

**JUDICIAL ACTIVISM AS EXPONENT OF THE
UNWRITTEN VALUES INHERENT IN THE
SOUTH AFRICAN BILL OF RIGHTS**

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SUMMARY

This study focuses on the role of the South African judiciary under an entrenched and justiciable Bill of Rights.

The lack of an established human rights culture in South Africa results in uncertainty regarding the permissible extent to which judges are empowered, under the Bill of Rights, to employ judicial activism and creativity in order to protect the fundamental rights of citizens.

Judicial activism is used in the sense that judges can and should, whenever expressly or impliedly sanctioned to do so by the Bill of Rights, ensure that the fundamental rights of the individual are protected to the extent of granting actual constitutional relief, where this is justified, instead of merely declaring the existence of a right.

The essential aim of this study is to outline the parameters of, and the legal basis upon which judicial activism can be justified and accepted into a South African human rights culture.

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Interpretation means to go beyond the natural vagueness, fuzziness and open texture of language, seeking the real dimensions of the interpretive question : the conflict between the plain literal meaning and background considerations, the existence of technical insufficiencies, incompleteness, inconsistencies or incoherences, the conflict between what the norm says and what the norm means within a certain interpretative situation¹. The starting point when interpreting a constitution is always to look at the written text itself, without bringing into the interpretation any pre-conceived notions of what a constitution should be like. However, in understanding the written text the interpreter must bring to bear upon the interpretation the entire contextual experience and not merely the literal wording of the text. The interpreter in giving content to the constitution has to make certain basic choices regarding the purpose and scope of the constitution. Dworkin in *Law's Empire* contends that to 'interpret' a constitution, is to make the best thing of its kind that one believes it is capable of being. According to Dworkin therefore, the interpreter should seek to understand the constitutional text in accordance with the interpreter's larger vision of what a good constitution should be like. The criticism of such an open perspective is that interpretation of the constitutional text may simply become a pretext for expressing one's own ideas of what the constitution should be. The essential task of the interpreter is to give meaning to the constitutional text and not to move outside the four corners of the text. One instance where this dividing line between legitimate interpretation inside the four corners of the text, and illegitimate interpretation which goes beyond the text, becomes blurred, is the phenomena known as judicial activism.

Within the context of Southern African constitutional law judicial activism can be defined as interpretation which is designed to ensure compliance with the values, norms, principles and constitutional relief not specifically mentioned in the constitutional text but which nevertheless form an integral part of the text by necessary implication. The task of constructing a rationally coherent interpretation calls for certain value commitments which involves a measure of subjectivism. However, theoretically the process is a detached and disinterested selection of values which the interpreter does not necessarily share or which he or she even rejects. The constitutional text itself should dictate the choice of values in that the interpreter should seek to make sense of the text in order to formulate a coherent, rational and justified result. In the exercise of this choice between values, the interpreter faces a conflict between legal certainty and the concrete

¹ MacCormack, D.N. *Interpreting Statutes* (Aldershot, Dartmouth 1991). 34

justice of the case. Judicial activism is an essential component of any articulated interpretation in that it completes gaps in the Constitution and provides solutions to situations where there is no positive law defining constitutional remedies. All hard cases of constitutional interpretation are characterised by the fact that an answer cannot be found in the mere wording of the constitutional text². A just solution to a hard case can not mean rigorously applying the words of the text, excluding its spirit. There must be room for creativity which is justified in terms of the function assigned to the judiciary under the South African Bill of Rights. *Creativity* is used in the sense of connoting a meaning which is consonant with the constitutional mandate of interpreting all law in terms of the 'spirit, purport and objects' of the rights contained in Chapter 3 of the Constitution of the Republic of South Africa Act³. In this study, the aforementioned type of interpretation will be referred to as '*functional creativity*' in the sense that judges have to respond to violations of fundamental rights in a creative and assertive manner and ameliorate potentially unjust situations brought about by human rights violations on the basis that the function of a judge under a bill of rights is first and foremost that of custodian of human rights. The concept of '*functional creativity*' is the cornerstone of any interpretation of the South African Bill of Rights which aims at being a value-coherent and purposive interpretation, as opposed to an otherwise unjust and formal interpretation.

The moment the decision goes beyond the lexical meaning of the text, one encounters the legal concept of gap-filling which does not strictly speaking fall within the definition of interpretation. In German constitutional law the distinction between interpretation and gap-filling is acknowledged, yet the notion of gap-filling is controversial and uncertain⁴. Gaps do exist in constitutions and must be closed. The implementation of an 'articulated interpretation' which cures any ambiguity, uncertainty and technical imperfections in the text can also solve the problem posed by textual gaps and is easier to justify than the controversial notion of gap-filling. An articulated interpretation which is justified by the interpreter in terms of why the chosen interpretation is to be preferred, rather than the other interpretive possibilities which would yield a different practical result, is essential. The interpretive

² MacCormack, D.N. *Interpreting Statutes* (Aldershot, Dartmouth 1991). 78

³ Act 200 of 1993 (as amended). Hereinafter referred to as "the Constitution"

⁴ MacCormack, D.N. *Interpreting Statutes* (Aldershot, Dartmouth 1991). 78

justification has to possess sufficient coherence and rationality so as to justify the interpretation on a substantive level. Such coherence would have to take into account the priority of a positive interpretation but at the same time allow for a progressive interpretation in terms of which social improvement is recognised as the objective of any constitution. At the same time must it be acknowledged that the Constitution attempts to foster a culture of justification in the sense that every exercise of power is expected to be justified, including the judicial exercise of power⁵.

THE CONSTITUTIONAL JUSTIFICATION FOR JUDICIAL ACTIVISM

No legal instrument, however well drafted, is beyond the need for interpretation⁶. The 1993 South African Constitution is no exception. It was produced after complicated negotiations involving diverse participants and is subject to ambiguities and uncertainties. The amalgamation of various party-political views into one multi-party Constitution increases the conceptual ambiguity of the constitutional provisions. The judiciary therefore is faced with the task of giving clarity, certainty and meaning to the Constitution since many constitutional issues will not be resolved by mere linguistic analysis of the Constitution. A crucial question of interpretation is therefore to what extent judicial activism is sanctioned by the Constitution and in particular, how wide the parameters of judicial activism are set by the Constitution itself. The judiciary must not alter the material of which the Constitution is woven, but they can and should iron out the creases⁷. This means that in the interpretation of the Constitution any judicial activism must be grounded in the constitutional text itself and not go beyond the four corners of the text.

Judicial activism, in order to be legitimate, must always adhere to the golden thread of accountability and justification which runs throughout the Constitution⁸. It is also important to understand that the rights and freedoms contained in the Constitution are not absolute as indicated by the limitation clause in the Constitution which results in a qualified commitment to the protection of human rights. The Bill of Rights therefore does not have the protection against legislative abuse of power as its only object, since the limitation clause introduces the fundamental notion of the interests of society as justification for the limitation of otherwise absolute human rights. The

⁵ Mureinik, E. *A bridge to where ? Introducing the Interim Bill of Rights* (1994) SAJHR 31.

⁶ Henkin L. *The International Bill of Rights* 1981. Preface.

⁷ Denning *The Discipline of Law*. 12

⁸ Mureinik, E. *A bridge to where ? Introducing the Interim Bill of Rights* (1994) SAJHR 31.

qualified way in which human rights are guaranteed in the Constitution is an indication that judicial activism also has definite parameters. The strongest case against judicial activism is the fact that human rights are not absolute and therefore not conducive to absolute protection *vis-a-vis* judicial activism.

In an attempt to set the judicial boundaries of creativity, and eliminate the potential for subjective design of the constitution, the drafters of the Constitution circumscribed a particular mode of interpretation⁹, as well as outlined most of the entrenched rights in the Constitution in very specific terms. The specification of a particular method of interpretation has a profound influence on the scope for judicial activism in the sense that where the written law is clear and unambiguous, the only vehicle for judicial activism is that of interpretation. The interpretation designated by section 35 of the Constitution however, does not cause the function of the judiciary in terms of the Constitution, to be resolute and dogmatic. Section 35 compels the judiciary in their interpretation of the Constitution, to have regard to public international law and the judiciary 'may' have regard to comparable foreign case law. This leaves the judiciary with a wide and extended creative framework within which to apply the fundamental rights contained in Chapter 3 of the Constitution. The designation of a specific theory of interpretation however, also has a negative aspect. Reading things into a constitution in order to bring it into line with a theory of interpretation is no more defensible than reading things out of a constitution. An illustration of the last-mentioned approach where things are read out of the constitution, is for instance where the interpreter chooses to ignore the narrow meaning of the literal wording of a particular constitutional provision, in order to assume an extended jurisdiction which allows for interpretation which is more consonant with the spirit as opposed to the letter of the constitution. Such an approach can be justified on the basis that a constitution should be considered in terms of our whole experience and not solely in that of what is said in the text. The drafters of a constitution were after all, framing the constitution, not painting its details beyond the need for human clarification and elucidation¹⁰.

Another equally important aspect of constitutional interpretation is the enforceability of the constitutional provisions. A bill of rights should contain effective constitutional remedies for the enforcement of the rights contained therein otherwise the bill of rights will amount to nothing more than a meaningless document consisting of empty political rhetoric¹¹. The judiciary therefore has an important role to

⁹ Section 35 of the Constitution.

¹⁰ Tribe L.H. *On reading the constitution*. 1991

¹¹ Cowling MG *Judges and the Protection of Human Rights in South Africa : Articulating the Inarticulate Premise* 1987 SAJHR 183.

play in that the abuse of fundamental rights can only be eradicated by a judiciary which ensures the judicial creation of constitutional remedies where no effective relief is otherwise available to the aggrieved party. The judiciary has an extended and creative framework within which to interpret and apply the Constitution under a system of judicial review¹². The process involves the weighing up of values and making of value-judgments which increase the possibility for the imposition of constitutionally sanctioned judicial activism and creative interpretation.

Judicial assertiveness is also sanctioned by sections 35(1) and 35(3) of the Constitution which provides inter alia that a court of law 'shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in [Chapter 3]' and 'have due regard to the spirit, purport and objects of [Chapter 3]'. In this regard section 2(2) of the International Covenant on Civil and Political Rights¹³ provides that :

'Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant'.

This section outlines the important function of the legislature in giving effect to the rights contained in the Constitution by providing effective constitutional remedies to counteract the violation of protected rights and freedoms. This section is also premised on the principle that human rights are not strictly speaking legislated but are rather recognised by the legislature as inalienable guarantees of the civil liberties of the individual. A bill of rights is 'framed' by its makers and not legislated as codified law which like all other statute law is subject to repeal once the purpose for which the statute was enacted has disappeared or the *mores* of society have changed. This means that the enactment of an instrument containing fundamental rights and freedoms is not the sole criterion by which to judge a country's commitment to human rights. A bill of rights is intended to serve as a declaration of the protection of human rights. It is not intended to conclusively legislate a codified impression of what the drafters' ideas on the possible parameters of human rights interpretation and judicial protection are, save to include a limitation clause to define the boundaries of the rights and freedoms. The limitation clause only specifies the permissible extent to which interference with fundamental rights is allowed, and does not in any way inhibit or limit the granting of judicial remedies once the violation of a fundamental right is shown on a balance of probabilities. The existence of effective

¹² Dugard J *Statutory Interpretation as an Exercise in Choice* 1978 SALJ 451 ; Dugard *Human Rights and the South African Legal Order* 1987. 303.

¹³ Adopted by General Assembly resolution 2200 A (XXI) of 16 December 1966.

judicial remedies for the protection of fundamental rights and freedoms is more indicative of the country's concern for human rights in that the codified rights and freedoms are not complete and independent from their enforcement. In order to address the need for effective constitutional remedies, section 2(3) of the International Covenant on Civil and Political Rights provides :

'Each State Party to the present Covenant undertakes :

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity ;*
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy (my emphasis) ;*
- (c) To ensure that the competent authorities shall enforce such remedies when granted '.*

It is trite that the International Covenant on Civil and Political Rights is binding as international law and therefore in accordance with section 35(1) of the Constitution the courts are entitled to interpret the Constitution in such a way as to give expression to the international law contained in section 2(3) of the International Covenant on Civil and Political Rights which requires that an effective remedy be determined by a competent authority *'provided for by the legal system of the State'* and that the remedies granted be enforced by the state authorities¹⁴. It is submitted that it is not enough for the Legislature to declare that it recognises and guarantees human rights. The Legislature also has an obligation to allow the courts to address violations to human rights and to give effect to and implement fundamental rights, albeit through judicial activism and creativity¹⁵. It is submitted that such an approach is sensible and justified on the basis that the Constitution does not contain provisions expressly dealing with judicial remedies and therefore it is implied that the courts must be assertive in giving effect to the rights and freedoms contained in the Constitution. To delay the granting of constitutional relief based on judicial abstention from making secondary legislation, would be contrary to section 7(4)(a) of the Constitution which provides that any person whose rights are violated shall have an effective remedy. It is submitted that assertive and self-executing action by the judiciary may be inevitable in order to uphold the fundamental rights contained in the Constitution. The fact that South Africa possesses a developed and independent¹⁶ judiciary means that it can provide such remedies effectively and execute them convincingly.

¹⁴ Henkin L. *The International Bill of Rights* 1981. 311

¹⁵ *Ibid* at 312.

¹⁶ See the views of Cowling MG in *Judges and the Protection of Human Rights in South Africa : Articulating the Inarticulate Premise* (1987) SAJHR 177 for a critique of the impartiality of the judiciary in Southern Africa.

JUDICIAL ACTIVISM UNDER A PURPOSIVE INTERPRETATION

In the interpretation of a bill of fundamental rights the particular judge has a relatively wide discretion to incorporate comparable foreign case law and international law into the interpretive process. This is a particularly portent aspect when one considers that some of the provisions of the Constitution are couched in very general language, thus leaving it to the courts to give these provisions content and meaning through interpretation. The judiciary however must guard against interpretation which goes beyond the four corners of the Constitution. To alleviate the initial uncertainty surrounding the extent to which creative interpretation is sanctioned, the Legislature provided the judiciary with specific interpretive guidelines. Section 232(4) of the Constitution was enacted for this purpose and provides that :

'In interpreting this Constitution a provision in any Schedule, including the provision under the heading National Unity and Reconciliation, to this Constitution shall not by reason only of the fact that it is contained in a Schedule, have a lesser status than any other provision of this Constitution which is not contained in a Schedule, and such provision shall for all purposes be deemed to form part of the substance of this Constitution.'

The rationale behind *inter alia* section 232(4) and the preamble of the Constitution which provides that the purpose of the Constitution is to create a new order, is to keep open the door for improvement of the rights and freedoms contained in Chapter 3 of the Constitution on the one hand, and their enforcement on the other. The drafters of the Constitution anticipated the need to allow for a judicial discretion in defining the exact reach and application of the constitutionally protected rights and freedoms in that the entrenched provisions of the Constitution cannot easily be amended. Any judicial discretion under the Constitution brings about the concomitant possibility for judicial creativity, which should be seen as a positive aspect of the Constitution. The purposive approach constrained by section 35 of the Constitution however, defines judicial creativity by requiring the interpreter to look at the object of the statute in order to arrive at the true meaning of the words used in the text.

The nature of the process clearly demonstrates that the judicial involvement is not mechanical and section 35(1) of the Constitution impels a broad, liberal and purposive method of interpretation which promotes the values underlying an open and democratic society based on freedom and equality. This section essentially incorporates the purposive approach to statutory interpretation into the Constitution. The purposive approach is intended to serve as a tool to overcome deficiencies in the wording of the Constitution, abridge changing circumstances, and in particular, to carry out the original intent and legislative purposes of the drafters¹⁷. Thus for example the right of the individual to have his or her individual freedom protected was

unmitigatedly violated in the name of 'apartheid'¹⁸ and as such the judiciary should all the more jealously guard the right to personal freedom on the basis that it is now recognised as a fundamental right. The contextual circumstances surrounding the right to personal freedom as evidenced by the numerous decisions in our case law dealing with the violation of the individual's liberty¹⁹, clearly indicate that the judiciary cannot be spectators of the abuse of the individual's liberty under a bill of rights. Friedman J in *Nyamakazi v President of Bophuthatswana*²⁰ adopted a purposive approach and held that :

*'A purposive construction of a bill of rights is necessary in that it enables the Court to take into account factors other than mere legal rules. These are the objectives of the rights contained therein, the circumstances operating at the time when the interpretation has to be determined, the future implications of the construction, the impact of the said construction on future generations, the taking into account of new developments and changes in society.'*²¹

In *Government of the Republic of Namibia v Cultura 2000*²², Mahomed CJ affirmed that constitutions must be broadly, liberally and purposively interpreted so as to avoid the '*austerity of tabulated legalism*' and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation. Chapters or Charters of fundamental rights are invariably couched in broad terms so that the textual meaning can be read contextually years after their inception. It is therefore fundamental that the judiciary take cognizance of their interpretive function and discretion under the Constitution to develop a human rights culture which is both elastic and general enough to allow for subsequent contextual configuration. A narrow purposive approach would require the interpreter to only state what the objective of the particular right is and not to ascribe to the particular right a meaning and reach which goes beyond the literal wording of the text. It is submitted however that the purposive approach in its narrow sense, does not go far enough in allowing for the necessary judicial discretion to take into account the contextual circumstances and factors surrounding the right in question as well as the Constitution as a whole. The Constitution cannot be read clause by clause nor can any clause be interpreted without an understanding of the framework of the instrument²³.

¹⁸ *Staatspresident v United Democratic Front* 1988 (4) SA 830 (A).

¹⁹ See for example *Minister of the Interior v Lockhat* 1961 (2) SA 587 (A) and *Goldberg v Minister of Prisons* 1979 (1) SA 14 (A).

²⁰ 1992(4) SA 540 (BGD).

²¹ at 567H.

²² 1994(1) SA 407 at 418 F.

²³ Davis D *Democracy - It's Influence upon the Process of Constitutional Interpretation* 1994 SAJHR 112.

In the case of *Qozeleni v Minister of Law and Order*²⁴ Froneman J held that it serves little purpose to characterise the proper approach to constitutional interpretation as liberal, generous or purposive since these labels do not in themselves assist in the interpretation process and carry the danger of introducing concepts or notions associated with them which may not find expression in the Constitution itself. According to Froneman J it is far more useful 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 measured²⁵. Froneman J pointed out that :

*'... the fundamental concern and scheme of the Constitution is to form a bridge between an unjust and undemocratic system of the past and a future system concerned with, inter alia, openness, democratic principles and human rights.'*²⁶

The interpretation of a Bill of Rights is a creative process whereby the often general constitutional provisions are applied to specific factual situations by taking into account the social conditions, experiences and perceptions of the people of the country²⁷. Although the subjective opinion of the judicial officer regarding the meaning of the Constitution is irrelevant, the purposive approach should be utilised in its wide sense to glean the true meaning of the written text from the 'unwritten' text. It requires taking into account the objects of the framers of the Constitution, the purposes for which the Constitution and its guarantees were enacted, the spirit, purport and objects of the Chapter of Fundamental Rights as a whole, the contextual circumstances relative to the enactment of the particular rights, the demands of public international law and the future implications of the interpretation.

It is clear from a reading of section 35(3) of the Constitution that the intention of Parliament is not confined to the words of the document but reaches wider to embrace the 'spirit, purport and objects' of the Bill of Rights. The Courts have a duty in terms of section 35(3) of the Constitution to have due regard to the spirit, purport and objects of Chapter 3. This means that the Courts have to develop and where necessary amend, the law in such a manner as to ensure that the law is in keeping with the Constitution on the basis that section 35(3) provides that 'any law' is subject to the Constitution. This means inter alia that the Constitution must be interpreted so as to uphold the society the Bill of Rights seeks to

²⁴ 1994 (3) SA 625 (E).

²⁵ at 633G.

²⁶ at 567 H.

²⁷ *Ex parte Attorney-General, Namibia : in re Corporal Punishment by Organs of State* 1991 (3) SA 76 (NmSC) at 96B-C.

achieve²⁸ and effect must be given to the intention of its framers, the principles of government contained therein and the objectives and reasons for its legislation²⁹. Regard must be had to the contemporary norms, aspirations, expectations and sensitivities of the society as well as the emerging consensus of values in a civilised international community³⁰. Seen in this light the Constitution is a living document which can be adapted to comply with the needs of the time. In the words of Chief Justice Marshall of the United States Supreme Court :

'We must never forget that it is a constitution we are expounding intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs'.³¹

Likewise the interpretation of the Constitution cannot remain unaffected by the subsequent development of law. The Constitution has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation³². In the case of *O' Callaghan NO v Chaplin*³³ Innes CJ pointed out that the court must always adopt a contextually correct approach to interpretation. The learned Chief Justice noted that :

'It is the duty of a court that it shall adapt itself to the changing conditions of the time'.

Interpretation is not only affected by social context but also by the generality of the language used in the Constitution. Chief Justice Rehnquist of the United States Supreme Court pointed out that :

'Where the framers used general language, they gave latitude to those who would later interpret the instrument to make that language applicable to cases that the framers might not have foreseen.'³⁴

²⁸ *Smith v Attorney-General, Bophuthatswana* 1984(1) SA 196 (B) at 199 H.

²⁹ *Nyamakazi v President of Bophuthatswana* 1992(4) SA 540 (BGD).

³⁰ *Ex Parte Attorney-General, Namibia : In Re Corporal Punishment by Organs of State* 1991 (3) SA 76 (NmSC).

³¹ *McCulloch v Maryland* (1819) 17 US (4 Wheat.) 316, 407 at 415. Cited by Friedman J in *Nyamakazi* (supra) at 549H.

³² Meron T *Human Rights and Humanitarian Norms as Customary Law* 1989. 112 ; See also the advisory opinion by the International Court of Justice in *Legal Consequences for States of the Continued Presence of South Africa in Namibia* 276 (1970), 1971 ICJ Rep. 16 at 31.

³³ 1927 A.D. at 310 and 327.

³⁴ William Rehnquist *The Notion of a Living Constitution* 1976 Texas 1 R 693, 4.

The initial interpretation of the Constitution is therefore of crucial importance. It is during this period that a human rights culture is established and the limitations on judicial involvement are set³⁵. Without a liberal, creative and judicially activist interpretation of the Constitution providing effective remedies against human rights abuses, the Bill of Rights will amount to nothing more than a meaningless document. Judicial activism however, raises the problem of the legitimacy of judge-made law which goes beyond the four corners of the written Constitution. However the Constitution itself authorises a broad liberal approach and there is an essential difference between constitutionally sanctioned judicial activism and judicial law-making. The Chapter on Fundamental Rights is designated by the Constitution as a declaration of special importance³⁶ and by implication the fundamental rights of the individual have to be protected by the Courts in the face of infringing legislation. The purpose of a Bill of Rights is to regulate the relationship between the state and the individual and to ensure that governmental violations of the rights of the individual do not go unanswered. It is submitted that even constitutional provisions which constrain the Court's power to protect the civil liberties of the individual cannot be blindly followed and left unscathed. The Court as custodian of individual liberty has to uphold the fundamental rights of the individual 'without fear, favour or prejudice'³⁷, even if it means finding ways and means to overcome deficiencies in the Constitution.

JUDICIAL REVIEW UNDER A BILL OF RIGHTS

The Constitution incorporates an entrenched and justiciable Bill of Rights containing fundamental legal principles which set the norm for a constitutional state³⁸. This is an abjectly different regime to the 1983 Constitution Act which essentially adhered to the principle of parliamentary sovereignty. One of the most significant changes is the testing power of the Constitutional Court³⁹ to set aside legislation of the democratically elected Parliament which conflict with the fundamental rights guaranteed in the Constitution. Under a constitutional system based on parliamentary sovereignty the court must start from the premise of seeking 'the intention of the Legislature' because the interpreting judge's value judgement of the content of the statute is irrelevant. In a system of judicial review based on the

³⁵ *Smith v Attorney-General, Bophuthatswana* 1984 (1) SA 196 (B).

³⁶ Sections 7 and 229 of the Constitution.

³⁷ The judicial oath taken by judges of the Supreme Court.

³⁸ Referred to in German constitutional law as "Rechtstaat".

³⁹ Sections 98(2)(c), 98(3), 101(3)(c) and 101(6) of the Constitution.

supremacy of the constitution on the other hand, the court has to test legislation and administrative action against the values and principles imposed by the Constitution⁴⁰. Constitutional interpretation under a bill of rights necessitates that the courts engage in value judgements by having regard 'to the emerging consensus of values in a civilised international community'⁴¹.

The South African judiciary however is not unfamiliar with the concept of the weighing up of values as evident even from the writings of the early Roman-Dutch legal scholars such as Voet whose perception of the weighing up of values in interpreting the law is formulated as follows :

'that which is done contrary to law is not ipso iure null and void, where the law is content with a penalty laid down against those who contravene it in these and the like cases greater inconveniences and greater impropriety would follow on the actual rescission of the things done, than would attend the actual thing done contrary to the law'.⁴²

The influence the doctrine of parliamentary sovereignty and legal positivism had on the judiciary is not always easy to discern since the creative reticence of the judges are disguised through technical and sophisticated legal reasoning⁴³. The judiciary came short in ameliorating the unjust situations created by the state's onslaught on human rights through security legislation during the apartheid years. The reason for this is succinctly set out in the case of *In re Mzolo*⁴⁴ in which it was pointed out that :

'a court of law is not at liberty to arbitrarily ameliorate what it considers harshness in a statute. It is only where the statute is reasonably capable of more than one meaning that a court will give it the meaning which least interferes with the liberty of the individual'.

The extent to which the judiciary was amenable to interference with the legislative enactments of parliament depended on the extent to which they regarded judicial review to be justified in terms of legal rules and legal reasoning⁴⁵. The judiciary preferred to give effect to legislative policies rather than oppose them in the name of human

⁴⁰ *Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Another* 1994 (4) SA 592 (SE) at 594.

⁴¹ *S v Acheson* 1991(2) SA 805 (NmHC) at 813B.

⁴² *Commentarius* 1.3.16 ; Steyn LC *Uitleg van Wette* 1981. 192 ; *Devenish Interpretation of Statutes* 1992. 223

⁴³ Nicholson D *Ideology and the South African Judicial Process - Lessons from the Past* 1992 SAJHR 53.

⁴⁴ 1984 (4) SA 491 (N) 500.

⁴⁵ Nicholson D *Ideology and the South African Judicial Process - Lessons from the Past* 1992 SAJHR 50.

rights by using the presumptions of interpretation which favoured individual liberty⁴⁶. The judiciary opted for a policy of judicial restraint and abstention from review and tacitly approved governmental action which arbitrarily distinguished between racially defined categories and treated them differently, notwithstanding the flagrant violations of the rules of natural justice and international human rights. Prior to the enactment of the South African Bill of Rights the judiciary only protected the civil liberties of the individual if able to rely on a specific rule, principle or presumption. The presumptions of interpretation functioned as a common law bill of rights in that they reflect the jurisprudence of natural law⁴⁷. But these presumptions which as a whole favour individual liberty were frequently sacrificed in the name of parliamentary sovereignty. The civil liberties of the individual are sacrosanct even in times of war and during states of emergency⁴⁸ in that individual liberty is an absolute value which must be protected within any context⁴⁹. Innes JA in *Whittaker v Governor of Johannesburg Gaol*⁵⁰ pointed out that *'however reprehensible a man's views may be he is entitled to have his personal liberty protected'*.

The power of the Constitutional Court to declare null and void legislative enactments which conflict with the rights entrenched in Chapter 3 does not open the flood gates to the judicial review of Parliamentary legislation. The Constitution expressly provides for the curtailment of excessive judicial activism and section 98(2)(f) of the Constitution provides that the Constitutional Court itself determines whether any matter falls within its jurisdiction. In this regard section 35(2) of the Constitution provides :

'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 [Chapter 3], provided such a 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 accordance with the more restricted interpretation'.

This section encapsulates the presumption of constitutionality which is found in the Latin maxim *ut res magis valeat quam pereat*. The same presumption is reiterated in section 232(3) of the Constitution under the heading *'Interpretation'*. The rationale behind the presumption

⁴⁶ Devenish *Interpretation of Statutes* (1992). 156

⁴⁷ Devenish *Interpretation of Statutes* (1992). 220

⁴⁸ *Dedlow v Minister of Defence* 1915 TPD 543 at 561 ; *Nathan v Union Government* 1915 CPD 353 ; *R v McGregor* 1941 AD 493 ; *Seedat v R* 1942 NPD 189.

⁴⁹ Nicolson D *Ideology and the South African Judicial Process : Lessons from the Past* 1992 SAJHR 59 ; *Whittaker v Governor of Johannesburg Gaol* 1911 WLD 139 ; *Governor of Johannesburg Gaol v Whittaker* 1911 TPD 798 ; *Whittaker v Roos and Bateman* 1912 AD 92.

⁵⁰ 1911 WLD 125.

of constitutionality is to delineate judicial activism and prevent the judiciary from becoming a super-legislature substituting its views for that of the Legislature. The presumption of constitutionality has another important function namely to set parameters for judicial non-intervention⁵¹ in the political arena. The result of too liberal constitutional interpretation is that excessive judicial activism in relation to a Bill of Rights results in the Court engaging in not only value judgments, but also in policy decisions which strictly speaking fall within the province of the Legislature. Furthermore the invalidation of legislation has the result that a lacuna is left in the country's legislation⁵². For this reason Hiemstra CJ in *S v Marwane*⁵³ held that a Bill of Rights is not a wide-open door to the invalidation of legislation⁵⁴. Legislative provisions which restrict fundamental rights are to be narrowly and strictly construed by the court as guardian of liberty, but it has to exercise its powers of controlling legislation with a scalpel and not a sledgehammer⁵⁵.

Judicial review under a Bill of Rights is a significant departure from the formalistic attitude of analytical, positivistic jurisprudence associated with the concept of parliamentary sovereignty which dominated South African juridical thinking for decades. The Constitution is a living system of values and societal aspirations, and it is up to the courts to give meaning and effect to this system of values underpinning the Constitution. Section 35 of the Constitution impels a purposive approach of interpretation as well as the application of public international law and comparable foreign case law. Section 35(3) unequivocally implores the judiciary to not only purposively interpret the Constitution but also to take a creative role in ensuring that in the interpretation of all law, due regard is paid to the '*spirit, purport and object*' of the Bill of Rights. The extent to which it is permissible to employ judicial activism when interpreting the Bill of Rights should be defined in order to erase any doubts regarding the legitimacy of a judicially created unwritten constitutional text which contains the system of values called into being by the Constitution. If the Constitution is to be more than just a written manifesto, the spirit as opposed to the letter of the Constitution should be upheld by the judiciary, and the ability of the judiciary to vindicate the fundamental rights of citizens should not be limited by the Constitution or any other law. In this regard Kruger points out that :

⁵¹ *Kruger v Minister of Correctional Services* 1995 (1) SACR 375 (T); *Luther v Borden* 48 US 1 (1849) ; *Baker v Carr* 369 US 186 (1962).

⁵² Forsythe C *Interpreting a Bill of Rights : The future task of a reformed judiciary* 1991 SAJHR 1. 6

⁵³ 1982 (3) SA 717 (A).

⁵⁴ at 204B.

⁵⁵ *Smith v Attorney-General, Bophuthatswana* 1984 (1) SA 196 (BS).

'Deur aldus aktivisties te werk te gaan, aktiveer die regspreker as't ware regswaardes wat nie uitdruklik in die primêre teks neergelê is nie, maar wat tog 'n geimpliseerde deel van die teks uitmaak.'⁵⁶

Invariably the Constitution will prove to be in need of concise interpretation and wanting for the exposition of an 'unwritten text' where the factual circumstances are not provided for in the Constitution. The judiciary cannot respond in positivist fashion and assert that the Constitution is silent on that aspect and that the court cannot consider the matter. The reason is that having regard to the 'spirit, purport and object' of the Constitution, the judges should in effect apply the Constitution as if a document embodying the written and the unwritten text.

THE SUPREME COURT AND FUNCTIONAL CREATIVITY

The Supreme Court has been confronted on more than one occasion⁵⁷ with the question as to whether or not it had the power to grant interim relief based on alleged violations of constitutionally guaranteed rights. In the cases of *Bux v Officer Commanding, Pietermaritzburg Prison*⁵⁸ and *Matiso v Commanding Officer, Port Elizabeth Prison*⁵⁹ the legal question for consideration was whether the Court had the jurisdiction to grant an interdict based on the alleged unconstitutionality of section 65F(1) read with section 65H of the Magistrates' Courts Act 32 of 1944, pending a decision by the Constitutional Court. Section 65F(1) of the Magistrates' Court Act provides that a warrant of arrest may be issued in the absence of the judgment debtor. This procedure is in direct conflict with sections 24(b)⁶⁰ and 25(3)⁶¹ of the Constitution. In both *Bux* and *Matiso* the applicants were arrested and imprisoned by way of the section 65F(1) procedure under the Magistrates' Court Act and the applicants respectively applied for a mandatory interdict ordering their release from detention.

⁵⁶ Kruger TJ *Regspositivisme en die 'ongeskrewe teks' van die (nuwe) grondwet (1991) SAPL 233.*

⁵⁷ See *Rudolph v Commissioner for Inland Revenue* 1994(3) SA 771 (W); *Wehmeyer v Lane* 1994(4) SA 441 (C); *Qozeleni v Minister of Law and Order* 1994(3) SA 625 (E); *S v Majavu* 1994(4) SA 268 (Ck); *Khala v Minister of Safety and Security* 1994(4) SA 218 (W); *Ferreira v Levin* 1995(2) SA 813 (W); *Japaco Investments (Pty) Ltd v Minister of Justice* 1995(1) BCLR 113 (C); *Podlas v Cohen and Bryden NNO* 1994(4) SA 662 (T).

⁵⁸ 1994(4) SA 562 (N).

⁵⁹ 1994(3) SA 899 (SE) and 1994(4) SA 592 (SE).

⁶⁰ The *audi alteram partem* rule.

⁶¹ The right to a fair trial.

In both *Bux* and *Matiso* a purposive approach was followed but the judges arrived at different interpretations. The difference in interpretation between the two cases is explained by the fact that a purposive interpretation is predicated upon the purpose of the right and consequently the widest possible interpretation will not inevitably be the one which will be supported⁶². In *Bux* Didcott J interpreted the Constitution purposively and held that the Court had no jurisdiction to grant interim relief in that the wording of the Constitution does not permit the Supreme Court to attribute to itself a constitutional jurisdiction wider than that encompassed by the wording of the Constitution. Didcott J reasoned that the court in shaping the Bill of Rights has to first and foremost pay deference to the written document. Didcott J found that the court's powers of review were limited by sections 98(2)(c), 98(3) and 101(6) of the Constitution which when read together, confer on the Constitutional Court an exclusive jurisdiction in respect of any enquiry into the constitutionality of an Act of Parliament and forbid the Supreme Court to trespass on that field unless the parties to the litigation agree to its doing so⁶³. Consequently Didcott J declined to have recourse to remedies which were alien to the literal wording of the document. The judicial deferent approach of Didcott J is in line with the cautionary note sounded by Hiemstra CJ in *Smith v Attorney-General, Bophuthatswana*⁶⁴ with regard to over-activism as opposed to 'deference to the Legislature'. Hiemstra CJ pointed out that the court's over-activism in striking down legislation may, apart from incurring the resentment of the Legislature, cause the Bill of Rights to become 'a clog upon the wheels of government'⁶⁵. The jurisprudential implications and soundness of such a judicial deferent approach under a bill of rights have been questioned by the courts and legal scholars⁶⁶.

In sharp contrast Froneman J in *Matiso* held that the interpretation of the Constitution must be directed at ascertaining the foundational values inherent in the Constitution. In this sense constitutional interpretation is thus primarily concerned with the recognition and application of constitutional values and not with a search to find the literal meaning of the Constitution. Froneman J noted that the Constitution gives explicit recognition to the role of the judiciary and in terms of the Constitution the courts bear the responsibility of giving specific content to those values and principles underlying the

⁶² Cachalia et al *Fundamental Rights in the New Constitution* 1994. 11

⁶³ at 564I.

⁶⁴ 1984(1) SA 196 (B).

⁶⁵ at 199B-C.

⁶⁶ *Monnakale v Republic of Bophuthatswana* 1991(1) SA 598 (B) at 620B ; Du Plessis & Du Ville *Bill of Rights Interpretation in the South African Context* (1) : *Diagnostic Observations* (1993) Stellenbosch Law Review 74.

Constitution. Froneman J argued that such an approach is consonant with 'values which underlie an open and democratic society based on freedom and equality' in that the Constitution forms a bridge between an unjust and undemocratic system of the past and a future system concerned with openness, democratic principles and human rights⁶⁷. Relying on this view Froneman J granted the interim relief sought by the applicant. The views of Froneman J are liberal and a drastic departure from the traditional South African principles of interpretation. Not surprisingly the Constitutional Court in its first judgement namely the case of *Zuma and Others v The State*⁶⁸ made reference to the liberal views of Froneman J. In *Zuma* Kentridge AJ expressed the following caution to such a liberal approach :

*'I am, however sure that Froneman J, in his reference to the fundamental "mischief" to be remedied, did not intend to say that all the principles of law which have hitherto governed our courts are to be ignored. Those principles obviously contain much of lasting value. Nor, I am equally sure, did the learned Judge intend to suggest that we should neglect the language of the Constitution. While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single "objective" meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.'*⁶⁹

The concerns of Kentridge AJ are valid but such a qualified contextual approach lends itself to unthinking compliance with the written text. Although the constitutional text is the starting point of any interpretation, a Constitution must be treated as a sui generis instrument with principles of interpretation of its own, suitable to its character, without necessary acceptance of all the presumptions that are relevant to legislation of private law⁷⁰. The Constitution is also an enduring and evolving statement of general values and as such those who wish to treat the constitutional text as immutable do so at their own peril in that they repudiate any concern for possible drafting oversights and changing circumstances⁷¹.

The approach of Froneman J is jurisprudentially sound in that the learned judge looked at the Constitution as a whole, including the literal meaning, the surrounding circumstances, historical background and legislative purposes. This is essentially a manifestation of an unqualified contextual methodology which is of great value when a Constitution is interpreted years after its inception when the norms and aspirations

⁶⁷ at 600I.

⁶⁸ 1995(2) SA 642 (CC).

⁶⁹ at 652.

⁷⁰ *Minister of Home Affairs and Another v Collins MacDonald Fisher and Another* 1980 AC 319 (PC).

⁷¹ Ely JH *Democracy and Distrust : A Theory of Judicial Review* 1980 Yale Law Review 1037 ; Waldron *Nonsense upon Stilts* 1987. 43.

of society have changed. Consonant with such an approach is the creative element of ensuring that the constitutionally guaranteed rights of the individual are afforded a contemporary as well as a value-coherent exposition. As such the court should not be inhibited by jurisdictional constraints when the fundamental rights of individuals are at stake, but should rather extend their constitutional jurisdiction to grant relief consonant with the general values inherent in the Constitution. This is in fact the method of interpretation designated by the Constitution in its interpretation clause. Even the Appellate Division recognises that a strict construction must be placed on provisions which clog the right to seek judicial relief⁷². In the Supreme Court the judiciary is faced with applicants who are real people seeking protection of their constitutionally guaranteed rights. The protection of the individual's fundamental rights should not simply be an abstract concept. It should be enforced on a practical level as concrete justice. In this regard Steyn J in *S v A*⁷³ points out that :

*'Terwyl ek geensins wil voorgee dat daar nie gevalle is wat gepas is om by wyse van 'n versoek om regsverklaring van soortgelyke aard as die huidige by die Hof aanhandig te maak nie, wil ek tog bedenkinge uitspreek aangaande die ontwikkeling van 'n tendens dat, veral strafsake maar ook ander, verdrag word bloot deur akademiese konstitusionele geskilpunte te opper. Akademiese debatte hoort tuis in die akademie, nie in die Hof nie. Dit is veral die geval waar sodanige aansprake geopper word sonder dat hulle op gegronde feitebevindings berus en dikwels die gevolg sou meebring dat verdere en moontlike onnodige verdragings bevorder word. "Justice delayed is justice denied" is geen ydele slagspreuk nie.'*⁷⁴

The decision in *Matiso* and the views of Steyn J are in keeping with section 7(4)(a) of the Constitution which provides that when an infringement of or threat to any right entrenched in Chapter 3 is alleged, any person with locus standi shall be entitled to apply to a 'competent court' of law for 'appropriate relief'. A 'competent court' would be a court having jurisdiction to hear and decide the matter as provided for in the Constitution or any other statute. 'Appropriate relief' means relief consonant with the 'interests of justice'. In *Matiso* Froneman J relied on section 102(1) of the Constitution to found jurisdiction namely the phrase '*the provincial or local division concerned shall, if it considers it to be in the interest of justice to do so, refer such matter to the Constitutional Court*' (my emphasis). In the opinion of Froneman J it would not have been '*in the interests of justice*' to deny the applicant '*appropriate relief*' where a clear violation of a fundamental right was present, notwithstanding the court's lack of jurisdiction upon a literal reading of the Constitution. Froneman J reasoned that the Supreme Court possesses an inherent jurisdiction independent from that accorded by statute to remedy wrongs

⁷² *Du Toit v Ackerman* 1962 (2) SA 581 (A) at 588.

⁷³ 1995(2) BCLR 153 (C).

⁷⁴ at 157G.

committed against individuals⁷⁵. This is a significant break with the traditional position first laid down by the Appellate Division in *Sefatsa v Attorney-General, Transvaal*⁷⁶ that parliament has the power to oust the jurisdiction of the courts and therefore the courts do not possess an inherent jurisdiction independent from statute⁷⁷.

The judicial activism displayed by Froneman J is to be welcomed and accepted as forming part of a new and unique Southern African constitutional jurisprudence. The assumption by the Supreme Court of a jurisdiction impinging upon the jurisdiction of the Constitutional Court to declare null and void legislative enactments in conflict with the Bill of Rights is not advocated. Such an approach will have the unsatisfactory result that different divisions of the Supreme Court may deliver conflicting judgements as to the invalidity of the challenged legislation and cause unprecedented uncertainty. The *Matiso* judgment however illustrates how the judiciary can protect the fundamental rights of the individual by using an unqualified contextual approach and purposive interpretation which have the collective result that the Constitution is interpreted as a collective whole, including the taking into account of factors not specifically mentioned in the constitutional text but which nevertheless form part of it. Although the Constitutional Court cautioned that the written text of the Constitution cannot be ignored and that traditional principles are still of 'lasting value', the fact cannot be overlooked that the original intent of the framers of the South African Constitution was to form a new judicial and constitutional dispensation. It was this intention that was used by Froneman J to justify the assumption of an extended constitutional jurisdiction to get around the jurisdictional constraints imposed upon him by the Constitution and arrive at an interpretation which is consonant with the '*spirit, purport and objects*' of the Bill of Rights.

If Froneman J followed the narrow purposive approach adopted by Didcott J in *Bux*, without taking into account all the contextual factors, then he would have merely paid lip service to the wording of the Constitution and failed in protecting the fundamental rights of the individual which is in fact the rationale behind the implementation of the South African Bill of Rights. The judicially assertive approach of Froneman J proved to be in line with the legislative intention. Subsequent to *Matiso's* case the legislator removed the judicial uncertainty surrounding the Supreme Court's power to grant an interdict pending the decision by the Constitutional Court by enacting section 16 of the Constitutional Court Complementary Act 13 of 1995 which now provides that :

⁷⁵ Taitz J *The Inherent Jurisdiction of the Supreme Court* 1985.

⁷⁶ 1989 (1) SA 821 (A).

⁷⁷ See also *Staatspresident v United Democratic Front* 1988 (4) SA 830 (A) where ouster clauses excluded the jurisdiction of the courts.

'Any division of the Supreme Court shall have jurisdiction to grant an interim interdict or similar relief, pending the determination by the Court of any matter referred to in section 98(2) of the Constitution, notwithstanding the fact that such interdict or relief might have the effect of suspending or otherwise interfering with the application of the provisions of an Act of Parliament.'

The reference to '*similar relief*' is a profound indication that the Legislature recognises that the judicial discretion under the Bill of Rights involves the rectification of what Froneman J calls a legislative '*mischief*'. What makes Froneman J's approach noteworthy is the fact that he had a limited judicial framework within which to enforce the Bill of Rights and through his judicial activism transcended the confines of the jurisdictional constraints imposed upon him. This does not mean that judges can invent a system of values and read these into the Constitution under the guise of interpretation. However the very nature of a Bill of Rights suggests that the protection of fundamental rights requires the judiciary to assume a non-mechanical interpretive function which unavoidably involves the exercise of judicial creativity. It is trite that constitutions are not value-free and in fact their fundamental purpose is to select and elevate specified rights and values over others⁷⁸.

The views of Froneman J are further supported by section 100(3)(f) of the Constitution which provides that the Supreme Court has jurisdiction in respect of the determination of questions whether any matter falls within its jurisdiction as well as section 19(1)(a)(iii) of the Supreme Court Act 59 of 1959 which provides that :

'A provincial or local division shall have power in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination'.

Although this section of the Supreme Court Act supports the view taken by Froneman J in *Matiso* that the court could enquire into the validity of an Act notwithstanding the fact that the Court is jurisdictionally constrained by the Constitution to do so, the Court should nevertheless only pronounce on future rights if its decision would be binding on persons affected thereby⁷⁹. Based on this principle the court in *Masaku v State President*⁸⁰ rejected the relevance of section 19(1)(a)(iii) of the Supreme Court Act to the granting of interim relief under the Constitution. Section 16 of the Constitutional Court Complimentary Act altered this position in that the Supreme Court is now expressly authorised to grant interim interdicts pending a decision by the Constitutional Court and the court's decision

⁷⁸ Thomson JA *Principles and Theories of Constitutional Interpretation and Adjudication : Some Preliminary Notes* 1982 Melbourne University Law Review 606.

⁷⁹ *Masaku v State President* 1994 (4) SA 374 (T) at 380G ; *Ex Parte Nell* 1963 (1) SA 754 (A) at 760B.

⁸⁰ *supra*.

would therefore be binding. However in the case of *S v Mhlungu*⁸¹ Kentridge AJ formulated a general principle that :

'where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed'.⁸²

This principle accords with the view of the United States Supreme Court that a question of constitutional law should never be anticipated in advance of the necessity of deciding it and a rule of constitutional law should never be formulated broader than is required by the precise facts to which it is to be applied⁸³. The Constitutional Court ruled in the *Zantsi*⁸⁴ case that a local or provincial division of the Supreme Court had no jurisdiction to enquire into the constitutionality of an Act of Parliament passed by the South African Parliament, irrespective of whether such Act had been passed before or after the commencement of the Constitution. This does not mean however, that the Supreme Court in exercising its powers in terms of section 101(2) of the Constitution which section clothes the Supreme Court with common law, inherent and constitutional jurisdiction, cannot act to protect the fundamental rights of citizens. As long as the Supreme Court does not purport to strike down an Act of Parliament or enquire into the constitutionality of an Act of Parliament, it always has the power, albeit subject to the Constitution, to address violations or threatened violations of fundamental rights entrenched in Chapter 3⁸⁵.

The court in the case of *Mangano v District Magistrate, Johannesburg*⁸⁶ went one step further in recognising the extended jurisdiction of the Supreme Court under the Constitution by holding that section 7(4)(a) of the Constitution did not provide that the right to interfere with an Act of Parliament which infringe upon a right entrenched in Chapter 3, was limited to the grounds of review enumerated in section 24 of the Supreme Court Act 59 of 1959⁸⁷. In *Ferreira v Levin*⁸⁸ a majority of two judges concurring, one dissenting also held that a provincial or local division of the Supreme

⁸¹ 1995 (7) BCLR 739 (CC) ; 1995 (3) SA 867 (CC).

⁸² at 867 (CC).

⁸³ *Liverpool, New York and Philadelphia Steamship Co v Commissioners of Emigration* 113 US 33, 39 (1885) followed in *Zantsi v The Council of State, Ciskei and Others* 24/94 (Constitutional Court judgment delivered on 22 September 1995).

⁸⁴ *supra*.

⁸⁵ *Wehmeyer v Lane* 1994 (4) SA 441 (C) at 448H ; *Podlas v Cohen and Bryden NNO and Others* 1994 (4) SA 662 (T) at 671B.

⁸⁶ 1994 (4) SA 172 (W).

⁸⁷ at 176H.

⁸⁸ 1995(2) SA 813 (W).

Court does have jurisdiction to grant interim interdicts preventing the exercise of rights or powers permitted by an Act of Parliament, pending a decision by the Constitutional Court as to whether the Act is unconstitutional or not⁸⁹. This approach is also in line with section 22 of the Constitution which provides for the right to have access to courts. Consequent upon section 22 any provision ousting the jurisdiction of the courts will be constitutionally invalid in that the Constitution recognises that the courts under a system of judicial review enjoy a more comprehensive jurisdiction.

Clearly the Supreme Court can, and must if necessary, utilise its powers of interdict to prevent violations or threatened violations of a persons's fundamental rights, more particularly since the Constitution specifically confirms the inherent jurisdiction vested in the Supreme Court⁹⁰. However section 229 of the Constitution which provides for continuity of legislation cannot be ignored. Section 229 provides that :

'Subject to this Constitution, all laws which immediately before the commencement of this Constitution were in force in any area which forms part of the national territory, shall continue in force in such area, subject to any repeal or amendment of such laws by a competent authority'.

Based on the reasoning that the Supreme Court was not authorised to interfere with existing legislation, the Supreme Court on numerous occasions declined to grant interim interdicts based on the alleged violation of fundamental rights⁹¹. It is submitted that the correct interpretation is to view the granting of interim relief by the Supreme Court prior to the Constitutional Court ruling on the constitutionality or otherwise of the Act in question, as not suspending or striking down the particular Act of Parliament. The Supreme Court in granting such interim interdicts is simply determining whether the alleged violation complained of, is consistent with the scheme of the Constitution and the Court in exercising its inherent jurisdiction to come to the protection of the applicant's fundamental rights determines whether or not the applicant has a right, whether *prima facie* or otherwise, which could be protected by an interdict. The Court, strictly speaking, is not striking down an Act of Parliament or declaring its existence as unconstitutional⁹². The bold decision in *Matiso* must also

⁸⁹ Olivier D *The Supreme Court gets to grip with Chapter 3* 1995 *De Rebus* 282.

⁹⁰ *Rudolph v Commissioner for Inland Revenue and Others* NNO 1994 (3) SA 771 (W) at 774C.

⁹¹ *Podlas v Cohen and Bryden* NNO 1994(4) SA 662 (T) ; *Lynn v The Master* (28 July 1994, unreported case no. 2246/94) ; *Rudolph v Commissioner for Inland Revenue* 1994(3) SA 771 (W) ; *Wehmeyer v Lane* 1994(4) SA 441 (C) ; *De Kock v Prokureur - Generaal, Transvaal*)20 May 1994, unreported case no. 8943/94) ; *Masuku v State President* 1994(4) SA 374 (T).

⁹² *S v Ndima* 1994 (4) SA 626 (D) at 629H.

be viewed in context. At the time *Matiso* was decided, the Constitutional Court was not yet constituted and therefore clearly there was no competent authority to settle the alleged justiciable dispute, let alone a right to institute proceedings in such a non-existent Court⁹³. Prior to the sitting of the Constitutional Court therefore, there rested an additional duty on the Supreme Court to uphold the fundamental rights of citizens. In *Qozeleni v Minister of Law and Order*⁹⁴ Froneman J pointed out correctly⁹⁵ that :

'The role of Judges in a system of judicial review based on the supremacy of the Constitution is bound to be controversial in any event, but the judicial history of this country makes it even more likely if due regard is not given to possible deficiencies in the past. A special responsibility rests on Judges in this regard ...'

A constitution is defined as the framework which structures the assemblage of laws, institutions and customs which govern a nation and its peoples, an ideological manifesto and written manifestation of national purpose⁹⁶. As such the Constitution is a living document embodying the national soul and the framers of the Constitution made certain fundamental value choices manifested in the words of the document. The words of the written text may or may not give explicit content to the values underlying the Constitution and therefore the Courts have to ascertain and enforce the intended meaning of constitutional provisions.

The Court gives meaning to the system of values and norms called into being by the Bill of Rights, having regard to textual and contextual factors⁹⁷. The narrow view of judicial activism holds that the judiciary is supposed to only proclaim what rights are and not what their substantial virtues are⁹⁸. However McIntyre J (as he then was) in *R v Andrews*⁹⁹ pointed out that '*realistic judges acknowledge their role as social engineers*'. The line however, should be drawn where judges in considering 'adjudicative facts' interpret 'legislative facts' in such a way as to take on a political role as a super-legislature that functions beyond the reach of Parliament. In *Matiso*

⁹³ *Podlas v Cohen and Bryden* NNO 1994(4) SA 662 (T) at 674A.

⁹⁴ 1994(3) SA 625 (OK) at 633; also 1994(3) BCLR 75 (OK).

⁹⁵ The views of Froneman J were criticised by Van Dijkhorst J in *Kalla v The Master* 1995(1) SA 261 (T) at 268.

⁹⁶ Roodie E *Discrimination in the Constitutions of the World* 1984.

⁹⁷ *Ex Parte Attorney-General, Namibia : in re Corporal Punishment by Organs of State* 1991 (3) SA 76 (NmSC) at 96B-C.

⁹⁸ *Reference re Section 94(2) of the Motor Vehicle Act* RSBC 1979, [1985] 2 SCR 486 at 497.

⁹⁹ [1989] 1 SCR 143 at 38.

Froneman J observed that judicial review under a bill of rights is still subject to important constraints and the recognition of those constraints is the best guarantee or shield against criticism that a system of judicial review is essentially undemocratic¹⁰⁰. A Bill of Rights has to be applied and interpreted as if an expression of the national soul. This does not mean that the Courts have the power to interpret the Constitution wider than the parameters set by the Constitution itself. But the Constitution compels the judiciary to take cognizance of the spirit and not only the letter of the Constitution and in so doing read into the text of the Constitution the inherent unwritten text.

INTERPRETIVISM VERSUS NON-INTERPRETIVISM

Those that support interpretivism maintain that interpretation is only legitimate if based on norms and values found in the language and structure of the Constitution. The supporters of non-interpretivism argue that it is legitimate to rely on values that are external to the document. The conflicting views that have emerged in *Matiso* and *Bux* regarding the interpretation of the provisions of the Constitution which confer on the Supreme Court the power to address violations of fundamental rights highlight the underlying interpretivist and non-interpretivist debate.

Didcott J in *Bux* followed what may be called an interpretivist approach and refused to adopt an interpretation which took account of extra-textual sources. The Constitution provides in section 102(1) that the judicial officer concerned must postpone the matter if 'in the interests of justice'. But justice is not served if the aggrieved party's fundamental rights cannot be enforced because the matter has to be postponed on the basis that fidelity has to be paid to the text of the Constitution. The '*spirit, purport and objects*' of the Constitution are to be upheld and not only the wording of the document. This means that the judiciary has to enforce the Constitution with this purpose in mind and that the courts have a duty to protect the public against human rights violations. This is essentially what the *Matiso* judgement illustrates on a practical level. Froneman J indicated that he intends to uphold the values underlying the Constitution notwithstanding jurisdictional constraints. In so doing he illustrated the utter necessity in certain circumstances to look beyond the four corners of the Constitution for meaning. This incorporation of value-coherent meaning into the text is the hallmark of the non-interpretivist approach and is justified on the basis that the original intent and purpose of the rights and freedoms contained in the Constitution will not remain unaffected by changing circumstances.

Although *Matiso* is not the modern-day equivalent of *Marbury v*

¹⁰⁰ at 598c.

*Madison*¹⁰¹, it nevertheless sets a valuable precedent for the future in that the liberal and activist thinking of a judge sitting in a local division of the Supreme Court ensured that a citizen's constitutionally guaranteed rights were upheld in the face of a lack of jurisdiction. The judicial activism exerted in *Matiso* is an exemplary illustration of the protection of the civil liberties of the individual by extending the meaning of the Constitution through judicial activism. In *Marbury v Madison* the United States Supreme Court declined to accept the jurisdiction it was clothed with by statute on the ground that it was 'repugnant to the Constitution'¹⁰² and in so doing established its review power. The South African Constitution expressly provides for judicial review by laying down in section 4 of the Constitution that the Constitution is supreme. However the approach of Froneman J is nevertheless profound in that the court adopted an approach akin to that of the United States Supreme Court in *Marbury v Madison*. *Froneman J* reasoned that the spirit of the Constitution enjoins the court with a jurisdiction to address human rights violations and as such the court cannot turn a blind eye to infringing legislation on the basis that the wording of the Constitution does not give the court that power. The hallmark of the office of a present-day South African judge is that of custodian of human rights and liberties. This embraces the enforcement of the values underlying the Constitution rather than paying lip service to the language of the written text of the Constitution. Although the Courts are not to act as incontrovertible 'engineers' in their interpretation of the Constitution, there is nevertheless a definite judicial discretion assigned to the Courts in section 35(1) of the Constitution to promote the values underlying an open and democratic society based on freedom and equality. The court would also be failing in its duty to be just and reasonable if it were to refuse mitigating the harsh effects of obscure or defective constitutional provisions¹⁰³.

The scope for judicial activism is substantially lessened where the meaning of the rights and freedoms concerned is expressed in unequivocal terms. Mr Justice Black of the United States Supreme Court was an interpretivist and argued for absolute Human Rights where meaning is fixed and room for uncertainty is abolished. In the case of *Goldberg v Kelly*¹⁰⁴ Black said the following regarding codified constitutions :

'A written constitution, designed to guarantee protection against governmental abuses, including those of judges, must have written standards that mean something definite and have explicit content.'

¹⁰¹ 5 U.S. (1 Cranch) 137 (1803).

¹⁰² *Ibid* at 176.

¹⁰³ *Monnakale v Republic of Bophuthatswana* 1991(1) SA 598 (B) at 621F.

¹⁰⁴ 397 U.S. 254 (1970).

In his work, *A Constitutional Faith*, Black wrote :

*'I simply believe that "Congress shall make no law" means Congress shall make no law.'*¹⁰⁵

The concern that Black expressed when he spoke out in favour of a literal mode of interpretation was that an interpretation that was not grounded in the Constitution was illegitimate and constitutionally invalid. Black perceived the problem to be a follow on from the landmark decision in *Marbury v Madison*¹⁰⁶ holding that the courts were to be the final interpreters of the Constitution. He reasoned that the testing power of the court *'can provide an opportunity to slide imperceptibly into constitutional amendment and lawmaking'*¹⁰⁷. Black was against the court exercising its interpretative function as a form of legislation¹⁰⁸ in that the Court effectively imposes its own ideas and values upon society when it goes beyond the express words of the Constitution and this exercise is essentially undemocratic.

The South African judges also have among their numbers those who choose to rather err on the positivist side, than extend the meaning and scope of statutes. The argument raised is that the actual meaning of the words used by the Legislature sets the outer limit of admissible judicial interpretation. The classical formulation of this school of thought is the following :

*'The task of the Courts 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 the intention is. It is not for the Court to invent fancy ambiguities and usurp the function of the Legislature.'*¹⁰⁹

The concern of the propounders of literalism is that the impartiality and repute of the judiciary will be brought into question should the judiciary descend into the political arena when making value judgments. But at the same time should it be accepted that the function of the judiciary under a bill of rights is bound to be somewhat controversial, especially in light of the fact that the judiciary did not previously enjoy a substantive testing right. It is an established principle of constitutional interpretation that constitutional provisions cannot be read

¹⁰⁵ H. Black *A Constitutional Faith*, 1969. 45

¹⁰⁶ *supra*.

¹⁰⁷ Dissenting judgement by Black in *Goldberg v Kelly* (*supra*) at 274.

¹⁰⁸ Robertson *The Dispossessed Majority*, 1972. 387

¹⁰⁹ *Segale v Government of the Republic of Bophuthatswana* 1990 (1) SA 434 (BA) at 448F ; See also *Kalla v The Master* 1994 (4) BCLR 79 (T).

in isolation¹¹⁰. The Constitution is more than just an expression of the wishes of the majority of the people, it is a written manifesto containing the civil liberties of the individual and is intended to endure for ages to come. In this regard section 35(3) of the Constitution impels the court to have regard to not merely the literal meaning of the text, but also to interpret the Constitution according to the spirit, purport and objects of Chapter 3. The so-called non-interpretive approach of Froneman J in *Matiso*, although activist and liberal, is still interpretive in a plausible sense in that Froneman J disregarded neither the text of the Constitution nor the motives of those who made it¹¹¹. He rather sought to articulate the unwritten values found within the conceptual four corners of the Constitution. The decision in *Matiso* was rather a progressive decision about the protection of fundamental rights than a decision aiming at transgressing on the terrain exclusively reserved for the Legislature and Constitutional Court. The decision illustrates that in order to truly protect fundamental rights, the plain meaning of words may have to make way for value-coherent decisions which better serve democracy by respecting the principles endorsed by the Legislature.

LIMITED JUSTICE

The South African Constitution is based on an amalgamation of the best features of various constitutions¹¹². But even this document constituted from years of experience in other countries may prove and has already shown¹¹³ that omissions are always present due to the fallibility of human faculties. In the words of Thomas Jefferson :

*'The Declaration of Rights is like all other human blessings allowed with some inconveniences and not accomplishing fully its object. But the good in this instance vastly outweighs the evil'*¹¹⁴

In order for the Bill of Rights to be an effective weapon against governmental onslaughts making inroads into the individual's protected rights and freedoms, the courts have to respond in activist fashion to ensure compliance with fundamental rights and any citizen should be able to approach the courts for constitutional relief. In *Ozeleni v*

¹¹⁰ Botha CJ *Steeds 'n paar tekstuele ikone teen die Regstaatlike muur* (1995) 3 THRHR 523 at 525.

¹¹¹ Dworkin, R. *A matter of principle* (1985). 35

¹¹² Constitutions of inter alia Canada, United States, Australia, India and Germany.

¹¹³ See Bux and Matiso (*supra*).

¹¹⁴ Mason and Beany *American Constitutional Law* (1978).

*Minister of Law and Order*¹¹⁵ Froneman J pointed out that if the Constitution is to fulfil its stated purposes, it must not only be interpreted in such a manner as to give clear expression to the values it seeks to nurture for a future South Africa, but this should be done in a way which makes it a living document for all the citizens of the country and not only for the chosen few who deal with it in courts of law¹¹⁶. The courts therefore have a duty under the Constitution to ensure that justice is seen to be done and not merely recognised on the paper the Constitution is written on.

The notion of '*tabulated legalism*'¹¹⁷ has become synonymous with the South African judiciary over the years. This view of the judiciary is further exacerbated by Rule 17 of the Constitutional Court which restricts direct access to the Constitutional Court. The effect of this rule is that the provincial or local division of the Supreme Court must be approached for relief before access to the Constitutional Court is granted. This position is untenable if the Supreme Court in question does not have the authority to remedy the human rights violation complained of¹¹⁸. However where parties to civil or criminal proceedings agree in terms of section 101(6) of the Constitution that the division of the Supreme Court in question shall have jurisdiction to decide whether an Act of Parliament is constitutionally valid, the Court will then by virtue of the consent to jurisdiction have the authority to determine the issue as if the Court had the same jurisdiction as that exclusively granted to the Constitutional Court¹¹⁹. The Court in those circumstances will in effect be obliged to pronounce upon the validity of the Act and cannot refer the matter to the Constitutional Court on the basis that the matter is decisive of the case and falls within the exclusive jurisdiction of the Constitutional Court¹²⁰. In sharp contrast to the theoretical justice afforded by South African constitutional remedies as outlined above, the Indian legal system provides accessible procedures to engage the help of the courts in remedying human rights violations. Indian public interest litigation is simplified by the appointment of fact finding commissions which remove the evidentiary burden from litigants¹²¹. In India any communication to any particular judge in the form of a letter or

¹¹⁵ 1994 (3) SA 625 (E).

¹¹⁶ at 633I.

¹¹⁷ *Minister of Home Affairs and Another v Collins MacDonald Fisher and Another* 1980 AC 319 (PC); *S v Acheson* 1991 (2) SA 805 (NmHC).

¹¹⁸ See *Matiso* (supra) and *Bux* (supra).

¹¹⁹ *S v Shangase* 1995(1) SA 425 (D).

¹²⁰ Section 102(1) of the Constitution; *S v Zuma* 1995(1) BCLR 49 (N) and decided by the Constitutional Court on 5 April 1995.

¹²¹ *Mukesh Advani v State of Madhya Pradesh* AIR 1985 SC 1368.

telegram is enough to initiate a constitutional action and could be converted into a writ petition without any verification¹²². In *Mukesh Advani v State of Madhya Pradesh*¹²³ the Court accepted a clipping of a newspaper article on the sordid state of bonded labourers working in stone quarries in Madhya Pradesh, as the basis for a petition. Although the Madhya judgment is extremely casual and lends itself to violations of the rules of natural justice and the audi alteram partem rule in particular, it nevertheless illustrates a sense of justice for all not practised in South Africa.

The scope for the protection of fundamental rights in the Magistrates' Courts is substantially lessened by the Constitution. Section 103(1) of the Constitution provides that the 'establishment, jurisdiction, composition and functioning of all other courts shall be as prescribed by or under a law'. This means that the ordinary jurisdiction of the magistrates' courts is retained, but the magistrates' courts now also have to apply the provisions of the Constitution save in those instances where they are expressly precluded from so doing. Section 98(3) of the Constitution provides that :

'The Constitutional Court shall be the only court having jurisdiction over a matter referred to in subsection (2), save where otherwise provided in sections 101(3) and (6) and 103(1) and in an Act of Parliament'.

The phrase 'an Act of Parliament' means any statute in existence immediately before or after the commencement of the Constitution. The Magistrates' Court Act 32 of 1944 falls within the definition of 'Act of Parliament' and therefore if in a Magistrates' Court dispute between the State and a citizen or between two private individuals, there arose as a matter of course, a constitutional question or issue incidental to the jurisdiction¹²⁴ of the Magistrates' Courts, then the Magistrates' Court concerned has jurisdiction to entertain constitutional argument by the litigants to the dispute and make a finding of law regarding the applicability of the Constitution.

The Magistrates' Courts can however, not pronounce upon the validity of Acts of Parliament or grant interim relief based on alleged violations of fundamental rights. These aspects fall within the exclusive jurisdiction of the Constitutional Court and Supreme Court respectively¹²⁵ and the Magistrates' Court concerned must decide the matter as if the law is valid or postpone the proceedings in the interests of justice so as to enable a party to apply to a competent

¹²² *Bandhua Mukti Morcha v Union of India* (1984) 3 SCC 161.

¹²³ AIR 1985 SC 1368.

¹²⁴ section 28 - Jurisdiction in respect of persons ; Section 29 - Jurisdiction in respect of causes of action ; Section 89 - Jurisdiction in respect of offenses.

¹²⁵ sections 98(3) and 101(3) of the Constitution.

court¹²⁶ for relief. In *Qozeleni v Minister of Law and Order*¹²⁷ Froneman J held that although the magistrates' courts are clearly excluded from an extended jurisdiction pertaining to judicial review, but it does not follow that in exercising their normal jurisdiction magistrates' courts are otherwise precluded from applying the full law of the land and that they are restricted to applying law of a crippled nature, namely law divorced from the inherent norms and values of the Constitution¹²⁸. However, section 103(3) and (4) of the Constitution provide for a special procedure to challenge the constitutional validity of legislative enactments prior to finalisation of the matter in the magistrate's court. Froneman J also pointed out that it would be absurd not to apply those constitutional provisions which are meant to safeguard the fundamental rights of citizens in the courts where the majority of people would have their initial and perhaps only contact with the provisions of the Constitution. Such an interpretation he went on to hold, would frustrate the very purpose of the Constitution of constituting a bridge to a better future¹²⁹.

Granting the Constitutional Court exclusive jurisdiction to set aside legislation in conflict with the Chapter on fundamental rights brings about the unsatisfactory position that applicants in the Supreme Court cannot always obtain relief sought under the Constitution and creates delays in bringing applications to the Constitutional Court. Furthermore the assignment of constitutional issues, especially human rights violations, to a special, elite tribunal may cause the wider public to view this court as 'remote from the society's core culture and average person'¹³⁰. Such an elite tribunal is however justified in that South Africa lacks an established human rights culture and the Constitutional Court brings with it a platform for certainty and authoritative guidance on human rights issues.

¹²⁶ A provincial or local Division of the Supreme Court.

¹²⁷ 1994 (3) SA 625 (E).

¹²⁸ at 636F.

¹²⁹ at 637E.

¹³⁰ *R v Andrews* [1989] 1 SCR 143 at 64.

CONCLUSION

The South African judiciary cannot hide behind notions of legal justice when social justice issues are addressed to it. It can also no longer attain social and political legitimacy without making a substantial contribution to issues of social justice¹³¹. If due to jurisdictional constraints the judiciary were to be prohibited from protecting the fundamental rights of an individual, in a situation where the individual has no other legal remedies, the spirit, purport and object of the Constitution would dictate that the judiciary must assert itself and remedy the violation complained of. This was the dilemma that presented itself in the case of *Matiso v Commanding Officer, Port Elizabeth Prison*¹³². The Court responded in activist fashion to safeguard the rights of the individual, notwithstanding the statutory prohibition on such judicial intervention. The court assumed a constitutional jurisdiction it did not possess in terms of the literal wording of the Constitution and instead relied on the values underlying the Bill of Rights to formulate a remedy where none existed. It is submitted that this approach is consonant with the broad and libertarian interpretation which is authorised by the Constitution and is preferred to a judicial attitude of acquiescence and abstention from review.

The Constitution by implication sanctions judicial activism and makes provision in its interpretation clause for interpretation which is both purposive and value-based. The purposive theory of interpretation which is constrained by the Constitution points to the extended and creative judicial review power of the judiciary under the Bill of Rights. There are few constitutional issues which can definitively be resolved by the text of the document alone¹³³. As a result the courts which just recently emerged from their previously supine judicial posturing, cannot afford to lapse back into judicial reticence by simply displaying fidelity to the constitutional text by treating it like any other statutory enactment. In constitutional interpretation under a bill of rights the task of the courts is to underpin the values of the 'Rechtsstaat' by determining the curvatures and boundaries of the normative regime of rights as well as the intrinsic and substantive content of any particular right¹³⁴. The court in giving meaning to the underlying values of the Constitution, may also take into account values which are not mentioned *eo nomine* in the Bill of Rights. A value orientated and unqualified contextual approach to interpretation coupled with a

¹³¹ Bhagwati *The Role of the Judiciary in the Democratic Process : Balancing Activism and Judicial Restraint* 5 (1992) *Developing Human Rights Jurisprudence* 10. at 14

¹³² 1994(3) SA 899 (SE) and 1994(4) SA 592 (SE).

¹³³ Shaman JM *The Constitution, the Supreme Court, and Creativity* 1982 *Hastings Constitutional Law Quarterly* 261.

¹³⁴ Patel and Watters *Human Rights - Fundamental Instruments and Documents* 1994. Preface vii

measure of judicial activism is required in order to give effect to the underlying but sometimes inarticulate values forming part of the South African Bill of Rights. In so doing the meaning of the Constitution will be ascertained by reference to the intra- and extra-textual context, and result in a value-coherent and realistic interpretation.

Under the Bill of Rights the judiciary becomes a crucial link between an artificial legislative intent and the practical result of such intent. Prior to the enactment of the Constitution the judiciary displayed a reluctance to adjudicate policy considerations. This judicial reticent approach has to make way for a culture which recognises that accepted legal reasoning can and must be replaced by more value-orientated and creative decisions. The ordinary rules of interpretation has to yield to an open-ended and liberal construction of the Constitution. This study does not purport to justify interpretation which is divorced from the text. This would result in uncertainty and raise problems of legitimacy. The text itself however, should be given a liberal meaning and not applied without full knowledge of the scheme of the Constitution as a whole. It is only when the judiciary recognises its creative mandate in giving practical content to the protection of human rights that the rubicon of functional creativity is crossed so as to give effect to the democratic values underlying the Constitution.

TABLE OF CASES

- Baker v Carr* 369 US 186 (1962)
- Bandhua Mukti Morcha v Union of India* (1984) 3 SCC 161.
- Bux v Officer Commanding, Pietermaritzburg Prison* 1994 (4) SA 562 (N)
- Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530
- De Klerk v Du Plessis* 1995 (2) SA 40 (T)
- Du Toit v Ackerman* 1962 (2) SA 581 (A)
- Ex parte Attorney-General, Namibia : in re Corporal Punishment by Organs of State* 1991 (3) SA 76 (NmSC)
- Ex Parte Nell* 1963 (1) SA 754 (A)
- Ferreira v Levin* 1995 (2) SA 813 (W).
- Goldberg v Kelly* 397 U.S. 254 (1970)
- Goldberg v Minister of Prisons* 1979 (1) SA 14 (A).
- Government of the Republic of Namibia v Cultura 2000* 1994 (1) SA 407 (NmSC)
- Governor of Johannesburg Gaol v Whitakker* 1911 TPD 798
- Hunter et al v Southam Inc* (1985) 11 DLR (4th) 641
- In re Mzolo* 1984 (4) SA 491 (N) 500.
- Japaco Investments (Pty) Ltd v Minister of Justice* 1995 (1) BCLR 113 (C)
- Kalla v The Master* 1995 (1) SA 261 (T)
- Kerchoff and Another v Minister of Law and Order and Others* 1986 (4) SA 1150 (A)
- Khala v Minister of Safety and Security* 1994 (4) SA 218 (W)
- Kruger v Minister of Correctional Services* 1995 (1) SACR 375 (T)
- Legal Consequences for States of the Continued Presence of South Africa in Namibia* 1971 ICJ Rep. 16

- Liverpool, New York and Philadelphia Steamship Co v Commissioners of Emigration* 113 US 33, 39 (1885)
- Luther v Borden* 48 US 1 (1849)
- Mangano v District Magistrate, Johannesburg* 1994 (4) SA 172 (W).
- Marbury v Madison* 5 U.S. (1 Cranch) 137 (1803)
- Masaku v State President* 1994 (4) SA 374 (T)
- Matiso v Commanding Officer, Port Elizabeth Prison* 1994 (3) SA 899 (SE) and 1994 (4) SA 592 (SE)
- M'Culloch v Maryland* (1819) 17 U.S. (4 Wheat.) 316, 407
- Minister of Home Affairs (Bermuda) and Another v Collins MacDonald Fisher and Another* 1980 AC 319 (PC)
- Minister of the Interior v Lockhat* 1961 (2) SA 587 (A)
- Mukesh Advani v State of Madhya Pradesh* AIR 1985 SC 1368
- Nyamakazi v President of Bophuthatswana* 1992 (4) SA 540 (BGD)
- O'Callaghan N.O. v Chaplin* 1927 AD 310
- Podlas v Cohen and Bryden NNO and Others* 1994 (4) SA 662 (T)
- Qozeleni v Minister of Law and Order and Another* 1994 (3) SA 625 (E)
- R v Andrews* [1989] 1 SCR 143
- R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 (SCC)
- R v Oakes* (1986) 26 DLR (4th) 200 (SCC)
- Reference re Section 94(2) of the Motor Vehicle Act RSBC 1979*, [1985] 2 SCR 486 at 497
- Rudolph v Commissioner for Inland Revenue* 1994 (3) SA 771 (W)
- S v Ebrahim* 1991 (2) SA 553 (A)
- S v Majavu* 1994 (4) SA 268 (Ck)
- S v Makwanyane* 1995 (6) BCLR 665 (CC) ; 1995 (3) SA 391 (CC)
- S v Marwane* 1982 (3) SA 717 (A)
- S v Mhlungu* 1995 (7) BCLR 739 (CC) ; 1995 (3) SA 867 (CC)

S v Ndima 1994 (4) SA 626 (D)

S v Shangase 1995 (1) SA 425 (D)

S v Zuma 1995 (1) BCLR 49 (N)

Sefatsa v Attorney-General, Transvaal 1989 (1) SA 821 (A)

Segale v Government of the Republic of Bophuthatswana 1990 (1) SA 434 (BA)

Shenker v The Master 1936 AD 136

Smith v Attorney-General, Bophuthatswana 1984 (1) SA 196 (B)

Staatspresident v United Democratic Front 1988 (4) SA 830 (A)

State President v Tsenoli 1986 (4) SA 1150 (A)

Wehmeyer v Lane 1994 (4) SA 441 (C)

Whittaker v Governor of Johannesburg Gaol 1911 WLD 125

Whitakker v Roos and Bateman 1912 AD 92

Zantsi v The Chairman, Council of State, Ciskei and Others 1995 (2) SA 534 (Ck) ; 1994 (6) BCLR 136 (Ck)

Zantsi v The Council of State, Ciskei and Others 24/94 unreported (Constitutional Court judgment delivered on 22 September 1995)

Zuma and Others v The State 1995 (2) SA 642 (C)

TABLE OF STATUTES AND INSTRUMENTS

The Constitution of the Republic of South Africa Act 200 of 1993

The Constitutional Court Complementary Act 13 of 1995

The Republic of South Africa Constitution Act 110 of 1983

The Interpretation Act 33 of 1957

The Magistrates' Courts Act 32 of 1944

The Magistrates' Courts Amendment Act 56 of 1984

The Supreme Court Act 59 of 1959

The Constitution of Namibia

The Constitution of Bophuthatswana

The Constitution of Canada

The Constitution of the United States of America

The Constitution of India

The Constitution of Germany

The Constitution of Australia

International Covenant on Civil and Political Rights, 1966

The European Convention on Human Rights

BIBLIOGRAPHY

- Amato, R *Understanding the New Constitution* (Cape Town, Struik Publishers 1994)
- Basson & Viljoen *South African Constitutional Law* (Cape Town, Juta 1988)
- Benyon, A. *Constitutional Change in South Africa* (Pietermaritzburg, University of Natal Press 1978)
- Black, H. *A Constitutional Faith* (New York 1969)
- Botha, C.J. *Interpreting the Constitution* (1994) South African Public Law 259
- Botha, C.J. *Steeds 'n paar tekstuele ikone teen die Regstaatlike muur* (1995) 3 Tydskrif vir Hedendaagse Romeins-Hollandse Reg 523
- Botha, H. *The values and principles underlying the 1993 Constitution* (1994) South African Public Law 233
- Cachalia et al *Fundamental Rights in the New Constitution* (Cape Town, Juta 1994)
- Cowling, M.G. *Judges and the Protection of Human Rights in South Africa : Articulating the Inarticulate Premise* (1987) 3 South African Journal of Human Rights 177
- Davis, D *Democracy - It's influence upon the Process of Constitutional Interpretation* (1994) South African Journal of Human Rights 112
- Denning, A. *The Discipline of Law* (London, Butterworths 1979)
- Devenish, G.E. *Interpretation of Statutes* (Cape Town, Juta 1992)
- De Villiers, B. (ed.) *Birth of a Constitution* (Cape Town, Juta 1994)
- De Villiers, B. *Directive Principles of State Policy and Fundamental Rights : The Indian Experience* (1992) South African Journal of Human Rights 29
- Dorn & Manne *Economic Liberties and the Judiciary* (Fairfax, George Mason University Press 1987)
- Dugard, J. *Statutory Interpretation as an Exercise in Choice : S v Moroney* (1978) 95 South African Law Journal 451
- Dugard, J. *Human Rights and the South African Legal Order* (Princeton N J, Princeton University Press 1987)

Du Plessis & Du Ville *Bill of Rights Interpretation in the South African Context (1) : Diagnostic Observations* (1993) Stellenbosch Law Review 63.

Dworkin, R. *A matter of principle* (Cambridge, Harvard University Press 1985)

Dworkin, R. *Law's Empire* (1986)

Ely, J.H. *Democracy and Distrust : A theory of judicial review* (1980) Yale Law Review 1037

Forsythe, C. *Interpreting a Bill of Rights : The future task of a reformed judiciary* (1991) South African Journal of Human Rights 1

Henkin, L. *The International Bill of Rights* (New York, Columbia University Press 1981)

Herdegen, M. *The activist judge in a "positivistic" environment - European Experiences* (1990) Stellenbosch Law Review 336

Kruger & Currin *Interpreting a Bill of Rights* (1994)

Kruger, T.J. *Regspositivisme en die 'ongeskrewe teks ' van die (nuwe) grondwet* (1991) South African Public Law 223

MacCormack, D.N. *Interpreting Statutes* (Aldershot, Dartmouth 1991)

Marcus, G. *Interpreting the Chapter on Fundamental Rights* (1994) South African Journal of Human Rights 92

Mason & Beany *American Constitutional Law* 6th ed (1978)

Meron, T. *Human Rights and Humanitarian Norms as Customary Law* (Oxford, Clarendon Press 1989)

Mureinik, E. *A bridge to where ? Introducing the Interim Bill of Rights* (1994) South African Journal of Human Rights 31

Nicholson, D. *Ideology and the South African Judicial Process - Lessons from the Past* (1992) South African Journal of Human Rights 50

Olivier, D. *The Supreme Court gets to grip with Chapter 3* (1995) De Rebus 282

Rehnquist, W. *The Notion of a Living Constitution* (1967) Texas 1 R 693

Robertson, M. *Human Rights for South Africans* (Cape Town, Oxford University Press 1991)

Robertson, W. *The Dispossessed Majority* (Cape Canaveral, Howard Allen Enterprises 1973)

- Roodie, E. *Discrimination in the Constitutions of the world* (1984)
- Sachs, A. *Protecting Human Rights in a new South Africa* (Cape Town, Oxford University Press 1990)
- Shaman, J.M. *The Constitution, the Supreme Court, and Creativity* (1982) Hastings Constitutional Law Quarterly 261
- Taitz, J. The inherent jurisdiction of the Supreme Court (1985)
- Thomson, J.A. *Principles and Theories of Constitutional Interpretation and Adjudication : Some Preliminary Notes* (1982) Melbourne University Law Review 606
- Tribe, L.H. *On reading the Constitution* (Cambridge, Harvard University Press 1991)
- Van der Vyver, J.D. *Constitutional Options for Post-apartheid South Africa* (1991) Emory Law Journal
- Van der Vyver, J.D. *The Private Sphere in Constitutional Litigation* (1994) Tydskrif vir Hedendaagse Romeins-Hollandse Reg 378
- Visser & Potgieter *Some critical comments on South Africa's Bill of Fundamental Human Rights* (1994) Tydskrif vir Hedendaagse Romeins-Hollandse Reg 493
- Wachtler, S. *Judicial Lawmaking* (1990) New York University Law Review 1