying a right of action would be limited by the fact that in an appeal case the constitutional issues would already have arisen and been canvassed in the provincial court, so that the court of appeal would be obliged to consider and determine the issues. Even if it were possible for the federal legislature to restrict the jurisdiction of the court, such a restriction would be invalid if it amounted to an evasion of the constitutional limitations on its power.⁸⁵

The Federal Court Act of 1971, however, presents the possibility of a denial of the right of provincial superior courts to consider constitutional issues which relate to federal government activity. In terms of section 17(1) of the Act, the Trial Division of the Federal Court has exclusive jurisdiction "in all cases where relief is claimed against the Crown"; section 18 of the Act gives the Trial Division exclusive jurisdiction over prerogative writs, declarations, and similar relief against tribunals or officers, including proceedings against

⁸³**Ibid.** at 106.

⁸⁴**Ibid.** at 107.

⁸⁵**Idem.**

the Attorney-General.⁸⁶ The effect of the Act is that the review jurisdiction which provincial superior courts formerly exercised over federal agencies is excluded.⁸⁷

In **Denison Mines Ltd v Attorney-General, Canada**⁸⁸ the Ontario High Court held that section 17 of the Federal Court Act, 1971 constituted an effective bar to an action for a declaration in a provincial court that a federal statute was invalid; it has also been held, in **Hamilton v Hamilton Harbour Commissioners**,⁸⁹ that section 18 of the Act constitutes a bar to an action against a federal board for a declaration involving a constitutional issue.

It has been held, however, that an action for a declaration in respect of which the validity of a statute is in issue is not an action 'against the Crown' or its agencies and that it does not affect the Crown directly⁹⁰; such an action would therefore, according to this view, not be excluded from the review jurisdiction of provincial superior courts over federal agencies. Provincial courts have distinguished such actions from those which sought a declaration concerning a specific personal or property right which is in dispute between the crown and the individual where crown property or financial interests would be affected; they have held that sections 17 and 18 of the Federal Court Act, 1971 deny access only in respect of the latter type of action and not in

⁸⁶**Ibid.** at 108.

⁸⁷See e.g. **Commonwealth of Puerto Rico v Hernandez** [1975] 1 S.C.R. 228 at 233-237.

⁸⁸[1973] 1 OR 797.

⁸⁹[1972] 1 OR 61.

⁹⁰**McNeil v N.S. Board of Censors** [1975] N.S.R. (2d) 483; **Canex Placer Ltd v Attorney-General, British Columbia** [1976] 1 W.W.R. 24. These cases did not, however, involve the Federal Court Act.

respect of actions where declarations about the validity of federal laws are sought.⁹¹

The Supreme Court of Canada has ignored the distinction made by the provincial courts and approached the matter differently. In an appeal from the British Columbia court, the Supreme Court held, in **Attorney-General, Canada v Law Society of British Columbia**⁹², that section 101 of the Constitution Act, 1867 merely empowered Parliament to make provision for the constitution, maintenance and organisation of the courts for the better administration of the laws and did not seek to prevent provincial superior courts from determining the constitutionality of those laws. The court reasoned that a restriction or denial of the jurisdiction of provincial superior courts would amount to stripping them of a judicial power fundamental to the Canadian federal system as described in the Constitution Act.

Strayer⁹³ points out, however, that provincial superior courts do not necessarily always have jurisdiction over Charter issues arising under federal laws. According to him what appears from **Attorney-General, Canada v Law Society of British Columbia**⁹⁴ is that provincial superior courts will have the power to determine the constitutionality of federal laws only if such laws are "fundamental to a federal system".⁹⁵ Provincial

⁹¹See **Law Society of British Columbia v Attorney-General, Canada** [1980] 4 W.W.R 6; **Borrowski v Minister of Justice** [1981] W.W.R 1; **Zutphen Brothers Const. Ltd v Diwidag Systems International et al** [1987] 35 D.L.R (4th) 43 (NSCA).

⁹²[1982] 2 S.C.R 307.

⁹³Strayer **op cit.** note 25 at 109.

⁹⁴**Supra.**

⁹⁵See also **Canada Labour Relations Board et al v Paul L'Anglais Inc. et al** [1983] 1 S.C.R 147 at 154.

superior courts' power to determine the constitutionality of federal laws would therefore be recognised only if their jurisdiction in respect of these laws is aimed at preserving the constitutional distribution of powers between the provincial government and the federal government.⁹⁶

The view that provincial superior courts are not necessarily empowered to determine the constitutionality of federal laws finds support in the provisions of section 24 of the Charter. Section 24 of the Charter assigns jurisdiction in respect of Charter issues to a 'court of competent jurisdiction'. A court of competent jurisdiction would be a court which has jurisdiction over the person, the subject matter and the remedy.⁹⁷ Section 52 of the Constitution Act, 1982, on the other hand, impliedly assigns exclusive jurisdiction to the Federal Court in relation to Charter issues arising from federal laws.

Section 98(2)(d) of the Republic of South Africa (interim) Constitution of 1993, read with section 101(3)(c), similarly assigns exclusive jurisdiction to the Constitutional Court in relation to Bill of Rights issues which raise the constitutionality of Acts of the national legislature. The argument that provincial superior courts have the power to determine the constitutionality of national laws only if such laws are 'fundamental to the provincial system' would not apply in South Africa because, in terms of section 98(2)(e) of the interim Constitution, the Constitutional Court has exclusive jurisdiction in the determination of disputes of a constitutional nature between organs of state at any level of government; the jurisdiction of provincial superior courts is confined to disputes between local and provincial governments.⁹⁸

⁹⁶Strayer *op cit.* note 25 at 109.

⁹⁷*Ibid.* at 70-73.

⁹⁸Section 101(3)(d).

3.2.3. Legislative Pre-determination of Judicial Decisions.

In a country where the courts are empowered to determine the constitutionality of legislation, an attempt by the legislature to dictate the finding a court must make on a constitutional question would be contrary to the concept of judicial review; such an attempt would also undermine the independence of the judiciary and frustrate the function of the courts as bodies entrusted with ensuring the efficacy of the supreme law of the Constitution. Canadian provincial courts have in the past spoken out against legislative pre-determination of judicial findings, holding that the legislature cannot preclude a court, where a constitutional question is properly before it, from reaching a certain conclusion as to the constitutionality of legislation.⁹⁹

In **Home Oil Distributors v Attorney-General, British Columbia**¹⁰⁰ the British Columbia Court of Appeal held that a statute which required the court to interpret its provisions in a particular way was "ineffective to curtail the unassailable power of the Courts of Canada to adjudicate upon constitutional questions under the British North America Act".¹⁰¹ This view would be equally applicable to the 1982 Constitution.

A distinction must, however, be made between a statute which requires the court to interpret its provisions in a particular way for the purpose of determining constitutional validity and a statute which simply lays down guidelines for the interpretation of its provisions. The latter type of statute is intended to provide a means of ascertaining the meaning and scope of application of a legislative instrument, whereas the former type dictates to the court how its constitutional validity must be determined. Where the

⁹⁹See Strayer **op cit.** note 25 at 111.

¹⁰⁰[1937] 2 W.W.R 418.

¹⁰¹At 419-420.

constitutional validity of a statute is in issue, the court has to determine whether the legislature acted within its constitutional jurisdiction; the legislature therefore cannot be allowed to achieve an effect which falls outside its constitutional jurisdiction by dictating how the statute in issue must be interpreted.¹⁰²

Legislative attempts to restrict judicial determination of constitutionality illustrate the tension between the power of judicial review and the exercise of legislative power. It may be said that the legislature may not use its legislative powers to prevent judicial determination of the constitutional limit of those powers, especially in relation to constitutional guarantees of the rights and freedoms of individuals. However, the extent to which the courts will be able to determine the constitutional limits of legislative power in relation to constitutionally guaranteed rights and freedoms effectively depends on the courts' approach to the interpretation of those rights and freedoms.

3.3. Judicial Interpretation of the Canadian Charter of Rights and Freedoms.

Prior to the adoption of the Charter of Rights and Freedoms in 1982, constitutional adjudication in Canada was mainly confined to an interpretation of the distribution of powers between the federal government and the provincial governments. Although the 1960 Bill of Rights introduced some value-based provisions in terms of which federal legislation could be interpreted, these provisions could be statutorily excluded and therefore did not effectively limit the legislative power of the federal Parliament. At best the 1960 Bill of Rights provided a mechanism by which the effect of federal legislation on individual rights and freedoms could be minimised.¹⁰³

¹⁰²See Strayer *op cit.* note 25 at 112.

¹⁰³The applicability of the 1960 Bill of Rights was also limited by the fact that it was not applicable to provincial legislation.

The approach of the Supreme Court of Canada to the 1960 Bill of Rights had generally been restrictive.¹⁰⁴ However, in interpreting the 1982 Charter the court acknowledged from the outset that it was engaged in a new interpretative task, a task which was significantly different from that of interpreting the 1960 Bill of Rights. The difference between the 1982 Charter and the 1960 Bill of Rights was expressed by Estey J in **Law Society of Upper Canada v Skapinker**¹⁰⁵, the first Charter case, as follows:

"We are here engaged in a new task, the interpretation and application of the Canadian Charter of Rights and Freedoms ... This is not a statute or even a statute of extra-ordinary nature of the Canadian Bill of Rights ... It is part of the Constitution of a nation ... The Canadian Bill of Rights is, of course, in form, the same as any other statute of Parliament. It was designed and adopted to perform a more fundamental role than ordinary statutes in this country. It stands, however, somewhere between a statute and a constitutional instrument..."¹⁰⁶

There are some simple but important considerations which guide a court in construing the Charter, and which are more sharply focused and discernible than in the case of the federal Bill of Rights. The Charter comes from neither level of the legislative branches of government but from the Constitution itself. It is part of the fabric of Canadian law. Indeed, it is 'the supreme law of Canada': s 52, Constitution Act, 1982.¹⁰⁷

¹⁰⁴See P. Brett "Reflection of the Canadian Bill of Rights" 1969 **Alberta LR 294. R v Drybones (supra)** was the only case in which the Canadian Supreme Court held a federal statute to be inoperative on the basis that it was incompatible with the Bill of Rights.

¹⁰⁵[1984] 9 D.L.R (4th) 161.

¹⁰⁶The South African Bill of Rights is different from the Canadian Charter. Like the Canadian Charter, its provisions are an integral part of a supreme Constitution. Although it is an interim Bill of Rights intended to operate until the adoption of a new final Constitution, Constitutional Principle II ensures the inclusion of the fundamental principles and values contained in it in the final Constitution. In terms of this constitutional principle the final Constitution must make provision for the protection of universally accepted fundamental rights, freedoms and liberties, drafted after consideration was given to *inter alia* the fundamental rights contained in the interim Bill of Rights.

¹⁰⁷At 167-168.

Unlike the 1960 Bill of Rights, the 1982 Charter is not merely declaratory. It not only sets out the individual's rights and freedoms but also guarantees them against legislative and executive infringement, at both federal and provincial level. In **R v Big M Drug Mart Ltd**¹⁰⁸ Dickson J held that the Canadian Charter of Rights and Freedoms does not simply recognise and declare rights as they were circumscribed by the legislation current at the time of the Charter's enactment; its language is imperative.

Since the language of the Charter is imperative, it means that the court has to give effect to its provisions whenever the constitutionality of legislation is in issue. As prescriptive provisions intended to set a standard upon which present as well as future legislation should be tested, Charter provisions therefore call for a generous interpretation which will give effect to their spirit. It was with this idea in mind that the court warned, in **Law Society of Upper Canada v Skapinker**¹⁰⁹, against

"[a] narrow and technical interpretation [which], if not modulated by a sense of the unknown of the future, can stunt the growth of the law and hence the community it serves."

To adopt a generous approach to the interpretation of the Charter is, in essence, to recognise its special nature and the great ideals it was intended to represent. The Charter is, as the court held in **Hunter et al v Southam Inc**¹¹⁰, a document which provides a continuing framework for the legitimate exercise of governmental power; it is, as a result, capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. It is, therefore, the task of the court to interpret the Charter in such a way that it will meet these social, political and historical realities.

¹⁰⁸[1985] 1 S.C.R 295.

¹⁰⁹**Supra** at 366.

¹¹⁰[1984] 2 S.C.R 145.

In line with the generous approach, the Supreme Court refused in a number of cases to follow its earlier Bill of Rights cases in the interpretation of Charter provisions.¹¹¹ It was therefore paradoxical when, in **Re Singh and Minister of Employment and Immigration**¹¹², the court stated that the "the Canadian Bill of Rights retains all its force and effects, together with the various provincial charters of rights". The court's affirmation of the continued existence and vitality of the 1960 Bill of Rights posed the danger that the courts could avoid dealing with difficult or contentious Charter issues and instead rely on Bill of Rights jurisprudence. This danger was, however, dispelled when the court, in **The Queen in Right of Canada v Beauregard**¹¹³, refused to follow Bill of Rights jurisprudence when interpreting the right to equality as guaranteed by the Charter.

While the Supreme Court was willing to give Charter provisions a generous interpretation, it nevertheless also sounded a caution with respect to the new interpretative task. In **Law Society of Upper Canada v Skapinker**¹¹⁴ Estey J cautioned that the interpretation and development of the Charter

"must necessarily be a careful process. Where issues do not compel commentary on these new provisions, none should be undertaken. There will be occasions when guidance by *obiter* or anticipation of issues will serve the Canadian community, and particularly the evolving constitutional process. On such occasions, the court might well enlarge its reasons for judgment beyond that required to dispose of the issues raised".

¹¹¹See for example **R v Therens** [1985] 18 D.L.R. (4th) 655; **Reference re British Columbia Motor Vehicle Act** [1985] 2 S.C.R. 486; **R v Oakes** [1986] 1 S.C.R. 103.

¹¹²[1985] 18 D.L.R. (4th) 422 at 430.

¹¹³[1986] 30 D.L.R. (4th) 481.

¹¹⁴**Supra** at 181.

What Estey J meant in essence was that although judges may comment *obiter* on certain important policy issues, they should not substitute their decisions for legislative ones.¹¹⁵ In **Reference re British Columbia Motor Vehicle Act**¹¹⁶ Lamer J was more forthright when he warned that the judiciary should avoid becoming a 'judicial super-legislature'. Lamer J was intimating that some moderation is called for when a generous approach is adopted in the interpretation of Charter provisions.

The case of **Operation Dismantle v The Queen**¹¹⁷ shows that the Supreme Court of Canada does in fact approach the interpretation of Charter provisions with moderation and not with over-eagerness. The case was concerned with the efforts of Operation Dismantle, an Ottawa peace group, to use the Charter as a means of stopping the testing of cruise missiles in Canada. The efforts were a sequel to the federal government's announcement, in July 1983, that it would allow the American government to conduct a series of cruise missile tests in Canada. Despite popular opposition to the tests the two major parties in the federal government had defeated a motion of the New Democratic Party against the tests. Operation Dismantle contended that the tests would be contrary to section 7 of the Charter. Section 7 guaranteed "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

After the matter had been considered by the Trial Division¹¹⁸ and the

¹¹⁵See also **Edward Books and Art Ltd v The Queen** [1986] S.C.R 713 at 781-782.

¹¹⁶**Supra** at 497.

¹¹⁷[1985] 18 D.L.R (4th) 481.

¹¹⁸**The Queen et al v Operation Dismantle et al** [1983] 1 F.C 745.

Federal Court of Appeal,¹¹⁹ the Supreme Court unanimously decided against Operation Dismantle. The Supreme Court readily acknowledged its power to determine the constitutionality of executive and legislative acts but nevertheless pointed out that there were limits to the exercise of the power. According to Dickson CJ, although the court should not refuse to determine the constitutionality of government policy merely because it involved the exercise of a prerogative or because it was highly controversial, it should refrain from adjudicating issues which "lie in the realm of conjecture, rather than fact".¹²⁰

In her judgment, Wilson J expressed the need to enforce Charter provisions while at the same time exercising moderation:

"[T]he courts should not be too eager to relinquish their judicial review function simply because they are called upon to exercise it in relation to weighty matters of State. Equally, however, it is important to realize that judicial review is not the same thing as substitution of the court's opinion on the merits for the opinion of the person or body to whom discretionary decision-making power has been committed."¹²¹

Operation Dismantle provides an illustration that policy issues are not suited to judicial determination; although judges often grapple with policy issues and sometimes shape policy through their decisions, they ought to decide on principle and not on policy. What was really in issue in **Operation Dismantle** was a question of defence policy and foreign policy, issues which fell within the discretion of the executive and invited the court to make a subjective evaluation of the merits of the opinion of the person or body to whom the discretion had been committed.

¹¹⁹**The Queen et al v Operation Dismantle et al** [1984] 3 D.L.R (4th) 193.

¹²⁰At 454.

¹²¹At 503.

As Wilson J stated when dealing with the argument that cruise missile testing endangered the lives and security of Canadian citizens, whatever disagreement one might have with government policy, any challenge of the policy before the courts must be based on a violation of some legally recognisable **principle**. She could not find such principle in Operation Dismantle's disagreement with the executive decision to allow nuclear testing in Canada:

"I do not see how one can distinguish **in a principled way** between this particular risk and any danger to which the government's action vis-a-vis other states might incidentally subject its citizens" (my emphasis).¹²²

The Supreme Court's call for caution and moderation with regard to the interpretation of the Charter underlines the need for the courts to stay within limits of the judicial role, especially in the relationship between the legislature and the judiciary. Thus, in **Edward Books and Art Ltd v The Queen**¹²³ Dickson J opined that "the courts are not called upon to substitute judicial opinions for legislative ones". According to McIntyre J, in **R v Andrews**¹²⁴, all that the courts are required to do is to "measure the legislative enactment against the requirements of the Charter". As long as the court confines itself to determining justiciable legal disputes which involve the legislature or the executive in accordance with the requirements of the Charter it acts within the scope of the judicial function.

There can be no doubt that legislative enactments can only be measured against the requirements of the Charter through interpretation of Charter provisions, and that the courts do in fact make law during the course of their interpretation of Charter provisions. The Supreme Court's concern with the proper limits of judicial review, therefore, essentially revolves around

¹²²At 518.

¹²³**Supra** at 781-782.

¹²⁴[1989] 1 S.C.R 143 at 191.

permissible judicial law-making in the course of interpretation.¹²⁵

The Supreme Court's concern with keeping within the proper limits of judicial review has at times resulted in self-imposed restraints. The court has, for example, refused to decide constitutional issues which arose during ordinary litigation when there were other grounds upon which the litigation could be disposed of.¹²⁶ The court has also indicated, however, that it would be willing to decide constitutional issues which arise during ordinary litigation if the issues raised are "important and novel", even if the litigation can be disposed of on other grounds.¹²⁷

In general, the proper role of the judiciary in constitutional adjudication is determined by the distinction between justiciable and non-justiciable issues. In the United States of America, for example, issues which raise 'political questions' have been classified as non-justiciable issues.¹²⁸ The Canadian Supreme Court has, however, rejected the 'political question' terminology, while at the same time recognising that judicial review has its limits.

In **Operation Dismantle et al v The Queen et al**¹²⁹ the Supreme

¹²⁵See Chapt. 10 for a discussion of the permissible limits of judicial law-making.

¹²⁶See for example, **Skoke-Graham et al v The Queen** [1985] 1 S.C.R 109; **R v Christansen** [1983] 15 D.L.R (3rd) 340 (NSCA); **Royal Trust Corp of Canada et al v Law Society of Alberta** [1985] 19 D.L.R (4th) 159.

¹²⁷See **Law Society of Upper Canada v Skapinker** (*supra*) at 360-361.

¹²⁸See in general E.S Corwin **The Supreme Court and Political Questions** (1936). See Chapt. 10 for a detailed discussion of the 'political question' doctrine.

¹²⁹**Supra.**

Court decided that it was not precluded from deciding issues which raised political questions. Speaking for the majority, Dickson J stated that he had "no doubt that disputes of a political or foreign policy nature may be properly cognizable by the courts".¹³⁰ Wilson J, in a separate judgment, also expressed the same view when she said that "courts should not be too eager to relinquish the judicial review function simply because they are called upon to exercise it in relation to weighty matters of State".¹³¹ According to Wilson J, the court is not called upon to determine whether government policy is sound, but whether or not it violates a litigant's rights as guaranteed by the Charter; she expressed the view that the concept of right as used in the Charter cannot be divorced from the reality of the modern state.¹³²

Although the Supreme Court of Canada has taken the general view that the courts are not precluded from determining issues which raise political questions,¹³³ it has nevertheless at the same time recognised that there is a line of demarcation, albeit not a clear one, between those issues which may properly be decided by the courts and those which are suitable for decision by the political branches of government. Issues such as conventions, for example, are imprecise, flexible political rules of conduct for the exercise of political powers and are unsuitable for judicial determination.

The court's recognition of a line of demarcation between issues which are suitable for judicial determination and those which are not can be gathered from its conclusion that although the testing of cruise missiles posed a risk to life or security of the individual, a finding whether the risk indeed existed involved so many imponderables and the weighing of so many probabilities,

¹³⁰At 459.

¹³¹At 471.

¹³²At 472 and 488.

¹³³See **Operation Dismantle v The Queen** (*supra*).

that it was not possible to determine the issues involved judicially.¹³⁴

The constitutional guarantee of fundamental rights and freedoms essentially prescribes the limit of the exercise of state power in relation to these rights and freedoms. Although it is the function of the courts to determine whether legislative power has been exercised within the limits of the guarantee of fundamental rights and freedoms as prescribed in the Constitution, the courts ought constantly to remind themselves that they are dealing with decisions taken by a freely elected legislature. It therefore becomes important, in determining whether the legislature has exercised its powers within the limits of constitutional guarantees, to look at the object the legislature intended to achieve. The Canadian Supreme Court has held in **R v Big M Drug Mart Ltd**¹³⁵ that the purpose and effect of legislation are important in determining the validity of legislation on the basis of the object the legislature intended to achieve.

R v Big M Drug Mart Ltd was concerned with the validity of the Lord's Day Act, an Act of the federal Parliament which outlawed commercial activity on Sunday.¹³⁶ The validity of the Act was attacked on the basis that it infringed freedom of conscience and religion as guaranteed in section 2(a) of the Charter. It was contended on behalf of the government that even if the original purpose of the Act was to protect the Sabbath of one form of religion, its effect was secular, alternatively that even if its original purpose was religious in nature, that purpose had changed into a secular objective of ensuring a day of rest.

¹³⁴See Strayer **op cit.** (1988) at 218-219.

¹³⁵**Supra.**

¹³⁶The Act was still in force in the majority of the provinces at the time of the Charter, with the exception of Ontario, Quebec, British Columbia, and Newfoundland.

Referring to the purpose and effect of legislation in general, Dickson J expressed the following view:

"[B]oth purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intended to achieve. This object is realized through the impact produced by the operation and application of the legislation. Purpose and effect, respectively, in the sense of the legislature's object and its ultimate impact, are clearly linked, if not indivisible. Intended and actual effect have often been looked at for guidance in assessing the legislation's object and thus, its validity."¹³⁷

It appears from the majority judgment in the **Big M Drug Mart** case that the purpose of legislation may in certain instances be an overriding factor in the determination of its constitutionality. The effect of the legislation would come into consideration where its purpose is valid but its effect is such that individual rights and freedoms are infringed. In this regard the court expressed itself as follows:

"If the legislation fails the purpose test, there is no need to consider further its effect, since it has already been demonstrated to be invalid. Thus, if a law with a valid purpose interferes by its impact, with rights and freedoms, a litigant could still argue the effects of the legislation as a means to defeat its applicability and possibly its validity. In short, the effects test will only be necessary to defeat legislation with a valid purpose; effects can never be relied upon to save legislation with an invalid purpose."¹³⁸

The court found that the purpose of the Lord's Day Act was "the compulsion of sabbatical observance". The purpose was found to be in conflict with freedom of conscience and religion; it was held to be invalid on that basis. As for the contention that the purpose of legislation could change with the passage of time and the change of circumstances the court held that

"[p]urpose is a function of the intent of those who drafted and enacted the legislation at

¹³⁷At 331.

¹³⁸At 334.

the time, and not of any shifting variable".¹³⁹

The court's finding that the purpose of legislation is fixed by those who drafted it at the time of its drafting and therefore cannot be affected by the change of circumstances underlines the distinction between purpose and its effect; the effect of legislation, on the other hand, is a shifting variable and depends on the circumstances of a particular case. The implication of this is that in determining the validity of legislation the court has to determine its purpose in the light of circumstances prevailing at the time of its enactment and its effect in the light of the circumstances of the case at the time of the determination of its validity.

The purpose of legislation is, however, not a paramount consideration in the determination of its constitutionality. The paramount consideration is the larger purpose of the Charter and the specific purpose of the relevant provision of the Charter which is alleged to have been infringed by the legislation in issue. Thus, in **Attorney-General, Quebec v Quebec Association of Protestant School Boards et al**¹⁴⁰ the Supreme Court, in coming to the conclusion that a Bill adopted to make exceptions to the minority language education rights guaranteed in section 23 of the Charter could not be justified under section 1 of the Charter, looked at the historical purpose of the framers in drafting section 23; the court found that the purpose of section 23 was to invalidate precisely the type of minority language education system which existed in Quebec at the time of the adoption of the Charter.

In emphasising the purpose of the relevant provision of the Charter the Supreme Court essentially adopted a teleological or value-coherent approach. An interpretation of the rights and freedoms guaranteed in the Charter is not

¹³⁹At 335.

¹⁴⁰[1984] 2 S.C.R. 66.

only based on the language used but on all factors which give these rights and freedoms their true worth; the language used merely lays down a general guide and leaves the court with wide room within which to interpret the Charter so as to carry out its spirit.

The case of **Hunter et al v Southam Inc**¹⁴¹ shows that the purpose of the relevant Charter provision is not only paramount but also decisive in the interpretation of the provision. The Supreme Court specifically stressed that "the proper approach to the interpretation of the Charter of Rights and Freedoms is a purposive one ..."¹⁴² and then proceeded to interpret section 8 of the Charter in the light of its purpose as discoverable from its history and the common law.

The relationship between the common law and the provisions of the Constitution was emphasised by McIntyre J in **Retail, Wholesale and Dept. Store Union Local 850 v Dolphin Delivery Ltd.**¹⁴³ The judge stated that the courts

"ought to apply and develop the common law in a manner consistent with the fundamental values enshrined in the Constitution".

The purposive approach was elaborated on by Dickson J in **R v Big M Drug Mart Ltd**¹⁴⁴ as follows:

"The meaning of a right or freedom guaranteed by the Charter (has) to be ascertained by an analysis of the purpose of such a guarantee; it (has) to be understood, in other words, in the light of the interests it was meant to protect.

¹⁴¹**Supra.**

¹⁴²At 157.

¹⁴³[1986] 2 S.C.R 573 at 603.

¹⁴⁴**Supra.**

... [T]his analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger object of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be, as the judgment in **Southam** emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing the individual the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in vacuum, and must therefore, as this Court's decision in **Law Society of Upper Canada v Skapinker** [1984] 1 S.C.R. 357 illustrates, be placed in its proper linguistic, philosophic and historical context.¹⁴⁵

A consideration of the purpose of legislation, the purpose of specific Charter provisions and the larger purpose of the Charter will in many instances involve a consideration of policy questions.¹⁴⁶ If it is borne in mind, however, that human rights provisions are based on open ended and value-laden concepts which are intended to operate within a social, political and economic context, a consideration of policy questions is invariably unavoidable. The approach of the Canadian Supreme Court to the interpretation of the Charter shows, however, that a consideration of policy issues is not an open invitation to a large-scale invalidation of legislative or executive acts.

The advantage of the Canadian Charter of Rights is that it circumscribes, in section 1, the extent of operation of the rights and freedoms guaranteed in the Charter. In terms of section 1 the rights and freedoms guaranteed in the Charter are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The Charter therefore not only guarantees the rights and freedoms specified in it but also makes provision for a criterion in terms of which the courts can measure the

¹⁴⁵At 344.

¹⁴⁶See Chapt. 10.

constitutionality of legislative limitations on those rights and freedoms.¹⁴⁷

The Canadian Supreme Court, in **R v Oakes**,¹⁴⁸ laid down an analytical framework, based on the provisions of section 1 of the Charter, which it would use to measure the constitutionality of laws it was asked to review. The framework involves a two-phase inquiry. In the first phase the challenger must establish that the law or act complained of infringes his right or freedom as guaranteed by the Charter; once the challenger has succeeded in doing this, the onus shifts to the government to show that the infringement is justifiable in terms of the values of a free and democratic society.

A challenger seeking to show that his right or freedom as guaranteed in the Charter has been infringed must establish that the law or act complained of actually infringes one of his rights or freedoms as guaranteed in the Charter. The proof that is required from the challenger is, however, not confined to establishing that the interest or activity for which protection is sought falls within one of the categories of rights or freedoms guaranteed in the Charter; it extends to showing that the law does, as a matter of fact, limit his constitutional entitlements.

Once the challenger has established that the law or act complained of infringes his constitutional right or freedom, the court passes on to the second phase, namely whether the government can justify the infringement as being consistent with the values of a free and democratic society. This process involves a consideration of the law or act in issue in the light of criteria which underlie the function of legislation in a free and democratic society, namely

¹⁴⁷Section 33(1) of the Republic of South Africa Constitution, 1993 also contains a limitation mechanism; however, unlike section 1 of the Canadian Charter, section 33(1) makes provision for stricter limitation requirements in respect of certain rights; a limitation of these rights must, in addition to being reasonable and justifiable, also be necessary: see Chapt. 10.

¹⁴⁸*Supra*.

its purpose and the proportionality of its object to its effect.

According to the court in **R v Oakes**¹⁴⁹, a law will be justifiable in terms of section 1 of the Charter, and therefore constitutionally valid, if it has sufficiently important objectives and employs appropriate means to achieve those objectives. In order to be valid, the means which the law employs to achieve its objectives must (a) be rationally connected to those objectives; (b) impair the rights and freedoms of individuals as little as possible; and (c) have an effect which is proportional to the importance of the objective which is sought to be achieved.

In determining whether a law is justifiable in terms of its objectives and the means it employs to achieve those objectives, the court embarks upon an interpretation which differs from that employed in relation to ordinary legislation. A determination of constitutionality in terms of section 1 of the Charter involves not only a consideration of the objectives of a law and the means it employs to achieve those objectives but also its effect on the rights and freedoms guaranteed by the Charter.

A consideration of the effect of a law involves a weighing up of the benefits which the community would derive from it, and the constraints which it imposes on the rights and freedoms of the individual as guaranteed by the Charter. Where the benefit to the community outweighs the constraints which it imposes on the rights and freedoms of individuals, the law may be upheld as being justifiable. The ultimate criterion, however, is whether the law's infringement of a right or freedom guaranteed by the Charter is justifiable in a free and democratic society. It may be said that a consideration of the effect of a law in the light of proportionality principle amounts to a practical application of the "in a free and democratic society" criterion; in weighing and balancing the interests of the community as represented by the state and the

¹⁴⁹Supra at 138-139.

interests of the individual the court attempts to achieve the highest level of consensus in society.¹⁵⁰

The case of **R v Stinchcombe**¹⁵¹ illustrates judicial weighing and balancing of the interests of the community as represented by the state and those of the individual and an attempt to achieve the highest level of consensus in society in the light of constitutional guarantees. The question in issue was whether an accused person is entitled to have access to documents and statements of witnesses in the possession of Crown Counsel. In coming to the conclusion that the accused was entitled to discovery of such documents and statements, Sopinka J considered the interests of the Crown at stake and the interests of the accused to answer the charges against him and to defend himself properly.

Sopinka J found that the inclusion in section 7 of the Charter of the right to liberty and not to be deprived thereof except in accordance with the principles of fundamental justice gave the common law rules relating to disclosure a new dimension. The judge invoked the principle of justice to weigh and balance the interests of the Crown and those of the individual;¹⁵² he found that an accused's right to answer charges against him and to defend himself properly is one of the pillars of criminal justice on which the courts depend to ensure that the innocent are not convicted. The principle of justice as applied by Sopinka J in essence represents the highest level of consensus in society.

In another sense, **Stinchcombe** also serves as an example of the application

¹⁵⁰See J. Murphy "Property rights in the new constitution: an analytical framework for constitutional review" 1993 **CILSA** 211 at 221.

¹⁵¹1992 LRC (Crim) 68.

¹⁵²At 71 the judge accepted the principle that justice is better served when the element of surprise is eliminated from the trial and the parties are prepared to address issues on the basis of complete information of the case to be met.

of the proportionality principle. Sopinka J stated that the obligation to disclose is not absolute and that there may be cases where there will be no duty to disclose, for example where it will result in serious prejudice or even harm to a person who supplied the information. In such instances non-disclosure is justified on the basis that it is in proportion to the accused's right to answer charges against him and to defend himself and would also not be contrary to the principle of justice.¹⁵³

The proportionality principle was applied by Hiemstra CJ in the Bophuthatswanan case of **Smith v Attorney-General, Bophuthatswana**¹⁵⁴ in order to determine in which circumstances and to what extent a denial of the right to bail in violation of the provisions of the Constitution would be unconstitutional. Hiemstra CJ held that for an interference with constitutionally guaranteed rights to be constitutional, such an interference must (a) be allowed in the Constitution, (b) be capable of achieving its purported objective, (c) be necessary to achieve such purported objective in the sense that no lesser form of interference is available and (d) be reasonable or proportional in the sense that the purported objectives of such interference are as such lawful, adequate, necessary and of equal or superior weight, when balanced against the affected right.¹⁵⁵ The last requirement involves a weighing and balancing of the interests of the state against the interests of the individual who claims that his rights have been interfered with.

3.4. Interpreting Equality/Inequality Issues.

¹⁵³**Stinchcombe** has been referred to with approval in a number of South African decisions dealing with the right to information (section 23 of the 1993 Constitution) and the disclosure of the contents of police docket: See Chapt. 10.

¹⁵⁴1984(1) SA 196 (BSC). See Chapt. 7 for a discussion of this case.

¹⁵⁵At 201A-C.

Like South Africa, Canada is a country of great social inequalities. Its societal composition is marked by economic, linguistic, ethnic and religious differences which are likely to become the subject of Charter interpretation.

Section 15(1) of the Charter guarantees every individual, irrespective of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability equality before and under the law. Section 15(2) goes on to state that section 15(1) does not preclude what may appropriately be called 'affirmative action', that is state action aimed at redressing the conditions of persons disadvantaged because of their race, national or ethnic origin, colour, religion, sex, or age or mental or physical disability.

Section 8 of the Republic of South Africa Constitution also similarly guarantees the right to equality¹⁵⁶ and prohibits discrimination on the grounds of race, gender, sex, ethnic or social origin, colour, sexual orientation, age disability, religion, conscience, belief or language.¹⁵⁷ Like section 15 of the Canadian Charter, section 8 does not preclude 'affirmative action'.

Despite the seemingly encompassing nature of section 15 of the Charter, Canadian courts have not been too eager to use its provisions and their power of judicial review to redress all issues of inequality. According to Mandel¹⁵⁸ Canadian courts "have not attempted to dismantle Canada's hierarchical structure. They have not even made a dent in (the) basic social inequalities. Nor is there any chance that they will".

Indeed, the courts' approach to the interpretation of section 15 has been accompanied by a painstaking attempt to strike a balance between legislative

¹⁵⁶Section 8(1).

¹⁵⁷Section 8(2).

¹⁵⁸M. Mandel *op cit.* at 241.

policy and judicial review. Thus, in **Reference re An Act to Amend the Education Act (Ontario)**¹⁵⁹ the Ontario Court of Appeal rejected a contention that the extension of full public funding to Catholic high schools contravened section 15 because it singled out one religion for government generosity.¹⁶⁰ The court based its decision on the original confederation compromise in terms of which the educational rights of denominational schools were protected in section 93(1) of the British North America Act, 1867. The court expressed the following view:

"These educational rights, granted specifically to the Protestants in Quebec and the Roman Catholics in Ontario, make it impossible to treat all Canadians equally. The country was founded upon the recognition of special or unequal educational rights for specific religious groups in Ontario and Quebec. The incorporation of the Charter into the Constitution Act, 1982, does not change the original Confederation bargain."

The Supreme Court of Canada agreed with the view expressed by the Ontario Court of Appeal and even went further to hold that the Constitution not only permitted but actually required full funding. It decided that the funding programme was part of government policy and "returns rights constitutionally guaranteed to separate schools by section 93(1) of the Constitution Act, 1867".¹⁶¹

The courts' approach in the Ontario Catholic Schools Funding case evidences their concern to avoid "a free interpretation of equality rights to upset the Canadian political balance of power".¹⁶² At the root of this concern, however, lurks a deeper concern to draw a line between judicial review and

¹⁵⁹[1986] 25 D.L.R (4th) 1 (Ont. CA).

¹⁶⁰The Act in issue was designed to redress educational inequalities in Ontario through generous government funding.

¹⁶¹**Reference re An Act to Amend the Education Act (Ontario)** [1987] 40 D.L.R (4th) (Supreme Court of Canada) at 59.

¹⁶²Mandel *op cit.* at 243.

a determination of policy issues. This deeper concern was voiced by Wilson J in the Ontario Court of Appeal in the same case:

"I want to stress ... that it is not the role of the court to determine whether as a policy matter a publicly funded Roman Catholic school system is or is not desirable. That is for the legislature. The sole issue before us is whether Bill 30 is consistent with the Constitution of Canada."¹⁶³

Another area in which the courts have interpreted section 15 is in relation to the rights of the aboriginal people of Canada. In **Apsit v Manitoba Human Rights Commission**¹⁶⁴ the court's approach to affirmative action programmes in favour of aboriginal people under section 15(2) was that such programmes must have a "reasonable relationship between the cause of the disadvantage and the ameliorative action" in order to be constitutionally valid.¹⁶⁵ The affirmative action programme in issue was the exclusive granting of new licences to aboriginal Indian people by the Manitoba government in order to encourage them to participate actively in the wild rice industry. The court found that poverty, and not discriminatory licensing, was the cause of the aboriginal Indians' inability to take an active role in the industry. It decided that there was no reasonable relationship between the cause of the disadvantage and the form of ameliorative action taken.

The case of **R v Kent, Sinclair and Gode**¹⁶⁶ illustrates the limited applicability of section 15 in protecting the rights of aboriginal Indian people even in relation to basic equality rights cases. In this case a Manitoba status Indian who had been convicted of murdering a prison guard contended that the selection of a jury panel, which consisted of only two Indians (out of 148),

¹⁶³At 38.

¹⁶⁴[1988] 1 W.W.R 629.

¹⁶⁵At 643.

¹⁶⁶[1986] 27 C.C.C (3d) 405.

and the final choice of only one of them to serve in his trial, violated his equality rights. The Court of Appeal rejected this contention and held that

"[t]o so interpret the Charter would run counter to Canada's multi-cultural and multi-racial heritage and the right of every person to serve as a juror (unless otherwise disqualified). It would mean the imposition of inequality".¹⁶⁷

Although the decision of the court was correct, it did not squarely address the appellant's fear, namely that a jury consisting of only one Indian, his peer, was likely to have been biased and to have treated him like a status Indian and not as an ordinary Canadian citizen. The irony of the matter, however, is that the appellant was faced with the insurmountable difficulty of showing that the jury would indeed be biased and would not treat him like an ordinary Canadian citizen.

The first case in which the Supreme Court of Canada squarely faced the interpretation and application of section 15 of the Charter and laid down the applicable principles was **Andrews v Law Society of British Columbia**¹⁶⁸. The issue in this case was whether a provision of the Barristers and Solicitors Act¹⁶⁹, which required British Columbia lawyers to be Canadian citizens, infringed section 15(1) of the Charter and, if it did, whether it was saved by section 1 of the Charter. The court unanimously held that the provision infringed section 15(1); a majority held that it was not saved by section 1.

¹⁶⁷At 421. In **S v Collier** 1995(8) BCLR 975 Hlophe J came to much the same conclusion when he held that the mere fact that a presiding officer was white did not necessarily disqualify him from presiding in a case involving an accused belonging to a different race. To insist upon a judicial officer recusing himself on account of his race "would run counter to the spirit of national reconciliation enshrined in the Constitution" (at 979F). See Chapt. 9 for a discussion of the Constitution of the Republic of South Africa of 1993.

¹⁶⁸[1989] 1 S.C.R 143.

¹⁶⁹Section 42 of the Barristers and Solicitors Act, R.S.B.C 1972 c 26.

Prior to the decision of the court in the **Andrews** case¹⁷⁰ there had been no attempt by Canadian courts to state the circumstances in which section 15(1) may be infringed and to lay down the principles applicable to its interpretation. McIntyre J described the circumstances in which section 15(1) may be applicable from the viewpoint of discrimination which would constitute unequal treatment:

"I would say that discrimination may be described as a distinction, whether intentional or not based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capabilities will rarely be so classed."¹⁷¹

The conception of equality which in McIntyre's view underlies section 15 is that "the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another".¹⁷² Although the judge emphasised that inappropriate distinction would amount to inequality, he also recognised that identical treatment may also produce inequality.

According to McIntyre J, a challenger claiming that legislation violated section 15(1) bears an onus regarding two issues. In the first place he must show that he has been denied one of the equality rights set out in the first part of the section;¹⁷³ secondly, that he has been discriminated against.¹⁷⁴ This

¹⁷⁰**Supra.**

¹⁷¹At 174-175.

¹⁷²At 165.

¹⁷³These rights are equality before the law, under the law and the equal protection and equal benefit of the law.

approach corresponds to the first phase of the review process as enunciated in **R v Oakes**¹⁷⁵, namely that, as a starting point, the burden lies on the challenger to prove that the legislation complained of actually infringes one of his rights or freedoms as guaranteed by the Charter. In relation to the right to equality this means that the challenger must establish that he is in terms of the Charter entitled to be treated equally; he must also show, in addition, that his constitutional entitlement has been denied as matter of fact.

McIntyre J also dealt with the relationship between section 15 and section 1 of the Charter. In terms of section 1 Charter guarantees are "subject to such reasonable limits as can be demonstrably justified in a free and democratic society". The section 1 exception corresponds to the second phase of the review process as enunciated in **R v Oakes**¹⁷⁶. Once the challenger succeeds in proving that his constitutional entitlement has been denied the onus shifts to the government to show that the denial is "justified in a free and democratic society". If the government fails to show that the denial is justifiable on some other principle or criterion compatible with the tenets of a free and democratic society, the legislation complained of will be unconstitutional.

In the British Columbia Court of Appeal in the **Andrews** case¹⁷⁷, before the matter went to the Supreme Court, McLachlin JA had opined that only unreasonable and unfair legislative distinctions between individuals would infringe section 15(1) and that once such a type of distinction is shown to exist, it would be justifiable under section 1 only in exceptional circumstances,

¹⁷⁴At 182.

¹⁷⁵**Supra.**

¹⁷⁶**Supra.**

¹⁷⁷[1986] 27 D.L.R (4th) 600.

for example a wartime emergency.¹⁷⁸ There is a distinction between unreasonable legislative distinctions and those that are unfair. Whether a distinction is reasonable or not has to be determined from its **content**; the crucial question is whether there is a reasonable connection between its objectives and the means it employs to achieve these objectives or whether the purported objectives are adequate and of equal or superior weight when balanced against the right to equality. The unfairness of legislation, on the other hand, is determined in the light of its **operation** and its **effect** on the individual.¹⁷⁹ This distinction was made by Melunsky J in the South African case of **AK Entertainment CC v Minister of Safety and Security and Others**.¹⁸⁰

¹⁷⁸In the instant case there is no suggestion that unfair discrimination arises because of the content of the law. It comes about, according to the applicant, because of the manner in which the law is applied by an organ of the State ... A law expressed to bind all should not have a more burdensome or less beneficial impact on one than another (*Andrews (supra)* at 11). In my view, however, and where the *application* of the law is in issue a transgression of section 8(1) or (2) will arise only if the organ of state intends to apply the law unequally or if the law is enforced according to a principle which has a discriminatory effect due to some particular characteristic of

¹⁷⁸The Court of Appeal did not make a distinction between the stage of deciding whether there is a violation of section 15 and one of determining whether discrimination, if it is found to exist, is justifiable under section 1; it held that the stage of determining whether a limitation on equality rights is justifiable under section 1 is when the court decides whether there was a violation of section 15. This approach was followed in **R v Keegstra** (1991) 2 W.W.R 1 where the court upheld section 219 of the Canadian Criminal Code; section 219 prohibited hate speech against groups identifiable by colour, race, religion etc.

¹⁷⁹Thus, while affirmative action may sometimes be unfair it may not always be unreasonable when the connection between the objective of the relevant legislation, namely to achieve the adequate protection and advancement of disadvantaged groups of persons, and the means it employs to achieve this connection are considered.

¹⁸⁰1994(4) BCLR 31 (E) at 37I-38A.

the discriminatee.¹⁸¹

Hogg¹⁸², a Canadian constitutional jurist, has ventured the view that any distinction between individuals infringed section 15(1) and that it was for the government to justify any such distinction if it is challenged. The Canadian Supreme Court, per McIntyre J in the **Andrews** case rejected both the approach followed by the British Columbia Court of Appeal and that suggested by Hogg.

McIntyre J instead adopted the "third or 'enumerated and analogous grounds' approach" as the one which

"most closely accords with the purposes of s.15 and the definition of discrimination outlined above and leaves questions of justification to s.1"¹⁸³.

The essence of this approach is that discrimination is generally determined on the basis of the analogous grounds enumerated in section 15(1). Section 15 applies as long as an analogous ground specified in it involving discrimination is found to exist, either in a specific provision of the law or through an intended or unintended effect of the law on a particular group.¹⁸⁴ In addition to an assessment of the distinction in issue on the basis of the enumerated grounds,

"the effect (*my emphasis*) of the impugned distinction or classification on the complainant must be considered ... A complainant under section 15(1) must show not only that he or she is not receiving equal treatment before and under the law or that the law has a

¹⁸¹The intention to apply a law unequally will appear from its content; whether a law is applied according to a principle which has a discriminatory effect will also appear from its content.

¹⁸²P. Hogg **Canadian Constitutional Law** (2nd ed. 1985) at 800-801.

¹⁸³At 182.

¹⁸⁴This approach was confirmed by the court in **McKinney v University of Guelph** (1991) 76 D.L.R. (4th) 545 at 647.

differential impact on him or her in the protection or benefit accorded by the law but, in addition, must show that the legislative **impact** (*my emphasis*) is discriminatory".¹⁸⁵

Once discrimination is found to be contrary to section 15(1), and section 15(2) is not applicable,

"any justification, any consideration of the reasonableness of the enactment, indeed, any consideration of factors which could justify the discrimination and support the constitutionality of the impugned enactment would take place under section 1".¹⁸⁶

Applying the approach he set out, McIntyre J came to the conclusion that by requiring that British Columbia lawyers be Canadian citizens the Barristers and Solicitors Act infringed section 15(1). It discriminated against a class of persons on grounds of lack of citizenship status and without considering educational qualifications or other attributes or merits of individuals in the group; it could also not be justified under section 1 of the Charter.¹⁸⁷

A closer look at the judgment of McIntyre J reveals that the conclusion that the Barristers and Solicitors Act infringed section 15(1) and could not be saved by section 1 was arrived at by applying the principles laid down in **R v Oakes**.¹⁸⁸ In the first place the court found that the Act was discriminatory and denied the challenger his constitutional entitlement; secondly, the finding that the Act could not be saved by section 1 evidences the absence of a sufficiently rational connection between the citizenship

¹⁸⁵**Idem.**

¹⁸⁶**Idem.**

¹⁸⁷The principles laid down in **Andrews v Law Society of British Columbia** (*supra*) have been approved and applied in **Reference re Sections 32 and 34 of the Workers Compensation Act (1983) (Newfoundland)** [1989] 56 D.L.R. (4th) 765 and **R v Turpin** [1989] 1 S.C.R. 1296.

¹⁸⁸**Supra.**

requirement and the government's desire to ensure that British Columbia lawyers are familiar with Canadian institutions and customs and are committed to the laws of Canada. As will be shown later, the approach of the Canadian Supreme Court has an interesting parallel with the approach followed by the Bophuthatswanan and the Namibian courts in some Bill of Rights cases.

The **Andrews** case is also important in regard to the approach to be followed in the interpretation of Charter provisions. The court followed a purposive interpretation. It determined the constitutional validity of section 42 of the Barristers and Solicitors Act (British Columbia) in the light of the purpose of section 15 of the Charter, which it found to be the promotion of a society in which all human beings are given equal concern, respect and consideration.

Decisions of the Canadian Supreme Court also reveal, however, that a purposive approach is not the only appropriate approach to constitutional interpretation. Thus, in **R v Big Mart Ltd**¹⁸⁹, Dickson J, while stating that the purposive approach is the proper approach to be taken in interpreting the Charter also opined that the character and larger objects of the Charter, the language chosen to articulate the specific right, the historical origin of the concepts enshrined and the meaning and purpose of other rights entrenched in the Charter will sometimes call for a generous approach.¹⁹⁰

Dickson J's **dictum** illustrates that a Constitution is a structural instrument consisting of provisions which are intended to serve the larger purpose of the whole; although each provision has a purpose of its own and sometimes a purpose associated with the purpose of other specific provisions, "every component contributes to the meaning as a whole, and the whole gives

¹⁸⁹**Supra.**

¹⁹⁰At 344. See Chapter 10 for a discussion of the purposive approach and the distinction between it and the generous approach.

meaning to its parts".¹⁹¹

3.5. Judicial Activism and Judicial Self-Restraint in Canada.

It may be said that an activist judicial philosophy which sought to foster a civil libertarian conception of the judicial role and the advancement of the fundamental ideals of an open society existed in Canadian constitutional jurisprudence even before the enactment of the 1960 Bill of Rights and the 1982 Charter of Rights and freedoms.¹⁹² However, with the exception of **R v Drybones**¹⁹³, the courts adopted a cautious approach to the interpretation and application of the Bill of Rights. In a number of cases the courts exercised restraint and refused to strike down legislation as being inconsistent with the provisions of the Bill of Rights.¹⁹⁴

The Canadian Supreme Court's recognition and acceptance that the interpretation of the 1982 Charter involved a new task, and its adoption of a purposive and generous approach¹⁹⁵ to the interpretation and application of

¹⁹¹**Dubois v The Queen** (1985) 23 D.L.R (4th) 503 at 528.

¹⁹²See for example the opinions of Chief Justice Duff in **Re Alberta Statutes** [1938] 2 D.L.R 81 at 107, Cannon J in **Re Alberta Statutes** (*supra*) at 119 and Rand J in **Winner v S.M.T (Eastern Ltd)** [1951] 4 D.L.R 529 at 558, **Saumur v Quebec** [1953] 4 D.L.R 641 at 670-671, **Henry Birks and Sons (Montreal) v Montreal** [1955] 5 D.L.R (2d) 321 at 322 and **Switzman v Elbling** [1957] 7 D.L.R (2d) 337 at 357-358.

¹⁹³*Supra*.

¹⁹⁴See for example **Attorney-General v Lavell** (*supra*); **Hogan v R** [1975] 2 S.C.R 579; **R v Chow** [1978] 43 C.C.C (2d) 215 (BCCA); **Duke v R** [1972] S.C.R 917; **R v Ewing and Kearney** [1974] 5 W.W.R 232.

¹⁹⁵The terms 'purposive' and 'generous' are not synonymous: see Chapt. 10 for a detailed discussion of the distinction between the two terms.

the Charter in the first cases it was called upon to consider¹⁹⁶ raised the hope that the judiciary would give primacy to the supremacy of the Constitution and accord the individual the full benefit of the rights and freedoms guaranteed by the Charter. A Canadian constitutional jurist has noted, however, that the impact which the Charter has had "has been somewhat limited and, on the whole, salutary".¹⁹⁷

The 1982 Charter merely set out and guaranteed individual rights and freedoms; it only supplied "the jural postulates or high level values common to a civilisation".¹⁹⁸ Clearly, the intention was that the individual should, subject to the constitutionally recognised limitations, enjoy the full benefit of Charter guarantees; the Charter did not, however, specifically stipulate how the rights and freedoms were to be interpreted and applied so as to reflect the "high level values common to a civilisation" and to give the individual the full benefit of its guarantees. It was up to the courts to choose what to do with the postulates or values enshrined in the Charter.

Although the Canadian Supreme Court had in the early Charter cases called for a purposive and generous approach to the interpretation of Charter provisions, it nevertheless sounded a cautionary note, urging that the development of the Charter should be a careful process.¹⁹⁹ The cautionary note carried within it seeds of judicial reticence and judicial deference to the legislature.

¹⁹⁶See for example **Law Society of Upper Canada v Skapinker (supra)**; **Hunter et al v Southam (supra)**; **R v Big M Drug Mart (supra)**.

¹⁹⁷Strayer 1988 **Public Law** at 355.

¹⁹⁸E. McWhinney "The Supreme Court and the Bill of Rights - The Lessons of Comparative Jurisprudence" 1959 **Can. Bar Rev.** 16 at 33.

¹⁹⁹See **Law Society of Upper Canada v Skapinker (supra)** at 181.

Traces of judicial deference to the legislature can be discerned from judgments in cases such as **Edward Books and Art Ltd v The Queen**²⁰⁰ and **R v Oakes**²⁰¹. In the **Edward Books** case Dickson CJ pointed out that the interpretation of the Charter was not an open invitation to substitute judicial opinions for legislative ones.²⁰² In a similar vein the court in the **Oakes** case took the view that courts should not invade the legislative field and substitute their views for that of the legislature, unless the choice of the legislature was unreasonable or not proportionally related to the means it used to effect its objective.²⁰³

The rationality and proportionality principles as laid down and applied in the **Oakes** case²⁰⁴ left an opening for judicial deference to the legislature. The court indicated that it would apply the rationality and proportionality principles with considerable caution and restraint. It would, for example, not strike down legislation if the legislature had a 'reasonable basis' for choosing the means it did, even if the challenger of the legislation succeeded in showing that his right or freedom as guaranteed by the Charter has been infringed as a matter of fact and that there were 'better possible means' to accomplish the objectives of the legislature.²⁰⁵ The court's indication was that little or no evidence would be required from the government defendant in order to show that an infringement of a Charter guarantee was rationally and proportionally related

²⁰⁰**Supra.**

²⁰¹**Supra.**

²⁰²At 781-782.

²⁰³See also the **Andrews** case (*supra*) at 191.

²⁰⁴**Supra.**

²⁰⁵D. Beaty "The Rule (and Role) of Law in a New South Africa: Some Lessons from Abroad" 1992 **SALJ** 408 at 419.

to the means it used to achieve its objective.²⁰⁶

The court's posture of deference was a sign of its wish to maintain the proper degree of respect for the separation between the judicial branch and the democratically elected branches of government.²⁰⁷ This wish is based on the fact that the legislature, as an elected branch of government has a direct mandate to make laws and policy decisions for the benefit of all citizens; it proceeds on the assumption that in a modern state laws are enacted by representatives of the people as a result of and through the process of participatory democracy.

Relying upon a strict division of powers between the judicial branch and the legislative and executive branches, Canadian courts have avoided making policy decisions, reserving such decisions for the legislature. McIntyre J specifically stated in **Retail, Wholesale and Department Store Union v Dolphin Delivery Ltd**²⁰⁸ that although it was acceptable in political science terms to treat the courts as one of the fundamental branches of government, judicial decisions cannot for the purpose of Charter application be equated with an element of governmental action.

The case of **Operation Dismantle et al v The Queen**,²⁰⁹ in particular, shows strong traces of judicial deference to the political branches of government. In this case the court held that the question whether or not the

²⁰⁶In the **Oakes** case (*supra*) Dickson CJ stated that "[w]here evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case ... there may be cases where certain elements of the s. 1 analysis are obvious or self-evident." See also the judgment of La Forest J in **Jones v R** [1986] 2 S.C.R. 284 at 299.

²⁰⁷Beaty 1992 SALJ at 419-420.

²⁰⁸*Supra* at 600.

²⁰⁹*Supra*.

testing of cruise missiles by the United States government in Canada endangered the lives and security of Canadian citizens was too imponderable for the court to determine. However, what the court was asked to consider was, in essence, the value of the government's decision to allow the testing of cruise missiles as against the values implicit in the right to life, liberty and security of the person as guaranteed by the Charter. The court felt that since the decision to allow the testing of cruise missiles was a foreign policy decision, and foreign policy decisions are not capable of prediction, a weighing of the competing values would be based on speculation; the court was concerned that to embark upon an inquiry into the weight of the competing values and to decide which value was more important would amount to a

"substitution of the court's opinion on the merits for the person or body to whom discretionary decision-making powers has been committed ..."²¹⁰

The court's reluctance to become involved in a determination of policy issues was justified. The danger was that to allow contentious policy issues to be settled through litigation could weaken the very basis of democracy on which the Constitution was founded. Contentious policy issues, especially those which involve the exercise of a discretion, are matters which fall within the domain of politicians. The political process in a modern democratic state provides for ways and means of debating contentious issues and of reaching consensus. The solution is political, not legal.

The sensitive nature of policy issues is discernible in cases which involve a determination of the constitutionality of highly contentious legislation, especially those dealing with important social and economic issues. One such case is **Morgentaler v The Queen**²¹¹, where the Canadian Supreme

²¹⁰At 503-504.

²¹¹[1988] 44 D.L.R (4th) 385.

Court struck down the abortion provisions of the Criminal Code²¹² which prohibited all abortions²¹³, except therapeutic abortions carried out in defined and limited circumstances.²¹⁴ The court held that the abortion provisions of the Criminal Code were unconstitutional on the basis that they infringed section 7 of the Charter and were not saved by section 1. The decision of the court was described as "a repeat performance of the 'quick and stunning victory' in **Roe v Wade** (which left Canada) suddenly without an abortion law".²¹⁵ The court was nevertheless reluctant to decide policy issues; the majority of the court restricted itself to the question of principle (the means), namely whether the means chosen to accomplish the provisions' objective were proportional to that objective and left the question of policy (the ends), namely under what circumstances an abortion would be permissible to the legislature.

The traces of judicial deference to the political branches of government in the Canadian courts' approach to the interpretation and application of Charter issues do not necessarily suggest judicial abdication of power. There have been many instances where the Supreme Court, in particular, has used provisions of the Charter to strike down legislation; it has, for example, struck down a law which made provision for a minimum period of imprisonment for driving on a highway without a valid driver's licence.²¹⁶ It has also struck down Sunday closing laws on the ground that they violate freedom of conscience and religion as guaranteed in section 2(a) of the Charter.²¹⁷

²¹²R.S.C 1970, c. C-34, s.251.

²¹³s.251(1)(2).

²¹⁴s.251(4).

²¹⁵Mandel **op cit.** at 277.

²¹⁶**Re British Columbia Motor Vehicle Act (Supra).**

²¹⁷**R v Big M Drug Mart (supra).**

Indeed, there has been a great deal of activist philosophy in Canadian constitutional jurisprudence; specific provisions of the Charter have been given a large and liberal construction "in the light of its larger objects", namely, "to guarantee and protect ... the enjoyment of the rights and freedoms it enshrines."²¹⁸ As the Supreme Court stated, the Charter ought to be interpreted and developed in such a way that it would "meet new social, political and historical realities often unimagined by its framers".²¹⁹

The interpretation and application of the Charter in such a way that it would be capable of growth and expansion involves an identification, elucidation and expression of the values contained in its open-ended provisions. According to Dickson CJ, in interpreting and applying the Charter, the court ought to express

"... the values and principles essential to a free and democratic society ... which embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals in society".²²⁰

In expressing the values and principles essential to a democratic society, judges certainly make value-laden assumptions about the social need for, and the effect of, each value and principle.

The court can only make objective determinations about rights and freedoms by having regard to the different conceptions about them; constitutional rights and freedoms can have meaning only if the social, political and economic values which inhere in them are identified, elucidated and expressed. If the court does not give meaning to these values, and apply them to cases at hand,

²¹⁸**Hunter et al v Southam Inc. (supra)** at 169.

²¹⁹At 155.

²²⁰**R v Oakes (supra)** at 136.

they will be abdicating their constitutional function.

The Canadian Supreme Court has in general followed a libertarian (though sometimes restrictive) approach to the interpretation and application of Charter provisions. While the court has been rigorous in its protection of the rights and freedoms in the Charter, it has been wary of overstepping the boundaries of judicial review. The libertarian approach of the Canadian Supreme Court not only appears from its rigorous application of Charter provisions but also from its approach to factors which have the propensity of affecting rigorous judicial review. It has significantly relaxed the *locus standi* requirement in constitutional litigation; a challenger of legislation need only show that he "has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the court".²²¹ It has expressly rejected the 'political question' doctrine and has held that it is not precluded from considering issues simply because they raise questions of a political or policy nature;²²² it has also undermined the presumption of constitutionality in relation to Charter litigation, holding that where a law is capable of more than one interpretation it will not simply presume in favour of the legislature but will instead try to avoid declaring it inconsistent with the Charter and thus invalid by choosing an interpretation

²²¹**Minister of Justice v Borowski** [1982] 1 W.W.R 97 at 117. Unlike section 7(4)(b) of the Republic of South Constitution of 1993, section 24(1) of the Canadian Charter, which provides for standing to sue, confines standing to persons "whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied". The purport of section 24(1) is that standing is confined to persons who are themselves affected by the allegedly unconstitutional law or action, that is persons acting in their own interest. Section 7(4)(b), on the other hand, extends standing to persons other than those acting in their own interest.

²²²**Operation Dismantle v The Queen** (*supra*) at 471-472, 481 and 484. See Chapter 10 for a discussion of the 'political question' doctrine.

that is consistent with the Charter.²²³

The lesson to be learnt from Canadian constitutional jurisprudence is that although courts may allow the executive and the legislature unfettered discretion in policy issues, they do make a real contribution to good and democratic government by ensuring that legislative and executive powers are exercised within the confines of constitutional prohibitions. Judicial review is much more than simply evaluating whether government initiatives and policies can be justified against broad constitutional principles;²²⁴ the terms of the constitutional text must be interpreted and defined, taking into account the purpose of constitutional guarantees and the function of the political branches of government in a modern democratic state.²²⁵

²²³See **Attorney-General, Manitoba v Metropolitan Stores (M.T.S) Ltd** [1987] 1 S.C.R 110. See Chapt. 10 for a discussion of the presumption of constitutionality and the 'reading down' of statutes.

²²⁴D. Beaty "Human Rights and Constitutional Review in Canada" 1992 **Human Rights LJ** 185 at 193-194.

²²⁵See Chapt. 11 for an analysis of the lessons which can be learnt from comparative constitutional jurisprudence.

CHAPTER 7

THE BOPHUTHATSWANAN EXPERIMENT.

Bophuthatswana was one of the 'independent' homelands (the so-called TBVC states) which may appropriately be described as the apartheid experiment in black self-rule; it came into existence as a result of the unilateral partition of South Africa into separate 'states' for the various ethnic groups. The partition was done in pursuance of the National Party government's policy of separate development; no referendum or any such process was conducted to test public opinion about the desire of citizens for 'independence'. Bophuthatswana became nominally independent on 6 December 1977.¹

The Constitution of Bophuthatswana² declared Bophuthatswana to be "a sovereign independent state and a republic ...".³ The Constitution was accorded recognition in South African law by the Status of Bophuthatswana Act.⁴

1. The Constitution of Bophuthatswana.

¹Bophuthatswana and its sister 'independent states', namely Transkei, Venda and Ciskei were not recognised by the international community as independent states; only the South African government recognised their 'independent' status. All these 'independent states' ceased to exist when they were re-incorporated into South Africa after the coming into operation of the Constitution of the Republic of South Africa, Act 200 of 1993 on 27 April 1994.

²Act 18 of 1977 (B).

³Section 1(1).

⁴Act 89 of 1977.

The Constitution of Bophuthatswana established a dispensation which deviated materially from the South African constitutional tradition. Section 7 introduced the principle of constitutional supremacy; in terms of this section the Constitution was made the supreme law of Bophuthatswana and any law, passed after its commencement, which was inconsistent with its provisions was, to the extent of such inconsistency, void. Chapter 2 of the Constitution embodied a declaration of fundamental rights.

The fundamental rights, which were contained in sections 9 to 17, were, in terms of section 8, binding on the legislature, the executive and the judiciary and directly enforceable by law. Section 8(2) specifically made the declared fundamental rights justiciable before the Supreme Court of Bophuthatswana.⁵ The purport of section 8(2) was to empower the Supreme Court to review legislative and executive acts and to declare them invalid if they were found to be inconsistent with the provisions which guaranteed the fundamental rights.

The Bophuthatswanan judiciary was drawn from members of the South African judiciary. Until 1982 the Appellate Division of the Supreme Court of South Africa acted as the final court of appeal from decisions of the Bophuthatswanan Supreme Court.⁶ The Bophuthatswanan Constitution therefore posed a great challenge for both the South African trained Bophuthatswanan judges and the South African Appellate Division, which had hitherto never exercised the power to review the substantive validity of Acts of Parliament in the light of a supreme Constitution which guaranteed fundamental rights.

⁵Section 59(1) of the Constitution established and constituted the Supreme Court of Bophuthatswana.

⁶Appeal to the South African Appellate Division was abolished by section 6 of Act 31 of 1982 (B).

2. The Judiciary and the Declaration of Fundamental Rights.

2.1. The Formative Years: **S v Marwane** and **Smith v Attorney-General, Bophuthatswana**

2.1.1. **S v Marwane**⁷

S v Marwane presented the first opportunity for the South African judiciary to test the validity of legislation against the yardstick of human rights constitutional provisions. The **Marwane** case was significant because it came at a time when the debate about the constitutional protection of human rights was beginning to gain momentum in South Africa.⁸

The legislation in issue in the **Marwane** case was the Terrorism Act, a statute which Bophuthatswana had inherited from South Africa. Marwane, who had been trained as a guerrilla in Angola, was found in possession of a grenade in Bophuthatswana. He was charged with various criminal offences and convicted of contravening section 2(1)(c) of the Terrorism Act, read with sections 1, 2(2) and 5 of the same Act, and sentenced to fifteen years' imprisonment. His application for leave to appeal having been refused by the court *a quo*,⁹ leave to appeal was granted by the Appellate Division.

⁷1982(3) SA 717 (A).

⁸The Constitutional Committee of the President's Council of South Africa later cited **Marwane**'s case as an example of "[t]he problems that may arise with the courts having a testing right by virtue of a human rights declaration...": **Second Report of the Constitutional Committee of the President's Council - The Adaptation of Constitutional Structures in South Africa** P.C 4/1982.

⁹**S v Marwane** 1981(3) SA 588 (B).

On appeal it was argued on behalf of Marwane that the sections of the Terrorism Act under which he was charged and convicted were in conflict with section 12(3) of the Constitution, which protected the right to liberty and security of the person; it was also contended that the provisions of the Terrorism Act in issue were in conflict with section 12(7) of the Constitution in that they placed the **onus** of proof of an essential element of the offence on the accused. Apart from the validity of the provisions of the Terrorism Act, the court also had to decide on the continued operation of received legislation, as provided for in section 93(1) of the Constitution, which was in conflict with the provisions of the Constitution.

The appeal was allowed. The majority of the court held that the sections of the Terrorism Act which were in issue were glaringly in conflict with Marwane's constitutional right to be presumed innocent until proven guilty as contained in section 12(7) of the Constitution.¹⁰

Miller JA, who delivered the judgment of the majority, also noted that section 6(5) of the Terrorism Act, which denied access to the courts to any individual detained under section 6(1) of that Act, directly violated the right of a detained person to approach the court for a determination of the legality of his detention as guaranteed in section 12(5) of the Constitution; furthermore, section 9(1) of the Terrorism Act, which made provision for the retrospective application of some of the provisions of the Act, was in conflict with section 12(8) of the Constitution, which clearly stated that no one would be guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under the law in force when it was committed.¹¹

In his judgment, Miller JA showed a keen awareness of the far-reaching consequences of a declaration of fundamental human rights in relation to

¹⁰At 746H *et seq.*

¹¹At 746-747.

legislation and the power of the court to enforce these rights:

"For as long as this Constitution stands, the right to challenge the validity of legislation passed by the legislative authority will remain, as will the Supreme Court's power (and its duty, when properly called upon to do so) to test the validity of challenged legislation by reference to the provisions of the Constitution. This is usually a feature of systems in which a 'bill of rights' is enshrined in a Constitution, to which very many cases decided in the United States bear irrefutable testimony".¹²

Turning to the continued operation of received legislation which is in conflict with the provisions of the Constitution, both Miller JA and Rumpff CJ, who delivered a minority judgment, rested a determination of the issue on an interpretation of sections 7(1), 7(2) and 93 of the Constitution and the intention of the legislature.

Rumpff CJ took the view that section 93(1) of the Constitution had to be restrictively interpreted, since a Constitution was a statute which was not passed in the ordinary course of Parliament's business. In his opinion, the real and true intention of Parliament was that all received laws should continue to operate until repealed or amended.¹³ Rumpff CJ thought that to interpret section 93(1) to mean that any existing laws which were in conflict with a provision of the Constitution would be invalid would lead to great uncertainty; he reasoned that such could never have been the intention of the Legislative Assembly.¹⁴

Miller JA, on the other hand, decided the issue on the basis of the principle of constitutional supremacy; since the Constitution was supreme to all other laws, provisions of the Constitution took precedence over all other laws, including received legislation, in the event of a conflict between these laws

¹²At 750A.

¹³At 740H.

¹⁴At 741G-H.

and the provisions of the Constitution.¹⁵ Miller JA admitted that such an approach could lead to uncertainty; he pointed out, however, that uncertainty may be unavoidable in systems in which human rights were guaranteed in the Constitution.¹⁶ The possibility of some uncertainty was, according to the judge, not an indication that the intention of the Legislative Assembly was that laws which were in conflict with the provisions of the Constitution should continue to operate until repealed or amended.

Miller JA's judgment, and his willingness to interpret the Constitution in favour of constitutional rights and freedoms, may at first sight appear to be value-oriented and to negate the strict literalist and intentionalist approach to constitutional interpretation. On a closer analysis, however, the judgment reveals a literalist and intentionalist approach which is discernible in the interpretation of ordinary statutes; in terms of this approach the intention of the law-maker is sought from the ordinary meaning of the words used. This approach also features in the minority judgment of Rumpff CJ.

Although in his judgment Miller JA, relying on the judgment of Lord Wilberforce in **Minister of Home Affairs and Another v Collins MacDonald Fisher and Another**¹⁷, called for a generous approach to the interpretation of the Constitution so as to give individuals the full benefit of constitutional guarantees¹⁸, he nevertheless restated the literalist-intentionalist approach when he intimated that the courts would, in interpreting a particular provision of the Constitution,

"give full effect to the ordinarily accepted meaning of the words used and would not deviate therefrom unless to give effect to the ordinary meaning would give rise to glaring

¹⁵At 753C.

¹⁶**Idem.**

¹⁷1980 CA 319 (PC) at 328-329.

¹⁸At 748H et seq.

absurdity; or unless there were indications in the Act (considered as a whole in its own peculiar setting and with due regard to its aims and objects) that the legislator did not intend the words to be understood in their ordinary sense".¹⁹

Miller JA's approach plays down the open-ended nature of human rights provisions and the creative role of the judiciary in the interpretation of these provisions.²⁰

Miller JA's judgment was also criticised for going for an 'overkill', by considering issues it was not even called upon to deal with.²¹ Nevertheless, it was praised as a positive one which gave pre-eminence to constitutional guarantees.²² The judgment may be described as a starting point in modern South African constitutional interpretation and was therefore to be welcomed.

2.1.2. **Smith v Attorney-General, Bophuthatswana**²³

¹⁹At 749D-E.

²⁰See Chapt. 10 for a discussion of the creative role of the judiciary in constitutional interpretation.

²¹See T.J Kruger **Die Wordingsproses van Suid-Afrikaanse Menseregtebedeling** (1990) at 211; A.E.A.M Thomashausen "Human Rights in Southern Africa: The Case of Bophuthatswana" 1984 **SALJ** 467 at 469-474.

²²See G. Carpenter "S v Marwane" 1983 **THRHR** 93 at 96-97; S. Luiz "S v Marwane" 1983 **THRHR** 231 at 237; G.N Barrie "Marwane's case: Echoes of Marbury v Madison on the Arid Plains of Southern Africa" 1983 **THRHR** 288.

²³1984(1) SA 196 (B). See G. Carpenter "Smith v Attorney-General, Bophuthatswana" 1984 **THRHR** 363; S. Luiz "The Entrenchment of Human Rights in Bophuthatswana" 1984 **SALJ** 435; Thomashausen 1984 **SALJ** 474-479 for a discussion of this case.

Smith v Attorney-General, Bophuthatswana came approximately one-and-a-half years after the **Marwane** case. Unlike the **Marwane** case, the **Smith** case was not politically sensitive, which made the court's task easier. The question in issue was the validity of section 61A of the Criminal Procedure Act.²⁴ Section 61A was a post-independence amendment of section 61 of the Criminal Procedure Act;²⁵ its effect was to give the Attorney-General the power to prevent the granting of bail to an accused person who was permanently or ordinarily resident outside the area of jurisdiction of the Bophuthatswana Supreme Court. On the mere **ipse dixit** of the Attorney-General that an accused was permanently or ordinarily resident outside the court's area of jurisdiction, and that he was not likely to reappear for trial if released on bail, the court was obliged to refuse bail for 90 days.

Smith had been arrested and charged with fraud and theft of money from the state. He was refused bail by a magistrate after the Attorney-General had submitted information that he was permanently or ordinarily resident in South Africa and that he was not likely to reappear for trial if released on bail. He appealed to the General Division of the Bophuthatswanan Supreme Court.

The main issue for decision was the constitutionality of section 61A of the Criminal Procedure Act. The court had to decide, first of all, whether section 61A was in conflict with section 12(3)(b) of the Constitution and secondly, whether it was covered by the section 18 derogation clause; it was argued that, by placing the granting or refusal of bail entirely in the hands of the Attorney-General, the section excluded the court's discretion and therefore interfered with the accused's right to be released pending the finalisation of the trial.

²⁴Act 51 of 1977.

²⁵Criminal Procedure Second Amendment Act, 33 of 1980 (B).

Hiemstra CJ approached the determination of the constitutionality of section 61A from two angles, namely the 'due process of law' principle and the 'proportionality' principle. 'Due process of law' is a well known principle which features prominently in American constitutional law; it entails compliance with the legal process before the rights of individuals can be interfered with. The 'proportionality' principle (**Verhältnismässigkeit**) is a principle of German law; it means that interference with constitutionally guaranteed rights is justifiable only if such interference is permitted by the Constitution, is capable of achieving its purported objective, is necessary in order to achieve its objective and is in **proportion** to the right affected; proportionality implies that the purported objective of a law which interferes with constitutionally guaranteed rights must be lawful, adequate, necessary and of **equal or superior weight** to the affected right.²⁶

After analysing the refusal to grant bail pursuant to the provisions of section 61A in the light of the proportionality principle, Hiemstra CJ came to the conclusion that section 61A was disproportionate in its rigour to attain the purpose sought to be achieved. This purpose was to prevent an accused from absconding; it could be fulfilled "by the traditional and long-standing method of court decisions".²⁷

As to the applicability of the 'due process of law' principle, Hiemstra CJ decided that individual liberty is universally protected by an independent judiciary operating in public and compelled to give reasons for its decision;²⁸ section 61A denied the appellant due process of law because it not only left the appellant with no right to challenge the Attorney-General's allegation but also compelled the court to accept the Attorney-General's word and to refuse

²⁶At 201A-C. See also the discussion of the Canadian case of **R v Oakes** [1986] 1 S.C.R 103 in Chapt. 6.

²⁷At 201F-G.

²⁸At 200F.

bail; it eliminated a fundamental rule of due process of law, namely the **audi alteram partem rule**, and was therefore "unmistakably an encroachment upon the essence of a fundamental right".²⁹

As to the question whether section 61A was covered by section 18 of the Constitution, the court once again relied on the German law concept of **Wesensgehalt**. In terms of this concept the main issue is whether a law encroaches upon the essence of a fundamental right; if it appears to encroach on the essence of the right, the court must apply the principle of **Wechselwirkung** or interplay of forces to decide whether it was constitutional or not.³⁰ The court found that the nature of section 61A was such that it encroached upon the essence of a fundamental right and was therefore unconstitutional.

In his judgment, Hiemstra CJ expressly recognised that the interpretation of a Constitution which guarantees fundamental human rights calls for a generous interpretation which upholds constitutional values, and not a narrow, literalist and mechanical interpretation. The judge noted that the approach to the interpretation of a Constitution with a Bill of Rights was entirely different from, and opposed to the "positivist tradition which applies statutes according to their strict meaning as construed from the words used".³¹

Whereas in **Marwane's** case Miller JA contented himself with calling for and following a generous approach to the interpretation of the Constitution, Hiemstra CJ went further and dwelt on the delicacy which accompanied the interpretation of a Constitution which restrains the exercise of legislative power by guaranteeing certain fundamental rights, especially where the

²⁹At 202H.

³⁰At 202F.

³¹At 199F.

restraints imposed are foreign to a system with a tradition of a supreme parliament with unfettered legislative powers. He explained this as follows:

"The Court helps to shape the Declaration of Human Rights with great deference to the Legislature. A Court which is over-active in striking down Legislation can destroy the exalted instrument it is trying to bring to life, it can incur the resentment of the Legislature and cause the Declaration, which was meant to be a charter of freedom, to become a clog upon the wheels of government. That must be avoided for the sake of the stature of Parliament as the highest law-making forum of the nation. In the course of reasoning along these lines the Court will for instance not create an embarrassing lacuna within the legislative structure if it is at all possible to avoid such a result. On the other hand the Court dare not abdicate its function as upholder of the long term aims and ideals of the Constitution."³²

Hiemstra CJ's plea for judicial deference to the legislature may at first sight sound strange when examined in the light of the generous approach to the interpretation of the constitution which he had advocated. This plea is, however, also a warning against judicial over-eagerness; it essentially informs us that there may very well be certain areas where the court ought to exercise its power to strike down legislation with great caution and restraint and to maintain a proper balance between the exercise of legislative powers and the protection of human rights.

The Canadian Supreme Court has followed a similar approach. The Court has repeatedly exercised restraint and applied the proportionality principle with caution when dealing with cases involving social and economic policies,³³ caution was necessary because such cases involved matters of compromise and accommodation.³⁴ In essence, however, judicial deference to the legislature,

³²At 199C-E.

³³See **Edward Books & Art Ltd v The Queen** [1986] 2 S.C.R. 713; **Irwin Toy v Quebec** (1989) 58 D.L.R. (4th) 577; **McKinney v University of Guelph** (1991) 76 D.L.R. (4th) 545.

³⁴See D. Beaty "Human Rights and Constitutional Review in Canada" 1992 **Human Rights LJ** 185 at 191.

in matters involving social economic policies in particular, amounts to an appreciation of the proper degree of the separation of powers between the judiciary and the elected branches of government. Legislation dealing with social and economic issues is usually enacted by the democratically elected representatives of the people after compromise and accommodation;³⁵ the judiciary, whose function is confined to the adjudication of justiciable legal disputes, ought to respect the legitimate expression of the will of the elected representatives of the people on important social and economic issues.

Another important aspect of Hiemstra CJ's judgment is that it not only emphasised judicial protection of constitutionally guaranteed rights and the relationship between the judiciary and the elected representatives of the people, but also the type of society within which the Constitution operates. Although Hiemstra CJ felt that it was the duty of the court to articulate the values and ideals embodied in the Constitution's Declaration of Human Rights,³⁶ he was at the same time conscious of the type of society within which the Declaration operated, the extent to which a human rights culture had permeated through society, and the political development of that society. Where a human rights culture has not yet become fully established, and the political processes are still in their infancy, the court ought to exercise its power of judicial review with caution, while at the same time fulfilling its duty as guardian of the principles and values embodied in the Constitution.³⁷

Smith v Attorney-General, Bophuthatswana is "an excellent example of carefully balanced constitutional adjudication".³⁸ Balanced constitutional adjudication implies, in the first place, that, taking the

³⁵**Idem.**

³⁶At 199H.

³⁷At 199 in fin - 200.

³⁸Thomashaussen 1994 **SALJ** at 480.

provisions which guarantee human rights as a starting point, the court must give meaning to the values and ideals of the Constitution in such a way that the individual enjoys their full benefit; it implies, in the second place, that the judiciary ought to exercise its power to strike down legislation with caution when dealing with certain contentious but important social and economic issues which have been decided by elected representatives through the ordinary political process and after compromise and accommodation; it also implies, in the third place, that, the judiciary should not lose sight of the prevailing social and economic conditions and the type of society within which it operates.

2.2. The Later Decisions.

The decisions in **S v Marwane** and **Smith v Attorney-General, Bophuthatswana** raised the hope that the Bophuthatswanan judiciary would give the Declaration of Fundamental Rights its due status in the regulation of relationships between state organs and individuals, and bring to bear on these relationships the fundamental values and ideals embodied in the Declaration. However, Hiemstra CJ's remark in the **Smith** case that "[t]he Court helps to shape the Declaration of Human Rights with great deference to the Legislature"³⁹ so as to avoid the resentment of the legislature proved to be a "harbinger of things to come".⁴⁰ This cautionary but somewhat conservative statement was grabbed at by later judges and applied out of context.

³⁹At 199C-D.

⁴⁰D. Woolfey & P. Manda "A Bill of Rights - Lessons from Bophuthatswana" 1990 **CILSA** 70 at 75.

2.2.1. **S v Chabalala**⁴¹

Chabalala had been convicted of murder; no extenuating circumstances having been found, he was sentenced to death. It was argued on his behalf that the death sentence was inhuman and degrading and therefore in conflict with section 11 of the Constitution.

Counsel for Chabalala had urged the court to adopt an approach which would uphold the Constitution rather than one which would promote deference to the will of legislature.⁴² In support of his argument that the death penalty was inhuman and degrading, Counsel referred to foreign writers, to case law dealing with the interpretation of article 3 of the European Convention on Human Rights⁴³, to American case law dealing with capital punishment and to the 8th Amendment of the Constitution of the United States, which prohibits 'cruel and unusual punishment'. An opportunity thus presented itself for the court to analyse the values embodied in section 11 and to make use of international law and foreign law as a guide in the search and analysis of these values.⁴⁴

The court's response was disappointing. Theal Stewart CJ implicitly gave

⁴¹1986(3) SA 623 (BA). See S. Luiz "A Bill of Rights: Is It Worth the Paper It's Written On?" 1987 **SAJHR** 105; Woolfey & Manda 1990 **CILSA** at 75-76 for a discussion of this case.

⁴²At 628A.

⁴³Article 3 of the European Convention on Human Rights is similar in content to section 11 of the Bophuthatswana Constitution.

⁴⁴See for example **S v Ncube; S v Tshuma; S v Ndlovu** 1988(2) SA 702 (ZSC) and **Ex Parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State** 1991(3) SA 76 (Nm) where the Zimbabwean and Namibian courts made extensive use of foreign law and international law as a guide in analysing the meaning of 'inhuman and degrading' punishment in relation to corporal punishment.

credit to the notion that a constitutional provision derives its meaning from the words used, a notion which is completely incompatible with the idea of human rights provisions as an embodiment of fundamental values; these values are expressed in vague and open-ended terms which have to be analysed in order to give them meaning. According to the judge, the "representatives of the people of Bophuthatswana" expressly authorised the death penalty; it could not therefore *per se* be inhuman or degrading.⁴⁵ Without even attempting to search for and analyse any values which might be embodied in section 11 of the Constitution, the judge concluded that there was nothing inhuman or degrading in the application of the death penalty in Bophuthatswana.⁴⁶

Theal Stewart CJ's line of reasoning manifests a commitment to a conservative doctrine of judicial responsibility which is akin to a positivist view of law. This line of reasoning underplays value considerations in judicial interpretation and focuses mainly on the intention of the legislator; it proceeds on the basis that the intention of the legislator overrides everything else.

As Luiz⁴⁷ points out, Theal Stewart CJ obviously took the view that it was the function of the legislature to abolish the death penalty. This does not imply, however, that a court which is called upon to determine constitutionality must abdicate its function of creatively interpreting the Constitution to give the individual the full benefit of its provisions. A court is not usurping the function of the legislature when declaring a statute invalid;

⁴⁵At 628C-D. Section 10(1) of the Constitution of Bophuthatswana guaranteed the right to life but qualified the guarantee by providing that a person may be deprived of his life "in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law". It should be noted that the main argument in **Chabalala** was not that the death penalty was inconsistent with section 10(1) but that it constituted inhuman and degrading treatment or punishment.

⁴⁶At 628J-629E. Moll and van den Heever JJA concurred.

⁴⁷Luiz 1987 **SAJHR** 110.

in a system of constitutional supremacy it is the function of the court, when called upon to do so, to determine whether a piece of legislation is in conflict with the provisions of the Constitution or not and to declare the legislation invalid if it finds it to be in conflict with such provisions; the court is simply giving effect to the supreme law of the Constitution.⁴⁸

According to Theal Stewart CJ, if one accepts that all punishment is degrading then imprisonment would also be unconstitutional.⁴⁹ This reasoning is faulty in one important respect; imprisonment does not always constitute cruel punishment if one applies the yardstick of whether punishment is out of proportion to the offence.⁵⁰ Imprisonment for a period of up to one year imposed upon an offender who has committed an assault with a deadly weapon can hardly be said to constitute cruel punishment if one takes into consideration the nature and gravity of the offence.

As to the use of international law and foreign law in the search of fundamental constitutional values Theal Stewart CJ crisply dismissed their influence:

"The fact that some Courts in other countries as well as various legal writers have expressed the view that, for one reason or another, the death penalty is inhuman or degrading cannot override its express acceptance by the representatives of the people of Bophuthatswana, in formulating the Bill of Rights, as the usual and appropriate punishment in certain prescribed circumstances".⁵¹

⁴⁸The death penalty was declared unconstitutional in South Africa by the Constitutional Court in **S v Makwanyane** 1995(6) BCLR 665 (CC).

⁴⁹At 628D-F.

⁵⁰Luiz 1987 **SAJHR** 110.

⁵¹At 629C. Section 10(1) of the Constitution of Bophuthatswana was similar but not identical to section 4(1) of the Botswana Constitution. Section 4(1) similarly guarantees the right to life but qualifies it by permitting the imposition of the death penalty "in respect of an offence under the law in force in Botswana". In **S V Ntesang** 1995(4) BCLR 426 (Botswana) Aguda JA, while recognising the significance of the development in other portions of the international community concerning the abolition and

It can be argued that the fact that the Bophuthatswanan Declaration of Rights is based largely on the European Convention of Human Rights⁵² shows that when the "representatives of the people of Bophuthatswana" adopted the Constitution they intended to adopt those fundamental values which are embodied in the European Convention as their own. This argument would mean that international law and foreign authorities dealing with the Convention were persuasive in the interpretation of the Declaration.⁵³ Section 11 itself is similar in content to article 3 of the European Convention.

There is also another aspect which is relevant to the interpretation of 'torture, inhuman and degrading treatment or punishment' which the court did not consider. In assessing the cruelty of capital punishment the court is not only concerned with the actual carrying out of the death sentence *per se*, but also with its total impact, from the moment it is imposed through the execution itself, both on the individual and on the society which sanctions its use.

The assessment of the cruelty of the death sentence in the light of its total

constitutionality of the death penalty, held that despite the fact that it may be considered to constitute torture, inhuman or degrading treatment or punishment, section 7(2) preserved its imposition. (See also the judgment of Aguda JA in **The Attorney-General v Dow** 1994(6) BCLR 1 (Botswana) at 45H-J on the significance of international law in the interpretation of the Constitution.) Section 7 of the Botswana Constitution prohibits torture or inhuman or degrading treatment or punishment but saves, in subsection (2), any law which authorises the infliction of any description of punishment that was lawful in Botswana before the coming into operation of the Constitution. The death penalty provision in the Botswanan Penal Code was already in existence at the time of the coming into operation of the Constitution. Section 11 of the Bophuthatswanan Constitution did not contain a saving clause.

⁵²See M.P Vorster, M. Wiechers & D.J Van Vuuren (eds) **Constitutions of Transkei, Bophuthatswana and Venda** (1985) at 85.

⁵³The adoption of the Sixth Protocol of the European Convention on Human Rights provides evidence of a world-wide movement against the death penalty.

impact is illustrated in the Zimbabwean case of **Catholic Commission for Justice & Peace, Zimbabwe v Attorney-General, Zimbabwe**.⁵⁴ In this case four prisoners were sentenced to death after having been found guilty of the crime of murder. The applicant, a human rights organisation, sought an order preventing the prisoners' execution, on the basis that the dehumanising factor of the prolonged delay of their proposed execution, viewed in conjunction with the harsh and degrading conditions under which they had been confined, constituted inhuman or degrading treatment in violation of section 15(1) of the Constitution of Zimbabwe.

After analysing the conditions endured by the prisoners, their mental anguish and the attitudes of the courts, both in Zimbabwe and in other countries, in relation to the **delay** in executing sentences of death, Gubbay CJ found that the total impact of these factors constituted cruel and inhuman or degrading treatment. With reference to American case law, the judge described the cruelty of the sentence of death in the following terms:

"The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture⁵⁵... The mental agony is, simply and beyond question, a horror⁵⁶... The ordeals of the condemned are inherent and inevitable in any system that informs the condemned person of his sentence and provides for a gap between sentence and execution. Whatever one believes about the cruelty of the death penalty itself, the violence done the prisoner's mind must afflict the conscience

⁵⁴1993(2) SACR 432 (ZS). See also the Jamaican case of **Pratt and Another v Attorney-General for Jamaica and Another** [1993] 2 All E.R 769 (PC).

⁵⁵At 448d.

⁵⁶At 448h.

of enlightened government and give the civilized heart no rest⁵⁷... The condemned must confront this primal terror directly, and in the most demeaning circumstances.⁵⁸

While accepting that fear, despair and mental torment are the inevitable concomitant of a sentence of death, the court, however, based its judgment on the delay in carrying out the sentence. The delay in carrying out the sentence prolongs the fear, despair and mental torment and therefore constitutes cruel, inhuman and degrading treatment.⁵⁹ The court ordered that the death sentences imposed on the prisoners be vacated. The sentences were set aside and sentences of life imprisonment substituted for them.

Gubbay CJ adopted a value-oriented and generous approach to the interpretation of section 15(1) of the Constitution of Zimbabwe⁶⁰ and thereby gave the individual the full benefit of the Declaration of Rights. This approach is clear from the judge's remarks:

"Because retribution has no place in the scheme of civilized jurisprudence, one cannot turn a deaf ear to the plea made for the enforcement of constitutional rights. Humaneness and dignity of the individual are the hallmarks of civilized laws. Justice must be done dispassionately and in accordance with constitutional mandates".⁶¹

An alternative argument was also advanced in the **Chabalala** case.⁶² It was argued that section 277 of the Criminal Procedure Act, 1977, which made the death sentence mandatory if no extenuating circumstances are found, was in

⁵⁷At 449a.

⁵⁸At 449b.

⁵⁹At 459g. The accused in **Chabalala**'s case had been on death row for 2 years when his execution was eventually scheduled to be carried out.

⁶⁰Section 15(1) of the Constitution of Zimbabwe is similar to section 11 of the Constitution of the former Bophuthatswana.

⁶¹At 459f.

⁶²**Supra.**

conflict with the Declaration of Fundamental Rights in that it severely limited the court's discretion as to sentence and converted the death penalty into a degrading and inhuman punishment.⁶³

Theal Stewart CJ took the view that the limitations arising from the operation of the concept of extenuating circumstances were not imposed by section 277 but by the South African courts' interpretation and application of the section; the section itself did not, according to the judge, define the extent of extenuating circumstances. What the judge did not take into account, however, was that when South African courts interpreted and applied the concept of extenuating circumstances, they were dealing with an ordinary statute and not with a Constitution with supreme authority; as Dickson J of the Canadian Supreme Court stated in **Hunter et al v Southam Inc**⁶⁴,

"[t]he task of expounding a constitution is crucially different from that of construing a statute ... A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power, and when joined by a Bill or Charter of Rights, for the unremitting protection of individual rights and liberties".

In essence, what the court was called upon to consider in the **Chabalala** case was whether the very same interpretation and application of section 277 of the Criminal Procedure as that followed by South African courts advanced the unremitting protection of individual rights in line with the Declaration of Rights. Since the interpretation and application of the Declaration called for a generous approach, the interpretation and application of section 277 of the Criminal in such a way that the section limited the appellant's constitutional right not to be subjected to cruel punishment was not in line with the spirit of the Bophuthatswanan Constitution.

⁶³At 632H-I.

⁶⁴(1984) D.L.R (4th) 641 at 649.

Van den Heever JA, who delivered a separate but concurring judgment, was concerned that the courts would be

"usurping the legislative function were they, without legislative intervention, to deviate from the meaning given to section 277, Act 51 of 1977 by judicial interpretation in the Republic of South Africa as at the date of its adoption by Bophuthatswana on 6 December 1977".⁶⁵

This approach, like that of Theal Stewart CJ, assumes that those who drafted or adopted the Constitution accepted the position as it existed in South Africa and ignores the fact that when the drafters gave the court a testing power it was intended that this power should be used; it manifests extreme deference to the legislature and fails to take into account the special character of the Constitution as a unique document which must "be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers".⁶⁶

2.2.2. **Segale v Government of Bophuthatswana and Government of Bophuthatswana v Segale.**⁶⁷

Segale, the applicant in this case, was the Chairman of the National Seoposengwe Party, the opposition political party in Bophuthatswana. His party had been refused permission to hold a political meeting in terms of section 31(1) of the Internal Security Act of 1979 (B). The effect of section 31(1) of the Internal Security Act was to ban the holding of public meetings

⁶⁵At 635.

⁶⁶**Hunter et al v Southam Inc.** (*supra*) at 649.

⁶⁷1987(3) SA 237 (B) and 1990(1) SA 434 (BA). See K. Motshabi "Constitutional Interpretation as a Means of Honouring Human Rights Commitments" 1988 **SAJHR** 79; A.M Dlamini "Growth by Stifling" 1990 **THRHR** 121; I.M Rautenbach "Vooraftoestemming vir Vergaderings" 1990 **TSAR** 767; G. Carpenter "Constitutional Interpretation in Bophuthatswana-What Price a Bill of Rights?" 1989/90 **SAYIL** 169; Woolfey & Manda 1990 **CILSA** at 77-79 for a discussion of these cases.

attended by more than 20 persons. Segale sought an order declaring that section 31 of the Internal Security Act violated freedom of expression and of peaceful assembly and association as guaranteed in sections 15 and 16 of the Constitution.

In granting the order as prayed, the General Division of the Bophuthatswanan Supreme Court, per Waddington and Khumalo JJ, endorsed the approach to the interpretation of a Constitution with a Bill of Rights which Miller JA had adopted⁶⁸ in **Marwane's** case⁶⁹ from the speech of Lord Wilberforce in **Minister of Home Affairs v Collins MacDonald Fisher and Another**⁷⁰, namely that a Constitution which entrenches human rights must be given a generous interpretation which gives individuals the full benefit of these rights.

In their judgment Waddington and Khumalo JJ recognised and articulated the values and norms inherent in the Constitution. Their Lordships found that the Constitution enshrined fundamental features of democracy and that its character and origin dictated that full recognition and effect must be given to the rights and freedoms it guaranteed. Adopting a generous interpretation to the Constitution, their Lordships came to the conclusion that section 31 of the Internal Security Act permanently left the fundamental rights guaranteed in section 15 and 16 of the Constitution exercisable at the discretion of the Minister of Justice and was therefore contrary to the spirit of the Constitution.⁷¹

The judgment of Waddington and Khumalo JJ is particularly significant in that

⁶⁸At 748G-749F.

⁶⁹**Supra**.

⁷⁰**Supra** at 328-329.

⁷¹At 247G.

it places the burden of proving that a derogation of constitutionally guaranteed rights is justified on the government and not on the challenger.⁷² Where the government relies on the security situation in the country in order to justify a derogation of rights it must show that there is a **clear and present danger**.⁷³

Following the court's order declaring section 31 of the Internal Security Act unconstitutional, the Government appealed to the Bophuthatswanan Appellate Division. The Appellate Division shattered the illusion that the judgment of *Waddington and Khumalo JJ* "constitutes the beginning of a new trend in the interpretation of the Bophuthatswana Constitution".⁷⁴ The court, per Galgut AJA, held that section 31 was not in conflict with the provisions of the Constitution and reversed the decision of the court **a quo**.⁷⁵

The Bophuthatswanan Appellate Division failed to appreciate that it was dealing with a Supreme Constitution⁷⁶ whose Declaration of Human Rights required cognisance to be taken of its fundamental values and ideals, as opposed to the intention of the legislature as discoverable from the words used. Although these fundamental values may also be discovered from the original intent of the framers, the interpretation of a Constitution is different

⁷²At 247D-F. This is the approach followed by the Canadian Supreme Court: see **R v Oakes** (supra).

⁷³At 247H.

⁷⁴K. Motshabi 1988 **SAJHR** at 79.

⁷⁵See A.M Dlamini "Growth by Stifling" 1990 **THRHR** 121; G. Carpenter "Constitutional Interpretation in Bophuthatswana- What Price a Bill of Rights?" 1989/1990 **SAYIL** 169; Woolfey & Manda 1990 **CILSA** 77-79 for criticisms of Galgut AJA's judgment.

⁷⁶See Dlamini **op cit.** at 123; Carpenter 1989/1990 **SAYIL** at 171 and 172; A.M Dlamini & P.J Majola "The Bophuthatswana (Constitution) Bill of Rights and Security Legislation: A Rule of Law Appraisal" 1993 **Stellenbosch LR** 100 at 117.

from the interpretation of ordinary statutes; its provisions are capable of adaptation to meet future unknowable needs.⁷⁷

The most startling aspect of Galgut AJA's judgment is its reliance on rules applicable to the interpretation of ordinary statutes; the judge referred mainly to South African and British cases which were decided against the background of the doctrine of legislative supremacy, a doctrine which is completely incompatible with the idea of the Constitution as the supreme law of the land to which all other laws are subordinate.

There is no doubt the general rules of statutory interpretation are not discarded in the interpretation of a Constitution with supreme authority. Many writers have in fact argued in favour of a purposive approach to the interpretation of ordinary statutes, one which takes into account the purpose of specific legislation and the purpose of law in society.⁷⁸ In the interpretation of a supreme Constitution, however, the purpose of the specific rights entrenched in the Constitution and the larger purpose of the Constitution occupy a central place. A paramount consideration in the interpretation of such a Constitution is that the court must give effect to the values and norms, the ideals and aspirations of society and spirit embodied in its provisions.⁷⁹ These values, norms, ideals and aspirations are actualised in a manner completely different from that associated with the enforcement of legislative policy as contained in

⁷⁷**McCulloch v Maryland** 17 US (4 Wheat.) 316 (1819) at 415.

⁷⁸See G.E Devenish **Interpretation of Statutes** (1992) at 35-39; L.M Du Plessis **Interpretation of Statutes** (1986) at 36; C.J Botha **Wetsuitleg** (1991) at 13; D.V Cowen "Prolegomenon to a Restatement of the Principles of Statutory Interpretation" 1976 **THRHR** 131; J.M.T Labuschagne "Die Opkoms van die Teleologiese Benadering tot die Uitleg van Wette in Suid-Afrika" 1990 **SALJ** 569.

⁷⁹See the discussion of Mahomed AJA's judgment in **Ex Parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State** (*supra*) in Chapt. 8.

ordinary statutes.

The Bophuthatswanan Appellate Division failed to rise above 'the austerity of tabulated legalism';⁸⁰ its judgment reveals a commitment to a conservative brand of judicial interpretation which is akin to positivism.⁸¹ Instead of seeking guidance from the provisions of the Constitution and searching for fundamental values and norms therefrom, Galgut AJA saw the intention of the legislature as fundamental and adopted a literalist-intentionalist approach:

"The task of the Court is to ascertain from the words of the statute in the context thereof what the intention of the Legislature is. If the wording of the statute is clear and unambiguous they state what that intention is. It is not for the Court to invent fancied ambiguities and usurp the functions of the Legislature."⁸²

Galgut AJA's approach was a narrow one which emphasised the intention of the legislature over superior constitutional values. Without analysing the circumstances under which, and the extent to which, the Constitution permitted a restriction of the right of freedom and of assembly, the judge came to the conclusion that "... the right of freedom of expression and of assembly (can) be restricted when this (is) necessary in the interest of public safety".⁸³

It is quite true that section 15 itself permitted certain restrictions.⁸⁴ Such restrictions, however, had to be **necessary in a democratic society**. Galgut AJA did not for one moment consider this criterion. Neither did he consider

⁸⁰**Marwane's case (supra)** at 748H.

⁸¹Dlamini 1990 **THRHR** at 124; Carpenter 1989/1990 **SAYIL** at 208 and 210-211.

⁸²At 448G.

⁸³At 449I-J.

⁸⁴Section 15(1).

the criterion laid down in the **Smith** case⁸⁵, namely that a restriction would be constitutionally justifiable only if it was reasonable or proportional, in the sense that it was lawful, adequate, necessary and of equal or superior weight to the right in issue.

The approach which the court ought to have followed is that which required the applicant to show that a constitutionally guaranteed right of his was at stake or had been violated; once the applicant had succeeded in showing that there was a **prima facie** violation or threat of violation of his right, the court ought to have required the government to justify this violation or threatened violation in terms of the proportionality and rationality principles or the criterion stipulated in section 15, namely that the restriction was

"necessary in a democratic state in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

The fact that section 15 specifically stipulated instances in respect of which restrictions on the rights guaranteed in the Constitution were permissible was an indication that these rights could be encroached upon only under special circumstances. Moreover, even if these special circumstances existed, the restriction still had to be "necessary in a democratic state". An evaluation of the special circumstances and of whether a restriction was necessary in a democratic state under such circumstances would involve a consideration of the proportionality and reasonableness of the restriction, the security, integrity etc. of the individual as well as the position in other free and democratic states and the prevailing circumstances in the state. Considerations of proportionality, rationality, security, integrity and democracy cannot be divorced from the ideals and aspirations of society, which clearly include full participation in the political process.

⁸⁵Supra.

As Woolfey⁸⁶ points out, had the court adopted a normative or teleological approach it would have found that although the Constitution expressly authorised, for certain purposes, restrictions on the rights and freedoms of individuals, such restrictions had to be kept to the absolute minimum; they should be permitted only when absolutely necessary in order to preserve the democracy which the Constitution sought to establish and to safeguard. The Constitution certainly did not permit unjustifiable and unnecessary restrictions of deliberately guaranteed rights and freedoms.

2.2.3. The General Division Follows Suit: **Monnakale and Others v Government of the Republic of Bophuthatswana and Others**⁸⁷ and **Lewis v Minister of Internal Affairs**⁸⁸.

Monnakale was concerned with the validity of detentions in terms of section 25 of the Internal Security Act.⁸⁹ Section 25(2) of the Act empowered any commissioned officer of the Police Force to detain an arrested person for interrogation, for a period of fourteen days, if the Commissioner of Police had reason to believe that such a person had engaged in activities that constituted an offence under the Act, or was withholding information relating to such an

⁸⁶1990 **CILSA** at 79.

⁸⁷1991(1) SA 598 (B). See G. Carpenter "Constitutional Interpretation in Bophuthatswana - Still no Joy" 1990/91 **SAYIL** 143; P. Manda "Executive Manipulation Employed by Virtue of the Security Clearance Act of Bophuthatswana" 1991 **CILSA** 240; I. Southwood "Naught for your (Constitutional) Comfort in Bophuthatswana" 1992 **SA Public Law** 169; H. Lever "Redressing the Racial Imbalance in the Law" 1992 **Consultus** 57; Woolfey & Manda 1990 **CILSA** at 79- 81 for criticisms of this case.

⁸⁸1991(3) SA 628 (B). See P.S Fouche & I.M Rautenbach "Deportasie en die Interpretasie van 'n Handves van Regte" 1992 **TSAR** 505 for a discussion of this case.

⁸⁹Act 32 of 1977 (B).

offence. Members of the Bophuthatswana Defence Force who were alleged to have been involved in a failed **coup** had been detained in terms of section 25. The applicants, relatives of the detainees, approached the court for an order for the release of the detainees. The main issue was the discretion given to the Attorney-General to order the continued detention of a detainee after a consideration of the reasons for the arrest and detention furnished to him by the Commissioner of Police.

The applicants contended that every arrest or detention **prima facie** interfered with the liberty of the citizen, that a decision to arrest or detain must be based on reasonable grounds and that such a decision was objectively reviewable. Friedman J rejected this contention and decided that "the statute itself entrusted to the repository of the power the sole and exclusive function of determining whether in its opinion the prerequisite fact, or state of affairs existed prior to the exercise of the power".⁹⁰ The judge opined that it was "not the function of the court to enquire into the correctness of the Attorney-General's decision".⁹¹

Monnakale is yet another example of the court's failure to appreciate the significance of a Constitution which operates as a supreme law and the higher status of the fundamental values and ideals embodied in its human rights provisions. Throughout his judgment Friedman J approached the matter as if he were dealing with South African law.⁹² Although the judge correctly pointed out that restrictions on human rights were permissible in the interests

⁹⁰At 612E, quoting from the judgment of Corbett J, as he then was, in **South African Defence Aid Fund & Another v Minister of Justice** 1967(1) SA 31 (C) at 35A-B.

⁹¹At 624I.

⁹²See **Carpenter** 1990/91 **SAYIL** at 145. At the time of the judgment the South African system was not based on a supreme Constitution; the system was based on the doctrine of legislative supremacy and the South African Constitution had the same status as any other ordinary statute: see Chapt. 4.

of national security,⁹³ he did not in any way attempt to deal with the values embodied in the Constitution and the circumstances under which these fundamental values would justifiably give way to interests of national security; the judge instead regarded the intention of the legislature as a 'skeletal framework' of the law, which is discoverable from the 'plain and unambiguous' meaning of the statute, as paramount, "however unpalatable the result may be".⁹⁴

Friedman J adopted a literalist-intentionalist approach which excludes a consideration of fundamental constitutional values. In the guise of giving effect to the intention of the legislature as it appears from the 'clear and unambiguous' language of the statute there is discernible "the positivist's belief in the fixed meaning of language and the rigid separation of law and morality".⁹⁵ Friedman J's approach betrays an avoidance of judicial creativity; it suggests that where the language of a statute which infringes constitutionally guaranteed rights is clear and unambiguous the role of the court is confined to giving effect to the intention of the legislature, without a corresponding analysis and application of superior constitutional values.

According to Friedman J, a generous approach to constitutional interpretation can only be resorted to where the language of a statute is uncertain and unambiguous.⁹⁶ This approach not only ignores the supremacy of the Constitution; it also reduces interpretation to a process whereby only the meaning of words used in a statute is sought and applied, without taking into account the situation or circumstances in which the meaning has to be applied.

⁹³At 613H-614A.

⁹⁴At 621D and H.

⁹⁵Woolfey & Manda 1990 **CILSA** at 80.

⁹⁶At 622G.

In relation to a statute which is alleged to violate constitutionally guaranteed rights, the right or rights in issue form part of the situation or circumstances in which the meaning of the statute have to be applied and therefore become relevant; a proper determination of a dispute involving an alleged violation of these rights is possible only when not only the meaning of the violating statute but also the meaning of the provisions which embody the rights are considered. By its very nature, a supreme Constitution which guarantees fundamental human rights calls for a generous interpretation which gives individuals the full benefit of the values and ideals embodied in its provisions.

Friedman J's view that a generous approach to the interpretation of a Constitution which guarantees human rights can only be resorted to where the words used in a statute which impinges on these rights are obscure or ambiguous also appeared in his judgment in **Lewis v Minister of Internal Affairs and Another**.⁹⁷ In this case a university lecturer who had been appointed on contract was ordered to leave Bophuthatswana in terms of section 65(1) and (2) of the Aliens and Travellers Control Act⁹⁸. Friedman J followed the 'original intent' approach⁹⁹ and held, with regard to the constitutionality of section 65(1) and (2), that the intention of the legislature in enacting the Declaration of Fundamental Rights had never been that the rights of the individual should prevail over interests of the state or public safety.

As in the **Monnakale** case,¹⁰⁰ Friedman J adopted a literalist-intentionalist approach. The judge viewed the function of the court as one of giving effect to the intention of the legislature as it appears from the 'clear and

⁹⁷Supra.

⁹⁸Act 22 of 1979 (B).

⁹⁹See Chapt. 10 for a discussion of this approach.

¹⁰⁰Supra.

unambiguous' language of a statute, even if the Constitution contained a justiciable Bill of Rights.¹⁰¹ This approach prefers the certainty and uniformity of plain meanings and avoids a creative and normative analysis of the tensions that may exist between such meanings and fundamental constitutional values and ideals.

Although, in the **Lewis** case, Friedman J referred to and approved the judgment of Corbett CJ in **Administrator Transvaal and Others v Traub**,¹⁰² which he found to be weighty and of persuasive authority, he refused to follow the generous approach which could be gleaned from that case. **Traub** did not specifically deal with constitutional or statutory interpretation; it does illustrate, however, the fundamental role of the judiciary in protecting the interests of the individual.¹⁰³

Traub was concerned with the question whether the director of hospital services could refuse to appoint the respondents, who were doctors, as senior house officers in accordance with the established practice, without having granted them an opportunity to present their case in terms of the **audi alteram partem** rule. The Appellate Division decided that the respondents had a legitimate expectation of being appointed and/or that they were entitled to a

¹⁰¹At 638F.

¹⁰²1989(4) SA 7 (A).

¹⁰³**Traub's** case has generally been well-received as a positive step towards substantial judicial protection of the interests of individuals in public law: see G. Carpenter "Legitimate Expectation Here to Stay" 1990 **Consultus** 59; C.F. Forsyth "A Harbinger of a Renaissance in Administrative Law" 1990 **SALJ** 387; M. Beukes "Geregverdigde Verwagting as Aanspraak van die Individu in die Administratiewe Proses" 1991 **TSAR** 150; M.P. Olivier "Legitimate Expectation and the Protection of Employment" 1991 **TSAR** 483. The concept of legitimate expectation has since been built into the Republic of South Africa (interim) Constitution of 1993: see section 24.

fair hearing in the event of a contemplation to depart from the established practice.¹⁰⁴ The application of the notion of legitimate expectation "where an adherence to the formula of 'liberty, property and existing rights' would fail to provide a legal remedy, when the facts cry out for one",¹⁰⁵ is an illustration of creative judicial decision-making in coming to the aid of the individual where his rights or interests are threatened by administrative or executive acts. By reaching out and coming to the aid of persons prejudicially affected, the court in essence adopted a generous approach to the protection of the rights or interests of the individual.

It may be argued that the right to be heard in terms of the **audi alteram partem** rule, which was in issue in the **Lewis** case, is a fundamental human right¹⁰⁶ and that the court ought to have held that it should have been complied with.¹⁰⁷ Although the **audi alteram partem** rule was not specifically enshrined in the Constitution, it may be argued that at least fair procedure was envisaged.¹⁰⁸ In the **Smith** case Hiemstra CJ specifically recognised and applied the 'due process of law' principle as a universal method of safeguarding the rights of individuals;¹⁰⁹ the right to be heard is clearly a major part of 'due process of law'. It may also be argued that the exclusion of the application of the **audi alteram partem** rule in respect of

¹⁰⁴At 762B-C.

¹⁰⁵At 761D-E.

¹⁰⁶See G. Carpenter "Fundamental Rights, Security Legislation and the **Audi Alteram Partem** Rule - Still no Congruence in the Appellate Division" 1989 **S.A Public Law** 87. See also the discussion of the **Chikane** case **infra**.

¹⁰⁷See for example the judgment of Khumalo J (with Comrie J concurring) in **Sefularo v President of Bophuthatswana & Another** (unreported judgment delivered in June 1992).

¹⁰⁸See for example the provisions of section 12(6) and section 12(7).

¹⁰⁹At 200F-H.

aliens who were lawfully in Bophuthatswana was in conflict with the right to equality, as guaranteed in section 9 of the Constitution, in that it discriminated against them in regard to a fundamental aspect of the administrative law process on the basis of their descent or origin.

Friedman J was able to exclude the application of the **audi alteram partem** rule through a literal interpretation of section 65(1) and (2) of the statute in issue, without a corresponding consideration of the values and ideals embodied in the Constitution. This approach fails to recognise the significance of a transition from a system of legislative supremacy, where giving effect to the intention of the legislature is paramount, to a system of constitutional supremacy, where fundamental constitutional values and ideals override ordinary legislation and executive acts which are inconsistent with these values and ideals.

It cannot be denied that every sovereign state is entitled to regulate the admission and removal of aliens within its territory. It is submitted, however, that where the Constitution specifically guarantees certain rights of individuals, an approach to the interpretation of legislation, which is alleged to be unconstitutional, which rests solely on the 'clear and unambiguous' sanction of a violation of these rights does not face the constitutionality of that legislation squarely. Whether the language of a statute is clear or unclear, ambiguous or unambiguous, its constitutionality must still be determined in the light of the rights which are alleged to have been violated and the fundamental values and ideals which are expressed or inherent in these rights.

By its very nature, the Bophuthatswanan Constitution required that weight be given to its supremacy rather than to the intention of the legislature. The court ought to have dealt with the constitutionality of the legislation in issue on the basis of either the compelling state interest principle or the proportionality principle. Such an approach would have involved a weighing up of the conflicting state interests and individual interests, a consideration of the

constitutional values associated with them and giving greater weight to constitutional values and ideals in the event of an absence of a compelling state interest or lack of proportionality between the objective of the legislation and the affected right. This approach takes cognisance of the superior nature of constitutional values and ideals and the limits which may justifiably be imposed on them.

2.2.4. A Change of Heart? - **Mfolo and Others v Minister of Education, Bophuthatswana**¹¹⁰ and **Nyamakazi v President of Bophuthatswana**¹¹¹

The **Mfolo** and **Nyamakazi** decisions constitute a significant departure from the Bophuthatswana General Division's earlier approach to the interpretation of the Constitution. In both cases the court was prepared to analyse and to articulate the fundamental values and ideals inherent in the Bophuthatswana Constitution's Declaration of Fundamental Rights.

The issue for determination in **Mfolo** was the validity of Regulation 13(2), promulgated under Government Notice No. 168 of 25 August 1989 (B). Regulation 13(2) made provision for the suspension of the rights of a student at a teachers' training college if such a student became pregnant during an academic year. The regulation was promulgated by the Minister of Education pursuant to section 10(1) of the Bophuthatswana National Education Act.¹¹²

The applicants, who were female students at a teachers' training college, were

¹¹⁰1992(3) SA 181 (B).

¹¹¹1992(4) SA 540 (B). See H. Lever "A Change of Heart on Bophuthatswana's Bill of Rights" 1993 **SALJ** 223 at 226 *et seq.* for a discussion of **Nyamakazi**.

¹¹²Act of 1979.

suspended from all college activities by the rector of the college on the ground that they were pregnant; their suspension also meant that they were precluded from writing their final examinations. They brought an application for a declaratory order that regulation 13(2) was null and void and that they were entitled to write the final examinations and to participate in all college activities.

It was contended on behalf of the applicants that regulation 13(2) violated the right to equality before the law regardless of sex, descent, race, language, origin or religious beliefs as guaranteed in section 9 of the Constitution. In determining the issue before it, the court looked at what section 9 of the Constitution had to say. It found that the key words in section 9 were 'before the law' and concluded that the operation of these words was not confined to courts of law but also extended to both the legislature and the executive.¹¹³

Comrie J relied on the judgment of the South African Appellate Division in **Cabinet for the Territory of South West Africa v Chikane and Another**¹¹⁴ and squarely faced the interpretation of the meaning and ambit of the right to equality before the law. The judge opined that the essence of the right to equality before the law is that classification of and discrimination against persons on the basis of sex, race, etc. would be unconstitutional, unless such a classification or discrimination was reasonable, in the sense that it was based on an intelligible **differentia** which distinguishes persons or things that are grouped together from others left out of the group, and rational, in the sense that the **differentia** is rationally related to the object which the statute or act in question sought to achieve.

The employment of 'object' or purpose, reasonableness and rationality in the

¹¹³At 184C and G.

¹¹⁴1989(1) SA 349 (A). See Chapt. 8 **infra** for a discussion of this case.

determination of the constitutionality of a legislative measure is commendable. It implies that, for a discriminatory legislative measure to be valid, it must have sufficiently important objectives and employ appropriate means to achieve those objectives.¹¹⁵

By making use of normative concepts such as reasonableness and rationality, Comrie J's approach in the **Mfolo** case constitutes a clear departure from the formalistic approach which emphasises the language of a legislative measure rather than fundamental values in so far as these values may be at variance with the provisions of the legislative measure. This approach is consistent with the superior force of constitutional values as discoverable from the provisions of the Constitution.

Comrie J's reference to the **dictum** of Grosskopf JA in the **Chikane** case illustrates the wide implication of the principles of reasonableness and rationality in the determination of the constitutionality of a legislative measure as well as the limits inherent in the language used in a legislative measure:

"The question ... is whether the distinctions rest on a 'reasonable basis': i.e whether they are 'founded on an intelligible **differentia**'; whether that **differentia** has a 'rational relationship to the object sought to be achieved by the statute in question'. A court, in ascertaining the object sought to be achieved by the statute engages in a process of interpretation. In doing so, it may **make use of whatever permissible aids are available for the interpretation of the statute in issue.**¹¹⁶ The question of interpretation is one of law".

¹¹⁵See e.g the Canadian cases of **R v Oakes** (*supra*) at 138-139 and **Andrews v Law Society of British Columbia** [1989] 1 S.C.R 143 at 182.

¹¹⁶**My emphasis.** This means that the court is not confined to the literal meaning of the words used in a statute but may employ other methods of interpretation to interpret the statute in the light of its purpose and the larger purpose of the Constitution. A strictly literal interpretation of the statute would be unsuitable because the court is not concerned only with finding the intention of the legislature but also with the object or purpose of the statute, the purpose of the right or freedom it is alleged to violate and the larger objects of the Constitution.

Nyamakazi epitomises the creative role of the judiciary in interpreting a Constitution with a declaration of fundamental rights, to give its terms their full worth and to reflect its spirit. In this case the court did not view interpretation as a conclusion but rather as a process whereby the terms of the Constitution are creatively analysed in search of a meaning which best reflects the spirit and supremacy of the Constitution; this process distinguishes between the interpretation of the provisions of an ordinary statute and those of a supreme Constitution and approaches the latter generously and extensively.

Nyamakazi was concerned with the constitutionality of section 31B of the Internal Security Act.¹¹⁷ The effect of section 31B was to prohibit non-citizens from participating, at gatherings, in speeches, addresses, discussions, debates or campaigns on matters pertaining to the internal politics of Bophuthatswana. The section was inextricably linked with section 30 of the same Act; the latter section extended the ambit and parameters of the section 31B prohibitions by defining 'act of public protest' and 'political organisations' to include almost every aspect of life in the State.

The applicant, who had been born in South Africa but resided in Winterveldt in Bophuthatswana, had as chairman of the Winterveldt Civic Association applied for and was granted permission to hold a public meeting to discuss issues of common concern to the residents of Winterveldt and to formulate steps to be taken to resolve the issues. In granting the permission to hold the meeting, the relevant authorities had stated that since the organisers and speakers were South African citizens, their participation at the meeting would be in contravention of section 31B of the Internal Security Act and therefore unlawful.

¹¹⁷Act 32 of 1979 (B). Section 31B was inserted by the Internal Security Amendment Act, 5 of 1991 (B).

The applicant attacked the validity of section 31B on a number of grounds. He contended, first, that it curtailed the rights to freedom of expression and assembly of aliens;¹¹⁸ secondly, that it was not of general application;¹¹⁹ thirdly, that it abolished the fundamental rights to freedom of association, assembly and information¹²⁰ and lastly, that it discriminated against non-citizens residing in Bophuthatswana.¹²¹ It was also argued that section 30 was unconstitutional in so far as it extended the ambit and parameters of section 31B.

The court, per Friedman J, held that section 31B and the definition of "act of public protest" in section 30 were unconstitutional and therefore invalid. During the course of his judgment Friedman J stated and elucidated the approach which ought to be followed in interpreting a Constitution with a declaration of fundamental human rights.

According to Friedman J, a Constitution with a declaration of fundamental rights must be "liberally construed, according to its terms and spirit, to give effect to the intention of the framers, the principles of government contained therein and the objectives and reasons for its legislation".¹²² It is significant to note that the intention of the framers is not the only important consideration; nor is the language used by the framers an overriding factor. As Friedman J explained,

"constitutions are expected to survive for a lengthy period of time, and because the process of amending or revising is more onerous than for an ordinary statute, they are not bound

¹¹⁸Sections 15 and 16 of the Constitution.

¹¹⁹Section 18(1) of the Constitution.

¹²⁰Section 18(2) of the Constitution.

¹²¹Section 9 of the Constitution.

¹²²At 566H.

by the strict or confined interpretation applied to the construction of a criminal or other statute".¹²³

Friedman J drew support for the liberal approach from American, Botswanan and Namibian constitutional jurisprudence as well as from decisions of the Privy Council in which the provisions of Commonwealth Constitutions with Bills of Rights were interpreted. Friedman J's reliance on foreign case law is in sharp contrast with Theal Stewart CJ's curt rejection of the influence of foreign case law in **S v Chabalala**.¹²⁴ The rejection of 'foreign influences' ignores the fact that the notion of a Bill of Rights is itself, within the African context, of foreign origin.¹²⁵

Indeed, the many years of experience of foreign courts in the interpretation and application of declarations of rights provide fertile ground for the development of a constitutional jurisprudence which would give meaning to local human rights provisions. As Friedman J found, the foreign decisions he referred to in his judgment support a broad, generous construction which takes into account

"the character and origin of the instrument ... guided by the principles of giving full recognition and effect of those fundamental rights and freedoms with a statement of which the constitution commences"¹²⁶ These fundamental rights are "the moral and legal norms relating to the rights of individuals and the concomitant powers of the Legislature in regard thereto".¹²⁷

The liberal or generous approach which Friedman J adopted emphasises the

¹²³At 567B-C.

¹²⁴**Supra.**

¹²⁵See Lever 1993 **SALJ** at 230.

¹²⁶At 555G.

¹²⁷At 567E-F.

substantial role played by factors beyond a mere mechanical, textual construction. It acknowledges that rights and freedoms are expressions of the fundamental values of society and that constitutional interpretation must take into account and reflect these values. Factors such as 'sense of community, substantive justice and rights' and 'moral norms' provide a yardstick for measuring human rights violations.¹²⁸ These factors reflect the fabric of human belief in good and just law as the foundation of good government and human freedom and are a manifestation of the endeavours of the human spirit; good law is regarded as being "synonymous with justice and the timeless fundamentals of human value".¹²⁹

What appears from Friedman J's judgment is that constitutional interpretation, first and foremost, recognises the wisdom of the framers who identified certain fundamental rights and then deemed it fit to guarantee for themselves and future generations the values contained in these rights; constitutional interpretation therefore has as its starting point the 'intention of the framers'.¹³⁰ However, since these fundamental values are also intended for the benefit of future generations, the Constitution in which they are entrenched must be interpreted as a living document "intended to endure for ages to come".¹³¹ As Friedman J put it,

"[i]t must be interpreted in the context, scene and setting that exists at the time, and not when it was passed, otherwise it will cease to take into account the growth of society which it seeks to regulate ... A constitution must not be regarded as frozen in time historically at the moment of its adoption. Society is dynamic, and its growth is escalating rapidly. A constitution is not a musty historical relic which is confined to the status of merely being an interesting historical document. It must be interpreted to provide for the growth and development of the society which it regulates as the 'supreme law of Bophuthatswana'. The constitution needs to be

¹²⁸At 561E-F.

¹²⁹At 563A-E.

¹³⁰At 566H-I.

¹³¹**McCulloch v Maryland (supra)** at 407.

interpreted in order to confront and answer the challenges of our time ..."¹³²

Friedman J's approach not only illustrates the creative role of the judiciary in identifying and evolving fundamental constitutional values, but also the duty of the judiciary to uphold the Constitution, and the difference between judicial interpretation of the Constitution and applying the law as it is, where effect is given to the will of a supreme legislature:

"As far as the role of the Supreme Court is concerned, it has the power to test legislation, creating in fact a position of judicial authority thereby establishing a jurisprudence based on the philosophy of natural law as opposed to positivism on which the doctrine of Parliamentary Sovereignty is based."¹³³

Friedman J's judgment is also particularly relevant in that, for the first time in the development of constitutional jurisprudence in Bophuthatswana, the court formulated principles for the interpretation of a Constitution with a declaration of fundamental rights.¹³⁴ The essence of these principles is that the provisions of a Constitution which guarantees fundamental democratic rights must be given a generous interpretation.¹³⁵

In his judgment, Friedman J also undertook a normative analysis of the right of equality before the law. The judge opined that the concept of equality of persons is "a fundamental premise of western, liberal, and democratic

¹³²At 567E and 569E-F.

¹³³At 570H-J.

¹³⁴At 566E-567J.

¹³⁵Lever 1993 **SALJ** at 228. As Lever points out, there is too much overlap and duplication of the principles. However, Friedman J's attempt to systematise judicial interpretation of the provision of a declaration of fundamental rights provides a good starting point for the development of a theory of constitutional interpretation in South Africa. See Chapt. 10 for a suggested framework and approach to the interpretation of the 1993 Constitution.

thought".¹³⁶ It is a moral idea that "has been converted from an ethical principle into 'an economic and social necessity'".¹³⁷ When contained in a Constitution which guarantees fundamental human rights, the concept of equality before the law "supplies a moral norm for the operation of the constitution, which must be implemented with uncompromising fidelity to its ideals".¹³⁸

The importance of the right to equality before the law and its harmonisation with the ideals of a Constitution can be discerned from the approach to the interpretation of discriminatory legislation. Legislation which is discriminatory or treats people differently "must be strictly construed, and may only be justified on the basis of a compelling state interest or national interest, which must be proved".¹³⁹ A consideration of the justification of a violation of constitutionally guaranteed rights on the basis of a compelling state or national interest necessarily involves a consideration and a balance of individual interests and state or national interests in the light of wider societal ideals.

In so far as the government may permissibly limit a basic right, a 'compelling governmental interest' is required for such a limitation.¹⁴⁰ The 'compelling state or national interest' doctrine has been applied in American cases where discrimination was alleged.¹⁴¹ The basic premise in American constitutional law is that all discrimination based on classification into groups is immediately suspect and unconstitutional, unless it can be supported on the basis of

¹³⁶At 573A.

¹³⁷At 573D.

¹³⁸At 575F.

¹³⁹At 567I and 583H-I.

¹⁴⁰See *Lever* 1993 **SALJ** at 227.

¹⁴¹See e.g. **Duncan v Missouri** 152 US 377 (1893); **Korematsu v United States** 323 US 214 (1944).

rationality, in the sense that it has a rational basis or is rationally related to a legitimate state or national interest.¹⁴² This principle applies to all forms of discrimination, including discrimination against non-citizens.¹⁴³

It has been argued in the discussion of the **Lewis** case that the fact that a state is entitled to regulate the admission and removal of aliens within its territory does not prevent a court from determining the constitutionality of legislation which makes provision for such regulation merely because the 'clear and unambiguous' language of the legislation sanctions a violation of the rights of aliens. In the **Lewis** case Friedman J had relied on the 'clear and unambiguous' language of the relevant sections to hold that the rights of aliens cannot prevail over interests of the state. He did not in that case make any distinction between fundamental rights which everyone, irrespective of his nationality, is entitled to enjoy and political rights which may justifiably be claimed and enjoyed by citizens only.

In the **Nyamakazi** case Friedman J made a clear distinction between fundamental rights and political rights in relation to the treatment of aliens admitted into a state's territory:

"The international standard relating to the treatment of aliens postulates that if a State admits an alien into its territory, it must conform in its treatment of him to the internationally determined standards. This means that the State should accord treatment to the alien which measures up to the ordinary standards of civilisation. The international standard of treatment of

¹⁴²For an exposition of this principle by a South African court see **Cabinet for the Territory of South West Africa v Chikane and Another (supra)** at 186.

¹⁴³The **Nyamakazi** case is in fact an interesting parallel of the Canadian case of **Andrews v Law Society of British Columbia (supra)**. In the **Andrews** case McIntyre J held that a statute which required lawyers in British Columbia to be Canadian citizens discriminated against a class of persons solely on grounds of lack of citizenship status, without considering other attributes or merits of individuals in the group, and was therefore unconstitutional.

aliens applies in respect of fundamental rights such as the right to life and integrity of persons but not to political rights, in respect of which an alien can only expect equality of treatment or even less than equality with that accorded to the State's own nationals".¹⁴⁴

Friedman J's approach in the **Nyamakazi** case differs markedly from his earlier approach in the **Monnakale** and **Lewis** cases. In the **Nyamakazi** case, the judge moved away from the formalistic and narrow approach which he had followed in the **Monnakale** and **Lewis** cases and adopted a generous approach which gives individuals the full benefit of constitutional guarantees and reflects the spirit and supremacy of the Constitution.

Despite the generous approach which he adopted in the **Nyamakazi** case, Friedman J nevertheless also concluded that he did not find paragraph (aB)(aa)(i) of section 3(b)(iii) of the Internal Security Amendment Act, 1991 to be in conflict with the Constitution.¹⁴⁵ This section amended section 31 of the principal Act; it provided that any application for authorisation to hold a public meeting must be accompanied by copies of the identity documents of the convener, speakers and participants. Friedman J's conclusion about this amendment raised the question whether there was anything in the Internal Security Amendment Act, 1991 that was worthy of being salvaged.¹⁴⁶

The whole thrust of Friedman J's reasoning was directed at the conclusion that the legislation discriminated against non-citizens. The judge did not consider two other important aspects which indicated that the amendment to the Internal Security Act also constituted a serious deprivation of the rights of citizens, namely, in the first place, that the legislation violated the right of citizens to expose their thoughts to others and therefore rendered the democratic right of

¹⁴⁴At 579C-D.

¹⁴⁵At 584E.

¹⁴⁶See Lever 1993 **SALJ** at 234.

freedom of expression meaningless and, in the second place, that it criminalised a dutiful citizen who attended a meeting to discuss important matters if, during the course of debate a non-citizen raised a matter which impacted on a matter of legal, economic or political consequence; the meeting was transformed into an illegal gathering and a citizen committed an offence if he chaired it.¹⁴⁷

In coming to the conclusion that the requirement that an authorisation to hold a public meeting must be accompanied by copies of the identity documents of the convener, speakers and participants did not affect fundamental rights, Friedman J did not consider that even though it was an administrative procedure, it no longer served the purpose it was intended to serve once it violated not only the rights of non-citizens but also citizens' democratic right of freedom of expression. The only purpose of the requirement was to identify the convenor of a public meeting and the speakers and participants at the meeting; such a purpose was rendered inoperative once it was found that the legislation violates constitutionally guaranteed rights and freedoms, especially the right of freedom of expression, without which there can be no exchange of ideas.

The requirement materially obstructed the exercise of the right of freedom of expression and participation in the democratic process through peaceful persuasion of other people to change their minds; it essentially made the exercise of the right of freedom of expression conditional and in that sense restricted its exercise. Such a restriction could only be justified if it was 'necessary in a democratic society'. The onus to justify the restriction rested on the government.¹⁴⁸

¹⁴⁷Lever 1993 SALJ at 229-230.

¹⁴⁸**R v Oakes (supra)**. See also **Matinkinca and Another v Council of State, Ciskei and Another** 1994(1) BCLR 17 (Ck) at 27C.

2.2.5. The Spectre Returns: **Mokwele v Government, Republic of Bophuthatswana and Others**¹⁴⁹.

If the judgment of Friedman J in the **Nyamakazi** case represented a change of heart in the Bophuthatswanan judiciary's approach to the interpretation of the Constitution and the constitutionality of the Internal Security Amendment Act, the judgment of Smith J in the **Mokwele** case showed that there was never really a significant change of heart. The judgment of Smith J in this case answered the question whether there was anything in the Internal Security Amendment Act worthy of being salvaged with a thunderous yes.

In the **Mokwele** case the applicant was charged in a regional magistrate's court with contravening section 31(7) of the Internal Security Act, as amended by the Internal Security Amendment Act, 1991. The charge was that he, together with other persons, had held an unlawful gathering. The applicant objected to the charge and contended that section 31, as amended, violated his right to freedom of thought and freedom of expression as contained in sections 15 and 16 of the Declaration of Fundamental Rights in the Constitution. The matter was postponed pending an application for an order declaring that the amendments to the Internal Security Act were unconstitutional.

The attack on the constitutionality of the Internal Security Amendment Act was three-pronged. It was contended, in the first place, that the amendment extended the operation of section 31 to meetings of any number of persons and no longer related to meetings of 20 persons or fewer; secondly, that the extended definition of 'gathering' contained in the amendment covered a wide range of activities than the previous word 'meeting'; and lastly, that the requirement in the amendment that the convenor of and the speakers at a

¹⁴⁹1993(2) SACR 707 (B).

gathering must submit their identity documents and their names and addresses unduly obstructed the exercise of freedom of thought and freedom of expression.

Smith J held that the Internal Security Amendment Act was not unconstitutional. He came to the conclusion that the Act was necessary in the interests of public safety. The judge relied heavily on the judgment of Galgut AJA in the **Segale** case, despite the fact that in that case the court had relied on rules applicable to the interpretation of ordinary statutes and failed to interpret the Constitution as the supreme law of the land and to consider whether the restrictions imposed by section 31 were constitutionally justifiable.

Smith J's interpretation of the constitutionality of the Act followed Galgut AJA's literalist-intentionalist approach. In the judge's opinion the wording of legislation is significant.¹⁵⁰ According to Smith J, the court was not entitled to intervene unless the wording is ambiguous.¹⁵¹ This approach completely ignores the superior nature of constitutional values and the creative role of the judiciary to interpret the provisions of the Constitution in such a way that full effect is given to these values.¹⁵² The applicability of the provisions of a supreme Constitution does not depend on the presence or otherwise of an ambiguity.¹⁵³

Although Smith J recognised the importance of freedom of speech and

¹⁵⁰At 713a.

¹⁵¹At 713b.

¹⁵²See the discussion of the **Segale** case (*supra*). Although the wording of legislation is important, the Constitution is the starting point. A statute will be unconstitutional if it is inconsistent with the provisions of the Constitution, even if its wording is clear; in such an instance the duty of the court is to uphold the supreme law of the Constitution by striking the statute down.

¹⁵³See Lever 1993 SALJ at 229.

freedom of assembly as part of democratic rights at common law and in the Constitution, he did not attempt an analysis of the fundamental values inherent in them and the extent to which these values may have to give way to the interests of public safety. Such an analysis clearly involves a weighing up of interest of the individual to exercise his constitutionally guaranteed rights, the interests of public safety and a consideration of the ideal of democracy which the Constitution is supposed to manifest.

Throughout in his judgment Smith J emphasised the restrictions to which the rights contained in sections 15 and 16 of the Declaration can be subjected.¹⁵⁴ It is not any type of restriction, however, which is permissible. Although section 18 permitted restrictions by a law of general application, sections 15 and 16 specifically prescribed which types of restrictions were permissible; the only restrictions which were permissible were those which were "necessary in a democratic society ...".¹⁵⁵ The crucial question, therefore, was whether the restrictions imposed on the particular guaranteed rights were, in the light of the purpose and objectives of the restricting legislation and all the considerations relevant to the constitutional values embodied in the guaranteed rights, justifiable as being necessary in a democratic society.

As mentioned above, in determining whether a restriction is necessary in a democratic society, the court must derive whatever assistance it can from the experience of other free and democratic societies and the circumstances in the society which it serves, to answer the question whether the restriction imposed on the particular guaranteed right can be justified as being reasonable in the

¹⁵⁴At 711b; 712j; 713b; 715b.

¹⁵⁵See articles by J.D van der Vyver: "Limitation Provisions of the Bophuthatswanan Bill of Rights" 1994 **THRHR** 47 and "Suspension, derogation and *de facto* deprivation of Fundamental Human Rights in Bophuthatswana" 1994 **THRHR** 257 for a detailed discussion of the limitation, suspension and derogation of the rights which were entrenched in the Bophuthatswanan Declaration of Fundamental Rights.

light of principles of democracy, considerations of public safety and the interests which the restricting legislation is intended to protect.

Since it was the government which imposed the restrictions, it was incumbent on the government to show that these restrictions were necessary in a democratic society. Smith J did not deal with this aspect satisfactorily. The judge simply quoted¹⁵⁶ from the judgment of Comrie J in the unreported case of **Kekana Royal Executive Council and Another v The Minister of Law and Order and Another**¹⁵⁷ in which the question of the onus to justify restricting legislation was also dealt with unsatisfactorily.

The **Kekana** case was concerned with the constitutionality of section 3B of the Prevention of Illegal Squatting Act¹⁵⁸ in the light of the provisions of sections 8, 9, 13 and/or 17 of the Declaration of Fundamental Rights. Comrie J held that section 3B was not unconstitutional.¹⁵⁹

Although Comrie J expressed himself in favour of a generous approach to the interpretation of the provisions of the Constitution, he watered down this approach by emphasising the literal meaning of the words of the statute under consideration.¹⁶⁰ According to Comrie, the "plain language (cannot) be ignored or receive less than its due weight".¹⁶¹

¹⁵⁶At 715b-716a.

¹⁵⁷BGD 17-06-1993, case No. M20/93.

¹⁵⁸Act 52 of 1951 (as it was when Bophuthatswana became 'independent').

¹⁵⁹See J.D van der Vyver "Comparative Law in Constitutional Litigation" 1994 **SALJ** 19 for an analysis of the **Kekana** case.

¹⁶⁰At 27.

¹⁶¹At 34.

Comrie J essentially relied on the judgment of Galgut AJA in the **Segale** case, which is flawed in a number of respects, as regards the question of the onus to justify restricting legislation. In the first place, Galgut AJA's approach was formalistic and premised on the importance of the intention of the legislature as opposed to the supremacy of the Constitution; in the second place, the judge contented himself with the fact that the legislature found it necessary to enact the legislation in issue and that it must have had reason to do so, without considering whether the legislation was actually justifiable as being reasonable and necessary in a democratic society; in the third place, Galgut AJA's opinion that the court was not in a position to decide the fate of the legislation,¹⁶² whereas the Constitution permitted it and in fact instructed it to do so, amounted to an abdication of judicial duty.

The most important flaw in Galgut AJA's judgment in the **Segale** case is that the judge proceeded on the basis that the onus was on the individual whose rights were at stake to show that the restrictions were **not necessary**.¹⁶³ The proper approach is that the onus to justify the restrictions rested on the government which imposed them in the first place.¹⁶⁴ The fact that the Minister gave reasons for the refusal of the appellants' application to hold a meeting did not really resolve the issue relating to the necessity for the introduction of the restrictions; the refusal by the Minister presupposed the validity of the restricting legislation, which issue had not been settled.¹⁶⁵ Comrie J's suggestion, in the **Kekana** case, that "the observation of Galgut AJA (at 452D) may not have been more than a conclusion based on the

¹⁶²At 452E.

¹⁶³At 452D.

¹⁶⁴See **R v Oakes** (*supra*).

¹⁶⁵Dlamini 1990 **THRHR** at 125.

absence of appropriate rebutting evidence¹⁶⁶ is therefore also flawed.

Comrie J also suggested in the **Kekana** case that there may well be cases where "[s]ome statutes ... would be so obviously within the apparent ambit of the permissible limitations, that the burden of adducing evidence against necessity would be upon the complainant".¹⁶⁷ This suggestion essentially implies that there are instances where, once the challenger has shown that a statute violates or restricts a constitutionally entrenched right of his, the challenger will carry the additional burden of showing that the violating statute is not justifiable or that a restriction it imposes is not necessary.

It is quite true that there may be instances where the violation or restriction will be so obviously justifiable or necessary that no evidence or very little evidence in favour of necessity would be required.¹⁶⁸ In such instances the government is not required to adduce evidence in favour of necessity because once it is obvious that the restriction is necessary or justifiable, it would be

¹⁶⁶At 32.

¹⁶⁷**Idem.**

¹⁶⁸It may be argued that section 3B of the Prevention of Illegal Squatting Act (Bophuthatswana) was socially desirable to deal with illegal squatting and to protect the rights of lawful owners of land and therefore obviously justifiable or necessary that no evidence in favour of necessity was required. However, section 121 of the Republic of South Africa Constitution has brought about some change in the field of property law; in terms of this section any person or community who was dispossessed of a right in land in terms of legislation that would have been inconsistent with the prohibition of racial discrimination contained in section 8(2), is entitled to claim restitution in respect of such right from the state in a court of law. From the viewpoint of this change a law prohibiting illegal squatting may therefore not be **obviously** justifiable or necessary; evidence that it is reasonable and justifiable in a democratic society will be required to justify its constitutionality. It is significant to note that section 28, which guarantees the right to property, is not included among the sections for which there is the additional requirement that limitations should also be necessary: see A.J van der Walt "Notes on the Interpretation of the Property Clause in the New Constitution" 1994 **THRHR** 181 for a discussion of sections 28 and 121.

superfluous to require it to do so. This does not mean, however, that the onus of adducing evidence against necessity rests on the complainant as suggested by Comrie J in the **Kekana** case.

In cases of statutes which deal with certain desirable social or economic policies the court may itself evaluate the situation and relieve the government of the burden to adduce evidence in favour of necessity; such statutes are enacted after comprehensive debate by elected representatives and usually involve compromise and accommodation. In some cases, especially where there is general consensus among elected representatives and the various interest groups, the importance or desirability of the legislation will be so obvious that it will require no justification at all.¹⁶⁹

In relieving the government of the burden to adduce evidence in favour of necessity the court in a sense defers to the legislature in matters concerning important social and economic issues. It may also be that, in another sense, when a court defers to the legislature in matters concerning important social and economic issues it acknowledges that such legislation involves contentious policy issues which are not suitable for judicial determination and as a result acquiesces in the democratic process by requiring the government to adduce little or no evidence in favour of necessity.¹⁷⁰

However, in determining whether the court is entitled to defer to the legislature in matters concerning important social or economic issues, a

¹⁶⁹An example is legislation which controls the production, sale and possession of pornographic material involving children and bestiality. Although there is no consensus on the control of the production, sale and possession of such material involving adults, there is consensus among representatives and interest groups that pornography involving children and bestiality should be outlawed; should the constitutionality of legislation outlawing this type of pornography be challenged, the government could hardly be expected to adduce evidence to justify its constitutionality.

¹⁷⁰See the discussion of the **Oakes** case in Chapter 6.

distinction should be made between rights which are essential to the democratic process and those which are not. Where the challenged legislation involves a restriction of a right which is essential to participation in the ordinary democratic process, such as the right of freedom of expression (which was in issue in the **Mokwele** case) or political rights, the court should not easily defer to the legislature.¹⁷¹ The right of freedom of expression, for example, is necessary for one peacefully to expose his thoughts to others, to persuade people to change their minds and to bring about a peaceful transfer of power; political rights, on the other hand, are the very core of democratic government; these are rights to which an individual is entitled in order to participate in the democratic process.

With the notable exception of **Smith, Mfolo, Nyamakazi** (and **Marwane** to some extent) the approach of the Bophuthatswanan judiciary to the interpretation of the Constitution was not encouraging.¹⁷² In most of the judgments the court adopted a literalist/intentionalist approach and thus set an unsound trend for modern constitutional jurisprudence.¹⁷³

¹⁷¹See **The Carolene Products** footnote (**United States v Carolene Products Co.** 304 US 144 (1938) at 152-153, footnote 4).

¹⁷²See L.M Du Plessis "Constitutional Interpretation in South Africa: Taking Stock", paper read at a conference a conference *Interpreting a Bill of Rights* held at the Potchefstroom University, 9-11 April 1992 and reproduced and expanded in J. Kruger & B. Currin **Interpreting a Bill of Rights** (eds) 1994 at 1-25 for an analysis of the performance of the Bophuthatswanan judiciary in the interpretation and application of the Declaration of Fundamental Rights. See also L.M Du Plessis and J.R De Ville "Bill of Rights Interpretation in the South African Context: Diagnostic Observations" 1993 **Stellenbosch LR** 63 at 73-76 and 199 at 200-202.

¹⁷³See Chapt. 11 for a discussion of the lessons to be learnt from decisions of the Bophuthatswanan judiciary.

CHAPTER 8

THE NAMIBIAN EXPERIENCE.

Namibia, formerly South West Africa, was a German colony before the First World War. In 1914, when the war broke out, the territory was occupied by South Africa at the request of the British government. During the South African occupation, it went from a League of Nations 'C' mandate territory¹ to a virtual fifth province of South Africa. In terms of section 7 of the South West Africa Affairs Act² the territory was allocated six white members in the South African House of Assembly as well as two nominated and two elected members in the Senate.

Although a Legislative Assembly was established in the territory, the South African government and Parliament exercised a considerable degree of control. The South African Parliament could override an ordinance of the Assembly. In essence, the South African Parliament exercised supreme legislative authority in and over the territory and no court of law was competent to inquire into and pronounce upon the validity of South African legislation applicable in the territory.³

The Constitution of South West Africa Act of 1968 placed the territory in much the same position as a province of the Republic.⁴ The topics on which

¹The mandate system was incorporated into article 22 of the League of Nations.

²Act 23 of 1949.

³See **S v Tuhadeleni & Others** 1969(1) SA 153 (A).

⁴Act 39 of 1968, read with the Matters Relating to South West Africa Act 25 of 1969.

the Legislative Assembly was competent to make laws were expanded. However, the legislative supremacy of the South African Parliament over the territory remained unchanged; in terms of section 37(1) of the Act, the provisions of the Act were not to be interpreted in such a way as to derogate from the full administrative and legislative powers exercised by the South African government and Parliament over the territory as a integral part of the Republic.

The constitutional system, like the South African system, was structured along racial lines. In pursuance of the South African government's policy of separate development, a system of progressive 'self-government' for the different black peoples of Namibia was introduced by the Development of Self-Government for the Native Nations in South West Africa Act.⁵

The exertion of pressure by the international community and internal political movements, in particular the South West African People's Organisation (SWAPO), precipitated a movement towards the independence of the territory. Following the abortive attempt to introduce the Turnhalle Constitution,⁶ the territory's representation in the South African Parliament was terminated and the office of the Administrator-General was instituted by the State President.⁷

⁵Act 54 of 1968. For accounts of Namibian constitutional history see *inter alia* F. Venter "Suidwes-Afrika: 'n Dominium van die Republiek?" 1970 **Speculum Juris** 70; D.S Prinsloo "SWA/Namibia: Interim Rule to Freedom" 1976 **SAYIL** 155; J.A Faris "South Africa's Severance of Links with South West Africa" 1977 **SAYIL** 49.

⁶For an analysis of the Turnhalle Constitution see D.S Prinsloo "SWA/Namibie : 'n Kritiese Ontleiding van die Turnhalle-grondwet vir 'n Tussentydse Regering" 1977(2) **Codicillus** 4; L.J Boulle "The Turnhalle Testimony" 1978 **SALJ** 49.

⁷Procl. 249 of 28 September 1977.

The Administrator-General proceeded to revise certain existing legislation⁸ and to make provision for the election of a constitutive assembly; the constitutive assembly was eventually converted into a National Assembly which could make laws for the territory.⁹ However, despite these changes, the South African Parliament still retained its legislative supremacy in and over the territory.¹⁰

A transitional Government of National Unity was established on 17 June 1985 at the request of the Multi-Party Conference.¹¹ The Multi-Party Conference proposed and subsequently approved a Bill of Rights which recognised and guaranteed fundamental human rights. The Bill of Rights, together with other proposals, was put to the South African government and later incorporated in Proclamation 101 of 17 June 1985.¹² The proclamation made provision for a legislative authority, an executive authority and a Constitutional Council which was charged with the task of drafting a Constitution for the territory. The Supreme Court of Namibia was given the power to inquire into and pronounce upon the validity of legislative and executive acts.¹³

⁸Controversial South African legislation such as the Prohibition of Mixed Marriages Act and section 16 of the Immorality Act were repealed.

⁹Procl. AG 21 of 14 May 1979. The election of the National Assembly was not recognised by the international community.

¹⁰See G. Carpenter **Introduction to South African Constitutional Law** (1987) at 424.

¹¹The Multi-Party Conference was made up of six major political organisations operating in the territory, viz. the Democratic Turnhalle Alliance, the Labour Party of South West Africa, the National Party of South West Africa, the Rehoboth Bevryde Demokratiese Party, the South West African National Union and the SWAPO Democrats.

¹²South West African Legislative and Executive Authority Proclamation, 1985 (Government Gazette vol. 240, No. 9790 of 17 June 1985). The Bill of Rights was contained in a **addendum** to the proclamation.

¹³An earlier draft national Constitution, the Turnhalle Constitution of 1977, made provision for the institution of a constitutional 'court'. The 'court'

Continued pressure for full independence by the international community led to a United Nations settlement plan. The plan was intended to lead to the adoption of a Constitution by an elected Constituent Assembly. An elected Assembly finally adopted the Constitution of the Republic of Namibia;¹⁴ the Constitution was based on the 1982 Constitutional Principles¹⁵ which were negotiated with all the parties involved in the Namibian dispute by the United States, the United Kingdom, France, Canada and West Germany.¹⁶

The Constitutional Principles were claimed to have been based on the United Nations Security Council Resolution 435. They made provision for the establishment of a unitary, sovereign and democratic state with a supreme Constitution which entrenches fundamental rights enforceable by an independent judiciary.

1. The Namibian Constitution.

The Constitution of Namibia came into operation on 21 March 1990, the date on which Namibia became a fully independent state. It established the Republic of Namibia as a unitary, sovereign, secular and democratic state.¹⁷

was, however, to be an advisory body with no power of judicial review.

¹⁴Act 1 of 1990 (Nm). For a detailed discussion of the Namibian Constitution see G. Carpenter "The Namibian Constitution - *ex Africa aliquid novi* after all?" 1989/90 **SAYIL** 22.

¹⁵For a comprehensive discussion of the 1982 Constitutional Principles see M. Wiechers "Namibia: The 1982 Constitutional Principles and their Legal Significance" 1989/1990 **SAYIL** 1.

¹⁶The Constituent Assembly conducted its business in terms of the Administrator-General's Constituent Assembly Proclamation of 6 November 1989. The Constitution was formally adopted on 9 February 1990. See D. van Wyk "The Making of the Namibian Constitution: Lessons for Africa" 1991 **CILSA** 341 for a discussion of the process which led to the making and adoption of the Namibian Constitution.

¹⁷Article 1(1).

In terms of article 1(6), the Constitution is the Supreme Law of Namibia. The supremacy of the Constitution implies that its provisions bind the legislature, the executive and the judiciary; the legislature and the executive may not exercise their powers in a way which is inconsistent with the provisions of the Constitution;¹⁸ in relation to the judiciary, the supremacy of the Constitution implies that the judiciary has the power to inquire into and pronounce upon the validity of legislative and executive acts and to invalidate those which it finds to be inconsistent with the provisions of the Constitution.¹⁹

Article 78(2) specifically makes provision for the independence of the judiciary. Article 78(3) goes on to provide that

"[n]o member of the Cabinet or the Legislature or any other person shall interfere with judges or judicial officers in the exercise of their judicial functions, and all organs of the State shall accord such assistance as the Courts may require to protect their independence, dignity and effectiveness...".

Chapter 3 of the Constitution guarantees and protects fundamental human rights and freedoms. Apart from basic human rights and freedoms, other rights such as children's rights,²⁰ administrative justice²¹ and the right to education²² are protected. The rights and freedoms enshrined in the

¹⁸Article 25(1) expressly provides that the legislature or any subordinate legislative authority shall not make any law, and the executive and the agencies of government shall not take any action which abolishes or abridges the fundamental rights conferred by Chapter 3.

¹⁹Articles 80(2) and 79(2) expressly empower the High Court and the Supreme Court of Namibia to hear and adjudicate cases (the High Court as a court of first instance and the Supreme Court as a court of appeal) which involve the interpretation, implementation and upholding of the Constitution and the fundamental rights guaranteed in it.

²⁰Article 15.

²¹Article 18.

²²Article 20.

Constitution are expressly rendered enforceable by the courts.²³ Any law which violates or is inconsistent with the rights and freedoms enshrined in Chapter 3 is invalid to the extent of the inconsistency.²⁴

The rights and freedoms enshrined in Chapter 3 are not absolute. Article 22 envisages limitations upon these rights and freedoms. However, any limitation must, in the first place, be of general application, must not negate the essential content of the right or freedom in issue, and must not be aimed at a particular individual; it must, in the second place, specify its ascertainable extent and identify the article or articles of the Constitution on which authority for its imposition is claimed to rest.

Article 24(1) also makes provision for derogation during periods when the country is in a state of national defence or any period when a declaration of emergency under the Constitution is in force.²⁵ However, article 24(2) makes provision for a number of safeguards where persons are detained by virtue of the authorisation of a declaration of emergency under the Constitution. An important safeguard is that article 24(3) expressly forbids a derogation or suspension of the right to life,²⁶ the right to human dignity,²⁷ the right not to be subjected to slavery and forced labour,²⁸ the right to equality and freedom from discrimination,²⁹ the right to fair trial,³⁰ the right

²³Articles 5 and 25(2).

²⁴Article 25(1).

²⁵Chapter 3 makes provision for the declaration of a state of emergency, state of national defence and martial law.

²⁶Article 6.

²⁷Article 8.

²⁸Article 9.

²⁹Article 10.

³⁰Article 12.

to marry and to found a family,³¹ children' rights,³² administrative justice,³³ culture, language or religious rights,³⁴ fundamental freedoms of speech and expression,³⁵ thought, conscience and belief,³⁶ religion³⁷ and association,³⁸ or of access to courts or legal practitioners.

A significant feature of the Namibian Constitution is that it absolutely prohibits any repeal or amendment which diminishes or detracts from the fundamental rights and freedoms enshrined in Chapter 3; any such purported repeal or amendment would be invalid.³⁹ The implication of this provision is that the judiciary would be competent to invalidate any repeal or amendment which diminishes or detracts from the enshrined rights and freedoms.

2. Judicial Interpretation and Application of the Constitution.

Judicial interpretation and application of the Constitution can be divided into two phases. The first phase relates to the Namibian Supreme Court and the South African Appellate Division's interpretation and application of the 1985 Bill of Rights, which was incorporated in Proclamation R101 of 17 June 1985; Proclamation R101 was essentially the transitional Constitution of Namibia.

³¹Article 14.

³²Article 15..

³³Article 18.

³⁴Article 19.

³⁵Article 21(a).

³⁶Article 21(b).

³⁷Article 21(c).

³⁸Article 21(e).

³⁹Article 131.

The second phase relates to the Namibian courts' interpretation and application of the Constitution of the Republic of Namibia.

2.1. Interpretation and Application of the Transitional Constitution.

The significance of the transitional Constitution is that it incorporated a Bill of Rights and therefore, like the Constitution of the former Bophuthatswana, provided the South African trained judiciary of South West Africa/Namibia and judges of the South African Appellate Division with an opportunity to interpret and apply human rights provisions.⁴⁰ The transitional Constitution was intended to be a precursor to the independence of Namibia; it was based on the desire to establish an independent state founded on the ideals of freedom, equality, human dignity, a respect for the inalienable rights of man and the belief that governments derive their powers from the people and therefore ought to promote the safety and welfare of the people.⁴¹ The intention was to prepare for the establishment of a state based on democratic values.

The Bill of Rights sought to entrench constitutionally, subject to certain qualifications, the right to life,⁴² liberty, security of the person, privacy and equality before the law, the rights to a fair trial, to freedom of expression,

⁴⁰See Chapt. 11 for a discussion of the lessons to be learnt from the Bophuthatswanan and Namibian experience.

⁴¹See the preamble to the original Bill of Fundamental Rights, drafted by the Political Committee of the Multi-Party Conference and Annexure I of Proclamation R101 of 17 June 1985.

⁴²The right to life was limited in that the court retained the competence to impose the death penalty.

peaceful assembly and freedom of association,⁴³ the rights to participate in political activity and government,⁴⁴ and to enjoy, profess, maintain and promote culture, language, tradition and religion, the right to freedom of movement and residence⁴⁵ and the right to own property.

Article 12 empowered the SWA/Namibian Supreme Court to hear and adjudicate matters arising out of the provisions of the Bill of Rights. In terms of this article, the Supreme Court was empowered to invalidate legislative, executive or judicial acts at variance with the provisions of the Bill.

The Namibian judiciary (drawn from the ranks of South African judges and advocates) had been schooled in the common law and statutory law tradition; it was used to the principle of legislative supremacy and unused to interpreting and applying constitutionally guaranteed human rights provisions.⁴⁶ Although the Namibian Supreme Court was prepared to come to the aid of an individual whose rights had been violated, it started off on a careful note. It was only in later decisions that it began to face the Bill of Rights squarely.

The discussion of decisions emanating from the transitional period will be confined to the formative decisions and the later important decisions. Specific attention will be given to the approach of the court in the interpretation and application of the provisions of the Bill of Rights.

⁴³The right to freedom of expression, peaceful assembly and freedom of association could be limited for the protection of public order, health or morals.

⁴⁴The right to participate in political activity and government could be limited in the interests of ethnic, racial or religious harmony.

⁴⁵Exigencies of public health and public order could limit freedom of movement and residence.

⁴⁶See Chapt. 10 and Chapt. 11 for a discussion of the influence of positivism and legislative supremacy in the interpretation of the provisions of a Bill of Rights and a comparison of the performance of the Bophuthatswanan and Namibian judiciary.

2.1.1. The Formative Decisions.

The first cases were decided by the Supreme Court of South West Africa. In these cases the court based its decisions on well-established common law rights and principles of administrative law.⁴⁷ In **Katofa v Administrator-General, South West Africa and Another**⁴⁸, Levy J found it unnecessary to consider certain arguments which counsel for the plaintiff had contended arose by virtue of the provisions of Proclamation 101 of 1985 as read with the Bill of Rights. The judge instead based his decision to confirm an order granting access to a detainee by his attorney, and a **rule nisi** calling upon the respondents to show cause why the detainee should not be released from detention, on a finding that the mere **ipse dixit** of the Chairman of the Cabinet that the release of the detainee was "not advisable" was not sufficient and that the respondent had neither claimed the defence of 'privilege', nor was such a defence available to him in respect of the reasons with which he responded to the **rule nisi**.

On the other hand, in **S v Angula**⁴⁹ Strydom J simply adopted a narrow approach to the interpretation of Proclamation 101 of 1985 and avoided a direct application of the provisions of the Bill of Rights. He dismissed an objection to a charge of contravening section 11 of the Internal Security Act,⁵⁰ as amended, and section 2(1)(a) of the Terrorism Act,⁵¹ the objection was based on the ground that these sections were in conflict with the

⁴⁷See S.M Cleary "A Bill of Rights as a Normative Instrument: South West Africa/Namibia 1975-1988" 1988 **CILSA** 291 at 305.

⁴⁸1985(4) SA 211 (SWA).

⁴⁹1986(2) SA 540 (SWA).

⁵⁰Act 44 of 1950.

⁵¹Act 83 of 1967.

provisions of the Bill of Rights. Adopting a literalist approach, Strydom J took the view that the words used in section 34 of the Proclamation suggested that the Bill of Rights did not override laws which were in force prior to its coming into operation.⁵² The judge based his view on the argument that the constitutional law of Namibia included the Constitution of South West Africa, Act 39 of 1968 and Acts of the South African Parliament.

In **Akweenda v Cabinet for the Transitional Government of South West Africa**⁵³ counsel for the applicant, a detainee, had argued, *inter alia*, that indefinite detention without trial was a violation of the provisions of the Bill of Rights, and that a detained person had a right to a hearing and to access to legal representation; the court, without directly applying the provisions of the Bill of Rights and analysing the content of these rights and the values enshrined in them, ordered the release of the applicant on the ground that the **audi alteram partem** rule had not been observed. Hendler AJ relied mainly on South African case law dealing with the application of the **audi alteram partem** rule in administrative law.

A noticeable change of approach occurred in **S v Heita and Others**.⁵⁴ In this case Levy J decided, in contradistinction to the judgment of Strydom J in **S v Angula**,⁵⁵ that the provisions of section 2 of the Terrorism Act were in conflict with article 4 of the Bill of Rights (the right to a fair trial, in particular the right to be presumed innocent until proven guilty). The judge did not consider the fact that the territory was not a sovereign and independent

⁵²The same approach was adopted by the South African Appellate Division in **Kabinet van die Tussentydse Regering van Suidwes-Afrika en 'n Ander v Katofa** 1987(1) SA 695 (A).

⁵³1986(2) SA 548 (SWA).

⁵⁴1987(1) SA 311 (SWA).

⁵⁵**Supra**.

state to be a significant factor in the interpretation and application of the Bill of Rights. He saw the Bill of Rights as a stepping stone towards independence based on constitutionally established law and order; the guarantee of fundamental rights constituted the very backbone of Proclamation 101 of 1985, which was intended to be a transitional arrangement leading to independence. The Proclamation was "no ordinary enactment and should be accorded pride of place amongst existing legislation".⁵⁶

Levy J's judgment concerning the Bill of Rights illustrates the importance of its nature in its interpretation and application. The judge referred to "the golden thread which is woven into the fabric of this proclamation - the fundamental rights of the people of SWA/Namibia",⁵⁷ to "the tone and spirit of the legislation",⁵⁸ and to "society's new substantive policy".⁵⁹ Levy J was in essence advertent to a new constitutional credo brought about by the adoption of the Bill of Rights, namely belief in a human rights value system as espoused by the representatives of the people at the Multi-Party Conference.

However, as in the **Katofa** case, Levy J once again found it unnecessary, in **S v Nathaniel**⁶⁰, to consider counsel's argument that sections 2 and 3 of the Prohibition and Notification of Meetings Act⁶¹ were in conflict with

⁵⁶At 323I. Levy J's judgment was specifically disapproved by the South African Appellate Division in the **Katofa** case (*supra*) when it went on appeal.

⁵⁷At 319H.

⁵⁸At 320D.

⁵⁹At 326G.

⁶⁰1987(2) SA 225 (SWA).

⁶¹Act 22 of 1981. Section 2 and 3 prohibited certain organisations from holding, promoting, etc. or presiding or otherwise officiating at or addressing or attending a meeting consisting of more than twenty persons.

provisions of the Bill of Rights. Although the judge remarked *obiter* that the Bill of Rights was as much part of the law as any other provision of Proclamation 101 of 1985,⁶² he regrettably chose to found the protection of fundamental rights, such as freedom of assembly and freedom of speech, on the common law and the application of ordinary rules of interpretation rather than on their constitutional recognition and protection and on a liberal interpretation in line with the tone and spirit of the document in which they were guaranteed. The constitutional recognition and protection of human rights and freedoms, even if they were already recognised at common law, surely emphasised their importance and elevated them to a higher status which called for their actualisation when positive law denied or violated their enjoyment by individuals.

2.1.2. The Later Decisions.

The Namibian decisions which have been considered thusfar were concerned with legislation which was in force prior to the coming into operation of the Bill of Rights as contained in Proclamation R101 of 1985. Three other important cases, namely **Cabinet of the Transitional Government for the Territory of South West Africa v Eins**,⁶³ **Cabinet for the Territory of South West Africa v Chikane and Another**⁶⁴ and **Namibian National Students' Organisation and Others v Speaker of the National Assembly for South West Africa and Others**,⁶⁵ (the **NANSO** case) dealt with legislation passed by the territory's National Assembly after the coming into operation of Proclamation

⁶²At 231F.

⁶³1988(3) SA 369 (A).

⁶⁴1989(1) SA 349 (A).

⁶⁵1990(1) SA 617 (SWA).

R101 of 1985 and the Bill of Rights. **Eins** and **Chikane** are decisions of the South Africa Appellate Division which went on appeal from the Supreme Court of South West Africa; **NANSO** was decided by the Supreme Court of South West Africa. These cases, together with the advisory opinion of the Supreme Court of South West Africa in **Ex Parte Cabinet for the Interim Government of South West Africa: In Re Advisory Opinion in terms of Section 19(2) of Proclamation R101 of 1985**,⁶⁶ are the last major constitutional cases which were decided before the independence of Namibia.

Both the **Eins** and the **Chikane** cases were concerned with the compatibility of section 9 of the Residence of Certain Persons in South West Africa Regulation Act⁶⁷ with the provisions of the Bill of Rights.⁶⁸ Section 9 empowered the cabinet of the territory to expel any person, excluding those born in the territory, whom it believed endangered or was likely to endanger the security of the territory or its inhabitants or the maintenance of public order. The advisory opinion, on the other hand, dealt with the question whether a proclamation of the Administrator-General which made provision for the creation of separate 'representative authorities' based on 'population grouping'⁶⁹ abolished, diminished or derogated from any fundamental rights guaranteed in the Bill of Rights.

⁶⁶1988(2) SA 832 (SWA).

⁶⁷Act 33 of 1985.

⁶⁸See S.M Cleary "A Bill of Rights as a Normative Instrument: South West Africa/Namibia 1975-1988" 1988 **CILSA** 291 at 316-328 for a discussion of the **Eins** and **Chikane** cases. See also G. Carpenter "Fundamental Rights, Security Legislation and the **Audi Alteram Partem** Rule - Still no Congruence in the Appellate Division" 1989 **SA Public Law** 87 at 90-93 for a discussion of the **Chikane** case.

⁶⁹The Representative Authorities Proclamation AG 8 of 1980.

2.1.2.1. The **Eins** Case.

The **Eins** case was an appeal from a decision of Hendler J, sitting in the Supreme Court of South West Africa. Hendler J had found that section 9 of the Residence of Certain Persons in South West Africa Regulation Act was in conflict with articles 2, 4 and 10 of the Bill of Rights.⁷⁰ He had also found that section 9, more specifically, violated the right to equality before the law as guaranteed in article 3 of the Bill of Rights. The basis of this finding was that section 9 constituted unacceptable discrimination. The section was therefore declared invalid.

On appeal to the South African Appellate Division by the Cabinet, counsel for the Cabinet had argued, as he did in the court **a quo**, that the respondent did not have **locus standi** to apply for the relief sought, namely an order declaring section 9 to be unconstitutional, invalid and unenforceable as being in conflict with the Bill of Rights. In the court **a quo** Hendler J had dismissed this contention and found that the recognition and protection of fundamental rights in a constitutional document gave any person whose rights have been violated or are threatened the right to approach the court for relief.⁷¹

The Appellate Division held that the court **a quo** had erred in rejecting the appellant's objection to the respondent's **locus standi**. The court's reasoning was that the legislation complained of did not affect the respondent unless and until the authorities decided to take steps against him under section 9 of the

⁷⁰Article 2 guaranteed the right to liberty, security of the person and privacy; article 4 guaranteed the right to a fair trial; and article 10 guaranteed the right to freedom of movement and choice of residence.

⁷¹It may be noted that article 12 of the Bill specifically made provision for any person to apply to the Supreme Court to enforce the rights conferred in the Bill. The article also described the procedural mechanisms available to persons seeking to enforce their rights.

Act.⁷² Regrettably, Rabie ACJ did not for one moment pause to consider whether that section would be compatible with the Bill of Rights if and when the authorities were to decide to take steps against the respondent. The court, without further ado, upheld the appeal and set aside the order of the court *a quo*.

2.1.2.2. The **Chikane** Case.

The **Chikane** case went much further than the **Eins** case. In the **Chikane** case Grosskopf JA analysed section 9 and considered the scope and effect of the Bill of Rights in order to determine whether the section was compatible with the provisions of the Bill. Since the judge decided the matter on the merits, he did not find it necessary to consider the appellants' objection to the respondents' *locus standi*.

The respondents' main attack on the validity of section 9 was that it was in conflict with articles 3 and 10 of the Bill of Rights. Article 3 guaranteed the right to equality; article 10 guaranteed the right to freedom of movement and residence.

In dealing with the attack on the validity of section 9, Grosskopf JA noted that the attack was based on the section's discrimination between one category of persons, namely persons born in the territory, persons rendering service in the territory in terms of the Defence Act of 1957 and persons employed in the civilian government service, and another category consisting of all other persons not included in the first category.⁷³

Grosskopf JA noted that it was common cause that the Bill of Rights

⁷²At 389D.

⁷³At 362H.

established a general rule against discrimination. It was also common cause, however, that the general rule against discrimination did not forbid "reasonable classification for the purposes of legislation".⁷⁴ Whereas in the **Eins** case Rabie ACJ relied mainly on South African law, Grosskopf referred extensively to foreign case law and looked at the position in countries with supreme Constitutions.

The principle that reasonable discrimination is permissible was, as the judge noted, also a principle of American and Indian constitutional law. In American constitutional law, the Fourteenth Amendment to the Constitution of the United States (the equal protection clause)

"forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate ... It does not take away from the states the power to classify either in the adoption of police laws, or tax laws, or eminent domain law, but permits to them the exercise of a wide scope discretion, and nullifies what they do only when it is not without any reasonable basis. Mathematical nicety and perfect equality are not required. Similarly, not identity of treatment (*sic*), is enough. If any state of facts can reasonably be conceived to sustain a classification, the existence of that state of facts must be assumed. One who assails a classification must carry the burden of showing that it does not rest upon any reasonable basis".⁷⁵

It was pointed out in the discussion of the approach of the Canadian courts that the onus to justify a limitation of a fundamental rights rests on the government.⁷⁶ This approach is, however, not applicable in the United States of America in deciding the scope of the equal protection clause. The United States Supreme Court has used a shifting standard of review, depending on the nature of the classification or treatment. Where socio-economic legislation is in issue, the **rationality** standard is employed; where the classification is

⁷⁴At 363B.

⁷⁵The **Chikane** case at 363D-F.

⁷⁶See the discussion of **R v Oakes** [1986] 1 S.C.R 103 in Chapt. 6.

based on race or where it creates a significant burden on the exercise of a fundamental right, (the so-called suspect classification) the **compelling interest** standard is used. The latter category invites strict judicial scrutiny and creates a burden for the government to show a compelling government interest. The former category is not subject to strict scrutiny; one who assails such a classification carries the burden to show that it does not rest upon any reasonable basis. There is also a third category, the so-called 'quasi-suspect classifications';⁷⁷ here the government is required to show that the classification or treatment is substantially related to an important government interest.⁷⁸

In Indian constitutional law, a classification will be constitutional only if two conditions have been met, namely,

"[t]he classification must be founded on an intelligible **differentia** which distinguishes persons or things that are grouped together from others left out of the group and, secondly, the **differentia** must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely geographical, or according to objects, occupations or the like. What is necessary is that there must be a **nexus** between the basis of classification and the object of the Act under consideration".⁷⁹

Support for the principle that reasonable discrimination, that is, one founded on an intelligible **differentia** and rationally related to the objects sought to be achieved, was permissible was overwhelming. Grosskopf JA found that the

⁷⁷Discrimination on the basis of sex falls under this category.

⁷⁸See A. Cachalia, H. Cheadle, D. Davis et al **Fundamental Rights in the New Constitution** (1994) at 110.

⁷⁹The **Chikane** case at 363H. This is also the approach which has been followed by the Canadian Supreme Court: see for example **Andrews v Law Society of British Columbia** [1989] 1 S.C.R 143. Comrie J and Friedman J followed the same approach in the Bophuthatswanan cases of **Mfolo and Others v Minister of Education and Another** 1992(3) SA 181 (B) and **Nyamakazi v President of Bophuthatswana** 1992(4) SA 540 (B) respectively.

Federal Constitutional Court of Germany has also adopted the same general approach as that applied in the United States and India.⁸⁰ The judge then decided that these principles were equally applicable to article 3 of the Bill of Rights.

What was left for the judge to consider was whether the distinction in section 9 of the Act in issue rested on a reasonable basis or, put differently, whether they were founded on an intelligible **differentia** and, if so, whether that **differentia** had a rational relation to the object sought to be achieved by the Act. The issue of the object sought to be achieved by the Act was a question of fact which involved a process of interpretation; this process of interpretation made use of "whatever permissible aids are available for the interpretation of the statute in issue".⁸¹

The reasonableness or intelligibility of the distinction in the Act, and the rationality of their relation to the object sought to be achieved were "largely matters of fact depending upon the circumstances to which the Act applies".⁸² Although the judge considered the question of the admissibility of evidence to resolve the question whether distinction was justifiable, he did not give any decision on it. Since no evidence was tendered, the judge dealt with the matter as if on exception, as this would have the same effect as where evidence was not admissible.

Grosskopf JA came to the conclusion that the section 9 distinction did not violate article 3 of the Bill of Rights. He based this conclusion on the possible explanations for the distinction between persons born in the territory, and others, on the one hand, and that between persons employed in the territory in various types of government service, and those not so employed, on the

⁸⁰At 363J.

⁸¹At 364C-D.

⁸²At 364E.

other hand. Among these explanations was the possibility that government servants could never be guilty of harmful conduct, and that there consequently was no need to include them within the purview of the Act,⁸³ or that there were effective means of dealing with government servants who are believed to be guilty of harmful conduct, or that there were satisfactory ways of terminating the employment of government servants suspected of harmful conduct. In Grosskopf JA's view, the section 9 distinction between government servants could conceivably be justified on the basis that the purpose of the Act could, with reference to them, be achieved in other satisfactory ways; any one of the explanations could constitute a reasonable basis for the distinction.⁸⁴

Grosskopf JA also found that section 9 was not in conflict with article 10 of the Bill of Rights. Apart from the finding that section 9 did not violate the prohibition on 'arbitrary' conduct in terms of article 10,⁸⁵ the judge also dealt with the respondents' contention that section 9 violated the rights of freedom of movement and residence as guaranteed in article 10. The guarantee of the right of freedom of movement and residence was subject, *inter alia*, to "such provisions as are properly prescribed by law in the interests of public health and public order"; the respondents had argued that 'public order' was a narrower concept than, for instance, national security, and that the purpose of the exception was to prevent persons such as convicted prisoners, and not each and every person, from claiming the right to travel freely in the territory.

⁸³This possible explanation seems to be based on the fact that a public servant is supposed to owe allegiance to the government of the day. Although this is the position in principle, it is not always so in practice. As Grosskopf JA pointed out, this was a question of fact which was not fully canvassed in the case.

⁸⁴At 366I-367B and 369E.

⁸⁵Grosskopf JA had earlier in his judgment found that the prohibition on 'arbitrary' conduct was included in the general rule against discrimination: at 363B.

The phrase 'public order' was not defined in the Bill of Rights; nor was any authority referred to which suggested that it had an established technical meaning. It had therefore to be given "... its ordinary meaning in the context".⁸⁶ The judge concluded that "[p]rovisions in the interest of 'public order' would clearly, in the context, include appropriate limitations on the freedom of movement and residence to protect the security of the territory and its inhabitants"; the ordinary meaning of 'public order' was wide enough to encompass such limitations.⁸⁷

Grosskopf JA found that section 9 was designed to counteract "the endangering of 'the security of the territory or its inhabitants or the maintenance of public order' and the engendering of ' a feeling of hostility between members of the different population groups of the territory'"; any action aimed at combating such evils would fall within the description of 'provisions prescribed in the interests of public order'.⁸⁸ The contention that section 9 violated article 10 of the Bill of Rights therefore had to fail.

As to the nature, scope and effect of the Bill of Rights, Grosskopf JA noted that it was not 'entrenched' and did not have as full an effect as its authors might have desired.⁸⁹ The judge observed that although the effect of Proclamation R101 of 1985 was that the National Assembly did not have the power to make a law which was in conflict with the Bill of Rights, and provision was made for the examination of pre-existing legislation with a view to possible amendment or repeal if it was in conflict with the Bill of Rights, the effect of the Bill of Rights was limited to the field of legislation; there

⁸⁶At 373F-G.

⁸⁷At 373G-H. Restrictions on free travel through military camps and other military or security installations or visits to strategic spots or areas would, for example, constitute appropriate limitations of freedom of movement.

⁸⁸At 374B.

⁸⁹At 378E-F.

was, in particular, nothing in the Proclamation to suggest that the Bill of Rights would, as such, have any bearing on the validity of administrative actions; the Bill of Rights operated only in relation to Acts of the National Assembly and did not serve to limit governmental power in other respects.⁹⁰

Grosskopf JA's judgment might at first sight appear to represent a significant movement away from the literalist/intentionalist approach to the interpretation of human rights provisions and a recognition of their *sui generis* nature. However, by explicitly refraining from deciding whether evidence concerning the reasonableness of the section 9 distinction was admissible, and deciding the matter as if on exception, the judge avoided direct application of article 3 of the Bill of Rights. In essence, the respondents' application was refused because the question of the admissibility of evidence was left undecided and not because the distinction was reasonable and therefore constitutionally permissible. The crucial issue was whether the distinctions, in that particular instance, were in fact reasonable or unreasonable. This was an issue which required a consideration of the evidence concerning the object of the distinctions for a proper resolution of the dispute.

Article 3 was, in essence, enacted as part of the Namibian people's desire for independence based on freedom and equality and had to be accorded a special place. As part of the Bill of Rights it called for a generous approach which reflected the idea of making effective provision for the protection of human rights for the full benefit of individuals. Grosskopf JA did not follow this approach; neither did he attempt to develop guidelines for the interpretation of the provisions of a Bill of Rights in the light of its special nature and the fundamental values which it postulated.

Van Heerden JA adopted a different approach but agreed that the appeal should succeed. In his opinion, the distinction between persons born in the

⁹⁰At 379B-C.

territory, or those in the civil service or the defence force on the one hand, and all others, on the other, was **prima facie** unreasonable and therefore impermissible; evidence might, however, show that the distinction was in fact reasonable.⁹¹ The judge preferred to refer the matter, as it pertained to the first respondent, back to the court **a quo**, to hear evidence regarding the reasonableness of the section 9 distinction, and to consider the application **de novo**. He took the view that the second respondent could not succeed on the ground that section 9 was incompatible with article 3 of the Bill of Rights as there was no evidence that action against it was contemplated under section 9.

Although Van Heerden JA did not specifically deal with the question of the **onus** regarding the reasonableness of a distinction, his opinion that a legislative distinction is **prima facie** unreasonable strongly suggests that the government carries the burden of producing evidence to justify its reasonableness. Once the challenger succeeds in showing that legislation distinguishes persons or things that are grouped together from others left out of the group, the burden rests on the government to show, in the first place, that the distinction is based on an intelligible **differentia** and, secondly, that the **differentia** is rationally related to the object sought to be achieved by the legislation in question.⁹²

2.1.2.3. The **Namibian National Students' Organisation** (NANSO) Case.⁹³

⁹¹At 384H. Van Heerden JA had earlier in his judgment concluded that evidence was admissible to establish whether a distinction was reasonable or unreasonable.

⁹²See for example the approach of the Canadian Supreme Court in **R v Oakes** (*supra*) and **Andrews v Law Society of British Columbia** (*supra*).

⁹³**Supra**.

Whereas the **Eins** and **Chikane** cases were decided by the South African Appellate Division, the **NANSO** case was decided by the Supreme Court of South West Africa/Namibia.⁹⁴ The question in issue in the **NANSO** case was the validity of sections 2 and 3 of the Protection of Fundamental Rights Act.⁹⁵ The purported object of the Act was to protect certain fundamental rights of persons; section 2 of the Act had the effect of forbidding students, lecturers at educational institutions, or individuals from advocating through peaceful means any stayaway or any boycotting of lectures. Section 3, which was not severable from section 2, prohibited the performance of acts aimed at inducing or attempting to induce anyone to engage in stayaways or boycotts by using violence or threats of violence. In addition section 2(3) of the Act required a person accused of having performed an act in contravention of section 2 to show that he had 'lawful cause' for doing so.

The applicants contended that sections 2 and 3 of the Proclamation of Fundamental Rights Act were in conflict with, in particular, articles 4 and 5 of the Bill of Rights. Article 4 protected the right to be presumed innocent until proven guilty; article 5 protected the right to freedom of expression of opinion, conscience and religious belief, including freedom to seek, receive and impart information and ideas through the press and other media, subject to a limitation of the right by the obligation to ensure that such expression does not infringe the rights of others, impair the public order or morals, or constitute a threat to national security.

Hendler J, with Strydom J concurring, found that section 2(1) of the Act under consideration could not be separated from the remaining provisions of the Act and decided that it was in conflict with article 5 of the Bill of Rights and therefore invalid. He also held that section 2(3) was unconstitutional and

⁹⁴See G. Carpenter "Namibia - The Final Run-in to Independence" 1989/90 **SAYIL** at 158-164 for a discussion of the **NANSO** case.

⁹⁵Act 16 of 1988.

therefore invalid.

In his judgment Hendler J showed an awareness of the superior force of a Constitution in limiting the exercise of legislative power and the special place of the Bill of Rights in the Constitution:

"[T]he constitution does not empower the National Assembly to pass legislation which has the effect of forbidding students, lecturers at educational institutions, or individuals from advocating the peaceful boycotting of lectures or the use of public services. These are rights given to the people of Namibia by the Bill of Fundamental Rights and are basic fundamental rights in any truly democratic society".⁹⁶

The main basis for the applicants' attack on the validity of section 2 had been that it not only prevented the debating and advocating of legitimate and legal ideals but also criminalised the mere inducement of a student to his colleagues not to attend a lecture, even though this may be done without the use of or advocating of force and violence.

Hendler J agreed that section 2 criminalised the peaceful expression of one's thoughts in a manner which may induce others to agree with one and to take peaceful action as a result, without any force, violence, intimidation or 'fighting talk'.⁹⁷ The judge found the following passage from the judgment in the American case of **The City of Houston v Hill**⁹⁸ to be pertinent:

"This Houston ordinance is not limited to fighting words nor even to obscene or opprobrious language but permits speech that in any manner interrupts. The constitution does not allow such speech to be made a crime. The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."⁹⁹

⁹⁶At 628H.

⁹⁷At 630C.

⁹⁸Case No. 86/243, 1987.

⁹⁹At 629J-630A.

The judge decided the constitutionality of section 2(3) with reference to Canadian cases where the question of the 'inverted onus' was considered. In **R v Carol**¹⁰⁰ the question of the constitutionality of legislation imposing an 'inverted onus' was decided on the basis of the principle of reasonableness. The Court held that to place the **onus** on an accused, in terms of the Canadian Narcotic Control Act, in cases of possession of narcotics for the purpose of trafficking cannot be permitted, unless this constitutes a reasonable limitation on the presumption of innocence and the limitation can be demonstrably justified in a democratic society within the meaning of the Canadian Charter of Rights and Freedoms.¹⁰¹

The constitutionality of the Canadian Narcotic Control Act's imposition of the 'inverted onus' was also considered in **R v Oakes**.¹⁰² In this case the Court decided that statutory exceptions to the general rule that an accused has the right to be presumed innocent until proven guilty will be held to be constitutional only if they are reasonable. For an 'inverted onus' to be reasonable there must be a rational connection between the proved fact and the presumed fact; such a rational connection will exist if the proved fact raises a probability that the presumed fact exists.¹⁰³

As Hendler J noted, the Canadian courts have held 'inverted onus' provisions to be constitutional where the accused has been engaged in highly suspicious

¹⁰⁰(1983), reported in the 1985 supplementary release to the Canadian Charter of Rights and Freedoms, at 16, 4.2.

¹⁰¹See Chapt. 6 for a discussion of section 1 of the Canadian Charter, which provides that a limitation of the rights guaranteed in the Charter is permissible only if it is demonstrably justifiable in a democratic society.

¹⁰²[1986] 1 S.C.R 103. See Chapt. 6 for a discussion of the **Oakes** test for constitutionality.

¹⁰³This test was confirmed by Strydom JP in **Freiremar SA v The Prosecutor-General of Namibia and Another** 1994(6) BCLR 73 (NmH). See also **S v Titus** 1995(3) BCLR 263 (NmH) at 266H.

activity. In such instances the proven facts, namely that the accused was engaged in a highly suspicious activity (for example, that he was found prowling, with instruments which are usually used in housebreaking, near a house at night), raise a probability of the presumed guilt of the accused and are therefore rationally connected with the presumed guilt.

Turning to the matter before him, Hendler J came to the conclusion that inducing others not to purchase from a certain business or inducing fellow students not to attend lectures did not raise the probability that such inducement was done without a lawful reason. There was no rational connection between the prohibited acts and the 'lawful reason' which the accused had to prove; section 2 therefore, on that basis, violated the right to be presumed innocent until proven guilty and was unconstitutional.

Mouton J gave a dissenting judgment. He dismissed the applications of the third, fourth, fifth and sixth applicants on the basis that they had no locus standi. He relied on the **Eins** case for the view that these applicants were not in immediate danger "of sustaining some direct injury as a result of the enforcement of the Act, nor were they affected thereby".¹⁰⁴ It is, however, arguable whether the applications could have properly been disposed of without going into the merits of the case. As Hendler J noted, the question of urgency and **locus standi** was interwoven with the merits of the application.¹⁰⁵ Moreover, there was also another overriding reason why it was necessary for the court to consider the merits of the applicants' contention that the Act violated constitutional rights; it was the court's function to act as a buttress between organs of the state and the individual; as legitimate enforcers of the Constitution, the courts must be astute not to divest

¹⁰⁴For a criticism of this view see the discussion of the **Eins** case (*supra*).

¹⁰⁵At 624C.

themselves of their judicial powers.¹⁰⁶

In determining the constitutionality of the Act in issue, Mouton J took as his starting point the presumption of constitutionality.¹⁰⁷ In his opinion, if the Act "falls within the framework generally of the rights envisaged in a Bill, the Court will sustain the validity of the Act".¹⁰⁸

Although Mouton J's approach of first and foremost presuming in favour of the constitutionality of legislation is correct, it is not clear from his judgment whether the presumption operates in respect of all types of legislation. In the **Carolene Products** footnote¹⁰⁹ Justice Stone of the United States expressed the view that the presumption of constitutionality may not operate in respect of legislation which restricted or infringed rights associated with the efficacy of the ordinary political process or a right within a specific prohibition of the Constitution. It is submitted that legislation which restricts or infringes the right to express one's opinion, especially if such expression is directed at peacefully persuading others to adopt or to refrain from adopting a particular political outlook or standpoint falls within the **Carolene Products** footnote category in that it inhibits, or at least has the potential of inhibiting, the efficacy of the ordinary democratic political process.

Mouton J adopted a rather narrow approach to the interpretation of the right

¹⁰⁶The role of the courts in protecting constitutionally guaranteed rights becomes even more crucial where the Constitution specifically empowers them to determine the constitutionality of legislation which is alleged to violate these rights.

¹⁰⁷See Chapt. 10 for a discussion of the presumption of constitutionality in relation to judicial interpretation of the Constitution.

¹⁰⁸At 635H.

¹⁰⁹**United States v Carolene Products Co.** 304 US 144 (1938), footnote 4.

to freedom of expression. He took the view that freedom of expression cannot be equated with free speech.¹¹⁰ However, viewed in a wider sense, free speech is an important aspect of freedom of expression, subject only to the limitation that free speech should not infringe the rights of others, impair public order or morals or constitute a threat to national security. One needs therefore to examine in each case whether the exercise of the right to express one's opinion exceeded those limits. Where the right is exercised within those limits it surely amounts to the legitimate exercise of the right of free speech.

Mouton J's concern seems to have been that since participation in functions and activities at educational institutions takes place on a voluntary basis, the exercise of one's right to expression in order to persuade others to adopt one's viewpoint may interfere with voluntary participation.¹¹¹ It is submitted, however, that as long as one does not infringe the rights of others, impair the public order or morals, or threaten the national security, one is entitled to persuade others to adopt one's point of view or to follow one's course of action. It is only where the rights of others are infringed or threatened with a view to persuading others to adopt one's viewpoint or to follow one's course that the exercise of the right to freedom of expression will be exceeded and therefore unlawful.

Mouton J's narrow approach also appears from his treatment of the question of the 'inverted onus'. Although the judge agreed that "[t]he onus rests, as it should in criminal matters, on the state, and the accused is presumed innocent",¹¹² he nevertheless placed emphasis on the deeming provisions

¹¹⁰At 636D.

¹¹¹See Carpenter 1989/90 **SAYIL** at 162-163 for a criticism of Mouton J's judgment on the question of voluntary participation in activities at educational institutions and the rules prescribed by the institution to govern participation.

¹¹²At 638G.

contained in section 2(3) of the Act,¹¹³ which actually formed the basis upon which the onus was inverted onto the accused.

Mouton J's statement that the use or publication of language is already an offence before the accused can prove a lawful reason (for the use or publication of the language) and that the deeming provision affords the accused an opportunity to advance a defence open to him is rather startling. This statement completely ignores the accepted rule of criminal law that the state must prove, beyond a reasonable doubt, all the elements of the offence.¹¹⁴ While an accused is entitled to disclose his defence, he is not obliged to do so.

The post-independence case of **S v Pineiro**¹¹⁵ confirms the correctness of Hendler J's judgment, and refutes the judgment of Mouton J, in relation to the question of the 'inverted onus'. In this case Levy J held that a provision of the Sea Fisheries Act, 58 of 1973 (Nm) which created an 'inverted onus' was in direct conflict with the right to be presumed innocent until proven guilty, as guaranteed in article 12(1)(d) of the Namibian Constitution, and was therefore unconstitutional.

Mouton J's approach to the interpretation of human rights provisions fails to accord constitutionally protected rights a status which is above ordinary legislation. It fails to take into account the spirit of the Constitution and ignores the fact that human rights provisions constitute a set of higher norms against which the validity of legislation must be measured.

¹¹³At 638H.

¹¹⁴See Carpenter 1989/90 **SAYIL** at 163 for a criticism of this aspect of Mouton J's judgment.

¹¹⁵1993(2) SA 412 (Nm).

2.1.2.4. The **Advisory Opinion**.¹¹⁶

The Cabinet for the territory of South West Africa had, in terms of section 19(2) of Proclamation R101 of 1985, submitted a question as to the compatibility of the Representative Authorities Proclamation of 1980¹¹⁷ with the Bill of Rights to the Supreme Court for argument and decision. In terms of section 19(2) the Cabinet was empowered, when it was in doubt whether a law in force immediately before the coming into operation of Proclamation R101 of 1985, abolished or derogated from any fundamental right, to cause the question to be submitted to the Supreme Court for argument and decision.

The Representative Authorities Proclamation made provision for the creation of 'representative authorities' which were to constitute the legislative and executive organs of the various population groups within the territory. Section 3 of the Proclamation, the provision in terms of which the legislative and executive organs were established, had the effect that every person in the territory was deemed to be a member of one or other of the various population groups by operation of law and not by choice. The question for decision was whether the rights and privileges of such population groups were unequal and whether the Proclamation was as a result discriminatory and in conflict with the Bill of Rights. The question of unequal or discriminatory treatment revolved largely around the availability and provision of funds to the various 'representative authorities' for the requisite administrative machinery and for necessary capital expenditure.

The opinion of the court was given by a full bench of five judges of the Supreme Court of South West Africa/Namibia. The court, per Berker JP, with all the other judges concurring, based its opinion on the interpretation of article 3 of the Bill of Rights. Article 3 guaranteed the right of equality before

¹¹⁶**Supra.**

¹¹⁷Procl. AG 8 of 1980.

the law.

The court's starting point in the interpretation of article 3 was a recognition of the special nature of the Bill of Rights as a constitutional instrument which guaranteed fundamental human rights.¹¹⁸ A constitutional instrument which guarantees fundamental human rights is premised on a belief in freedom, equality, human dignity and the inalienable rights of man as well as a commitment by the state to respect these rights in the exercise of its power; as the judicial organ of the state, the court is charged with ensuring the efficacy of these ideals.

As an instrument of a special kind, a Constitution which guarantees fundamental human rights is, unlike ordinary legislation, drafted in a broad and ample style; it lays down principles of width and generality and calls for an approach which reflects its character and the spirit of its human rights provisions:

"[Provisions laying down fundamental rights] should be treated *sui generis* 'calling for principles on interpretation of its own, suitable to its character', without necessary acceptance of all the presumptions and principles applicable to legislation of ordinary statutes. The object is to ascertain the spirit of the various provisions of a Bill of Rights, as revealed by the language used, and to avoid the pitfalls of rigid literalism."¹¹⁹

In analysing the right to equality before the law, Berker JP observed that article 3 of the Bill of Rights could be divided into two distinct but interrelated parts, namely the prescription that everyone is equal before the law and the prohibition of prejudice or advantage on grounds of ethnic or social origin, sex, race, language etc. The crucial issue for decision was the meaning of the second part.¹²⁰ According to Berker JP, the words 'prejudice' or 'advantage'

¹¹⁸At 853B.

¹¹⁹At 853E.

¹²⁰At 854E.

ought to be interpreted widely to include material and economic prejudice or advantage. In adopting this approach, the judge took into account the fact that the majority of the territory's citizens were economically disadvantaged and relied on the government's financial assistance for their health, welfare, education and other related needs.¹²¹ This approach is commendable in that it harmonises the provisions of a Bill of Rights with the needs and aspirations of the society within which the Bill operates.

The court also considered the question whether the right of equality before the law and the prohibition of discrimination on grounds of ethnic origin, language or religion was in conflict with the recognition of ethnic, linguistic and religious groups within a state. Berker JP concluded that there was no conflict between the articles providing for the two types of right;¹²² in coming to this conclusion the judge observed that the exercise of ethnic, linguistic and religious rights does not involve compulsion but is based on free choice. Whereas ethnic, linguistic and religious rights were protected only in so far as the rights of others were not infringed, the right to equality was absolute in that it had no qualification.¹²³ In essence, ethnic, linguistic and

¹²¹At 855C-D.

¹²²Articles 3 and 9. Article 9 made provision for the right of all ethnic, linguistic and religious groups, and all persons belonging to such groups, to enjoy, practice, profess, maintain and promote their cultures, languages, traditions and religion, as long as they did not infringe the rights of others or violate the national interest.

¹²³At 856B-C. Although Berker JP's opinion that the right to equality before the law *per se* has no qualification and is therefore absolute is correct, it is not entirely correct as far as the prohibition of discrimination is concerned; it is an accepted principle of constitutional law that reasonable discrimination, that is one which is based on an intelligible **differentia** and is rationally related to the object sought to be achieved by the discriminating statute is permissible: see the discussion of the **Andrews** (Chapt. 6), **Nyamakazi** (Chapt. 7) and **Chikane** (*supra*) cases. The fact of the matter is that it is not any form of discrimination that is prohibited; what is prohibited is **arbitrary** and **irrational** treatment or discrimination; for this reason a person who alleges that he is being treated unequally in a particular

religious rights are more of an entitlement and do not involve a prohibition; the right to equality, on the other hand, amounts to both an entitlement and a prohibition.

An entitlement merely gives one the **choice** to enjoy one's right without interference as long as the conditions attached to the right are complied with. The right to equality as entrenched in a Bill of Rights is different in that it does not involve a choice whether one wishes to enjoy it or not; it is more than an entitlement in that it creates an **obligation** upon the state and its organs to treat every person equally before the law and to afford them equal protection of the law and also involves a **prohibition** of any action which amounts to unequal treatment before the law or unequal protection of the law.

Although the decision of the court that the Representative Authorities Proclamation was in conflict with the Bill of Rights did not have the effect of invalidating the proclamation but was merely an advisory opinion, it went a long way towards reflecting the character of a constitutional instrument which guaranteed fundamental human rights and articulating the spirit underlying the constitutional guarantee of fundamental human rights. The court adopted a generous approach which has the effect of giving individuals the full benefit of constitutionally guaranteed fundamental rights.¹²⁴

context must show that he is entitled to be treated equally: see the **Andrews** case.

¹²⁴The Cabinet referred the Proclamation (AG8 of 1980) and the Court's Advisory Opinion to the Standing Committee of the National Assembly; although the Standing Committee reported, by way of a majority decision, that the Cabinet should take the necessary steps to replace the Proclamation with legislation providing for regional government in accordance with the provisions of the Bill of Rights, the Administrator-General criticised, in a public address, the court's conclusions on the facts and the law: see Cleary 1988 **CILSA** at 330-331.

2.2. The Interpretation and Application of the Constitution of Namibia.

Article 5 of the Namibian Constitution specifically renders the rights and freedoms enshrined in Chapter 5 enforceable by the courts.¹²⁵ The Namibian Supreme Court and Namibian High Court have, since independence, dealt with a number of cases concerning the validity of legislation in the light of the rights guaranteed in Chapter 3 of the Namibian Constitution.¹²⁶ These cases illustrate the role of the courts, and their approach, in the interpretation and application of the provisions of a supreme Constitution which guarantees fundamental human rights.

For present purposes the decisions of the Namibian High Court and the Namibian Supreme Court in **S v Acheson**¹²⁷, **S V Minnies**¹²⁸, **Ex Parte Attorney-General, Namibia: In Re Corporal Punishment by Organs of the State**¹²⁹, **S v Tcoeib**¹³⁰, **Mwandingi v Minister of Defence, Namibia**¹³¹, **Minister of**

¹²⁵Article 80(2) specifically empowers the High Court to hear and adjudicate cases which involve the interpretation, implementation and upholding of the Constitution and the fundamental rights and freedoms guaranteed in it; article 79(2) empowers the Supreme Court to hear appeals which involve the interpretation, implementation and upholding of the Constitution and the fundamental rights and freedoms guaranteed in it.

¹²⁶Hereinafter referred to as the Bill of Rights.

¹²⁷1991(2) SA 805 (Nm HC).

¹²⁸1991(3) SA 364 (Nm HC).

¹²⁹1991(3) SA 76 (Nm SC).

¹³⁰1993(1) SACR 274 (Nm HC).

¹³¹1991(1) SA 851 (Nm HC).

Defence, Namibia v Mwandinghi¹³², **Government of the Republic of Namibia and Another v Cultura 2000 and Another**¹³³ and **Djama v Government of the Republic of Namibia and Others**¹³⁴ will be analysed to illustrate the attitude and approach of the courts towards the interpretation and application of the Bill of Rights.¹³⁵ The analysis of the post-independence decisions will be concluded with an examination of **S v Heita**¹³⁶, which illustrates the court's attitude to the independence of the judiciary.

2.2.1. The **Acheson** Case.

In this case the accused, Acheson, had been charged with the murder of a prominent member of SWAPO, the majority party in the Namibian Parliament, and then held in custody. The State had applied for a lengthy postponement of the murder trial and asked that the accused should remain in custody in the interim. The court granted the postponement but released the accused on bail. Although the applicability of the Bill of Rights and the validity of legislation did not pertinently arise for decision, Mahomed AJ made certain remarks which have a bearing on judicial interpretation and application of a constitutionally entrenched Bill of Rights.

¹³²1991(2) SA 355 (Nm SC).

¹³³1994(1) SA 407 (Nm SC).

¹³⁴1993(1) SA 387 (Nm SC).

¹³⁵See G.J.C Strydom "A Bill of Rights and 'Value Judgments' vs Positivism: the Namibian Experience" in J. Kruger & B. Currin **Interpreting a Bill of Rights** (1994) at 94 for a discussion of the **Minnies, Acheson, Mwandingi** and **Ex Parte Attorney General: in Re Corporal Punishment by Organs of the State** cases and an assessment of the performance of the Namibian judiciary.

¹³⁶1992(3) SA 785 (Nm HC).

The question that the court had to decide was whether it should exercise its discretion in favour of an adjournment and the granting of bail. Mahomed AJ expressed the view that this issue cannot be divorced from the fundamental values embodied in the Constitution:

"The law requires me to exercise a proper discretion having regard, not only to all the circumstances of the case and the relevant statutory provisions, but against the backdrop of the constitutional values now articulated and enshrined in the Namibian Constitution of 1990".¹³⁷

What Mahomed AJ meant was that since the exercise of the discretion to grant an adjournment and bail affected the constitutionally guaranteed rights and freedoms of the accused, it must be harmonised with the values embodied in the Constitution. These values derived their importance from the special nature of the Constitution:

"It is a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the Constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion".¹³⁸

Mahomed AJ's judgment aptly illustrates the role of the court in upholding the Constitution and giving effect to its spirit and tenor to give individuals the full benefit of its provisions. Human rights provisions were embodied in the Constitution with the aim that the rights and freedoms of individuals should be given effective protection; it is therefore the function of the court to exercise its discretion in such a way that these rights and freedoms are fully protected.

2.2.2. The **Minnies** Case.

S v Minnies was concerned with the admissibility of evidence of a pointing

¹³⁷At 812J-813A.

¹³⁸At 813B.

out.¹³⁹ The question was whether evidence of a pointing out was, in terms of section 218 of the Criminal Procedure Act, 1977¹⁴⁰, admissible against an accused. In terms of section 218, evidence of a pointing out may be admitted at criminal proceedings, notwithstanding the fact that such pointing out formed part of an inadmissible confession. The question whether such a pointing out could be used against an accused revolved around the interpretation of article 12(1)(f), read with article 8(2)(b), of the Namibian Constitution.

Article 8(2)(b) of the Namibian Constitution protects individuals against torture, cruel, inhuman or degrading treatment or punishment. Article 12(1)(f) protects the individual against self-incrimination and also provides that the court shall not admit evidence obtained in violation of article 8(2)(b).¹⁴¹

The court accepted that the accused had made a pointing out as a result of repeated questioning and assaults. It came to the conclusion that the evidence of the pointing out was inadmissible, notwithstanding the provisions of section 218 of the Criminal Procedure Act, 1977. Du Toit AJ rejected the state's argument that article 12(1)(f) should be narrowly interpreted to refer only to verbal declarations by the accused, and to exclude evidence of a pointing out as envisaged in section 218; the judge opined that this approach ignores the generous or benevolent interpretation which gave effect to constitutionally guaranteed rights and freedoms.¹⁴²

Du Toit AJ's preference for and adoption of the generous or benevolent

¹³⁹See G. Carpenter "A Namibian Duo" '1990/91 **SAYIL** at 164-166 for a comment on this case.

¹⁴⁰Act 51 of 1977.

¹⁴¹As the court noted, the provisions of article 12(1)(f) are peremptory (at 385G).

¹⁴²At 385I.

approach to the interpretation of the provisions of the Constitution was based on the fact that human rights provisions in a Constitution were an expression of democratic values and ideals, and a belief in life, liberty and human dignity under law:

"[They] are a catalogue of human rights protecting life, liberty and human dignity. They express values and ideals which are consonant with the most enlightened view of a democratic society existing under law".¹⁴³

Du Toit AJ's view was that the protection of human rights is so important that he would rather err in their favour than in favour of executive excesses:

"In interpreting and giving effect to human rights provisions, I would rather err, if I do err, on the side of the protection of the individual against police excesses".¹⁴⁴

The generous or benevolent approach preferred and adopted by Du Toit AJ upholds the supremacy of the Constitution over legislative and executive acts. Du Toit AJ's decision to exclude illegally obtained pointings out is, however, also important in another respect. It implies that a law must have a relevant underlying rationale¹⁴⁵ and must be consonant with the idea of law in society, namely governing human conduct through the proper administration of justice. The admission of evidence of an illegally obtained pointing out, in terms of section 218 of the Criminal Procedure Act, 1977, would have been contrary to the underlying rationale for excluding illegally obtained evidence, namely that the use of such evidence can bring the administration of justice into disrepute.¹⁴⁶

¹⁴³At 384H.

¹⁴⁴At 385B.

¹⁴⁵See Carpenter 1990/91 **SAYIL** at 165, who mentions the inconsistency of excluding an improperly obtained statement and admitting information which has come to light in consequence of such a statement.

¹⁴⁶See the **Minnies** case at 385I.

2.2.3. Ex Parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State.

The question for determination in this case was whether the infliction of corporal punishment by organs of the state was in conflict with the prohibition of torture, cruel, inhuman or degrading treatment or punishment as contained in article 8(2)(b) of the Bill of Rights.¹⁴⁷ The matter had gone to the Namibian Supreme Court by way of a petition submitted to the Chief Justice in terms of section 15(2) of the Supreme Court Act, 1990.¹⁴⁸ Article 87(c), read with article 79(2), of the Constitution empowers the Attorney-General to refer to the Supreme Court for decision issues involving the protection and upholding of the Constitution.

The judgment of Mahomed AJA constitutes one of the most important expositions of the nature and spirit of a Constitution entrenching fundamental human rights and the context within which it ought to be interpreted and applied:

"The Namibian Constitution seeks to articulate the aspirations and values of the new Namibian nation following upon independence. It expresses the commitment of the Namibian people to the creation of a democratic society based on respect for human dignity, protection of liberty and the rule of law. Practices and values which are inconsistent with or which might subvert this commitment are vigorously rejected.

For this reason colonialism as well as 'the practice and ideology of apartheid from which the majority of the people of Namibia have suffered for so long' are firmly repudiated.

Article 8 of the Constitution must therefore be read not in isolation but within the context of a fundamental humanistic philosophy introduced in the preamble and woven into the manifold structure of the Constitution.¹⁴⁹

¹⁴⁷See Carpenter 1990/91 **SAYIL** at 163-164 for a comment on this case.

¹⁴⁸Act 15 of 1990 (Nm).

¹⁴⁹At 78A-C.

Article 8 does not specifically prohibit corporal punishment. It is, however, particularly relevant in relation to corporal punishment in that it guarantees the right to dignity, not only in general¹⁵⁰ but also during the enforcement of a penalty¹⁵¹, and also prohibits the subjection of any person to torture or to cruel, inhuman or degrading treatment or punishment.¹⁵² The main issue, therefore, was whether the imposition of corporal punishment is inhuman or degrading and therefore an invasion of the right to dignity in contravention of article 8.

In considering this issue, Mahomed AJA referred to the importance, and sometimes unavailability, of value judgments in the interpretation and application of the provisions of a Bill of Rights:

"The question whether a particular form of punishment authorised by law can properly be said to be inhuman or degrading involves the exercise of a value judgment by the court."¹⁵³

As appears from Mahomed AJA's judgment, the values which the court must express and apply are not the court's own values or moral standards; the exercise of a value judgment involves an objective searching, identification and articulation of applicable values.¹⁵⁴ The process of searching, identifying and articulating these values is a continually evolving dynamic which uses as a source contemporary norms, the aspirations, expectations and sensitivities of the people as expressed in national institutions and the Constitution. It also takes into account the emerging values in the civilised international

¹⁵⁰Article 8(1).

¹⁵¹Article 8(2)(a).

¹⁵²Article 8(2)(b).

¹⁵³At 86H.

¹⁵⁴See J. Kruger "Value Judgments versus Positivism" 1991 **SA Public Law** 290 for an analysis of Mahomed AJA's value-oriented approach.

community.¹⁵⁵ More importantly, however, the process of searching, identifying and articulating applicable values recognises and seeks to give effect to perceptions as they exist at the time and application of the relevant provision of the constitution¹⁵⁶ and, therefore, treats the Constitution as a 'living document'.

There were various factors which, according to Mahomed AJA, supported the view that corporal punishment was inconsistent with civilised values pertaining to the administration of justice and the punishment of offenders. These factors were, *inter alia*, the invasion of the offender's status as a human being, the infliction of acute pain and physical suffering which 'strips the recipient of all dignity and self-respect and arbitrariness inherent in the infliction of the punishment'.¹⁵⁷ After analysing the position in other countries, Mahomed AJA came to the conclusion that corporal punishment was degrading and inhuman and therefore in conflict with article 8 of the Constitution.

In his judgment Mahomed AJA also highlighted the role of the judiciary in a system of constitutional supremacy, with reference to the dictum of Chief Justice Warren in the American case of **Trop v Dulles**¹⁵⁸:

"We are oath-bound to defend the Constitution. The obligation requires that congressional enactments be judged by the standards of the Constitution. The judiciary has the

¹⁵⁵At 86I-J. Mahomed AJA's reference to the European Convention on the Protection of Human Rights and Fundamental Freedoms, and to the position in other countries (at 88A-89E), signifies the importance of international law and foreign law in the search for fundamental constitutional values: see Chapt. 10.

¹⁵⁶At 87A.

¹⁵⁷At 87D-H. As Mahomed AJA noted, "[j]uveniles also have an inherent dignity by virtue of their status as human beings and that dignity is also violated by corporal punishment in consequence of judicial or quasi-judicial authority" (at 90H). See also the Zimbabwean case, **S v A Juvenile** 1990(4) SA 151 (ZS).

¹⁵⁸356 US 86 (1958).

duty of implementing the constitutional safeguards that protect individual rights. When the government acts to take away the fundamental rights of citizenship, the safeguards of the Constitution should be examined with special diligence.

The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorise and limit governmental powers in our Nation. They are the rules of government. When the constitutionality of an Act of Congress is challenged in this Court, we must apply these rules. If we do not, the words of the Constitution become little more than good advice.

When it appears that an Act of Congress conflicts with one of these provisions, we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less. We cannot push back the limits of the Constitution merely to accommodate challenged legislation. We must apply those limits as the Constitution prescribes them, bearing in mind both the broad scope of legislative discretion and the ultimate responsibility of constitutional adjudication.¹⁵⁹

Berker CJ agreed with the opinion of Mahomed AJA but made additional remarks in which he emphasised the importance of local norms and standards and the aspirations,¹⁶⁰ conditions, experiences, perceptions and beliefs of the people of Namibia in the making of a value judgment.¹⁶¹

Berker CJ's opinion epitomises the importance of local conditions over and above other considerations in the making of a value judgment:

"... [T]he making of a value judgment is only possible by taking into consideration the historical background, with regard to social conditions and evolutions, of the political impact of the perceptions of the people and a host of other factors, as well as the ultimate crystallisation of

¹⁵⁹At 91F-I.

¹⁶⁰Modern Constitutions usually contain provisions which reflect the aspirations and ideals of the nation: see for example the Postamble of the Republic of South Africa Constitution of 1993, which forms an integral part of the Constitution. While admitting that "people differ very much in what they think it necessary for a Constitution to contain", Wheare has suggested that a Constitution should contain "[t]he very minimum, and that minimum to be rules of law" : K.C Wheare **Modern Constitutions** (1966) at 32 and 34.

¹⁶¹At 96A.

the basic beliefs of the people of Namibia in the provisions in the Bill of Fundamental Human Rights and Freedoms.¹⁶²

According to Berker CJ, the fact that Namibia was formerly under colonial rule and had been subjected to social values, ideologies and perceptions and political and general beliefs held by the former colonial power and which the people of Namibia found unacceptable, made the norms, approaches, moral standards, aspirations, beliefs, etc. of the Namibian people themselves a major and basic consideration in making value judgments. Since the Namibian people had become independent and free to make their own values, their own perceptions, approaches, moral standards, aspirations, beliefs, etc became paramount.¹⁶³

The approach of the court in **Ex Parte Attorney-General, Namibia: In re Corporal Punishment by Organs of the State** is in sharp contrast to the approach of the Bophuthatswanan court in **S v Chabalala**.¹⁶⁴ In the **Chabalala** case Theal Stewart CJ adopted a literalist-intentionalist approach to the interpretation of the provisions of the Constitution, and did not analyse or consider fundamental constitutional values; the judge avoided making a value judgment and played down the influence and importance of international law and foreign authorities as sources of fundamental constitutional values. Van den Heever JA, on the other hand, was concerned that the making of a value judgment would amount to usurping the function of the legislature.

¹⁶²At 96J-97A.

¹⁶³The view that the contemporary norms, aspirations, expectations, sensitivities, views, etc. of the Namibian people are paramount in making a value judgment was reaffirmed by the Namibian High Court in **S v Tcoeib** 1993(1) SACR 274 (Nm HC).

¹⁶⁴Discussed in Chapt. 7.

The problem that the making of value judgments invites judicial policy making and that the judiciary may in the process usurp the function of the legislature or the executive, exists even in a system where judges do not have to make a switch to constitutional supremacy. The problem centres around drawing a line between judicial decision making and judicial legislation; while judges do make value judgments and shape policy in the process of making a decision, they can only do so within the scope of their function to resolve a justiciable legal dispute.¹⁶⁵ Value judgments are often unavoidable in judicial decision making; even an ostensibly value neutral judgment is a value judgment.¹⁶⁶

In contrast to the judgments of Theal Stewart CJ and Van den Heever JA in the Boputhatswanan case of **S v Chabalala**, which reveals excessive judicial restraint, the judgments of Mahomed AJA and Berker CJ in **Ex Parte Attorney-General, Namibia: In re Corporal Punishment by Organs of the State** epitomise a generous approach which is based on the spirit and primacy of a supreme Constitution in the legal system.

In **Ex Parte Attorney-General, Namibia: In re Corporal Punishment by Organs of the State**, the court did not for one moment feel that it would be usurping the legislative function when it made

¹⁶⁵See Chapt. 10 for a discussion of the permissible limits of judicial review.

¹⁶⁶See W. Friedman **Legal Theory** (1976) at 436. The executive-minded decisions of the South African Appellate Division such as, *inter alia*, **Omar v Minister of Law and Order** 1987(3) SA 859 (A); **Castel NO v Metal and Allied Workers' Union** 1987(4) SA 795 (A); **Staatspresident v United Democratic Front** 1988(4) SA 830 (A) and **Staatspresident v Release Mandela Campaign** 1988(4) SA 930(A) afford an example of ostensibly value-neutral judgments which were in essence value judgments.

a value judgment as to the constitutionality of corporal punishment;¹⁶⁷ it was engaging in a legitimate process of interpreting and applying the provisions of the Constitution; in doing so it was called upon to implement deliberately imposed constitutional safeguards that limited governmental power and protected individual rights.

As both Mahomed AJA and Berker CJ were at pains to emphasise, the making of value judgments is not a haphazard process; it involves an objective and careful identification of contemporary norms, aspirations, expectations and sensitivities of the people as expressed in, *inter alia*, the Constitution. It is, in essence, the Constitution which provides the yardstick against which a value judgment must be made in the determination of the constitutionality of a legislative or executive act.

It may very well be that the Constitution is a political document and that its interpretation is in consequence a political activity. However, it is not a 'party-political' activity; it is a political activity of a special kind. Although judicial interpretation and application may have far-reaching political consequences, they are limited to articulating and applying the values of the Constitution. As long as the court does not question the wisdom of the government's choice of policy, it acts within its power to determine constitutionality and does not therefore undermine the doctrine of separation

¹⁶⁷Admittedly the court had been asked for an advisory opinion by way of abstract review in terms of article 87(c), read with article 79(2) of Constitution of Namibia. Nevertheless the judgment was bound to have a fundamental impact on legislative power with regard to corporal punishment. Unlike the Constitution of the United States and the German Basic Law, the South African Constitution (1993) also makes provision for a system of abstract review. In Canada the system is provided for in separate ordinary legislation; each province has legislation which empowers the Lieutenant Governor in Council to refer constitutional questions to a provincial superior; the Governor in Council may also, in terms of the Supreme Court Act, refer to the Supreme Court "important questions of law or fact" which deal *inter alia* with the constitutionality of federal legislation: see B.L Strayer **The Canadian Constitution and the Courts** (1988) at 170.

of powers. What the court did in the case in point was to determine whether the imposition of corporal punishment was in conflict with the constitutional norms and values which apply in relation to the Namibian society, and to give effect to these supreme and fundamental constitutional norms and values.

2.2.4. The **Mwandingi** Cases.

Mwandingi v Minister of Defence, Namibia¹⁶⁸ was concerned with the interpretation of article 140(2) of the Namibian Constitution. In terms of article 140(3) of the Constitution, the Namibian Government accepts the validity of anything done under any law by its predecessor, the South African Government. The applicant, Mwandingi, had been shot by members of the South African Defence Force prior to the independence of Namibia; however, his claim for compensation was overtaken by independence. He had sought to replace the Minister of Defence of South Africa as the respondent and to cite the Minister of Defence of Namibia in the place of the former.

Although article 140 does not contain an express reference to delicts and wrongs committed by a predecessor government, the applicant contended that, by virtue of the provisions of articles 140 and 145 of the Constitution, the Government of Namibia had accepted liabilities incurred by its predecessor. The respondent, on the other hand, relied on the presumption that a reference in a law to any action or conduct was a reference to lawful or valid action and contended that the Namibian Government did not accept liability for wrongful acts committed by its predecessor.

The approach of the High Court of Namibia¹⁶⁹ to the issue, per Strydom

¹⁶⁸Supra.

¹⁶⁹**Mwandingi v Minister of Defence, Namibia** (supra). See N. Botha "To Pay or not to Pay: Namibian Liability for South African Delicts" 1990/91 **SAYIL** 156-162; A. Boshoff "Interpretation of a

AJP, was that article 140 must be interpreted in the light of the other provisions of the Constitution. The Constitution of Namibia was, according to Strydom AJP, not like an ordinary Act of Parliament and should therefore be interpreted "...in a specially purposive way, particularly so when the Constitution contains a declaration of human rights and freedoms, so as to give recognition and protection to such rights".¹⁷⁰

Strydom AJP confirmed the view that in interpreting the Constitution special consideration should be given to the broader context in which the words appear, as opposed to their literal meaning; he referred¹⁷¹ to a **dictum** of Lord Wright in **James v Commonwealth of Australia**,¹⁷² where his Lordship stated:

"It is true that a constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general, and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning."

The view that a Constitution which guarantees fundamental human rights is a **sui generis** document which should not be interpreted like ordinary legislation is supported by the judgment of Lord Wilberforce in **Minister of Home Affairs (Bermuda) and Another v Fisher**.¹⁷³ Such a Constitution is not suited to the 'the austerity of tabulated legalism'; it

"calls for principles of interpretation of its own, suitable to its character ..., without

Constitution: **Mwandingi v Minister of Defence, Namibia**" 1992 **TSAR** 331 for discussions of this case.

¹⁷⁰At 857C.

¹⁷¹At 857E.

¹⁷²[1936] AC 578 at 614.

¹⁷³[1980] AC 319 at 328-329.

necessary acceptance of all the presumptions that are relevant to legislation of private law".

Strydom AJP took the view that since the applicant's claim formed part of his property, which was constitutionally protected in the Bill of Rights, article 140 should be given a generous interpretation in order to give full effect to the article in the context in which it appeared.¹⁷⁴ Following this approach, he came to the conclusion that article 140 was couched in the widest possible terms and could not be restricted by the presumption on which the respondent relied. To restrict the operation of article 140 on this basis would be to apply the 'austerity of tabulated legalism'.¹⁷⁵ The judge then ordered that the Minister of Defence of Namibia be substituted for the Minister of Defence of South Africa.

The Minister of Defence (Namibia) appealed against the judgment of Strydom AJP to the Namibian Supreme Court. The Namibian Supreme Court unanimously dismissed the appeal.¹⁷⁶ The Supreme Court relied, as did Strydom AJP in the court *a quo*, on the *dicta* of Lord Wright in **James v Commonwealth of Australia**¹⁷⁷ and Lord Wilberforce in **Minister of Home Affairs (Bermuda) and Another v Fisher**,¹⁷⁸ adding that the interpretation of the rights and freedoms guaranteed in the Namibian Constitution are international in character and called for the application of international human rights norms.¹⁷⁹

¹⁷⁴At 860C.

¹⁷⁵At 860E.

¹⁷⁶**Minister of Defence, Namibia v Mwandighi (supra).**

¹⁷⁷**Supra.** At 362C.

¹⁷⁸**Supra.** At 362H-363G.

¹⁷⁹At 362G.

Botha¹⁸⁰ has criticised the opinion of Strydom AJP, that article 145 of the Constitution did not affect an individual's right to claim damages from a new government arising out of a delict committed by a predecessor government, as being out of step with the specific provisions of the Constitution, with the spirit of the Constitution, and with public international law. He bases his criticism on the argument that Namibia's commitment to principles of public international law, as evidenced by the provisions of sections 144 and 145 of the Constitution, implies that it has accepted the principles of public international law that a new state does not succeed to the delicts of its predecessor.

It is submitted, however, that although a state may in terms of public international law not be liable for the delicts committed by its predecessor, the principle had to be applied in the light of the provisions of the Constitution of Namibia as the supreme law of the land.¹⁸¹ Article 140(3) qualifies the application of the principle by providing that the acts of the South African government done prior to independence "shall be deemed" (my emphasis) to be the acts of the Namibian government, unless the latter repudiates such acts by an Act of Parliament. The section does not strictly speaking do away with the applicability of the international law principle that a state does not succeed to the delicts committed by its predecessor; it is simply a deeming provision which creates a legal fiction as a substitute for the true position.¹⁸²

¹⁸⁰Botha 1990/91 *SAYIL* at 162.

¹⁸¹In **Minister of Defence, Namibia v Mwandighi** (*supra*) at 366B-D the court expressed reservations about the consistent application of the principle. As the court stated (at 366D) "[i]n Namibia art 140(3) confirms and puts beyond doubt the continuity of succession and its consequences".

¹⁸²See **Government of the Republic of Namibia v Cultura 2000** 1994(1) SA 407 (NmSC). In this case Mahomed CJ observed that Parliament can enact legislation to undo the fiction and replace it with the true position.

It is true that article 144 of the Constitution provides that "the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia"; the court is of course obliged to apply a rule of public international if it is an integral part of the law of the country. However, these rules are binding only if the Constitution does not provide otherwise. The Constitution, in article 140(3), contained a provision which provided otherwise; article 140(3) created a fiction in terms of which the Government of Namibia accepted liability for the delicts committed by its predecessor. As an integral part of a supreme Constitution, the section 140(3) fiction operates as a fundamental constitutional rule which overrides ordinary rules of law.

The crucial issue in the **Mwandingi** case was whether article 140(3) should be interpreted restrictively to refer to only those acts which were lawfully done or generously to include those which were not lawfully done. In doing so the court had to take into account the nature of the Constitution as a "mirror reflecting the national soul", the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and **disciplining its government**" (my emphasis).¹⁸³

The very nature of a Constitution which deliberately guarantees fundamental rights and freedoms calls for a generous interpretation which gives individuals the full benefit of its human rights provisions. The Constitution constitutes the basic law of the state; it binds the state and authorises and limits governmental power. The supremacy of the Constitution and the entrenchment of fundamental human rights in it gives it a character of its own:

"This distinguishes the Constitution from ordinary Acts of Parliament. The whole tenor of chap 3 and the influence of international human rights instruments, from which many of its provisions were derived, call for a generous, broad and purposive interpretation that avoids the

¹⁸³**S v Acheson** (*supra*) at 813A-C.

'austerity of tabulated legalism'.¹⁸⁴

The judgments of the Namibian High Court and the Namibian Supreme Court in the **Mwandingi** cases constitute an antithesis to a narrow and pedantic approach to the interpretation and application of the provisions of a Constitution which entrenches fundamental human rights. In both cases the court followed an approach which harmonises the interpretation and application of constitutional provisions with the fundamental principles, norms and values embodied in the Constitution.

2.2.5. **Government of the Republic of Namibia and Another v Cultura 2000 and Another.**¹⁸⁵

The **Cultura 2000** case, like the **Mwandingi** cases, was concerned with the interpretation and application of article 140(3) of the Namibian Constitution in the light of the Constitution's guarantee of fundamental rights and freedoms. The question in issue was whether the State Repudiation (Cultura 2000) Act,¹⁸⁶ an Act which was promulgated pursuant to article 140(3) and provided for, *inter alia*, the repudiation of any sale or donation of any movable or immovable property under laws which were in force prior to the independence of Namibia by the government or any official of the Republic of South Africa, was in conflict with the provisions of the Constitution. Cultura 2000, a cultural organisation whose aim was to preserve and further 'West-European cultural activities' in Namibia, received a generous donation of money from the former administration for whites, on condition that the donation be used for the promotion, development and

¹⁸⁴**Minister of Defence, Namibia v Mwandinghi** (*supra*) at 364B.

¹⁸⁵**Supra.**

¹⁸⁶Act 32 of 1991 (Nm) (hereinafter referred to as the Repudiation Act).

extension of the European culture; this was after a farm was sold to it by the administration for a consideration of R318 000. 00; a further generous amount of money, which was later converted to a donation by the Administrator-General, was lent to Cultura 2000 by the former administration.

It was clear that the Repudiation Act was aimed at repudiating the donations made to Cultura 2000. The validity of the Act was attacked on the basis that it constituted a statutory expropriation without compensation in conflict with article 16 of the Constitution, and violated the right to practise and promote the culture, language or traditions of certain persons or groups as guaranteed in article 19 of the Constitution.

The Namibian High Court, per Levy AJP, had held that the Repudiation Act was unconstitutional and inconsistent with the provisions of section 140(3), and therefore invalid.¹⁸⁷ Levy AJP held that the fact that Cultura 2000 had originated as a racist organisation and the question whether that would make it an unlawful organisation in post-independence Namibia was not relevant; article 140(3), according to the judge, applied to both lawful and unlawful acts of the predecessor government. The judge arrived at the conclusion that the intention of the framers in permitting the repudiation of acts done by the predecessor government in article 140(3) was to enable the Namibian successor government to evade continuing obligations and not completed acts; since the donation to Cultura 2000 was a completed act, the repudiation in terms of the Repudiation Act, was, according to the judge, in conflict with the provisions of article 140(3).

In arriving at the conclusion that the Repudiation Act was in conflict with the provisions of the Constitution, Levy AJP had relied on a **dictum** of the full

¹⁸⁷**Cultura 2000 and Another v Government of the Republic of Namibia and Others** 1993(2) SA 12 (Nm HC).

bench of the Namibian Supreme Court in the **Mwandingi** case.¹⁸⁸ In that case the court held that the Namibian Government could not escape liability simply by a narrow and mechanical interpretation of article 140(3) so as to limit its operation to acts lawfully done. The court adopted a purposive and generous interpretation¹⁸⁹ in order to give the individual the full benefit of the provisions of the Constitution.

Levy AJP also relied on a **dictum** of Strydom AJP, sitting in the High Court, in the **Mwandingi** case, to the effect that article 140(3) should be interpreted purposively and generously to preserve the rights guaranteed in the Bill of Rights. Following this approach, the judge held that the Repudiation Act amounted to expropriation without compensation and was therefore contrary to the specific provisions of article 16 and the spirit of the Constitution.¹⁹⁰ Levy AJP, however, found that there was another reason, which he considered to be obvious, why the Repudiation Act was inconsistent with the provisions of the Constitution and therefore unconstitutional, namely that the Namibian legislature purported to repudiate an act never performed by the predecessor government and therefore acted **ultra vires** its powers to repudiate 'acts' or 'actions' performed by the predecessor government.

The Government of the Republic of Namibia appealed against the judgment of Levy AJP to the Namibian Supreme Court. The appeal initially sought a finding that the whole Act was unconstitutional. This raised the important constitutional question whether the sections of the Act in terms of which the moneys paid to Cultura 2000 by the former administration became repayable, and the property transferred to it became vested in and retransferred to the

¹⁸⁸**Supra.**

¹⁸⁹See Chapt. 10 for the distinction between the two concepts.

¹⁹⁰At 26G-H.

Government of Namibia,¹⁹¹ were in conflict with article 16 of the Constitution; article 16 guarantees the right to acquire, own and dispose of property. This point was, however, abandoned. The remaining question was whether the repudiating provision (section 2(1)) was unconstitutional. The Namibian Supreme Court, per Mahomed CJ, held that it was not.

In his judgment, Mahomed CJ once again set out the principles applicable in the interpretation and application of a supreme Constitution. What clearly emerges from Mahomed CJ's judgment is that the major premise in the interpretation and application of a Constitution is its nature, spirit and, in particular, the specific goals, values, aspirations and beliefs upon which its provisions are premised. Having examined the preamble and the provisions of the Constitution, Mahomed CJ said:

"It is manifest from these and other provisions that the constitutional jurisprudence of a free and independent Namibia is premised on the values of the broad and universalist human rights culture which has begun in recent times and that it is based on a total repudiation of the policies of apartheid which had for so long dominated lawmaking and practice during the administration of Namibia by the Republic of South Africa."¹⁹²

As in the **Mwandingi** case, Mahomed CJ advocated and followed a purposive and generous approach in terms of which the provisions of the Constitution are given a construction which is in accord with the ideals and aspirations of the nation and is 'most beneficial to the widest amplitude'.¹⁹³

A purposive approach implies that a specific provision of the Constitution should not be looked at in isolation; a Constitution is an organic instrument which must be interpreted in the light of all its provisions to give effect to its spirit and larger purpose. As Mahomed CJ observed, the 'basic temper of the

¹⁹¹Sections 2(2) and 3.

¹⁹²At 412C.

¹⁹³At 418G

Constitution' not only appeared throughout from the terms of the preamble¹⁹⁴ but also from specific human rights provisions such as article 10,¹⁹⁵ which prohibited discrimination, and general provisions of the Constitution, such as article 23,¹⁹⁶ which prohibited racial practices, and article 63(2),¹⁹⁷ which gave Parliament the power to

"remain vigilant and vigorous for the purposes of ensuring that the scourges of apartheid, tribalism and colonialism do not again manifest themselves in any form in a free and independent Namibia and to protect and assist disadvantaged citizens of Namibia who have historically been the victims of these pathologies".

Mahomed CJ did not agree with Levy AJP's reasoning that article 140(3) empowered the legislature to repudiate only continuing obligations and not completed acts. Article 140(3) was simply a deeming provision which was coupled with the power to reverse such deeming by an Act of Parliament; the effect and purpose of section 140(3) was "to create a legal fiction as a substitution for the truth and ... to enable Parliament to enact legislation through which the fiction introduced by the deeming can be undone and again substituted with the true position".¹⁹⁸ Article 140(3) did not, therefore, preclude Parliament from enacting an Act which sought to repudiate donations made to Cultura 2000 by the previous administration of Namibia.

Levy AJP had based his opinion that article 140(3) empowered the legislature to repudiate only 'continuing' obligations, and not completed acts, on the meaning of the word 'repudiate'; according to the judge the word 'repudiate' indicated that the intention of the framers of the Constitution "was to enable

¹⁹⁴At 411F.

¹⁹⁵At 411I.

¹⁹⁶At 411I-412A.

¹⁹⁷At 412B.

¹⁹⁸At 417F.

the Namibian successor Government to get out of an obligation which it had to do, something arising from an 'action' done or contracted by the previous regime".¹⁹⁹ The judge simply imputed the 'intention of the framers', without inquiring into the question whether the framers actually intended section 140(3) to repudiate only 'continuing' obligations and not completed ones; there was nothing in article 140(3) or in the word 'repudiate' to suggest that the **sole** intention of the framers was to empower the legislature to repudiate only 'continuing' obligations.

Levy AJP adopted a 'narrow, mechanistic, rigid and artificial' interpretation of article 140(3) and failed to articulate the ideals and aspirations of the Namibian people as expressed in the whole organic body of the Constitution. Mahomed CJ, on the other hand, adopted a purposive and generous approach which is in line with the ideals and aspirations of the Namibian people as expressed in the supreme Constitution. The Namibian Constitution is based on a rejection of the policies of apartheid and a desire to eradicate apartheid, not only in the statute books, but in social relations everywhere in Namibia and to establish a non-racial society; acts of the previous administration that sought to manipulate cultural and ethnic diversity were therefore contrary to the aspirations and ideals of the Namibian people as expressed in the Constitution; this is the background against which the provisions of the Constitution had to be interpreted and applied.

Although the question of the constitutionality of the whole Act had been abandoned on appeal, Mahomed CJ commented that a repudiating Act which unlawfully invades any of the rights and freedoms guaranteed in the Constitution would be vulnerable to constitutional attack.²⁰⁰ The sections

¹⁹⁹The intention of the framers approach is inconsistent with the purposive and generous approach. It does not allow a Constitution to grow in order to deal with events unimagined by its drafters: See Chapt. 10 where the 'original intent' approach is discussed.

²⁰⁰At 422G.

effecting the repayment of the money paid to Cultura 2000 and the retransfer of the property transferred to it would also be vulnerable to attack on the basis that they invaded the right to property. The judge pointed out, however, that not every repudiating Act would be set aside by the court; it is only those which are **in conflict** with chapter 3 of the Constitution which will be set aside.²⁰¹ The court did not express any view as to whether the provisions effecting repayment or retransfer were indeed unconstitutional or not.

In dealing with the contention that section 2(1) (the repudiating section) of the Repudiation Act was in conflict with articles 16 and 19 of the Constitution and therefore unconstitutional, the Namibian Supreme Court held that the Act did not violate the respondent's right to own property or to just compensation in the event of expropriation as guaranteed in article 16 nor its right to profess, maintain and promote the culture, language or traditions of its members. The court held that section 2(1) was simply a repudiatory provision which reversed the fiction that the acts of the previous administration in allocating moneys to Cultura 2000 were acts of the new Government and did not therefore violate the rights guaranteed in articles 16 and 19.

2.2.6. Djama v Government of the Republic of Namibia and Others.²⁰²

Djama had been born in Somalia but claimed that he was entitled to Namibian citizenship by virtue of his father's having born in Namibia. Having entered Namibia under the auspices of the United Nations High Commission for Refugees, he was arrested in terms of the Admissions of Persons to the Republic Regulation Act, 1972²⁰³ and subsequently detained. However,

²⁰¹At 422H.

²⁰²**Supra.**

²⁰³Act 59 of 1972.

contrary to the requirements of section 5 of the said Act, he was not informed of the reasons for his detention.

Pursuant to an urgent **habeas corpus** application, a rule **nisi** interdicting the respondents from deporting him, and requiring the respondents to show cause why he should not be released, was issued. However, on the day of the application a 'warrant of release' was presented by the Minister of Home Affairs officials to the Prison authorities; Djama was released into the custody of a Home Affairs official and subsequently handed a document declaring him to be a prohibited immigrant in terms of section 40 of the Admission of Persons to the Republic Regulation Act; he was thereafter detained again and requested to leave Namibia voluntarily and to apply for entry from outside the country. When he refused to leave he was detained further until the court ordered his immediate release.

The court relied on articles 7 and 11 of the Namibian Constitution to order Djama's release. Article 7 prohibits the deprivation of personal liberty, except in accordance with the procedures established by law. Article 11 prohibits the arbitrary arrest and detention of any person; subarticle (3) prohibits the detention of any person for a period of more than 48 hours without the authority of a magistrate; subarticle (4) renders the provisions of subarticle (3) inapplicable to prohibited immigrants but goes on to provide that such persons shall not be deported from Namibia unless such a deportation has been authorised by a tribunal empowered by law to authorise the deportation. The tribunal envisaged by article 11(4) had not yet been established at the time of Djama's application.

In his judgment, Muller AJ pointed out that the right to liberty not only features in most regional and international human rights instruments but is specifically guaranteed in the Namibian Constitution.²⁰⁴ The judge observed

²⁰⁴ At 394D.

that the protection of the right to liberty is fortified by the prohibition of arbitrary arrest or detention and the mechanisms provided for in article 11. It would be arbitrary, the judge stated, to detain a person if such detention was not authorised by law.²⁰⁵

It is clear from a reading of articles 7 and 11 that the right to liberty is not absolute. However, as Muller AJ pointed out in his judgment, where the right to liberty is affected by the application of a statute or law, and such a statute or law is reasonably capable of more than one meaning, the meaning which least interferes with the liberty of the individual is to be preferred;²⁰⁶ the statute or law must be interpreted strictly to avoid harshness or injustice.²⁰⁷

The principles enunciated by Muller AJ are in fact ordinary common law rules of statutory interpretation. They are principles which still form part of the legal system; the adoption of a supreme Constitution does not relegate them to the background. In the **Djama** case they were applied against the background of the provisions of the Bill of Rights to maximise judicial protection of constitutionally guaranteed human rights. The application of common law rules of interpretation in the light of the provisions of a Bill of Rights in the **Djama** case aptly illustrates that the common law contains certain principles and values which can be harmonised with the Bill of Rights in order to give individuals the full benefit of constitutionally guaranteed rights.²⁰⁸ Applying these principles, Muller AJ was able to arrive at the conclusion that section 40 of the Admission of Persons to the Republic Regulation Act did not envisage indefinite detention or detention the purpose of which was not to remove a person from Namibia.

²⁰⁵At 394H.

²⁰⁶At 394I-J.

²⁰⁷At 395A-B.

²⁰⁸See Chapt. 10.

2.2.7. **S v Heita:**²⁰⁹ The Court's view of Judicial Independence.

A judiciary, especially one which has the role of enforcing the provisions of the Constitution and protecting the rights and freedoms of individuals, must be able to discharge its judicial functions fearlessly and independently.²¹⁰

The **Heita** case illustrates the tenacity with which the Namibian judiciary strives to uphold its independence.

In reaction to a sentence imposed by O'Linn J in a criminal case, some people purporting to act on behalf of SWAPO, the ruling party in Namibia, had called for the dismissal and resignation of the judge, and even for his arrest. Similar calls had been made based on the allegation that the judge was colonialist and anti-black.

During the course of a criminal trial in the **Heita** case, O'Linn J decided to consider, *mero motu*, whether he should recuse himself from continuing with the trial after he and other members of the judiciary had been scandalised, insulted and threatened. The judge dealt extensively with the independence of the judiciary and decided that he should not recuse himself.²¹¹

Article 78(2) of the Constitution of Namibia expressly provides for the independence of the judiciary. The article makes it abundantly clear that the independence of the judiciary is subject only to the Constitution and the law.

²⁰⁹**Supra.**

²¹⁰See Chapt. 5 for a discussion of judicial independence.

²¹¹The judge decided this particularly in view of the fact that there were indications that the government did not condone the acts of those responsible for scandalising, insulting and threatening the judiciary and that these people would be prosecuted; both counsel for the state and for the defence had also urged the judge not to recuse himself and expressed their confidence that he would decide the case fairly and undeterred by the abuse and threats from a small section of the population.

As O'Linn J aptly put it,

"[t]his simply means that it is also not subject to the dictates of political parties, even if the party is the majority party. Similarly it is not subject to any other pressure group".²¹²

Not only does article 78 protect the independence of the judiciary in general; article 78(3) goes even further to prohibit members of the cabinet or the legislature from interfering with the judiciary in the exercise of its judicial function, be it before, during or after judicial proceedings.²¹³ Article 78(3) also places a positive legal duty on all organs of the state to provide such assistance as the courts may require to protect their independence, dignity and effectiveness. Failure by these organs to protect the independence of the judiciary would be an "evasion and abrogation of their legal duties" and an "open invitation to the disgruntled and uninformed members of the public to do their damndest, without fear of interference or action from the organs of government".²¹⁴

O'Linn J emphasised that it was not only the independence of the judiciary that must be protected but also its dignity and effectiveness. It was precisely because judges were expected to perform their function of adjudicating legal disputes and protecting the rights of individuals impartially and effectively that interference with the judiciary was prohibited and legal duties to protect judicial independence were imposed. In this regard O'Linn J said:

"The aforesaid prohibitions and legal duties are imposed to make it possible for Judges and judicial officers to perform effectively their very onerous and responsible functions - which include their role as guardians of the Constitution, protectors of the fundamental human rights of the citizen and guarantors of a fair trial to those accused who appear before them on criminal charges or those who are engaged in civil suits or actions."²¹⁵

²¹²At 789E.

²¹³See O'Linn J's observation at 789F.

²¹⁴At 790C-E.

²¹⁵At 791B.

The judgment of O'Linn J on the independence of the judiciary is also important in another respect. It dispels the misconception that the granting of fundamental human rights and their constitutional guarantee are necessarily absolute. No doubt article 21 of the Namibian Constitution guarantees freedom of speech and expression; however, subarticle (2) restricts this freedom in that it must be exercised only

"subject to the law of Namibia, insofar as such law imposes **reasonable restrictions** on the exercise of the rights and freedoms conferred by the said subarticle (subarticle (1)), which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to **contempt of court**, defamation or incitement to an offence".²¹⁶

The restriction of freedom of speech in so far as it relates to judicial independence is without doubt reasonable and necessary in a democratic society. The specific restriction of freedom of speech and expression in relation to contempt of court²¹⁷ is "necessary to protect the independence of the courts and the independence, dignity and effectiveness of the courts and their judicial officers".²¹⁸ In essence, judicial independence ensures the very same democratic ideal for which the constitutional guarantee of fundamental human rights stands.

The post-independence judgments of the Namibian High Court and the Namibian Supreme Court represent a positive development in judicial interpretation and application of the provisions of a supreme Constitution. The court viewed the Constitution as a supreme law which embodies the values and aspirations of the people and recognised that in its interpretation and application these values must be objectively articulated and identified. Most importantly, cognisance must be taken of prevailing social conditions,

²¹⁶At 792D.

²¹⁷It may be noted that contempt of court is also a crime.

²¹⁸At 793A.

experiences and perceptions of the people.

The judgment of O'Linn J in **S v Heita**²¹⁹, in particular, contains the important warning that the successful implementation of the provisions of a supreme Constitution depends on the independence of the judiciary and the government's commitment to upholding the Constitution.

²¹⁹**Supra.**

CHAPTER 9

THE SOUTH AFRICAN CONSTITUTION OF 1993.

1. Introduction.

The operation of the doctrine of legislative supremacy in South Africa has had a negative impact on the role of the judiciary in the field of the protection of fundamental rights and freedoms. In accordance with this doctrine the courts were obliged to enforce an Act of Parliament, even if it infringed or unnecessarily curtailed the rights and freedoms of individuals as recognised at common law.¹ The courts were obliged to give effect to the clear intention of the legislature; norms of the common law, international law and morality which advanced the individual's fundamental rights and freedoms had to give way to the intention of the legislature.²

In its original Westminster context the doctrine of parliamentary sovereignty, from which the concept of legislative supremacy originated, is generally regarded as one of the pillars of the Constitution. In its historical context in English constitutional law, the sovereignty of Parliament was regarded as a

¹L. Boule, B. Harris & C. Hoexter **Constitutional and Administrative Law - Basic Principles** (1989) at 112; D. Basson & H. Viljoen **South African Constitutional Law** (1988) at 226; M.G Cowling "Judges and the Protection of Human Rights in South Africa" 1987 **SAJHR** 177 at 181.

²See for example **S v Meer** 1981 (4) SA 604(A); **S v Christie** 1982 (1) SA 464 (A).

victory over the despotism of the monarchs;³ when Parliament became the champion of the rights and freedoms of the ordinary citizen, its sovereignty came to be seen as necessary for the protection of these rights against the despotism of the monarch.

The fear of legislative despotism in England has by and large been mitigated by Parliament's respect for conventions, a high regard for civil liberties, respect for the rule of law⁴, universal adult suffrage and full parliamentary representation. However, in South Africa, limited parliamentary representation, the absence of universal adult suffrage, Parliament's disregard for fundamental human rights and a disrespect for the rule of law led in the past to legislative and executive high-handedness and a violation of the rights and freedoms of citizens.⁵

Although the 1983 Constitution of the Republic of South Africa represented a marked departure from the traditional Westminster system, it did not completely abandon the concept of legislative supremacy;⁶ it instead retained the concept in substance.⁷ There was as yet no substantive review of legislation; the role of the judiciary remained restricted to formal testing of compliance with certain structural or procedural provisions of the

³E.C.S Wade & A.W Bradley **Constitutional Law** (1965) at 47; O Hood Phillips **Constitutional and Administrative Law** (1973); J.D van der Vyver "Parliamentary Sovereignty, Fundamental Freedoms and a Bill of Rights" 1982 **SALJ** 557 at 559.

⁴See J.D van der Vyver 1982 **SALJ** at 557.

⁵Van der Vyver 1982 **SALJ** at 557; Cowling 1987 **SAJHR** at 180.

⁶See Chapt. 4 for a discussion of the 1983 Constitution.

⁷G. Carpenter **Introduction to South African Constitutional Law** (1987) at 330; D. Basson & H. Viljoen **South African Constitutional Law** (1988) at 199; F. Venter "Die Grondwet van die Tweede Republiek van Suid-Afrika" 1985 **THRHR** 253 at 275.

Constitution.

The 1983 Constitution was essentially an attempt to accommodate and involve the 'Coloured' and Indian population groups in the main-stream of government; it was, however, not well received, mainly because it excluded blacks, the majority of the South African population. The Constitution's lack of credibility meant that there would have to be an earnest search for a new constitutional dispensation which catered for all the peoples of South Africa.

Tentative steps towards a new constitutional dispensation began with the request by the National Party government to the South African Law Commission to investigate and make recommendations on the protection of human rights and the role of the courts in connection with such protection.⁸ The Law Commission subsequently published a working paper⁹, an interim report on group and human rights¹⁰ and a report on constitutional models.¹¹

In September 1990 the former State President, Mr F.W de Klerk, announced that the government accepted the protection of human rights in principle. The majority of the participants at the first Conference for a Democratic South Africa expressed their support for a new constitutional dispensation which protected human rights in a Bill of Rights; however, the African National Congress, one of the major parties at the negotiations, suspended its participation after the Boipatong massacre on 17 June 1992.

Constitutional talks resumed on 1 April 1993 after almost 11 months of

⁸See **Hansard**, 23 April 1986 columns 4014-4015.

⁹Working Paper 25, Project 58 **Group and Human Rights**, 1989.

¹⁰Project 58, **Group and Human Rights**, Interim Report, August 1991.

¹¹Project 77, **Report on Constitutional Models** October 1991.

interruption. On 2 July 1993 the Negotiating Council of the Multi-Party Negotiating Process accepted a package of Constitutional Principles with which a new constitutional dispensation and all subsequent dispensations would have to comply;¹² it also agreed on a date for a non-racial and democratic election, namely 27 April 1994. This agreement was followed by a further agreement, on 7 September 1993, to set up a Transitional Executive Council (TEC); Parliament subsequently passed the Transitional Executive Council Act¹³, which established the TEC.

It became clear throughout the negotiations for a new constitutional dispensation that the majority of the participants were in favour of a supreme Constitution with a justiciable Bill of Rights; this was a clear indication of an intention to abandon the doctrine of legislative supremacy and an acceptance of the principles of constitutional supremacy and the constitutional protection of fundamental human rights. On 18 November 1993 the Negotiating Council agreed on an interim Constitution, to operate until April 1999 when a final Constitution adopted by the Constitutional Assembly will come into operation. Parliament enacted the 1993 Constitution¹⁴ on 22 December 1993.¹⁵

2. The 1993 Constitution.

The 1993 Constitution was adopted on the basis that some of its provisions,

¹²The package initially consisted of twenty-seven Constitutional Principles but was expanded on 17 November 1993 by an additional six principles. With the later addition of another principle there are now thirty-four principles in all.

¹³Act No. 151 of 1993.

¹⁴Constitution of the Republic of South Africa, Act 200 of 1993.

¹⁵For a detailed account of constitutional development leading to the adoption of the 1993 Constitution see *inter alia* B. De Villiers (ed) **Birth of a Constitution** (1994); L. Du Plessis & H. Corder **Understanding South Africa's Transitional Bill of Rights** (1994) Chapters 1 and 2.

especially those which establish a multi-party Government, will operate for only five years. It provides a framework on which the Constitutional Assembly will draw up a final Constitution.

The 1993 Constitution differs from all other previous Constitutions in that it breaks away from a past of racial and gender inequality, violation of fundamental human rights and freedoms, strife and injustice and establishes, for the first time in South African history, a democratic constitutional state. The preamble makes mention of

"the need to create a new order in which all South African will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms".

In systems of legislative supremacy the preamble does not have the same status as the provisions of the Constitution and is generally regarded as being of little use in the interpretation of these provisions; it is usually referred to when interpreting an uncertain or unclear provision.¹⁶ In **S v Mhlungu and Others**,¹⁷ however, Sachs J emphasised the importance of the preamble in the interpretation of the 1993 Constitution:

"The preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretative value. It connects up, reinforces and underlies all the text that follows. It helps to establish the basic design of the Constitution and to indicate its fundamental purposes."

The 'postamble',¹⁸ which is entitled **National Unity and Reconciliation**,

¹⁶See D. Basson & H. Viljoen **South African Constitutional Law** (1988) at 230.

¹⁷1995(7) BCLR 793 (CC) at 840D.

¹⁸The 'postamble' is also called the 'commitment' or 'afterword'. Unlike the preamble, it is expressly given the same status as any other provision of the Constitution (section 232(4)); it provides an important guidance in the

characterises the Constitution as

"a bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development of opportunities for all South Africans, irrespective of colour, race, class, belief or sex".

The Constitution is in essence a vehicle for transforming the state from one characterised by a culture of authoritarianism to one characterised by a culture of justification.¹⁹ It not only makes provision for the structure and powers of government but also sets out the limits of government power in relation to the rights and freedoms of individuals as guaranteed in it. A government limitation on these rights and freedoms is valid only if it is reasonable and justifiable in an open and democratic society based on freedom and equality and does not negate the essential content of the right or freedom in question.²⁰

The Constitution is divided into 15 chapters. For present purposes the most important these are chapters 1, 2, 3, 4, 6, 7 and 9. Chapter 1 deals with the constituent and formal provisions; chapter 2 makes provision for the enjoyment of the rights, privileges and benefits of South African citizenship by all South Africans²¹ and extends the franchise to all South African citizens of or over the age of 18 years.²² Chapter 3 entrenches fundamental human rights and freedoms, subject to the limitations contained in section 33(1) and section 34(4); this chapter also contains a general interpretation clause.²³

interpretation of the Constitution.

¹⁹See E. Mureinik "A Bridge to Where? Introducing the Interim Bill of Rights" 1994 **SAJHR** 31 at 32.

²⁰Section 33(1).

²¹Section 5(3).

²²Section 6.

²³Section 35.

Chapter 4 makes provision for a legislature which consists of two houses, the National Assembly and the Senate²⁴; chapter 6 makes provision for a multi-party cabinet. Chapter 7 deals with the judiciary and the administration of the judiciary; it establishes, in addition to the existing Supreme Court, a Constitutional Court²⁵ and makes provision, *inter alia*, for the appointment, removal from office and remuneration of judges²⁶, the independence of the judiciary²⁷ and the establishment of a Judicial Service Commission²⁸. Chapter 9 deals with provincial government.

2.1. The Nature of the Constitution.

Save for stating that the Republic of South Africa shall be "one, sovereign state",²⁹ the 1993 Constitution does not specify whether it establishes a unitary or a federal state. There are, however, federal features; there is a good deal of devolution of power between the national government and provincial governments³⁰. While the central legislature has plenary power to make laws for the Republic in accordance with the provisions of the Constitution,³¹ provincial legislatures are competent to make laws for the province with regard to certain matters, which are specified in Schedule 6.³²

²⁴Section 36.

²⁵Section 98(1).

²⁶Sections 97, 99 and 104.

²⁷Sections 96(2) and (3).

²⁸Section 105(1).

²⁹Section 1.

³⁰The national territory is divided into nine provinces, each with its own government.

³¹Section 37.

³²Section 126(1).

Although the legislative power of provincial legislatures is greatly enhanced, the central government still retains its ultimate supremacy. The central legislature is competent, in addition to its plenary legislative power, to make laws with regard to matters which fall within the competence of provincial legislatures as specified in Schedule 6.³³ However, section 126(3) limits central legislature's legislative power with regard to these matters.³⁴ The central and provincial legislatures have concurrent powers. In essence, the Constitution provides for a system which is neither fully federal nor fully unitary.

The 1993 Constitution replaces the doctrine of legislative supremacy with the principles of constitutional supremacy and the entrenchment of fundamental human rights. Section 4 of the Constitution provides that the Constitution is the supreme law of the land; any law or act which is inconsistent with its provisions, including those which guarantee fundamental human rights, is to the extent of the inconsistency of no force and effect³⁵; the provisions of the Constitution are binding on the legislative, executive and judicial organs of

³³Section 126(2A).

³⁴In terms of section 126(3) a law passed by a provincial legislature prevails over an Act of the central legislature which deals with matters within the competence of provincial legislatures, except in so far as (1) such Act deals with a matter that cannot be regulated effectively by provincial legislation; (2) such Act deals with a matter that, to be performed effectively, requires to be co-ordinated by uniform norms or standards that apply generally throughout the country; (3) such Act is necessary to set uniform standards across the nation for the rendering of public services; (4) such Act is necessary for the maintenance of economic unity, the protection of the environment, the promotion of interprovincial commerce, the protection of the common market in respect of the mobility of goods, services, capital or labour, or the maintenance of national security; or (5) the provincial law materially prejudices the economic, health or security interests of another province or the country as a whole, or impedes the implementation of national economic policies. Furthermore, section 126(4) provides that an Act of the central legislature will prevail over a provincial law only if it applies uniformly in all parts of the country.

³⁵Section 4(1).

state at all levels of government³⁶. Section 4 must be read together with sections 7(4), 98(2) and 102(3) and 102(3); these provisions are what may appropriately be called the justiciability provisions and deal with judicial enforcement of the provisions of the Constitution.³⁷

In contrast to the principle of legislative supremacy, the principle of constitutional supremacy means that the Constitution has the status of a higher law. All state organs are subject to its provisions; it operates with supreme authority and the legislature or the executive organs may not act contrary to its provisions; the judicial organ is bound to apply its provisions when called upon to do so.

A supreme Constitution usually derives its supremacy from the fact that it is an original act of the people, usually through their representatives at a constitution-making body. Its supremacy is based on the rationale that the will of the people is superior to all other wills, be they legislative or executive³⁸; all legislative and executive powers are derived from and therefore subordinate to it³⁹. Although the 1993 Constitution cannot be said to be an original act of the people in the strict sense,⁴⁰ it lays down the foundation for the reflection of the will of the people in a final Constitution.⁴¹

³⁶Section 4(2).

³⁷See **infra**.

³⁸See B.O Nwabueze **Constitutionalism in the Emergent States** (1973) at 28.

³⁹Nwabueze **ibid** at 5.

⁴⁰The Constitution was negotiated by the major parties represented at the Negotiating Council of the Multi-Party Negotiating Process and adopted by the former Parliament.

⁴¹Chapter 5 of the 1993 Constitution makes provision for the adoption of the new Constitution. In terms of section 68(2) the Constitutional Assembly, which consists of the National Assembly and the Senate sitting jointly, is to draft and adopt the new Constitution. In terms of section 71(1)(a) the new

The supremacy of the Constitution does not mean, however, that its provisions are completely incapable of repeal or amendment. A more difficult method for its repeal or amendment is laid down. In terms of section 62(1) of the 1993 Constitution, a two-thirds majority of all the members of both houses of Parliament sitting jointly is required for any amendment of its provisions, except where the proposed amendment relates to the legislative competences of the provinces as contained in section 126 and the executive authority of the provinces as contained in section 144, in which case a two-thirds majority of all the members of each house sitting separately is required for any amendment; in addition, an alteration of the boundaries and legislative and executive competencies of a province can only be effected with the consent of the provincial legislature concerned.⁴²

Whether a Constitution will be easy or difficult to amend depends largely on the sufficiency of the mechanism for its amendment. It is submitted that a parliamentary majority, as required by section 62 of the Constitution, does not provide a sufficient preventive measure against the amendment of certain core provisions of the Constitution. Provisions which entrench fundamental human rights and those which constitute the organs of state and prescribe their powers, for example, require more than a parliamentary majority for their amendment or repeal; such provisions are the essence of the will of the people. If the Constitution is to bear the mark of a document emanating from the will of the people and therefore its supreme force, something more than a parliamentary majority is required for the amendment of core provisions. The sanction of the electorate at a referendum, as in Belgium or the dissolution of the legislature and new elections before the proposed

constitutional text must comply with the Constitutional Principles contained in Schedule 4 of the 1993 Constitution; these Constitutional Principles are an agreed pact which was negotiated and adopted by the majority of all political parties and formations at the Multi-Party Negotiating Forum and are binding upon the democratically elected Constitutional Assembly.

⁴²Section 62(2).

amendment is made, would reflect the supreme force of a Constitution and also constitute effective preventive measures against its repeal or amendment.

2.2. The Entrenchment of Fundamental Rights.

The entrenchment of fundamental human rights in a supreme Constitution is a significant step in South African constitutional development. The constitutional entrenchment of fundamental human rights is premised on the principle of limited government and the idea that the individual must be free legitimately to pursue his interests, with little interference from the government;⁴³ the principles of limited government and the entrenchment of human rights are an expression of the fundamental principles of natural law, right and justice and the religious, philosophical and moral concepts which have developed through the ages and are still valid today. These historical, religious, philosophical and moral concepts form the basis of higher legal values in terms of which the validity of positive law must be judged.⁴⁴

The entrenchment of fundamental rights in a Constitution determines the scope of individual rights while at the same time determining the scope of state power in relation to these rights. The exercise of state power is limited to the extent that state organs may not, in the exercise of their powers, violate the rights entrenched in the Constitution.⁴⁵ An effective guarantee of the rights set out in the Constitution is secured through justiciability and the sanction of invalidity; any legislative or executive act which infringes these rights can be

⁴³See Chapt. 10 for a discussion of the paradoxical notion of the power of the judiciary to enforce constitutional guarantees ahead of the legislature as a representative of the will of the people.

⁴⁴D. Basson & H. Viljoen **South African Constitutional Law** (1988) at 1-3 and 217-219.

⁴⁵As Mureinik 1994 **SAJHR** at 32 points out, the entrenchment of human rights fosters a culture of justification, one in which "every exercise of (governmental) power is expected to be justified;..."

declared invalid by courts of law.

Section 7(1) of the Constitution specifically provides that the Chapter in which fundamental rights and freedoms are guaranteed (Chapter 3 or the Bill of Rights) shall bind all legislative and executive organs of state at all levels of state. Unlike 4(2) of the Constitution, which is part of the supremacy clause, section 7(1) does not provide that the judiciary, as an organ of state, is also bound by the provisions of Chapter 3. This seems to suggest that the courts are excluded from the binding effect of the Chapter. This, however, is not necessarily so.

There are certain provisions of Chapter 3 which are necessarily binding on the courts because they also lay down the manner in which judicial proceedings must to be conducted. Section 8(1) for example, makes provision for equal protection of the law; courts are therefore obliged to give every person equal protection of the law. Section 22, which makes provision for access to the courts, obliges the courts to settle justiciable disputes. Section 25(3) of the Constitution, for example, guarantees the right to a fair trial. The rights entrenched in section 25 are by their nature procedural rights which form an integral part of judicial proceedings⁴⁶ and therefore bind the judiciary.⁴⁷

A possible explanation of the omission of the judiciary in section 7(1) is that

⁴⁶There are instances where a person may be tried by an administrative tribunal for an administrative misconduct (the so-called 'misconduct trials'). Administrative tribunals are a part of the executive machinery and are, in terms of section 7(1), bound by Chapter 3: see the definition of 'organ of state' in section 233(1)(ix).

⁴⁷See for example **S v Sefadi** 1994 (2) BCLR 23 (D); **S v Shangase and Another** 1994 (2) BCLR 42 (D); **S v Solo** 1995(1) SACR 499 (E) **S v Mtyuda** 1995 (5) BCLR 646 (E) and **S v Zuma and Others** 1995 (4) BCLR 401 (CC) where it was held that the courts were in essence bound by the provisions of section 25(3). See P.W Hogg **Constitutional Law of Canada** (1985) at 672 on the position in Canada.

the traditional function of the judiciary is to protect fundamental human rights and freedoms against infringements by the legislative and executive organs of state in terms of the principle of the separation of powers;⁴⁸ the legislature and the executive, on the other hand, are the organs which traditionally endanger these rights and freedoms. According to this explanation section 7(1) merely indicates that the legislative and executive organs of state are obliged not to infringe unconstitutionally upon the fundamental rights entrenched in Chapter 3.⁴⁹ Since the function of the judiciary is to resolve legal disputes, it is obliged to grant appropriate relief when an infringement of or any threat to any right entrenched in the Chapter is alleged.⁵⁰ In addition, section 35 obliges the courts to promote the values which underlie an open and democratic society based on freedom and equality and, where applicable, to have regard to public international law applicable to the protection of the entrenched rights when interpreting the provisions of Chapter 3. Section 35 in essence obliges the courts to interpret and protect the entrenched rights in accordance with the ethos of Chapter 3.

The question also arises whether the omission of the judiciary from the binding effect of section 7(1) was intended to make it clear that the judiciary is not obliged to enforce the rights and freedoms entrenched in Chapter 3 when dealing with matters which do not involve an organ of the state⁵¹ as a

⁴⁸See Chapt. 5 for a discussion of the principle of the separation of powers.

⁴⁹See D. Basson **South Africa's Interim Constitution** (1994) at 14.

⁵⁰See section 7(4).

⁵¹In **Directory Advertising Cost Cutters CC v Minister of Posts, Telecommunications and Broadcasting and Others** [1996] 2 All SA 83 (T) the court held that the test to be adopted to determine whether a particular organ or body was an organ of state was whether the state was in control.

litigant, that is matters involving private individuals *inter se*.⁵²

The Canadian Supreme Court held in **Retail, Wholesale and Department Store Union Local 580 v Dolphin Delivery Ltd**⁵³ that the Canadian Charter does not ordinarily apply to the common law in litigation between private individuals; it will apply only in so far as the common law is the basis of some governmental action which is alleged to infringe a guaranteed right or freedom. This approach cannot, however, be applied to the South African situation. In terms of section 98(2)(a) and section 101(3)(a) of the Constitution, an action or defence to an action at common law can be founded on the provisions of Chapter 3.⁵⁴ Furthermore, section 35(3) of the Constitution specifically obliges the court to have regard to the spirit, purport and objects of Chapter 3 in the interpretation of **any law** and the application and development of the **common law** and customary law.⁵⁵ The provisions of section 35(3) and the fact that section 7(4) does not confine justiciable infringements to those by organs of state seem to indicate that Chapter 3 also operates 'horizontally'.⁵⁶ Section 7(4) does not say that an

⁵²The question in essence is whether the omission is intended to indicate that the Bill of Rights operates only vertically and not horizontally.

⁵³**Supra**.

⁵⁴See J.D Van der Vyver "The Private Sphere in Constitutional Litigation" 1994 **THRHR** 378 at 383.

⁵⁵See A. van Aswegen "The Implications of a Bill of Rights for the Law of Contract and Delict" 1995 **SAJHR** 50 at 56-58 for a discussion of the effect of section 35(3) on private law.

⁵⁶Basson **op cit** at 15. This view is confirmed by the judgments in **Mandela v Falati** 1994(4) BCLR 1 (W), especially at 6H-J; **Gardener v Whitaker** 1994(5) BCLR 19 (E), especially at 30G-31B; **Jurgens v The Editor, The Sunday Times Newspaper and Another**

infringement must be by an organ of a state.⁵⁷

In terms of section 7(4), any person who alleges that his right as entrenched in Chapter 3 has been infringed or is being threatened is entitled to apply to a competent court of law⁵⁸ for appropriate relief; juristic persons are also entitled to the rights entrenched in Chapter 3, in so far as the relevant rights may by their nature be enjoyed by juristic persons.⁵⁹ Enforcement of the rights guaranteed in Chapter 3 is not limited to a person whose interests are directly affected; persons acting as members of interest groups or acting in the public interest, *inter alia*, may also approach the court for appropriate relief.⁶⁰

Chapter 3 guarantees a wide range of fundamental human rights. These rights

1995(1) BCLR 97 (W), especially at 103C. But **contra De Klerk and Another v Du Plessis and Others** 1994(6) BCLR 124 (T).

⁵⁷The reason for the omission of the judiciary from section 7(1), and the whole question of the limits of horizontal operation of Chapter 3 have not yet been finally resolved: see **Du Plessis & Corder op cit** at 110-114. Addendum: The Constitutional Court has held in **Gardener v Whitaker** CCT 26/94, judgment delivered on 15 May 1996 and **De Klerk v Du Plessis** CCT 8/95, judgment delivered on 15 May 1996 that the provisions of Chapter 3 of the 1993 Constitution do not operate horizontally. However, the new Constitution (Constitution of the Republic of South Africa, 1996) now provides in section 8(1) that the Bill of Rights "binds the legislature, the executive, the judiciary, and all organs of state".

⁵⁸See **infra** in connection with the question of which court is competent to determine the constitutionality of a law which is alleged to infringe the rights guaranteed in the Constitution.

⁵⁹Section 7(3).

⁶⁰Section 7(4)(b).

may be divided into six categories,⁶¹ namely equality rights⁶², private law rights⁶³, fundamental freedoms⁶⁴, mobility, citizenship and political rights⁶⁵, administrative justice⁶⁶, economic, welfare and educational rights⁶⁷, language and cultural rights⁶⁸ and procedural rights⁶⁹.

Chapter 3 does not provide for an absolute guarantee of the rights prescribed

⁶¹There are various ways of categorising rights. One of the ways is to distinguish between first generation, second generation and third generation rights. First generation rights include political, civil and procedural rights; second generation rights include social, economic and cultural rights; third generation rights are the so-called peoples' rights and include the right to peace, the right to self-determination, the right to control over resources, the right to development and the right to a clean environment: see Du Plessis & Corder **op cit.** at 24; "Albie Sachs on Human Rights in South Africa" 1990 **SAJHR** 29. Van der Vyver **Seven Lectures on Human Rights** (1976) at 57 **et seq.** distinguishes between substantive rights and freedoms, which include personal rights, civil rights, political rights, economic rights and social rights, and procedural rights, which are concerned with the administration of justice; see also G. Carpenter **Introduction to South African Constitutional Law** (1987) at 94.

⁶²Sections 8(1) and (2).

⁶³Sections 9, 10, 12, 13 and 28.

⁶⁴Sections 11, 14, 15, 16, 17, 18 and 19.

⁶⁵section 20 and 21.

⁶⁶Section 24.

⁶⁷Sections 26, 27, 29, 30 and 32.

⁶⁸Section 31.

⁶⁹Sections 23 and 25.

in it. The chapter makes provision for three types of curtailment.⁷⁰ Section 33(1) makes provision for limitation by law of general application, provided, however, that such limitation is reasonable, justifiable in an open and democratic society based on freedom and equality, and does not negate the essential content of the right in question;⁷¹ a limitation of the rights enumerated in section 33(1)(aa) must, in addition to being reasonable, also be necessary; a limitation of the rights enumerated in section 33(1)(bb) must, in addition to being reasonable, also be necessary in so far as they relate to free and fair political activity.

The first type of curtailment affects what may be called the 'least protected category' of rights; these are all the rights which are not enumerated in sections 33(1)(aa) and 33(1)(bb), as long as those enumerated in section 33(1)(bb) do not relate to free and political activity.

The second type of curtailment affects what may be called the 'most protected category' of rights. These are those enumerated in section 33(1)(aa), namely the rights to human dignity,⁷² freedom and security of the person,⁷³ the right not to be subjected to servitude and forced labour,⁷⁴ the right to freedom of conscience, religion, thought, belief and opinion, including academic freedom,⁷⁵ the right freely to engage in political activities,⁷⁶ the

⁷⁰See J.D van der Vyver "Limitation Provisions of the Bophuthatswanan Bill of Rights" 1994 **THRHR** 46 at 58-65 for a distinction between the various types of curtailment.

⁷¹See **infra** for a discussion of the interpretation and application of section 33(1).

⁷²Section 10.

⁷³Section 11.

⁷⁴Section 12.

⁷⁵Section 14(1).

rights of detained, arrested and accused persons,⁷⁷ the rights of children not to be neglected or abused and not to be subjected to exploitative labour practices or required or permitted to perform work which is hazardous or harmful to their education, health or well-being,⁷⁸ the right of detained children to be kept under conditions and to be treated in a manner that takes into account of his or her age.⁷⁹

The rights enumerated in section 33(1)(bb), namely the right to freedom of speech and expression, including freedom of the press and other media and freedom of artistic creativity and scientific research,⁸⁰ the rights of assembly, to demonstrate and to present petitions,⁸¹ freedom of association,⁸² freedom of movement,⁸³ the right of access to information⁸⁴ and administrative justice⁸⁵ fall under the most protected category only in so far as they relate to free and fair political activity;⁸⁶ they enjoy the least protection if they do not relate to free and fair political activity. Section 33(1)(bb) in essence

⁷⁶Section 21.

⁷⁷Section 25.

⁷⁸Sections 30(1)(d) and (e).

⁷⁹Section 30(2).

⁸⁰Section 15(1).

⁸¹Section 16.

⁸²Section 17.

⁸³Section 18.

⁸⁴Section 23.

⁸⁵Section 24.

⁸⁶The distinction between the categories of protection is inconsistent and arbitrary. For example, freedom of speech and expression, which constitutes the foundation of democracy, falls into the intermediate category of protection; the right to life, which is one of the most important rights, falls into the least protected category: see Mureinik 1994 **SAJHR** at 33-35.

creates an intermediate and hybrid category.⁸⁷

The strict requirement that any limitation of the two classes of rights specified in section 33(1)(aa) and (bb) must, in addition to being reasonable, also be necessary, is based on the fact that these rights emphasise the worth of the human being as a member of political and civil society; as a member of political and civil society the individual ought to be sufficiently protected in his person, religion, belief, opinion and participation in political activities and also ought to be treated fairly and justly in criminal proceedings. The guarantee of the second class of rights, in particular, is necessary for free and fair political activity and forms part of the process of democracy.

The second type of curtailment of the rights guaranteed in Chapter 3 is contained in section 34. This curtailment must, however, be distinguished from the ordinary limitation contained in section 33. It is a curtailment which is based on the constitutional law rule that a state is entitled to defend itself or to protect its supremacy when faced with a situation of necessity.⁸⁸ In terms of section 34(4) the rights guaranteed in Chapter 3 may be suspended during a state of emergency if such suspension is necessary to restore peace or order.⁸⁹ Section 34(4) is based on the principle that the state is, in

⁸⁷Mureinik 1994 **SAJHR** at 33.

⁸⁸See in general Basson & Viljoen **op cit** at 245 et seq.

⁸⁹Section 34 suggests that a suspension of the rights entrenched in Chapter 3 means a temporary deprivation or inoperation (a temporary but total holding in abeyance) of the rights and not their abolition: see Van der Vyver 1994 **THRHR** at 61. The power to extend the state of emergency beyond the 21 days limit is restricted by the requirement that at least two-thirds of all elected representatives of the National Assembly must support a resolution to extend (section 34(2)); this power is also limited by means of judicial controls in terms of section 34(3). Section 34(4) specifically provides that the rights

circumstances which constitute necessity, entitled to restrict or suspend the rights of individuals in order to secure the interests of the general public and to maintain the continued existence of the state.⁹⁰ Section 34, however, contains a number of regulatory and protective mechanisms, including the competence of the court to inquire into the validity of a declaration of a state of emergency and any action under such declaration.

Chapter 3 also contains in section 35 an interpretation clause which is intended to serve as a general guide in the interpretation and application of its provisions by the courts. Section 35 contains some key guides to the interpretation and application of the provisions of Chapter 3. In the first place, in the interpretation of the provisions of the Chapter, due regard must be taken of

"the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in (Chapter 3), and may have regard to comparable foreign law".⁹¹

In the second place,

"no law which limits any of the rights entrenched in (Chapter 3), shall be constitutionally invalid solely by reason of the fact that the wording used **prima facie** exceeds the limits imposed in (the) Chapter, provided such law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in

entrenched in Chapter 3 may be suspended only to the extent necessary to restore peace and order. See Chapt. 11 for a discussion of the role of the judiciary in a state of emergency.

⁹⁰See **infra**.

⁹¹Section 35(1). See Chapt. 10 for a discussion of the usefulness of international law and foreign law as sources of constitutional values.

accordance with the said more restricted interpretation".⁹²

Lastly, "in the interpretation of any law and the development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of (Chapter 3)".⁹³

Section 35(1) merely provides a general interpretative framework based on the nature of the Constitution; it is in itself too wide and open-ended to constitute a specific interpretative framework; the phrase "open and democratic society" requires further judicial construction, as does the phrase "spirit ... of this Chapter" in section 35(3). However, the requirement that the court must, where applicable, have regard to public international law provides a basis for the search of values which underlie an open and democratic society.

The spirit of Chapter 3 can be gleaned from the postamble. In terms of the postamble the Constitution is intended to lead to "a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex". The spirit and larger object of Chapter 3 is to bring about the ideal of a democratic state in which the freedom, rights and dignity of persons are protected and respected.

The requirement that the court must have regard to public international law does not mean that the court must apply all rules of public international law. Section 35(1) refers to the interpretation of the human rights provisions contained in Chapter 3; the applicable public international law is therefore international human rights law, which promotes the legal values of democratic

⁹²Section 35(2). Section 35(2) is simply a reading down provision; it does not, strictly speaking, create a presumption of constitutionality: see Chapt. 11.

⁹³Section 35(3).

government based on freedom, equality and human dignity.⁹⁴ The section in essence acknowledges that in certain instances national human rights law may be deficient and that it should in such instances be supplemented by international human rights law.⁹⁵

While the court has a duty to have regard to public international law where applicable, it merely has a discretion to have regard to comparable foreign case law.⁹⁶ It is important to note that the court may only have regard to **comparable** foreign case law; this means that only those foreign cases in which constitutional texts which are contextually comparable to our Constitution have been interpreted and applied are relevant. The Constitution of Canada, in particular, is contextually comparable to our Constitution; the section 33(1) limitation, which is vital to the interpretation and application of the provisions of Chapter 3, has a predominantly Canadian influence. German, Indian, Zimbabwean, Botswanan and Namibian case law is also relevant. Canada, Namibia and South Africa, in particular, share a common tradition of legislative supremacy which was superseded by constitutional supremacy and the entrenchment of fundamental human rights. Despite the fact that the Constitution of the United States is different from the South African Constitution, American constitutional case law will also be persuasive; many cases of constitutional importance have been decided by the United States Supreme Court in particular.

⁹⁴On international human rights law see L. Henkin "The Internationalization of Human Rights" in L. Henkin et al **Human Rights: A Symposium** (1977) 6.

⁹⁵See Chapt. 10 for a discussion of the extent of the application of international human rights law in the interpretation and application of the provisions of Chapter 3.

⁹⁶This is clear from the use of "shall" in respect of public international law and "may" in respect of comparable foreign case law.

2.3. Justiciability.

The efficacy of a Constitution with supreme authority is ensured by the sanction of invalidity, in the sense that any law which is in conflict with its provisions may be declared invalid by a court of law. In practical terms this means that a person who alleges that the provisions of the Constitution have been infringed, may approach the court for a determination of the constitutionality of the law in question and an order that it is invalid, should the court find that it is unconstitutional. The justiciability of a Constitution is an essential characteristic of constitutional supremacy; it gives the courts a fundamental role in the process of government and is an effective means of preserving constitutional limitations on the exercise of government authority⁹⁷.

The justiciability of the provisions of the Constitution derives from the provisions of sections 4(1), 7(4), 98(2) and 101(3). Section 4(1) constitutes the basis of justiciability; it provides that any law which is inconsistent with the provisions of the Constitution shall be of no force and effect to the extent of the inconsistency. Section 4(1) in essence makes provision for the sanction of invalidity, a sanction which is enforceable by courts of law. Section 7(4)(a), on the other hand, relates specifically to laws which are alleged to infringe the fundamental rights guaranteed in Chapter 3 of the Constitution; the section entitles a person, as specified in subsection (b), who alleges that any of his rights as guaranteed in the Chapter has been infringed or is being threatened, to apply to a **competent court of law** for relief. Sections 4(1) and 7(4)(a) do not state specifically which court is competent to determine constitutionality.

Section 7(4)(a) of the Constitution makes express provision for a remedial or enforcement measure. However, the section merely states that a person who

⁹⁷See B.O Nwabueze **Judicialism in Commonwealth Africa: The Role of the Courts in Government** (1977) at 27.

has **locus standi** as specified in section 7(4)(b)⁹⁸ and who alleges an infringement of or threat to any right entrenched in Chapter 3 is "entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights". In terms of the Constitution, competent courts of law are the Constitutional Court, in terms of its exclusive constitutional jurisdiction⁹⁹, and the Supreme Court, in terms of the concurrent constitutional jurisdiction it shares with the Constitutional Court.¹⁰⁰

The Constitution envisages an order of invalidity as the major form of relief. In terms of section 4(1) any law or act inconsistent with the provisions of the Constitution shall, unless otherwise provided expressly or by necessary implication in the Constitution, be of no force and effect to the extent of the inconsistency. In essence, section 4(1), which is the supremacy clause, empowers a competent court of law, at the instance of an applicant who has **locus standi**, to declare a law or act which is inconsistent with the provisions of the Constitution invalid and of no force and effect to the extent of the inconsistency.¹⁰¹

⁹⁸**Locus standi** is granted to persons acting in their own interest, to an association acting in the interest of its members, to a person acting on behalf of another person who is not in a position to seek relief in his or her own name, to a person acting as a member of or in the interest of a group or class of persons and to a person acting in the public interest.

⁹⁹Section 98(2).

¹⁰⁰Section 101(3)(a).

¹⁰¹The court may, however, in terms of sections 98(5) and 101(4), also make an order, in the interests of justice and good government, requiring Parliament or any other competent authority, within a period specified by it, to correct a defect in the law or provision in issue, in which event the law remains in force pending correction or the expiry of the specified period: see **Director: Office for Serious Economic Offences v Park-Ross**

In instances where there is a threat to any of the rights entrenched in Chapter 3, an appropriate form of relief would be an interim interdict. It has been held that the Supreme Court is competent to grant interim relief pending the decision of the Constitutional Court on the constitutionality of an Act of Parliament.¹⁰²

There are various other forms of relief which the court may grant. In criminal proceedings the court may quash the proceedings or order that an accused be furnished with information in terms of section 23 of the Constitution or that he be released on bail in terms of section 25(2)(d). Another form of relief would be the exclusion of evidence obtained in contravention of the provisions of, for example, section 11(2) of the Constitution. Section 11(2) prohibits torture and cruel or inhuman or degrading treatment; evidence obtained by the police through torture can be excluded on the basis that it was obtained in contravention of section 11(2).¹⁰³

In certain instances, appropriate relief may involve the restoration of the plaintiff's rights, or to compensate him or her for the deprivation or infringement of such rights. Appropriate relief for an infringement of the right to freedom of the person,¹⁰⁴ for example, will be a restoration of the

and Another 1995(5) BCLR 652 (C).

¹⁰²See **Matiso and Others v The Commanding Officer, Port Elizabeth Prison and Others** 1994(3) BCLR 80 (SE) and **Wehmeyer v Lane NO and Others** 1994(2) BCLR 14 (C). **Matiso** is discussed in detail in Chapt. 10.

¹⁰³The exclusion of a confession on the basis that it was obtained in contravention of section 11(2) would be consistent with the common law rule that a confession is admissible only if it is made freely and voluntarily and without any undue influence.

¹⁰⁴Section 11(1).

plaintiff's physical liberty. The payment of monetary damages might, for example, be the most appropriate remedy for infringements that also constitute private law wrongs, such as infringements of the right to dignity¹⁰⁵ or the right to privacy.¹⁰⁶

In **Fose v Minister of Safety and Security**¹⁰⁷ the court stated that there might be instances where a violation of a constitutional right might require the recognition of constitutional damages, because the common law does not provide a remedy. As opposed to delictual damages, constitutional damages serve a fourfold purpose, namely (1) the prevention and deterrence of violations of fundamental rights; (2) the vindication of the values of the rights themselves; (3) the punishment of the violator where the conduct was egregious; and (4) the compensation of the litigant for harm suffered.

Section 7(4)(a) specifically mentions a declaration of rights as one of the appropriate forms of relief. A declaration of rights is a common law remedy which may be sought by an applicant where there is a clear legal dispute or legal uncertainty in regard to the act of an administrative organ or in order to ensure that an administrative organ performs a statutory duty it is obliged to perform.¹⁰⁸ The advantage of declarations of right is that they can be made in instances where the law does not provide for a more specific remedy. A court will not, however, make a declaration of rights where the dispute is merely academic.¹⁰⁹

¹⁰⁵Section 10.

¹⁰⁶Section 13.

¹⁰⁷1996(2) BCLR 232 (W), at 235J-236A.

¹⁰⁸See M. Wiechers **Administrative Law** (1985) at 268-269.

¹⁰⁹**Trustees JC Ponyton Property Trust v Secretary for Inland Revenue** 1970 (2) SA 618 (T); **Reinecke v Incorporated**

3. Constitutionalism and the New Constitution.

The doctrine of constitutionalism is a prescriptive doctrine which indicates how state power should be exercised; it is also a normative doctrine which indicates the values which should be upheld in the governing process.¹¹⁰ As a normative doctrine, constitutionalism means more than formal adherence to the letter of the Constitution; it recognises the necessity for government but demands that government should be limited, accountable and not arbitrary.¹¹¹

The fact that there is a formal written Constitution does not necessarily mean that the government is a constitutional one or that any action taken by the government which is technically within the provisions of the Constitution is constitutional. Whether a Constitution will be able to foster constitutionalism largely depends on the sufficiency of the limitations it imposes upon the powers of the government and their adequacy. More than anything else, however, constitutionalism depends on the willingness and ability of those who operate the state system, namely the legislators, the policy makers, the administrators, and most importantly the judges, to respect its principles.

The 1993 Constitution contains a number of fundamental principles of constitutionalism, namely the creation of a sovereign and democratic constitutional state¹¹², the supremacy of the Constitution¹¹³, the

General Insurances Ltd 1974(2) SA 84 (A).

¹¹⁰Boulle, Harris & Hoexter **op cit.** at 20.

¹¹¹Nwabueze **op cit.** note 38 at 1.

¹¹²The Preamble. Section 1(1) declares the Republic of South Africa to be one sovereign state.

¹¹³Section 4(1) of the Constitution.

entrenchment of fundamental human rights¹¹⁴, judicial review of legislative and executive acts as a means of ensuring compliance with the provisions of the Constitution¹¹⁵ and the separation of powers between the legislative, executive and judicial branches, with a guarantee of the independence of the judiciary.¹¹⁶ These principles, together with a number of other democratic principles, are also contained in Schedule 4 (the Constitutional Principles);¹¹⁷ they provide a standard by which the record of future governments can be measured.

The supremacy of the Constitution is one of the important principles of modern constitutionalism; section 4(1) specifically entrenches this principle. It limits the exercise of state power in that those who operate the state system must adhere to the values which underlie an open and democratic society based on freedom and equality; they may not make any law or perform any act which is inconsistent with these values.¹¹⁸ The judiciary, on the other hand is obliged, in terms of section 35(1), to promote these values. Any act or law which is inconsistent with the values embodied in the Constitution must yield to its superior force. The supremacy of the Constitution also demands that the judiciary, as the organ which is responsible for interpreting and

¹¹⁴Chapter 3 of the Constitution.

¹¹⁵Sections 98(2) and 101(3), read with section 4.

¹¹⁶There is a clear distinction between the legislature, the executive and the judiciary, and a prescription of the different powers of these organs. : see sections 37, 75 and 96. The independence of the judiciary is guaranteed in section 96(2).

¹¹⁷In terms of section 71(1) the final Constitution must comply with the Constitutional Principles contained in Schedule 4. The Constitutional Court must also certify that the final Constitution complies with the Constitutional Principles (section 7(2)).

¹¹⁸See section 33(1).

applying the law, must vigorously enforce the supreme law of the Constitution by invalidating any act or law which is inconsistent with its provisions.

The entrenchment of fundamental human rights, on the other hand, specifically limits the exercise of state power in relation to the individual. It is based on the notion that there are certain individual interests and fundamental values of society which those who exercise state power must respect. In so far as these interests and values are entrenched in a supreme Constitution, they determine and limit the scope of state power. Any act or law which infringes the rights entrenched in the Constitution may be declared invalid; coupled with the fact that the fundamental rights entrenched in the Constitution are enforceable by an independent judiciary, their entrenchment therefore constitutes a substantive element of constitutionalism.

The separation of powers and functions between the legislature, the executive and the judiciary necessarily operates as a limitation upon arbitrary exercise of state power; each of the three organs of state is required by the Constitution to exercise its powers according to the differentiation of functions prescribed in the Constitution.

The separation of powers is particularly important in relation to the judicial function. Since it is the judiciary that interprets and enforces the limitations which the Constitution imposes upon the legislature and the executive, it is necessary that it be separate and independent from these other branches of government¹¹⁹. Section 96(2) of the 1993 Constitution specifically provides that "[t]he judiciary shall be independent, impartial and subject only to this Constitution and the law."¹²⁰

¹¹⁹See Chapt. 5.

¹²⁰It is significant to note that in previous Constitutions the independence of the judiciary was mentioned in the preamble only; the preamble was, juridically speaking, of little value. It could be used only in cases of

It may be said that the separation of the judiciary from the other two branches of government, and its independence, are some of the most significant features of constitutionalism.¹²¹ It may also be said, however, that it is not only the separation of the judicial branch and its independence that will determine the standard of constitutionalism under the new Constitution but, by and large, how the judiciary itself will interpret and apply the supreme law of the Constitution.

4. The Jurisdiction of the Courts under the 1993 Constitution

4.1. Abstract Review

Traditionally, the role of the South African judiciary was confined to the interpretation and application of those norms which have concretised into law, when personal interests are involved and there is a legally recognised basis for an action. Proposed legislation, or a bill, is as such not yet law in a formal sense and does not at that stage materially affect personal interests; the judiciary does not therefore in general have the power to determine the constitutionality of such an instrument.¹²² The most appropriate way of controlling the constitutionality of such an instrument is through political means, whereby it is either prevented from acquiring the force of law or

uncertainty. The preamble now enjoys the same status as the rest of the Constitution. The provision of the independence of the judiciary in a supreme Constitution amounts to an express guarantee of judicial independence.

¹²¹See Nwabueze **op cit.** note 38 at 16.

¹²²Constitutionality is not necessarily the same thing as constitutionalism. Constitutionality refers to a formal compliance with the principles of the Constitution. Constitutionalism, on the other hand, has two meanings; as a prescriptive doctrine it indicates how state power should be exercised; as a normative doctrine it means that the state must not only exercise its power according to the letter of the Constitution but must also be responsible and accountable. The concept of constitutionalism is therefore wider than that of constitutionality.

amendments are effected to ensure that it complies with the provisions of the Constitution.

However, the 1993 Constitution has introduced a new feature in relation to the power of the judiciary to determine the constitutionality of bills. In terms of section 98(2)(d) the Constitutional Court is empowered to determine any dispute over the constitutionality of any bill before Parliament or a provincial legislature; provincial and local divisions of the Supreme Court are empowered to determine disputes over the constitutionality of bills before a provincial legislature.¹²³ This is a form of abstract review.

The Constitution does not, however, create a right of action in respect of bills which allegedly violate its provisions. Sections 98(9) and 101(3)(e) limit **locus standi** in respect of the constitutionality of bills; they qualify judicial determination of the constitutionality of bills by providing that the court can exercise its jurisdiction to determine the constitutionality of bills only at the request of the Speaker of the National Assembly, the President of the Senate or the Speaker of a provincial legislature; furthermore, the Speaker of the National Assembly, the President of the Senate or the Speaker of a provincial legislature can request the court to determine the constitutionality of a bill only upon receipt of a petition by at least a third of the members of the National Assembly, the Senate or a provincial legislature requiring such determination.

Sections 98(2)(d) and 101(3)(e) of the Constitution make the judiciary an important body in the legislative process. These sections, whenever they are invoked, will ensure that the legislature passes laws which are in accordance with the Constitution. It is doubtful whether the courts will suddenly find themselves flooded with requests for determinations of the constitutionality of bills; the provisions of these sections seem to be aimed at highly contentious

¹²³Section 101(3)(e).

bills to ensure that they comply with the provisions of the Constitution. The provisions are, however, significant in another respect; they reflect a desire to ensure legality and constitutionalism in that they seek to achieve clarity and certainty and to prevent arbitrary and excessive exercise of power. This formal 'sifting' process for legislation is an interesting constitutional mechanism which is foreign to South African constitutional law and practice. As a process which is aimed at bringing about legality it is to be welcomed.

In the majority of cases, determinations of constitutionality take place by way of direct review, when an instrument has already become law and when an individual whose interests are affected approaches the court for relief. Once an individual approaches the court for relief, and there is a justiciable dispute relating to a violation of the law, the court has a duty to determine the alleged violation and to apply the law. Section 7(1)(b) of the Constitution specifically stipulates which persons may approach the court for relief where there is an allegation of an infringement of or threat to any of the rights entrenched in Chapter 3.

4.2. Direct Review.

The Constitution stipulates which courts may exercise direct review. Section 96(1) of the interim Constitution vests the judicial authority in the courts established by the Constitution and any other law. The only court established by the Constitution is the Constitutional Court; courts established by "any other law" are the Appellate Division of the Supreme Court, the provincial or local divisions of the Supreme Court,¹²⁴ Supreme Courts of the former TBVC states,¹²⁵ Magistrates' Courts¹²⁶ and other specialised courts such

¹²⁴Established in terms of section 2 of the Supreme Court Act, 59 of 1959.

¹²⁵These courts were established in terms of the Constitutions of the former TBVC states. In terms of section 241(1) of the 1993 Constitution they continue to function in terms of the laws applicable to them until changed by a competent authority.

as the Industrial Court.

Not all courts are, however, vested with constitutional jurisdiction. The Constitution makes provision for a two-tiered system of review of constitutionality. This system contains elements of both centralisation and decentralisation.

In accordance with the two-tiered system of control, the determination of constitutionality takes place at the Constitutional Court level¹²⁷ and the Supreme Court level¹²⁸. The Constitutional Court level constitutes the higher level of review; the Supreme Court level constitutes the lower level of review.

Section 98(2) specifically assigns the determination of constitutionality to the Constitutional Court. In terms of this section, the Constitutional Court has jurisdiction as a court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of the Constitution, including, a determination of the constitutionality of any law, including an Act of Parliament, executive or administrative acts and bills before parliament, and a determination of disputes of a constitutional nature between organs of state at any level of government.

At the lower level of review, a provincial or local division of the Supreme Court retains the jurisdiction which it had before the commencement of the Constitution.¹²⁹ Provincial or local divisions are also assigned jurisdiction in respect of violations or threatened violations of the rights entrenched in

¹²⁶Established in terms of the Magistrates' Courts Act, 32 of 1944.

¹²⁷Section 98(2) and (3).

¹²⁸Section 101(3) & (4).

¹²⁹Section 101(2).

Chapter 3, the constitutionality of executive or administrative acts,¹³⁰ bills before a provincial legislature and laws applicable within their area of jurisdiction, and disputes of a constitutional nature between local governments or between a local and a provincial government.

The jurisdiction of provincial or local divisions of the Supreme Court to determine the constitutionality of laws applicable within their area of jurisdiction does not, however, extend to Acts of Parliament; in terms of section 101(3)(c) a provincial or local division has jurisdiction to determine "the constitutionality of any law applicable within its area of jurisdiction, **other than an Act of Parliament** ..."¹³¹ Unless the parties consent to the jurisdiction of a local or provincial division of the Supreme Court in terms of section 101(6), only the Constitutional Court has exclusive jurisdiction to determine the constitutionality of Acts of Parliament.¹³²

The retention in section 101(2) of the jurisdiction which vested in the Supreme Court immediately before the commencement of the Constitution raises the

¹³⁰Strictly speaking, the section 101(3)(b) area of jurisdiction forms part of the inherent jurisdiction vested in the Supreme Court immediately before the commencement of the Constitution. Section 103(3)(b) should therefore be seen as an explicit recognition of the Supreme Court's power to review the constitutionality of executive or administrative acts.

¹³¹See **Zantsi v Council of State, Ciskei and Others** 1995(4) SA 615 (CC). The Constitutional Court held in this case that the words 'Act of Parliament' as used in the 1993 Constitution refer to an Act passed by the South African Parliament sitting in Cape Town and not to an Act passed by any of the former TBVC legislatures; provincial or local divisions have jurisdiction to inquire into the constitutionality of Acts of the former TBVC legislatures applicable within their areas of jurisdiction.

¹³²Sections 98(2)(c), 98(3) and 101(3)(c). In **JT Publishing (Pty) Ltd v Directorate of Publications and Another** 1995(1) BCLR 70(T) it was held that where parties consent to the jurisdiction of a provincial or local division of the Supreme Court in terms of section 101(6) and the relief sought includes an order that provisions of an Act of Parliament be declared invalid, the government must be represented by the responsible minister, notwithstanding that it is already represented by one of its functionaries.

question whether a provincial or local division would be competent, under the Constitution, to inquire into the requirements governing the manner and form of Acts of Parliament, that is the requirements governing the structural composition of Parliament as well as the procedure according to which Parliament must legislate, as opposed to the substantive validity of legislation.¹³³ Under previous Constitutions it was an accepted principle that the Supreme Court has jurisdiction in respect of Parliament's manner and form of legislating.¹³⁴

If section 101(3)(c) excludes the jurisdiction of the provincial or local divisions of the Supreme Court to determine the constitutionality of Acts of Parliament, it is unlikely that section 101(2) will be interpreted as conferring jurisdiction upon these divisions in respect of Parliament's manner and form of legislating as set out in the Constitution. An inquiry into the question whether an Act of Parliament was enacted in accordance with the provisions of the Constitution, be they procedural or substantive, amounts to a determination of the constitutionality of that Act. The words "[s]ubject to this Constitution..." in section 101(2) make it clear that the section does not confer

¹³³Section 62 of the Constitution contains procedural requirements regarding the amendment of the Constitution, the boundaries and legislative and executive competences of the provinces. In terms of section 62(1) an amendment of the Constitution requires a two-thirds majority of the total number of members of both the National Assembly and the Senate at a joint sitting of the two houses for its adoption as law. In terms of section 62(2), an amendment of the provisions dealing with the legislative competence of the provinces (section 126) and with the executive authority of provinces (section 144) requires a two thirds majority of the members of each house sitting separately; furthermore, the consent of the relevant provincial legislature is required for an amendment of the boundaries and legislative competencies of the provinces. Section 74(2) also contains a procedural requirement regarding the provisions dealing with the adoption of the new Constitution (Chapter 5); in terms of this section the provisions of Chapter 5, except section 74(1), which may not be amended or repealed at all, may be amended by the Constitutional Assembly by a resolution of a two-thirds majority of all its members.

¹³⁴See Chapt. 4.

upon a provincial or local division jurisdiction contrary to the provisions of the Constitution.

Another question which arises, is whether section 101(3)(a) can be interpreted to mean that a provincial or local division of the Supreme Court has jurisdiction to inquire into the constitutionality of Acts of Parliament which violate or threaten to violate the fundamental rights in Chapter 3. Section 103(3)(a) simply states that a provincial or local division of the Supreme Court has jurisdiction in respect of any violation or threatened violation of any fundamental right entrenched in Chapter 3, without specifying whether violations by Acts of Parliament are excluded or not.

The Constitution specifically assigns jurisdiction in respect of violations of the fundamental rights entrenched in Chapter 3 to both the Constitutional Court and the provincial or local divisions of the Supreme Court. In terms of section 98(2)(a) the Constitutional Court has jurisdiction in respect of "any violation or threatened violation of any fundamental right entrenched in Chapter 3"; section 101(3)(a) makes use of exactly the same wording to confer jurisdiction upon a provincial or local division in respect of violations or threatened violations of the rights entrenched in Chapter.

It would seem, therefore, that, on a wide interpretation of section 101(3)(a), section 101(3)(c) does not preclude a provincial or local division of the Supreme Court from inquiring into the constitutionality of Acts of Parliament which violate or threaten to violate the rights entrenched in Chapter 3. Cachalia *et al*¹³⁵ prefer this interpretation. According to them this interpretation accords with the fact that all decisions of provincial or local divisions on constitutional matters are subject to appeal to the Constitutional Court and relieves the Constitutional Court of the burden of having to deal

¹³⁵A. Cachalia, H. Cheadle, D. Davis, N. Haysom, P. Maduna & G. Marcus **Fundamental Rights in the New Constitution** (1994) at 14.

with an unmanageable load of cases involving violations of the rights entrenched in Chapter 3 by Acts of Parliament. It seems illogical, however, to argue that a provincial or local division can inquire into the constitutionality of an Act, whereas it is clearly not empowered to invalidate the Act should it be found to be unconstitutional.

Claassen¹³⁶ argues that any interpretation which would permit a provincial or local division of the Supreme Court to review the constitutionality of Acts of Parliament would be a deviation from the express exclusion of the jurisdiction of these courts to review the constitutionality of Acts of Parliament. According to him such a wide interpretation would undermine the "spirit, purport and objects" of the Constitution. He argues that the extension of jurisdiction by agreement to a provincial or local division as provided for in section 101(6) is an indication that such jurisdiction is ordinarily excluded. As in the case of jurisdiction in respect of Parliament's manner and form of legislating,¹³⁷ the words "[s]ubject to this Constitution..." in section 101(2) make it clear that section 101(3)(c) does not confer upon a provincial or local division of the Supreme Court jurisdiction contrary to the provisions of the Constitution.

The fact that the Constitutional Court is given wide constitutional jurisdiction and provincial or local divisions of the Supreme Court limited constitutional jurisdiction gives force to the argument that sections 98(2)(c) and section 101(3)(c) are express jurisdictional provisions which give the Constitutional Court exclusive jurisdiction to determine the constitutionality of Acts of Parliament.

It is clear from the express provisions of sections 98(2)(c) and 101(3)(c) that

¹³⁶C.J. Claassen "The Functioning and Structure of the Constitutional Court" 1994 **THRHR** 412 at 427.

¹³⁷See **supra**.

unless the parties have agreed to jurisdiction in terms of section 101(6), provincial or local divisions of the Supreme Court do not have jurisdiction to determine the constitutionality of Acts of Parliament which violate the fundamental rights entrenched in Chapter 3. In essence, a local or provincial division of the Supreme Court is competent to hear any case which involves a human rights violation, except where this would involve a determination of the constitutionality of an Act of Parliament. It is not clear from the Constitution, however, whether provincial or local divisions have jurisdiction to dispense interim relief pending the final determination of the constitutionality of Acts of Parliament by the Constitutional Court.

There were conflicting decisions on the question whether a provincial or local division of the Supreme Court can dispense interim relief pending a final determination of the constitutionality of an Act of Parliament by the Constitutional Court.¹³⁸ The question has now been settled. In terms of section 101(7) of the Constitution any division of the Supreme Court of South Africa is competent to grant interim relief, pending a determination of constitutionality by the Constitutional Court.¹³⁹

¹³⁸For cases in which it was held that a provincial or local division of the Supreme Court is competent to grant interim relief see: **Wehmeyer v Lane NO and Others** 1994(2) BCLR 14 (C); **Matiso and Others v The Commanding Officer, Port Elizabeth Prison and Others** 1994(3) BCLR 80 (SE); **Ferreira v Levin and Others; Vryenhoek and Others v Powell NO and Others** 1995(4) BCLR 437 (W). For cases in which it was held that a provincial or local division is not competent to grant interim relief see: **De Kock en 'n Ander v Prokureur-Generaal van Transvaal** 1994(2) SACR 113 (T); **Rudolph and Another v Commissioner for Inland Revenue and Others** 1994(2) BCLR 9 (W); **Podlas v Cohen NO and Others** 1994(3) BCLR 137 (T); **Bux v The Officer Commanding the Pietermaritzburg Prison and Others** 1994(4) BCLR 10 (N).

¹³⁹Section 101(7) was inserted by section 3 of the Constitution of the Republic of South Africa Second Amendment Act, 44 of 1995.

An approach which denies the jurisdiction of the Supreme Court to grant interim relief where the constitutionality of an Act of Parliament is in issue leaves an applicant with no immediate legal remedy to protect his constitutionally guaranteed rights.¹⁴⁰ In terms of the rules of the Constitutional Court direct access to that court will be allowed in exceptional cases only.¹⁴¹

The granting of jurisdiction to provincial and local divisions of the Supreme Court to grant interim relief is a positive development which promotes the spirit, purport and objects of Chapter 3 of the Constitution. The spirit and purport of Chapter 3 is to give individuals the full benefit of the rights and freedoms entrenched in it; this involves full protection of these rights and freedoms by the courts. Section 101(7) therefore encapsulates one of the most important principles of the Constitution, namely the realisation of fundamental constitutional values through judicial protection of human rights. As Froneman J stated in **Matiso and Others v The Commanding Officer, Port Elizabeth Prison and Others**,¹⁴²

¹⁴⁰The only course open to the applicant would be to seek the other party's consent or to request a referral to the Constitutional Court.

¹⁴¹According to the Rules of the Constitutional Court (Government Notice R1584, published in **Regulation Gazette** 5394 of 16 September 1994 and repealed and replaced by Government Notice R5, published in **Regulation Gazette** 5450 of 6 January 1995) direct access will be allowed only where the opinion of the court is sought on the proposed constitutional text in terms of section 71(4) of the Constitution (rule 12), where there is a dispute over the constitutionality of any Bill (rule 13), where there is a dispute between parties in Parliament or between organs of state (rule 14(1)), when the court is required to certify the new constitutional text (rule 15) and when it is required to certify a provincial Constitution (rule 16); other than these instances direct access will be allowed in exceptional circumstances only, "which will ordinarily exist only where the matter is of such urgency, or otherwise of such public importance, that the delay necessitated by the use of the ordinary procedures would prejudice the public interest or prejudice the ends of justice or good government" (rule 17(1)).

¹⁴²**Supra.**

"[t]he inherent values of the Constitution are ... better served by recognising the possibility of interim relief pending decisions of the Constitutional Court on the constitutionality of an Act of Parliament, rather than the exclusion of interim relief altogether".¹⁴³

From a practical point of view, issues concerning violations of fundamental rights are more likely to arise either by means of petitions for declaratory orders in ordinary proceedings before provincial or local divisions of the Supreme Court or disputes of constitutionality in criminal proceedings before these divisions.¹⁴⁴

In the absence of the consent of parties, the section 103(3)(c) exclusion of the jurisdiction of a provincial or local division of the Supreme Court to inquire into the constitutionality of Acts of Parliament which violate the rights entrenched in Chapter 3, confines the constitutional jurisdiction of the Supreme Court under section 103(1)(a) to dispensing interim relief pending determination by the Constitutional Court, referrals to the Constitutional Court, violations by executive or administrative acts or conduct or arising from the operation of a rule of common law or customary law, violations by provincial or local laws and violations of a procedural nature. In most cases jurisdiction will be exercised in respect of violations by executive or administrative acts, those arising from operation of a rule of common law and those of a procedural nature.

In the absence of consent to the jurisdiction of a provincial or local division of the Supreme Court, determinations of the constitutionality of Acts of Parliament will be through direct access to the Constitutional Court, which will be very difficult in terms of the rules of the Constitutional Court, or through referrals by provincial or local divisions in terms of section 102(1) or

¹⁴³At 901.

¹⁴⁴In most cases these issues will arise in criminal appeals from the Magistrates' Courts.

other courts in terms of section 103(3) and (4).¹⁴⁵

The constitutional entrenchment of fundamental human rights and the nature and spirit of the Constitution demands that human rights violations must be determined and resolved as speedily and as efficiently as possible in order to give individuals the full benefit of their constitutional guarantees. Since most violations will be raised at the provincial or local division level, these courts are the appropriate forum for a determination of the constitutionality of such violations, including violations where the constitutionality of an Act of Parliament is in issue.

The exclusion of provincial or local divisions of the Supreme Court from determining the constitutionality of Acts of Parliament means that, in the absence of consent by the parties, the role of provincial or local divisions in respect of the protection of the entrenched rights against violations by Acts of Parliament is limited to placing such issues before the Constitutional Court in order to obtain a binding decision from it. The apparent inconsistency here is that a referral of an issue to the Constitutional Court by a provincial or local division would generally first involve a determination by the latter as to whether an issue of constitutionality in fact exists or not. This position also involves the cumbersome and expensive procedure of suspending the resolution of a dispute pending a determination of constitutionality by the Constitutional Court, which may take time to give a decision.¹⁴⁶

¹⁴⁵The Constitutional Court has indicated that it will not readily decide a constitutional issue referred to it unless it is in the interests of justice to do so and there are compelling reasons that the issue should be decided: see **Zantsi v Council of State, Ciskei and Others** 1995(1) BCLR 1224 (CC) at 1428-1429; **S v Mhlungu** 1995(7) BCLR 793 (CC) at 821F-G. In **Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others** 1996(1) BCLR 1 (CC) the court added the implied requirement that there must be a reasonable prospect of success before an issue is referred to it for decision.

¹⁴⁶See section 102(2).

The role of the Constitutional Court should rather be seen as that of a court of final instance in constitutional matters.¹⁴⁷ The only exception to the role of the Constitutional Court as a court of final instance would be in respect of determining the constitutionality of an Act of Parliament which does not violate or threaten to violate the rights entrenched in Chapter 3 or an Act of Parliament which violates or threatens to violate the entrenched rights but deals with matters of national importance or of a highly sensitive nature, determining disputes over the constitutionality of any Bill before Parliament and determining any dispute of a constitutional nature between organs of state at any level of government.¹⁴⁸

An assignment of determinations of constitutionality to both the Constitutional Court and provincial or local divisions of the Supreme Court would encourage the judiciary at all levels of judicial activity to develop a 'constitutional conscience'. A constitutional conscience contributes to the performance of regular judicial duties, with an eye to a maximum prevention of violations of constitutional guarantees. An exclusion of the jurisdiction of the provincial or local divisions level to determine the constitutionality of Acts of Parliament which violate fundamental rights, which are likely to constitute most violations, will result in a corresponding lessening of constitutional awareness at the provincial or local level of judicial activity.

The exclusion of provincial or local divisions from determining the constitutionality of Acts of Parliament which violate the fundamental rights entrenched in the Constitution may in the long run lead to a development of a high degree of constitutional and human rights awareness at Constitutional Court level and a lesser degree of awareness and vigilance at provincial or

¹⁴⁷See section 98(2).

¹⁴⁸Questions revolving around the division of legislative power between Parliament and provincial legislatures, the constitutionality of Bills before Parliament and any dispute of a constitutional nature between organs of state are highly sensitive matters which are of national importance.

local division level; furthermore, the Constitutional Court may inevitably tend to focus on the constitutionality of a specific, abstract instrument, rather than on a factual situation in relation to which there has been a violation of the provisions of the Constitution. Provincial or local divisions, on the other hand, as courts of first instance, would be in a better position to assess not only the violating legislation but also the relevant factual issues.

An interesting feature of the Constitution's assignment of jurisdiction in respect of the determination of constitutionality is that section 101(5) specifically precludes the Appellate Division of the Supreme Court, which is the highest forum at Supreme Court level, from adjudicating any matter within the jurisdiction of the Constitutional Court. Since the jurisdiction of the Constitutional Court covers virtually all issues of a constitutional nature, section 101(5) effectively excludes the Appellate Division from any determination of constitutionality. This means that the jurisdiction of Appellate Division is now confined to hearing appeals of a non-constitutional nature; if an appeal from a provincial or a local division raises a question of a constitutional nature such an appeal will have to go to the Constitutional Court. This scheme is in line with the idea of a specialised Constitutional Court which has the final say in all matters in which constitutional issues are raised; to give the Appellate Division a final say in such matters would be inconsistent with this scheme. It is somewhat anomalous, however, that a junior ordinary judge of the Supreme Court may adjudicate on violations of fundamental rights, but the most senior judges of appeal, including the Chief Justice, may not do so.¹⁴⁹

¹⁴⁹While the advantage of a Constitutional Court is that as a specialised court it concentrates specifically on constitutional issues, it also has the disadvantage that it may become politicised; the Appellate Division, on the other hand, has the advantage that it is unlikely to be politicised because the judges have wide experience of other 'neutral' aspects of the legal system.

CHAPTER 10

THE ROLE OF THE SOUTH AFRICAN JUDICIARY UNDER THE NEW CONSTITUTION.

1. **Judicial Review and the "Higher Law" Nature of the New Constitution.**

The Constitution is the supreme law of the Republic and any law or act inconsistent with its provisions will, unless otherwise provided expressly or by necessary implication in the Constitution, be of no force and effect to the extent of the inconsistency. This means that the Constitution ranks higher in status than any other law, including Acts of Parliament.

In one of his celebrated judgments, **McCulloch v Maryland**¹, Chief Justice Marshall of the United States Supreme Court summed up the nature of a supreme Constitution and the role of the judiciary in the interpretation and application of its provisions when he said:

"[W]e must never forget that it is a constitution we are expounding;² [it has] great outlines [and] important objects³ [and] intended for ages to come".⁴

¹17 US (Wheat.) 36 (1819).

²At 407.

³**Idem.**

⁴At 415. Although the 1993 Constitution is an interim document, it is largely based on the constitutional principles contained in schedule 4. In terms of section 71(1)(a) of the Constitution the new fully-fledged constitutional text must comply with these constitutional principles.

Chief Justice Marshall was alluding to the fact that a Constitution with supreme authority needs to be interpreted as a supreme law which stands above all other laws and reflects the ideals and aspirations of present and future generations; its provisions are enacted in such a way that they are capable of regulating present and future events.

As an original higher law from which all other laws derive their authority,⁵ a supreme Constitution stands as a standard against which all other laws must be measured. It is an act of faith through which people establish the structure and mechanism of government and also limit the exercise of state authority by guaranteeing the individual fundamental rights which those who exercise the authority of the state must respect.⁶ The government may not, either through ordinary legislation or through executive acts, violate the rights which have been given a higher status through their entrenchment in the Constitution.

The essence of a Constitution as a 'higher law' is that it is based on principles of right and justice which, by virtue of their intrinsic excellence, are superior and valid, regardless of the attitude of those who wield political power at any given time. These principles contain immutable fundamental values which ought to bind the legislative, executive and judicial organs of government.⁷

In practical terms, the nature of the Constitution as a higher law implies that the Constitution is the sum total of the elements of the politico-legal system around which legislative, executive and judicial powers revolve. In relation to the judiciary, this means that the judiciary, as a co-ordinate branch of

⁵B.O Nwabueze **Constitutionalism in the Emergent States** (1973) at 28.

⁶A.R Brewer-Carias **Judicial Review in Comparative Law** (1989) at 96.

⁷E.S Corwin **The 'Higher Law' Background of American Constitutional Law** (1957) at 4-5.

government which is charged with the interpretation and application of the law, must diligently exercise its power to keep the powers of the legislature and the executive within the limits of the Constitution.⁸ The Constitution exists as a real norm which is supreme to the whole political and legal order and therefore ought to control it.⁹

Referring to the role of the judiciary in relation to the Constitution, Alexander Hamilton stated in **The Federalist** that, as a fundamental law which stands above all other laws, the Constitution enjoys preference over ordinary legislation; the courts are duty bound to prefer the meaning of the superior Constitution where there is an irreconcilable variance between its provisions and those of ordinary legislation.¹⁰

The Constitution binds all co-ordinate branches of government and obliges the judiciary to give effect to its superior provisions. This was essentially the basis upon which Chief Justice Marshall held in **Marbury v Madison**¹¹ that the courts were empowered to review Acts of Congress. Chief Justice Marshall considered the supremacy of the Constitution to be one of the fundamental principles of society and reasoned that the essence of judicial duty is to determine the rules that govern the case. He concluded that, in relation to the Constitution, the rule is that the Constitution is superior to ordinary

⁸The supremacy of a Constitution does not necessarily mean that the judiciary is supreme, in the sense that it has substantive judicial review. The power of judicial review is subject to institutional and jurisdictional limits. See Chapt. 5 for a distinction between constitutional supremacy and 'judicial supremacy'; see also **infra** for a discussion of the institutional and jurisdictional limits of judicial review and the democratic dilemma of judicial review.

⁹Brewer-Carias **op cit.** at 97.

¹⁰Alexander Hamilton **The Federalist** (1878), as cited by Brewer-Carias **op cit.** at 99.

¹¹5 US (1 Cranch) 137 (1803).

laws and therefore enjoys precedence over them.

The nature of a supreme Constitution as a higher law distinguishes it from ordinary laws and implies that the Constitution cannot be overridden or modified by them. In preferring and enforcing the provisions of the Constitution a judge merely acts in accordance with the essence of the judicial function to accord pre-eminence to those legal provisions or principles which bind him most. This has nothing to do with judicial activism,¹² since the judge is merely applying the provisions of the Constitution.

The concept of a Constitution as a higher law which contains fundamental principles and values confers on the judiciary the power to expound the Constitution and to review the validity of laws against the yardstick of its superior provisions. When faced with laws which allegedly violate provisions of the Constitution, the judiciary interprets the laws and the provisions of the Constitution to determine, whether these laws fall within the confines of the Constitution or not. Should the laws fall outside the confines of the Constitution, it is the duty of the judiciary to enforce the superior provisions of the Constitution. The overall effect is that arbitrary and excessive exercise of governmental power is controlled.

2. Interpreting the New Constitution.

"Interpretation", according to Cross¹³ "is the process by which the courts determine the meaning of a statutory provision for the purpose of applying it to a situation before them". Constitutional interpretation, however, goes further than that because not only must the meaning of a statutory provision which is alleged to be in conflict with the Constitution be determined, but also

¹²See **infra** for a discussion of judicial activism.

¹³R. Cross **Statutory Interpretation** (1976) at 40.

the meaning of the Constitution on that particular subject.

The traditional approach to the interpretation of legal instruments is generally descriptive, whereby aids of interpretation are set out with a view to using them in practice; these aids are drawn from within the instrument itself and outside it.¹⁴ The basic premise of this approach is that the process of interpretation involves a search for the intention of the author of the instrument from the text of the instrument itself;¹⁵ sources extraneous to the instrument may, however, be consulted in order to shed light on the text when the intention of the author does not appear clearly from the text.¹⁶ Transposed to the interpretation of a Constitution, this approach would mean that the paramount concern of the interpreter is to seek and give effect to the intention of the framers of the document.

2.1. The Intention of the Framers.

The rationale behind the approach that the interpreter must seek and give effect to the intention of the framers is that the values which must be applied and enforced are those values which the framers of the Constitution intended to be applied and enforced; according to this approach, these values are discoverable from the document itself. A question which then arises is: what is actually the intention of the framers?

The English case of **Salomon v Salomon & Co. Ltd**¹⁷, which was concerned with the interpretation of an ordinary statute, provides some indication of what "the intention of the framers" may mean. With reference

¹⁴**Ibid.** at 99-141.

¹⁵**Ibid.** at 99-121.

¹⁶**Ibid.** at 122-141.

¹⁷[1897] AC 22.

to "the intention of the legislature",¹⁸ Lord Watson stated that the phrase is a common but very slippery one

"which, popularly understood, may signify anything from intention embodied in a positive enactment to speculative opinion as to what the legislature probably would have meant, although there has been an omission to enact it. In a court of law or equity, what the legislature intended to be done or not to be done can only legitimately be ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication."¹⁹

What appears to be paramount in the statement of Lord Watson is that the phrase "intention of the legislature" means what the legislature originally intended to convey.

The intentionalist approach was generally accepted in South Africa;²⁰ it uses as its primary source of interpretation the language used in an instrument. In statutory interpretation it is generally accepted that the intention of the legislature should first and foremost be sought in the words used.²¹ In terms of this approach the meaning which the court must give to a statute is that found in the words used in the statute.

¹⁸The 'intention of the legislature', as the phrase is used in the interpretation of ordinary statutes, is not the same as 'intention of the framers', as the phrase is used in the interpretation of a supreme Constitution. While 'intention of the framers' is more concerned with the values the framers intended to be applied, 'intention of the legislature' is concerned with what the legislature intended a phrase or provision of a statute to mean. The similarity between the two is that they emphasise the importance of language as a medium of giving meaning to what was intended. A significant difference between the two phrases is that constitutional language is a distinct form of legislative language: see L. du Plessis & H. Corder **Understanding South Africa's Transitional Bill of Rights** (1994) at 47.

¹⁹At 38.

²⁰For a criticism of the approach see Du Plessis & Corder **op cit.** at 63-67.

²¹See **Union Government v Mack** 1917 AD 731 at 750; **Dadoo Ltd v Krugersdorp Municipal Council** 1920 AD 530 at 554.

In constitutional interpretation the intentionalist approach, which is sometimes called the 'original intent' approach, implies that the Constitution must be interpreted according to its original meaning. The values which the court must apply are those which the framers of the Constitution intended to be applied; these values are discoverable from the language which the framers used in the Constitution.

An obvious difficulty with the language used in the Constitution or a statute is that it is usually not the framers or the legislators, either individually or collectively, who put the words into a statute; this is usually done by draftsmen. Even if it is accepted that draftsmen act as agents of the framers or the legislators and receive instructions from them,²² the words they choose to use may not always accurately reflect what the framers or the legislators actually intended; very few words are capable of being given a single and clear meaning; moreover, words do always not have a fixed and immutable meaning. This is true of all theories based on intention.

Literalism, that is construction according to the primary meaning of words, does recognise the difficulty inherent in the nature of words.²³ As a result, interpretive help is sometimes sought from sources external to the instrument which is being interpreted. These sources include facts known to the framers at the time of enactment and surrounding circumstances, or legislative history.²⁴ Devenish²⁵ notes, however, that the South African approach to statutory interpretation is characterised by an anomalous reluctance to use legislative materials that are remote from the law-making process. He also

²²See **Cross op cit.** at 35.

²³See **R v Venter** 1907 TS 910 at 913.

²⁴See G.E Devenish "External Aids to Construction - Some Inconsistencies and Anomalies in the South African Approach which Obstruct an Unqualified Contextual Methodology in the Interpretation of Statutes" 1991 **THRHR** 58.

²⁵Devenish 1991 **THRHR** at 75.

notes that some external sources such as reports of commissions and surrounding circumstances are used without qualification, whereas some internal sources such as headings and the preamble are used with qualification.

The interpretation of a Constitution is not confined to finding the meaning of a specific constitutional provision; it also involves applying that provision to a factual situation with which the court is confronted. In applying a provision of a Constitution to a factual situation the court must take into account all the underlying values, both expressed and unexpressed. In interpreting a constitutional provision the interpreter should give it a meaning which harmonises it with the whole legal system.²⁶ Contemporary legal principles and values are as much a part of the legal system as the Constitution itself.²⁷

The 'original intent' approach has become a perennial issue in American constitutional law whenever the question of the proper theory of constitutional adjudication arises. Arguments in support of the 'original intent' approach are mainly based on strict originalism and Borkean originalism.²⁸

Strict originalism advocates that judges should apply only those norms that are stated or clearly implicit in the provisions of the Constitution and reflect what the framers thought about specific constitutional issues; these norms are discoverable by having recourse to the historically demonstrable intention of

²⁶H. Stone **Law and its Administration** (1915) at 25; D.V Cowen "The Interpretation of Statutes and the Concept of "the Intention of the Legislature" 1980 **THRHR** 374 at 378.

²⁷See J.M.T Labuschagne "Regsnormvorming : Riglyne vir 'n Nuwe Benadering tot die Tradisionele Reels van Wetsuitleg" 1989 **SA Publiekreg** 202.

²⁸See D.H van Wyk et al **Rights and Constitutionalism** (1994) at 11-18 for a discussion of strict originalism and Borkean originalism.

the framers.²⁹ This approach is based on the argument that the framers presupposed that their intention would be carried out.³⁰ Its justification is that applying those norms originally intended by the framers limits the discretion of judges to the will of the people as expressed in the Constitution and also promotes consistent interpretation.³¹

Borkean originalism, on the other hand, is not premised on a strict adherence to the intention of the framers. According to Bork, "a judge is to apply the Constitution according to the principles intended by those who ratified the document".³² The framers of the Constitution or those who ratified it intended that principles which are neutral in derivation, definition and application must be applied;³³ these principles are found in the language used in the Constitution. Judges must accept the value choices of the legislature unless such choices are clearly contrary to the choices of the framers;³⁴ they can override the wishes of a representative legislature only if they can show by means of principled reasoning that the express words of the Constitution justify such action. Bork argues that originalism preserves the Constitution, the separation of powers and the liberties of the people.³⁵

²⁹R. Berger **Government by Judiciary** (1977) at 1-19.

³⁰Berger **op cit.** at 365-366.

³¹See Van Wyk **et al op cit.** at 12.

³²R. Bork **The Tempting of America - The Political Seduction of the Law** (1990) at 143.

³³See Bork's explanation of originalism at 143-160.

³⁴R. Bork "Neutral Principles and Some First Amendment Problems" 1971 **Indiana LJ** 1 at 10-11.

³⁵(1989) at 159. Bork's concern that non-originalism erodes the separation of powers and does not encourage respect for precedent is justified. This concern cannot, however, be addressed by strictly adhering to the 'original intent' theory. The erosion of the separation of powers is an issue which revolves around defining the proper role of the judiciary in constitutional

Powell³⁶ examines the cultural resources available to the framers of the Constitution and those who ratified the document and which could have been used to conceptualise the task of interpreting a written Constitution and comes to the conclusion that the assumption that the framers of the Constitution or those who ratified it expected that it would be interpreted according to their intentions is historically mistaken. According to Powell, 'original intent', in relation to American constitutional law, is more of a reference to the 'intentions' of the American states party to the constitutional compact concerning the rights and powers which they could delegate to a common agent without destroying their own autonomy, than to the personal intentions of the framers of the Constitution or those who ratified it.³⁷

The major problem of the intentionalist approach is that the intention of the framers, like that of the legislature in ordinary statutory interpretation, is a fiction and is therefore not readily ascertainable. Bork's originalism, for example, immediately raises the problem that it cannot be determined with certainty whether a particular principle of the Constitution is neutral in derivation, definition and application.

According to the American constitutional lawyer Sandalow,³⁸ constitutional law is a means whereby effect is given to the ideals and values which are, from time to time, regarded as fundamental. The Constitution itself is an

decision-making; while respect for precedent brings about legal certainty, it should not be allowed to undermine the application of underlying or unexpressed constitutional values.

³⁶H.J Powell "The Original Understanding of Original Intent" 1985 **Harv. LR** 885.

³⁷Powell 1985 **Harv. LR** at 888 and 948. See also H. Wechsler "Toward Neutral Principles of Constitutional Law" 1959 **Harv. LR** 1 for a criticism of originalism.

³⁸T. Sandalow "Judicial Protection of Minorities" 1977 **Michigan LR** 1162 at 1184.

expression of those ideals and values and constitutes the very fabric of political society; its principles and values are "intended to endure for ages to come, and, consequently, must be adapted to the various crises of human affairs".³⁹

An intentionalist approach is not suited to constitutional interpretation because a Constitution is an instrument *sui generis* which is framed in a broad and inclusive style;⁴⁰ its provisions do not have a fixed meaning; they range from the relatively specific to the extremely open textured. More importantly, however, the questions that may face later generations may not be those that the framers ever thought about or anticipated.⁴¹ A Constitution which operates with supreme authority often contains provisions which invite one to look beyond its four corners;⁴² its provisions are framed in value-laden terms which call for the making of substantive choices between competing values and considerations of unsettled political, moral and social conceptions.⁴³

2.2. Constitutional Interpretation and Fundamental Values.

A supreme Constitution is a fundamental law which embodies basic principles and fundamental values that must be applied to constitutional cases which

³⁹Per Chief Justice Marshall in **McCulloch v Maryland** (*supra*) at 415.

⁴⁰Du Plessis & Corder **op cit.** at 75 and 93. See also L.M du Plessis & J.R de Ville "Bill of Rights Interpretation in the South African Context (3): Comparative Perspectives and Future Prospects" 1993 **Stellenbosch LR** 364 at 365.

⁴¹See T. Sandalow "Constitutional Interpretation" 1981 **Michigan LR** 1033 at 1035.

⁴²See J.H Ely **Democracy and Distrust : A theory of Judicial Review** (1980) at 13.

⁴³See L. Tribe **American Constitutional Law** (1978) at 452.

come before the courts.⁴⁴ It is the function of the judiciary to interpret the Constitution in order to identify, define and evolve those principles and values with a view to applying them to the case at hand.⁴⁵

In his role as interpreter of fundamental values, the judge is confronted by an array of principles, concepts and values from which he may choose. In the first place, he functions as an individual who has his own conceptions and value influences which derive from his own socio-political and educational background as well as from his self-constructed world-viewpoint.

The most important source of fundamental values is the Constitution itself.⁴⁶ However, the values embodied in the Constitution can only have meaning in the light of the concept of constitutionalism. Constitutionalism is a normative concept which prescribes the norms and values of a democratic and constitutional government. Central to this concept is the idea of a limited government which recognises and respects the rights and freedoms of individuals so as to enable them to pursue their legitimate interests to the full. In this sense constitutionalism is libertarian and value-oriented.

Other important sources of fundamental values are international law and foreign law.⁴⁷ These sources become particularly relevant where some of the

⁴⁴Ely *op cit.* at 43; A. Bickel **The Least Dangerous Branch** (1962) at 68 and 109. See H. Botha "The Values and Principles underlying the 1993 Constitution" 1994 **SA Public Law** 233 for a discussion of the source and origin of the values contained in the 1993 Constitution.

⁴⁵Bickel *ibid.* at 55.

⁴⁶Sections 35(1) and 35(3) of the 1993 Constitution specifically call for the application of value judgments: see J. Kruger "Is Interpretation a question of common sense? Some reflections on value judgments and section 35" 1995 **CILSA** 1.

⁴⁷See *infra* for a discussion of international law and foreign law as sources of fundamental values.

provisions of the Constitution are similar to provisions of international instruments or foreign constitutional instruments. Judicial pronouncements and commentaries on international instruments and foreign constitutional instruments that bear a resemblance to the Constitution are therefore useful in the identification and development of constitutional values.

2.2.1. Personal Judicial Values.

It is hardly contestable that in his role as interpreter of the Constitution the judge is not supposed to elevate his personal views regarding fundamental values to the status of the sole measure. His task is that of objectively defining and interpreting those values which are constitutionally justifiable to be applied to a particular case, taking into consideration the particular circumstances of the case.

However, no person, not even a judge, can ever be completely objective.⁴⁸ Like everybody else, judges' conceptions are sometimes formulated against the background of time, culture and personal and ideological influences.⁴⁹ Judicial conceptions cannot always be divorced from the inner subconscious forces which constitute the mental make-up of all human beings.

Criticism of the influence of personal values on judicial decisions in South Africa is not uncommon.⁵⁰ The pro-executive stance of some members of the South African judiciary has been explained in terms of the influence of racial

⁴⁸See D. Basson & H. Viljoen **South African Constitutional Law (1988)** at 265.

⁴⁹H.J Erasmus **Regspleging in die gedrang**, paper read at the University of Stellenbosch, February 1986 at 24-25.

⁵⁰See R. Suttner "The Ideological Role of the Judiciary in South Africa" in J. Hund (ed) **Law and Justice in South Africa** (1988) at 81; B. van Niekerk "... Hanged by the Neck until you are Dead" 1969 **SALJ** 457 and 1970 **SALJ** 60.

and class background as well as legal education and training.⁵¹ Such criticism may not be surprising in a heterogeneous society with different, and often contradictory, value conceptions. It does not follow, however, that because personal values sometimes influence judicial decisions they always shape them. It also does not mean that because one or a few judges allow their personal value systems which are not in line with the values of society in general to influence their decisions, all judges are likely to act similarly.

Personal judicial values are, however, unacceptable precisely because judges, who are appointed and not politically representative, should not run the country by imposing their own values on citizens; the imposition of personal judicial values is inconsistent with democratic theory. The role of judges is to interpret and apply the law in accordance with those principles and values which emanate from and are consistent with the legal system.

Because of their training as lawyers, judges are equipped with the skills to interpret and apply the law objectively and without bias. Judges, therefore, are less likely than the executive or the legislature to be influenced by passion or prejudice. This is one of the important factors which make the judiciary an organ which is best suited to determine the constitutionality of legislative and executive acts.

2.2.2. Constitutionalism and Libertarian Values.

Constitutionalism, it has been noted, implies limited government and prescribes principles which determine the limits of the exercise of government

⁵¹See H. Corder **Judges at Work - The Role and Attitudes of the South African Appellate Judiciary** (1984) at 237 and 238; C.F Forsyth **In Danger for their Talents - A Study of the Appellate Division of the Supreme Court of South Africa** (1985) at 227 and 228.

authority in relation to citizens.⁵² In practical terms, constitutionalism in relation to a Constitution with supreme authority means that the limits prescribed in the Constitution must be observed; it means, in relation to the individual in particular, that the individual must enjoy the full benefit of his rights and freedoms as guaranteed in the Constitution.

The essence of constitutionalism is that good government is based on principles of justice, fairness and freedom; these principles demand that the individual must be treated justly and fairly, and that his rights and freedoms must be protected from arbitrary and excessive exercise of government power.⁵³ To this extent there is a link between constitutionalism, democracy, legitimacy and the rule of law and the **Rechtsstaat** idea. Justice, which is a fundamental value of democratic government, is

"the co-ordination of the diversified efforts and activities of the members of the community and the allocation of rights, powers and duties among them in a way which will satisfy the reasonable needs and aspirations of individuals while at the same time promoting the maximum productive effort and social cohesion".⁵⁴

In so far as constitutionalism prescribes principles of justice, fairness and freedom, it is normative. The entrenchment of fundamental individual rights and freedoms as a means of limiting the exercise of government authority in relation to the individual is an important normative aspect of modern constitutionalism. Constitutionalism as such, therefore, contains fundamental values which ought to be applied in cases which come before the courts.

The theoretical underpinning of individual rights and freedoms can be traced

⁵²See Chapt. 9 for a discussion of the concept of constitutionalism.

⁵³See J. Rawls "Constitutional Liberty and the Concept of Justice" in C.J Friedrich & J.W Chapman (eds) **Justice** (1963) at 23 et seq.

⁵⁴C.R.M Dlamini "Law and Justice: A South African Perspective" 1987 **De Jure** 270 at 271-272.

to the philosophy of natural law. In terms of this philosophy man is imbued with certain inalienable rights.⁵⁵ These rights are fundamental because they are derived from a higher law which is an expression of principles or values against which the validity of positive law can be tested.⁵⁶ Modern man, however, seldom rationalises about, and hardly strives to justify, the concept of rights and freedoms because

"taking rights for granted ... is the mark of he (sic) who has ripened into full civilisation. To such a man rights represent not only legal security, but also morality, social refinement, the highest ethic, a measure for high humanity and a yardstick for pure government".⁵⁷

In the spirit of constitutionalism, the interpretation of the Constitution should be approached in a critical and normative fashion. According to Basson & Viljoen,⁵⁸ positive constitutional law must be evaluated by means of those legal values which are based on a libertarian tradition. These legal values are

"the centuries-old products of history and the religious, philosophical and moral concepts which have developed through the ages and are still valid today. The actualization of these legal values always takes the existing (social, economic and political) circumstances within a particular dispensation at a given time into consideration".

In terms of the concept of constitutionalism, the interpretation of the Constitution must therefore proceed on the basis that, in relation to the exercise of government authority, the individual is the bearer of certain rights and freedoms which ought to operate to limit the arbitrary and excessive exercise of government authority. The function of constitutional law, in

⁵⁵See W.J Hosten, A.B Edwards et al **Introduction to South African Law and Legal Theory** (1995) at 62 et seq.

⁵⁶Basson & Viljoen **op cit.** at 216.

⁵⁷F. Venter "The Western Concept of Rights and Liberties in the South African Constitution" 1986 **CILSA** 99 at 100.

⁵⁸Basson & Viljoen **op cit.** at 1 and 218.

relation to the relationship between the government and the individual, is to determine the scope of government authority and the scope of individual rights and freedoms and to resolve conflicts between the government and the individual.⁵⁹ The relationship between the government and the individual must be based on the fundamental values of justice and fairness, which demand that individuals should be treated justly and fairly and that their rights and freedoms must be protected.⁶⁰

The legal values inherent in the concept of constitutionalism are not foreign to South African law. The South African common law is rich with expressions of commonly shared values and conceptions of reasonableness, fairness and justice.⁶¹ According to Basson & Viljoen,⁶² the legal values underlying the common law are largely based on the value of justice which fosters individual freedom. The Appellate Division in **S v Ebrahim**⁶³ also recognised that the common law embodies fundamental legal principles which maintain and promote individual rights.

2.2.3. International Law and Foreign Law as Sources of Constitutional Values.

The recognition and protection of fundamental human rights is universally accepted today.⁶⁴ According to Lauterpacht,⁶⁵ international law is a source

⁵⁹L. Duguit **Law in the Modern State** (1970) at 20 and 25 et seq.

⁶⁰Basson & Viljoen **op cit.** at 219.

⁶¹See **infra**, section 2.2.4.

⁶²Basson & Viljoen **op cit.** at 265.

⁶³1991(2) SA 553(A) at 582B-C.

⁶⁴See L. Henkin "The Internationalization of Human Rights" in L. Henkin, C. Frankel & R.M Dworkin (eds) **Human Rights : A**

which constitutes the ultimate safeguard of the rights of man. International human rights provisions such as the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as well as decisions of the International Court of Justice and the European Court of Human Rights dealing with human rights violations, provide abundant material from which fundamental values may be sought.

The applicability of international and foreign human rights norms in South African law was not readily accepted in the past. The 1993 Constitution now expressly directs the courts to have regard to applicable international law norms in the interpretation and enforcement of the rights entrenched in Chapter 3.

Section 35(1) of the Constitution provides that the court must

"[i]n interpreting the provisions of this Chapter (Chapter 3) promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law".

In terms of section 231(4)

"[t]he rules of customary international law binding on the Republic, shall, unless inconsistent with this Constitution or an Act of Parliament, form part of the law of the Republic".⁶⁶

The provisions of section 35(1) and section 231(4) are consistent with the

Symposium (1977) at 6.

⁶⁵H. Lauterpacht **International Law and Human Rights** (1950) at 93.

⁶⁶See J. Dugard "The Role of International Law in Interpreting the Bill of Rights" 1994 **SAJHR** 208 at 210-214 for a discussion of the effect of these provisions on South African Law.

principle of harmonisation. According to O'Connell,⁶⁷ "harmonisation assumes that international law, as a rule of human behaviour, forms part of municipal law and hence is available to a municipal judge". O'Connell adds that

"international law and municipal law are concordant bodies of doctrine, each autonomous in the sense that it is directed to a specific, and, to some extent an exclusive, area of human conduct, but harmonious in that in their totality the several rules aim at a basic human good".

From a jurisprudential point of view the decisions of the South African courts support harmonisation.⁶⁸ The decision of the United States Court of Appeals in **Filartiga v Pena Irala**⁶⁹ also supports harmonisation; in this case it was held that certain core provisions of the Universal Declaration of Human rights are part of international customary law. There are other decisions of courts of the United States of America which also support the view that international human rights norms are useful in the search for fundamental values.⁷⁰ Zimbabwean and Namibian courts have also in some instances

⁶⁷D.P O'Connell **International Law** vol. I (1970) at 45.

⁶⁸See J. Dugard "International Law is part of our Law" 1971 **SALJ** 13 at 15; R.P Schaffer "The Inter-Relationship between Public International Law and the Law of South Africa: An Overview" 1983 **ICLQ** 277. Cf. **Nduli & Another v Minister of Justice & Others** 1978(1) SA 893 (A); **Inter-Science Research and Development Services (Pty) Ltd v Republica Popular da Mocambique** 1980(2) SA 111(T); **Kaffraria Property v Government of the Republic of Zambia** 1980(2) SA 709(E). For a contrary view see H. Booysen **Volkereg en Sy Verhouding met die Suid-Afrikaanse Reg** 2nd ed. (1989) at 157; N.J Botha "Municipal Application of International Law: Seizure in Foreign Territory, Terrorism and Self-Defence" 1978 **SAYIL** 170; D.J Devine "Recognition: Newly Independent States and General International Law" 1984 **SAYIL** 18 at 19-20.

⁶⁹1980 **ILM** 966; 630 **Fed. Rep** 876 (1980).

⁷⁰See **Lareau v Manson** 507 **F. Supp.** 1177 (1980); **Fernandez**

made use of international human rights norms as a source of fundamental values.⁷¹ South African courts have, since the coming into operation of the 1993 Constitution, invoked international human rights norms as a guide to the interpretation of the rights entrenched in Chapter 3 of the Constitution.⁷²

The search for and discovery of fundamental values in international human rights norms and foreign law ensures that the interpretation and application of the Constitution is harmonised with universally recognised and accepted practices; it enhances the global concern for the effective protection of the rights of man. According to Lauterpacht,⁷³ the global concern for the rights of man provides an ultimate safeguard of these rights.

Section 35(1) does not, however, mean that the courts must apply all rules of public international law. The court is obliged to apply only those rules which are applicable to the rights entrenched in Chapter 3. These are rules which are concerned with the protection of those fundamental human rights and freedoms

v Wilkinson 505 F. Supp 787 (1980); **Sterling v Cupp** OR 625 P 2d 123.

⁷¹See **S v Ncube; S v Tshuma; S v Ndlovu** 1982(2) SA 702 (ZSC); **S v A Juvenile** 1990(4) SA 151 (ZSC); **Ex Parte Attorney-General, Namibia : In re Corporal Punishment by Organs of the State (Supra)**. See also the Botswanan case of **The Attorney-General v Dow** 1994(6) BCLR 1 (Botswana) at 43J-44J. The Zimbabwean and Namibian Constitutions do not contain provisions which are similar, though not identical, to section 35(1); article 144 of Namibian Constitution provides, however, that, unless the Constitution provides otherwise, the general rules of public international law and international agreements binding upon Namibia under the Constitution form part of the law of Namibia.

⁷²See *inter alia* **Qozeleni v Minister of Law and Order and Another** 1994(1) BCLR 75(E) at 88I; **S v Lombard en 'n Ander** 1994(3) SA 776(T) at 782F-H; **S v Williams and Others** 1995(7) BCLR 861(CC) at 871C-E.

⁷³Lauterpacht **op cit.** at 93.

entrenched in Chapter 3; they are mainly found in international agreements⁷⁴ in which states commit themselves to recognise, respect and promote fundamental human rights for the inhabitants of their own countries.⁷⁵

The directive in section 35(1) to have regard to international law applicable to the rights entrenched in Chapter 3 provides a standard in terms of which the protection of the entrenched rights can be brought in line with international practice. International human rights law is concerned with the promotion and encouragement of fundamental values such as freedom, equality, human dignity, justice and democracy.

The thrust of section 35(1) is the promotion of the values which underlie an open and democratic society based on freedom and equality.⁷⁶ The directive to have regard to applicable international law in essence implies that the court must in interpreting the provisions of Chapter 3 identify and apply those values which, in line with international human rights law, promote the fundamental values of freedom, equality, human dignity, justice and democracy.

The foundational concern of the Constitution is to build

"a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans,

⁷⁴These are agreements such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the African Charter on Human and Peoples Rights.

⁷⁵See J.Lourens & M. Frantzen "The South African Bill of Rights - Public, Private or Both : A Viewpoint on its Sphere of Application" 1994 **CILSA** 340 at 349.

⁷⁶See D. Davis "Democracy - Its Influence upon the Process of Constitutional Interpretation" 1994 **SAJHR** 103 at 120.

irrespective of colour, race, class, belief or sex".⁷⁷

In essence, the 1993 Constitution emphasises the importance of building a new South Africa which is founded on those values which are regarded by the majority of the people as the highest values⁷⁸ which promote the democratic ideal of justification and accountability.⁷⁹ International human rights law has a significant role in the realisation of this goal in that its aim is the recognition and promotion of human rights and democracy based on justification and accountability.

Article 21 of the Universal Declaration of Human Rights, in particular, encourages the building of a democratic state founded on justification and accountability. It provides that everyone has the right to take part in the government of his country directly or indirectly through elected representatives and the right to equal access to public service in his country; it also provides that the will of the people shall be the basis of the authority of government.

Many other international human rights law provisions are relevant to the interpretation of the rights entrenched in Chapter 3 of the Constitution. Article 1(1) of the Declaration and Convention on the Elimination of all Forms of Racial Discrimination, for example, prohibits racial discrimination, based on, *inter alia*, race, colour, descent, or national or ethnic origin, having the

⁷⁷See the postamble entitled "National Unity and Reconciliation". The preamble also refers to "a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms".

⁷⁸See J. Kruger "Die Beregting van Fundamentele Regte Gedurende Die Oorgangsbedeling" 1994 **THRHR** 396 at 398.

⁷⁹See E. Mureinik "A Bridge to Where? Introducing the Interim Bill of Rights" 1994 **SAJHR** 31 at 32.

purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.⁸⁰

Article 8(2) of the Constitution similarly prohibits discrimination based on, *inter alia*, race, ethnic or social origin, colour, culture or language; it does not, however, state what the purpose or effect of the discrimination must be for it to be unconstitutional. In terms of section 35(1) of the Constitution, the court should therefore have regard to article 1(1) of the Declaration and Convention in order to determine whether discrimination having a specific purpose or effect is unconstitutional in terms of section 8(2).

The definition of torture in the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment provides a basis for the interpretation of section 11(2).⁸¹ Article 3 of the European Convention, on the other hand, is relevant in deciding whether corporal punishment is inhuman or degrading and therefore also violates the right to dignity (section 10).⁸² In **S v Williams and Others**⁸³ the Constitutional Court relied, *inter alia*, on article 3 of the European Convention and the decision of the European Court of Human Rights in **Tyrer v United Kingdom**⁸⁴ to determine whether juvenile whipping as a sentencing option was constitutional. The court held that

⁸⁰See G.N Barrie "International Human Rights Conventions: Public International Law Applicable to the Protection of Rights" 1995 **TSAR** 66 at 74.

⁸¹Section 11(2) entrenches the right not to be subjected to torture, cruel, inhuman or degrading treatment or punishment.

⁸²See **S v A Juvenile (supra)** at 156D-F; **Ex Parte Attorney-General, Namibia: In Re Corporal Punishment by Organs of the State (supra)** at 89.

⁸³**Supra** at 871 and 873.

⁸⁴(1979-1980) 2 **EHRR** 19.

juvenile whipping as a sentencing option violated section 11(2) of the Constitution.

An important aspect of international human rights is that it recognises that the protection of human rights is not absolute. Article 29(2) of the Universal Declaration, for example, permits a limitation of the exercise of these rights, provided that the purpose of the limitation is to secure "due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".⁸⁵ The article therefore provides a guideline for the interpretation of the section 33 limitation. It may be said that, in general, a limitation of any of the rights entrenched in Chapter 3 will be "reasonable and justifiable in an open and democratic society based on freedom and equality" and therefore permissible⁸⁶ if its purpose is to recognise and respect the rights and freedom of others and of meeting the requirements of morality, public order and the general welfare in a democratic society.⁸⁷

Most important, however, is the fact that Chapter 3 itself was influenced by international human rights conventions and instruments such as the Universal Declaration of Human Rights, the International Covenant on Economic, Social

⁸⁵Barrie 1995 **TSAR** at 70.

⁸⁶Section 33(1)(a).

⁸⁷Decisions of international courts and tribunals may, however, be of limited value in the interpretation of national limitation clauses because domestic judges and authorities are in a better position than an international judge to assess whether, in terms of the provisions of the Constitution and prevailing circumstances, a limitation of a right is reasonable or justifiable or necessary: see the decision of the European Court of Human Rights in the **Handyside Case**, Judgment of 7 December 1976, A24 (1976) at 22 where it was stated that "[b]y reason of their direct and continuous contact with the vital forces of their countries, State authorities are, in principle, in a better position than the international judge to give an opinion on the exact content of these requirements [of the values or morals] as well as the 'necessity' of a restriction' or penalty' intended to meet them".

and Cultural Rights, the International Covenant on Civil and Political Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁸⁸ Moreover, it is similar to the Covenant on Civil and Political Rights and the European Convention in language and tone. According to Dugard, these international human rights instruments therefore provide an important guide to South African courts in the interpretation and application of the provisions of Chapter 3.⁸⁹

The interpretation and application of a Constitution and the search for fundamental constitutional values is, however, not a haphazard and baseless process; it is a rational process which makes use of legal reasoning and also takes into account the purpose of the specific rights, the wider purpose of the Constitution and the function of law in society. The interpretation and application of the Constitution and law as a whole ought therefore to involve a careful analysis of the Constitution and the law in issue, as well as an examination of the circumstances to which the texts apply.

2.2.4. The Common Law as a Source of Fundamental Values.

The main common law source of South African constitutional law is English common law; however, the Roman Dutch law features of our common law were not supplanted by English law. The common law of South Africa, as derived from Roman Dutch law, is rich in principles that are capable of promoting judicial enforcement of the values enshrined in the new Constitution. These principles are the result of a process of reasoning by jurists over a long period of time and express the commonly shared values and

⁸⁸See Du Plessis & Corder **op cit.** at 47.

⁸⁹See J. Dugard **International Law: A South African Perspective** (1994) at 350.

conceptions of justice, reasonableness and the common good.⁹⁰ They provide standards of reason by which the protection of individual rights and freedoms can be fostered and therefore constitute a sound basis upon which legislation can be interpreted to advance and strengthen the fundamental rights enshrined in the Constitution.

In considering the relevance of common law in the interpretation of statutes, a distinction is made between the common law approach and the plain-fact approach;⁹¹ this distinction is also relevant in the interpretation and application of a Constitution. The plain-fact approach plays down the importance of value considerations in the interpretation and application of legislation and emphasises the intention of the legislature as a paramount consideration. The common law approach, on the other hand, dictates that those principles of the common law which express the commonly shared values of justice, reasonableness and the common good should be applied where legislation which adversely affects the rights and freedoms of the individual is interpreted.

The common law approach has a significant role to play in the interpretation and application of the fundamental rights enshrined in the Constitution. Central to these fundamental rights are values of justice, equality, human dignity and freedom; these values are also inherent in the common law. The dissenting judgment of Gardiner AJA in **Minister of Posts and Telegraphs v Rasool**⁹² emphasises the significance of principles of the common law as a reflection of fundamental values and moral standards.

⁹⁰See J. Dugard **Human Rights and the South African Legal Order** (1978) at 382-383.

⁹¹See Chapt. 4 for a discussion of the two approaches.

⁹²*Supra*.

Rasool was concerned with the validity of an instruction by the Postmaster-General which had the effect of dividing a post office into two sections, one for 'Europeans' and another for 'non-Europeans'. The Postmaster-General had been empowered by Act 10 of 1911 to issue instructions which he "deemed necessary for the carrying out of official duties". A judge in chambers had on the application of Rasool, an Indian affected by the instruction, issued a **mandamus** compelling the Postmaster-General to withdraw the instruction on the ground that it was unreasonable; the full bench of the Transvaal Provincial Division having confirmed the order, the Minister of Posts and Telegraphs appealed to the Appellate Division.

The majority of the appeal judges reversed the decision of the full bench. The majority implicitly relied on the 'separate but equal' doctrine, a doctrine which was adopted by the United States Supreme Court in **Plessy v Ferguson**⁹³ but later rejected in **Brown v Board of Education**⁹⁴, and held that the mere division of a post office into two separate sections did not amount to unequal treatment and was therefore not unreasonable. Gardiner AJA delivered a dissenting judgment.

In his judgment Gardiner AJA took the view that the distinction of persons on the basis of colour was a humiliating treatment which relegated other groups of persons into an inferior order of civilisation; such treatment was an impairment of the dignity of the persons affected. Gardiner AJA invoked the fundamental principle of the common law that in the eyes of the law all men are equal. He harmonised the interpretation of statutes with the protection of the rights of the individual by holding that the court should presume that the legislature and government officials who are involved in the implementation of legislation intend to honour principles of the common law. This approach

⁹³163 U.S 537 (1896).

⁹⁴347 U.S 483 (1954).

implies that courts should always endeavour to interpret legislation in favour of the rights and freedoms of individuals.⁹⁵

The interpretation and application of the Constitution should be harmonised with those principles of the common law which promote the values of reasonableness, justice and the common good in order to give full effect to its letter and spirit and to give individuals the full benefit of its fundamental human rights provisions. Common law presumptions such as the presumption against absurd or anomalous results and the presumption against harshness or unreasonableness could play an important role in the harmonisation process. In an address to Lawyers for Human Rights, Mr Justice Milne recognised that the contents of declarations of human rights overlap with "a great many of the fundamental presumptions that guide our interpretation of what the legislature 'intended'".⁹⁶

The common law approach provides a sound basis for the development of a value-oriented jurisprudence; it provides value-based principles and concepts which can be harmonised with the values enshrined in the Constitution so as to enhance the full protection of human rights and freedoms. Where constitutional values have not yet been properly identified and articulated, the common law approach provides a sound starting point.

2.3. Purpose, Rationality and Teleological Reasoning in the Interpretation of the Constitution.

While the interpretation of a Constitution rests mainly on the meaning of its provisions and the fundamental values which are discoverable from them and other sources, the meaning of these provisions and the application of

⁹⁵See **Nxasana v Minister of Justice** 1976(3) SA 745(D) at 747-748.

⁹⁶**LHR Bulletin** No.3 (January 1984) 43 at 48.

fundamental values are not the sole object of interpretation. Both the Constitution and ordinary laws are enacted with the view of achieving certain goals, purposes and functions which advance the interests of individual members of society and society as a whole. These goals, purposes and functions must be identified and realised in accordance with their relevance and importance. This view presupposes purposive, rational and teleological approaches to constitutional interpretation.

2.3.1. Purpose and Rationality.

According to Devenish,⁹⁷ the purposive approach is based on the **rationale** that an enactment is an inherently purposive communication between the law-maker and the public. In order to bring about this purposive communication, the interpreter must examine all the internal and external sources in the light of the overall context.

The use of purpose in English and South African law is usually associated with the so-called **mischief rule**.⁹⁸ In terms of this rule, the purpose of legislation can be inferred from its historical motivation; the words used can then be read in the light of that purpose. There must, however, be some

⁹⁷G.E Devenish **Interpretation of Statutes** (1992) at 36.

⁹⁸This rule was expounded in **Heydon's case** (1854) 3 Rep. 7a; its essence is that if Parliament has provided a remedy for a specific conduct, situation or defect, the court must consider the conduct, situation or defect and adopt an interpretation which would suppress the mischief and advance the remedy according to the true intent of Parliament. Mischief in this sense means the conduct, situation or defect which Parliament sought to remedy. For an application of the mischief rule in South African case law see **Hleka v Johannesburg Council** 1949(1) SA 842 (A); **Reek NO v Registrateur van Aktes** 1969(1) SA 589 (T); **S v Conifer (Pty) Ltd** 1974(1) SA 651 (A).

ambiguity or obscurity before the mischief rule can be applied.⁹⁹ The application of the mischief rule therefore amounts to a qualified purposive approach.¹⁰⁰

In contrast to the qualified purposive approach, an authentic purposive approach does not depend on the presence of an ambiguity or obscurity for its application; it takes into account the purpose of a statute and all the surrounding circumstances, regardless of the presence or absence of an ambiguity or obscurity.¹⁰¹ The purposive method of interpretation is applied on the European continent¹⁰² and has become increasingly acceptable in the United Kingdom.¹⁰³ Roman-Dutch authority also seems to support an anti-literalist purposive approach.¹⁰⁴

Legislative purpose becomes particularly important when the constitutionality of legislation which deals with the treatment of different classes of persons is in issue. In the United States the Supreme Court has sought to buttress the equal protection clause by first seeking the purpose of legislation and then

⁹⁹Devenish **op cit.** (1992) at 132. See also **Santam Insurance Ltd v Taylor** 1985(1) SA 514 (A) at 526I-527A-G.

¹⁰⁰Devenish **ibid.** at 36.

¹⁰¹**Idem.**

¹⁰²Devenish **ibid.** at 37.

¹⁰³See A. Denning **The Discipline of Law** (1979) at 21; see also the remarks of Lord Diplock in **R v National Insurance Commissioners** [1972] AC 944 at 1005D-E.

¹⁰⁴See L.M du Plessis **The Interpretation of Statutes** (1986) at 36; D.V Cowen "Prolegomenon of a Restatement of the Principles of Statutory Interpretation" 1976 **TSAR** 131 at 144.

asking whether the statute is rationally related to that purpose.¹⁰⁵ The court has held that a statute which treats classes of citizens differently will only be upheld only if it is rationally related to the purpose it seeks to achieve.¹⁰⁶ Where minorities or special groups are involved, the court has required a higher degree of rationality and a compelling interest which justifies the statute.¹⁰⁷

Purpose and rationality have also been used in Canada, the former Bophuthatswana and Namibia as means of determining the constitutionality of legislation which is alleged to discriminate against persons. In **Andrews v Law Society of British Columbia**,¹⁰⁸ the Canadian Supreme Court held that a law which discriminated against a class of persons solely on the basis of lack of some attribute would be invalid if there was no sufficiently rational connection between that attribute and the purpose of the law.

In **Nyamakazi v President of Bophuthatswana**¹⁰⁹ Friedman J, sitting in the Bophuthatswana General Division, applied the rationality and compelling interest tests in order to determine the constitutionality of a law which prohibited non-citizens from participating at political gatherings. The

¹⁰⁵See J. Tussman & J. Ten-Broek "The Equal Protection of the Laws" (1949) 37 **California Law Rev.** 341 at 356-364.

¹⁰⁶See for example **Rinaldi v Yeager** 384 US 305 (1966); **Dandridge v Williams** 404 US 471 (1970); **Eisenstadt v Baird** 405 US 438 (1972); see also Tussman & Ten-Broek 1949 **California Law Rev.** at 343-353.

¹⁰⁷See for example **Shapiro v Thompson** 394 US 618 (1969) at 634.

¹⁰⁸[1989] 1 S.C.R 143. See also in general on the relevance of purpose **R v Big M Drug Mart Ltd** [1985] 1 S.C.R 295; **R v Oakes (Supra)**; **Edward Books & Art Ltd v The Queen (Supra)**. See Chapt. 6 for a discussion of these cases.

¹⁰⁹1992(4) SA 540 (B). See Chapt. 7 for a discussion of this case.

judge held that the prohibition would be permissible if it was rationally related to a legitimate government interest.

The relevance of purpose and rationality in relation to discriminatory legislation also appears from the judgment of Grosskopf JA, sitting in the Appellate Division, in **Cabinet for the Territory of South West Africa v Chikane and Another**.¹¹⁰ The judge of appeal held that a classification which violates the rule against discrimination will be permissible only if it was rationally related to the object which the classifying law sought to achieve.

Although the purposive approach provides a valuable aid to construction in the determination of constitutionality, the purpose of the statute in issue may not be clear, or it may be inconclusive.¹¹¹ Mureinik¹¹² also notes that "if the policy of a statute is iniquitous, a purposive interpretation may well foster iniquity". A difficult situation may also arise where a statute is found to be rationally related to more than one purpose, all of which are controversial and difficult to resolve.¹¹³

The use of purpose is also somewhat limited because the court is likely to frame legislative purpose as a unitary value, whereas there may be many other important values. Fundamental rights which are entrenched in a Constitution are in themselves values which limit the exercise of government authority;

¹¹⁰1989(1) SA 349 (A). See Chapt. 8 for a discussion of this case.

¹¹¹See R. Dickerson **The Interpretation and Application of Statutes** (1975) at 91.

¹¹²E. Mureinik "Administrative Law in South Africa" 1986 **SALJ** 615 at 624.

¹¹³See N.J Singer (ed) **Sutherland's Statutory Construction** (1984) vol. 2A 40 para. 45.09.

they are therefore paramount, if not overriding, indicators to whether a piece of legislation which affects individuals is constitutional or not. Apart from those values which are found in the Constitution itself, there are also those commonly shared conceptions of justice, fairness and common good, and those values which have, through universal recognition and acceptance, come to be regarded as part of all civilised legal systems.

The 1993 Constitution calls for an approach which is wider than the purposive approach. In terms of section 35(1) the court must in interpreting the provisions which guarantee fundamental rights promote the values which underlie an open and democratic society based on freedom and equality; the section also respectively directs and permits the court to have regard to public international law applicable to the protection of the rights entrenched in Chapter 3 and to comparable foreign law.

However, foreign law ought to be used with caution because Constitutions are "born to different countries in different ages and in very different circumstances";¹¹⁴ foreign law should rather be seen as "a tool, not as a master."¹¹⁵ The court should therefore seek guidance from those foreign cases which deal with human rights provisions which are similar to the provisions contained in Chapter 3, such as the provisions of the Canadian Charter of Rights and Freedoms of 1982, the German Basic Law of 1949 and the Namibian Chapter on Fundamental Human Rights and Freedoms in the Constitution of the Republic of Namibia of 1990. Although the Constitution of the United States is different from ours, decisions of United States courts

¹¹⁴Per La Forest J in **Rahey v The Queen** [1987] 39 D.L.R. (4th) 481 at 517. (A similar warning was sounded by Cloete J in **Shabalala and Others v The Attorney-General of Transvaal and Others** 1994(6) BCLR 85 (T) at 117E and Marais J in **Nortje and Another v Attorney-General of the Cape and Another** 1995(2) BCLR 236 (C) at 240H-241E).

¹¹⁵**Idem.**

will be persuasive authority.

The relevance of the phrase "open and democratic society" is not confined only to the interpretation and application of the provisions which guarantee the rights and freedoms of individuals in general; it also operates as a means of determining whether a limitation of the rights entrenched in the Constitution is permissible in terms of section 33(1)(a). By requiring that a limitation of the rights guaranteed in the Constitution must not only be reasonable but must also be justifiable in an open and democratic society, section 33(1)(a) envisages an approach which is wider than the purposive approach; such an approach must take into account all the values which are the hallmark of an open and democratic society and reflect the function of law in society.

2.3.2. The Teleological Approach.

The word 'teleology' comes from the Greek word *telos*, which means an end or design. Teleology as a concept refers to a purpose or design which something is aimed at fulfilling. It is associated with the idea that mechanisms or processes alone cannot explain the facts of nature or life; these can only be explained in full by taking into account the purpose or design which nature or life are intended to fulfil. Explanations of facts in the light of their purpose or design also attempt to show a coherence between these facts and their purpose or design.

Teleological reasoning is also used in statutory interpretation. The teleological approach, however, is not confined to the isolated purpose of an individual statute.¹¹⁶ It is wider than the purposive approach in that it not only revolves around purpose and rationality but also seeks to harmonise purpose as a value

¹¹⁶See Devenish **op cit.** at 39-48; Mureinik 1986 **SALJ** at 623-626; J.M.T Labuschagne "Die Opkoms van die Teleologiese Benadering tot die Uitleg van Wette in Suid- Afrika" 1990 **SALJ** 569.

with other fundamental values such as justice, equity, human dignity, freedom and equality. These values reflect the ideals of democracy and the function of law in society; law is seen as an instrument which serves humanity and not as one which inhibits human endeavour and the legitimate interests of individuals. The essence of the teleological approach, therefore, is that the interpretation and application of a Constitution should have as its aim the maximisation of those values which best advance the legitimate interests of individuals in a just and equitable way. The Constitution is seen as a means of ensuring that citizens are governed in a just and equitable way.

The teleological approach uses as its major premise justice¹¹⁷ and equity,¹¹⁸ in the light of the reason and moral sense of men generally.¹¹⁹ As an approach which involves a moral evaluation, the teleological approach infuses morality into the interpretation of the Constitution and is clearly inconsistent with positivism, which seeks to separate law from morality. By applying the teleological approach, a court recognises that morality provides a standard in terms of which law and its function in society can be understood. The judge's understanding of constitutional values such as equality, liberty, security of the person, property, cruel and inhumane treatment, etc is necessarily shaped by the prevailing morality.¹²⁰

The teleological approach to interpretation takes into account the morality of the whole legal system and harmonises it with, and as a result lends legitimacy to, that system. The ultimate aim of the interpretation of a Constitution is seen

¹¹⁷On the concept of justice see J. Rawls **A Theory of Justice** (1972) at 3-4 and 60.

¹¹⁸See P.V Baker & P. St. J Langen (eds) **Snell's Principles of Equity** (1982) at 5-6.

¹¹⁹See E.T Crawford **The Construction of Statutes** (1940) at 243.

¹²⁰O.M Fiss "Objectivity and Interpretation" 1982 **Stanford LR** 739 at 753.

as one of epitomising just, equitable and good government.

Traces of the teleological approach can be found in some South African judgments. In **Dadoo Ltd & Others v Krugersdorp Municipal Council**¹²¹ Innes CJ spoke in favour of a construction of statutory provisions which least interferes with elementary rights. Innes CJ took the view that this approach "should be applied not only in interpreting a doubtful phrase, but in ascertaining the law as a whole". Innes CJ's reference to "law as a whole" is, on a superficial level, a manifestation of an unqualified contextual methodology, in terms of which interpretation is harmonised with the protection of elementary rights and the spirit of the whole legal system. The only criticism that can be levelled against Innes CJ's judgment is that it specifically refers to the **intent** of the law and appears, on that basis, to be an example of a literal, 'intent' based approach.

Schreiner JA's dissenting judgment in **Collins v Minister of the Interior**¹²² is perhaps the best classic pre-1994 case of a purposive and teleological approach in South African constitutional law. The judgment emphasises the centrality of the overall **purpose** of legislation in the determination of constitutionality. A closer examination of the judgment reveals, however, that it was not premised purely on a narrow purposive approach but also, intrinsically, on a wider teleological or functional approach.

Although Schreiner JA was throughout his judgment concerned with the purpose of the legislation in issue, he also referred to the 'substance' of the Act and drew a careful distinction between an inquiry into the psychological

¹²¹1920 AD 530 at 532.

¹²²**Supra**. See Chapt. 4 for a full discussion of the **Collins** case.

'motive' of the Act and an inquiry into its 'function'.¹²³ Schreiner JA examined the 'purpose', 'substance' and 'function' of legislation in order to arrive at a result which can be considered to be just and equitable in the light of the circumstances of the case; his approach was based on a form of teleological reasoning.¹²⁴

Schreiner JA implicitly recognised that purpose sets a standard for evaluating established practice and provides a source for controlling the exercise of power to bring about just and equitable results. Schreiner JA's approach is functional or teleological in that, in addition to purpose, it makes use of creative reasoning and the moral sense of men to bring about just and equitable results.

That the approach in Schreiner JA's judgment was indeed teleological can be gleaned from his rejection of the respondents' reasoning. The respondents had argued that although the cumulative effect of the two statutes which were in issue was to destroy the voting rights of 'Coloured' persons, the two statutes were, looked at individually, perfectly legally enacted. The judge of appeal rejected this argument as being "contrary to principle". The essence of Schreiner JA's reasoning was that the Constitution made provision for an effective guarantee of voting rights; any legislative scheme in terms of which this effective guarantee was circumvented was contrary to the principle of effective guarantee of these voting rights.

The rejection of the respondents' argument on the basis of **principle** is of particular significance in relation to the protection of fundamental rights, which are based on normative standards. According to Mureinik,¹²⁵

¹²³At 577A-B.

¹²⁴See J. Hund "Aspects of Judicial Review in Southern Africa" 1982 **CILSA** 276 at 277, footnote 6.

¹²⁵Mureinik 1986 **SALJ** at 620.

principles are important normative standards that are not rules; they are values in terms of which rules must be justified.¹²⁶ Unlike a rule, which must be justified for it to have force, a principle derives its strength from its innate moral appeal and influence.¹²⁷

The Constitutional Principles contained in Schedule 4 of the Constitution provide a good example of normative standards; they are values which were identified by the Multi-Party Negotiating Process to serve as a test in terms of which the new constitutional text must be justified. In terms of section 71(1) the new constitutional text must comply with these Principles; furthermore, in terms of section 71(2) the Constitutional Court must certify that all the clause of the new text comply with these Principles.

Viewed in its proper perspective, Schreiner JA's purposive and teleological approach in the **Collins** case was a justification of the constitutional rule contained in sections 35 and 152; the rule contained in these sections was that Parliament could not abolish the voting rights guaranteed in the South Africa Act except through a two-thirds majority of both houses of Parliament in a joint sitting. Schreiner JA justified this rule by invoking the principle that a lawful scheme cannot be used to get around legal obstacles to achieve an unlawful purpose. In his view, the same principle applied where the obstacle was a constitutional protection of voting rights, and the means of achieving the purpose of abolishing this right was a lawful legislative scheme. This view is in line with the idea of justice and fairness in the political process.

¹²⁶Literalists may argue that a rule which is clearly expressed need not be justified. Although there may be no factual need to justify such a rule, there is always a principle which justifies it. The crucial issue in dealing with such an argument is whether the principle which justifies the rule is also clearly identifiable. It is because of this that the purposive approach is preferable; this approach seeks to justify a rule in terms of its purpose, from which the principle that justifies it is derived.

¹²⁷D.M Davis "Integrity and Ideology: Towards a Critical Theory of the Judicial Function" 1995 **SALJ** 105 at 107.

Mureinik¹²⁸ points out that a principle retains its truth and value as part of the legal system as long as there is a single rule of the system that it justifies; together with other principles it constitutes a morality which explains and justifies the whole legal system. It is in this way that Schreiner JA's judgment in the **Collins** case is intrinsically teleological.

The judgment of the majority in the **Collins** case, on the other hand, is characterised by a commitment to known legal rules and artificial reasoning, which tend to limit the scope of interpretation. The judgment proceeded on the basis that the known legal rule was that Parliament must follow the prescribed procedure to enact valid legislation; once it had been shown that the rule had been followed, no other rule became relevant. The contradiction between the "validly" enacted legislation and its purpose, namely to remove Coloured voters from the common voters's roll by a reconstituted Parliament, was resolved through artificial reasoning; once it was found that Parliament had followed the prescribed procedure the purpose of the legislation and the motive behind its enactment became irrelevant.

Nonet and Selznick¹²⁹ have constructed a theory of law which shows the usefulness of teleological reasoning. This theory is based on three modalities of law in society, namely repressive law, autonomous law and responsive law.¹³⁰

Repressive law is characterised by the institutionalisation of class justice; it consolidates and legitimises patterns of social subordination and is mainly preoccupied with the preservation of authority and maintaining a close

¹²⁸Mureinik 1986 **SALJ** at 621.

¹²⁹P. Nonet & P. Selznick **Law and Society in Transition : Towards Responsive Law** (1978).

¹³⁰**Ibid.** at 14-16.

relationship between political power and legal institutions.¹³¹

Autonomous law separates law from politics, inhibits judicial creativity and limits the judicial role to maintaining obedience to rules of positive law.¹³² It reduces the risk of repression through a commitment to a distinctive mission or accountability to external controls but accentuates the separation of law and politics.¹³³

Responsive law, on the other hand, acknowledges the need for integrity or principle within the legal system, while at the same time encouraging openness; it seeks to resolve the tension between integrity and openness. The tension between integrity and openness arises because the one leads to an urgency to achieve accountability through bureaucratic tendencies, formalism and rigidity, while the other leads to an urgency to achieve accountability through "unguided adaptation to events and pressures".¹³⁴

According to Nonet & Selznick,¹³⁵ an institution's commitment to a distinctive mission or accountability to external controls protects its integrity. However, when an institution becomes too wedded to its mission or to accountability, it easily becomes entrapped in formalism and rigidity and loses its capability to cope with new contingencies. Openness, on the other hand, presumes wide grants of discretion and encourages officials to be flexible, adaptive and self-corrective; its danger is that it may easily degenerate into opportunism. Responsive law resolves the tension between integrity and openness by maintaining accountability while at the same time responding to

¹³¹**Ibid.** at 33.

¹³²**Ibid.** at 54.

¹³³**Ibid.** at 57-60.

¹³⁴**Ibid.** at 76.

¹³⁵**Idem.**

new forces within the social order.¹³⁶

To a large extent, Nonet and Selznick's theory solves the problem which advocates of critical legal studies raise and seek to address, namely that of delegitimizing patterns of social subordination in the judicial legal process and the liberal legal order as it exists. Critical legal studies is opposed to repressive law and denies the autonomy or neutrality of law.¹³⁷ Responsive law, like critical theory, is characterised by the need for openness, the possibility of choice, change, reconstruction and development. It recognises that law and society are not fixed but change constantly.

Within the framework of Nonet & Selznick's systems of law the formalistic, mechanical approach to judicial interpretation which is implicit in a system of legislative supremacy can be characterised as consistent with autonomous law and, in the extreme, with repressive law. Both autonomous and repressive law adopt a narrow conception of justiciability and promote judicial deference to the legislature and the executive; they inhibit judicial creativity and confine the judicial role to giving effect to positive law and lack a balance between the need to maintain integrity and the need to respond to new forces within the social order.

Responsive law is functional or teleological in that it recognises that law has social and moral purposes; it responds to society's needs and aspirations in order to promote that which is good or desirable as an end to be achieved; law is seen as an instrument which ought to serve society's needs and aspirations

¹³⁶**Ibid.** at 77.

¹³⁷For an exposition of critical legal theory and critical legal studies see D. Held **Introduction to Critical Theory** (1980); R.W Gordon "New Development in Legal Theory" in D. Kairys (ed) **The Politics of Law: A Progressive Critique** (1982) 281; A. Hunt "The Theory of Critical Legal Studies" 1986 **Oxford JLS** 1; M. Tushnet "Critical Legal Studies and Constitutional Law" 1984 **Stanford LR** 623.

in order to promote the interests of society and its individual members. The general purposes of law, therefore, provide a standard upon which the courts can creatively interpret legislation in order to mitigate its negative impact on individuals and respond to the needs of society and its individual members.¹³⁸

Although the risk of repression is reduced in a system of autonomous law, the judiciary often engages in artificial reasoning¹³⁹ and becomes preoccupied with seeking and enforcing the intention of the legislature. In a system of responsive law the judiciary engages in legal reasoning based on principles such as justice, fairness and security, and principles of democracy.¹⁴⁰ Indeed, principles and standards of morality, even though they may not be stated in legislation, provide authoritative grounds for legal argument and decision¹⁴¹ and help to reduce the arbitrariness of legal interpretation.¹⁴²

The usefulness of the functional or teleological approach in the South African context is that it could help to facilitate a change from the formalistic approach to the interpretation of legislation of the past to a more value-oriented approach which gives full effect to the provisions of the Constitution and reflects the proper role of the judiciary as a co-ordinate branch of government which is capable of actualising the values, ideals and standards of

¹³⁸Nonet & Selznick **op cit.** at 77; J.M Kernochan "Statutory Interpretation : An Outline of Method" (1976-1977) 3 **Dalhousie LJ** 333 at 344.

¹³⁹Nonet & Selznick **op cit.** at 62.

¹⁴⁰**Ibid.** at 80-81; Kernochan 1976-1977 **Dalhousie LJ** at 344.

¹⁴¹See R. Dworkin "The Model of Rules" 1967 **Univ. of Chicago LR** at 22.

¹⁴²Nonet & Selznick **op cit.** at 80.

morality as embodied in the Constitution, and of rising to the changing needs and aspirations of society.

3. **The Scope of Judicial Review of Constitutionality.**

In terms of the doctrine of the separation of powers, only the legislature may legislate. The judiciary may not legislate; its function is to apply the law to cases at hand. A direct question which arises in relation to judicial determination of constitutionality and the separation of powers is: how far may the judiciary go in exercising its power of interpreting and applying the provisions of the Constitution without usurping the function of the legislature? It is hardly open to doubt that in applying the law judges have to interpret the law, and, in doing so, sometimes make law;¹⁴³ this happens even in a system of legislative supremacy.¹⁴⁴ There can also be little doubt that judicially enforceable, open-ended and value-laden human rights provisions create more room for judicial creativity and law-making.¹⁴⁵

The dividing line between judicial interpretation and judicial law-making is very fine. On the one hand, the judiciary is not supposed to legislate, for that is the function of the legislature; on the other hand, judicial interpretation inevitably invites a form of law-making, because it is a creative enterprise which involves the definition of nuances, the filling of gaps and the clarification of ambiguities.

¹⁴³See H.J Abraham **The Judicial Process** (1986) at 338-339; M. Cappelletti "The Law-making Power of the Judge and its Limits: A Comparative Perspective" 1981 **Monash Univ. LR** 15.

¹⁴⁴See Lord Denning **The Discipline of Law** (1979); A Lester "English Judges as Law Makers" 1993 **Public Law** 269.

¹⁴⁵See M. Cappelletti "Judicial Review in Comparative Perspective" 1970 **California LR** 1017.

The controversy surrounding judicial interpretation and judicial law-making essentially revolves around two major concepts which are related to the judicial role, namely judicial self-restraint and judicial activism. The former concept informs us that in order to guard itself against usurping the function of the legislature and acting as a sort of a 'super-legislature', the judiciary ought to restrain itself in the exercise of its power to determine constitutionality and not be too eager to strike down legislation,¹⁴⁶ the latter concept implies that the judiciary fulfils a watchdog role and should therefore creatively and vigorously interpret the Constitution in order to ensure full compliance with its letter and spirit.¹⁴⁷

The problem with judicial self-restraint and judicial activism is that they have not been universally defined; they mean different things to different people. Properly understood, the two concepts are, however, not necessarily inconsistent. The determination of constitutionality not only implies the power to declare legislation invalid; it also involves exercising that power responsibly. The danger that lies within and beyond the exercise of judicial power to declare legislation invalid is that the judiciary may exercise this power beyond permissible or acceptable limits, to the extent of usurping the functions of the legislature and becoming a sort of a 'super-legislature', or may abdicate its function and completely defer to the legislature.¹⁴⁸

3.1. Judicial Self-Restraint.

¹⁴⁶See E. McWhinney **Judicial Review in the English Speaking World** (1969) at 177.

¹⁴⁷**Ibid.** at 178.

¹⁴⁸Judicial deference to the legislature is in a sense also a form of activism which influences the course of law; a judiciary which abdicates its constitutional function and defers to the legislature for policy reasons or political motives in essence actively supports the legislature and undermines constitutional restraints.

Judicial approaches and attitudes to determinations of constitutionality in South Africa will largely determine the course and success or failure of the constitutional entrenchment of human rights and freedoms. Judicial self-restraint, the ability with which judges restrain themselves in the exercise of their power to determine constitutionality, is one of the important aspects which may very well determine that course.

Hiemstra CJ's **dictum** in **Smith v Attorney-General, Bophuthatswana**¹⁴⁹ contains a caution which expresses the need for some form of restraint in judicial determination of constitutionality:

"A court which is over-active in striking down legislation can destroy the exalted instrument it is trying to bring to life, it can incur the resentment of the Legislature and cause the Declaration (of human rights), which was meant to be a charter of freedom, to become a clog upon the wheels of government."¹⁵⁰

Hiemstra CJ was, however, not calling for judicial inaction. He warned later on in his judgment that

"on the other hand the court dare not abdicate its function as upholder of the long term aims and ideals of the Constitution".¹⁵¹

It may be said, therefore, that the essence of judicial determination of constitutionality is a fine balance between judicial activism and judicial restraint.

There is no power which does not call for some form of restraint; unrestrained power eventually becomes autocratic. It is a dictate of prudence that the courts should always, without compromising their power to determine

¹⁴⁹(**Supra**). See Chapt. 7 for a discussion of this case.

¹⁵⁰At 199.

¹⁵¹**Idem**.

constitutionality, be conscious of the need to uphold the Constitution, while at the same time recognising the legal and practical limits of that power, as well as the delicate nature of their relationship with the political branches of government.¹⁵²

Judicial self-restraint ought not, however, be elevated to judicial inaction.¹⁵³ A formalistic approach to the determination of constitutionality is one of the approaches which may lead to an elevation of judicial self-restraint to judicial abdication. Whereas the interpretation of a supreme Constitution which entrenches fundamental human rights requires judges to be creative and to make value choices,¹⁵⁴ a formalistic approach tends to encourage a purely mechanical decision-making process and discourages a voluntaristic, discretionary making of value choices. The formalistic approach can be attributed to the misconceived notion that judges lack the authority and competence to make law; judges do in fact make law in the process of interpretation.¹⁵⁵

A formalistic approach is inconsistent with the spirit of a Constitution which guarantees fundamental human rights. Human rights provisions are couched in wide and open-ended terms which call for greater creativity and, as a result, increase the scope of judicial law-making; they are intended to safeguard the rights of the present generation and future generations and

¹⁵²See B.O Nwabueze **Judicialism in Commonwealth Africa: The Role of the Courts in Government** (1977) at 72.

¹⁵³**Idem.**

¹⁵⁴Cappelletti 1981 **Monash Univ. LR** at 21. According to Cappelletti, the making of value choices involves "evaluation and balancing; it means giving consideration to the choice's practical and moral results; and it means employment of not only the arguments of abstract logic, but those of economics and politics, ethics, sociology and psychology".

¹⁵⁵See S.D Smith "Courts, Creativity and the Duty to Decide a Case" 1985 **Univ. of Illinois LR** 573 at 577-585; Lester 1993 **Public Law** 269.

therefore ought to be adapted to changing circumstances;¹⁵⁶ in giving content to such wide and open-ended terms, judicial law-making is inevitable.

Although judges ought to exercise some restraint in their determination of the constitutionality of laws, there is another important factor which calls for some form of judicial activism. Constitutional guarantees are prohibitions against arbitrary and excessive exercise of power. Non-enforcement of such prohibitions renders them meaningless and makes a mockery of the entrenchment of fundamental human rights. The efficacy of constitutional guarantees depends on "a vigorous, courageous activism on the part of the court".¹⁵⁷

The essence of judicial self-restraint, far from being an invitation to judicial abdication, is that it serves as a reminder that the power to determine constitutionality is not a general licence for striking down laws; it reminds judges that there may very well be instances where individual interests must yield to the legitimate will of elected representatives of the people, especially where there is a compelling state or national interest. Judicial restraint informs the court that the power of judicial review is a power which must be exercised properly and responsibly; it implies that judicial power, like any other power, has both legal and practical limits. Justice Frankfurter meant precisely this when, quoting Madison's phrase, he said that "all power is 'of an encroaching nature'" and admonished that "[j]udicial power is not immune against this human weakness. It must be on guard against encroaching beyond its proper bounds, and not the less since the only restraint upon it is self-restraint".¹⁵⁸

¹⁵⁶Cappelletti 1981 **Monash Univ. LR** at 41.

¹⁵⁷C.L Black **The People and the Court** (1960) at 100.

¹⁵⁸Per Justice Frankfurter, dissenting in **Trop v Dulles** 356 US 86 (1958) at 113.

Precisely what the proper limits of judicial power are, is not clear. Abraham¹⁵⁹ provides some pointers to the essence of judicial self-restraint; he has identified sixteen "maxims of judicial self-restraint."¹⁶⁰ These maxims may appropriately be divided into two broad categories, namely institutional or jurisdictional limits and political limits.

3.1.1. Institutional or Jurisdictional Limits.

Institutional or jurisdictional limits are those which are inherent in the function of the judiciary as a specialised and unique organ of government. As an organ of government which is concerned with the resolution of disputes of a legal nature, the judiciary has certain attributes which define its composition, its manner of operation and its objective within the whole structure of government.

First and foremost, the judiciary, as an institution of government which is charged with the resolution of disputes, does not have the power to initiate the process of litigation or determination of constitutionality; it has to wait for a dispute to arise and for parties to the dispute to approach it for a resolution of the dispute.¹⁶¹ This lack of initiative implies certain limitations on judicial power; these limitations are related to both the dispute and the parties to the dispute.

Before the court can entertain a complaint, it must be satisfied that there is a real and substantial dispute and not merely a trivial or fanciful one. In relation to the determination of constitutionality, this means that before the court can

¹⁵⁹**Op cit.** at 369-392.

¹⁶⁰See also Justice Brandeis' judgment in **Aswander v Tennessee Valley Authority** 297 US 288 (1936) for some of the rules of judicial self-restraint.

¹⁶¹See Nwabueze **op cit.** at 49.

entertain a matter it must be satisfied that there is a definite case or controversy at law or in equity between **bona fide** adversaries under the Constitution, involving the protection or enforcement of valuable legal rights, or the punishment, prevention or redress of wrongs directly concerning the party or parties bringing the justiciable suit.¹⁶² This is the most fundamental limitation upon the power of the judiciary to determine constitutionality.¹⁶³ It implies that the court, as a distinct and specialised institution, should restrain itself from getting involved with trivial, fanciful, abstract or contingent issues.¹⁶⁴ The institutional function of the judiciary is to determine and resolve real, concrete and justiciable issues.

The requirement that there must be an actual controversy also implies that the court does not ordinarily render advisory opinions upon hypothetical facts. As an institution with a specific purpose, its function is to resolve legal disputes by rendering declaratory judgments which are final and binding on existing parties to a dispute.¹⁶⁵

¹⁶²Abraham **op cit.** at 369. However, some jurisdictions permit of a greater degree of abstract review even when there is no clear case or controversy.

¹⁶³R.H Jackson **The Supreme Court in the American System of Government** (1955) at 11. The American system provides for concrete review only.

¹⁶⁴**Ibid.** at 12.

¹⁶⁵The South African Appellate Division may, however, in appropriate cases render opinions even when there are no existing parties to a dispute: see section 333 of the Criminal Procedure Act, 51 of 1977 and section 23 of the Supreme Court Act, 59 of 1959. Such opinions are intended for future guidance and to ensure the proper administration of justice. The 1993 Constitution does not make express provision for the request of an opinion from the Constitutional Court by a Minister or some other official where a constitutional issue of importance has arisen and no person has approached the court for a determination of constitutionality. Section 7(4)(v) can, however, be interpreted as empowering a Minister or an official of the State, such as the Attorney-General, to seek an opinion of the Constitutional Court or a local or provincial division of the Supreme Court where an infringement of or threat

Logically associated with the requirement that there must be an actual dispute is the requirement that the parties must have **locus standi** to bring the suit.¹⁶⁶ In South African law this requirement was associated with the non-recognition of the **actio popularis** of Roman law, whereby every person was entitled to challenge the validity of government activity to ensure due performance.¹⁶⁷

South African courts have required that for a party to have **locus standi** he or she must have a direct and substantial interest, although it need not be a special interest.¹⁶⁸ This requirement led to a denial of **locus standi** in cases where an individual sought to challenge in the broader general interest action which threatened the environment, such as air or water pollution.¹⁶⁹

A strict requirement of **locus standi** inhibits the participation of interest groups and the general public in ensuring that the government must honour the

to any of the rights entrenched in Chapter 3 is alleged. Another instance where a public official may approach the court for a determination of constitutionality is in relation to the constitutionality of a Bill before Parliament or a provincial legislature (section 98(2)(d), read with section 98(9)). The 1993 Constitution therefore makes provision for a measure of abstract review; it is more reminiscent of the German than the American Constitution.

¹⁶⁶See Abraham **op cit.** at 370.

¹⁶⁷See J.D van der Vyver "Actiones Populares and the Problem of Standing in Roman, South African Law and American Law" 1978 **Acta Juridica** 191; see also **Director of Education, Transvaal v McCagie** 1918 AD 616 at 621.

¹⁶⁸See L. Baxter **Administrative Law** (1984) at 650 et seq.; C. Loots "Locus Standi to claim relief in the public interest in matters involving the enforcement of legislation" 1989 **SALJ** at 131-132; C. Loots "Standing to Enforce Fundamental Rights" 1994 **SAJHR** 49.

¹⁶⁹See Baxter **op cit.** at 658 et seq.; Loots 1989 **SALJ** at 132 et seq. and 141 et seq.

values enshrined in the Constitution. There may be instances where a government activity violates one or more of the rights entrenched in the Constitution, but does not affect any specific individual or affected individuals do not approach the court for relief; in such instances an interest group or somebody else may wish to challenge the offending government action in order to ensure due performance.

Section 7(4)(b) of the 1993 Constitution liberalises **locus standi** in relation to the protection and enforcement of the rights entrenched in Chapter 3 of the Constitution; it extends **locus standi** to a wide range of litigants in instances where violations or threatened violations of the rights entrenched in Chapter 3 are alleged.¹⁷⁰ This extension promotes the fundamental value of justice and is therefore to be welcomed.¹⁷¹

In addition to persons who act in their own interest, an association acting in the interest of its members, a person acting on behalf of another person who is not in a position to seek relief in his or her own name, a person acting as a member of or in the interest of a group or class of persons or a person acting in the public interest, now have **locus standi** where a violation or an alleged violation of any of the rights entrenched in Chapter 3 is alleged. These extensions of **locus standi** in essence introduce the **actio popularis** in the field of human rights law and are particularly relevant in those instances where government action threatens the environment.¹⁷² Section 7(4)(b) does not, however, contain any measure to prevent frivolous litigation; the courts have,

¹⁷⁰Rule 9(1) of the Constitutional Court Rules also makes provision for the admission of a person in a matter before the court as **amicus curiae**; the written consent of the parties is, however, required.

¹⁷¹See Loots 1994 **SAJHR** at 49-51 for a discussion of the significance of extending **locus standi**.

¹⁷²See E. Bray "The Liberation of **Locus Standi** in the Interim Constitution : An Environmental Angle" 1994 **THRHR** 481.

however, in the past developed mechanisms to prevent such litigation.¹⁷³ In addition, the rules of the Constitutional Court also serve to contain the volume of cases.¹⁷⁴

Another self-imposed restraint is the requirement that a litigant must exhaust all available remedies before he can approach the court for relief.¹⁷⁵ This requirement is of particular significance in relation to judicial control of the exercise of administrative powers;¹⁷⁶ thus, where an administrative structure itself provides for some form of redress or appeal, an individual affected by its action is required to exhaust those remedies before he can approach the court for relief.¹⁷⁷ The remedies may, however, be external in the sense that another organ which is not related to the violating organ is also empowered to consider the dispute (another tribunal, for example), in which case a litigant will not be heard by the court before the matter has been exhaustively dealt with by the lower tribunal.

The requirement that a litigant must exhaust all available remedies is closely related to the requirement that only those issues which have been substantially raised in the court *a quo* are appealable. The Constitutional Court will, on this

¹⁷³See D. Basson **South Africa's Interim Constitution** (1994) at 21. It may be required, for example, that the applicant must show why a person whose rights are affected is not able to approach the court personally and that had he been in a position to do so he would have done so: see **Wood v Ondangwa Tribal Authority** 1975(2) SA 294 (A) at 311G.

¹⁷⁴Government Notice R1584 published in Regulation Gazette 5394 of 16 September, 1994 and repealed and replaced by Government Notice R5 published in Regulation Gazette 5450 of 6 January 1995.

¹⁷⁵**Abraham op cit.** at 377.

¹⁷⁶Judicial control of the exercise of administrative powers becomes particularly relevant in the constitutional law context in the light of the entrenchment of administrative justice in section 24 of the Constitution.

¹⁷⁷See M. Wiechers **Administrative Law** (1985) at 270-275.

basis, be able to refuse to consider an appeal involving a constitutional issue from a provincial or local division unless it is satisfied that a question constituting an appropriate ground for a determination of constitutionality by these divisions as envisaged in section 101(3) of the Constitution has been raised, argued and decided.¹⁷⁸ The power of review is also restrained in that the court will express itself only on a matter in issue; even when a peripheral issue of major importance is raised the court can simply leave the matter undecided.¹⁷⁹

The court may also restrain itself from coming to the relief of an individual where he has accepted state action which violates his rights or where he has availed himself of the benefits of the action.¹⁸⁰ The essence of this form of self-restraint is that if a person accepts an act or its benefit, it can hardly be said that he is prejudiced by its operation.

3.1.2. Political Limits.

'Political limits', in the sense in which the phrase is used here, refers to those limits which are based on judicial respect for the legislature and the executive as the political branches of government; the legislature, in particular, is traditionally regarded as the branch best suited to make laws. The traditional view that the legislature is the organ which is best suited to make laws is based on the view that, as a body elected by the people and representing them,

¹⁷⁸See **Abraham op cit.** at 377 in relation to the position in the United States. It is clear from the Constitutional Court Rules that the court will entertain a matter only if it is satisfied that the matter has been fully canvassed and dealt with in the local or provincial division of the Supreme Court. Rule 18(e)(ii) requires a judge or judges of any of these divisions to certify that "the evidence in the proceedings is sufficient to enable the Court to deal with and dispose of the matter without having to refer the case back to the division for further evidence".

¹⁷⁹The court may, however, comment **obiter**.

¹⁸⁰**Abraham op cit.** at 377.

it is the proper body to make laws which should govern the people; theoretically, the legislature has a mandate from the people to make laws as it deems fit. According to Lord Hailsham, the legislature is an 'elective dictatorship' whose powers "are restrained only by the consciences of its members, the checks and balances of its different members and the need, recognised in practice if capable in theory of being deferred, for periodic elections".¹⁸¹

In terms of the conception that the function of law-making traditionally falls within the domain of the legislature, law-making is seen as a political process which ought to be left to the judgment of those politicians who have been elected, and therefore mandated, by the people to make laws which ought to govern them. The judiciary is an appointed and non-elected body which can make no valid claim to having a popular mandate and therefore ought not to make law; its prestige and public standing depend on its political non-involvement and the extent to which it is able to stand aloof from the mainstream of politics.¹⁸² Members of the judiciary are generally regarded as being not well-equipped for the determination of purely political controversies.¹⁸³

This conception is associated with the idea that courts should decide disputes on principle and leave policy issues to politicians. It says much about the supposed limits of judicial power and the relationship between the judiciary and the political branches of government; it constitutes one of the bases upon which judges may restrain themselves in the exercise of their power to

¹⁸¹Lord Hailsham **The Dilemma of Democracy - Diagnosis and Prescription** (1978) at 126.

¹⁸²See E. McWhinney "The Supreme Court and the Bill of Rights - Lessons in Comparative Jurisprudence" 1959 **Can. Bar Rev.** 16 at 34-35; Bickel **op cit.** at 172.

¹⁸³McWhinney 1959 **Can. Bar Rev.** at 35.

determine constitutionality. It implies, in essence, that there are certain "conditions and purposes that circumscribe judicial action".¹⁸⁴ These limits dictate that the judiciary ought to show a measure of respect for political will; they are self-imposed limits which seek to draw a line between the political playing field and the judicial playing field. Chief among these limits are the 'political question' doctrine, the presumption of constitutionality and the non-imputation of illegal motives to the legislature.

3.1.2.1. The 'Political Question' Doctrine.

The phrase 'political question' refers to those issues which, although of a legal nature, impose a duty which is peculiarly political; their observance depends upon legislative or executive fidelity.¹⁸⁵ However, whether a particular issue which the court is called upon to decide is a 'political question' may be controversial because almost every constitutional question or issue is to some extent political.¹⁸⁶

The 'political question' doctrine has received prominent attention in American constitutional law. Until the decision in **Baker v Carr**,¹⁸⁷ the United States Supreme Court for a long time consistently refused to determine the constitutionality of constitutional and legislative delimitation or apportionment of state or congressional districts, holding that such issues were political

¹⁸⁴Nwabueze **op cit.** at 25.

¹⁸⁵Nwabueze **op cit.** at 25; E.S Corwin **The Supreme Court and Political Questions** (1936) at 11.

¹⁸⁶Nwabueze **op cit.** at 25-26; Abraham **op cit.** at 380. De Toqueville aptly noted that "there is hardly a political question in the United States that does not sooner or later turn into a judicial one": see J.P Mayer (ed) **Democracy in America** (1969) at 270.

¹⁸⁷369 US 186 (1962).

questions.¹⁸⁸ According to Justice Frankfurter, one of the chief proponents of the 'political question' doctrine, the court should not become involved in a "patently political question"; to Justice Frankfurter, political questions were a 'political thicket' which was the exclusive domain of legislatures.¹⁸⁹

Baker v Carr¹⁹⁰ represents a turning point on the question whether the delimitation or apportionment of districts is a non-justiciable 'political question' or not. Justice Brennan, who wrote the judgment of the court, held that the delimitation or apportionment of districts was a justiciable controversy in respect of which the court has jurisdiction.¹⁹¹

Justice Brennan's opinion in **Baker v Carr** was that the political question doctrine was confined to a function of the separation of powers. He elaborated this view in the following terms:

"Prominent on the surface of any case held to involve a political question is found a textually demonstrable commitment of the issue to a co-ordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking an independent resolution without expressing lack of respect

¹⁸⁸See Abraham **op cit.** at 381.

¹⁸⁹See Justice Frankfurter's judgment in **Colegrove v Green** 328 US 549 (1946) and his dissenting judgment in **Baker v Carr** (*supra*).

¹⁹⁰**Supra**. For later cases in which **Baker v Carr** was followed see *inter alia* **Gray v Sanders** 372 US 368 (1963); **Wesberry v Sanders** 376 US 1 (1964); **Reynolds v Sims** 377 US 533 (1964).

¹⁹¹It is conceivable that the South African Constitutional Court may be called upon to deal with the question of demarcation of provinces. The existing boundaries of the provinces were accepted on the basis that there would be further discussion and that a process which allows for an amendment of the boundaries would be put in place; see C de Coning "The Territorial Imperative : Towards an Evaluation of the Provincial Demarcation Process" in B. de Villiers **Birth of a Constitution** (ed) (1994) at 189, especially at 216-219.

due to co-ordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."¹⁹²

American constitutional scholars, however, hold divergent views on the 'political question' doctrine. The views of Wechsler and Bickel represent the two divergent streams of thought. According to Wechsler,¹⁹³ the doctrine implies that "the courts are called upon to judge whether the Constitution has committed to another agency of government the autonomous determination of the issue raised, a finding that itself requires an interpretation", but which is "toto caelo different from a broad discretion to abstain or to intervene".¹⁹⁴ Bickel,¹⁹⁵ on the other hand, rejects Wechsler's view about the interpretation of the Constitution and the court's discretion whether to abstain from determining political questions or to intervene where a political question is involved; he argues that "only by a play of words can a broad discretion that the courts have in fact exercised be turned into an act of constitutional interpretation".¹⁹⁶

In Bickel's view, the political question doctrine can be explained in terms of the very nature of the judicial process. According to him political questions are not justiciable because of

"the court's lack of capacity, compounded in unequal parts of the strangeness of the issue and the suspicion that it will have to yield more often and more substantially to expediency than to principle; the sheer momentousness of it, which unbalances judgment and prevents one from

¹⁹²At 217.

¹⁹³H. Wechsler "Toward Neutral Principles of Constitutional Law" 1959 **Harv. LR** 1.

¹⁹⁴Wechsler 1959 **Harv. LR** at 7-9.

¹⁹⁵A. Bickel "The Supreme Court, 1960 Term-Foreword: The Passive Virtues" 1961 **Harv. LR** 40.

¹⁹⁶Bickel 1961 **Harv. LR** at 46.

subsuming the normal calculations of probabilities; the anxiety not so much that judicial judgment will be ignored, as that perhaps it should be but will not; finally and in sum (in a mature democracy), the inner vulnerability of an institution which is electorally irresponsible and has no earth to draw strength from".¹⁹⁷

Bickel's view about the political question doctrine is based on the separation of powers and judicial prudence in relation to institutional functions of the coordinate branches of government. This view emphasises the political function of the legislature and the executive as well as the 'passive virtues'¹⁹⁸ and the techniques of prudence through which the courts exercise a discretion to abstain from determining issues of a highly political nature as an important aspect of the 'political question' doctrine. In terms of this view, policy issues whose determination cannot be based on principle should rather be left to the political branches of government.

Although both the separation of powers and respect for political branches of government are necessary ingredients of democracy, an unbridled discretionary abstention from the determination of justiciable controversies may turn into judicial abdication. An explanation of the 'political question' doctrine strictly in terms of the separation of powers poses the danger of judicial avoidance of determinations of constitutionality simply because a case has a political undertone or serious political implications.

Nwabueze¹⁹⁹ warns about "the disturbing implication that the political question doctrine might be extended to 'infinite' categories of questions". The danger of the doctrine in relation to constitutionally entrenched rights and freedoms is obvious; when an uncontrolled discretion, grounded only on prudence, is used to abstain from determining the constitutionality of

¹⁹⁷Bickel 1961 **Harv. LR** at 75. See also Bickel **op cit** (1962) at 172.

¹⁹⁸Bickel 1961 **Harv. LR** at 69-71; **passim**.

¹⁹⁹**Op cit.** at 38.

justiciable violations of fundamental rights and freedoms, the constitutional entrenchment of these rights and freedoms loses much of its meaning. An extension of the political question doctrine to shelter legislative and executive violations of constitutionally guaranteed rights and freedoms opens the door wide to judicial abdication.²⁰⁰

The 'political question' doctrine should rather be seen as nothing but a matter of justiciability.²⁰¹ It simply means that there are no judicially cognisable standards for a claim of unconstitutionality; there is simply no justiciable issue. To say that there is a political question is no different from saying that there is no constitutional violation, either in law or on the merits. One may therefore be tempted to say that there is in reality no 'political question' doctrine.²⁰²

3.1.2.2. The Presumption of Constitutionality, Non-imputation of Illegal Motives and Legislative Wisdom .

These forms of judicial self-restraint are related. They are largely based on the courts' respect for legislative wisdom, integrity and patriotism. Like the 'political question' doctrine, they have as their basis the idea that the function of the judiciary is to decide cases on principle and that policy issues should be left to the political branches of government; according to this idea, it is therefore not the function of the judiciary to question the wisdom, integrity and patriotism of the legislature; that function falls within the political process and not within the judicial process.

²⁰⁰**Ibid.** at 39.

²⁰¹**Ibid.** at 37-39.

²⁰²See L. Henkin "Is There a 'Political Question' Doctrine?" 1976 **Yale LJ** 597.

The presumption of constitutionality is based on the notion that an elected legislature represents the will of the people; legislation, as an expression of the will of the people through their elected representatives, ought not to be easily tampered with, unless it can clearly be shown that such legislation violates another superior expression of the will of the people, namely the Constitution which sets out the powers of government and also limits the exercise of such power in relation to the individual.

The operation of the presumption of constitutionality in relation to judicial determination of constitutionality implies that, since legislation is an expression of the will of elected representatives of the people, the court should assume in favour of constitutionality. It is said that when courts assume in favour of constitutionality they allow the ordinary political process to take its course, in the sense that if the legislation in issue is regarded as undesirable it will be repealed or amended by the elected representatives;²⁰³ furthermore, elected representatives who constantly enact unpopular legislation always run the risk of not being re-elected.

Speaking about the presumption of constitutionality, Justice Bushrod Washington of the United States Supreme Court said:

"It is but a decent respect to the wisdom, integrity, and patriotism of the legislative body, by which any law is passed, to presume in favour of its validity, until its violation of the Constitution is proved beyond a reasonable doubt."²⁰⁴

Justice Washington expressed the same view about the presumption of constitutionality in **Cooper v Telfair**²⁰⁵ when he said:

²⁰³See McWhinney **Judicial Review** (1969) at 179.

²⁰⁴**Ogden v Sanders** 12 Wheat. 213 (1827), as quoted in Abraham **op cit.** at 385.

²⁰⁵(1800) 4 Dallas (4 US) 14, as quoted in A.R Brewer-Carias **Judicial Review in Comparative Law** (1989) at 351, footnote 4.

"The presumption indeed must always be in favour of the validity of laws, if the contrary is not clearly demonstrated."

What appears from Justice Washington's **dicta** is that the presumption of constitutionality essentially implies that the court will not readily declare legislation invalid, unless the party alleging invalidity clearly shows that the act or law in issue prejudicially affects his rights and freedoms in contravention of an existing constitutional provision. The initial **onus** of showing that an act or a law violates a constitutionally entrenched right rests on the challenger and not on the organs of state;²⁰⁶ once a violation has been shown the state bears the onus to justify it.²⁰⁷

Whether the presumption of constitutionality is, in its wider sense, applicable in each and every instance may be problematic. Justice Harlan Stone, in the **Carolene Products** footnote,²⁰⁸ implied an exception to the presumption when he stated that there may be a narrower scope of operation of the presumption when challenged legislation involves a restriction or curtailment of the ordinary political process or rights within a specific prohibition of the Constitution. Justice Stone had in mind legislation involving, for example, a curtailment of the right to vote, or specific prohibitions such as the prohibition of discrimination on the basis of race, sex, religion etc; in such instances the operation of the presumption of constitutionality may be limited in the sense that the state would be required to show the existence of a compelling state

²⁰⁶Cf. **Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd** 1984 (2) SA 778 (ZS) at 783H.

²⁰⁷See Chapt. 6 where the analytical framework used to measure constitutionality, as laid down in **R v Oakes (Supra)**, is discussed.

²⁰⁸**United States v Carolene Products Co. (Supra)** at 152-153, footnote 4.

interest to justify constitutionality.²⁰⁹

It does not seem, however, that the **Carolene Products** footnote exception to the presumption of constitutionality implies a deviation from the requirement that the **onus** of showing that an act or law violates constitutionally entrenched rights lies on the challenger. What the exception amounts to is that once the challenger proves a violation of any of those rights which are related to the political process or which form part of specific prohibitions of the Constitution, the presumption of constitutionality falls away; in such instances a compelling state interest is required to justify constitutionality. Justice Stone's implied exception was also, in another sense, a **caveat** against an extremely strict application of the presumption, which might be inappropriate in cases involving certain fundamental rights and freedoms which constitute the very essence of democracy.

Much in the same way as the presumption of constitutionality reflects the courts' respect for legislative wisdom, integrity and patriotism, so does the courts' unwillingness to impute illegal motives to the legislature. The courts will always assume that the legislature acted with good motives.²¹⁰

The basic premise for the non-imputation of illegal motives is that as long as the legislature acts within its constitutional powers, the court has no authority to question the motives behind the exercise of that power.²¹¹ The court is

²⁰⁹This corresponds to the section 33(1) limitation requirements, namely that a limitation of any of the rights entrenched in Chapter must be reasonable and justifiable in a democratic state based on freedom and equality. A state interest will generally be regarded as 'compelling' if it is reasonable and justifiable in a democratic state based on freedom and equality. However, although factors which indicate the existence of a 'compelling state interest' may also indicate that a state of affairs is 'reasonable and justifiable in a democratic state', the two phrases are not synonymous.

²¹⁰Abraham **op cit.** at 387.

²¹¹**Idem.** See **Barenblatt v United States** 360 US 109 (1959).

supposed not to consider the motives of the legislature at all.²¹² Motive should, however, be distinguished from **intent** and **purpose**, concepts with which the courts often grapple in the interpretation of legislation.

The exercise of judicial self-restraint in order to respect the wisdom, integrity and patriotism of the legislature upholds, in an indirect way, the separation of powers. The legislature, being the elected representative of the people, is presumed to possess the necessary wisdom, integrity and patriotism to make good laws; unless there is a clearly demonstrable violation of a provision of the Constitution, the court ought to refrain from replacing legislative wisdom with its own.²¹³

3.1.3. Judicial Self-restraint and a Policy of Avoidance.

On closer scrutiny, some instances of judicial self-restraint may reveal a policy of avoidance, whereby judges deliberately avoid the determination of justiciable constitutional disputes simply because they do not want to offend the legislature or the executive. According to Justice Frankfurter, a proponent of a policy of avoidance, "[t]he most fundamental principle of constitutional adjudication is not to face constitutional questions but to avoid them, if at all possible".²¹⁴

Adherents to a policy of avoidance regard this policy as prudent; they base the legitimacy of judicial review on the assumption that the court should not only perform its function in a principled and sober manner but should also avoid

²¹²Abraham **op cit.** at 388.

²¹³Under the general concept of legislative wisdom may also be mentioned the courts' reluctance to check inept, unwise, emotional or unrepresentative legislators. Such issues are best resolved through the political process and not through the legal process: see Abraham **op cit.** at 292.

²¹⁴See **United States v Lovett** 328 US 303 (1946) at 320.

engaging in sensitive issues.²¹⁵ They argue that the court may legitimately refrain from deciding a constitutional issue if it in its prudence thinks this is the proper course to follow.²¹⁶

The problem with avoiding the determination of constitutional issues simply on the grounds of prudence is that it negates the basic notion that the fundamental function of the court is to determine justiciable issues properly before it, regardless of the sensitivity of the issue. Part of the function of the judiciary involves the determination of questions which are relevant to the outcome of the dispute before it.²¹⁷ It is one thing to say that an issue is simply not justiciable, but to avoid the determination of a justiciable issue simply because it is prudent to avoid engaging in sensitive issues, is tantamount to judicial abdication.

Judicial avoidance is improper because it takes away the individual's means of protecting his constitutionally guaranteed rights against government excesses; the judiciary is the only institution which stands between the individual in his quest to pursue his constitutionally recognised interests and the state in the exercise of its power. It is improper for a court to avoid a determination of justiciable constitutional issues when the Constitution confers upon it the power to do so; the Constitution itself, as the ultimate will of the people,²¹⁸ specifically mandates and directs the courts to determine the constitutionality of acts of the elected representatives of the people.

²¹⁵See Bickel *op cit.* (1962) at 67-71.

²¹⁶See F.W Scharff "Judicial Review and the Political Question: A Functional Analysis" 1966 *Yale LJ* 517 at 520.

²¹⁷*Idem.*

²¹⁸The question of the extent of judicial power to determine constitutionality is a complex and difficult one and revolves around judicial creativity and judicial law-making: see *infra*.

As soon as society begins to realise the implication of constitutional limitations of the exercise of state authority and the guarantees of fundamental rights and freedoms, and begins to value these limitations and guarantees, it soon begins to rely more and more on the courts' authoritative determination of constitutional disputes between the individual and the state organs. The court's willingness and ability to face constitutional issues before it, and a fearless and bold protection of constitutional limitations and guarantees, help to shape and direct the future course of political decisions and to provide better constitutional options to law-makers.²¹⁹

3.2. Judicial Activism, Creativity and the Proper Role of the Judiciary.

In a system of constitutional supremacy, the constitutional role of the judiciary is essentially determined by the nature of the Constitution. A supreme Constitution operates as a fundamental law which limits the exercise of power by state organs, and declares and guarantees the rights and freedoms of individuals. It is an expression of the values, ideals and aspirations of the people; it is directly applicable by the courts to limit the exercise of power by state organs in relation to individuals.

The fundamental values, ideals and aspirations upon which a supreme Constitution is based are the foundation of freedom and justice in a democratic society. The supremacy of the Constitution operates as a directive to the courts, as interpreters and enforcers of the law, to uphold the supreme law of the Constitution in the event of conflicts between its provisions and inferior acts of state organs; its provisions operate as a yardstick for judicial determinations of the validity of acts of state organs.

The justiciability of a supreme Constitution is intended to give the individual

²¹⁹Scharff 1966 **Yale LJ** at 534.

the full benefit of its values and ideals; unless its provisions are enforced fearlessly and courageously, its noble ideals are as dead as the proverbial dodo. A Constitution which declares and guarantees fundamental human rights and freedoms has very little meaning on its own; it is what the courts choose to do with its jural postulates or values that determines its efficacy.²²⁰

The supreme nature of the Constitution does not, however, *per se* grant the courts the power to grind each and every constitutional issue that arises. The institutional function of a court of law is confined to the determination of justiciable legal disputes which are brought before it by individuals who complain that one or more of their legally recognised and guaranteed rights has been violated or denied. As Nwabueze²²¹ points out, "the court is not the prime mover or instigator of its discomfiture, its only role is to interpose its machinery between the government and its opponents..." The crucial point, therefore, with regard to the constitutional role of the judiciary, is that the court exercises its power in order to decide justiciable legal disputes.

There is, however, another dimension of the role of the judiciary which is associated with the nature of a supreme Constitution which guarantees fundamental human rights and freedoms. The provisions of the Constitution do not have a meaning unless the meaning of the words used is determined. Human rights provisions are often framed in wide and vague terms that must be interpreted and given meaning before they can be applied to cases which come before the courts. Given the generality of constitutional provisions, a question which arises pertinently is: What permissible limits are there to the way in which the provisions of the Constitution are interpreted in order to give them meaning?

The question of the permissible limits of constitutional interpretation arises

²²⁰E. McWhinney 1959 *Can. Bar Rev.* at 33.

²²¹Nwabueze *op cit.* at 49.

from the danger that a judiciary which is not vigilant may easily lose sight of the real controversy, namely an alleged violation of the provisions of the Constitution. Courts are not supposed to grapple with each and every constitutional issue that arises²²² or to question policy choices by the elected political branches of government; their function is to resolve justiciable legal disputes.

A judiciary which questions policy choices by the elected representatives of the people, and substitutes its views for those of the legislature, invades the legislative sphere and also, as a result, undermines the separation of powers between the legislature and the judiciary; it functions as "a judicial 'super-legislature' and stretches its power beyond the reach of Parliament ... and the electorate".²²³ On the other hand, a judiciary which is clothed with the power to review legislative and executive acts and deliberately avoids the determination of justiciable constitutional issues and simply defers to the legislature or the executive abdicates its constitutional function of resolving disputes which are brought before it; such a judiciary runs the risk of losing its legitimacy.

The demarcation of the boundary between permissible constitutional interpretation and judicial usurpation of legislative functions essentially revolves around the dividing line between creative constitutional interpretation and judicial legislating.²²⁴ The real issue, however, is not whether judges do

²²²See L.H Pollack "Securing Liberty through Litigation - The Proper Role of the United States Supreme Court" 1973 **MLR** 113 at 114.

²²³**Reference re Section 94(2) of the Motor Vehicle Act [1985]** 2 S.C.R 486 at 497.

²²⁴The term 'judicial legislating' is preferable to 'judicial law-making'. The term 'judicial law-making' can be misleading; it presupposes that judges do not make law. Judges do make law, not in the sense of legislating but in the sense of developing the law through interpretation and filling legislative vacuums. 'Judicial legislating', in the sense in which the term is used here, connotes a judiciary which misperceives its adjudicatory function, or simply

or should make law when they interpret the provisions of the constitution but rather one of defining the limits of creative constitutional interpretation.²²⁵

Constitutional interpretation, in relation to a supreme Constitution, essentially involves giving the wide, elastic and open-ended terms of the Constitution meaning; these terms contain values, goals and ideals which have been positivised into fundamental social and economic rights. Constitutional interpretation, therefore, is unavoidably a creative process²²⁶ which involves finding the meaning of words, defining the nuances, clarifying ambiguities and applying the meanings, within the context in which they are used, to the controversy with which the court is faced.²²⁷ As Cappelletti²²⁸ points out, "judicial interpretation of social rights necessarily implies a high degree of creativity".

The main objection to judicial creativity is that it involves the judiciary in politics and policy issues. Critics of judicial creativity argue that in interpreting the provisions of the Constitution creatively, judges meddle with political and policy issues; they contend that when judges interpret the provisions of the Constitution, they not only meddle with politics and policy issues but also make law, something which is reserved for the legislature.²²⁹

ignores it, and acts as if it were a legislator for the general good; it in essence refers to judicial usurpation of legislative functions.

²²⁵See B. Dickson "The Judiciary - Law Interpreters or Law-makers?" 1982 **Manitoba LJ** 701.

²²⁶It may even be argued that, in formulating constitutional provisions in wide and open-ended terms, the framers of the Constitution left room for judicial creativity.

²²⁷See M. Cappelletti 1981 **Monash Univ. LR** at 17.

²²⁸**Ibid.** at 40.

²²⁹See in general R.H Bork **The Tempting of America : The Political Seduction of the Law** (1990).

The important thing to remember in defining the limits of creative constitutional interpretation is that although judges do make law when they give meaning to the provisions of the Constitution, the law which they make is not the same thing as the 'law' which issues from Parliament. Unlike Parliament, judges do not deliberately make policy decisions which they then enact into law intended for the general good; judges make law within the context of their institutional function, which is to interpret the law in order to apply it to concrete justiciable disputes between parties to a suit.²³⁰ Creative constitutional interpretation is, therefore, first and foremost limited by the institutional function of the judiciary.

Creative constitutional interpretation is not the same as arbitrary interpretation. In giving meaning to the terms of the Constitution, a judge is faced with more than one meaning and values from which he has to choose; this process involves the exercise of a discretion and the making of a principled choice.²³¹ Creative constitutional interpretation, therefore, is essentially based on principle.

The making of a principled choice is not an arbitrary and mechanical process. It means, in relation to judicial interpretation,

"evaluation and balancing; it means giving consideration to the choice's practical and moral results; and it means employment of not only the arguments of abstract logic, but those of economics, politics, ethics, sociology and psychology".²³²

²³⁰The bulk of the common law exemplifies judge-made law; the common law developed as a result of the creation of new legal concepts; these legal concepts were further developed and expanded to accommodate new demands for appropriate legal remedies.

²³¹The making of a principled choice involves a consideration of legal principles; these principles, in relation to constitutional interpretation, are discoverable from the Constitution itself, from outside sources, such as international law and comparable foreign law, as well as from the evolving conceptions about rights and freedoms.

²³²Cappelletti 1981 *Monash Univ. LR* at 21.

Wechsler²³³ has aptly stated the relationship between principle and creativity in constitutional interpretation; according to him, "constitutional interpretation must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved". This means that a judgment which is arrived at in any determination of constitutionality must be supported by reasons that are adequate to maintain any choices that are made during the process of interpretation.²³⁴

The argument that judges are called upon to interpret the provisions of the Constitution in order to apply them to cases before them creates the illusion that judges are not supposed to engage in policy issues. Of course, judges are supposed to decide cases on principle and not on policy. They cannot, however, at all times avoid policy issues; objective determinations of constitutionality can only be made by having regard to the policies that lie at the root of legislation, the values that underlie the rights in issue, as well as the different conceptions of rights and freedoms.²³⁵

A Constitution which entrenches fundamental rights and freedoms is essentially a political document, and interpreting it is inescapably a political activity.²³⁶ This does not mean, however, that the political nature of the Constitution entitles judges to enter the political arena; interpreting the

²³³H. Wechsler 1959 **Harvard LR** at 15.

²³⁴**Ibid.** at 20.

²³⁵For a discussion of the influence of public policy on judicial interpretation see R.S Abella "Public Policy and the Judicial Role" 1989 **McGill LJ** 1021; P.C.A Snyman "Public Policy in Anglo-American Law" 1986 **CILSA** 220.

²³⁶L.M Du Plessis "The Interpretation of Bills of Rights in South Africa: Taking Stock" in J. Kruger & B. Currin **Interpreting a Bill of Rights** (1994) at 20-22; M. Dlamini "The Political Nature of the Judicial Function" 1992 **THRHR** 411.

Constitution is a political activity of a special kind and not of a 'party-political' kind.²³⁷ The duty of judges is to decide cases in accordance with their understanding of justice and sound policy and not to substitute their views or policies for those of the legislature.

In many instances, the principles which judges fashion have to be applied to political and policy issues. In exercising their interpretive and adjudicatory role, judges express the values and fundamental ideals of a political community; they interpret and apply the provisions of a Constitution which limits the exercise of power by the leaders of a political community and, in doing so, also give direction to society and help to maintain social order.²³⁸ In this sense, the constitutional role of the judiciary is policy-oriented.²³⁹ Constitutional values, in particular, are about public policy.²⁴⁰

The fact that constitutional values are about public policy does not necessarily mean that judges should decide cases on grounds of policy. The primary instrument of judicial decision-making is principle; policy is merely an issue which the court may become involved with in the application of principle. Policy becomes an issue when, in applying principle in constitutional decision-making, the judge interprets and articulates the fundamental constitutional values and ideals of society and, in this way, gives direction to society and helps to maintain social order.

Judges are of course expected to be neutral and impartial when they interpret the law in order to resolve legal disputes. Neutrality and impartiality do not mean, however, that judges ought to be unmindful of policy issues. There is

²³⁷**Idem.**

²³⁸**Bell op cit.** at 7.

²³⁹**Nwabueze op cit.** at 138 and 139.

²⁴⁰**Abella 1989 McGill LJ** at 1021.

a close relationship between policy and the judicial role. Abella²⁴¹ explains this relationship as follows:

"The interpretive judicial function ... has always necessarily involved the sifting of normative considerations, not only because laws derive from and operate in a social system and culture of values, but because judges are conditioned to operate in the same system. In so far as the sifting of legal choices is the sifting of policy values, judges, in interpreting law, do always and have always considered, in addition to logic and precedent, the values or policy implications their legal conclusions represent."

Creativity and the sifting of policy considerations in constitutional interpretation calls for a measure of judicial activism, as opposed to judicial deference to, and respect for, legislative determinations of policy. In essence, judicial activism is a courageous and constructive interpretation of the Constitution in order to give individuals the full benefit of these provisions within the limits of what is constitutionally proper. It proceeds on the basis that as long as the Constitution continues to operate as the supreme law of the land and to guarantee fundamental rights and freedoms, it is the duty of the judiciary to interpret its provisions creatively, imaginatively and courageously and to strike down any legislative or executive act which is in conflict with these provisions; it reflects a greater readiness to preserve and to extend by interpretation, where appropriate, constitutionally guaranteed rights and freedoms, and implies that judges, as interpreters and upholders of the law, should assume a 'watch-dog role' and courageously and fearlessly uphold the supremacy of the Constitution.²⁴²

Although judges ought to interpret the open-ended provisions of the Constitution creatively and courageously, and dare not abdicate their function to uphold the supreme law of the land, unprincipled activism, especially in the interpretation and implementation of human rights provisions, has its dangers.

²⁴¹**Idem.**

²⁴²See McWhinney **op cit.** note 200 at 178.

The greatest danger which faces an activist judiciary is that "[l]egal rights are extremely volatile, tending to enlarge their reach and content beyond their original meaning and purpose".²⁴³ Judicial activism can therefore be both courageous and presumptuous, constructive and obstructive.²⁴⁴

Judges can avoid presumptuous and obstructive activism by constantly reminding themselves that, although the provisions of the Constitution leave room for creative interpretation and adaptation to changes in social conditions and human aspirations, they ought to interpret the Constitution within the context of their institutional function, namely the resolution of justiciable legal disputes. Within the context of the institutional function of the judiciary, constitutional interpretation is confined to defining the terms of the Constitution and setting out the duties they impose, To determine exactly what measures and conditions these terms require in each particular case, and to dictate to the legislature and to the executive what they must do, is to go beyond the confines of constitutional interpretation; it is a violation of the separation of powers and an indication of lack of self-restraint.²⁴⁵ Judicial activism, therefore, requires some form of restraint.

Judicial self-restraint, however, is not the same thing as strict constructionism. Strict constructionism follows a strict and literal interpretation of the terms of the Constitution. Judicial self-restraint, on the other hand, is based on limitations to the creative and 'activist' role of the judiciary. Properly exercised, judicial self-restraint is a means of acknowledging the limits of judicial review and showing respect for the democratic decisions of the legislature and the executive as chief policy-making bodies while at the same time creatively and courageously interpreting and applying the provisions of

²⁴³I. Jenkins "Judicial Activism and Constitutional Government" 1984 **Am. J Jur.** 169 at 171.

²⁴⁴Jenkins 1984 **Am. J Jur.** at 172.

²⁴⁵**Ibid.** at 171.

the Constitution. In other words, judicial activism and judicial self-restraint are compatible with each other if correctly interpreted. It implies, for example, that the court will not entertain a dispute unless the parties have **locus standi** and there is a ripe justiciable dispute;²⁴⁶ it also implies that the court will not impose its will upon the legislature or the executive where the issues it is asked to decide are not capable of impartial and principled judicial determination.

The distinguishing feature between a judiciary which exercises improper self-restraint and adopts a policy of avoidance and a creative judiciary is that the former is bound more than the latter by self-imposed limits to its interpretive functions; it refrains from creative interpretation by prescribing for itself strict limits for its interpretive role and often adopts a strict and purely mechanical approach to the interpretation of the provisions of the Constitution. Such a judiciary allows itself little freedom to articulate constitutional values and the ideals and aspirations of the people as enshrined in the Constitution and shies away from pursuing the goals of the wider governmental process as set out in the wide and open-ended terms of the Constitution.

A creative judiciary, on the other hand, strives to arrive at just results by seeking guidance in the high-level values, great ideals and visions implicit in the libertarian tradition of the Constitution. It recognises that constitutional guarantees are expressions of values and principles and that constitutional provisions ought to be interpreted courageously, creatively and imaginatively in order to give individuals their full benefit.

The process of interpreting the provisions of the Constitution to meet the "various crises of human affairs",²⁴⁷ new social changes and the ideals and

²⁴⁶Section 7(b) of the Constitution significantly extends **locus standi** in respect of violations of the rights entrenched in Chapter 3.

²⁴⁷See **McCulloch v Maryland (Supra)** at 417.

aspirations of society is necessarily a creative task. Such is the logical demand implicit in the interpretation of provisions which are framed in wide and open-ended terms; wide and open-ended terms call for imaginative clarifications and amplification.

Improper self-restraint and undue deference to the political branches of government undermine the high-level values and great ideals of a Constitution which is intended to operate as the supreme law of the land; on the other hand, courage, fearlessness and judicial creativity advance the constitutional values which are intended to regulate the exercise of government power and to protect the legitimate interests of individuals. In general, a Constitution which entrenches fundamental rights and freedoms is intended to operate as a deliberate limitation of the exercise of governmental power and unless the values, ideals and aspirations it enshrines are realised, its provisions remain hollow promises.

Both judicial extremism and judicial inaction may lead to a degeneration of not only the Constitution but also of the whole legal system. Proper judicial activism and judicial restraint are necessary ingredients of judicial review; they constitute the life-blood of constitutional jurisprudence; their interplay and interaction are the essence of judicial power.²⁴⁸

In a modern African state, in particular, the judiciary carries the heavy burden of adapting the provisions of the Constitution to the values, ideals and aspiration of an evolving African society.²⁴⁹ In interpreting and applying the provisions of the Constitution, the social, political and economic conditions peculiar to this society cannot be lost sight of.

In the South African context, the task of the judiciary is compounded by a

²⁴⁸See McWhinney 1959 **Can. Bar Rev.** at 33.

²⁴⁹Nwabueze **op cit.** at 140.

multiplicity of complex value systems and conflicting ideals and aspirations. The task of the judiciary could become easier if fundamental and widely shared values, ideals and aspirations, as opposed to the sectional values, ideals and aspirations of a particular group or the ruling party or parties, are identified and defined with a sufficient degree of precision.²⁵⁰

4. **Judicial Approaches to the Interpretation of the New Constitution.**

Since the coming into operation of the 1993 Constitution provincial or local divisions of the Supreme Court and the Constitutional Court have already had to deal with a number of cases which involve the interpretation of the Constitution. Some of these cases provide some pointers to the approach of the courts to the interpretation of the Constitution.²⁵¹

The first three reported cases, namely **S v Fani & Others**²⁵², **S v James**²⁵³ and **S v Smith & Another**²⁵⁴ dealt with the interpretation of section 23 and section 25(3)(b) of the Constitution. Section 23 entrenches the right to information; section 25(3)(b) entrenches the right of an accused

²⁵⁰Nwabueze **ibid.** at 141.

²⁵¹The analysis of the approach of the courts will be confined to cases which were decided before the judgment of the Constitutional Court in **S v Makwanyane** 1995(6) BCLR 665 (CC). The **Makwanyane** case and other cases which were decided after it will be referred to only when it is appropriate to do so.

²⁵²1994(1) BCLR 43 (E). Also reported in 1994(1) SACR 635 (E); 1994(3) SA 619 (E).

²⁵³1994(1) BCLR 57 (E). Also reported in 1994(2) SACR 141 (E); 1994(3) SA 881 (E).

²⁵⁴1994(1) BCLR 63 (SE). Also reported in 1994(2) SACR 116 (SE); 1994(3) SA 887 (SE).

person to be informed with sufficient particularity of the charge brought against him. In all three cases the accused claimed access to the contents of police docket. Prior to the commencement of the Constitution documents contained in police docket were regarded as privileged.

In the **Fani** case the court held that although it was necessary to furnish the accused with information to apprise him of the charge with sufficient particularity, the privilege attaching to police docket was reasonable and justifiable in a democratic society based on freedom and equality and was therefore not inconsistent with the Constitution. Jones J based his decision on the section 33 limitation, in terms of which a limitation of the entrenched rights is permissible if it is reasonable, necessary, justifiable in an open and democratic society based on freedom and equality and does not negate the essential content of the right in issue.

Although Jones J spoke in favour of giving effect to the larger object of the Constitution as contained in section 35(1), namely "to promote the values which underlie an open and democratic society based on freedom and equality"²⁵⁵ and stated that the provisions of the Constitution are not to be interpreted restrictively, he did not go far enough. The judge did not lay down any definitive interpretative approach; neither did he adopt any framework for determining the reasonableness and justifiability of the privilege attaching to police docket. Nor did he refer to the important Canadian case of **R v Oakes**²⁵⁶ where the question whether an alleged infringement of an entrenched right was reasonable and justifiable in a democratic society was considered and an analytical framework for a determination of such question was laid down.

²⁵⁵At 45D (BCLR).

²⁵⁶[1986] 1 S.C.R 103.

In the **James** case Zietsman JP adopted a narrow approach to the interpretation of sections 23 and 25(3) of the Constitution and held that it could not have been the intention of the framers of the Constitution that the right of access to information as entrenched in section 23 should entitle the defence to the contents of police dockets. He found that the privilege attaching to police dockets was not affected by section 23. He reached this conclusion without having fully considered the content of sections 23 and the nature of the Constitution as an organic instrument which entrenches the fundamental rights and freedoms of individuals.²⁵⁷

S v Smith went somewhat further than the **Fani** and **James** cases. In that case Van Rooyen AJ acknowledged that the Constitution brought about a fundamental change in respect of the privilege attaching to the contents of police dockets. The judge agreed with the reasoning in the **Fani** case that the privilege attaching to the statements of witnesses is not inconsistent with the Constitution but nevertheless found that effect should be given to the meaning and spirit of section 25(3) without encroaching on the privilege.²⁵⁸

According to Van Rooyen AJ an accused person is entitled to information which would enable him to adduce and challenge evidence; the protection of information in terms of the privilege continues to exist, however, if such protection is, as required by section 33, reasonable, necessary, justifiable in an open and democratic society based on freedom and equality and does not negate the essential content of the entrenched right.²⁵⁹ The judge opined that

²⁵⁷The judge's approach was remarkably literalist. He proceeded on the basis that section 23 did not deal specifically with criminal trials and left the matter there (at 61B), without venturing into the larger objects of the Constitution, namely to promote the values of an open and democratic society based on freedom and equality.

²⁵⁸At 70J-71B and 74D-E (BCLR).

²⁵⁹At 71E (BCLR).

an approach similar to that laid down in **R v Oakes**²⁶⁰ would be appropriate in considering the section 33 limitation.²⁶¹ This approach involves a two stage enquiry, firstly, whether the challenged law violates any of the entrenched rights; secondly, whether the limitation contained in the challenged law is consonant with the limitation clause.²⁶²

Qozeleni v Minister of Law and Order and Another²⁶³ is one of the most far-reaching cases on the interpretation of section 23 to come after the **Smith** case. In that case Froneman J (with Kroon J concurring) attempted to formulate the proper approach to the interpretation and application of the Constitution. The judge looked not only at section 23 but also at the nature of the Constitution as the supreme law of the land, its object and the other related rights entrenched in it in order to interpret its provisions.

Although Froneman J warned against the use of labels such as a "purposive" approach to constitutional interpretation²⁶⁴, the approach he preferred and followed is the purposive approach. According to this approach the interpreter searches for the design or purpose which lies behind the instrument he is interpreting.²⁶⁵ With regard to 'purpose' the judge referred to the approach enunciated in the Canadian case of **R v Big M Drug Mart Ltd**²⁶⁶:

²⁶⁰Supra.

²⁶¹At 73B-I (BCLR).

²⁶²See Chapter 6 for a discussion of the **Oakes** analytical framework.

²⁶³1994(1) BCLR 75 (E).

²⁶⁴At 80D (BCLR).

²⁶⁵See **supra** for a discussion of this approach.

²⁶⁶(1985) 18 D.L.R (4th) 321 (SCC) at 359-360.

"The meaning of a right or freedom guaranteed by the Charter must be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by **reference to the character and the larger objects of the Charter itself**, to the language chosen to articulate the specific right or freedom, to the historical origin of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the context of the Charter."

It is clear from this **dictum** that the purpose in issue is not only the narrow purpose of the specific right with which the court is concerned but also the larger purpose or object of the Constitution and the purpose of the other specific rights associated with the right in issue. This is precisely the approach which Froneman J followed. The purpose of section 23 is to enable a litigant to protect his rights and, taken together with section 8(1) (the right to equality) to provide him with an "equality of arms" so that he may have a fair trial; this purpose fits in with the larger purpose of the Constitution, namely to bring about an open and democratic society committed to the principles of openness and accountability.²⁶⁷

Froneman J emphasised the supremacy of the Constitution as the most important factor to be taken into account in its interpretation. There may very well be other factors relevant to the interpretation of the Constitution, but its supremacy constitutes the most important guide:

"Far more useful is to recognise that because the Constitution is the supreme law of the land against which all law or conduct is to be tested, it must be examined with a view to extracting from it those principles or values against which such law or conduct can be measured."²⁶⁸

Section 35 of the Constitution, the Preamble and the Post-amble, provide a

²⁶⁷At 881-89C (BCLR).

²⁶⁸At 80E (BCLR).

framework of the principles and values against which laws and conduct can be measured. The essence of these principles and values is to create and sustain a society which is characterised by "openness, democratic principles, human rights, reconciliation, reconstruction and peaceful co-existence between the people of the country".²⁶⁹

As for the section 33 limitation, Froneman J approved the two-pronged inquiry similar to that laid down in the Canadian case of **R v Oakes**²⁷⁰, namely whether there has been an infringement of the right, the onus resting on the party alleging the infringement and, secondly whether the infringement is justifiable in terms of section 33, the onus resting on the person alleging that the right is subject to the limitation.²⁷¹ The judge stated that some kind of proportionality test, in terms of which the means used to protect the interest underlying the limitation must be proportional to the object of the limitation, may have to be adopted in the interpretation of section 33.²⁷²

The judgment of Froneman J in **Qozeleni** is also significant because the judge specifically recognised the special responsibility which rests on the judiciary in a system of judicial review based on the supremacy of the Constitution, especially one with a tradition of legislative supremacy, an absence of substantive judicial review and a neo-positivistic approach to the judicial function; as the judge pointed out, the role of the judiciary is "bound to be controversial in any event, but the judicial history of this country makes

²⁶⁹At 80H (BCLR).

²⁷⁰Supra.

²⁷¹At 87C-E and H (BCLR).

²⁷²At 90D-F (BCLR). See the discussion of **Smith v Attorney-General of Bophuthatswana** 1984 (1) SA 196 (BSC) in Chapt. 7 and **R v Oakes** (supra) in Chapt. 6 where the proportionality principle is discussed.

it even more likely if due regard is not given to possible deficiencies in the past".²⁷³ It is the responsibility of the judiciary to bring the Constitution to life by interpreting its provisions in such a way that its values and the ideal of an open democratic society based on freedom and equality are realised; in doing so it has to be constantly aware of the deficiencies of the past which it seeks to redress.

Froneman J has a keen awareness of the greater responsibility of a judiciary which, having been schooled in the Westminster tradition of parliamentary sovereignty, is entrusted with the interpretation and application of a supreme Constitution. In **Matiso and Others v The Commanding Officer, Port Elizabeth Prison and Others**²⁷⁴ the judge once again emphasised the need for our judiciary to recognise the different nature of the Constitution and the changed role of the judiciary:

"Despite the apparent general recognition that constitutional interpretation is different from 'ordinary' statutory interpretation it is, in my view, important to understand why this should be the case, especially for us in South Africa who were schooled in the tradition and concept of parliamentary sovereignty in the Westminster mould. Such an understanding is not merely a theoretical exercise, but in my view an essential one for all judicial officers who are entrusted with the judicial review of law and administrative action, based on the supremacy of the Constitution, as is the case with our present Constitution..."²⁷⁵

In a constitutional system based on parliamentary sovereignty it makes good sense to start from the premise of seeking 'the intention of the legislature' in statutory interpretation, because the interpreting judge's value judgment of the content of the statute is, theoretically at least, irrelevant...²⁷⁶

²⁷³At 79H (BCLR).

²⁷⁴1994(3) BCLR 80 (SE).

²⁷⁵At 86I-87A.

²⁷⁶At 87B. Even in a system based on parliamentary sovereignty it is questionable whether it makes good sense to start from the premise of seeking 'the intention of the legislature'. 'Intention of the legislature' is a fiction; the

The interpretive notion of ascertaining the 'intention of the legislature' does not apply in a system of judicial review based on the supremacy of the Constitution, for the simple reason that the Constitution is sovereign and not the legislature.²⁷⁷ This means that both the purpose and method of statutory interpretation in our law should be different from what it was before the commencement of the Constitution on 27 April 1994. The purpose is now to test legislation and administrative action against the values and principles imposed by the Constitution.²⁷⁸

An important aspect of Froneman J's judgment in the **Matiso** case is that the judge recognised that interpreting a supreme Constitution involves judicial creativity and also warned about the dangers which face our judiciary:

"The values and principles contained in the Constitution are, and could only be, formulated and expressed in wide and general terms, because they are to be of general application. In terms of the Constitution the courts bear the responsibility of giving specific content to those values and principles in any given situation. In doing so judges will invariably 'create law'. For those steeped in the tradition of parliamentary sovereignty the notion of judges creating law and not merely implementing and applying the law is an uncomfortable one. Whether the traditional view was ever correct is debatable, but the danger exists that it will inhibit judges from doing what they are called upon to do in terms of the Constitution. This does not mean that judges should now suddenly enter into the orgy of judicial law-making,²⁷⁹ but that they should recognise that their function of judicial review, based on the supremacy of the Constitution, should not be hidden under the guise of simply seeking and giving expression to the will of the majority in

use of the term implies that the interpreter seeks to reconstruct the mental state of the legislature without a consideration of the on-going time-frame within which statutes operate: see D.V Cowen "The Interpretation of Statutes and the Concept of the Intention of the Legislature" 1980 **THRHR** 375 at 391.

²⁷⁷The fact that the Constitution is 'sovereign' or supreme and not the legislature does not, however, preclude the possibility of an intentionalist approach to the interpretation of the Constitution. It may also mean that the 'intention' of the legislature in enacting other laws is subjected to the overall 'intention' of the Constitution.

²⁷⁸At 87F.

²⁷⁹As Froneman J noted (at 88C) "judicial law-making in the form of judicial review is fundamentally different from making law by legislation".

Parliament.²⁸⁰ Judicial review has a different function, but is still subject to important constraints. Recognition of those constraints is the best guarantee or shield against criticism that such a system of judicial review is essentially undemocratic".²⁸¹

Froneman J's **dictum** underlines the tension between a tradition of parliamentary sovereignty and judicial review in a system of constitutional supremacy, and also identifies the main doctrinal problem arising from substantive judicial review, namely its undemocratic nature. It emphasises that while judicial review in a system of constitutional supremacy invariably involves judicial creativity, it also has its limits; these limits imply that the judiciary must, in 'creating law' during constitutional interpretation, constantly keep in mind that the function of making law falls in the hands of the legislature as a democratically elected representative of the people. A tradition of parliamentary sovereignty does not permit substantive judicial review and therefore gives pre-eminence to the will of democratically elected representatives of the people; it carries with it, however, the danger of a policy of avoiding judicial creativity under the guise of seeking and giving expression to the will of the legislature.²⁸²

The cases which came after **Qozeleni** and in which the courts were concerned with section 23 of the Constitution follow basically the same interpretative approach as that adopted in the **Qozeleni** case, namely to view

²⁸⁰Van Blerk AJ made a similar observation in **Magano and Another v District Magistrate, JHB and Others (2)** 1994(2) SACR 304 (at 306d-e): "The provisions establishing fundamental guarantees in Chapter 3 are couched in broad and wide language. This is no doubt to afford flexibility to the Constitution. The result thereof is to impose upon the Constitutional Court and this Court the duty to determine the precise limits of the guarantees afforded under the Constitution to citizens and other persons. In doing so, it seems to be that this Court should steer a course between the Scylla of inflexibility, on the one hand, and the Charybdis of uncertainty, on the other. Ultimately, the Judges of this Court are put in the unfamiliar role of exercising a greater function in lawmaking than they have in the past. In doing so, they are required to make value judgments".

²⁸¹At 87I-88B.

²⁸²See **supra**.

the Constitution as the supreme law of the land which has as its ideal an open and democratic society based on the values of equality and freedom.

Thus in **S v Majavu**²⁸³, **Khala v The Minister of Safety and Security**²⁸⁴ and **S v Botha and Others**²⁸⁵, the court considered the Constitution as an instrument *sui generis* which calls for a purposive and generous interpretation so as to give effect to the values and principles contained in it. The court surveyed the position in other countries and came to the conclusion that an accused or litigant is entitled to the information contained in a police docket in order to protect his rights.

In all these cases the court placed great reliance on the judgment of Sopinka J in the Canadian case of **R v Stinchcombe**²⁸⁶ and took the view that although section 23 gives a person the right to information in order to protect his rights, such a right was not absolute; an accused or a litigant may be denied access to certain information if such a denial is shown to be reasonable and justifiable in an open and democratic society based on freedom and equality, does not negate the essential content of the right and is necessary, the onus resting the person seeking to limit the right to information. In essence, if the State wishes to limit the right by invoking the common law privilege, it will have to satisfy the requirements of section 33.²⁸⁷

²⁸³1994(2) BCLR 56 (CkGD). Also reported in 1994(2) SACR 265 (Ck); 1994(4) SA 268 (CkGD).

²⁸⁴1994(2) BCLR 89 (W). Also reported in 1994(2) SACR 361 (W); 1994(4) SA 218 (W).

²⁸⁵1994(3) BCLR 93(W). Also reported in 1994(2) SACR 541 (W).

²⁸⁶1992 LRC (Crim) 68. See Chapt. 6 for a discussion of this case.

²⁸⁷A similar approach was followed in **S v Sefadi** 1994(2) BCLR 23 (D). See also **S v Khoza en Andere** 1994(2) SACR 611 (W).

The interpretation of section 23 and the proper approach to the interpretation of fundamental human rights was also dealt with extensively in **Phato v Attorney-General, Eastern Cape and Another; Commissioner of South African Police Services v Attorney-General, Eastern Cape and Others**²⁸⁸. The judgment of Froneman J in **Qozeleni** was approved. Jones J considered foreign case law, in particular the Canadian case of **R v Stinchcombe**²⁸⁹, and came to the conclusion that the blanket common law docket privilege is *prima facie* unconstitutional. The court adopted a purposive approach which "gives recognition to the constitutional themes of openness and accountability in respect of official action by an organ of State in the performance of its powers and functions".²⁹⁰

Jones J also pointed out that a purposive interpretation of a provision of the Constitution is not synonymous with a generous or liberal interpretation. A generous interpretation requires a court to interpret a constitutional provision in the widest possible manner. A purposive interpretation has as its main consideration the purpose of the right; if this interpretation is followed, the widest possible interpretation is not necessarily the one which will be

²⁸⁸1994(5) BCLR 99 (E). Also reported in 1995(1) SA 799 (E).

²⁸⁹Supra.

²⁹⁰At 129G. In **S v Shabalala and Others** 1995(12) BCLR 1593 (CC) the Constitutional Court endorsed the view that a blanket docket privilege is unconstitutional because it is unreasonable and not justified in an open and democratic society based on freedom and equality. The Court reasoned (per Mahomed DP) that, apart from the provisions of section 23 of the Constitution, the right to fair trial as entrenched in section 25(3) entitles an accused person to have access at least to the statements of prosecution witnesses; the prosecution may, however, in a particular case, be able to justify a denial of such access on the grounds that it is not justified for the purposes of a fair trial.

supported.²⁹¹

Jones J approved the view of the Canadian writer Hogg on the overriding role of purpose in relation to the question whether a restriction upon a guaranteed right is justified.²⁹² Hogg²⁹³ argues, with reference to **R v Oakes**²⁹⁴, that the high standard of justification prescribed in **Oakes**²⁹⁵ is inconsistent with the generous approach, which was suggested in **R v Big M Drug Mart Ltd**²⁹⁶. The generous approach underlines the importance of constitutionally protected values; the purposive approach, on the other hand, restricts the scope of constitutionally protected rights to the purpose of the rights.

The two approaches raise the problem of how to restrict the scope of constitutionally protected rights without undermining their values. According to Hogg²⁹⁷ this problem can be resolved by ascertaining the purpose of the right from the language in which it is expressed, the context in which it is protected and its relationship to other rights. He argues that the same standard

²⁹¹See P. Hogg **Constitutional Law of Canada** (1992) at 814-815; A. Cachalia, H. Cheadle et al **Fundamental Rights in the New Constitution** (1994) at 11; D. Davis "Democracy - Its Influence upon the Process of Constitutional Interpretation" 1994 **SAJHR** 103 at 119.

²⁹²In terms of section 33(1) of the 1993 Constitution a limitation of a right entrenched in Chapter 3 is permissible if, *inter alia*, it is "justifiable in an open and democratic society based on freedom and equality".

²⁹³**Op cit.** at 812-813 and 819.

²⁹⁴**Supra.**

²⁹⁵See Chapt. 6 for a discussion of the **Oakes** standard of justification.

²⁹⁶**Supra:** see Chapt. 6.

²⁹⁷P. Hogg "Interpreting the Charter of Rights" 1990 **Osgoode Hall LJ** 817 at 820.

must apply to the scope of the right and the scope of the limitation. He prefers the purposive approach because its reach does not go beyond behaviour that is outside the scope of the right; furthermore, it reduces the volume of litigation and limits the policy making role of the courts.

Adherents to the purposive approach criticise the generous approach largely because they feel that it gives judges unconstrained judicial choice. Bakan,²⁹⁸ a Canadian constitutional lawyer, has noted that these adherents understand the purposive approach as

"a 'compromise' between the implausible view that judicial decision-making can be constrained by the constitutional text and doctrine, and the unacceptable view that judicial decision-making is nothing more than judicial policy-making. The burden of the argument in favour is that purposive reasoning **does** constrain judicial choice and discretion".

The purposive approach cannot, however, **always** successfully constrain judicial choice and discretion in the interpretation and application of human rights provisions. Bakan²⁹⁹ has shown, with reference to the decision of the Canadian Supreme Court in **Reference Re Public Service Employee Relations Act, Labour Relations Act and Police Officers Collective Bargaining Act**,³⁰⁰ that conflicting characterisations of purpose make the assumption that judicial choice and discretion can be avoided through purposive reasoning implausible. In this case the judges understood the purpose of freedom of association in relation to the right to strike in quite different terms.

Le Dain J and McIntyre J, who wrote the majority judgment, found that the

²⁹⁸J.C Bakan "Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought" 1989 **Osgoode Hall LJ** 123 at 153.

²⁹⁹1989 **Osgoode Hall LJ** at 157.

³⁰⁰(1987) 38 DLR (4th) 161.

purpose of freedom of association was to protect the freedom of individuals to associate with one another and not the freedom of an association to pursue its activities. Dickson CJC on the other hand, in a dissenting judgment, found that the purpose of freedom of association was to protect the activities of associations in so far as these are essential to achieve collective goals. Bakan points out that the disagreement was in essence a manifestation of a conflict between two competing political visions, namely 'individualism' and 'collectivism'.³⁰¹

Questions about the purpose of rights such as freedom of association, freedom of expression and equality will always raise highly contentious political, ideological and policy issues that will often not elicit the same answers from judges, lawyers, politicians and the general public. Moreover, human rights provisions are framed in vague and indeterminate terms which do not have a settled meaning and do not usually give rise to consistent characterisations.

Judicial determination of constitutional disputes involves the articulation of competing interests, balancing the interests against one another and deciding which interest ought to prevail.³⁰² Deciding which interest ought to prevail invariably involves judicial choice and discretion. In making choices and exercising a discretion, judges must of course do so impartially, basing their choices on analysis and reasoning transcending the immediate result that is achieved.

A generous interpretation involves an articulation of the particular interests of the individual and the government at stake, and deciding which interest is weightier. It involves the making of a value judgment in a juridically qualified way, in the sense that the values to be considered must either be

³⁰¹At 155-156.

³⁰²Bakan 1989 **Osgoode Hall LJ** at 169.

constitutionally related or connected. Kruger³⁰³ makes this point with reference to the judgment of Mahomed AJA in **Ex Parte Attorney-General, Namibia: in re Corporal Punishment by Organs of State**:³⁰⁴

"The methodology followed by the latter was, however, **juridically qualified**; the values to be considered were either **constitutionally related or connected** eg fundamental humanist constitutional philosophy' or the norms, aspirations etc as **expressed in the Constitution**, or were ascertained by way of **legal comparison**, bearing in mind the **historical background** to the constitution. All the constitutionally related factors as they are embodied in the preamble and the manifold structures of the constitution were taken into consideration. Mahomed AJA furthermore stressed that the value judgment requires to be **objectively articulated and identified**".³⁰⁵

The problem that interpreting a right in the widest possible manner may lead to a lack of proportionality between it and a government restriction or its limitation need not arise if one bears in mind that constitutional adjudication involves a balancing of competing interests and deciding which interest ought to prevail. If the court cannot 'strike a balance' between the interests,³⁰⁶ it will have to determine which interest is important or 'compelling' and

³⁰³J. Kruger "Towards a new Interpretive Theory" in J. Kruger & B. Currin (eds) **Interpreting a Bill of Rights** (1994) 103 at 115.

³⁰⁴1991(3) SA 76 (Nm SC).

³⁰⁵My emphasis.

³⁰⁶Convergence of interests is difficult to achieve in a society which is characterised by social and economic domination. Although public opinion may have some relevance in the resolution of conflicting interests, it is no substitute for the duty of the court to interpret and apply the provisions of the Constitution. In applying these provisions judges invariably make value choices; the court cannot allow itself to be diverted from its duty as an impartial and independent arbiter of the Constitution by making choices on the basis of public opinion; the assessment of public opinion is essentially a legislative and not a judicial function: see **S v Makwanyane** 1995(6) BCLR 665 (CC) at 703f-704C.

therefore ought to prevail.³⁰⁷ The same process applies where rights compete; the court is called upon to balance competing interests and to decide which interest should prevail in the context in which the conflict occurs.³⁰⁸

The 1993 Constitution has the advantage that it places greater emphasis on the importance of certain fundamental rights. Section 33(1) requires that a limitation of the rights specified in subsections (1)(aa) and (bb) shall be permissible if, in addition to being reasonable and justifiable in an open and democratic society based on freedom and equality, it is also necessary; this additional requirement indicates that greater importance is attached to these rights.

It is submitted that the section 33(1) high degree of scrutiny in the interpretation of the rights specified in section 33(1)(aa) and (bb) of government in essence suggests that the rights specified in the section must be given greater protection whenever the government seeks to limit them; the section therefore encourages a generous approach, one which allows the widest possible interpretation in order to give individuals the full benefit of the specified rights.

An adoption of the generous approach does not mean, however, that a purposive approach should not be applied; neither does it mean that the Constitution must be interpreted freely; the rights must be interpreted generously in the light of their specific objects, the larger object of the Constitution and the prevailing "norms, aspirations, expectations and sensitivities of the (South African) people as expressed, *inter alia*, in the

³⁰⁷See Chapt. 11 where constitutional adjudication and balancing conflicting interests are discussed.

³⁰⁸See **Gardener v Whitaker** 1994(5) BCLR 19 (E) at 37A-B.

Constitution".³⁰⁹

In **De Klerk and Another v Du Plessis and Others**³¹⁰ Van Dijkhorst J stated the correct approach to be applied when the provisions of a Constitution are interpreted purposively and generously. The judge said:³¹¹

"If the word "generous" is read ... as qualifying the word "purposive" I have no problem with it. If, however, it is intended as an entirely separate concept, a free floating interpretation unanchored in the aims of the Constitution, it might lead to interpretation based on personal predilections and preferences. In interpreting the Constitution one should guard against using it like a ventriloquist's dummy, making it utter what you want to hear. That danger lurks in applying as a yardstick in interpretation such phrases as "generous approach" which might tempt one to read into the text of the Constitution one's own social preferences and subjective sympathies.

In my view one must apply the purposive approach to the interpretation of our Constitution, determining from it as a whole what was the aim of Chapter 3 and its constituent sections individually, what problems and aspirations did it seek to address, and what does it have in mind for our society. In short, what are the values and norms our society cherishes and intends to uphold. **This approach does not mean that in some or many instances this will not result in a "generous" interpretation**³¹². It will, but that is not the starting point".

Van Dijkhorst's dictum is significant in that it shows that the generous approach in essence amounts to a qualified purposive approach. A genuine generous approach does not ignore the usefulness of purpose. It takes into account purpose as a value and seeks to harmonise it with other fundamental

³⁰⁹See the judgments of Mahomed AJA and Berker CJ in **Ex Parte Attorney-General, Namibia: In Re Corporal Punishment by Organs of the State** (*supra*), discussed in Chapt. 8.

³¹⁰1994(6) BCLR 124 (T). Although this case did not involve the interpretation and application of section 23, it lays down principles which are applicable to the interpretation and application of all the provisions of Chapter 3 of the Constitution.

³¹¹At 128E-H.

³¹²My emphasis.

constitutional values which reflect the norms, aspirations and ideals of civil society; it seeks to maximise not only purpose as a value but also other values which best advance the interests of individuals in a just and equitable and is therefore in this sense teleological.³¹³

Van Dijkhorst J did not, however, adopt this approach when he dealt with the question whether some of the rights entrenched in Chapter 3 also operate horizontally. He held that Chapter 3 was intended to be of vertical application only.³¹⁴ He disagreed with the judgment of Van Schalkwyk J in **Mandela v Falati**³¹⁵ in which the judge adopted a broader and generous approach in terms of which certain rights entrenched in Chapter 3 pre-eminently require horizontal application. In his view the application of Chapter 3 in litigation involving individuals among themselves would have a chaotic effect on the common law. It is submitted that the approach followed by Van Schalkwyk J is the correct one; it harmonises the rights entrenched in Chapter 3 with principles of the common law.³¹⁶ Although many of the rights are by their nature exclusively vertical in operation, some of them are not.

The generous approach to the question whether some of the rights entrenched in Chapter 3 also operate horizontally is implicit in the judgments of

³¹³See **supra** where the teleological approach is discussed.

³¹⁴In **Kalla and Another v The Master and Others** 1994(4) BCLR 79 (T) Van Dijkhorst also went back to the intentionalist approach. He took the view that it could not have been the intention of the framers of the Constitution that section 14(1), which guarantees freedom of religion, should have the effect of validating marriages under a system of religious law permitting polygamous unions.

³¹⁵1994(4) BCLR 1 (W). See **infra** for a discussion of this case.

³¹⁶See **Motala and Another v University of Natal** 1995(3) BCLR 374 (D) at 382H where Hurt J opined that the rights entrenched in sections 8(1), 8(2) and 32 are enforceable not only against the State or its organs, but also against natural or juristic persons.

Froneman J in **Gardener v Whitaker**³¹⁷ and that of Friedman J in **Baloro and Others v University of Bophuthatswana and Others**³¹⁸. In these cases the court considered that the values contained in the Constitution and its basic concern to transform the South African legal system into one concerned with openness, accountability, democratic principles and a genuine protection of the rights and freedoms of individuals call for a horizontal application of certain rights.

Although approaches such as the purposive approach and the generous approach as applied in other jurisdictions are useful in the interpretation of human rights provisions, they are not golden rules of interpretation. One should be careful not simply to take over how other courts approach their task. As Marais J pointed out in **Nortje and Another v Attorney-General of the Cape and Another**³¹⁹, a case dealing with the interpretation and application of section 23 of the Constitution,

"[t]he approaches adopted by other Courts and constitutional lawyers to the interpretation, limitation and application of constitutionally entrenched rights are undoubtedly a valuable aid to understanding what is entailed in those process. Logically structured and systematic approaches have an inherent appeal for lawyers. However, they remain what they are, not holy writ, but simply methodological approaches which are not necessarily the only legitimate approaches to the task."³²⁰

In his judgment Marais J identified two important aspects which have to be borne in mind when interpreting the provisions Chapter 3 of the Constitution. First of all, the Constitution itself contains in section 35 an injunction as to

³¹⁷1994(5) BCLR 19 (E). See **infra** for a discussion of this case.

³¹⁸1995(8) BCLR 1018 (B). See **infra** for a discussion of this case.

³¹⁹1995(2) BCLR 236 (C).

³²⁰At 248H.

how these provisions have to be interpreted.³²¹ Secondly, the Constitution is legislation **sui generis**; it provides a set of societal values which operate as a standard against which laws must be measured in order to be valid law.³²² A Constitution differs from ordinary legislation; the traditional canons of interpretation, which are suited to the interpretation of ordinary legislation, are therefore inappropriate in interpreting provisions of the Constitution.³²³

An important aspect of Marais J's judgment in the **Nortje** case is that the judge emphasised the need to take into account the nature of the society which the court serves when adopting or importing a principle of foreign law. Circumstances such as a high rate of crime, lawlessness, political intolerance and non-co-operation may force the courts to adopt a less indulgent attitude when applying the provisions of Chapter 3. Indeed, such circumstances run counter to the spirit and object of the Constitution, namely to secure for all citizens, peace, freedom and equality in an open and democratic society; a less indulgent attitude in the application of the provisions of Chapter 3 under such circumstances would be reasonable and justifiable in an open and democratic society based on freedom and equality.

The interpretation of section 25 of the Constitution has also featured in the decisions of the courts. Section 25 entrenches a wide range of rights of

³²¹At 256J.

³²²At 247E. Marais J also pointed out that the provisions in which the values are contained are couched in wide and all-embracing terms such that paring down of one kind or another is required in order to avoid absurdity (at 247F). In so far as a paring down involves a narrower interpretation of the right it militates against a generous approach to some extent; as Marais J pointed out, this may not be justified in a given case. It is submitted, however, that a paring down should depend on the scope or reach of the specific right as established by the court, having regard to the particular circumstances of the case. If paring down is sought to be achieved by means of legislation, such legislation will have to conform to the section 33 limitation standard.

³²³At 247H.

detained, arrested and accused persons.

In **S v Shangase and Another**³²⁴ the court had to consider the constitutionality of the presumption in section 217(1) of the Criminal Procedure Act, 51 of 1977 requiring an accused person to prove that a confession was not made freely and voluntarily. With reference to the Canadian case of **R v Oakes**³²⁵ the court found that the rights entrenched in sections 25(2)(a) (the right to be informed of the right to remain silent), 25(2)(c) (the right not to be compelled to make a confession or an admission), 25(3)(c) (the right to be presumed innocent and to remain silent) and 25(3)(d) (the right to adduce and challenge evidence and not to be a compellable witness against oneself) are the "very pillars of a criminal justice system in an open and democratic society".³²⁶

The court held that the section 217(1) presumption was in conflict with section 25(2)(a) and 25(2)(c) of the Constitution and ruled that the State bore the onus to prove beyond a reasonable doubt the admissibility of an accused's statement; this standard of proof, the court observed, was "the very essence of the fundamental right to have a fair trial".³²⁷

The right to a fair trial, which is entrenched in section 25(3) is in fact the essence of the rights of an accused person; all the other rights which he has as an accused person are merely a corollary of it.

The section 217(1) presumption was dealt with extensively in the first reported

³²⁴1994(2) BCLR 42 (D). Also reported in 1994(2) SACR 659 (D).

³²⁵Supra.

³²⁶At 45F (BCLR).

³²⁷At 46A (BCLR).

case of the Constitutional Court, **S v Zuma**.³²⁸ The Constitutional Court held that **S v Shangase** was correctly decided.³²⁹ However, Kentridge AJ went much further and held that the right to fair trial embraces more than what is contained in the list of specific rights enumerated in section 25(3); it encompasses the notions of substantive fairness and justice and it is the duty of the courts to give content to these notions.³³⁰

Kentridge AJ laid down the principles which ought to be applied in interpreting the fundamental rights entrenched in Chapter 3 of the Constitution. He approved the judgment of Lord Wilberforce in the Privy Council case of **Minister of Home Affairs (Bermuda) v Fisher**³³¹ in which it was stated that the provisions of a supreme Constitution ought to be given a generous interpretation, one which gives to individuals the full measure of the rights and freedoms entrenched in it.

It is clear from Kentridge AJ's judgment that a generous interpretation is not the same thing as free interpretation. Although a supreme Constitution calls for principles of interpretation of its own, respect must be paid to the language used and to the traditions and the usages which give meaning to that language. Paying respect to the language used is not in any way literalistic because the language used is not the starting point; the starting point is the character and origin of the Constitution; the language, together with the principle of giving

³²⁸1995(4) BCLR 401 (CC).

³²⁹The question whether the section 217(1) presumption was constitutional was in essence one of the constitutionality of a reverse onus. The Constitutional Court also held in **S v Bhulwana; S v Gwadiso** 1995(12) BCLR 1579 (CC) that a reverse onus provision, which created a presumption of dealing in dagga once it is proved that an accused was found in possession of dagga exceeding 115g, was unconstitutional.

³³⁰At 411H-J.

³³¹(1980) AC 319 (PC).

full effect recognition and effect to the entrenched rights provide a guide in the process of interpretation.

What appears from Kentridge AJ's judgment is that the purpose of a right provides a means through which the meaning of a right and the interests sought to be protected can be ascertained.³³² The specific purpose cannot be looked at in isolation; it has to be sought by reference to the character and larger objects of Chapter 3. This process is consistent with a purposive and generous approach rather than a legalistic one.

The judge also referred to and approved the judgment of Froneman J in **Qozeleni**.³³³ He qualified the value-oriented approach adopted by Froneman J by stating that a Constitution embodying fundamental rights should be given a broad or generous interpretation **as far as its language permits**.³³⁴ While Froneman J's approach in the **Qozeleni** case is bold and places greater emphasis on constitutional values than on language, Kentridge AJ's approach in the **Zuma** case is more cautious and conducive to legal certainty and continuity.³³⁵ Nevertheless the bold and value-oriented approach adopted by Froneman J is important because it shows that our judges are willing and able to undertake an empirical analysis of constitutional values and the social forces that revolve around them.

The effect of section 25 of the Constitution on the release of accused persons on bail has also been considered by the courts. Section 25(2)(d) guarantees the

³³²At 411D.

³³³**Supra**.

³³⁴At 412H.

³³⁵Kentridge AJ remarked for example (at 412F) that the principles of law which have hitherto governed our courts should not be ignored because they contain much of lasting value.

right "to be released from detention with or without bail, unless the interests of justice require otherwise". Prior to the commencement of the 1993 Constitution it was generally accepted that the accused carried the onus to show that he was entitled to be released on bail. However, Van Blerk AJ held in **Magano and Another v The District Magistrate, Johnson NO and Others**³³⁶ that the state bears the onus to show that an accused's release on bail is not in the interests of justice.³³⁷ He based his decision on the reasoning that section 25(2)(d) does not merely give an accused the right to apply for bail; this right already exists under the Criminal Procedure Act, 51 of 1977. Section 25(2)(d) guarantees the right to be released on bail and this right can only be denied where the interests of justice require otherwise. In his view the word 'unless' adds weight to the argument that the interests of justice must require the continued detention of the accused if he is to be denied bail.³³⁸

In **Prokureur-generaal van die Witwatersrand Afdeling v Van Heerden en Andere**³³⁹ Eloff JP took a different view and held that there is no indication in section 25(2)(d) that the state bears the onus to prove that the interests of justice outweighed an accused's claim to liberty and to be released on bail. This view was confirmed by the decision of the majority of the full bench in **Ellish en andere v Prokureur-Generaal, WPA**.³⁴⁰ The court found that although it was clear from the wording of section 25(2)(d) that the state had to commence with the presentation of evidence, there was no onus on the state to prove that it is not in the interests

³³⁶1994(2) BCLR 125 (W).

³³⁷See also **S v Njadayi** 1994(5) BCLR 90 (E) at 96C-D.

³³⁸At 128F.

³³⁹1994(2) SACR 467 (W).

³⁴⁰1994(2) SACR 579 (W).

of justice to release the accused on bail; it held that bail proceedings were *sui generis* proceedings in which the court had to speculate about a future prospect.³⁴¹ It appears from this decision that what the court has to consider is whether, considering all the evidence before it, there are circumstances which in the interests of justice militate against the release of the accused on bail; one of the major considerations is whether the accused will come back to stand trial if released on bail.

The effect of the decision of the court in **Ellish** is that the accused is in a more favourable position than the State. The overriding factor is no longer whether the accused has satisfied the court on a balance of probabilities that he is entitled to be released on bail but whether, weighing the interests of the accused and the interests of justice, he is entitled to be released on bail. The State bears the initial burden of showing that the interests of justice require that the accused should not be released on bail.

The courts have also had an opportunity to deal with other entrenched rights which are not concerned with criminal justice, namely the right to equality³⁴² and freedom of expression.³⁴³

In *AK Entertainment CC v Minister of Safety and Security*

³⁴¹See also in general **S v Mabaza en 'n ander** 1994(5) BCLR 42 (W).

³⁴²**AK Entertainment CC v Minister of Safety and Security and Others** 1994(4) BCLR 31 (E); **Motala and Another v University of Natal** 1995(3) BCLR 374 (N); **Baloro and Others v University of Bophuthatswana and Others** (supra).

³⁴³**Mandela v Falati** (supra); **Gardener v Whitaker** (supra); **Jurgens v The Editor, Sunday Times Newspaper and Another** 1995(1) BCLR 97 (W); **Government of the Republic of South Africa v The Sunday Times Newspaper and Another** 1995(2) BCLR 182 (T).

and Others³⁴⁴ the court was concerned with the interpretation of section 8 (the right to equality). The applicant contended that the police acted selectively when they carried out certain raids on its casino and seized its equipment, while others were not raided. This amounted to an infringement of its right to equality before the law (section 8(1)) and its right not to be unfairly discriminated against (section 8(2)). The court adopted an approach which is similar to that enunciated in the Canadian case of **Andrews v Law Society of British Columbia**³⁴⁵ and held that it is not every distinction or differentiation in treatment at law which transgresses the section; it is only those distinctions or differentiations which are unfair, in the sense that they cause prejudice to the person discriminated against, that are hit by the equality section.

The court found that the discrimination complained of did not arise because of the content of the law but because of the manner in which the law is applied by an organ of State; in such an event an infringement of section 8 will arise only if the organ of State applies the law unequally or enforces it according to a principle which discriminates against a person because of some particular characteristic which he possesses. It concluded that the police may have applied the law inconsistently, but that in itself did not amount to an unfair discrimination against the applicant in contravention of section 8.

It may be that an inconsistent application of the law amounts to discrimination; however, such discrimination is not necessarily unfair and therefore inconsistent with the provisions of section 8(2). As Melunsky J noted,³⁴⁶ for a discrimination to be unfair it must be shown that the law in

³⁴⁴**Supra.**

³⁴⁵(1989) 56 D.L.R (4th) 13; [1989] 1 S.C.R 143. See Chapt. 6 for a discussion of the **Andrews** case.

³⁴⁶At 40G.

issue is applied unequally or is enforced according to a principle which has a discriminatory effect due to some particular characteristic of the discriminatee.³⁴⁷ In essence, what is prohibited is not simply any discrimination but discrimination which has the effect of inequitably benefiting or disadvantaging certain groups or persons on the basis of some identifiable characteristic. Some of these characteristics are enumerated in section 8(2).

The dispute in **AK Entertainment** involved an individual and an organ of the State; the question whether section 8 also operated where the parties are private litigants (the so-called horizontal operation) was not therefore in issue. This question arose in **Motala and Another v The University of Natal**.³⁴⁸

The question in issue in **Motala** was whether the policy adopted by the University of Natal for the selection of first-year students for admission to the University amounted to unfair discrimination. The selection procedure was such that it favoured African pupils but not Indian pupils.

Before dealing with the question whether the University's selection policy was in conflict with section 8(2) of the Constitution, Hurt J considered the question whether the section operates horizontally. He held that the fundamental rights entrenched in Chapter 3 do not exclusively operate vertically and came to the conclusion that the provision in section 7(1) that the Chapter binds "all

³⁴⁷In **Cherry v Minister of Safety and Security and Others** 1995(5) BCLR 570 (SE), for example, the applicant sought to show that the Liquor Act, 27 of 1989 is applied according to a policy which has the effect of discriminating against him as a member of a disadvantaged community. This contention in essence distinguishes this case from **AK Entertainment**. The contention was, however, rejected. It was held that the licensing and control of the sale constituted a justifiable limitation on the applicant's right in terms of section 33(1).

³⁴⁸Supra.

legislative and executive organs of State" does not preclude the horizontal application of certain fundamental rights.

In his judgment Hurt J adopted a broad rather than a restrictive approach to the question whether some of the fundamental rights entrenched in Chapter 3 operate horizontally. He not only considered the provisions of section 7(1) but also other provisions of the Constitution. In his view section 7(1) was enacted to stress that the state and its organs are to honour the entrenched rights both in legislation and in administration; there are other provisions of the Constitution, however, which indicate that the Courts, as guardians of a supreme Constitution, must bring the common law into conformity with the entrenchment of fundamental rights in the Constitution. The judge expressed the following opinion:

"One of the primary objectives of the Constitution was to replace the system of parliamentary supremacy with one of constitutional supremacy. This was achieved in section 4. With a metaphorical stroke of the pen, the framers avoided 'any law or act inconsistent with' the provisions of the Constitution 'to the extent of the inconsistency'. Section 33(2) expressly stipulates that the rights entrenched in Chapter 3 are not to be limited, save in terms of subsection 33(1), by any law 'whether a rule of the common law, customary law or legislation'. Section 35(3) charges courts to 'have due regard to the spirit, purport and objects of this Chapter'. Having regard to these admonitions, I do not consider that it was intended or contemplated that the courts would leave it to the legislator to pass legislation aimed at bringing the common law into conformity with Chapter 3. By giving the judicial arm of the State the power to avoid or ignore statutory provisions inimical to the Constitution, and more particularly to the rights entrenched in Chapter 3, it seems clear to me that the framers of the Constitution intended to make the Courts the custodians of those rights."³⁴⁹

What appears from Hurt J's judgment is that there is a distinction between rights which are by their nature exclusively vertical in their operation and those which operate vertically as well as horizontally. The right to equality, in particular, falls under the second category.³⁵⁰

³⁴⁹At 3811-382B.

³⁵⁰At 382H.

Turning to the question whether the University's selection policy was in conflict with section 8(2) or section 32(a)³⁵¹, the court found that it was not. It held that the selection policy fell within the scope of section 8(3) and was therefore not unfairly discriminatory.³⁵²

The question whether certain provisions of Chapter 3 operate horizontally was also considered by Friedman J in **Baloro and Others v University of Bophuthatswana and Others**.³⁵³ He disagreed with the judgment of Van Dijkhorst J in **De Klerk and Another v Du Plessis and Others**³⁵⁴ and endorsed the judgments in **Mandela v Falati**³⁵⁵ and **Gardener v Whitaker**.³⁵⁶ He held that some of the provisions entrenched in Chapter 3 applied horizontally in certain instances.³⁵⁷ Like

³⁵¹Section 32(a) entrenches the right to basic education and to equal access to educational institutions.

³⁵²Section 8(3) is the so-called 'affirmative action' provision; it constitutes an exception to the operation of the section 8 equality provision. The court found that there was evidence that African pupils were more severely disadvantaged than their Indian counterparts under the apartheid education system.

³⁵³**Supra.**

³⁵⁴**Supra.**

³⁵⁵**Supra.**

³⁵⁶**Supra.**

³⁵⁷**Addendum:** The argument that Chapter 3 applied horizontally was rejected by the Constitutional Court in **Gardener v Whitaker** CCT 26/94, judgment delivered on 15 May 1996 and **De Klerk v Du Plessis** CCT 8/95, judgment delivered on 15 May 1996. However, the new Constitution (Constitution of the Republic of South Africa, 1996) opens the door to horizontal application. Section 8(2) of the new Constitution provides that "a provision of the Bill of Rights binds natural and juristic persons if, and to the extent that, it is applicable, taking into account the nature of the right and any duty imposed by the right."

Motala, Baloro was also concerned with the application of section 8 of the Constitution.

Friedman J based his decision concerning the horizontal application of some of the rights entrenched in Chapter 3 on the larger purpose which the framers had in mind when they adopted the Constitution. The larger purpose of the Constitution was to restructure the South African legal, social and economic order into an order based on the ideals of a constitutional state based on a supreme Constitution;³⁵⁸ this purpose was implicit from the entrenchment of fundamental rights in a justiciable Bill of Rights and the directive to the courts to promote the values which underlie an open and democratic society based on freedom and equality when they interpret the Constitution³⁵⁹ and also to have due regard to its spirit and objectives in the application and development of the common law and customary law.³⁶⁰ He found that the objectives of the Constitution, the values embodied in it, the justiciability clause³⁶¹ and the directive to the courts contained in section 35 point to an interpretation which gives certain rights a horizontal dimension.³⁶²

The approach adopted by Friedman J is, like that of Hurt J in the **Motala case**, broad rather than restrictive. It recognises the significance of the Constitution as not only a catalogue of fundamental human rights but also an organic instrument which seeks to realise the ideals of justice, equality and the enjoyment of human rights and manifests a quest for an open and democratic society:

"The Constitution contains a most vivid and elaborate illustration of a vision of

³⁵⁸At 1044H and 1045F.

³⁵⁹Section 35(1).

³⁶⁰Section 35(3).

³⁶¹Section 7(4).

³⁶²At 1049E and 1050E.

fundamental rights, expanded almost to the limit for the manifold application of human rights to life in the country by the government and the courts, in order that principles of justice operate in the formation of an egalitarian society.³⁶³

If the fundamental rights are to be of vertical application only, between the State and the individual, then the refreshing breeze of humanism calculated to blow through 'the Constitution' would be relegated to the cellar in the hierarchy of values contained therein.³⁶⁴

The individual, apart from his relations with the State, would be moored between the sacred (the vertical application) and the profane (the horizontal application).³⁶⁵

A significant aspect of Friedman J's judgment is that he sounded a caution about over-extending the horizontal dimension of Chapter 3³⁶⁶ and also laid down a useful test to determine when its provisions will apply to 'non-State' activity. The warning arises from the fact that an over-extension of the horizontal dimension may lead to a right such as the right to equality clashing with other rights such as the right to privacy and the right to freedom of association. This clash can be avoided by qualifying the horizontal dimension and recognising that ordinary private law activity and relationships are in general not subject to the horizontal application of fundamental human rights provisions.

In his judgment Friedman J formulated a test to determine under what circumstances the provisions of Chapter 3 will have horizontal application. According to this test any activity, operation, undertaking or enterprise operating in the community and open to the public falls within the scope of the

³⁶³At 1055B.

³⁶⁴At 1055I.

³⁶⁵At 1055J.

³⁶⁶At 1059I.

horizontal operation of Chapter 3.³⁶⁷ Corporations, companies, commercial or professional firms, hotels, restaurants etc, hospitals, universities, clubs and transport enterprises that deal with the public or are open to the public fall in this category.³⁶⁸

Friedman J also referred to the 'state action' doctrine of American law as another approach which can be usefully employed.³⁶⁹ In terms of this doctrine an activity or conduct falls within the scope of the horizontal dimension if (i) it is a 'public function' or takes place within the public domain or (ii) it is so linked or intertwined with public action that the private actor becomes equated with the public domain or (iii) where the actor is a private person and the conduct has been approved, authorised or encouraged by the State or public institutions in such a way so as to be responsible for it. The test formulated by Friedman J corresponds to some extent to the 'public function/public domain' leg of the 'state action' doctrine.

It is not clear, however, whether Friedman J intended the 'State action' doctrine approach to operate as an independent test in relation to the provisions of Chapter 3 or whether it supplements the test he laid down. Except in instances where the Thirteenth Amendment is invoked,³⁷⁰ the 'State action' doctrine is generally invoked where the State has some form of

³⁶⁷At 1059D.

³⁶⁸At 1058H-1059C.

³⁶⁹This doctrine was first enunciated in the **Civil Rights Cases** 109 US 3 (1883).

³⁷⁰In **Jones v Alfred H Meyer Co.** 392 US 409 (1968) it was held that the Thirteenth Amendment, which outlaws slavery, could be applied in purely private relations. The decision was based on the argument that the Amendment covers almost all incidents of racial discrimination which were manifestations of incidents of slavery.

relationship with the private violator of the Bill of Rights.³⁷¹ On the other hand, the test laid down by Friedman J does not seem to be based on some form of relationship between the State and the private violator; it seems to be based on the fact that the activity in issue cannot be performed or that the operation, undertaking or enterprise cannot operate without participation by members of the general public or the community. It would seem therefore that this test goes further than the 'State action' doctrine.

One can draw an analogy from judicial review of the acts of private or domestic tribunals in administrative law to explain the broad or generous approach adopted by the courts concerning the horizontal dimension of some of the provisions of Chapter 3 of the Constitution, especially where large corporations and organisations which owe their existence to the participation of members of the public are involved. In administrative law the courts have reviewed the acts of private or domestic tribunals such as disciplinary tribunals of churches and clubs.³⁷² In doing so they adopted a broad or liberal approach based on the realisation that there exists an unequal relationship between corporations or organisations and their members or patrons and that the relationship is in many respects analogous to the authoritative public law relationship. This approach is realistic.³⁷³

³⁷¹See for example **Burton v Wilmington Parking Authority** 365 US 715 (1961) (space rented by restaurant owner in state-owned parking lot); **Evans v Moore** 382 US 296 (1966) (state nominated as trustee in will); **Moose Lodge v Irvis** 407 US 409 (1972) (club required to have state liquor licence).

³⁷²See for example **Motaung v Makubela NO** 1975(1) SA 618 (O); **Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika** 1976(2) SA 1 (A) at 9C-G and 21D-F; **Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange** 1983(3) SA 344 (W); **Grundling v Van Rensburg** 1984(3) SA 207 (W).

³⁷³See J. Taitz "The **Audi Alteram Partem** Rule and the Obligation to Exhaust Domestic Remedies" 1976 **SALJ** 552 at 554-555.

However, a right such as freedom of expression has by its nature some seepage into the horizontal dimension even in instances where there is no state involvement or an authoritative relationship whatsoever in disputes between private individuals among themselves.

In **Mandela v Falati**³⁷⁴ Van Schalkwyk J found that the Constitution did not spell out in clear terms whether Chapter 3 was intended to operate only horizontally or also vertically. He held that the right to freedom of expression,³⁷⁵ in so far as it relates to political activity, can be enforced in a private dispute because political activity occurs not only between the State and its organs and private individuals but also between individuals among themselves.³⁷⁶ In coming to this conclusion the judge adopted a broad or liberal approach which takes into account the spirit, purport and objects of the Constitution and extends the protection of fundamental human rights beyond circumstances for which the common law makes provision.³⁷⁷

The case was concerned with an application for an interdict restraining the respondent from making defamatory statements about the applicant. In dealing with the question whether an interim interdict which was granted by consent should be postponed and extended, the court considered whether such a postponement and extension was justified in the light of the respondent's right to freedom of speech and expression as entrenched in section 15(1) of the Constitution and the applicant's right to dignity as entrenched in section 10.

³⁷⁴Supra.

³⁷⁵Section 15.

³⁷⁶At 6H.

³⁷⁷At 6J. Basson **South Africa's Interim Constitution** (1994) at 15 also argues in favour of this view. This view is based on the section 35(3) directive that the courts should have due regard to the spirit, purport and objects of Chapter 3 in the interpretation of any law and the development of the common law and customary law.

Crisply, **Mandela v Falati** raised the question of balancing freedom of speech and expression with the right to dignity. Van Schalkwyk J, after referring to various authorities, emphasised the importance of freedom of speech:

"The history of liberty shows that the currency of every free society is to be found in the market-place of ideas where, without restraint, individuals exchange the most sacred of all commodities. If the market is sometimes corrupt or abused or appears to serve the interest of the wicked and unscrupulous, that is reason enough to accept that it operates in accordance with the rules of human nature."³⁷⁸

Van Schalkwyk J's **dictum** is in accord with the idea of an open and free society. Freedom of speech is the hallmark of a free and democratic society; it enables citizens to point out and correct wickedness and corruption in the interests of society. The judge also pointed out, however, that the importance of freedom of speech did not mean that whenever the right of freedom of speech comes into conflict with the right to dignity the former must prevail:

"To allow that to happen would be to abrogate the law of defamation, and would in any case violate the provisions of section 33(1) of the Constitution".³⁷⁹

The question of the horizontal dimension of Chapter 3 and the importance of freedom of speech in relation to other fundamental rights was also dealt with in **Gardener v Whitaker**³⁸⁰. In this case Froneman J considered the position in other jurisdictions and found that although fundamental human rights charters primarily apply to litigation between an individual and organs of the state, fundamental constitutional values ought to permeate throughout the entire legal system.³⁸¹ It is the duty of the courts to adapt the common

³⁷⁸At 8D.

³⁷⁹At 8F.

³⁸⁰1994(5) BCLR 19 (E). **Addendum: Gardener v Whitaker** was overturned by the Constitutional Court: see footnote 357.

³⁸¹At 29J-30B.

law to the broader objects of the Constitution;³⁸² this duty stems from the fact that sections 35(1) and 35(3) oblige the courts to harmonise the common law with the values of the Constitution.³⁸³ The judge concluded that aspects of the common law must therefore be scrutinised to determine whether they accorded with the provisions of the Constitution.³⁸⁴

The dispute in **Gardener**, like that in **Mandela**, raised the question of balancing the competing rights of freedom of speech and human dignity, which incorporates the common law of defamation. Under the common law greater weight is attached to the right to one's good name or reputation than the right to freedom of speech.³⁸⁵ However, under the Constitution both rights are fundamental and therefore equal in weight; the Constitution does not create a hierarchy of fundamental rights where an alleged infringement of the right to free speech and expression has to be determined in the context of another, competing, fundamental right.³⁸⁶ In order to determine whether one right should take precedence over another in a competing situation, one should look at the context in which the clash of interests occurs and decide the matter by means of a process of balancing the competing interests.³⁸⁷

³⁸²At 30H-I.

³⁸³At 30I.

³⁸⁴As Froneman J pointed out (at 31B), the nature and extent of a particular right and the values that underlie it are important in determining whether it operates horizontally.

³⁸⁵This is clear from the fact that a defamatory statement is presumed to be wrongful. The defendant bears the onus to rebut the presumption: see *inter alia* **SAUK v O'Malley** 1977(3) SA 394 (A) at 401-402; **Borgin v De Villiers** 1980(3) SA 556 (A) at 571; **Marais v Richard** 1981(1) SA 1157 (A) at 1166-1167.

³⁸⁶At 35I-36A.

³⁸⁷At 37A. See Chapter 11 for a discussion of balancing competing interests in constitutional litigation.

In the United States of America freedom of speech and expression is highly valued.³⁸⁸ Freedom of speech is seen as essential to advance the search for truth and to enable people, especially where issues of public importance are involved, to hear and consider different points of view.³⁸⁹ Hate speech is therefore afforded protection as a result of the high value placed on freedom of expression.³⁹⁰ This stems mainly from the fact that American society has in the course of building a strong democracy developed a high degree of political tolerance; hate speech which is aimed at promoting political ideals is therefore tolerated.³⁹¹

Hate speech is also tolerated in Canada, although not to the same extent as in the United States. In **R v Keegstra**³⁹² the Canadian Supreme Court held that a provision of legislation which prohibited wilful promotion of group hatred infringed the right of free speech as guaranteed in section 2(b) of the Canadian Charter of Rights and Freedoms. It is significant to note, however, that the court held, by a majority of four to three, that the legislative infringement in issue was a demonstrably justifiable limitation under section 1 of the Charter.

³⁸⁸See for example **Roth v United States** 354 US 476 (1957) at 484; **New York Times v Sullivan** 376 US 254 (1964) at 270-271.

³⁸⁹See E. Neisser "Hate Speech in the New South Africa: Constitutional Considerations for a Land Recovering from Decades of Racial Repression and Violence" 1994 **SAJHR** 336 at 344-345.

³⁹⁰See for example **Brandenburg v Ohio** 395 US 444 (1969) (right of Ku Klux Klan to call for the expulsion of blacks and Jews upheld); **Smith v Collins** 439 US 916 (1978) (right of Nazis to march and chant in a suburb populated by survivors of Jewish concentration camps affirmed).

³⁹¹Hate speech which does not form part of dialogue or exposition of ideas does not fall under the protected category: see D. van Wyk, J. Dugard **et al Rights and Constitutionalism** (1994) at 275.

³⁹²(1990) 3 SCR 697.

South Africa is still a young democracy which has just emerged from a long history of discrimination, division and racial tensions; it has not yet developed a high degree of political tolerance; affording hate speech, especially speech with a racial tone, protection risks tension and disunity.³⁹³ Legislation prohibiting hate speech will have to be measured against the section 33 'reasonable' and 'justifiable in an open democratic society based on freedom and equality' criteria, bearing in mind the infancy of our democracy and the need to advance national unity and reconciliation.³⁹⁴

Section 33(1)(bb) requires a high degree of justification where freedom of expression relates to free and fair political activity; if legislation prohibiting hate speech which relates to political activity is to be saved it must also be shown that it is necessary.³⁹⁵ The challenger will have to show, however, that the speech in issue relates to fair political activity. It is submitted that once South Africa develops into a mature democracy, hate speech which promotes the aspirations and ideals of members of the various sections of the community and their participation in the political process should be afforded protection.

In the **Mandela** case the court approved the rule adopted in **New York**

³⁹³The postamble, which is entitled 'national unity and reconciliation, specifically states that the 1993 Constitution provides a "historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and **peaceful co-existence** and development opportunities, irrespective of colour, **race**, class, belief or sex" (my emphasis).

³⁹⁴**Addendum:** Section 16(2) of the new Constitution (Constitution of the Republic of South Africa, 1996) now provides that freedom of expression "does not extend to advocacy of hatred based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

³⁹⁵It may be argued that such legislation is necessary to realise the ideal of national unity and reconciliation as provided in the postamble and to nurture our young democracy.

Times Co v The United States,³⁹⁶ namely that a system of prior restraint of expression places a heavy presumption against its constitutional validity; a party who seeks to have a prior restraint upheld carries a heavy burden of showing justification for the imposition of such a restraint.³⁹⁷ If a defamation occurs the aggrieved party has recourse in an action for damages.

Mandela v Falati and **Gardener v Whitaker** are also important because they recognise the special position of public figures in relation to freedom of expression. Public figures should not be permitted to silence their critics because of their influential position in society; the very fact that they are prominent public figures exposes them to a high degree of scrutiny and criticism. As Van Schalkwyk J stated in the **Mandela** case:

"It is a matter of the most fundamental importance that such criticism should be free, open robust and even unrestrained. This is so because of the inordinate power and influence which is wielded by politicians, and the seductive influence which these attributes have upon corrupt men and women. The most appalling crimes have been committed by politicians because their baseness and perversity was hidden from public scrutiny."³⁹⁸

However, Van Schalkwyk J did not deal with the question whether the fact that a litigant is a public official or figure has any bearing in an action for damages based on defamation. In **New York Times Co. v Sullivan**³⁹⁹ the United States Supreme Court held that a public official or figure cannot recover damages for defamation unless he can prove that the defamatory

³⁹⁶403 US 713.

³⁹⁷See D. Spitz "Eschewing Silence Coerced by Law: The Political Core and Protected Periphery of Freedom of Expression" 1994 **SAJHR** 301 at 318-321 for a discussion of the doctrine of prior restraint.

³⁹⁸At 9B-C.

³⁹⁹**Supra**.

matter was published with malice; in essence, it must be shown that the matter was published with the knowledge of its falsehood or with reckless disregard as to whether it was true or not.⁴⁰⁰

The position at common law in South Africa is that once a public official or figure proves that a publication is defamatory, he is entitled to recover damages, unless the defendant proves the existence of one of the ground of justification, namely privilege, truth and public interest and fair comment.⁴⁰¹ Malice is relevant only to show that the defendant exceeded permissible limits where privilege and fair comment are raised as grounds of justification.⁴⁰² Malice is not relevant where truth and public interest are raised as grounds of justification.⁴⁰³

In **Neethling v Du Preez and Others; Neethling v The Weekly Mail and Others**⁴⁰⁴ the Appellate Division held that a defendant in a defamation case bears the full **onus** to prove that a publication was true and in the public interest; it also declined to recognise a general media privilege. In **Argus Printing & Publishing Co. Ltd v Esselen's Estate**⁴⁰⁵ the court also rejected the contention that a public official (in this case a judge) should be barred from recovering defamation damages for the criticism

⁴⁰⁰See also **Gertz v Robert Welch Inc.** 418 US 323.

⁴⁰¹See J. Neethling, J.M Potgieter & P.J Visser **Law of Delict** (1989) at 284-287.

⁴⁰²See for example **Jordaan v Van Biljon** 1962 (1) SA 286 (A) at 295-296; **Naidoo v Vengtas** 1965 (1) SA 1 (A) at 21; **Marais v Richard** 1981 (1) SA 1157 (A) at 1170.

⁴⁰³See **Schourie v Afrikaanse Pers Publikasies** 1966 (1) PH J1 (W).

⁴⁰⁴1994(1) SA 708 (A).

⁴⁰⁵1994(2) SA 1 (A).

of the performance of his official duties.

The **Neethling** and **Esselen's Estate** cases were decided in the light of the common law of defamation; at the time they were decided the 1993 Constitution had not yet come into operation. The Constitution, which seeks to create an open and democratic society based on freedom and equality provides a proper basis for a re-evaluation of rules of the common law. Chapter 3 of the Constitution provides a standard against which principles of the common law can be measured.⁴⁰⁶ In this way the common law principles of defamation can be harmonised with constitutionally guaranteed rights such as freedom of speech in order to encourage candid dialogue and public participation in the democratic process.

In the **Gardener** case Froneman J considered the impact of the Constitution on the common law rules of defamation in a case where the plaintiff is a public figure. He held that public figure plaintiff bears the onus of proving (1) that the statement made by the defendant referred to him; (2) that the statement would have been understood as infringing his right to his reputation; and (3) that the statement is not worthy of protection as an expression of free speech.⁴⁰⁷ As Froneman J opined, the Constitution has changed the common law position.⁴⁰⁸ What used to be defences which relied upon freedom of expression as their basis, such as public interest, privilege, fair comment, and the like in an action of defamation are now available to the public figure plaintiff to show that the defendant's statement is not worthy of protection as an expression of free speech; in other words, the plaintiff must show that the statement is not in the public interest, is not protected by privilege, is not true or was published with reckless disregard as to whether it was true or false.

⁴⁰⁶See H. Botha "Privatism, Authoritarianism and the Constitution: The Case of Neethling and Potgieter" 1995 **THRHR** 496 at 498-489.

⁴⁰⁷At 37E.

⁴⁰⁸At 37G.

In **Bogoshi v National Media Limited and others**⁴⁰⁹ Eloff JP did not approve the judgment of Froneman J in the **Gardener** case. According to Eloff JP the defendant in a defamation case can escape liability only if he can at least establish that a defamatory statement was true; it is no answer to say that the statement was published in good faith and without an intention to defame, and that it was published in the public interest. The judge concluded that section 15 of the Constitution should not be interpreted so as to alter the common law liability of the media for defamatory statements.

It is important to distinguish, however, between a defamatory statement that is in the public interest or relates to free and political activity and one which does not. It is clear from Froneman J's judgment that the principles he enunciated are applicable to a defamation case that has a public dimension and not to 'purely private altercations';⁴¹⁰ in essence, free speech which relates to matters of public interest or to free and fair political activity merits more weight than one which occurs in 'purely private altercations' because it contributes to the development of public opinion. The publisher of a newspaper will ordinarily not be able to rely on the section 15 guarantee of freedom of expression where it publishes defamatory statements which are not in the public interest or do not relate to free and fair political activity.

The importance of free speech that has a public dimension was recognised by Cameron J in **Holomisa v Argus Newspapers Ltd**⁴¹¹. The judge approved the judgment of Froneman J in the **Gardener** case and reaffirmed the approach that the values of the Constitution must be given primacy over the rules of the common law. This approach entails that where there is a clash between an individual's interest to protect his good name and the right to

⁴⁰⁹[1996] 1 All SA 670 (W)

⁴¹⁰At 35G, 36C and 39D.

⁴¹¹[1996] 1 All SA 478 (W).

freedom of speech and expression, the competing values must be weighed up in the light of the Constitution's ethos of openness and accountability.

The approach adopted by Cameron J in the **Holomisa** case relating to the onus with regard to defamatory statements that have a public dimension corresponds to that adopted by Froneman J in the **Gardener** case; the plaintiff bears the onus of showing that the defendant has forfeited entitlement to constitutional protection⁴¹² or, as stated in the **Gardener** case, that the statement is not worthy of protection as an expression of free speech. The test is whether the defendant acted reasonably.⁴¹³

The **Mandela, Gardener** and **Holomisa** cases reflect the spirit and ideal of the 1993 Constitution, namely to usher in a new order founded on the recognition and protection of human rights and democratic principles. Responsible criticism of public officials or figures made in good faith is an essential component of the democratic order.

The approach adopted by the court in **Mandela** and **Gardener** is in accord with the broad and liberal approach suited to the interpretation of a supreme Constitution. It recognises the importance of the protection of human rights in a supreme Constitution and seeks to give individuals the full benefit of human rights guarantees and the need to harmonise the human rights provisions of the Constitution with the rest of the legal system.

A generous approach, as opposed to a literalist approach, to the interpretation of the rights entrenched in Chapter 3, was also supported in the judgment of

⁴¹²At 504d.

⁴¹³**Holomisa** at 504e. The judge rejected the argument that the 'actual malice' test enunciated in **New York Times Co. v Sullivan** (*supra*) should be imported into our law.

Joffe J in **Government of the Republic of South Africa v The Sunday Times Newspaper and Another**.⁴¹⁴ In this case, which, like the **Mandela** and **Gardener** cases, was concerned with the interpretation and application of freedom of speech,⁴¹⁵ Joffe J opined that although respect must be paid "to the language which has been used and to the traditions and usages which have given meaning to that language" in the interpretation of the Constitution, a generous approach must be adopted if the court is to determine "the full ambit of the rights enshrined in the Constitution and be vigorous in the protection thereof".⁴¹⁶

In his judgment in the **Sunday Times Newspaper** case Joffe J referred with approval to the judgment of Van Schalkwyk J in **Mandela v Falati**, in which it was stated that freedom of speech and expression is vital to the protection and promotion of democracy. Freedom of expression, as it relates to the press in a democratic society in particular, is vital in ferreting out corruption, dishonesty and graft and exposing the perpetrators; the press facilitates the exchange of ideas, advances communication between the governors and the governed and serves as a watchdog of the governed.⁴¹⁷ The court held that a regulation,⁴¹⁸ which prohibited the publication of a report of a Commission of Inquiry before the President had released it and before it was tabled in Parliament was unconstitutional as it constituted an

⁴¹⁴**Supra.**

⁴¹⁵The difference between **Mandela** and **Gardener**, on the one hand, and the **Sunday Times Newspaper** case, on the other, was that while the former involved disputes between private individuals, the government was a party in the latter.

⁴¹⁶At 186E.

⁴¹⁷At 188G-H.

⁴¹⁸Regulation 13 (Government Gazette of 8 June 1993, notice R50), made in terms of the Commissions Act, 8 of 1947.

improper prior restraint.

The broad and generous approach to the interpretation of the Constitution was also apparent from Froneman J's judgment in the **Gardener** case when he dealt with the question whether section 241(8) has the effect of excluding the operation of the provisions of the Constitution to pending proceedings. The judge adopted the approach that the provisions of Chapter 3 of the Constitution apply to cases which were pending before the coming into operation of the Constitution on 27 April 1994. Although the judge mainly based his decision on the view that the purpose of section 241(8) is to ensure a continuation of the territorial jurisdiction of the court in which a case was pending immediately before the commencement of the Constitution, he preferred a "broader approach based on the inherent values of the Constitution".⁴¹⁹

In **S v Saib**⁴²⁰, however, Thirion J adopted a literalist/intentionalist approach to the interpretation of section 241(8) of the Constitution. He came to the conclusion that the intention of the legislature, when it enacted section 241, was that the provisions of the Constitution did not apply in respect of matters which were pending before the coming into operation of the Constitution.⁴²¹

Thirion J did not agree with counsel's argument that the Constitution should be interpreted as an instrument *sui generis*, generously and with a view to giving individuals the full benefit of the fundamental rights entrenched in it.

⁴¹⁹At 25H.

⁴²⁰1994(2) BCLR 48 (D). Also reported in 1994(2) SACR 517 (D).

⁴²¹By contrast, in **S v Smith and Another** (*supra*) Van Rooyen AJ found that the intention of section 241(8) was to ensure that a court which had jurisdiction in a matter pending before 27 April 1994 would not lose it as a result of the coming into operation of the Constitution.

According to the judge the rules for the interpretation of the Constitution do not "differ materially from the ordinary rules of the interpretation of statutes. One still has to ascertain and give effect to the intention of the legislature".⁴²²

In terms of the approach preferred by Thirion J the intention of the legislature is fundamental. The role of the interpreter is to ascertain the intention of the legislature from the words used; clear and unambiguous words reflect the intention of the legislature, which must be given effect to. This approach not only fails to distinguish between interpreting ordinary statutes and giving effect to the fundamental values contained in a supreme Constitution but also severely restricts judicial creativity in constitutional interpretation.

The correct approach to the interpretation of section 241(8) is the purposive and generous approach preferred by Froneman J in the **Gardener** case.⁴²³ This approach is set out fully by Froneman J in the **Qozeleni** case.⁴²⁴ The judge considered that the rights entrenched in Chapter 3 were so fundamental that their violation cannot be allowed simply because proceedings were pending at the time of the coming into operation of the Constitution.⁴²⁵ He saw the larger purpose of the Constitution as an important consideration:

⁴²²At 531 (BCLR). See also **Kalla and Another v The Master and Others** (*supra*) at 87J.

⁴²³*Supra*. There are, however, decisions which support the decision in **Saib**: see for example **S v Ndima and Others** 1994(2) SACR 517 (D), **S v Lombard** 1994(3) BCLR 126 (T), **S v Vermaas** 1994(4) BCLR 18 (T) and **S v Coetzee and Others** 1994(4) BCLR 58 (W).

⁴²⁴*Supra*.

⁴²⁵See also **S v W** 1994(2) BCLR 135 (C) at 145B-C; **Shabalala and Others v The Attorney-General of Transvaal and Others** (*supra*) at 92C; **Jurgens v The Editor, Sunday Times Newspaper and Another** (*supra*) at 102G.

"The Constitution is envisaged as a bridge from a despairing past to a hopeful future, not as an extended bypass to prevent one from ever getting to the bridge."⁴²⁶

The purposive and generous approach to the interpretation of section 241(8) was endorsed by Mahomed J in his majority judgment in the Constitutional Court case of **S v Mhlungu and Others**.⁴²⁷ This approach gives force and effect to the values, purpose and spirit of the Constitution. The purpose and spirit of the Constitution is to usher in a new political, constitutional and legal dispensation based on the values of openness, freedom and equality; its human rights provisions should be given "a construction which is 'most beneficial to the widest possible amplitude' if the language and context of the relevant sections reasonably permits such a course".⁴²⁸ By contrast, Kentridge AJ, in a minority judgment, adopted a literalist/intentionalist approach. He found that the 'clear' language of section 241(8) expressly

⁴²⁶At 86C (BCLR). The 'bridge' metaphor is taken from the postamble and was used by Mureinik as well in his article "A Bridge too Where? Introducing the Interim Bill of Rights" 1994 **SAJHR** 31.

⁴²⁷1995(7) BCLR 793 (CC), especially at 799-800A. Although the judge took the view that the special emphasis on 'territorial jurisdiction' in the **Gardener** and **Qozeleni** cases was not justified by section 241(8), he found that the emphasis on the jurisdictional objectives the section provided a basis for an alternative approach to its meaning. He found that the purpose of the section was to create constitutional legitimacy for the courts which were established before the Constitution came into operation; such courts are deemed to have been established in terms of the Constitution (section 241(1)); section 241(8) merely preserve their authority to continue to function as courts for the purpose of adjudication in pending cases. (at 804H and 805H).

⁴²⁸At 800D. See also the authorities cited by Mahomed J. Although one should make a distinction between the interpretation of formal structural provisions such as section 241(8) and the interpretation of the provisions of a Bill of Rights, section 241(8) called for a value-oriented, purposive and generous approach similar to that applicable in the interpretation of the provisions of a Bill of Rights because it directly impacted on the question whether individuals should have the benefit of the rights entrenched in Chapter 3 or not. In essence, where a formal structural provision impacts on fundamental human rights, an approach which is similar to that applicable in the interpretation of human rights provisions should be adopted.

excluded the operation of the provisions of Chapter 3 to pending cases; he took the view that the section is a transitional provision, intended to deal with a limited number of cases, covering a defined short period of time.⁴²⁹

A literalist/intentionalist approach is not suited to the interpretation and application of a supreme Constitution; it flies in the face of Chief Justice Marshall's warning:

"[W]e must never forget that it is a Constitution we are expounding... [It has] great outlines [and] important objects".⁴³⁰

Du Plessis⁴³¹ points out that the literalist/intentionalist approach "is not seriously concerned about what meaning, understanding and interpretation really entail". The interpretation of a supreme Constitution involves not only seeking and understanding the meaning of words used but also the underlying principles and values, both expressed and unexpressed. Constitutional principles and values are as much part of the Constitution as the words used in it.

⁴²⁹At 828H and 830D. A similar approach was adopted by Didcott J in **Bux v The Officer Commanding the Pietermaritzburg Prison and Others** 1994(4) BCLR 10 (N). Although the judge agreed with the generous and value-oriented approach adopted by Froneman J in **Matiso** (*supra*), the approach he adopted is a technical one characteristic of literal interpretation. He decided that a provincial or local division of the Supreme Court was not competent to grant interim relief pending final determination of the constitutionality of an Act of Parliament by the Constitutional Court; he reasoned that the framers of the Constitution intended to exclude the jurisdiction of a provincial or local division to grant interim relief when they created a special Constitution Court which is specifically empowered to inquire into the constitutionality of Acts of Parliament. Section 101(7) of the Constitution now empowers provincial or local division to grant interim relief pending final determination of constitutionality by the Constitutional Court.

⁴³⁰**McCulloch v Maryland** 17 US (Wheat.) 36 (1819) at 407.

⁴³¹L.M Du Plessis "The Interpretation of Bills of Rights in South Africa: Taking Stock" in Kruger & Currin **Interpreting a Bill of Rights** (1994) at 18.

The preamble and the post-amble of the 1993 Constitution set out certain fundamental ideals which can only be realised by seeking and giving effect to the principles and values contained in the Constitution; the meaning of words alone is not sufficient.⁴³² Some judgments of the Supreme Court, notably the judgments of Froneman J in **Qozeleni, Matiso and Gardener**, the judgment of Van Dijkhorst in **De Klerk**, the judgment of Van Schalkwyk in **Mandela** and the judgment of Joffe J in the **Sunday Times Newspaper** case have made a good start in identifying and giving effect to the principles and values embodied in the Constitution. The first judgments of the Constitutional Court in the **Zuma** and **Mhlungu** cases, on the other hand, have laid down a sound basis for the interpretation of the Constitution in a manner which gives effect to fundamental constitutional values.

⁴³²This is precisely what Mahomed AJA meant when he said, in **Ex Parte Attorney-General, Namibia : In re Corporal Punishment by Organs of State (supra)**: "...[T]he Constitution must... be read not in isolation but within the context of a fundamental humanistic philosophy introduced in the preamble and woven into the manifold structure of the Constitution" (at 78C).

CHAPTER 11

CONCLUSION.

Justice Jerome Frank of the United States once posed the question whether decisions of the South African judiciary, had they been supported by a Bill of Rights, would have done much to rein in the exercise of power by the apartheid regime under former Westminster-based Constitutions.¹ South Africa now has a Constitution which incorporates a justiciable Bill of Rights.² Yet, the question posed by Justice Frank remains, although in a somewhat different form, as relevant today as it was then: What success will decisions of the South African judiciary, supported by a Bill of Rights, be able to achieve in reining in the exercise of power by a new government?

The success or failure of the judiciary in bringing to life the noble ideals contained in the Constitution, and giving individuals the full benefit of the provisions of the Bill of Rights, will depend on judicial approaches to the interpretation and application of the provisions of the Constitution. No matter how noble and well-written constitutional provisions are, they are not self-

¹Jerome N Frank "Some Reflections on Judge Learned Hand" 1957 **Chicago LR** 666 at 698.

²Constitution of the Republic of South Africa Act No. 200 of 1993. Although the Constitution of 1993 was adopted and enacted as an interim Constitution, it can be accepted that the final Constitution will not differ materially from the interim Constitution and will contain a Bill of Rights which is substantially the same as the present Bill of Rights. In terms of section 71(1) of the interim Constitution, a new constitutional text must comply with the constitutional principles contained in schedule 4, a number of which deal with the protection of fundamental rights; the interim Constitution itself is also largely based on the constitutional principles contained in schedule 4.

executing; they require judicial elaboration and concretisation.

The South African judiciary has been accustomed to a system of legislative supremacy. Under the Westminster-type system of legislative supremacy Parliament was supreme and its intention paramount; the role of the courts was by and large limited to determining and applying the intention of the legislature. The shift from a subordinate role under the doctrine of legislative supremacy to a position of guardian of the Constitution and arbiter of the constitutionality of legislative and executive acts in the light of the Bill of Rights brings with it new challenges to the South African judiciary. In the new South Africa, the role of the judiciary will be more important and prominent than it was in the past.

An analysis of the role of the South African judiciary under a system of legislative supremacy has highlighted some of the challenges which faced the judiciary in the constitutional arena;³ on the other hand, a comparative analysis of the role of the judiciary in countries which have made a transition from a system of legislative supremacy to one of constitutional supremacy and constitutional guarantees of fundamental human rights highlights the challenges which face a judiciary operating under a human rights regime.⁴ Indeed, South Africa has much to learn from the failures, mistakes and successes of the judiciary in Canada, the former Bophuthatswana and Namibia.

An analysis of the role of the South African judiciary under the new Constitution reveals that there is a great difference between interpreting ordinary statutes and interpreting a Constitution which operates as the supreme law and entrenches fundamental rights and freedoms. A supreme Constitution which guarantees fundamental human rights and freedoms contains values which reflect the ideals and aspirations of the society which it serves; it is the

³See Chapt. 4.

⁴See Chapt. 6, 7 and 8.

function of the judiciary, in interpreting and applying the provisions of the Constitution, to identify and articulate these values and to give individuals their full benefit.

To conclude this thesis, the role of the South African judiciary during the transition from a system of legislative supremacy to one of constitutional supremacy and constitutional guarantee of fundamental human rights and freedoms and the lessons from comparative constitutional law is evaluated. Two other issues which are related to the role of the judiciary, namely the balancing of conflicting interests in judicial adjudication, and the role of the judiciary in a democracy, are discussed briefly; an approach to the interpretation of the provisions of the Bill of Rights is then finally suggested.

1. Crossing the Bridge: From Legislative Supremacy to Constitutional Supremacy.

Numerous studies on the role of the South African judiciary in the field of human rights under former Constitutions have illustrated how lamentable the performance of the judiciary has been.⁵ It is encouraging to know, however, that existing judges of the Supreme Court have reacted positively to the challenge of actualising the fundamental values contained in the human rights provisions of the 1993 Constitution.⁶

⁵See *inter alia* J. Dugard **Human Rights and the South African Legal Order** (1973); H. Corder **Judges at Work - The Role and Attitudes of the South African Appellate Division** (1984); C.F. Forsyth **In Danger for their Talents - A Study of the Appellate Division of the Supreme Court of South Africa** (1985); D. Dyzenhaus **Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy** (1991).

⁶See Chapt. 10 for a discussion of some of the cases where the provisions of the 1993 Constitution have been interpreted and applied. Even before the coming into operation of the 1993 Constitution there were judges who spoke out in favour of a justiciable Bill of Rights: see, *inter alia*, Mr Justice M.M

The starting point in the transition from legislative supremacy to constitutional supremacy with regard to the role of the judiciary is the Constitution itself. Section 4, the supremacy clause, tells much about the role of the judiciary; the supremacy clause is a directive to the judiciary, as interpreters and implementors of the law, to uphold the supremacy of the Constitution and to strike down any law which is inconsistent with its provisions. Sections 101(3) and 98(2) expressly place the interpretation and application of the provisions of the Constitution squarely on the shoulders of the judiciary.

The parties to the constitutional agreement chose not to entrust the upholding of the agreement and the protection of the fundamental rights and freedoms entrenched in it to a parliamentary majority but to the judiciary. The judiciary, as the institution which occupies a pivotal position in upholding the Constitution, has the important function of ascertaining what the norms of the Constitution are and to apply them to the relevant facts of the case.

The greatest challenge which faces the judiciary is to adopt an interpretative stance which is suited to the Constitution, in particular its Bill of Rights, for there is a great deal of difference between interpreting the provisions of a supreme Constitution and the provisions of an ordinary statute. The difficulty with many Constitutions, when their provisions come up for interpretation by the courts, is that there may not be explicit guiding principles in the event of there being a conflict of interpretations.

The 1993 Constitution contains a number of pointers to the interpretation of the provisions of the Bill of Rights. Section 35(1) specifically directs the court

Corbett "Human Rights : the Road Ahead" 1979 **SALJ** 192; Mr Justice Leon "A Bill of Rights for South Africa" 1986 **SAJHR** 60; Mr Justice G.P Kotze "Menseregte: Suid-Afrika se Dilemma" in J. van der Westhuizen & H. Viljoen **A Bill of Rights for South Africa** (1988) 1 at 4; J. van der Westhuizen "An Interview with the Hon. Mr Justice P.J.J Olivier" 1988 **SAJHR** 99.

to "promote the values which underlie an open and democratic society based on freedom and equality". The position in other democratic societies and international law affords a valuable starting point in promoting the values which underlie an open and democratic society based on freedom and equality; in terms of section 35(1), in interpreting the provisions of which entrench fundamental human rights the judiciary must have regard to international law applicable to the protection of human rights and may have regard to comparable foreign case law.⁷

Section 35(3) of the Constitution contains another important directive to the judiciary with regard to the interpretation of laws which are alleged to be in conflict with the provisions of the Bill of Rights. Section 35(3) directs that any law must be interpreted with due regard to the spirit, purport and objects of the Bill of Rights.

The spirit, purport and objects of a Bill of Rights emanate from the Constitution in which it is contained and appear from its terms. When the framers of the new Constitution adopted and enacted it, they desired to create a new order under a democratic constitutional state based on freedom and equality and the protection of the inalienable rights of man.⁸ The desire to create a new order was also a desire to move away from the past, where the rights and freedoms of citizens were at the mercy of parliamentary majorities.

⁷As to the use of comparative foreign law, the courts have repeatedly called for circumspection because Constitutions have different contexts and social milieu within which and historical backgrounds against which they are drafted: see **Qozeleni v Minister of Law and Order** 1994(1) BCLR 75 (E) at 80C; **Park-Ross v Director, Office for Serious Economic Offences** 1995(2) BCLR 198 (C) at 208D, approved in **Potgieter en 'n Ander v Kilian** 1995(11) BCLR 1498 (N) at 1513J-1514A; **Fose v Minister of Safety and Security** 1996(2) BCLR 232 (W) at 237H.

⁸See preamble to the Constitution.

The 1993 Constitution defines the powers of government and also limits the exercise of these powers in relation to the citizen by entrenching fundamental rights and freedoms. The resolution of disputes concerning the exercise of power and the guarantee of fundamental rights and freedoms demands an appraisal and an articulation of constitutional values. The impact of the new Constitution is profound: it urges the upholding of the fundamental values of fairness, freedom under the law, equality and justice.

It may be that the 1993 Constitution sets out and entrenches fundamental human rights and freedoms to which the individual is entitled. It is worth remembering, however, that human rights and freedoms do not operate in a vacuum. The interpretation and application of human rights provisions involve the arbitration of social conflicts; the judiciary, as a societal institution, must promote and serve the interests and values of the society in which it operates. Judicial power, particularly in relation to the resolution of disputes concerning the exercise of governmental power and the protection of fundamental human rights, lies in the judiciary's ability to mediate and harmonise existing social relations within society.

The ability to do this depends on the judiciary's approach to the interpretation and application of the law. There are two approaches which are open to the judiciary: it may either follow a strict, literalist and mechanical approach, in which event the new constitutional values will have very little effect in the mediation and harmonisation of social relations, or it may follow a purposive and generous approach,⁹ which promotes the spirit, purport and objects of the Constitution as an instrument which is intended to regulate social relations by defining the powers of government and limiting the exercise of these powers through the entrenchment of fundamental rights and freedoms.

A comparative study of the performance of the judiciary in those countries

⁹See Chapt. 10 for a discussion of the difference.

which have made a transition from legislative supremacy to constitutional supremacy shows that an approach which is suited to the interpretation and application of a Bill of Rights is the purposive and generous approach.¹⁰ This approach recognises the special nature of the Constitution, its value-based terms and objects as well as the ideals, needs and aspirations of the society it serves.

Section 35(2) contains another pointer to the interpretation and application of the provisions of the Bill of Rights. However, the provisions of section 35(2) are applicable only in relation to the interpretation and application of a law which **limits** any of the rights entrenched in the Bill of Rights. In terms of section 35(2), a law which limits any of the rights entrenched in the Bill of Rights cannot be held to be unconstitutional solely by reason of the fact that the wording used **prima facie** exceeds the limits imposed in the Bill of Rights; if the law in question is reasonably capable of having a more restricted meaning, it must be interpreted in accordance with the more restricted meaning.¹¹

Section 35(2) must be read with section 33(1). Section 33(1) permits limitations of the rights entrenched in the Bill of Rights by means of a law of general application, provided that the limitation in question is reasonable and justifiable in an open and democratic society based on freedom and equality and does not negate the content of the right in question.¹² Read with section 33(1), section 35(2) means that **prima facie** proof that a law, in terms of its wording, limits any of the rights entrenched in the Bill of Rights is not to be

¹⁰See Chapt. 6, Chapt. 7 and Chapt. 8. See **infra** for an evaluation of the valuable lessons from comparative constitutional law.

¹¹Section 232(3) contains a similar provision in respect of the interpretation of the Constitution as a whole.

¹²In terms of sections 33(1)(b)(aa) and (bb) a law which limits the rights entrenched in the enumerated sections must, in addition to being reasonable and justifiable in an open and democratic society, also be necessary.

regarded as proof of unconstitutionality.

Cachalia et al¹³ are of the view that section 35(2) embraces a presumption of constitutionality. Basson¹⁴ is also of the same view. However, viewed in its proper perspective, section 35(2) is more of a 'reading down' provision than a provision which embraces or creates a presumption of constitutionality.¹⁵

Section 35(2) therefore does not direct the court to presume in favour of constitutionality; it instead directs the court to adopt a restrictive interpretation if that is possible. The essence of the section is that if a limiting statute can be interpreted in two ways, namely one which would render the statute unconstitutional and another which would have a less invasive effect but still fall within the criteria laid down in section 33(1), the court must choose the latter interpretation.

If a statute is capable of more than one interpretation, it makes sense to prefer an interpretation which does not violate Chapter 3 and to avoid one which violates it. In this way the court ensures that the statute survives judicial review, while at the same time ensuring that it is consistent with the provisions of the Constitution. This interpretation protects the individual's rights, while at the same time eliminating the need for legislation to be

¹³A. Cachalia, H. Cheadle, D. Davis **Fundamental Rights in the New Constitution** (1994) at 122. See also G. Marcus "Interpreting the Chapter on Fundamental Rights" 1994 **SAJHR** 92 at 96.

¹⁴D. Basson **South Africa's Interim Constitution** (1994) at 58.

¹⁵See L. du Plessis & H. Corder **Understanding South Africa's Transitional Bill of Rights** (1994) at 121; L. du Plessis "A Note on the Application, Interpretation, Limitation and Suspension Clauses in South Africa's Transitional Bill of Rights" 1994 **Stellenbosch LR** 86 at 87.

promulgated all over again.¹⁶

Section 35(2) merely incorporates a rule of interpretation. It cannot be used to justify legislative lacunae which are inconsistent with the provisions of section 33(1). A similar view was stated by Dickson CJ in the Canadian case of **Hunter v Southam Inc.**¹⁷

"While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional. Without appropriate safeguards legislation authorizing search and seizure is inconsistent with s. 8 of the Charter. As I have said, any law inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect".

The postamble contains another important guide to the interpretation of the Constitution; it sets out the wider purpose of the Constitution as the building of a future "founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex". It is clear from the postamble that the Constitution is based on the ideal of a new democratic order in which there is freedom under the law, equality and respect for and the protection of fundamental human rights. It is therefore the function of the judiciary to ensure that this ideal and the values attached to it are actualised.

Constitutional principles are enacted to promote and realise the values, ideals, needs and aspirations of society. An interpretation and application of the provisions of the Constitution in such a way that these principles "operate

¹⁶This interpretation is common in the interpretation of ordinary statutes, where a statute which is capable of more than one meaning must be given a meaning which is in *favorem libertatis*: See **Dadoo Ltd v Krugersdorp Municipal Council** 1920 AD 530 at 552.

¹⁷[1984] 2 S.C.R 145 at 168-169.

covertly producing results that are both undemocratic and also inefficient, without full and adequate consideration of the policy alternative actually available to the court,¹⁸ carries with it the danger of a legitimacy crisis; lack of confidence in the courts inevitably leads to a degeneration of the legal system.

Cowling¹⁹ aptly summarised the greatest challenge which faces the South African judiciary when he stated that in order to extricate the South African legal system from past crises, formal impartiality

"must be broadened into genuine objectivity, neutrality and independence - essential ingredients for the protection of human rights - which should be the most important and fundamental purpose of any functioning legal system".

2. The Lessons from Comparative Constitutional Law.

A comparative analysis of judicial interpretation and application of the Constitutions of Canada, the former Bophuthatswana and Namibia aptly illustrates the difficult constitutional role of the judiciary in those countries that have made a transition from legislative supremacy to constitutional supremacy and the constitutional guarantee of fundamental human rights and freedoms. The role of the judiciary in these countries contains valuable lessons for the judiciary in the new South Africa.

The transition from legislative supremacy to constitutional supremacy involves a radical change in the relationship between the judiciary and the political branches of government. The role of the judiciary in relation to the exercise of power by the political branches is increased. The supremacy of the

¹⁸E. McWhinney **Judicial Review in the English-Speaking World** (1969) at 186-187.

¹⁹M.G Cowling "Judges and the Protection of Human Rights in South Africa: Articulating the Inarticulate Premiss" 1987 **SAJHR** 176 at 200.

Constitution vests in the courts the power to determine the constitutionality of acts of the political branches and to invalidate any law which is inconsistent with the provisions of the Constitution.

It would be incorrect to say that judicial review in those countries that have made a transition from legislative supremacy to constitutional supremacy and the constitutional entrenchment of human rights, necessarily brought about full protection of the rights of the individual against legislative and executive encroachments. The threat to individual rights comes not only from the legislature or the executive, but also from judicial attitudes and approaches to the interpretation of provisions of the Constitution.

A conservative and restrained approach, one which emphasises judicial deference to the legislature and the executive, poses as much of a threat to the rights and freedoms of the individual as legislative and executive excesses. On the other hand, some measure of judicial deference is necessary if the courts are not to usurp the function of the legislature. Judicial over-activism holds the danger that politicians may resort to unconstitutional means if their policy decisions are continuously being undermined by the courts.

The Canadian, Bophuthatswanan and Namibian courts' approach to the interpretation of constitutional provisions which guarantee human rights and freedoms illustrates that words alone, unless they are brought into life through creative interpretation, do not afford sufficient protection of human rights and freedoms. The lesson to be learnt from the decisions of these courts is that the approach of the court to the interpretation of constitutional provisions is the pivotal point upon which the protection of constitutionally guaranteed rights and freedoms ultimately rests.

The early decisions, in particular the Canadian and Namibian decisions dealing with the unentrenched Bills of Rights, reveal a cautious approach. Although the courts did not deny the existence of the constitutional guarantee

of individual rights and their role in protecting these rights, they were not readily prepared to articulate and apply the values implicit in these rights.

In Canada, with the notable exception of **R v Drybones**,²⁰ the Supreme Court was reluctant to give individuals the full benefit of the Bill of Rights. Thus, a law which disenfranchised Indian women - but not Indian men - who married non-Indians was upheld, despite the fact that the law was discriminatory and violated the provisions of the Bill of Rights;²¹ evidence obtained in violation of the provisions of the Bill of Rights was held to be admissible²²; and the question whether an accused had a right to counsel was held to be merely a factor to be considered in deciding whether to admit a confession.²³

In the case of Namibia/South West Africa, with a few exceptions,²⁴ the court adopted a cautious and conservative approach to the interpretation and application of the transitional Bill of Rights. Either too much reliance was placed on well-established common law or administrative law principles, without an analysis and articulation of the fundamental values embodied in the provisions of the Bill of Rights,²⁵ or a narrow and legalistic approach was

²⁰(1969) 9 D.L.R (3d) 473.

²¹**Attorney-General, Canada v Lavell** [1974] S.C.R 1349. Laskin J's comment on the legislation in issue, in his dissenting judgment, was particularly scathing; he called the legislation 'invidious', 'a statutory excommunication' and a 'banishment'.

²²**Hogan v R** [1975] S.C.R 579.

²³**R v Chow** [1978] 43 C.C.C (2d) 215 (B.C.C.A).

²⁴Notably **S v Heita & Others** 1987(1) SA 311 (SWA).

²⁵See for example **Katofa v Administrator-General, South West Africa and Another** 1985(4) SA 211 (SWA), **Akweenda v Cabinet for the Transitional Government of South West Africa** 1987(1) SA 311 (SWA) and **S v Nathaniel** 1987(2) SA 225

adopted.²⁶ It was only after the judgment of Grosskopf JA in **Cabinet for the Territory of South West Africa v Chikane**²⁷ that some change became noticeable;²⁸ a generous approach, one which gave individuals the full benefit of the provisions of the Bill of Rights, was adopted.

It may be argued that the operation of the doctrine of legislative supremacy in Canada and Namibia at the time of the 1960 Bill of Rights and the Namibian transitional Bill of Rights explains the courts' cautious and conservative approach. The judiciary was still used to the supremacy of the legislature as the basic principle of the legal system and not yet fully committed to the constitutional protection of fundamental human rights. There was as yet no full realisation that the positivising of fundamental human rights in a constitutional document is an express legislative and popular recognition of their importance and an indication that the courts were called upon to

(SWA).

²⁶See for example **S v Angula** 1986(2) SA 540 (SWA) and the decision of the Appellate Division in **Cabinet for the Transitional Government for the Territory of South West Africa v Eins** 1988(3) SA 369 (A). It is significant to note, however, that in the **Eins** case the court *a quo* had adopted a generous approach and held, after an analysis of the provisions of the Bill of Rights, that the legislation in issue violated the right to equality as guaranteed in the Bill of Rights. A narrow and mechanical approach is also discernible in some of the Bophuthatswanan decisions: see for example **Monnakale and Others v Government of the Republic of Bophuthatswana and Others** 1991(1) SA 598 (B), **Government of Bophuthatswana v Segale** 1990(1) SA 434 (B) and **Lewis v Minister of Internal Affairs** 1991(3) SA 628 (B).

²⁷1989(1) SA 349 (A).

²⁸Although Grosskopf JA extensively analysed and articulated the right to equality, he avoided a direct application of the provisions of the Bill of Rights by deciding the matter as if on exception, without making a value judgment about the reasonableness of the legislative distinction in issue.

ensure their efficacy.²⁹

Kaufman³⁰ offers another plausible explanation for the Canadian Supreme Court's early conservatism and cautious approach. According to him, suspicion and fear were partly to blame; "suspicion of an act of Parliament which told us how to construe and apply other acts, and fear that chaos might result from bold and progressive interpretations". Judicial deference to the legislature and 'fear that chaos might result from bold and progressive interpretations' may also explain the conservatism of the court in the interpretation of the Namibian transitional Bill of Rights. Added to this was perhaps the fact that the 1960 Canadian Bill of Rights and the Namibian transitional Bill of Rights were not constitutionally entrenched and therefore took the form of ordinary statutes, enjoying no special status.

The explanation for the conservatism of the courts in the Bophuthatswanan cases³¹ can be found in the court's fear of incurring the resentment of the legislature. Hiemstra CJ's somewhat stern admonition, in the **Smith** case,³² that "[t]he court helps to shape the Declaration of Human Rights with great

²⁹The judgment of Martland J in the Canadian case of **R v Burnshire** [1975] 1 S.C.R. 693 illustrates the lack of appreciation that a Bill of Rights was an express recognition of the importance of constitutionally guaranteed human rights. According to Martland J, the 1960 Canadian Bill of Rights merely protected rights which already existed at common law and did not purport to define new rights; yet the fact of the matter is that the positivising and express protection of these rights gives them a new perspective altogether.

³⁰F. Kaufman "The Canadian Charter : A Time for Bold Spirits, Not Timorous Souls" 1986 **McGill LJ** 456 at 459.

³¹The only exceptions in the Bophuthatswanan cases are **S v Marwane** 1982(3) SA 717 (A), **Smith v Attorney-General, Bophuthatswana** 1984(1) SA 196 (BSC), **Mfolo and Others v Minister of Education, Bophuthatswana** 1992(3) SA 181 (B) and **Nyamakazi v President of Bophuthatswana** 1992(4) SA 540 (B).

³²**Supra.**

deference to the Legislature³³ seems to have been taken too seriously. Starting with **S v Chabalala**³⁴, (but with the exception of the **Mfolo**³⁵ and **Nyamakazi**³⁶ cases) the court adopted a mechanical, conservative approach and abdicated its function as "upholder of the long term aims and ideals of the Constitution".³⁷ The intentionalist mind-set was not abandoned; it did not occur to the judiciary that a supreme Constitution called for an altogether new interpretative approach.

The adoption of supreme Constitution which entrenched human rights in Canada, Bophuthatswana and Namibia provided the courts in these countries with a new mandate. It was no longer the legislature which was supreme but the Constitution. The justiciability of the provisions of the Constitution was a mandate to the courts to review the constitutionality of legislative and executive acts and to strike down any such act which they found to be in conflict with its supreme provisions; the new mandate was a directive to uphold the supremacy of the Constitution with vigour and vigilance. Whether the courts would obey this mandate and use it to promote and realise the needs, expectations, ideals and aspirations of the nation as expressed in the provisions of the Constitution, was therefore up to the courts themselves.

The difficulty which faces a court that is called upon to uphold the provisions of a supreme Constitution is that the mandate involves the interpretation of provisions which are often framed in wide and general terms. However, although these provisions are framed in wide and general terms, they are

³³At 199C.

³⁴1986(3) SA 623 (BA).

³⁵**Supra.**

³⁶**Supra.**

³⁷**Smith's** case (**supra**) at 199E.

nevertheless meaningful and express the values, ideals and aspirations of the nation; if judges fail to perceive these provisions as a new mandate, the needs, expectations, ideals and aspirations of the nation can be frustrated and confidence in the courts and the Constitution, the very basis of the legal system and civil society, can be severely damaged.³⁸

In Canada the Supreme Court expressly acknowledged that it was engaged in a new task. The court also cautioned, however, that the development of the Charter of Rights and Freedoms must necessarily be a careful process; where comment on the new Charter provisions is not called for the court ought to refrain from such comment.³⁹ Although this was a prudent caution, it was clearly not a sanction for judicial abdication of duty.

The judgments of the Namibian High Court and the Namibian Supreme Court in the post-independence cases, notably **Ex Parte Attorney-General, Namibia: In re Corporal Punishment by Organs of the State**⁴⁰ and **Mwandingi v Minister of Defence**⁴¹, clearly illustrate that the special nature of a supreme Constitution gives judges a mandate to identify and articulate the norms, aspirations, expectations and sensitivities of the people as expressed in the Constitution and to give individuals the full benefit of the provisions which guarantee their fundamental rights and freedoms.

³⁸N. Lyon "The Teleological Mandate of the Fundamental Guarantee : What to do with Vague but Meaningful Generalities" (1982) 4 **Supreme Court Rev.** 57 at 58.

³⁹See **Law Society of Upper Canada v Skapinker** [1984] 9 D.L.R (4th) 161 at 181.

⁴⁰1991(3) SA 76 (Nm SC).

⁴¹1991(1) SA 851 (Nm HC).

As Mahomed AJA noted in the **Corporal Punishment by Organs of the State** case,⁴² the full import and true meaning of the wide and general terms of the provisions of the Constitution "can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge".

The **dictum** of Hiemstra CJ in the **Smith** case,⁴³ on the other hand, makes it clear that although the interpretation of the provisions of a Bill of Rights calls for a purposive and generous approach, it also involves a careful and balanced process. According to the judge, the court must "exercise its powers of controlling legislation with a scalpel and not with a sledgehammer". The power to review the constitutionality of legislation is not a licence for a wholesale striking down of legislation; the court must strike down legislation only after an objective determination of the constitutionality of the legislation in issue and only when there has been a demonstrable violation of a specific provision of the Constitution.

An important lesson to be learnt from the judgments of the courts in Canada and Namibia is that the courts specifically acknowledged that the interpretation and application of the provisions of a supreme Constitution which entrenches fundamental human rights and freedoms differs significantly from the interpretation and application of ordinary legislation.⁴⁴ The courts recognised that the interpretation of the provisions of the Constitution must take into account its **sui generis** character; a Constitution expresses the norms, ideals, expectations, aspirations and sensitivities of the nation; it is drafted with an

⁴²**Supra**, with reference to what was stated by Lord Wright in **James v Commonwealth of Australia** 1936 CA 574 at 614.

⁴³**Supra**, at 200C.

⁴⁴See for example **Hunter v Southam Inc.** [1984] 2 S.C.R 145, the **Nyamakazi** case (**supra**) and the Namibian post-independence cases.

eye to the future and intended to be capable of growth and development over time to meet new social, political and economic realities.

In all the cases where the courts were prepared to perceive the interpretation of the Bill of Rights as a new mandate, they adopted a generous and purposive approach which gives individuals the full benefit of constitutional guarantees. Emphasis was placed on the purpose of the specific rights, the spirit and larger purpose of the Constitution, its fundamental values and the ideals and aspirations it represented.⁴⁵

It is significant to note, however, that the Canadian Supreme Court, in particular, did not simply, and in general, advocate a 'purposive and generous' approach. On the contrary, the court also laid down a framework within which this approach ought to be applied. In **R v Oakes**⁴⁶ the court laid down a two-phased framework within which the purposive and generous approach ought to be applied in the determination of the constitutionality of legislation. The first phase involves proof by the challenger that the legislation complained of actually infringes a constitutionally guaranteed right or freedom of his; this phase entails establishing a factual basis for the complaint and showing that the interest or activity for which protection is sought is covered by one or more of the rights or freedoms guaranteed in the Constitution. The second phase arises only if the first phase has been completed; once the requirements for the first phase have been complied with, the onus shifts to the government to prove that the infringement is rational and in proportion to the purpose or objective of the infringing legislation.

The principles of rationality and proportionality have also been considered and

⁴⁵**Idem.**

⁴⁶[1986] 1 S.C.R 103.

applied by the Bophuthatswanan and Namibian courts. In the **Smith** case⁴⁷ Hiemstra CJ applied these principles to determine the constitutionality of legislation which made the granting of bail dependent on the *ipse dixit* of the Attorney-General. In **Namibian National Students' Organisation and Others v Speaker of the National Assembly for South West Africa and Others**⁴⁸ Hendler AJ applied the rationality and proportionality principles to determine whether a legislative provision which imposed an 'inverted onus' was constitutional.⁴⁹ These principles were also considered by Grosskopf JA in the **Chikane**⁵⁰ case when he determined the constitutionality of a statute which discriminated against non-citizens.

Although the two-phase analytical framework provides a suitable criterion for a purposive and generous approach to the interpretation and provisions of the Constitution, it has an element of judicial deference to the legislature in respect of certain types of legislation. In the **Oakes** case⁵¹ the Canadian Supreme Court suggested that judicial deference was called for where the legislation in issue dealt with social and economic policies; it was stated that the legislature is not required to choose the 'best possible means' to accomplish the objectives of legislation dealing with social and economic policies; all that the legislature needs to show is that there is a 'rational basis'

⁴⁷Supra.

⁴⁸1990(1) SA 617 (SWA).

⁴⁹The 'inverted onus' was held to be unconstitutional in **S v Shangase and Another** 1994(2) BCLR 42 (D) and **S v Zuma** 1995(4) BCLR 401 (CC). See also the post-independence Namibian cases of **S v Pineiro** 1993(2) SA 412 (Nm) and **Freiremar SA v The Prosecutor-General of Namibia and Another** 1994(6) BCLR 73 (NmH).

⁵⁰Supra.

⁵¹Supra.

for choosing the policy it did, even if 'best possible' means were available.⁵²

The rationale for the court's view with regard to legislation dealing with social and economic policies is that it is prudent to respect legislative determinations of social and economic policy issues; these issues are usually highly controversial and legislation dealing with them usually involves accommodation and compromise by elected representatives. Judicial deference in relation to policy issues is in line with the separation of powers; policy issues fall within the domain of the political branches of government and are not capable of principled judicial determination.

Dicta from Canadian cases indicate that the courts do in fact defer to the legislature where the exercise of the power to strike down legislation would undermine the division of governmental powers.⁵³ In **Edward Books & Art Ltd v The Queen**⁵⁴ Dickson CJ stated that "[t]he courts are not called upon to substitute judicial opinions for legislative ones". A similar view was expressed by McIntyre J in **R v Andrews**⁵⁵:

"[U]nless the court can find that choice (of the legislature) unreasonable, it has no power under the Charter to strike it down ... [to] invade the legislative field and substitute its view for that of the legislature".⁵⁶

⁵²See D. Beaty "The Rule (and Role) of Law in a New South Africa: Some Lessons From Abroad" 1992 **SALJ** 408 at 419.

⁵³See Chapt. 10 for a discussion of the dividing line between judicial law-making and judicial creativity and the proper limits of judicial review in a system of constitutional supremacy.

⁵⁴[1986] 2 S.C.R 713 at 781-782.

⁵⁵[1989] 1 S.C.R 143 at 191.

⁵⁶See also **Reference re Section 94(2) of the Motor Vehicle Act** [1985] 2 S.C.R 486 at 497; **Amax Potash Ltd v Government of Saskatchewan** [1977] 2 S.C.R 576 at 590.

The type of judicial deference which appears from the **dicta** of Dickson CJ and McIntyre J is not indicative of judicial abdication of duty but rather of judicial restraint and respect for the separation of powers. However, whether judicial self-restraint and respect for the separation of powers in a particular instance will be consistent with the effective protection of constitutionally guaranteed rights and freedoms will depend on the court's ability to find the proper limits of judicial review.⁵⁷ While the courts are empowered to interpret the law creatively and to uphold the superior law of the Constitution, they are certainly not empowered to usurp the functions of the political branches of government.

Legislation which deals with controversial social and economic policies may become problematic. Such legislation may benefit the general good and yet clearly infringe constitutionally guaranteed rights and freedoms. In such instances the judiciary ought to tread carefully and take cognisance of the fact that it is the function of the legislature and the executive to make important social and economic choices in the interest of the common good. The **dictum** of La Forest J in the **Andrews** case⁵⁸ epitomises the restricted role of the judiciary in the determination of the constitutionality of legislation which involves important legislative choices:

"[I]t bears repeating that considerations of institutional functions and resources should make courts wary about questioning legislative and government choices".

The important lesson to be learnt from comparative constitutional law is that while the judiciary ought to interpret and apply the provisions of the Constitution purposively and generously to give individuals their full benefit and to uphold them with vigour and vigilance, it must at the same time avoid "the dangers of a judicial 'super-legislature' [which functions] beyond the

⁵⁷See Chapt. 10.

⁵⁸**Supra** at 194.

reach of Parliament ... and the electorate⁵⁹ and embarks upon capricious policy-making.⁶⁰

Judicial respect for the separation of powers between the legislature and the judiciary does not necessarily mean that judges are precluded from engaging in policy issues; nor is it an open invitation to abdication of judicial duty. It remains the function of the judiciary to interpret legislative policies which are alleged to violate constitutionally guaranteed rights and freedoms. The interpretation of value-laden constitutional provisions involves a consideration of the different social, economic and political conceptions of the rights and freedoms in issue; it also involves a consideration of the social, economic and political milieu within which these rights and freedoms are to operate and an articulation of the values, ideals and aspirations of society. The consideration of social, economic and political standards and the articulation of the ideals and aspirations of society involves the making of choices between competing values.

It is heartening that in most of the cases in which provisions of the 1993 Constitution have been interpreted and applied judges of the Supreme Court have risen above the narrow, mechanical and legalistic approach and adopted a purposive and generous approach which articulates fundamental constitutional principles and values and upholds the supremacy of the Constitution. **Qozeleni v Minister of Law and Order**,⁶¹ **S v Majavu**,⁶² **Matiso and Others v The Commanding Officer**,

⁵⁹Reference re Section 94(2) of the Motor Vehicle Act (*supra*) at 497.

⁶⁰See **Amax Potash Ltd v Government of Saskatchewan** (*supra*) at 590.

⁶¹1994(1) BCLR 75 (E).

⁶²1994(2) BCLR 56 (CkGD).

Port Elizabeth Prison and Others,⁶³ and **Mandela v Falati**⁶⁴ are among such cases.⁶⁵ On the other hand, in **S v Saib**⁶⁶ and in **Kalla and Another v The Master and Another**⁶⁷ the court adopted an intentionalist/literalist approach. While Kentridge AJ adopted a cautious approach in the first reported case decided by the Constitutional Court, namely **S v Zuma and Others**,⁶⁸ Mahomed J, in a majority judgment, adopted a purposive and generous approach in the later case of **S v Mhlungu and Others**.⁶⁹

3. Balancing Conflicting Interests.

The discussion on the role of the judiciary has so far centred on the interpretation and enforcement of constitutional guarantees of human rights and freedoms. The interpretation and enforcement of the provisions of the Constitution do not only involve, however, a consideration of the values embodied in the Constitution but also of the values chosen by the legislature and embodied in a statute which is alleged to be in conflict with the provisions of the Constitution. Judicial determination of constitutionality involves, therefore, a consideration of conflicting and competing interests; since both the individual and the legislature (or the state) allege that they have legitimate claims to certain interests, the constitutional role of the judiciary involves a

⁶³1994(3) BCLR 80 (SE).

⁶⁴1994(4) BCLR 1 (W).

⁶⁵See Chapt. 10 for a discussion of these cases.

⁶⁶1994 BCLR 48 (D).

⁶⁷1994(4) BCLR 79 (T).

⁶⁸1995(4) BCLR 401 (CC).

⁶⁹1995(7) BCLR 793 (CC).

weighing and balancing of conflicting interests. Constitutional adjudication, like any other form of adjudication, is invariably concerned with the weighing and balancing of conflicting interests or values.

The concept of balancing as an aspect of adjudication is associated with the idea and function of law in society. According to the noted American jurist, Roscoe Pound,⁷⁰

"law is an attempt to satisfy, to reconcile, to harmonise, to adjust ... overlapping and often conflicting claims and demands, either securing certain individual interests, or through delimitations or compromises of individual interests, so as to give effect to the greatest total of interests or to interests that weigh most in our civilisation, with the least sacrifice of the scheme of interests as a whole".

Balancing as an aspect of constitutional adjudication has received scant attention in South African legal literature. It is an important conceptual operation which occurs in almost all conflicts which come before the courts.⁷¹ The determination of a conflict necessarily involves the making of a choice between two or more outcomes; the making of a choice is preceded by some form of weighing and balancing, with the result that the chosen outcome is regarded as the one that yields the greatest net benefit.⁷²

3.1. Constitutional Adjudication and Balancing Conflicting Interests.

Balancing as an aspect of constitutional adjudication involves the

⁷⁰R. Pound "A Survey of Social Interests" 1943 **Harv. LR** 1.

⁷¹**Ex Parte Minister van Justisie: in re S v Van Wyk** 1967(1) SA 488 (A) affords a good example of judicial balancing of conflicting interests in the field of criminal law.

⁷²See T.A Aleinikoff "Constitutional Law in the Age of Balancing" 1987 **Yale LJ** 943.

identification, evaluation and comparison or weighing of those values, ideals and aspirations to which either individuals *inter se* or both individuals and the state lay a legitimate claim. It involves an identification of conflicting interests and an explicit or implicit assignment of values to the identified interests.⁷³

When a court is faced with conflicting interests, it has to weigh the interests in order to determine which interest outweighs the other and should therefore prevail. With regard to conflicts between the interests of the individual and state interests, a state interest has to be 'compelling' or important⁷⁴ if it is to outweigh an individual interest.⁷⁵ The interests need not, however, always outweigh each other absolutely; the court may seek to 'strike a balance' between or among competing interests by recognising and regarding each of the interests as worthy of protection.⁷⁶

Balancing in constitutional adjudication becomes particularly important where, in the process of addressing social and economic issues, the court has to weigh state interests against individual interests; a significant clash between state interests and individual interests is likely to occur where the state passes legislation which is aimed at addressing social and economic imbalances and at the same time violates constitutionally guaranteed rights.

Legislation making provision for or promoting 'affirmative action' is likely to give rise to constitutional litigation which will involve a delicate weighing and balancing of individual interests and state interests in the area of social and

⁷³Aleinikoff 1987 **Yale LJ** at 945.

⁷⁴In terms of section 33(1) a state interest will be 'compelling' or important, in relation to the rights entrenched in Chapter 3, if it is reasonable and justifiable in a democratic state based on freedom and equality.

⁷⁵Aleinikoff 1987 **Yale LJ** at 946.

⁷⁶**Idem.**

economic activity.⁷⁷ In terms of section 8(3)(a) of the Constitution, the guarantee of the right to equality does not preclude 'affirmative action' measures; similarly, in terms of section 26(2), the guarantee of the right to free economic activity does not preclude 'affirmative action' measures.

The implication of these 'affirmative action' provisions is that the legislature may enact legislation which violates the right to equality or the right to free economic activity; section 8(3)(a) and section 26(2) do not, however, take away the rights in issue or negate their essential content. It is still open to an affected individual to assert them in court, in which event the court will have to weigh and balance the interests of the state to embark upon and promote 'affirmative action' programmes and the interests of the affected individual.

Section 26(2) provides some indication of what the court must take into account in weighing and balancing the interests of the affected individual. In terms of section 26(2), an 'affirmative action' measure must be "justifiable in an open and democratic society based on freedom and equality".⁷⁸ This means that the court will have to evaluate the justifiability of the legislation in issue in the light of the needs or objectives, values and principles of an open and democratic society, bearing in mind that an open and democratic society is committed to social justice and equality, accommodates a wide variety of beliefs, respects cultural and group identity and has faith in social and political institutions which enhance the participation of individuals and groups in society.⁷⁹ The practice in other open and democratic societies will

⁷⁷Judicial weighing and balancing of individual interests and state interests in the enforcement of the provisions of the Constitution is not, however, confined to social and economic issues; every interpretation and application of human rights provisions in essence involves a weighing and balancing of conflicting interests.

⁷⁸Section 26(2) is not restricted to affirmative action measures; its terms are wider and can encompass other labour or economic measures as well.

⁷⁹See **R v Oakes** (*supra*).

also provide material for evaluating the justifiability of 'affirmative action' programmes under section 26(2). However, affirmative action policies in South Africa will, to a certain extent, inevitably be different from policies in other countries because of unique South African historical circumstances.

Section 8(3)(a) does not, on the other hand, provide a guideline for the weighing and balancing of conflicting state and individual interests.⁸⁰ It may be argued, however, that, although there is no express provision to that effect, section 8(3)(a) envisages justifiable 'affirmative action' programmes and that the same criterion of 'justifiable in an open and democratic society' should apply in weighing and balancing the conflicting interests, the rationale being that in most cases such programmes limit someone's rights.⁸¹ This argument can be supported by the further argument that the express guarantee of the right to equality is an essential aspect of an open and democratic society.

The weight which the court has to attach to respective competing interests may turn out to be a contentious issue in practice. The court may in the process invite for itself either a liberal or conservative label.⁸² The danger of labels

⁸⁰See C. Albertyn and J. Kentridge "Introducing the Right to Equality in the Interim Constitution" 1994 **SAJHR** 149 at 172-174; N. Smith "Affirmative Action under the New Constitution" 1995 **SAJHR** 84 for a discussion of section 8(3). See also in general D.J Joubert "Affirmative Action in Employment: the Rationale" 1994 **De Jure** 116.

⁸¹There is no express indication in the Constitution that section 8(3) is insulated from the provisions of section 33(1). However, du Plessis & Corder **Understanding South Africa' Transitional Bill of Rights** (1994) (at 130) argue that section 8(3)(a) is not subject to the section 33(1) limitation; according to them section 8(3)(a) does not entrench a limitable right but merely authorises a procedure which may result in entitlements for certain categories of people. The operation of section 8(3)(a) was considered in **Motala and Another v The University of Natal** 1995(3) **BCLR** 374 (N); the court did not consider, however, whether the section was subject to the section 33(1) limitation.

⁸²The words 'liberal' and 'conservative' are used here in a jurisprudential sense and not in the political sense.

may be avoided if the court seeks to strike a balance by a careful analysis of the particular interests at stake, without dealing with interests as absolutes.⁸³ A careful analysis of competing interests implies objectivity; it implies that adjudication should be based on juridical norms that transcend the viewpoint of the adjudicator, the individual and the legislator;⁸⁴ it implies, in essence, that the overriding values are those constitutional values which reflect the needs, expectations, ideals and aspirations of society as a whole.

No absolute method of weighing and balancing can be constructed. Elevating constitutional adjudication beyond personal preferences and viewpoints does, however, provide some solution. Answers as to how much weight must be attached to competing interests do not lie in personal preferences and viewpoints but in an objective analysis and evaluation of external sources. External sources such as history, current 'social consensus' and the importance or significance of an interest to society as a whole might provide an answer.⁸⁵

The German principle of proportionality (*Verhältnismässigkeit*), which was applied in the case of **Smith v Attorney-General, Bophuthatswana**⁸⁶, provides another method of weighing and balancing conflicting interests. In terms of this principle, interference with constitutionally guaranteed rights is permissible only if it is (a) sanctioned by the Constitution; (b) capable of achieving its purported objective; (c) necessary to achieve its objective and (c) reasonable or **proportional** in the sense that the purported objective of the interference is lawful, adequate, necessary and

⁸³See Aleinikoff 1987 **Yale LJ** at 961.

⁸⁴See O.M Fiss "Objectivity and Interpretation" 1982 **Stanford LR** 739 at 744.

⁸⁵See Aleinikoff 1987 **Yale LJ** at 984.

⁸⁶1984(1) SA 196 (B).

of equal or superior weight when balanced against the affected right.⁸⁷ The application of the proportionality principle therefore involves a weighing and balancing of conflicting interests.

The value of weighing and balancing in constitutional adjudication is that it helps to identify, and to give proper weight to, those interests which the legislature or the executive tend to overlook in a rushed attempt to rectify social or economic imbalances. In this process the court plays two fundamental roles; first, it helps to ensure that the rights of underprivileged or minority groups are fully protected and, secondly, it helps to ensure that those constitutional rights and freedoms that are sometimes under-enforced are given their full worth.⁸⁸

3.2. Balancing Individual Interests and State Interests in a State of Emergency.

One other area that will involve a delicate weighing and balancing of individual interests and state interests is the declaration of a state of emergency. Section 34 of the Constitution permits the declaration of a state of emergency⁸⁹ and a suspension of the rights guaranteed in Chapter 3⁹⁰ where the security of the Republic is threatened by war, invasion, general insurrection or disorder at a time of national disaster, in order to restore peace or order.

The determination of whether a situation is serious enough to justify a state of emergency lies with the government. However, section 34(1) specifically

⁸⁷Smith's case (*supra*) at 201A-C.

⁸⁸See Aleinikoff 1987 *Yale LJ* at 984.

⁸⁹Section 34(1).

⁹⁰Section 34(4).

lays down the circumstances which would justify the declaration of a state of emergency, namely, threat of war, invasion, general insurrection or disorder or national disaster; furthermore, the declaration of a state of emergency must be objectively necessary to restore peace or order.

The role of the judiciary in relation to a declaration of a state of emergency will arise when an individual complains that his rights have been suspended or violated. In terms of section 34(3), any superior court is competent to enquire into the validity of a state of emergency and any action taken under such declaration. Action taken under the declaration includes the suspension or violation of some of the rights guaranteed in Chapter 3 of the Constitution.

The judicial function in relation to a declaration of a state of emergency and complaints by individuals that their rights have been suspended or violated involves a three-stage inquiry. The first stage involves determining whether the prescribed circumstances for the declaration exist, that is whether the security of the Republic is threatened by war, invasion, general insurrection or disorder or there is a national disaster; the second stage involves determining whether the declaration is necessary to restore peace or order; the third stage involves determining whether the actions taken in terms of a necessary declaration of a state of emergency are themselves proportionate or necessary to achieve the objective of the declaration.

In relation to the first and second stages of the inquiry it is the government which makes the first judgment as to whether any of the prescribed circumstances exists and whether a declaration of a state of emergency is necessary to restore peace and order. A question which then arises is whether the court is obliged to accept the government's judgment of the situation, or whether it must make its own judgment.

Section 34 does not contain any suggestion that the court must defer to the government's judgment as to whether a situation justifies a declaration of a

state of emergency and whether the declaration is necessary to restore peace and order. Section 34(3) makes it clear that it is within the court's power to examine the facts for itself and to determine whether the prescribed circumstances exist and justify a declaration of a state of emergency to restore peace and order.⁹¹

Judicial inquiry into the validity of a state of emergency involves a factual inquiry and an objective determination. The question whether the prescribed circumstances exist is a question of fact which must be decided in the light of the prevailing circumstances; the question whether a state of emergency is necessary to restore peace or order involves an objective determination whether the circumstances are grave enough and disturb peace or order sufficiently to justify a declaration of a state of emergency.

A finding that the prescribed circumstances under which a state of emergency may constitutionally be declared are present, and that such a declaration is necessary to restore peace and order does not, however, necessarily mean that any suspension of the rights entrenched in Chapter 3 of the Constitution would be constitutional. In terms of section 34(4) these rights may only be suspended in consequence of the declaration **only to the extent necessary to restore peace or order.**

This last stage of the inquiry implies that there must be a direct and proximate

⁹¹In so far as a decision to declare a state of emergency amounts to a 'political question', section 34(3) appears to entail a rejection of the 'political question' doctrine: see Chapt. 10. It has been suggested, however, that, since it would be difficult for courts to weigh the gravity of a threat to peace or order or to determine whether particular steps need to be taken in a situation which the government regarded so serious as to warrant a declaration of a state of emergency, some judicial deference to the government's judgment will be appropriate: see S. Ellmann "A Constitution for All Seasons: Providing Against Emergencies in a Post-Apartheid Constitution" 1989 **Columbia HRLR** 163 at 187-188. It has been argued elsewhere in this thesis that where the court has been called upon to adjudicate justiciable legal disputes, simply deferring to the political branches is tantamount to abdication of duty.

nexus or a reasonable connection between government action in consequence of a necessary state of emergency and the need to restore peace or order; it involves a consideration of the question whether a suspension of any of the entrenched rights will result in or contribute to the restoration of peace and order. This consideration also involves a weighing and balancing of the interests of the state to restore and maintain peace or order and the interests of the individual to enjoy his constitutionally entrenched rights. The decisive factor is whether the interests of the state to restore peace or order outweigh the interests of the individual in enjoying any of his constitutionally entrenched rights.

Section 34 contains certain safeguards of the rights of individuals under a necessary state of emergency. In the first place, section 34(5)(c) expressly prohibits the suspension of the provisions dealing with the application of Chapter 3 of the Constitution⁹², those entrenching certain fundamental rights⁹³ and those making provision for the circumstances under which limitations of the rights entrenched in Chapter 3 would be permissible⁹⁴; in the second place, section 34(5)(a) prohibits the creation of retrospective crimes; in the third place, the state is not indemnified against liability for

⁹²Section 7.

⁹³Sections 8(2) (the right not to be unfairly discriminated against), 9 (the right to life), 10 (the right to human dignity), 11(2) (the right not to be subjected to torture, cruel, inhuman or degrading treatment or punishment), 12 (the right not to be subjected to servitude or forced labour), 14 (freedom of religion, belief and opinion), 27(1) and (2) (the rights to fair labour practices and to form and join trade unions or employers' organisations), 30(1)(d) and (e) (children's rights not to be subjected to neglect or abuse, not to be subjected to exploitative labour practices nor to be required or permitted to perform work which is hazardous or harmful to their education, health or well-being) and 30(2) (the right of a detained child to be detained under conditions and to be treated in a manner that takes into account his or her age).

⁹⁴Sections 33(1) and (2).

unlawful actions during the state of emergency⁹⁵; in the fourth place, section 34(6) makes provision for certain procedural conditions which have to be observed where a person is detained under a state of emergency⁹⁶; finally, section 34(7) prohibits the re-detention of a person on the same grounds where a court has previously found that the grounds for the detention were unjustified, unless the state shows good cause to the court prior to the re-detention.

South African constitutional law is already rich with judicial decisions about emergency regulations.⁹⁷ A number of these decisions show that the South African judiciary, even when not supported by a justiciable Bill of Rights, was able and willing to control, within the context of judicial review, the exercise of government authority and to protect the rights of individuals during a state of emergency.⁹⁸

It is the courts' willingness to enforce constitutional guarantees, and an ability

⁹⁵Section 34(5)(b).

⁹⁶Section 34(6)(c) makes provision for a special safeguard where the rights entrenched in section 11 (freedom and security of the person) or 25 (the rights of detained, arrested and accused persons) have been suspended during a state of emergency. In terms of section 34(6)(c)(i) the detention of a detainee becomes reviewable by a court of law as soon as it is reasonably possible but not later than 10 days after the detention; if the court is satisfied that the detention is not necessary to restore peace or order, it is obliged to order the release of the detainee; after the expiry of 10 days after the review, a detainee is, in terms of section 34(6)(c)(ii), entitled to apply to the court for a further review and an order for his release.

⁹⁷For an examination of some of these cases see D. Basson "Judicial Activism in a State Of Emergency: An Examination of Recent Decisions of the South African Courts" 1987 *SAJHR* 28.

⁹⁸See in particular **Dempsey v Minister of Law and Order** 1986 (4) SA 530 (C); **Radebe v Minister of Law and Order & another** 1987 (1) SA 586 (W); **The State President & others v Tsenoli; Kerchoff & Another v The Minister of Law and Order & Others** 1986 (4) SA 1150.

to strike a proper balance between individual interests and state interests during normal times, that will to a large extent shape the process of constitutional adjudication during a state of emergency. The judiciary ought therefore to cultivate a culture of objectivity during ordinary constitutional litigation; this culture will help to shape appropriate principles for the weighing and balancing of conflicting interests in constitutional litigation during a state of emergency.

4. Democracy and Judicial Responsibility.

4.1. Democracy and the Judiciary.

Judicial control of legislative and executive acts essentially takes place within the context of the separation of powers and checks and balances. Within the context of this concept, judicial control implies that while the judiciary has the power to review legislative and executive acts in order to check and balance the exercise of power by the other two organs of government, each organ retains its powers as prescribed in the Constitution. Judicial control is therefore only a tool for checking and balancing widely dispersed governmental powers; it does not permit undue judicial encroachment on the proper sphere of the powers of the other organs of government.

The traditional basis for opposing judicial control of legislation is that it is undemocratic.⁹⁹ Opponents of judicial control essentially question the power of an unelected and unrepresentative body to set aside acts of elected, representative and politically accountable bodies.¹⁰⁰ Within the context of the

⁹⁹This has been a major topic of discussion in the United States of America, largely because the Constitution does not expressly confer review powers on the judiciary.

¹⁰⁰See D.V Cowen **The Foundations of Freedom** (1961) at 139-140.

separation of powers and checks and balances, judicial control of legislative and executive acts is, however, a necessary ingredient of democratic government;¹⁰¹ it does not amount to a usurpation of legislative or executive power but constitutes a means of keeping the exercise of governmental power within constitutional limits and brings about effective protection of individual rights in order to maintain a free and democratic society.¹⁰² The ideals of democracy are achieved not only through the election of representatives who are mandated to govern through legislative and executive acts but also through a proper exercise of legislative and executive powers; judicial determination of justiciable disputes which arise over the proper boundaries of the powers granted to the elected representatives is one of the legitimate means of ensuring that these powers are properly exercised.

Although judicial control over the exercise of governmental power is an essential component of democracy, the very concept of democracy also limits the exercise of judicial power. The essence of this observation is that the function of the court is not to substitute its own views for those of the elected branches; the function of the court is simply to ascertain and declare whether government action complained of is in accordance with, or in contravention of, those provisions of the Constitution which delimit the exercise of governmental power in relation to those rights of the individual which are guaranteed in the Constitution; it is not the function of the court to condemn the policies of the elected organs of government, unless these conflict irreconcilably with the Constitution. In a democracy, the approval or

¹⁰¹The scope of this thesis does not permit a detailed discussion of the arguments in favour of or against judicial review. For a detailed discussion of democracy and the judiciary see J.H Ely **Democracy and Distrust: A Theory of Judicial Review** (1980); E.V Rostow "The Democratic Character of Judicial Review" 1952 **Harv. LR** 193.

¹⁰²The specific reference to 'an open and democratic society' in section 33(1)(a)(ii) of the Constitution and the justiciability of the rights guaranteed in Chapter 3 in terms of section 7(4)(a) are clear indications of the recognition of the fundamental role of the judiciary in the democratic process.

disapproval of the policies of the elected organs of government lies with the people and their representatives.

Whether the judiciary has in the performance of its function in a specific case descended into the political arena may in some instances not always be easy to tell. Issues such as 'political questions' and 'affirmative action'¹⁰³ may become contentious in this regard. Whatever the full implication of these issues may be in relation to the role of the South African judiciary under the new Constitution, they do, however, emphasise that even if the judiciary is empowered to determine the constitutionality of acts of the elected organs of government, democracy dictates that the judiciary ought to respect the elected and representative branches and to exercise its power of judicial review within the confines of its sphere of operation.

4.2. Judicial Responsibility.

The entrenchment of fundamental human rights and freedoms in South Africa will no doubt be accompanied by a corresponding growth in judicial activity. As social and economic needs arise and expectations are raised, government activity to cater for these needs will also increase. In the process of trying to address these needs and expectations, various individual interests will be affected and the courts will increasingly be called upon to determine whether certain government programmes are constitutional or unconstitutional. This state of affairs brings into sharp focus the relationship between the judicial function and judicial responsibility.

Judicial responsibility in relation to the role of the judiciary has two meanings. It means, in the first place, the duty of the judiciary to perform its functions responsibly, without either acting like a 'super-legislature' or abdicating its

¹⁰³See *supra*.

duty to decide justiciable legal disputes¹⁰⁴. In the sense in which it is used here, judicial responsibility, however, also means accountability.

As a body which is not elected and does not represent any specific constituency, the judiciary may on a superficial level appear to be accountable to no one. Judicial power, like any other power, however, implies accountability. There are two main forms of judicial accountability, namely political accountability and public or societal accountability.

Political accountability has as its basis the concept of the separation of powers and checks and balances. In terms of this concept, the judiciary must not only be separate from the political branches of government, but these other branches ought also to some extent check and balance the exercise of judicial power. This checking and balancing of the exercise of judicial power implies a measure of judicial accountability to the political branches of government. Judges are, for example, expected to behave properly and, in the event of misbehaviour¹⁰⁵ or incompetence, may be impeached.¹⁰⁶ The idea of impeachment, therefore, operates as an admonition for judges to behave properly; proper judicial behaviour is an indication of accountability.¹⁰⁷

¹⁰⁴This aspect has already been discussed in relation to judicial activism and judicial self-restraint: see Chapt. 10.

¹⁰⁵Examples of judicial misbehaviour or misconduct are adjudicating a dispute in which the judge has a personal interest, using judicial influence to obtain a personal favour and openly advocating the cause of a specific political party.

¹⁰⁶See section 104(4) of the Constitution. No judge has been impeached or dismissed on the ground of misbehaviour since Union: see G. Carpenter **Introduction to South African Constitutional Law** 1987 at 258.

¹⁰⁷See M. Cappelletti "Who watches the Watchmen? : A Comparative Study of Judicial Responsibility" in S. Shetreet & J. Deschenes (eds) **Judicial Independence : The Contemporary Debate** (1985) 550 at 558.

More importantly, however, the concept of separation of powers also serves as a constant reminder that the judicial function should be confined to adjudication and that judges should not involve themselves in day-to-day politics, which is the domain of politicians. Members of the judiciary may thus not become members of the legislature or the executive, or involve themselves in party politics.

It is public or societal accountability, however, which constitutes the most important form of judicial accountability. The judiciary, like all other organs of government, is an organ which serves the interests of society as a whole and is therefore in the final analysis accountable to the society it serves. Public or societal accountability ensures proper judicial performance and serves as a means of harmonising the judicial function with democracy.

Public or societal accountability is largely generated by the judiciary's exposure to fair and justified criticism, either through the media or through critical and analytical legal literature. The fact that judicial proceedings are open to the general public, and that judicial decisions are reported, also helps to instil public accountability.¹⁰⁸

The tendency by members of the judiciary to frown upon fair criticism by the press or commentators does not foster judicial accountability.¹⁰⁹ Section 15(1) of the Constitution specifically entrenches the right to freedom of speech and expression, which includes freedom of the press and other media; fair criticism of the judiciary should therefore not be frowned upon. The public should be made aware of, and be allowed to comment on, the judicial office

¹⁰⁸**Ibid.** at 560-561.

¹⁰⁹See for an example the criticism of Mr Justice Steyn ("Regbank en Regsfakulteit" 1967 **THRHR** 101), Mr Justice Ogilvie Thompson ("Address on the Centenary Celebrations of the Northern Cape Division" 1972 **SALJ** 30) and Mr Justice Rabie ("Regbank en Akademie" 1983 **De Jure** 21), levelled at comments on judicial performance by academics.

and its functioning.

No doubt freedom of expression, like any other freedom, has its limits; were it not so, judicial independence would be threatened by undue and unreasonable disparages and denigrations.¹¹⁰ Proper and disciplined criticism of judicial performance is the best way in which the exercise of judicial power can be subjected to scrutiny and the judiciary be made accountable to the society it serves.

Cappelletti¹¹¹ has constructed a useful system of models of judicial accountability. The first two models, namely the repressive or dependency model and the corporative-autonomous or separateness model, represent extreme models of accountability which, in one way or another, pose a danger in respect of the exercise of judicial power. The first model places the control of judges in the hands of the political branches of government and, therefore, poses a danger of undue political interference, which may lead to loss of judicial independence; the second model places the control over judges in the hands of the judiciary itself and, therefore, poses a danger of unchecked judicial power, which may result either in an excessive or improper exercise of that power or in abdication or neglect of duty.

The third model, which Cappelletti advocates, is the responsive or consumer-oriented model. It is a mixed model which places the control of judicial power neither exclusively in the hands of the political branches of government nor exclusively in the hands of the judiciary itself but moderately in the judiciary itself, the political branches and society. The obvious attractiveness of this model is that it

"combines a reasonable degree of political and societal responsibility, without, however, either subordinating judges to the political branches, to political parties, and to societal

¹¹⁰See Chapt. 5.

¹¹¹Cappelletti **op cit.** at 570-575.

organizations, or exposing them to the vexatious suits of irritated litigants"¹¹².

This model is useful because it shows that the role of the judiciary demands responsiveness to the needs, ideals and aspirations of society and that the 'politicisation' and 'socialisation' of the judiciary in a modern democratic state is unavoidable;¹¹³ it also shows, more importantly, that the judicial role is limited by judicial, political and societal considerations.

5. Interpreting and Applying the Bill of Fundamental Rights: A Suggested Framework and Approach.

It is neither practical nor desirable to construct an all-embracing interpretive approach, one which would be uniformly applicable to all constitutional disputes. The resolution of legal disputes depends on the circumstances of the case, and the way in which the court ought to interpret and apply the provisions of the Constitution may vary from case to case. Constitutional interpretation, in particular, ought not to proceed on the basis of a uniform mechanical framework but on the basis that the values, ideals and aspirations of society must be given effect to, regardless of the approach that is adopted.

It is possible, however, to construct a general flexible framework and approach to the interpretation of the provisions of a supreme Constitution. Such a framework and approach can never be exhaustive and all-inclusive; it would merely, at best, provide some guidelines to the interpretation of the provisions of the Constitution.

To conclude this thesis, the following framework and general approach, extracted from the previous analysis of the role of the judiciary in a modern

¹¹²**Ibid.** at 574.

¹¹³**Idem.**

state, are suggested. However, in the final analysis, no framework or theoretical approach, however well constructed, can ever sufficiently meet the unique practical realities of real disputes. The administration of justice lies not so much in theoretical frameworks and pre-determined approaches as in the judge's preparedness and ability to administer it; theoretical frameworks and approaches, whether good or bad, are merely intended to help to point the way to justice.

5.1. Proposed Framework.

1) The challenger must prove

a) that the legislative or executive act complained of infringes or threatens to infringe or limits one or more of his constitutionally entrenched rights
or

b) that he has been denied one or more of his constitutionally guaranteed rights.

This step involves factual proof of a statutory or executive infringement or threat of infringement or limitation or denial of one or more of the constitutionally entrenched rights and establishing that one or more of the provisions of the Constitution protects a legitimate interest or activity of the challenger.¹¹⁴

It is not sufficient simply to prove that the wording used in a law **prima facie** exceeds the limits imposed in the Constitution; the challenger must prove an actual infringement or threat of infringement or limitation or denial. Where a law is capable of a more restricted interpretation which does not exceed constitutional limits, the Constitution directs the court to adopt the more restricted interpretation.¹¹⁵

¹¹⁴See Beaty 1992 **SALJ** at 411.

¹¹⁵Section 35(2).

If the challenger cannot prove that the act complained of infringes or threatens to infringe one or more of the constitutionally guaranteed rights, **and** establish that the Constitution protects a legitimate interest or activity of his, the case should be dismissed and the act or law complained of upheld.

2) The nature and extent of the infringement or threat of infringement, limitation or denial must be established. This requirement is necessary in order to ensure that only constitutionally recognised infringements or behaviour which is worthy of constitutional protection should give rise to unconstitutionality. In essence, constitutional protection of a right does not go beyond the nature and the purpose of the right. Not all unequal treatment, for example, is unconstitutional; the law does not always, for various cogent reasons, treat adults and children or citizens and foreigners alike; such unequal treatment clearly does not fall within the scope and purpose of the section 8 right to equality.

3) Once the challenger establishes that one or more of his constitutional rights has been infringed or limited or denied to the extent that the infringement or limitation or denial is covered by the scope or purpose of the right in issue, it must be established whether the Constitution permits such an infringement, limitation or denial. At this stage the **onus** of justifying the constitutionality of the infringement, limitation or denial rests on the party who alleges that it is constitutional, usually the government or one of its organs. The provisions of section 33, and section 34 to some extent, of the Constitution are paramount during this stage of the inquiry.

Section 33 makes provision for **five** criteria to determine whether any limitation of any of the rights entrenched in Chapter 3 is permissible. It must be shown that

- 3.1) the law complained of is of general application;
- 3.2) the limitation is reasonable;
- 3.3) the limitation is justifiable in an open and democratic society

based on freedom and equality;

3.4) the limitation does not negate the essential content of the right in question; and,

3.5) when the rights listed in section 33(1)(b)(aa) or in section 33(1)(b)(bb), in so far as the right relates to free and political activity, are in issue, the limitation is necessary.

The requirement that the law complained of must be of general application was interpreted in **Smith v Attorney-General, Bophuthatswana**¹¹⁶ to mean that such law must not be confined to individuals or a class of individuals.¹¹⁷ Article 19(1) of the German Basic Law not only requires that the law must apply generally but also adds the words "and not for an individual case".¹¹⁸ This article suggests that the phrase "law of general application" means a law which does not seek exclusively to regulate a concrete instance or an isolated group of concrete instances, or "to speak to" a particular addressee only; if it can be applied in many instances it applies generally and not for an individual case.¹¹⁹

The idea that a law which limits any of the rights entrenched in Chapter 3 must apply generally seems to be related to the principle of equality as entrenched in section 8 of the Constitution; in essence, it implies equal application of the law. It may be argued, therefore, that a law which applies specifically to any one of the class or group of persons identified on the basis of the grounds specified in section 8 will not be a law of general application

¹¹⁶1984(1) SA 196 (BSC).

¹¹⁷At 202D-E.

¹¹⁸See L. Du Plessis & H. Corder **Understanding South Africa's Transitional Bill of Rights** (1994) at 124; J.D van der Vyver "Limitation Provisions of the Bophuthatswanan Bill of Rights" 1994 **THRHR** 47 at 55.

¹¹⁹See van der Vyver 1994 **THRHR** at 55-56.

for the purpose of section 33(1).

The reasonableness criterion involves an inquiry into the weight of the interest underlying the limitation and the proportionality of the limitation in relation to the objective which it seeks to achieve. The limitation would be permissible if it is sufficiently important or compelling or proportional to the objective it seeks to achieve. Proportionality implies that the limitation must (a) be rationally connected to its objective; (b) impair the rights and freedoms of individuals as little as possible; and (c) have an effect which is proportional to the importance of the objective which it seeks to achieve.

In determining whether a limitation is justifiable in an open and democratic society based on freedom and equality, the court must first seek guidance from the democratic character of the Constitution itself, its values, and the ideals and aspirations which it is intended to express. It can then also seek guidance from the practice in other comparable democratic societies and the position in international law.

In the Zimbabwean case of **Woods and Others v Minister of Justice, Legal and Parliamentary Affairs and Others**¹²⁰

Gubbay CJ explained the concept of reasonable and justifiable in a democratic society as follows:

"What is reasonably justifiable in a democratic society is an elusive concept. It is one that defies precise definition by the Courts. There is no legal yardstick, save that the quality of reasonableness of the provision under attack is to be adjudged on whether it arbitrarily or excessively invades the enjoyment of the guaranteed right according to the standards of a society that has a proper respect for the rights and freedoms of the individual."

The requirement that the limitation must not negate the essential content of the

¹²⁰1995(1) BCLR 56 (ZS) at 59C.

right in question¹²¹ may appear to be the most difficult requirement in the section 33(1) inquiry. However, this is not necessarily the case. By the time the court turns its attention to the question whether a limitation is permissible in terms of section 33(1) it would have already determined the content of the right in issue;¹²² this will usually be at the stage the nature and extent of an alleged infringement is examined. As Marais J pointed out in **Nortje and Another v Attorney-General of the Cape and Another**¹²³, the question whether a limitation negates the essential content of a right or not

"should ordinarily be the first matter for consideration. Not only because it is the ultimate criterion which is applicable to every single fundamental right in Chapter 3, but because it would be pointless to examine such questions as reasonableness, justifiability in an open and democratic based on freedom and equality, or even necessity, if the proposed limitation negates the essential content of the entrenched right".¹²⁴

The content of a right simply means the value or values which are embodied in it; these can be established by ascertaining the meaning of the words and phrases which are used to express it¹²⁵, by determining the purpose it is designed to serve and by having regard to the larger purpose of the Constitution. In the **Nortje** case¹²⁶ Marais J said the following with regard to the essential content of a right:

"The test of whether or not the essential content of a right has been negated may

¹²¹Section 33(1)(b).

¹²²See S. Woolman "Riding the Push-me Pull-you: Constructing a Test that Reconciles the Conflicting Interests which Animate the Limitation Clause" 1994 **SAJHR** 60 at 71.

¹²³1995(2) **BCLR** 236 (C).

¹²⁴At 258G-H.

¹²⁵See P.M Bekker "Interpretation of the Right to Bail (Section 25(2)(d)) and the Limitation Clause (Section 33) of the Constitution of the Republic of South Africa 200 of 1993" 1994 **THRHR** 487 at 491.

¹²⁶**Supra**.

sometimes be quantitative, sometimes qualitative, and sometimes both. Everything turns ... on the nature of the right and its *raison d'être*.¹²⁷

In **Smith v Attorney-General, Bophuthatswana**¹²⁸ Hiemstra CJ referred to the German concept of *Wesensgehalt* or essence (of a right) and the related principle of *Wechselwirkung* or interplay of forces as important factors in a determination of the essential content of a right. The judge said:

"The 'Wesensgehalt' or essence will assume its own characteristics in relation to each fundamental right or 'Grundrecht', according to its particular weight and meaning within the totality of the system. Before the court will strike a law down because it seems to encroach upon the essence of a fundamental right, it will apply the process of an interplay of forces, or 'Wechselwirkung' as the Germans call it - nicely rendered by 'wisselwerking' in Afrikaans. When an infringing law admittedly, taken on the wording as such, encroaches upon a fundamental right, the Court will in turn interpret such a law restrictively, 'in the light of the meaning of the Bill of Rights'. If the Court can achieve such a synthesis of the two opposing forces, it would prefer to

¹²⁷In **S v Makwanyane and Another** 1995(6) BCLR 665 (CC) the Constitutional Court left open the meaning and appropriate interpretation of 'the essential content of the right'. Chaskalson P gave an exposition of the subjective and objective approaches but did not decide which approach is the appropriate one; he held that, at the very least, section 33(1)(b) evinces a concern that a right should not be taken away altogether. According to Chaskalson P's formulation, whereas the subjective approach is concerned with the content of a right from the point of view of the challenger, the objective approach is concerned with its content from the viewpoint of a constitutional norm. While Kentridge AJ appears to have preferred the objective approach, Ackerman J did not endorse Chaskalson's formulation of the objective approach. Mahomed J suggested a third approach which focuses on a distinction between the essential content of a right and some other content. According to the judge "this distinction might justify a relative approach to the determination of what is the essential content of a right by distinguishing the central core of the right from its peripheral outgrowth and subjecting a law of general application limiting an entrenched right to the discipline of not invading the core, as distinct from the peripheral outgrowth. In this regard, there may conceivably be a difference between rights which are inherently capable of incremental invasion and those which are not" (at 768D).

¹²⁸Supra.

uphold the infringing law under a truncated meaning rather than declare it unconstitutional.¹²⁹

In German constitutional law a determination of the essential content of a right involves, in the first place, a determination of the meaning of the right in the light of the values and practices of a free and democratic society (objective content) and, secondly, its meaning in the light of the values and practices of particular individuals or groups who have a specific interest in the exercise of the right (subjective content).¹³⁰ This approach is preferable because it seeks to strike a balance between the interests of the state to promote the democratic and social processes and those of individuals or groups to pursue their ends within prescribed legal limits.

The requirement that a limitation of any of the rights enumerated in sections 33(1)(b)(aa) and 33(1)(b)(bb) must, in addition to being reasonable, also be necessary, is an indication that their limitation must be scrutinised strictly. If a limiting law is to survive this higher level of scrutiny it must be shown that the limitation is not only reasonably connected to its objective but also necessary or essential to achieve that objective; the distinction between a permissible limitation of the rights enumerated in sections 33(1)(b)(aa) and 33(1)(b)(bb) and other rights entrenched in Chapter 3, therefore, is that the while the latter is based on reasonableness only, the former is based on both reasonableness and necessity.

In relation to a declaration of a state of emergency in terms of section 34, the suspension, limitation or infringement of the entrenched rights would be permissible only if the circumstances prescribed in section 34(1) exist; the

¹²⁹At 202. Hiemstra CJ's approach is consistent with the provisions of section 35(2).

¹³⁰See Woolman 1994 **SAJHR** at 72. Woolman (at 73) suggests that the court can determine the content of a right by simply determining the underlying values at stake and whether government restrictions frustrate the point of the right generally, or with respect to the particular challenger.

suspension of certain rights, enumerated in section 34(5)(c), is not permissible.¹³¹

The proposed framework accords with that suggested by Erasmus J in **S v Shuma and Another**¹³²:

"In applying any of the fundamental rights in Chapter 3 of the Constitution to a given set of facts, the Courts, I think, should reason in the following way. The first enquiry is whether the behaviour complained of does in fact amount to a restriction or limitation of a fundamental right. If such limitation is found, the extent thereof is then set out. However, rights rarely operate in pure form, but frequently are found to exist in a balance, or in conflict even, with other rights and laws. In order to strike the correct balance between constitutional rights and other laws, a third enquiry is required: the procedure which is laid down in section 33(1) of the Constitution."¹³³

5.2. Proposed Approach.

In applying the suggested framework, the following principles should be borne in mind:

1) The Constitution is the supreme law against which all other law or conduct must be tested; its provisions override the provisions of ordinary law. It is an instrument of a special nature which is intended to regulate the affairs of present and future generations. The primacy of the Constitution, as opposed to the primacy of the intention of the legislature in ordinary statutes, and its special nature are paramount considerations in the interpretation and application of its provisions.

2) Interpreting the provisions of a supreme Constitution is not the same as

¹³¹See **supra**.

¹³²1994(2) SACR 486 (E).

¹³³At 493b-c.

interpreting ordinary statutes. The human rights provisions of a Constitution, in particular, are deliberately enacted expressions of the norms, values and the ideals and aspirations of the nation which bind and discipline the government; they should be creatively but responsibly interpreted in accordance with the spirit, purport and objects of the Constitution and be capable of growth and development to meet new social, political and economic challenges and realities; ordinary statutes, on the other hand, are enacted to regulate specific instances.

3) The human rights provisions of the Constitution should be given a purposive and, where the language permits, generous construction. The larger object of constitutionally entrenched rights is fully to guarantee the individual a life of freedom and equality under the law and an enjoyment of universally recognised fundamental human rights; more importantly, the Constitution itself, in the postamble, identifies its ultimate purpose as the creation of an open and democratic society based on freedom and equality, a society which is characterised by an accountable and constitutional exercise of governmental power. A purposive and generous approach implies that individuals should be given the full benefit of the human rights provisions in the light of their specific purpose and the larger purpose of the Constitution; the wider teleological approach, in particular, places emphasis on the purpose and function of law in society and a harmonisation of this purpose and function with the protection of fundamental human rights and a recognition of the fundamental values of justice, fairness, equality and good government.

4) The values and ideals expressed in the Constitution and the generally held norms, moral standards and aspirations of society should be objectively identified, articulated and given effect to.

5) Cognisance should be taken of the prevailing social, political and economic conditions and the experiences, sensitivities and perceptions of the people.

6) The provisions of the Constitution should be interpreted impartially, fearlessly and courageously; more importantly, however, since constitutional adjudication is concerned with the determination of justiciable disputes, it must be objective and principled.

In the final analysis, it is not the judiciary alone which can turn the new Constitution into a 'living document' and make it a success; its success will also depend on the attitudes of the society it is intended to serve, the veneration with which it is held and the ability and willingness of the government of the day to respect its great outlines. The hope it holds for South Africa does not lie so much in its lifeless provisions; it lies in South Africans, who must turn it into a 'living document'.

POSTSCRIPT:

The thesis was completed just after the new (final) Constitution of the Republic of South Africa, 1996 was formally adopted by the Constitutional Assembly. It was not possible to refer to and analyse the provisions of the new Constitution because of the stage at which the thesis was.

Since the focus of the thesis is judicial approaches to constitutional interpretation, the analysis, the submissions and the conclusions made remain relevant. The judgments analysed provide a foundation for the further development of constitutional jurisprudence under the new (1996) Constitution.

TABLE OF CASES

A

- Administrator Transvaal and others v Traub 1989(4) SA 7 (A)
AK Entertainment CC v Minister of Safety and Security and others 1994(4) BCLR 31 (E)
Akweenda v Cabinet for the Transitional Government of South West Africa 1986(2) SA 548 (SWA)
Amax Potash Ltd v Government of Saskatchewan [1977] 2 SCR 576
Andrews v Law Society of British Columbia [1989] 1 SCR 143
Apsit v Manitoba Human Rights Commission [1988] 1 WWR 629
Argus Printing & Publishing Co. Ltd v Esselen's Estate 1994(2) SA 1 (A)
Aswander v Tennessee Valley Authority 297 US 288 (1936)
Attorney-General, Canada v Lavell (1974) SCR 1349
Attorney-General, Canada v Law Society of British Columbia [1982] 2 SCR 307
Attorney-General, Manitoba v Metropolitan Stores (M.T.S) Ltd [1987] 1 SCR 110
Attorney-General for New South Wales v Trethowan 1932 AC 526
Attorney-General, Quebec v Quebec Association of Protestant School Boards et al [1984] 2 SCR 66

B

- Baker v Carr 369 US 186 (1962)
Baloro and Others v University of Bophuthatswana and Others 1995(8) BCLR 1018 (B)
Barenblatt v United States 360 US 109 (1959)
Baylis v Bishop of London [1913] 1 Ch. 127
Beauregard v The Queen 130 (1981) DLR 433 (Can. Federal Court)
Bogoshi v National Media Limited and Others [1996] 1 All SA 670 (W)
Bonham v Atkins (1610) Coke's Reports 113b
Borgin v De Villers 1980(3) SA 556 (A)
Borrowski v Minister of Justice [1981] WWR 1
Bowles v Bank of England (1913) 1 Ch. 57
Brandenburg v Ohio 395 US 444 (1969)
British Coal Corporation v The King 1935 AC 500
Brown v Board of Education 347 US 483 (1954)
Brown v Leyds (1897) 4 OR 17
Bunting v Minister of Justice 1963(4) SA 531 (C)
Burton v Wilmington Parking Authority 365 US 715 (1961)

Buthelezi v The Attorney-General of Natal 1986(4) SA 377 (D)
Bux v The Officer Commanding the Pietermaritzburg Prison and others
1994(4) BCLR 10 (N)

C

Cabinet for the Territory of South West Africa v Chikane and Another
1989(1) SA 349 (A)
Cabinet of the Transitional Government for the Territory of South West Africa
v Eins 1988(3) SA 369 (A)
Canada Labour Relation Board et al v Paul L'Anglais Inc. et al [1983] 1 SCR
147
Canex Placer Ltd v Attorney-General, British Columbia [1976] 1 WWR 24
Case of Commendams (Colt and Glover v Bishop of Coventry) Hobart 140
Case of Proclamations (1611) Coke's Rep. 74
Case of Prohibitions (1607) 12 Coke's Rep. 63
Case of Shipmoney 1637(3) State Trials 825
Cassim and Solomon v The State 1892 Cape LJ 58
Castel NO v Metal and Allied Workers' Union 1987(4) SA 795 (A)
Catholic Commission for Justice & Peace, Zimbabwe v Attorney-General,
Zimbabwe 1993(2) SACR 432 (ZSC)
Cherry v Minister of Safety and Security and Others 1995(5) BCLR 570 (SE)
City of London v Wood (1701) 12 Mod. 669; 88 ER 1592
Civil Rights Cases 109 US 3 (1883)
Colegrove v Green 328 US 549 (1946)
Collins v Minister of the Interior 1957(1) SA 552 (A)
Colonial Secretary v Molteno School Board 27 SC 96
Commonwealth of Puerto Rico v Hernandez [1975] 1 SCR 228
Cooper v Telfair 4 Dallas 14 (1800)
Cowburn v Nasopie (Edms) Bpk 1980(2) SA 547 (NC)
Cultura 2000 and Another v Government of the Republic of Namibia and
Others 1993(2) SA 12 (Nm HC)
Curr v The Queen (1972) 26 DLR (3d) 603

D

Dadoo Ltd v Krugersdorp Municipal Council 1920 AD 530
Dandridge v Williams 404 US 471 (1970)
Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange 1983(3)
SA 344 (W)
Day v Savadge 1615 Hob. 85
Dempsey v Minister of Law and Order 1986(4) SA 530 (C)
De Klerk and Another v Du Plessis and Others 1994(6) BCLR 124 (T)
De Kock en 'n Ander v Prokureur-Generaal van Transvaal 1994(2) SACR 113
(T)

Denison Mines Ltd v Attorney-General, Canada [1973] 1 OR 797
Director of Education, Transvaal v McCagie 1918 AD 616
Director: Office for Serious Economic Offences v Park-Ross and Another
1995(5) BCLR 652 (C)
Directory Advertising Cost Cutters v Minister of Posts, Telecommunications
and Broadcasting and others [1996] 2 All SA 83 (T)
Djama v Government of the Republic of Namibia and others 1993(1) SA 387
(Nm SC)
Dom's Trustees v Bok 2 (1887) 187
Dubois v The Queen [1985] 23 DLR (4th) 503
Duke v R [1972] SCR 917
Duncan v Missouri 152 US 377 (1893)
Duport Steels Ltd v Sirs [1980] 1 WLR 142

E

Ebrahim v Minister of Interior 1977(1) SA 665 (A)
Edward Books and Art Ltd v The Queen [1986] SCR 713
Eisenstadt v Baird 405 US 438 (1972)
Elish en andere v Prokureur-Generaal, WPA 1994(2) SACR 579 (W)
Evans v Moose 407 US 409 (1972)
Ex Parte Attorney-General, Namibia: In re Corporal Punishment by Organs
of State 1991(3) SA 76 (Nm)
Ex Parte Cabinet for the Interim Government of South West Africa: In Re
Advisory Opinion in terms of Section 19(2) of Proclamation R101 of 1985
1988(2) SA 832 (SWA)
Ex Parte Minister van Justisie: in re S v Van Wyk 1967(1) SA 488 (A)

F

Fernandez v Wilkinson 505 F. Supp. 787 (1980)
Ferreira v Levin and others; Vryenhoek and others v Powell NO and others
1995(4) 437 (W)
Filartiga v Pena Irala 1980 ILM 966; 630 Fed. Rep. 876 (1980)
Fose v Minister of Safety and Security 1996(2) BCLR 232 (W)
Freiremar SA v The Prosecutor-General of Namibia and Another 1994(6) 73
(NmHC)

G

Gardener v Whitaker 1994(5) BCLR 19 (E)
Gray v Sanders 372 US 368 (1963)
Gertz v Robert Welch Inc. 418 US 323

Godden v Hales (1686) 11 State Trials 1165
Government of Bophuthatswana v Segale 1990(1) SA 434 (BA)
Government of the Republic of Namibia and Another v Cultura 2000 and
Another 1994(1) SA 407 (Nm SC)
Government of the Republic of South Africa v Government of Kwazulu
1983(1) SA 164 (A)
Government of the Republic of South Africa v The Sunday Times Newspaper
and Another 1995(2) BCLR 182 (T)
Grundling v Van Rensburg 1984(3) SA 207 (W)

H

Hamilton v Hamilton Harbour Commissioners [1972] 1 OR 61
Handyside Case, Judgment of 7 December 1976, A24 1976 (ECHR)
Harris v Donges NO 1951(4) SA 707 (C)
Harris v Minister of the Interior 1952(2) SA 428 (A)
Hayburn's Case 2 Dallas 409 (1792)
Hleka v Johannesburg Council 1949(1) SA 842 (A)
Henry Birks and Sons (Montreal) v Montreal [1955] 5 DLR (2d) 321
Hess v The State (1895) OR 112
Heydon's Case (1854) 3 Rep. 7a
Hinds v The Queen [1976] 2 WLR 366 (PC)
Hogan v R [1975] 2 SCR 579
Holmes v Walton (New Jersey, 1780)
Holomisa v Argus Newspapers Ltd [1996] 1 All SA 478 (W)
Home Oil Distributors v Attorney-General, British Columbia [1937] 2 WWR
418
Hunter et al v Southam Inc. [1984] 2 SCR 145; (1984) DLR (4th) 641

I

In re Duma 1983(4) SA 469 (N)
Inter-Science Research and Development Services (Pty) Ltd v Republica
Popular da Mocambique 1980(2) SA 111 (T)
Irwin Toy v Quebec (1989) 58 DLR (4th) 577

J

James v Commonwealth of Australia 1936 AC 578
Jones v Alfred H Meyer Co. 392 US 409 (1968)
Jones v R [1986] 2 SCR 284
Jordaan v Van Biljon 1962(1) SA 286 (A)
JT Publishing (Pty) Ltd v Directorate of Publications and Another 1995(1)
BCLR 70 (T)
Jurgens v The Editor, The Sunday Times Newspaper and Another 1995(1)

BCLR 97 (W)

K

Kabinet van die Tussentydse Regering van Suidwes-Afrika en 'n Ander v Katofa 1987(1) SA 695 (A)

Kaffraria Property v Government of the Republic of Zambia 1980(2) SA 709 (E)

Kalla and Another v The Master and Others 1994(4) BCLR 79 (T)

Katofa v Administrator-General, South West Africa and Another 1985(4) SA 211 (SWA)

Kekana Royal Executive Council and Another v The Minister of Law and Order and Another, unreported judgment of 17-06-1993, BGD Case No. M29/93

Korematsu v United States 323 US 214 (1944)

L

Langermann v Johannesburg Liquor Licensing Board (1897) 4 OR 137

Lareau v Manson 507 F. Supp. 1177 (1980)

Law Society of British Columbia v Andrews [1986] 27 DLR (4th) 600

Law Society of British Columbia v Attorney-General, Canada [1980] 4 WWR 6

Law Society of Upper Canada v Skapinker [1984] 9 DLR (4th) 161

Lee v Bude and Torrington Railway (1871) LR 6 CP 576

Lewis v Minister of Internal Affairs 1991(3) SA 628 (B)

Liyanage v R [1966] 1 ALL ER 650 (PC)

M

Magano and Another v The District Magistrate, Johnson NO and Others 1994(2) BCLR 125 (W)

Mandela v Falati 1994(4) BCLR 1 (W)

Marais v Richard 1981(1) SA 1157 (A)

Marbury v Madison 1 Cranch 137 (1803)

Matinkinca and Another v Council of State, Ciskei and Another 1994(1) BCLR 17 (Ck)

Matiso and others v The Commanding Officer, Port Elizabeth Prison and others 1994(3) BCLR 80 (SE)

May v Udwin 1981(1) SA 1 (A)

McCorkindale's Executors v Bok (1884) 2 SAR 202

McCulloch v Maryland 17 US (4 Wheat.) 316 (1819)

McKinney v University of Guelph (1991) 76 DLR (4th) 545

McNeil v N.S Board of Censors [1975] NSR (2d) 483

Mfolo and others v Minister of Education, Bophuthatswana 1992(3) SA 181 (B)
Mills v The Queen [1986] 1 SCR 863
Minister of Defence, Namibia v Mwandighi 1991(2) SA (Nm SC)
Minister of Home Affairs and Another v Collins McDonald Fisher and Another 1980 CA 319 (PC)
Minister of Home Affairs (Bermuda) and Another v Fisher [1980] AC 319
Minister of Interior v Harris 1952(4) SA 769 (A)
Minister of Justice v Borowski [1982] 1 WWR 97
Minister of Law and Order v Hurley 1986(3) SA 568 (A)
Minister of Posts and Telegraphs v Rasool 1934 AD 167
Mitchell v The Queen 24 CCC (2d) 241
Mokwele v Government, Republic of Bophuthatswana and others 1993(2) SACR 707 (B)
Monnakale and others v Government of the Republic of Bophuthatswana and others 1991(1) SA 598 (B)
Moore v Attorney-General for the Irish Free State 1935 AC 484
Moose Lodge v Irvis 407 US 409 (1972)
Morgentaler v The Queen (1975) 20 CCC (2d) 449
Morgentaler v The Queen [1988] 44 DLR (4th) 385
Mortensen v Peters (1906) 8 SC 93
Motala and Another v University of Natal 1995(3) BCLR 374 (D)
Motaung v Makubela NO 1975(1) SA 618 (O)
Mpangele and others v Botha and others (1) 1982(3) SA 633 (C)
Mpangele and Another v Botha and Others (2) 1982(3) SA 639 (C)
Mwandighi v Minister of Defence, Namibia 1991(1) SA 851 (Nm SC)

N

Nabal v Bok (1883) 1 SAR 60
Naidoo v Vengtas 1965(1) SA 1 (A)
Namibian National Students' Organisation and others v Speaker of the National Assembly for South West Africa and others 1990(1) SA 617 (SWA)
Nasopie (Edms) Bpk en andere v Minister van Justisie 1979(4) SA 438 (NC)
Ndlwana v Hofmeyr 1937 AD 229
Nduji & Another v Minister of Justice & Others 1978(1) SA 893 (A)
Neethling v Du Preez and Others; Neethling v The *Weekly Mail* and Others 1994(1) SA 708 (A)
New York Times v Sullivan 376 US 254 (1964)
New York Times Co. v United States 403 US 713
Nkwinti v Commissioner of Police and Others 1986(2) SA 421 (EC)
Nicholas Fuller's Case (1608) 12 Coke's Rep. 41
Nortje and Another v Attorney-General of the Cape and Another 1995(2) BCLR 236 (C)
Northern Securities v United States 193 US 197 (1904)
Northern Telecom Ltd v Communication Workers of Canada [1980] 1 SCR

115

Nyamakazi v President of Bophuthatswana 1992(4) SA 540 (B)
Nxasana v Minister of Justice 1976(3) SA 745 (D)

O

O'Connor v The Queen (1966) 57 DLR (2d) 123
Ogden V Sanders 12 Wheat. 213 (1827)
Omar & others v Minister of Law & Order; Fani & others v Minister of Law
and Order & others; State President & others v Bill 1987(3) SA 857 (A)
Operation Dismantle v The Queen [1985] 18 DLR (4th) 481

P

Park-Ross v Director, Office for Serious Economic Offences 1995(2) BCLR
198 (C)
Penrice v Dickenson 1945 AD 6
Plessy v Ferguson 163 US 537 (1896)
Podlas v Cohen NO and others 1994(3) BCLR 137 (T)
Potgieter en 'n Ander v Kilian 1995(11) BCLR 1498 (N)
Pratt and Another v Attorney-General for Jamaica and Another [1993] 2 All
ER 769 (PC)
Prokureur-generaal van die Witwatersrand Afdeling v Van Heerden en Andere
1994(2) SACR 467 (W)

Q

Qozeleni v Minister of Law and Order and Another 1994(1) BCLR 75 (E)

R

R v Abdurahman 1950(3) SA 136 (A)
R v Andrews [1989] 1 SCR 143
R v Big M Drug Mart Ltd [1985] 1 SCR 295
R v Burnshire [1975] 1 SCR 693
R v Carol (1983), 1985 Supplementary Release to the Canadian Charter of
Rights and Freedoms, 16, 4.2
R v Chow [1978] 43 CCC (2d) 215 (BCCA)
R v Christansen [1983] 15 DLR (3rd) 340 (NSCA)
R v Currie (1983) 33 CR (3d) 277
R v Drybones (1969) 9 DLR (3d) 473
R v Electricity Commissioners [1924] 1 KB 171
R v Ewing and Kearney [1974] 5 WWR 232

R v Keegstra (1990) 3 SCR 697
R v Kent, Sinclair and Gode [1986] 27 CCC (3d) 405
R v McChlery 1912 AD 199
R v National Insurance Commissioners [1972] AC 944
R v Ndobe 1930 AD 484
R v Oakes [1986] 1 SCR 103
R v Stinchcombe 1992 LRC (Crim) 68
R v Sussex Justices, ex parte McCarthy [1924] 1 KB 256
R v Therens [1985] 18 DLR (4th) 655
R v Turpin [1989] 1 SCR 1296
R v Venter 1907 TS 910
Radebe v Minister of Law and Order and Another 1987(1) SA 586 (W)
Rahey v The Queen [1987] 39 DLR (4th) 481
Rajah and Rajah (Pty) Ltd v Ventersdorp Municipality 1961(4) SA 402 (A)
Re Alberta Statutes [1938] 2 DLR 81
Re Blainey and Ontario Hockey Association (1986) OR (2d) 513 (Ont. CA)
Rebrin v Bird (1961) 130 CCC 55
Reek NO v Registrateur van Aktes 1969(1) SA 589 (T)
Reference re An Act to Amend the Education Act (Ontario) [1986] 25 DLR (4th) 1 (Ont. CA)
Reference re British Columbia Motor Vehicle Act [1985] 2 SCR 486
Reference re Section 32 and 34 of the Workers Compensation Act (1983) (Newfoundland) [1989] 56 DLR (4th) 765
Reinecke v Incorporated General Insurance Ltd 1974(2) SA 84 (A)
Re Martin: Children's Aid Society of Winnipeg v Martin et al (1983) 25 Man. R (2d) 143 (CA)
Re Singh and Minister of Employment and Immigration [1985] 18 DLR (4th) 422
Retail, Wholesale & Department Store Union Local 580 v Dolphin Delivery Ltd [1986] 2 SCR 573
Reynolds v Sims 377 US 533 (1964)
Rinaldi v Yeager 384 US 305 (1966)
Robertson and Rosentanni v The Queen (1963) 41 DLR (2d) 485
Roth v United States 354 US 476 (1957)
Royal Trust Corp. of Canada et al v Law Society of Alberta [1985] 19 DLR (4th) 159
Rowles v Mason (1612) 2 Brownl. 192; 123 ER 892
Rudolph and Another v Commissioner for Inland Revenue and Others 1994(2) BCLR 9 (W)

S

S v Acheson 1991(2) SA 805 (Nm HC)
S v Adams; S v Werner 1881(1) SA 187 (A)
S v A Juvenile 1990(4) SA 151 (ZS)
S v Angula 1986(2) SA 540 (SWA)

- S v Baleka & others 1986(1) SA 361 (T)
S v Bhulwana; S v Gwadiso 1995(12) BCLR 1579 (CC)
S v Chabalala 1986(3) SA 623 (BA)
S v Christie 1982(1) SA 464 (A)
S v Coetzee and others 1994(4) BCLR 58 (W)
S v Collier 1995(8) BCLR 975 (C)
S v Conifer (Pty) Ltd 1974(1) SA 651 (A)
S v Fani & others 1994(1) BCLR 43 (E)
S v Heita 1992(3) SA 785 (Nm HC)
S v Heita and others 1987(1) SA 311 (SWA)
S v James 1994(1) BCLR 57 (E)
S v Lombard en 'n Ander 1994(3) SA 776 (T)
S v Mabaza en 'n ander 1994(5) BCLR 42 (W)
S v Makwanyane 1995(6) BCLR 665 (CC)
S v Marwane 1981(3) SA 588 (B)
S v Marwane 1982(3) SA 717 (A)
S v Meer 1981(4) SA 604 (A)
S v Mhlungu and others 1995(7) BCLR 793 (CC)
S v Minnies 1991(3) SA 364 (Nm HC)
S v Mtyuda 1995(5) BCLR 646 (E)
S v Nathaniel 1987(2) SA 225 (SWA)
S v Ncube; S v Tshuma; S v Ndlovu 1988(2) SA 702 (ZSC)
S v Nel 1987(4) SA 276
S v Ndima and others 1994(2) SACR 517 (D)
S v Njadayi 1994(5) BCLR 90 (E)
S v Ntesang 1995(4) BCLR 426 (Botswana)
S v Pineiro 1993(2) SA 412 (Nm)
S v Saib 1994(2) BCLR 48 (D)
S v Sefadi 1994(2) BCLR 23 (D)
S v Shangase and Another 1994(2) BCLR 42 (D)
S v Shuma and Another 1994(2) SACR 486 (E)
S v Smith & Another 1994(1) BCLR 63 (SE)
S v Solo 1995(1) SACR 499 (E)
S v Tcoeib 1993(1) SACR 274 (Nm HC)
S v Tuhadeleni & others 1969(1) SA 153 (A)
S v Vermaas 1994(4) BCLR 18 (T)
S v Williams and others 1995(7) BCLR 861 (CC)
S v Zuma and others 1995(4) BCLR 401 (CC)
Salomon v Salomon & Co. Ltd [1897] AC 22
Santam Insurance Ltd v Taylor 1985(1) SA 514 (A)
SAUK v O'Malley 1977(3) SA 394 (A)
Saumur v Quebec [1953] 4 DLR 641
Schourie v Afrikaanse Pers Publikasies 1966(1) PH J1 (W)
Sefularo v President of Bophuthatswana & Another, unreported judgment delivered in June 1992 (BGD)
Segale v Government of Bophuthatswana 1987(3) SA 237 (B)
Seluka v Suskin and Salkow 1912 TPD 256
Shabalala and others v The Attorney-General of Transvaal and others 1994(6)

BCLR 85 (T)

Shapiro v Thompson 394 US 618 (1969)

Singh v Minister of Employment and Immigration [1985] 1 SCR 177

Sinovich v Hercules Municipal Council 1946 AD 783

Smith v Attorney-General, Bophuthatswana 1984(1) SA 196 (BSC)

Smith v Collins 439 US 916 (1978)

Snuif v The State (1895) 4 OR 294

Staatspresident v Release Mandela Campaign 1988(4) SA 930 (A)

Staatspresident v United Democratic Front 1988(4) SA 830 (A)

Sterling v Cupp OR 625 P 2d 123

Stockdale v Hansard (1839) 9A & E 1; 112 ER 1112

South African Defence Aid Fund & Another v Minister of Justice 1967(1) SA 31 (C)

Swart NO v Garner and Others 1951(3) SA 589 (A)

Switzman v Elbling [1957] 7 DLR (2d) 337

T

The Attorney-General v Dow 1994(6) BCLR 1 (Botswana)

The City of Houston v Hill, Case No. 86/243, 1987

The Prince's Case (1606) 8 Coke's Rep. 1a

The Queen v Burah [1878] 3 AC 889

The Queen in Right of Canada v Beauregard [1986] 30 DLR (4th) 481

The Queen v Operation Dismantle et al [1983] SCR 713

The Queen v Operation Dismantle et al [1984] 3 DLR (4th) 193

Theron v Minister van Justisie 1961(3) SA 298 (T)

The State v Gibson 1898 Cape LJ 1

The State President & others v Tsenoli; Kerchoff & another v The Minister of Law and Order & others 1986(4) SA 1150 (A)

Thorson v Attorney-General of Canada [1975] 1 SCR 138

Trevett v Wheeden (Rhode Island, 1786)

Trop v Dulles 356 US 86 (1958)

Trustees JC Ponyton Property Trust v Secretary for Inland Revenue 1970(2) SA 618 (T)

U

United States v Butler 297 US 1 (1936)

United States v Carolene Products Co. 304 US 144 (1938)

United States v Lovett 328 US 303 (1946)

Union Colliery of British Columbia v Bryden [1899] AC 580

Union Government v Mack 1917 AD 731

V

Van Horne's Lessee v Dorrance 2 Dallas 304 (1795)
Venter v R 1907 TS 910

W

Wehmeyer v Lane NO and others 1994(2) BCLR 14 (C)
Wesberry v Sanders 376 US 1 (1964)
Winner v S.M.T (Eastern Ltd) [1951] 4 DLR 529
Wood v Ondangwa Tribal Authority 1975(2) SA 294 (A)
Woods and others v Minister of Justice, Legal and Parliamentary Affairs and
others 1995(1) BCLR 56 (ZS)

Z

Zantsi v Council of State, Ciskei and others 1995(4) SA 615 (CC)
Zutphen Brothers Const, Ltd v Diwidag Systems International et al [1987] 35
DLR (4th) 43 (NSCA)
Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd 1984(2)
SA 778 (ZS)

TABLE OF STATUTES

Bill of Rights, 1 William and Mary sess. 2 c2 (1689)
Ordinance No. 2 of 1852
Colonial Laws Validity Act, 1865
British North America Act, 1867
Judicature Act, 1873 (UK)
Judicature Act, 1875 (UK)
South Africa Act, 1909 (9 Edw. 7 C.9)
Judicature Act, 1925 (UK)
Native Administration Act, 38 of 1927
Statute of Westminster, 1931
Status of Union Act, 69 of 1934
Representation of Natives Act, 1936
Magistrates' Courts Act, 32 of 1944
British North America Act (No. 2), 1949
Internal Security Act, 44 of 1950
Separate Representation of Natives Act, 46 of 1951
High Court of Parliament Act, 35 of 1952
The Appellate Division Quorum Act, 27 of 1955
The Senate Act, 53 of 1955
South Africa Act Amendment Act, 9 of 1956
Supreme Court Act, 59 of 1959
An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms, S.C 1960, c 44 (Canadian Bill of Rights, 1960)
Republic of South Africa Constitution Act, 32 of 1961
Terrorism Act, 83 of 1967
Constitution of South West Africa Act, 39 of 1968
Development of Self-Government for the Native Nations in South West Africa, 54 of 1968
Matters Relating to South West Africa Act, 25 of 1969
Federal Court Act, 1971 (Canada)
Republic of Bophuthatswana Constitution Act, 18 of 1977
Electoral Act, 45 of 1979
Criminal Procedure Second Amendment Act, 33 of 1980 (B)
Canada Act, 1982, c 11 (UK)
Constitution Act, 1982 (Canada)
Republic of South Africa Constitution Act, 110 of 1983
South West African Legislative and Executive Authority Proclamation, 1985
Judges' Remuneration and Conditions of Employment Act, 88 of 1989
Constitution of the Republic of Namibia Act, 1 of 1990
The Constitution of the Republic of South Africa Act, 200 of 1993

TABLE OF AUTHORITIES

A

- R.S Abella "Public Policy and the Judicial Role" 1989 **McGill LJ** 1021
H.J Abraham **The Judicial Process** (1986)
C. Albertyn & J. Kentridge "Introducing the Right to Equality in the Interim Constitution" 1994 **SAJHR** 149
T.R.S Allan "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" 1985 **CLJ** 111
T.A Aleinikoff "Constitutional Law in the Age of Balancing" 1987 **Yale LJ** 943

B

- J.C Bakan "Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought" 1989 **Osgoode Hall LJ** 123
P.V Baker & P. St. J Langen (eds) **Snell's Principles of Equity** (1982)
B.R Bamford "Aspects of Judicial Independence" 1956 **SALJ** 380
E. Barker **The Politics of Aristotle** (1946)
G.N Barrie "International Human Rights Conventions: Public International Law Applicable to the Protection of Rights" 1995 **TSAR** 66
G.N Barrie "Marwane's case: Echoes of **Marbury v Madison** on the Arid Plains of Southern Africa" 1983 **THRHR** 288
G.N Barrie "The Separation of Powers Doctrine" 1967 **SALJ** 94
D.A Basson "Judicial Activism in a state of emergency: an examination of recent decisions of the South African Courts" 1987 **SAJHR** 28
D. Basson & H. Viljoen **South African Constitutional Law** (1988)
D. Basson **South Africa's Interim Constitution: Text and Notes** (1994)
L. Baxter **Administrative Law** (1984)
L.G Baxter "The State and other Basic Terms in Public Law" 1982 **SALJ** 212
D. Beaty "Human Rights and Constitutional Review in Canada" 1992 **Human Rights LJ** 185
D. Beaty "The Rule (and Role) of Law in a new South Africa: Some Lessons from Abroad" 1992 **SALJ** 409
T.L Becker **Comparative Judicial Politics: The Political Functioning of the Courts** (1970)

- B. Beinart "Parliament and the Courts" 1954 **Butterworths LR** 134
- B. Beinart "Sovereignty and the Law" 1952 **THRHR** 101
- B. Beinart "The Rule of Law" 1962 **Acta Juridica** 99
- P.M Bekker "Interpretation of the Right to Bail (Section 25(2)(d)) and the Limitation Clause (Section 33) of the Constitution of the Republic of South Africa 200 of 1993" 1994 **THRHR** 487
- J. Bell **Policy Arguments in Judicial Decisions** (1983)
- R. Berger **Government by Judiciary** (1977)
- A. Bickel **The Least Dangerous Branch** (1962)
- A. Bickel "The Supreme Court, 1960 Term-Foreword: The Passive Virtues" 1961 **Harv. LR** 40
- A. Bickel **The Supreme Court and the Idea of Progress** (1978)
- C.L Black **The People and the Court** (1960)
- Sir William Blackstone **Commentaries on the Laws of England** (1765)
- Robert Bolt **A Man for All Seasons** (1962)
- H. Booysen & D. van Wyk **Die '83 Grondwet** (1984)
- H. Booysen **Volkereg en sy Verhouding tot die Suid-Afrikaanse Reg** 2nd ed (1989)
- R. Bork "Neutral Principles and Some First Amendment Problems" 1971 **Indiana LJ** 1
- R. Bork **The Tempting of America - The Political Seduction of the Law** (1990)
- A. Boshoff "Interpretation of a Constitution: *Mwandingi v Minister of Defence, Namibia*" 1992 **TSAR** 331
- C.J Botha **Wetsuitleg** (1991)
- H. Botha "The Values and Principles underlying the 1993 Constitution" 1994 **SA Public Law** 233
- N. Botha "To Pay or not to Pay: Namibian Liability for South African Delicts" 1990/91 **SAYIL** 156
- N.J Botha "Municipal Application of International Law: Seizure in Foreign Territory, Terrorism and Self-Defence" 1978 **SAYIL** 170
- L.B Boudin **Government by the Judiciary** (1932)
- L. Boulle, B. Harris & C. Hoexter **Constitutional and Administrative Law** (1989)
- L.J Boulle "Federation and Consociation: Conceptual Links and Current Constitutional Models" 1981 **THRHR** 236
- L. Boulle & L. Baxter (eds) **Natal and Kwazulu: Constitutional and Political Options** (1981)
- L. Boulle **South Africa and the Consociational Option** (1984)
- L.J Boulle "The Second Republic: Its Constitutional Lineage" 1980 **CILSA** 1

- L.J Boule "The Turnhalle Testimony" 1978 **SALJ** 49
- H. Bownes "The Interpretation of the Constitution and the Bill of Rights: The Role of the Judge and the Lawyer" 1987 **New Hampshire Bar J** 301
- N. Bratza **European Convention for the Protection of Human Rights**, paper delivered at the International Human Rights Seminar, Magaliesburg, 22-29 July 1986 (Background Materials, vol. 2, Legal Resources Centre, Univ. of Witwatersrand.)
- E. Bray "The Liberation of **Locus Standi** in the Interim Constitution: AN Environmental Angle" 1994 **THRHR** 481
- P. Brett "Reflections on the Canadian Bill of Rights" 1969 **Alberta LR** 294
- A.R Brewer-Carias **Judicial Review in Comparative Law** (1989)
- J. Bryce **Studies in History and Jurisprudence** (1901)
- H. Burton "The Cornerstone of Constitutional Law: **Marbury v Madison**" 1950 **Am. Bar Ass. J** 805

C

- A. Cachalia, H. Cheadle, D. Davis et al **Fundamental Rights in the New Constitution** (1994)
- E. Cameron "Legal Chauvinism, Executive-mindedness and Justice - L.C Steyn's impact on South African Law" 1982 **SALJ** 38
- E. Cameron "Nude Monarchy: The Case of South Africa's Judges" 1987 **SAJHR** 338
- M. Cappelletti "Judicial Review in Comparative Perspective" 1970 **California LR** 1017
- M. Cappelletti "The Law-making Power of the Judge and its Limits: A Comparative Perspective" 1981 **Monash Univ. LR** 15
- M. Cappelletti "Who Watches the Watchmen?: A Comparative Study of Judicial Responsibility" in S. Shetreet & J. Deschenes (eds) **Judicial Independence: The Contemporary Debate** (1985) 550
- G. Carpenter "A Namibian Duo" 1990/91 **SAYIL** 164
- G. Carpenter "Constitutional Interpretation in Bophuthatswana - What Price a Bill of Rights?" 1989/90 **SAYIL** 169
- G. Carpenter "Constitutional Interpretation in Bophuthatswana - Still no Joy" 1990/91 **SAYIL** 143
- G. Carpenter "Fundamental Rights, Security Legislation and the **Audi Alteram Partem** Rule - Still no Congruence in the Appellate Division" 1989 **SA Public Law** 87
- G. Carpenter "Namibia - The Final Run-in to Independence" 1989/90 **SAYIL** 158

- G. Carpenter "S v Marwane" 1983
THRHR 93
- G. Carpenter "Smith v Attorney-General, Boputhatswana" 1984 **THRHR**
363
- G. Carpenter "The Namibian Constitution - ex Africa aliquid nova after all?"
1989/90 **SAYIL** 22
- G. Carpenter **Introduction to South African Constitutional Law**
(1987)
- C.J Claasen "The Functioning and Structure of the Constitutional Court" 1994
THRHR 412
- S.M Cleary "A Bill of Rights as a Normative Instrument: South West
Africa/Namibia 1975-1988" 1988 **CILSA** 291
- H.J Coetsee "Hoekom nie 'n verklaring van Menseregte nie" 1984 **TRW** 5
- J.P.J Coetzer "Die Regsadministrasie en Verwante Sake in 'n Nuwe Bedeling"
1991 **Consultus** 104
- M.M Corbett "Aspects of the Role of Policy in the Evolution of the Common
Law" 1987 **SALJ** 52
- M.M Corbett "Human Rights: The Road Ahead" 1979 **SALJ** 192
- H. Corder (ed) **Democracy and the Judiciary** (1989)
- H. Corder (ed) **Essays in Law and Social Practice in South
Africa** (1988)
- H. Corder **Judges at Work - The Role and Attitudes of the
South African Appellate Judiciary** (1984)
- E.S Corwin "Judicial Review" **Encyclopaedia of Social Sciences**
(1932)
- E.S Corwin "Marbury v Madison and the Doctrine of Judicial Review" 1914
Michigan LR 538
- E.S Corwin **The 'Higher Law' Background of American
Constitutional Law** (1957)
- E.S Corwin **The Supreme Court and Political Questions** (1936)
- D.V Cowen **The Entrenched Sections of the South Africa Act**
(1949)
- D.V Cowen **The Foundations of Freedom** (1961)
- D.V Cowen "The Interpretation of Statutes and the Concept of the Intention
of the Legislature" 1980 **THRHR** 374
- D.V Cowen "Prolegomenon to a Restatement of the Principles of Statutory
Interpretation" 1976 **THRHR** 131
- M.G Cowling "Judges and the Protection of Human Rights in South Africa:
Articulating the Inarticulate Major Premise" 1987 **SAJHR** 177
- E.T Crawford **The Construction of Statutes** (1940)
- R. Cross **Statutory Interpretation** (1976)

D

- R.M Dawson **The Government of Canada** (1957)
- D.M Davis "Democracy - Its Influence upon the Process of Constitutional Interpretation" 1994 **SAJHR** 103
- D.M Davis "Integrity and Ideology: Towards a Critical Theory of the Judicial Function" 1995 **SALJ** 105
- D.M Davis "Positivism and the Judicial Function" 1987 **SALJ** 103
- Lord A. Denning **The Discipline of Law** (1979)
- S.A de Smith **Constitutional and Administrative Law** (1981)
- S.A de Smith **The New Commonwealth and its Constitutions** (1964)
- G.E Devenish "External Aids to Construction - Some Inconsistencies and Anomalies in the South African Approach which Obstruct an Unqualified Contextual Methodology in the Interpretation of Statutes" 1991 **THRHR** 58
- G.E Devenish **Interpretation of Statutes** (1992)
- B. de Villiers (ed) **Birth of a Constitution** (1994)
- D.J Devine "Recognition: Newly Independent States and General International Law" 1984 **SAYIL** 18
- Lord Devlin **The Judge** (1979)
- R.W.M Dias **Jurisprudence** (1970)
- A.V Dicey **An Introduction to the Study of the Law of the Constitution** 10th ed (1975)
- R. Dickerson **The Interpretation and Application of Statutes** (1975)
- B. Dickson "The Judiciary - Law Interpreters or Law-makers?" 1982 **Manitoba LJ** 701
- J.M Didcott "Memorandum and other Submissions to the Hoexter Commission" 1980 **SALJ** 651
- A.M Dlamini "Growth by Stifling" 1990 **THRHR** 121
- A.M Dlamini & P.J Majola "The Bophuthatswana (Constitution) Bill of Rights and Security Legislation: A Rule of Law Appraisal" 1993 **Stellenbosch LR** 100
- C.R.M Dlamini "Law and Justice: A South African Perspective" 1987 **De Jure** 270
- C.R.M Dlamini "The Senate Case Revisited" 1988 **SALJ** 470
- H. Dooyeweerd **De Crisis in die Humanistiese Staatsleer** (1931)
- H. Dooyeweerd **Die Strijd om het Soewereiniteitsbegrip** (1950)
- C.J.R Dugard **Human Rights and the South African Legal Order** (1978)
- C.J.R Dugard **International Law: A South African Perspective** (1994)
- C.J.R Dugard "International Law is part of our Law" 1971 **SALJ** 13

- C.J.R Dugard "Review of Forsyth" 1986 **SALJ** 303
- C.J.R Dugard "Should Judges Resign? A Reply to Professor Wacks" 1984 **SALJ** 286
- C.J.R Dugard "Some Realism about the Judicial Process and Postivism: A Reply" 1981 **SALJ** 372
- C.J.R Dugard "The Judicial Process, Positivism and Civil Liberty" 1971 **SALJ** 181
- C.J.R Dugard "The Role of International Law in Interpreting the Bill of Rights" 1994 **SAJHR** 208
- L. Duguit **Law in the Modern State** (1970)
- L. Du Plessis "A Note on the Application, Interpretation , Limitation and Suspension Clauses in South Africa's Transitional Bill of Rights" 1994 **Stellenbosch LR** 86
- L.J Du Plessis **Die Moderne Staat** (1941)D.
- L.M Du Plessis **Interpretation of Statutes** (1986)
- L.M Du Plessis & J.R De Ville "Bill of Rights Interpretation in the South African Context (3): Comparative Perspectives and Future Prospects" 1993 **Stellenbosch LR** 364
- L.M Du Plessis & J.R De Ville "The Bill of Rights: Interpretation in the South African Context - Diagnostic Observations" 1993 **Stellenbosch LR** 59
- L.M Du Plessis "The Interpretation of Bills of Rights in South Africa: Taking Stock" in J. Kruger & B. Currin **Intrepreting a Bill of Rights** (1994) 1
- L. Du Plessis & H. Corder **Understanding South Africa's Transitional Bill of Rights** (1994)
- R. Dworkin "The Model of Rules" 1967 **Univ. of Chicago LR** 22
- D. Dyzenhaus **Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy** (1991)
- D. Dyzenhaus "Judges, Equity and Truth" 1985 **SALJ** 295
- D. Dyzenhaus "Positivism and Validity" 1983 **SALJ** 454

E

- S. Ellmann "A Constitution for All Seasons: Providing Against Emergencies in a Post-Apartheid Constitution" 1989 **Columbia HRLR** 163
- J.H Ely **Democracy and Distrust: A Theory of Judicial Review** (1980)
- E.B England (ed) **The Laws of Plato** (1921)
- H.J Erasmus **Regspleging in die gedrang**, paper read at the University of Stellenbosch, February 1986

F

J.A Faris "South Africa's Severance of Links with South West Africa" 1977 **SAYIL** 49

J.D Finch **Introduction to Legal Theory** (1970)

O.M Fiss "Objectivity and Interpretation" 1982 **Stanford LR** 739

P.S Fouche & I.M Rautenbach "Deportasie en die Interpretasie van 'n Handves van Regte" 1992 **TSAR** 505

C.F Forsyth **In Danger for their Talents - A Study of the Appellate Division of the Supreme Court of South Africa** (1985)

C.F Forsyth "Interpreting a Bill of Rights: The Future Task of a Reformed Judiciary" 1991 **SAJHR** 1

Jerome N. Frank "Some Refections on Judge Learned Hand" 1957 **Chicago LR** 666

W. Friedman **Legal Theory** (1976)

C.J Friedrich **Constitutional Government and Democracy** (1968)

G

J. Gauntlett "Aspects of the Value Problems in Judicial Positivism" 1972 **Responsa Meridiana** 204

A. Gerwith **Marsilius of Padua, the Defender of the Peace** (1956)

E.W.F Gey van Pittius **Staatsopvatting van die Vootrekkers en die Boere** (1958)

R.W Gordon "New Development in Legal Theory" in D. Kairys (ed) **The Politics of Law: A Progressive Critique** (1982) 281

J.W Gough **Fundamental Law in English Constitutional History** (1955)

W. Gray "The Sovereignty of Parliament Today" 1953 **CLJ** 54

H

Halsbury's **Laws of England** 4th ed (1973)

H.R Hahlo & E. Kahn **The Union of South Africa: The Development of its Laws and Constitution** (1960)

Lord Hailsham **The Dilemma of Democracy - Diagnosis and Prescription** (1978)

A. Hamilton **The Federalist** (1878)

H.L.A Hart **The Concept of Law** (1961)

- H.L.A Hart "Positivism and the Separation of Law and Morality" 1958 **Harv. LR** 593
- D. Held **Introduction to Critical Theory** (1980)
- L. Henkin "Is There a 'Political Questions' Doctrine" 1976 **Yale LJ** 597
- L. Henkin "The Internationalization of Human Rights" in L Henkin et al **Human Rights: A symposium** (1977) 6
- R.F.V Heuston **Essays in Constitutional Law** 2nd ed. (1964)
- F.H Hinsley **Sovereignty** (1986)
- P. Hogg **Canadian Constitutional Law** (2nd ed. 1985)
- P. Hogg "Interpreting the Charter of Rights" 1990 **Osgoode Hall LJ** 817
- C. Hoexter "Judicial Policy in South Africa" 1986 **SALJ** 436
- W.J Hosten, A.B Edwards et al **Introduction to South African Law and Legal Theory** (1995)
- J. Hund "Aspects of Judicial Review in Southern Africa" 1982 **CILSA** 276
- A. Hunt "The Theory of Critical Legal Studies" 1986 **Oxford JLS** 1
- P.M.A Hunt **South African Criminal Law and Procedure** vol.II (1982)

J

- R.H Jackson **The Supreme Court in the American System of Government** (1955)
- J. Jaconelli **Enacting a Bill of Rights** (1980)
- I. Jenkins "Judicial Activism and Constitutional Government" 1984 **Am. J of Jur.** 169
- W.I Jennings **The Law and the Constitution** (1959)
- J.E.A Joliffe **The Constitutional History of Medieval England** 4th ed. (1961)

K

- E. Kahn (ed) **Fiat Justitia - Essays in Memory of Oliver Deneys Schreiner** (1983)
- E. Kahn "Republic Outside the Commonwealth" 1961 **Annual Survey of SA Law** 12-14
- E. Kahn "The History of the Administration of Justice in the South African Republic" 1958 **SALJ** 294; 1959 **SALJ** 46
- F. Kaufman "The Canadian Charter: A Time for Bold Spirits, Not Timorous Souls" 1986 **McGill LJ** 456
- I.R Kaufman "The Essence of Judicial Independence" 1980 **Columbia LR**

671

- S. Kentridge "Telling the Truth about Law" 1982 **SALJ** 648
J.M Kernochan "Statutory Interpretation: An Outline of Method" (1979-1977)
3 **Dalhousie LJ** 333
G.P Kotze "Menseregte: Suid-Afrika se Dilemma" in J. van der Westhuizen & H. Viljoen (eds) **A Bill of Rights for South Africa** (1988) 1
J.G Kotze **Memories and Reminiscences** (1949)
J. Kruger "Die Beregting van Fundamentele Regte Gedurende die Oorgangsbedeling" 1994 **THRHR** 396
J. Kruger & B. Currin (eds) **Interpreting a Bill of Rights** (1994)
J. Kruger "Value Judgments versus Positivism" 1991 **SA Public Law** 290
T.J Kruger **Die Wordingsproses van 'n Suid-Afrikaanse Menseregtebedeling**, LLD thesis, PU for CHE (1990)
J. Kruger "Towards a new Interpretive Theory" in J. Kruger & B. Currin (eds) **Interpreting a Bill of Rights** (1994) 103

L

- J.M.T Labuschagne "Die Opkoms van die Teleologiese Benadering tot die Uitleg van Wette in Suid-Afrika" 1990 **SALJ** 569
J.M.T Labuschagne "Regsnormvorming: Riglyne vir 'n Nuwe Benadering tot die Tradisionele Reels van Wetsuitleg" 1989 **SA Public Law** 202
H. Lauterpacht **International Law and Human Rights** (1950)
R. Leon "A Bill of Rights for South Africa" 1986 **SAJHR** 60
A. Lester "English Judges as Law Makers" 1993 **Public Law** 269
A. Lester "Fundamental Rights: The Law and the British Constitution" 1976-1977 **Univ. of Pennsylvania LR** 337
H. Lever "A Change of Heart on Bophuthatswana's Bill of Rights" 1993 **SALJ** 223
H. Lever "Redressing the Racial Imbalance in the Law" 1992 **Consultus** 57
A. Lipjart **Democracy in Plural Societies: A Comparative Exploration** (1977)
Lord Dennis LLoyd **Jurisprudence** (1979)
Lord Dennis Lloyd **The Idea of Law** (1987)
J. Locke **Two Treatises of Government**, P. Laslett ed (1967)
C. Loots "Locus Standi to claim relief in the public interest in matters involving the enforcement of legislation" 1989 **SALJ** 131
C. Loots "Standing to Enforce Fundamental Rights" 1994 **SAJHR** 49
J. Lourens & M. Frantzen "The South African Bill of Rights - Public, Private or Both: A Viewpoint on its Sphere of Application" 1994 **CILSA** 340
S. Luiz "A Bill of Rights: Is it Worth the Paper It's Written On?" 1987

SAJHR 105

S. Luiz "**S v Marwane**" 1983 **THRHR** 231

S. Luiz "The Entrenchment of Human Rights in Bophuthatswana" 1984 **SALJ** 435

N. Lyon "The Teleological Mandate of the Fundamental Guarantee: What to do with Vague but Meaningful Generalities" (1982) 4 **Supreme Court Rev.** 57

M

V.S Mackinnon "Dicey and New Dispensations: the Canadian Charter of Rights and Freedoms" 1985 **CILSA** 404

F.W Maitland **Constitutional History** (1911)

F.W Maitland **Constitutional History of England** (1941)

F.W Maitland **Selected Essays** (1936)

P. Manda "Executive Manipulation Employed by Virtue of the Security Clearance Act of Bophuthatswana" 1991 **CILSA** 240

M. Mandel **The Charter of Rights and the Legalization of Politics in Canada** (1989)

D. Marais **Constitutional Development of South Africa** (1987)

G. Marcus "Interpreting the Chapter on Fundamental Rights" 1994 **SAJHR** 92

G. Marshall **Constitutional Theory** (1971)

G. Marshall **Parliamentary Sovereignty and the Commonwealth** (1957)

A.S Mathews "A Bridle for the Unruly Horse" 1964 **SALJ** 312

A.S Mathews **Freedom, State Security and the Rule of Law** (1986)

A.S Mathews "The South African Judiciary and the Security System" 1985 **SAJHR** 199

H.J May **The South African Constitution** (1955)

J.P Mayer (ed) **Democracy in America** (1969)

C.H McIlwain **Constitutionalism in a Changing World** (1939)

C.H McIlwain **The High Court of Parliament and Its Supremacy** 2nd ed. (1934)

E. McWhinney **Judicial Review** (1968)

E. McWhinney **Judicial Review in the English Speaking World** (1969)

E. McWhinney "The Supreme Court and the Bill of Rights - the Lessons of Comparative Jurisprudence" 1959 **Can. Bar Rev.** 16

J. Mellaart **The Dawn of Civilisation** (1962)

P. Mirfield "Can the House of Lords Lawfully be Abolished?" 1979 **LQR**

36

Montesque **L'esprit des Lois**, G. Truc ed (1949)

Z. Motala "Independence of the Judiciary, Prospects and Limitations of Judicial Review in terms of the United States Model in a new South African Order: Towards an Alternative Judicial Structure" 1991 **CILSA** 285

K. Motshabi "Constitutional Interpretation as a Means of Honouring Human Rights Commitments" 1988 **SAJHR** 79

C.F.J Muller **Five Hundred Years: A History of South Africa** (1971)

E. Mureinik "A Bridge to Where? Introducing the Interim Bill of Rights" 1994 **SAJHR** 31

E. Mureinik "Administrative Law in South Africa" 1986 **SALJ** 615

E. Mureinik "Law and Morality in South Africa" 1988 **SALJ** 457

J. Murphy "Property Rights in the new constitution: an analytical framework for constitutional review" 1993 **CILSA** 211

N

J. Neethling, J.M Potgieter & P.J Visser **Law of Delict** (1989)

E. Neisser "Hate Speech in the New South Africa: Constitutional Considerations for a Land Recovering from Decades of Racial Repression and Violence" 1994 **SAJHR** 336

R.H Nelson "Separation of Powers: An Historical Review from **Marbury** to **Bowsher**" 1987 **Illinois Bar J** 484

B. Neuborn "Judicial Review and Separation of Powers in France and the United States" 1982 **New York Univ. LR** 363

G. Nienaber "United States Supreme Court Appointments: Implications for a Future Constitution in South Africa" 1991 **Consultus** 19

P. Nonet & P. Selznick **Law and Society in Transition: Towards Responsive Law** (1978)

B.O Nwabueze **Constitutionalism in the Emergent States** (1973)

B.O Nwabueze **Judicialism in Commonwealth Africa: The Role of the Courts in Government** (1977)

O

N. Ogilvie Thompson "Centenary Celebrations of the Northern Cape Division of the Supreme Court" 1972 **SALJ** 23

L. Openheim **International Law - A Treatise** vol. 1 8th ed. (1985)

P

- A. Passerin d'Entreves **The Notion of the State - An Introduction to Political Theory** (1967)
- G.W Paton **A Textbook of Jurisprudence** (1951)
- D.C Pearce **Statutory Interpretation in Australia** (1991)
- O. Hood Phillips **Constitutional and Administrative Law** 6th ed. (1978)
- G. Poggi **The Development of the Modern State** (1978)
- L.H Pollack "Securing Liberty through Litigation - The Proper Role of the United States Supreme Court" 1973 **MLR** 113
- A.F Pollard **The Evolution of Parliament** 2nd ed. (1926)
- F. Pollock **The Science of Politics** (1911)
- R. Pound "A Survey of Social Interests" 1943 **Harv. LR** 1
- H.J Powell "The Original Understanding of Original Intent" 1985 **Harv. LR** 885
- D.S Prinsloo "SWA/Namibia: Interim Rule to Freedom" 1976 **SAYIL** 155
- D.S Prinsloo "SWA/Namibie: 'n Kritiese Ontleiding van die Turnhallegrondwet vir 'n Tussentydse Regering" 1977(2) **Codicillus** 4

Q

- H. Quaritsch **Staat und Souverinitat** (1970)

R

- A.W.G Raath "Jural Freedom and Legal Principles: Their Nature and Role in Public Law" 1987 **SA Public Law** 21
- P.J Rabie "Regbank en Akademie" 1983 **De Jure** 21
- I.M Rautenbach & E.F.J Malherbe **Constitutional Law** (1994)
- J. Rawls **A Theory of Justice** (1972)
- J Rawls "Constitutional Liberty and the Concept of Justice" in C.J Friedrich & J.W Chapman (eds) **Justice** (1963) 23
- E.V Rostow "The Democratic Character of Judicial Review" 1952 **Harv. LR** 193

S

- G.H Sabine **A History of Political Theory** 3rd ed. (1961)
- T. Sandalow "Constitutional Interpretation" 1981 **Michigan LR** 1033

- T. Sandalow "Judicial Protection of Minorities" 1977 **Michigan LR** 1162
- A.J.G.M Sanders "Die Rule of Law - 'n Gemeenregtelike Westerse gedagskode" 1971 **THRHR** 164
- A.J.G.M Sanders "Legal Philosophy as a Political Tool in South Africa" 1990 **THRHR** 203
- L. Scarman **English Law - The New Dimension** (1974)
- L. Scarman "Fundamental Rights: The British Scene" 1978 **Columbia LR** 1575
- R.P Schaffer "The Inter-Relationship between Public International Law and the Law of South Africa: An Overview" 1983 **ICLQ** 277
- F.W Scharff "Judicial Review and the Political Question: A Functional Analysis" 1966 **Yale LJ** 517
- D.A Schmeiser **Civil Liberties in Canada** (1964)
- C.H.W Schmidt "Section 114 of the Constitution and the Sovereignty of Parliament" 1962 **SALJ** 315
- S. Shetreet **Judges on Trial** (1976)
- S. Shetreet & J. Deschenes (eds) **Judicial Independence: The Contemporary Debate** (1985)
- N.J Singer (ed) **Sutherland's Statutory Construction** (1984)
- S.D Smith "Courts, Creativity and the Duty to Decide a Case" 1985 **Univ. of Illinois LR** 573
- Sir Thomas Smith **De Republica Anglorum** Book 2, Alston ed. (1906)
- C.R Snyman **Criminal Law** (1983)
- P.C.A Snyman "Public Policy in Anglo-American Law" 1986 **CILSA** 220
- South African Law Commission **Group and Human Rights Working Paper 25, Project 58** (1989)
- South African Law Commission **Report on Constitutional Models Project 77** (Oct. 1991)
- D. Spitz "Eschewing Silence Coerced by Law: The Political Core and Protected Periphery of Freedom of Expression" 1994 **SAJHR** 301
- Klaus Stern "The Genesis and evolution of European-American constitutionalism: some comments on the fundamental aspects" 1985 **CILSA** 187
- L.C Steyn "Regsbank en Regsfakulteit" 1967 **THRHR** 101
- H. Stone **Law and its Administration** (1915)
- B.L Strayer "Life under the Canadian Charter: Adjusting the Balance Between Legislatures and the Courts" 1988 **Public Law** 347
- B.L Strayer **The Canadian Constitution and the Courts** (1988)
- J. Strayer **On the Medieval Origins of the Modern State** (1973)
- C.F Strong **Modern Constitutions** (1966)
- G.J.C Strydom "A Bill of Rights and 'Value Judgments' vs Positivism: the Namibian Experience" in J. Kruger & B. Currin **Interpreting a Bill of**

Rights (1994) 94

I. Southwood "Naught for your (Constitutional) Comfort in Bophuthatswana" 1992 **SA Public Law** 169

R. Suttner "The Ideological Role of the Judiciary in South Africa" in J. Hund (ed) **Law and Justice in South Africa** (1988) 81

T

J. Taitz "The **Audi Alteram Partem** Rule and the Obligation to Exhaust Remedies" 1976 **SALJ** 552

A.E.A.M Thomashausen "Human Rights in Southern Africa: The Case of Bophuthatswana" 1984 **SALJ** 467

L.M Thompson "Constitutionalism in the South African Republics" 1954 **Butterworths SA Law Rev.** 49

S.M Trengove "Judicial Ideologies in the Interpretation of a Bill of Rights in South Africa" 1992 **Responsa Meridiana** 118

L. Tribe **American Constitutional Law** (1978)

L. Tribe "The Puzzling Persistence of Process-Based Constitutional Theories" 1980 **Yale LJ** 1063

M. Tushnet "Critical Legal Studies and Constitutional Law" 1984 **Stanford LR** 623

J. Tussman & J. Ten-Broek "The Equal Protection of the Laws" (1949) 37 **California LR** 341

V

A. van Aswegen "The Implications of a Bill of Rights for the Law of Contract and Delict" 1994 **SAJHR** 50

A. van Blerk **Judge and be Judged** (1988)

J.D van der Vyver **Die Grondwet van die Republiek van Suid-Afrika** (1984)

J.D van der Vyver "Comparative Law in Constitutional Litigation" 1994 **SALJ** 19

J.D van der Vyver "Judicial Review under the new Constitution" 1986 **SALJ** 236

J.D van der Vyver "Limitation Provisions of the Bophuthatswanan Bill of Rights" 1994 **THRHR** 47

J.D van der Vyver "Parliamentary Sovereignty, Fundamental Freedoms and a Bill of Rights" 1982 **SALJ** 557

J.D van der Vyver "Political Power Constraints and the American Constitution" 1987 **SALJ** 416

- J.D van der Vyver "Suspension, derogation and *de facto* deprivation of Fundamental Human Rights in Bophuthatswana" 1994 **THRHR** 257
- J.D van der Vyver **Seven Lectures on Human Rights** (1976)
- J.D van der Vyver "The Private Sphere of Constitutional Litigation" 1994 **THRHR** 378
- J.D van der Vyver "The Section 114 Controversy and Government Anarchy" 1980 **SALJ** 363
- J.D van der Vyver "The State, the Individual and Society" 1977 **SALJ** 291
- A.J van der Walt "Notes on the Interpretation of the Property Clause in the New Constitution" 1994 **THRHR** 181
- J. van der Westhuizen "An Interview with the Hon. Mr Justice P.J.J Olivier" 1988 **SAJHR** 99
- B. van Niekerk "... Hanged by the Neck until you are Dead" 1969 **SALJ** 457; 1970 **SALJ** 60
- D.J van Vuuren & D.J Kriek (eds) **Political Alternatives for South Africa: Principles and Perspectives** (1983)
- D. van Wyk, J. Dugard et al **Rights and Constitutionalism** (1994)
- D.H van Wyk "The New Constitution" 1983 **SAYIL** 111
- D. van Wyk "The Making of the Namibian Constitution: Lessons for Africa" 1991 **CILSA** 341
- D.H van Wyk "Westminsterstelsel - requiescat in pace? of: kan 'n luiperd sy kolle verander?" 1980 **THRHR** 105
- F. Venter "Die Grondwet van die Tweede Republiek van Suid-Afrika" 1985 **THRHR** 253
- F. Venter "The Western Concept of Rights and Liberties in the South African Constitution" 1986 **CILSA** 99
- J.P VerLoren van Themaat **Staatsreg** M. Wiechers, ed (1981)
- M.J.C Vile **Constitutionalism and the Separation of Powers** (1967)
- K. von Fritz **The Theory of the Mixed Constitution in Antiquity** (1954)
- M.P Vorster, M. Wiechers & D.J van Vuuren **Constitutions of Transkei, Bophuthatswana and Venda** (1985)

W

- R. Wacks "Judges and Injustice" 1984 **SALJ** 266
- R. Wacks "Judging Judges: A Brief Rejoinder to Professor Dugard" 1984 **SALJ** 295
- E.C.S Wade **Constitutional Law** (1957)
- E.C.S Wade & A.W Bradley **Constitutional Law** (1965)
- E.C.S Wade, G. Phillips & A.W Bradley **Constitutional and**

Administrative Law (1977)

H.W.R Wade **Constitutional Fundamentals** (1980)

H.W.R Wade "The Basis of Legal Sovereignty" 1955 **CLJ** 172

H.W.R Wade "The Senate Act and the Entrenched Sections of the South Africa Act" 1957 **SALJ** 160

H. Wechsler "Toward Neutral Principles of Constitutional Law" 1959 **Harv. LR** 1

W.A Weynes **Legislative, Executive and Judicial Powers in Australia** (1976)

K.C Wheare **Modern Constitutions** (1966)

M. Wiechers **Administrative Law** (1985)

M. Wiechers "Namibia: The 1982 Constitutional Principles and their Legal Significance" 1989/90 **SAYIL** 1

M. Wiechers "The Fundamental Laws Behind our Constitution - Reflections on the Judgment of Schreiner JA in the Senate Case" in E. Kahn (ed) **Fiat Justitia - Essays in Memory of Oliver Deneys Schreiner** (1983)

G. Winterton "Is the House of Lords Immortal?" 1979 **LQR** 386

G. Winterton "The British Grundnorm: Parliamentary Supremacy Re-examined" 1976 **LQR** 591

D. Woolfey & P. Manda "A Bill of Rights - Lessons from Bophuthatswana" 1990 **CILSA** 70

S. Woolman "Riding the Push-me Pull-you: Constructing a Test that Reconciles the Conflicting Interests which Animate the Limitation Clause" 1994 **SAJHR** 60

Z

M. Zander **A Bill of Rights?** (1979)

INDEX

Abstract review	420
Access to police dockets	510
Affirmative action	
and balancing conflicting interests	583
Appellate Division	
exclusion of constitutional jurisdiction	433
Artificial reasoning	472
Autonomous law	473
Balancing conflicting interests	
and affirmative action	583
and principle of proportionality	585
in a state of emergency	586
in constitutional law	580
Bill of Rights	
spirit and objects of	562
Bodin	34
Bophuthatswana	274
Constitution of	275
death sentence in	287
judicial interpretation of rights in	276
Borkean originalism	441
Canada	
constitutional history of	210
generous approach to interpretation in	239
judicial activism in	265
judicial determination of constitutionality in	226
judicial interpretation in	237
judicial review in	220
judicial self-restraint in	265
legislative supremacy in	215
ouster clauses	231
right to equality in	255
Canadian Bill of Rights	217
Canadian Charter of Rights and Freedoms	215
Checks and balances	162
Common law	
as a source of constitutional values	458
Common law approach	459
Consociationalism	80
Constitution	
and the judiciary	436
as supreme law	435
fundamental rules	126
Constitution of the United States of America	5

Constitutional adjudication	19
Constitutional Court	423
Constitutional development	50
Constitutional entrenchment	67
Constitutional interpretation	16, 437
Constitutional jurisdiction	423
Constitutional supremacy	10, 136, 398
Constitutionalism	2, 9, 417
and libertarian values	447
Constitutionality	423
Content of a right	602
Continuing' view of legislative supremacy	91
Courts' testing right	112
Critical legal studies	474
Curtailment of rights	407
Declaration of Rights	38
Defamation	
and freedom of speech	544
Democracy	
role of judiciary in	591
Democratic principles	19
Direct review	422
Entrenched Provisions	66, 131
Entrenched sections trilogy	102
Entrenchment	84
Entrenchment of fundamental rights	401, 419
Essential content of a right	601
European Convention on Human Rights	75
Executive-mindedness	149
Foreign law	
as a source of constitutional values	450
Freedom of speech	
and human dignity	544
Freedom of speech and expression	545
Functional approach	123
Fundamental constitutional values	444
Fundamental human rights	406
Generous approach	520
Generous interpretation	530
Grundnorm	15
Guarantee	
of fundamental rights	402
High Court of Parliament	111, 194
Horizontal operation of right	536
Independence of the judiciary	60
Intention of the framers	438
Intention of the legislature	439, 554
Intentionalist approach	439

International law	
as a source of constitutional values	450
'Inverted onus'	352
John Locke	159
Judicial accountability	594
Judicial activism	498
Judicial adjudication	14
Judicial appointments	195
Judicial authority	163
Judicial control	136
Judicial creativity	501
Judicial deference	578
Judicial independence	174, 387
and constitutional supremacy	208
and judicial appointments	195
collective independence	190
functional independence	186
personal independence	185, 188
substantive independence	186
Judicial interpretation	476
Judicial law-making	476
Judicial responsibility	591
Judicial review	10, 18, 44
of administrative acts	148
and nature of Constitution	434
in Canada	220
scope of	476
Judicial self-restraint	478
and policy of avoidance	496
Judicial Service Commission	204
Judiciary	42
Justiciability of a Constitution	413
Law of general application	600
Legal positivism	136, 137
Legality	77, 78
Legislative authority	53
Legislative intent	143
Legislative purpose	463
Legislative supremacy	10, 18, 42, 68, 89, 136, 145, 391
and judicial review	97
continuing view	91
in Canada	222
self-embracing view	94
Libertarian approach	152
Limitation	
of rights	407
Limitation of rights	
in Canada	225

Literalism	440
Literalist/intentionalist approach	553
Living document	19
Locus standi	484
Mechanical approach	129
Mischief rule	462
Mixed authority	155
Modern state	26
Montesquieu	160
Motive	123
Namibia	327
Constitution of	330
interpretation of Constitution of	333
Normative approach	138
Original intent	19, 440
Ouster clause	152
Parliament	37, 39, 90
Parliamentary sovereignty	4, 28, 40
Personal judicial values	446
'Plain fact' approach	141
Policy issues	
in constitutional interpretation	503
'Political question' doctrine	488
and separation of powers	491
Polybius	157
Positivistic approach	128
Postamble	395
Preamble	395
Presumption of constitutionality	492
Presumptions of interpretation	147
Primacy of law	79
Principle of harmonisation	452
Principles and values	148
Proportionality principle	254
Protection of Human Rights	73
Purpose	123
Purpose and rationality	461
Purpose of a right	250
Purpose of legislation	122, 247
Purposive and generous approach	524, 554
Purposive approach	462, 512
and generous approach, distinction	520
Rationality and proportionality	575
Reasonableness criterion	601
Repeal or amendment of Constitution	400
Repressive law	472
Responsive law	473

Right to equality	534
Right to information	510
Rights of detained and accused persons	528
Rule of law	76, 78
'Self-embracing' view of legislative supremacy	94
Separation of powers	145, 154
and constitutional supremacy	164
and independence of judiciary	154
and judicial accountability	594
and judicial review	167
and judiciary	419
and legislative supremacy	164
and limitation of authority	155
Separation of the judicial branch	162, 169
Sovereignty	28, 34, 36
State	23
State authority	2, 23
State of emergency	586
and suspension of rights	586
role of judiciary in	587
Statute of Westminster	66, 100, 107
Strict originalism	441
Substantive judicial review	167
Supremacy of Constitution	7, 8, 418
Supreme Constitution	399
Supreme Court constitutional jurisdiction	423
Teleological approach	123, 467
Teleological reasoning	461
Trias politica	114
Union Parliament	65, 107
Universal Declaration of Human Rights	455
Value judgment	369
Value-oriented approach	22, 138
Vertical operation of right	536
Volksraad	54, 59
Weighing and balancing	
in constitutional interpretation	253
Westminster system	69