

**STUMBLING ON THE ESSENTIAL CONTENT  
OF A RIGHT - AN INSURMOUNTABLE  
HURDLE FOR THE STATE?**

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**BY**

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## **PROLOGUE**

**1 "Denn nur durch vergleichung unterscheidet man sich und erfährt, was man ist, um ganz zu werden, was man sein soll"**

**1 "For only by making comparisons can we distinguish ourselves from others and discover who we are, in order to become all that we are meant to be"**

**The quotation is taken from David P Currie: The constitution of the Federal Republic of Germany.**

## **SUMMARY**

**Section 33(1)(b) is fraught with borrowed provisions. The end-product marries German and Canadian features. The failure of the German Constitutional Courts to interpret the "essential content of a right" precipitated the adopted infant's bumpy landing in South Africa. That the sibling still lacks identity is evidenced by our Constitutional Court's evasive and superficial treatment of the clause. Section 33(1)(a) - proportionality prong enables judges to justify their neglect of Section 33(1)(b). The opinion is expressed that Section 33(1)(b) demands interpretation but to date it has been shrouded in vagueness. After all without demarcating boundaries with sufficient precision and highlighting where the State may not tread the State may trespass. Alternatively the limitable nature of human rights could become a myth as Section 33(1)(b) could be transformed into an insurmountable hurdle for the State, rendering every right absolute in practice. A workable conceptual framework proposes an inverted, porous and value imbibing solution.**

## **KEY TERMS**

**Analysis of Section 33(1)(b); Borrowed Provisions; Complex Interpretative Conundrums; Insurmountable Obstacle; Myopic Guidance - enter our Constitutional Court; Academic Opinion; Boundary Demarcation; Prognosis of Working Draft Re:- Section 35(1)(b); Solution: Inverted value orientated/residual approach.**

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## **1. INTRODUCTION: "A BRIDGE TOO FAR"?**

The drafters of the Interim Constitution, academics and a host of Court decisions concur that the pivotal clause in our Constitution is the limitation clause - section 33<sup>(1)</sup>.

Fleshing out a consistent and meaningful limitation clause remains a daunting task. In this paper I will attempt to elucidate the genesis of our section 33(1)(b) before scrutinizing the myopic guidelines exemplified by our Constitutional Court<sup>(2)</sup>. I am of the view that the essential content of a right (section 33(1)(b)) should be removed from the category of a "paper tiger"<sup>(3)</sup> / figure head to take its place as a finely tuned yet elastic concept.

It is trite law that the interim Constitution seeks or aspires to be:-

- <sup>(4)</sup> "A historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future found on the recognition of human rights, democracy and peaceful co-existence and development of opportunities for all South Africans irrespective of colour, race, class, belief or sex."

Etienne Mureinik submits that the point of the Bill of Rights is to spearhead the effort to bring about a culture of justification. He continues to add :-

<sup>(6)</sup> "If the new Constitution is a bridge away from a cultural authority, it is clear what it must be a bridge to. It must lead to a culture of justification - a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in its defence of its decisions, not the fear inspired by the force at its command. The new order must be community built on persuasion, and not coercion".

The same writer opines that the limitation clause is a provision which empowers the government to override the Bill's fundamental rights and hence it authorises the government to justify or to defend laws which clash with the rights appearing in the Bill<sup>(6)</sup>. Therefore according to Mureinik the limitation clause has the potential to be a soft underbelly of the Bill of Rights<sup>(7)</sup>. He continues to add that unless it is narrow and precise, it could make the rights in the Bill easy to trump no matter how strongly they are worded. Erasmus too alludes to the general principle of interpreting limitations strictly so that the right is more often than not protected whilst the limitation becomes the exception<sup>(8)</sup>. Other decisions compatible with this approach include the dicta in Handyside<sup>(9)</sup> as well as the decision in OAKES<sup>(10)</sup>. It is submitted that the converse argument remains largely unexplored and unanswered. Is it possible for a limitation clause to be too tautly strung? This lacuna underlies the main purpose of this paper which is to explore the premise of creating an insurmountable hurdle for the State or a bridge too far by tightening the

limitation clause to strangulation point. It is submitted that Justice Hiemstra's prescient dicta in Smith<sup>(11)</sup> identified this conundrum over twenty years ago:-

"The Court has a particular duty as guardian of liberty, but it has to exercise its powers of controlling legislation with a scalpel and not with a sledgehammer."

Taken to its logical conclusion this judicial activism enabled by an "overstrung" limitation clause could have the effect of transforming theoretically limitable rights into absolutes and thereby rendering the limitation clause obsolete.

## 2. **BRIEF HISTORICAL OVERVIEW - "PLUCKING BMWs AND SOWING OAKES"**.

Why the Interim Constitution chose to adopt rather than create has sowed a recipe for disaster. **TRIBE** stresses the importance of making constitutional choices highlighting a multi-faceted team of protagonists. Identified actors include inter alia : judges, presidents, governors, legislators, lawyers, scholars, government bureaucrats, writers and historians. To **TRIBE**:-

<sup>(12)</sup> "the Constitution is in part the sum of all these choices. But it is also more than that. It must be more if it is to be a source either of critique or of legitimation. Thus, just as the Constitutional choices we make are channelled and

constrained by who we are and by what we have lived through, so too they are constrained and channelled by a constitutional text and structure and history by constitutional language and constitutional tradition, opening some paths and foreclosing others."

Besides emphasizing the importance of choice **TRIBE** is also highlighting the unique "home-grown" quality of the American Constitution conceived, nurtured and catapulted into use against its own historical backdrop. This is a common factor amongst Constitutions across the globe ensuring an assorted variety of distinct end-products. All have responded to their own judicial climate, culture and history culminating in domestically friendly and appropriate documents.

Hence the German<sup>(13)</sup>, Canadian<sup>(14)</sup> and Indian<sup>(15)</sup> Constitutions have not simply regurgitated the American Constitution and called it their own nor have they opted for internal modifiers "limitations" like the American strict scrutiny / rational connection test<sup>(16)</sup>. In fact **KENTRIDGE J** exemplified this argument in **ZUMA**<sup>(17)</sup> referring with approval to the dicta in **FISCHER AND BIG M DRUG MART LTD.**

"But Lord Wilberforce and Dickson J emphasised that regard must be paid to the legal history, traditions, and usages of the country concerned, if the purposes of its Constitution are to be fully understood. This must be right."

A fortiori the uniqueness and home-grown qualities should be encapsulated in the written text.

**In stark contrast the second half of our limitation clause appears strikingly similar to article 19(2) of the German Bill:-**

**<sup>(18)</sup> "In Keinem Falle darf ein Grundrecht in seinem Wesensgehalt angetastet werden"**

**"In no case may the essence of a basic right be encroached upon"**

**Section 33(1)(b) of our Constitution provides:-**

**<sup>(19)</sup> "Shall not negate the essential content of the right in question"**

**Whilst the Canadian limitation clause reads as follows:-**

**<sup>(20)</sup> "guarantees set out in [the CHARTER] subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"**

**Section 33(1)(a) of our Constitution reads:-**

**<sup>(21)</sup> "The rights entrenched in this chapter may be limited by law of general application, provided that such limitation (a) shall be permissible only to the extent that it is :-**

**(i) reasonable and**

**(ii) justifiable in an open and democratic society based on freedom and equality."**

**Again our provision bears more than a striking resemblance to its Canadian cousin whose heritage is itself German based. CURRIE submits that this balancing and proportionality prong was introduced by the Magna Carta and developed by BLACKSTONE. During the German**

Enlightenment **CARL GOTTLIEB SVAREZ** elaborated and developed the proportionality concept:-

<sup>(22)</sup> "First the State was justified in restricting the liberty of the individual only to the extent necessary for the liberty and security of others and secondly the evil to be prevented must be substantially greater than the attendant harm to individual liberty."

It is respectfully submitted that the Canadian formula in **OAKES**<sup>(23)</sup> in essence captures both Svarez components. Counsel appearing before both our Supreme<sup>(24)</sup> and Constitutional Courts <sup>(25)</sup> have relied heavily on this formula as enunciated by **DICKSON J.** Despite **KENTRIDGE J's** caveat in **ZUMA**<sup>(26)</sup> re: Section 33(1)(a)

"...I see no reason in this case at least, to attempt to fit our analysis into the Canadian pattern."

The learned judge did not expressly reject **OAKES**<sup>(27)</sup>.

In the light of the brief overview it is apparent that our limitation clause is suffering from an identity crisis. Instead of weaving a genuine sui-generis clause from our soil we have spawned a mongrel. This is in spite of **DE WAAL'S** warning:-

<sup>(28)</sup> "like any other Constitution, the basic law is more than a tree from which one can pluck little BMWs which could happily be driven on South African roads."

Unperturbed by questionable lineage **WOOLMAN** submits that:-

<sup>(29)</sup> "the limitation clause is a beast of reasonable temperament, and one that can be brought to heel if properly understood."

I am of the opinion that this optimistic "understanding" of Section 33(1)(b) has yet to be exhibited by both the German<sup>(30)</sup> and South African Constitutional Courts<sup>(31)</sup>.

### 3. LOGIC VS REALITY - "SURVIVING IN A STORM OF SPECULATION"

The demise of parliamentary sovereignty was signalled by the following:-

<sup>(32)</sup> "The Constitutional Court shall have the jurisdiction in the Republic as the court of final instance over all matters relating to the interpretation, protection and enforcement of the provision of this Constitution."

This novel provision struck a chord amongst academics and a flood of literature followed in its wake<sup>(33)</sup>. Early articles concentrated on our sovereign Constitution, the advantages of International Law, the broadening of locus standi, the American and Canadian Bill of Rights and much speculation over the composition and tasks of a reformed judiciary<sup>(34)</sup>.

Prior to the birth of "our" Bill much attention was devoted to the Appellate Division's interpretation of the Bophutswana and Namibian Bill of Rights. Criticism over the positivist- literalist approach as enunciated in the infamous trio of SEGALE<sup>(35)</sup>, MONNAKALE<sup>(36)</sup> and LEWIS<sup>(37)</sup> reached

its apogee in **SMITH**<sup>(38)</sup> and remains valid despite preceding these decisions. In this decision **HIEMSTRA C J** preferred a “revolutionary” approach advocating a comparative enquiry and a divorce from positivism<sup>(39)</sup>. Despite a succinct and erudite exposition of Constitutional interpretation it is respectfully submitted that **HIEMSTRA C J** may have inadvertently and tacitly sanctioned a culture of borrowing. After all being forced to escape from the existing trend of stale literalism left little option other than to seek guidance elsewhere - viz Germany<sup>(40)</sup> and the United States<sup>(41)</sup>. I hold the view that this culture of “guidance” has been distorted and abused by the drafters of the Interim Constitution, Court decisions and some academics<sup>(42)</sup>. In essence the dye had been cast albeit in an interim mould for the troubled mongrel’s South African debut. In its wake lay a convoluted cloak of comparative “cousins” of questionable lineage. By far the most unrelated being the American “cousin” devoid of any express limitation lineage. Nevertheless **PROFESSOR MUREINIK** was prompted to comment in this regard :-

<sup>(43)</sup> “Because the United States has been interpreting Bills of Rights longer than anybody else and there is a whole lot more law there than anywhere else, we will be looking at American law probably more than at any other system.”

I submit that this is a particularly puzzling comment in the light of our recognition of the importance of an express limitation clause and the American omission of same. Without delving too deeply into the dense

and often irrelevant jungle of American Constitutionalism I submit that misguided speculation underlines the conflict between logic and reality.

Whether the speculation pertains to the importance of foreign decisions, foreign Bills of Rights or the interpretation and prognosis of our own Bill the American Chief Justice WACHTLERS' caveat should be noted. The learned Chief Justice referred to and approved HOLMES' dicta :-

<sup>(44)</sup> "The life of the common law has not been logic, it has been experience, but when it relies solely upon logic and from the perspective of the common law process the rule of law produced is stillborn."

If one emphasises "the logic of speculation" only to produce a stillborn product wherein lies its value? WACHTLER submits that the Court provides the key :-

<sup>(45)</sup> "It is the court, however, that applies law directly to real persons. It is in court where the collision between law and real - world events take place . It is the judge who must, in every case, consider the discreet predicaments of specific persons, look these persons directly in the eye, and explain how the law affects them."

Despite a genetic hybrid of a limitation clause the " constant bombardment of real life events " described as the central ingredient by WACHTLER "in the crucible of the lawsuit, (of real-world events and

persons)<sup>(46)</sup> could have solidified Section 33(1)(b) - enter our Constitutional Court.....

#### 4. **ENTER THE CONSTITUTIONAL COURT**

##### A. **IGNORING THE INFANT IN ZUMA**

A brief synopsis of the Judge's interpretation of Section 33 (1) (b) highlights the foreign infant's failed acclimatisation.

In **ZUMA**, the first Constitutional case, **KENTRIDGE A J** conceded that our Section 33(1)(a) was virtually akin to Section 1 of the Canadian Charter<sup>(47)</sup>.

Without expressly rejecting the Canadian proportionality test as enunciated in **OAKES**<sup>(48)</sup> the learned Judge warned against fitting our analysis into the Canadian pattern<sup>(49)</sup>. The crux of the decision did however revolve around the proportionality test which exemplified much of **OAKES**<sup>(50)</sup>... :

<sup>(51)</sup> "The tests of reasonableness, justifiability and necessity are not identical, and in applying each of them individually one will not always get the same results. But in this particular instance reasonableness, justification and necessity may be looked at and assessed together"

In essence the rationale and purpose of the legislation was simply measured against the consequent harm of infringing the right. The

reverse burden was felt to be too onerous when weighed against Section 25 (2) and thus the State failed to justify its action. Effectively the proportionality prong prevailed despite the learned Judge's lengthy dicta stressing the so called principles of interpretation - and the importance of home grown traditions<sup>(52)</sup>. In summary, three major criticisms may be levelled at KENTRIDGE A J. Firstly despite his voluminous exposition of constitutional interpretation he failed to link these principles to the actual interpretation of Section 33<sup>(53)</sup>. It is respectfully submitted that Section 33 is the "engine room" of the interpretive process and I would therefore concur with Professor Davis that KENTRIDGE A J missed a golden opportunity to sketch the parameters of a judicial landscape instead of touching on tentative guideposts<sup>(54)</sup>. Instead the learned Judge echoed Section 1 of the Canadian Charter and sought refuge in proportionality<sup>(55)</sup>. Secondly, the learned Judge portrayed an overly tentative, cautious and restrictive approach by concluding ... :

<sup>(56)</sup> "It is important, I believe, to emphasise what this judgment does not decide. It does not decide that all statutory provisions which create presumptions in criminal cases are invalid. This court recognises that in some cases the prosecution may require reasonable presumptions to assist it in this task."

Finally and not totally divorced from this under inclusive tone is the omission to acknowledge the existence of the adopted sibling viz Section 33 (1) (b). Perhaps the learned Judge opined that the proportionality

prong had not been cleared and hence the State's attempt at justification had failed. It could be argued therefore, that any mention of the sibling would be irrelevant and the problem child issue should be dealt with at a later stage. With respect this argument has cemented an ethos of omission, neglect and a culture of procrastination when dealing with the affairs of the adopted sibling<sup>(57)</sup>.

**B. ACKNOWLEDGING, NEGLECTING BUT NOT DECIDING IN MAKWANYANE.**

In the death penalty case (MAKWANYANE) all eleven Judges concurred that the death penalty was unconstitutional<sup>(58)</sup>. Juxtaposed to such unanimity was the diverse and varied degrees of attention bestowed on Section 33(1)(b). The JUDGE PRESIDENT CHASKALSON acknowledged its existence, touched on its ancestry, severe domestic teething problems and questioned whether it should be viewed objectively, subjectively or both. Nevertheless he concluded as follows :-

<sup>(59)</sup> “ It is, however, not necessary to solve this problem in the present case. At the very least the provision evinces concern that, under the guise of limitation, the rights should not be taken away altogether.”

With respect one wonders what value such an acknowledgment has without attempting to provide some conceptual framework to nourish the problem child.

**ACKERMANN J.** felt it necessary to summarise **CHASKALSON's** views on Section 33(1)(b)<sup>(60)</sup>. With regard to the objective and subjective approach the learned Judge expressed a hint of disagreement over the Judge President's views regarding the objective approach<sup>(61)</sup>. In effect a summary, and a hint of criticism epitomised **ACKERMAN J's** neglect of the infant before concluding : -

<sup>(62)</sup> " in my view it is unnecessary in the present case to say anything at all about the meaning to be attached to this provision. Without the fullest exposition of, and argument on, inter alia, the German jurisprudence in this regard, I consider it undesirable to express any view on the subject."

**DIDCOTT J's dicta** regarding Section 33(1)(b) differed from his predecessors in two respects. Firstly despite the fact that "it is better I therefore feel, not to go into the question on this occasion, but to leave that open for consideration and decision on a different one when it has to be answered"<sup>(63)</sup>, the learned Judge could not resist a tentative prod at the infant. This arises from the following statement :-

<sup>(64)</sup> " Perhaps the essential content of the right to life is negated .....".

This is remarkable in light of the State's failure to meet the requirements of Section 33(1)(a) and (aa). The significance of this comment will be explored in greater detail at a later stage. Secondly, **DIDCOTT J.** progresses from **CHASKALSON's** superficial simplification of "rights not

being taken away altogether"<sup>(65)</sup> by conceding that Section 33(1)(b) is indeed a troubled and complex problem child. This is evident from the following dicta :-

<sup>(66)</sup> "Negating the essential content of a constitutional right is a concept less simple and clear than it may at first appear to be."

**KENTRIDGE A J** begins by concurring with the Judge President that " our decision in this case can be reached without requiring the Court to give an authoritative interpretation of that Clause"<sup>(67)</sup>. In contrast to **ACKERMAN J, KENTRIDGE A J** agrees that sufficient argument was heard to elicit some response<sup>(68)</sup>. In his generous acknowledgment of the infant the learned Judge favours an objective approach<sup>(69)</sup>. Effectively, his Lordship is concentrating on laws that apply for most people at most times and the use and enjoyment of same. Translated into the present scenario this would result in a convicted murderer's execution not negating the essential content of his right to life. After all viewed objectively most people were not convicted of murder and therefore their right to life remains intact<sup>(70)</sup>. Furthermore such law abiding citizens would enjoy an added dimension of safety and security on the annihilation of the accused. In essence this bizarre "juggling act" only serves to enhance the quality of our right to life only when a fellow human being is obliterated. Despite the extreme and irreversible plight of the executed felon the objective approach insists on focusing on "most other people". Another criticism linked to his Lordship's attachment to the objective approach is

the manner in which he dismisses the subjective approach<sup>(71)</sup>. In an attempt to justify his conclusion **KENTRIDGE A J** sketches a hypothetical situation of a prisoner serving a jail sentence for committing a serious crime. He then questions how this prisoner's right to freedom, to leave the country, or to pursue a livelihood anywhere in the national territory is not negated during his jail sentence<sup>(72)</sup>. Surely the duration of the imprisonment is the nub of the issue. His Lordship can hardly be advocating that a prisoner serving a twenty year jail sentence has been deprived of these rights on a permanent basis? With respect an answer of "yes" could have absurd and farcical consequences culminating in most necessary and justifiable State measures negating the essential content of a right. Furthermore it is submitted that the German decision in 86 Bverf GE 288 1992 provides the solution:

**" The State strikes at the very heart of human dignity if (it) treats the prisoner without regard to the development of his personality and strips him of ever regaining his freedom."<sup>(73)</sup>**

Further support appears in 45 Bverf GE :-

**" life imprisonment does not negate the essential content of the rights to human dignity, equality or personal freedom, so long as the individual has a reasonable prospect for parole and release based upon his good behaviour."<sup>(74)</sup>**

In other words life imprisonment without any chance of parole was held to be unconstitutional as the “very heart” of the right to human dignity was obliterated. Conversely a prisoner, or even a so called long term inmate would not have had the essential content of the right to freedom negated if his life sentence only spanned over a period of fifteen or twenty years<sup>(75)</sup>.

I am of the view that the dicta in this decision should be followed by our Constitutional Court. Furthermore, there may well be merit in the subjective approach despite KENTRIDGE A J's rejection of same<sup>(76)</sup>.

MAHOMED J. concurs with his predecessors that it is unnecessary to decide on the problem at present and the sibling's future should be left open<sup>(77)</sup>. He does however provide a germ of hope by elucidating on a third approach outside of the objective / subjective approaches. This so called relative approach could become a kernel concept in coping with Section 33 1 (b)<sup>(78)</sup>. My criticisms of MOHAMED J are twofold. Firstly he touches on, yet fails to elaborate on this approach:-

<sup>(79)</sup> “We have not heard proper argument on any of these distinctions which justify debate in the future in a proper case. I say no more.”

Furthermore the choice of the term "relative" has certain negative connotations which I will illuminate on during the course of my argument. It is submitted that a coherent development of the positive components of this school of thought possesses the potential to rescue the sibling from a premature demise.

Other Justices that hinted at launching a possible rescue of Section 33 (1) (b) were LANGA<sup>(80)</sup>, MADALA<sup>(81)</sup>, MOKGORO<sup>(82)</sup> and O' REGAN<sup>(83)</sup>. Despite no express acknowledgment of the sibling their emphasis on underlying values and ubuntu could be of great assistance to the infant.

KRIEGLER J. was content to treat Section 33(1)(b) in a manner not dissimilar from that of KENTRIDGE A J in the ZUMA<sup>(84)</sup> case. To justify his neglect the Judge emphasised proportionality before summarising the orphan's future:-

<sup>(85)</sup> "In respect thereof I express no opinion."

A prima facie reading of the final judgment reveals little. SACHS J. concurs with his brother's conclusion, emphasises proportionality and elaborates on values<sup>(86)</sup>. However on closer analysis I submit that the learned Judge has authoritatively acknowledged and supported a subjective approach to Section 33(1)(b) albeit disguised under a cloak of proportionality. Evidence of such includes: -

<sup>(87)</sup> "At its core, constitutionalism is about the protection and development of rights, not their extinction."

<sup>(88)</sup> "Even if one applies an objective approach in relation to the enjoyment of the right to life, namely, that the State is under a duty to create conditions to enable all persons to enjoy the right, in my view this cannot mean that the State's function can be extended to encompass complete, intentional and avoidable obliteration of any person's subjective right."

<sup>(88)</sup> "Thus, execution ceases to be a punishment of a human being in terms of a constitution, and becomes instead the obliteration of a sub human from the purview of the constitution."

**PROFESSOR DAVIS** opined prior to this Judgment regarding Section 33(1)(b) :-

<sup>(89)</sup> "It might thus be that the Constitutional Court will provide clearer guidelines as to the meaning of the phrase."

With respect the already murky waters surrounding the orphan have been clouded further by **CHASKALSON J** <sup>(91)</sup>, **KENTRIDGE A J** <sup>(92)</sup>, **ACKERMANN J** <sup>(93)</sup> and **KRIEGLER J** <sup>(94)</sup>. Despite no express recognition of the infant from **LANGA J** <sup>(95)</sup>, **MADALA J** <sup>(96)</sup>, **MOKGORO J** <sup>(97)</sup>, and **O'REGAN J** <sup>(98)</sup> it is submitted that their reference to ubuntu and values may contribute indirectly to his rescue. Perhaps the real key to his survival was presented by **DIDCOTT J** <sup>(99)</sup>, **MAHOMED J** <sup>(100)</sup> and **SACHS J** <sup>(101)</sup>.

I hope to develop their tentative arguments during the remainder of my discussion in order to keep the orphan afloat.

### C. **SUBSEQUENT CLARIFICATION ?**

Since **MAKWANYANE** <sup>(102)</sup> there have been a host of other judgments handed down by our Constitutional Court <sup>(103)</sup>. To date the constant bombardment of real life issues in Court has not comforted or consoled

the foreign infant<sup>(104)</sup>. Troubled by his past and left unresolved by the Constitutional Court his acclimatisation remains unrealised. In a tigerish effort to live he turns his attention to academic opinion - perhaps his last gasp?

## 5. **ARMING THE PAPER TIGER**

### A. **WITHOUT CLAWS**

From the foregoing discussion the following questions have arisen :-

Firstly, how fatal a flaw will the borrowed lineage prove to be? Secondly, is there any conceptual framework to assist interpretation? Of course the exploration of both questions remains futile if the infant is viewed as merely a figurehead or "paper tiger"<sup>(105)</sup>. Advocates of this school of thought justify their conclusion by focusing their enquiry predominantly on "the wonders of proportionality - Section 33(1)(a)" to the exclusion of the remainder of Section 33<sup>(106)</sup>. Nevertheless, despite his "paper tiger" conclusion **WOOLMAN** finds it necessary to question the lineage of the beast :-

<sup>(107)</sup> " At first blush the essential content prong looks to be the most troublesome element in a limitation clause test : most troublesome because it was untimely ripped from the German basic law and placed in an interim constitution which contains none of the basic law's particular safeguards ".

With respect, is there any point in delving back into a troubled childhood if the fully grown Section 33 1 (b) is predominantly a “paper tiger”? WOOLMAN's argument is three-tiered. Firstly, he alludes to the rareness of actually negating the essential content of a right <sup>(108)</sup>. Secondly, he emphasises the temporary nature of most right infringements<sup>(109)</sup> and thirdly he succumbs to the "wonders of proportionality" by concluding that:-

<sup>(110)</sup> “Most of these cases will require the careful analysis of closely balanced State and individual interests - and not a threshold determination about whether the essential content of the individual right has been negated.”

The following criticisms may be levelled at WOOLMAN's approach:-

Dealing simultaneously with his submissions, is there any merit in retiring the infant to figurehead status because most cases will be decided on proportionality? The major criticism is therefore the assumption that the limitation clause consists solely of Section 33 (1)(a) in practice. In MAKAWANYANE<sup>(111)</sup> of what assistance, if any, would this approach be if the proportionality prong had been cleared? In other words what if the Court had upheld the State's argument that the death penalty was reasonable and justifiable in a democratic country based on freedom and equality? It is therefore submitted that any conceptual guidelines pertaining to the interpretation of Section 33(1)(b) remain largely unexplored.

The second criticism stems from the rejection of the written word. It is trite law that Constitutional interpretation is sui generis rather than a slave to the archaic literalist principles of the interpretation of Statutes<sup>(112)</sup>. However, I am of the opinion that the inclusion of Section (33)(1)(b), albeit a problematic one, demands attention rather than abandonment. I would therefore concur with the following :-

<sup>(113)</sup> "This (WOOLMAN's) point of view, however, does not accord with the rules of interpretation of constitutions containing a bill of rights. These rules state that every word has to be given a meaning in order to define the intention of the framers, and to give life to the purpose and spirit of the constitution. The clause essential content should therefore be interpreted and not merely discarded."

It is submitted that the inclusion of a clawless "paper tiger" provision fraught with interpretative difficulties serves to enhance the appeal of proportionality. After all the temptation of discarding the complex infant becomes compelling when viewed against the proportionality prong.

## **B. WITH CLAWS**

I am of the view that Section 33(1)(b) is of seminal importance. However its questionable lineage has enhanced its interpretative complexity<sup>(114)</sup>. Consequently most attempts at moulding a conceptual framework remain

vague and unresolved<sup>(115)</sup>. Furthermore, a coherent limitation clause should exhibit and portray an internal equilibrium. One prong of the Clause (example Section 33(1)(a) should not therefore smother another (example Section 33(1)(b) ) simply because it is easier to decipher. It is therefore submitted that the domination of proportionality (Section 33(1)(a)) should be replaced by a harmonious and complimentary relationship between Sections 33 (1) (a) and (b). Pursuant to this end is the rejection of the "paper tiger" myth and the realisation that the infant's future demands interpretation<sup>(116)</sup>. Implicit in the development of a workable interpretative and conceptual framework is the caveat of duplication. Any interpretative framework must therefore be careful not to subrogate the negative components of proportionality into Section 33(1)(b). As DE VILLE and DE WAAL correctly submit this would be tantamount to a repetition or duplication of the proportionality prong<sup>(117)</sup>.

### **C. UPSIDE DOWN WITH CLAWS AND TEETH**

To date the most attractive option tendered to the orphan originate from Supreme Court Judgments <sup>(118)</sup>. In NORTJE<sup>(119)</sup> MARAIS J. offers a logically sound solution to the interpretative conundrum of Section 33(1)(b). However, before discussing his suggestion it must be noted that the learned Judge opines that the sibling is indeed too tightly strung therefore creating an insurmountable hurdle for the State or a bridge too far :-

<sup>(120)</sup> "It (section 33(1)(b) ) is a remarkable provision. In their understandable zeal to ensure that the fundamental rights conferred in chapter 3 remain undiluted as far as possible, the framers of the provision appear to have brought about a rigidity and inflexibility which society may come to regret. While acknowledging the need for some dilution where the interests of society require it, the framers of the provision have largely disabled the courts from responding to the need, by insisting that the essential content of the right shall not be negated."

Despite his Lordship's legitimate concern for the orphan he correctly acknowledges that

<sup>(121)</sup> "we are obliged to give effect to the provision as best we can."

This in itself is a commendable step towards acknowledging and interpreting the orphan rather than seeking refuge in the proportionality prong viz. Section 33(1)(a). Secondly, and most importantly, **MARAIS J.** provides a feasible suggestion towards the development of an interpretative "coping mechanism". His Lordship opines as follows :-

<sup>(122)</sup> "Relatively little consideration has been given to the question of whether that form of privilege negates the essential content of the right conferred by section 23. That, to me, should ordinarily be the first matter for

consideration. Not only because it would be pointless to examine such questions as reasonableness, justification in an open and democratic society based on freedom and equality, or even necessity, if the proposed limitation negates the essential content of the entrenched right."

In KHALA<sup>(123)</sup> MYBURGH J, expressly acknowledges this school of thought by commencing his analysis with Section 33(1)(b)<sup>(124)</sup>. In so doing his Lordship provides cogent support for the "upside - down" approach despite being ostensibly shackled by the proportionality hierarchy of Section 33(1)(a).

I respectfully submit that reversing the infant into the firing line is a logically sound contention. As MARAIS J correctly argues why wade through the proportionality prongs when the essential content of the right would have been negated anyway<sup>(125)</sup>? Furthermore, commencing with the inverted infant would force some of the reluctant Constitutional Court Judges to wrestle with the problem child.

#### D. UPSIDE DOWN WITH CLAWS, TEETH AND VALUES

Previously I argued that Constitutional Court Judges LANGA<sup>(126)</sup>, MADALA<sup>(127)</sup>, MOKGORO<sup>(128)</sup> AND O'REAGAN<sup>(129)</sup> had somehow provided a germ of hope for the sibling. I submit that their reference to values could have far reaching results for Section 33(1)(b) when read with

**MARAIS J's** submissions in **NORTJE** <sup>(130)</sup> and **MYBURGH J's** approach in **KHALA** <sup>(131)</sup>. I would therefore agree with **WOOLMAN** when he commented that "the content of a right is really no more than the values and practices the right is designed to support"<sup>(132)</sup>. Furthermore, **LOURENS** lends support to this submission by contending that "it seems necessary to define the borders of values in a democratic society as this lies the basis of the essential content clause"<sup>(133)</sup>. Despite recurring values like ubuntu, reconciliation, justification and the creation of a human rights culture each right should remain value specific. Sufficient flexibility should surround the interpretation of each right in every separate instance. To marry this value orientated approach with the inverted infant would, I submit, contribute to the resurrection of Section 33(1)(b). Furthermore the language of the infant is couched in clumsy legalese confounded further by the use of a negative viz. "shall not negate the essential content of a right". At first glance perhaps this explains why the drafters of the new working draft Constitution ostensibly omitted to include him<sup>(134)</sup>. However on closer analysis Section 35 (1) (b) appears to be the Constitutional Committee's version of revamping the infant<sup>(135)</sup>. With respect, instead of providing conceptual guidelines, the working draft appears to have armed the already vexed infant with a limitless myriad of personalities. The phrase "nature of the right" is as broad as it is imprecise lending the Constitutional Court Judges an opportunity to masquerade as "philosopher kings"<sup>(136)</sup>. This hazy numerus clausus would divert the interpretative process into an esoteric and philosophical debate

transforming the problem child into a disturbed and malleable misfit. There criticisms are confounded further by the working drafts continued reliance and support for the proportionality prong instead of commencing with an analysis of the actual right in question. The shortcomings inherent in Section 35 (1) (b) could be avoided by replacing the present version of Section 33(1)(b) with :-

**33 LIMITATION** - The rights entrenched in this chapter may be limited by law of general application provided that such limitation shall be permissible only to the extent that the core value (s) of each right remains:

- (i) intact;
- (ii) reasonable, and
- (iii) justifiable in an open and democratic society based on freedom and equality.

To avoid exchanging one poison for another I intend to revisit the death penalty case in order to "test drive" the revamped infant.

## **6. WRESTLING WITH THE REVAMPED INFANT**

### **A. A HYPOTHECAL TEST - REVISITING MAKWANYANE**

How would the Constitutional Court now interpret the revamped infant? Would the Court's decision now be drastically altered? The answer will unfold as **MAKWANYANE**<sup>(137)</sup> is revisited . Suffice to say at present that

the significance of the revamped orphan could stem more from its useful interpretative functioning and conceptual demarcation than from its result metamorphosis.

The application of a two-tiered approach would still set the interpretative process in motion. In other words has a right been infringed? If yes, then the onus shifts to the State to justify such intrusion. How would the application of Section 33 now function in light of its revamped nature? It is submitted that the first leg would encapsulate an analysis of the core value/s of the particular right. This would be a separate enquiry from ascertaining general values like ubuntu which would remain as constants or yardsticks. In identifying specific values inherent in the right to life it is vital to acknowledge a realistically orientated approach stressing values and their relationship with reality at the time of interpretation. **SMENDS'** <sup>(138)</sup> approach would be compatible with the following Judge's dicta in **MAKWANYANE** <sup>(139)</sup>, **LANGA** <sup>(140)</sup>, **MADALA** <sup>(141)</sup>, **MOKGORO** <sup>(142)</sup>, AND **O'REAGAN** <sup>(143)</sup> as much of their emphasis focuses on values. In addition, **SMENDS'** <sup>(144)</sup> approach also reconciles **WACHTLER's** <sup>(145)</sup> earlier caveat by acknowledging that values do not exist in a vacuum.

They are instead shaped by the constant bombardment of real life events with each unique contextual instance<sup>(146)</sup>. Critics of this approach like **BÖCKENFÖRDE** argue that "there is no sign as yet of either a rational justification for values, let alone an order of values, or a rationally recognisable and debatable system for weighting and ranking values....In

practical terms it serves as a cloak for case by case interpretation and adjudication"<sup>(147)</sup>. In order to avoid such pitfalls I submit that those engaged in interpreting specific values should not merely reach a decision and only then justify their conclusion by referring to apparent values. Instead they should begin by identifying and listing specific core value/s of a particular right. What specific core values underlie the right to life? Prior to MAKWANYANE<sup>(148)</sup>, RUDOLPH posed the identical question - "What human value is it that the right is designed to protect?"<sup>(149)</sup> His answer reflects a literal approach not dissimilar from SACHS' judgment in MAKWANYANE<sup>(150)</sup>"

"Being alive is in a sense, like being pregnant, you either are or you are not .... Right to life means the individual has the right to live and the right to breath and so the essential nature of the right to life is just that - being alive.. The value behind that right is that the all members of society have the right to live their lives until naturally their lives come to an end..<sup>(151)</sup>"

I would therefore submit that the specific values encapsulated would include the opportunity to function as a civilised human being, self respect, respect for human life and dignity, tolerance of others, ubuntu and reconciliation.

**(B) RENAMING THE INFANT**

Before renaming the sibling I would like to extend and elaborate on **MAHOMED J's** germ of hope. The learned Judge discussed a relative approach whose origins may be traced back to Germany<sup>(152)</sup>. In accordance with the German interpretation of this approach the emphasis is on values and the balancing of same <sup>(153)</sup>. Regrettably, the term relative approach smacks of the proportionality which as **DE VILLE** and **DE WAAL** correctly submit would be tantamount to duplication <sup>(154)</sup>. (See my previous discussion in this regard). However, despite potential shortcomings in name, Judge **MAHOMED** did provide a mould from which to launch the revamped infant:-

"By distinguishing the central core of the right from its peripheral outgrowth .. of not invading the core as distinct from the peripheral outgrowth."<sup>(155)</sup>

This approach could, I submit, provide the foundations for a successful revamping of the infant viz. (The new Section 33.) Perhaps the term "residual - value orientated approach" would assist in forging a working solution for the infant? Translating this residual approach into the revamped infant the question remains which (identified) core values remain intact? To assist in answering, a host of German writers provide an aftermath or hypothetical scenario <sup>(156)</sup>. They ask the question "What meaning will the right have to that particular person after it has been limited?"<sup>(157)</sup>

**KRÜGER** <sup>(158)</sup> submits that the underlying purpose of the right should still be intact after limitation whilst **STEIN** <sup>(159)</sup> argues that the bearers personality must still be capable of development. **DURIG's** <sup>(160)</sup> emphasis is on the maintenance and existence of human dignity.

It is respectfully submitted that not one of the core residual values identified earlier would remain intact if viewed subjectively. I would therefore concur with **PIEROTH** and **SCHLINK** <sup>(161)</sup>, **DIDCOTT J.** <sup>(162)</sup> (to a lesser extent), **MARAIS J** <sup>(163)</sup>, **SACHS J** <sup>(164)</sup>, **HENDRICKS**, **MOUNZ**, **STEIN**, **VON HIPPEL** <sup>(165)</sup>, **OLIVER** <sup>(166)</sup> and **CORBETT J** <sup>(167)</sup> that it is the individual whose rights or whose core values are threatened who is of paramount importance. Revisiting **MAKWANYANE** <sup>(168)</sup> in light of the revamped - residual infant, the failure of the State to leave intact sufficient Identified core values would complete the enquiry. Accordingly it would be unnecessary to assess Section 33 (ii) and (iii) and the death penalty would therefore fail to survive constitutional muster.

7. **CONCLUSION: "ADVANTAGES OF A REVAMPED - RESIDUAL ADULT?"**

Previously I argued that negating the essential content of a right was a vague, unexplored and unworkable concept. Failed opportunities to solidify the concept by real life bombardments in Court increased the chances of the infant's untimely demise<sup>(169)</sup>. The dangers inherent in such an unworkable limitation clause could include the possibility that due to

interpretative complexities the essential content of a right could become an insurmountable obstacle for the State rendering all rights absolute in practice. The brow of academic opinion concluded that the orphan was merely a "paper tiger" - figurehead of little significance<sup>(170)</sup>. This was despite the express albeit problematic "physical" presence of the infant. Furthermore the working draft of the Constitution's version (see Section 35(1)(b)) has succeeded in converting an already riddled concept into a maze of philosophical and esoteric permutations.

Elaborating on the germ of hope enunciated by LANGA J<sup>(171)</sup>,

MADALA J<sup>(172)</sup>, MOKGORO J<sup>(173)</sup>, O'REAGAN J<sup>(174)</sup>, DIDCOTT J<sup>(175)</sup>,

MAHOMED J<sup>(176)</sup>, SACHS<sup>(177)</sup>, and MARAIS J<sup>(178)</sup> I have attempted to marry and extend their submissions to incorporate a value - residual approach to interpretation.

In summary the advantages of such an approach would include:

- A THE CREATION AND DEVELOPMENT OF OUR OWN VALUES EPITOMISING A GENUINE "HOMEGROWN" QUALITY.
- B THE ESTABLISHMENT OF A BACKBONE OF COMPATIBILITY AND CONSISTENCY PERMEATING THROUGHOUT THE CONSTITUTION LINKING THE PREAMBLE, SECTION 35(1), THE REVAMPED SECTION 33(1)(a) AND THE POSTAMBLE.
- C THE EMPHASIS OF ASCERTAINABLE CORE RESIDUAL VALUES TO FACILITATE AND SIMPLIFY INTERPRETATION.

**D A HEALTHY AND SYMBIOTIC RELATIONSHIP BETWEEN VALUES AND PROPORTIONALITY COMMENCING WITH THE MOST VITAL ENQUIRY.**

**E THE TRANSFORMATION OF AN OTHERWISE DOOMED INFANT INTO A POROUS, TRANSPARENT, VALUE IMBIBING AND FUNCTIONAL ADULT.**

**In conclusion, it is hoped that the once "clawless paper tiger"<sup>(178)</sup> has achieved one goal during his traumatic existence. If only to provide a spring-board to spark future debate on the unsuitability and potentially fatal consequences of retaining complex borrowed provisions - "That legal theory and practice can still not give truly practical meaning to (the provision) after more than 40 years..."<sup>(180)</sup>**

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- 18 D Currie See note 13 Supra page 351; J De Waal See note 1 Supra page 19.
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- 27 See note 26 Supra especially 414 (A) - (D); 416 (D)-(E).
- 28 J De Waal See note 14 Supra at page 2.
- 29 S Woolman See note 20 Supra at page 63.
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## 10. **ABBREVIATIONS**

1	<b>ABA Journal</b>	<b>American Bar Association</b>
2	<b>AS</b>	<b>Annual Survey of South African Law</b>
3	<b>CILSA</b>	<b>Comparative and International Law Journal of Southern Africa</b>
4	<b>DR</b>	<b>De Rebus</b>
5	<b>SACC</b>	<b>South African Journal of Criminal Law and Criminology</b>
6	<b>SACJ</b>	<b>South African Journal of Criminal Justice</b>
7	<b>SAJHR</b>	<b>South African Journal of Human Rights</b>
8	<b>SALJ</b>	<b>South African Law Journal</b>
9	<b>STELL LR</b>	<b>Stellenbosch Law Review</b>
10	<b>THRHR</b>	<b>Tydskrif vir Hedendaagse Romeins - Hollands Reg.</b>

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