

**THE IMPACT AND INFLUENCE
OF THE
CONSTITUTIONAL COURT
IN THE
FORMATIVE YEARS
OF
DEMOCRACY IN SOUTH AFRICA**

by

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SUMMARY

Title of thesis:

The Impact and Influence of the Constitutional Court in the Formative Years of Democracy in South Africa

The objective of this thesis is to assess the impact and influence of South Africa's Constitutional Court in the first two years of our democracy. To achieve this objective, some of the definitive and controversial cases already decided by the Court have been selected and analysed in an attempt to glean some jurisprudential perspectives of the Court.

It focuses on the work of the Court over the past two years. It deals with the evolution of South Africa into a democracy, and analyzes the South African legal system prior to the beginning of the process of transformation. It briefly surveys the evolution of our constitutional system, dating back from the pre-1910 colonial period and provides a broad outline of the legal system in the post-April 1994 period of transformation.

It analyzes the Court from the point of view of, *inter alia*, its composition, jurisdiction and powers. The Court is also contrasted with courts in other jurisdictions which exercise full judicial review.

The Court's emerging jurisprudence is examined. A review is made, *inter alia*, of the Court's understanding of, and approach to, the questions of the values underpinning the post-apartheid society and its constitutional system, and constitutional interpretation.

The right against self-incrimination and South African company law and the two relevant Constitutional Court cases are discussed.

The collection of evidence by the State and the constitutionality of provisions relating to search and seizure and the taking of fingerprints are looked into.

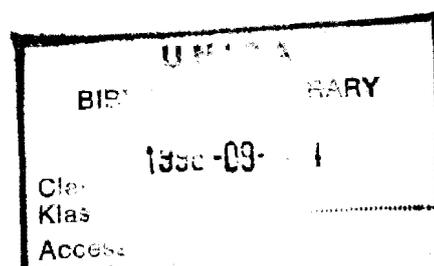
The Court's approach to statutory presumptions and criminal prosecutions; some aspects of our appeals procedures; an accused's right to be assisted by a lawyer at state expense; the question of a fair trial and access to information; capital punishment; corporal punishment; committal to prison for debt; and the certification of constitutions is analyzed.

Two of the cases in which the provinces clashed with the national government on the distribution of posers between provinces and the national government are discussed.

The conclusion is that the Court has, overall, hitherto acquitted itself well in the handling of particularly the controversial quasi-political questions that arose in the cases it has decided.

Key Terms:

A constitutional court
Constitutionalism
Parliamentary sovereignty
The franchise
The presumption of innocence
The right to a fair trial
The right to life
Capital punishment
Corporal punishment
Imprisonment for debt
Formal and substantive equality



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DEDICATION

*THIS THESIS IS DEDICATED TO THE MEMORY OF MY
MOTHER, **PRISCILLA THOKOZILE MADUNA**, WHO
UNFORTUNATELY DID NOT HAVE THE OPPORTUNITY
TO WITNESS THE BIRTH OF THE NEW SOUTH AFRICA.*

ACKNOWLEDGMENTS

The research that went into this thesis was a result of real boredom. After completing my studies for the Higher Diploma in Tax Law with the University of the Witwatersrand in 1994, I suddenly felt I had nothing, or very little, to do particularly in the evening in Cape Town where, as a Member of Parliament, I have to live for most of the year. I always use the pressure of studies to ensure that I keep sane after the hurly burly of daily political chores.

After discussion with a few of my friends in the academic world, I decided that I should carefully monitor the cases of the Constitutional Court, an innovation in our judicial system and certainly a first on the African continent. Thus was sown the seed of interest in the Court's work which has led to the completion of this thesis.

As a black, needless to say, I was a product of those familiar township conditions of deprivation and hopelessness. For this reason, I am profoundly and permanently indebted to my mother, **PRISCILLA THOKOZILE MADUNA**, who, though earning her livelihood as a charwoman, put so much store by education that she cajoled, encouraged and supported me in my endeavour to get an education. The saddest thing is that she did not live long enough to witness the conclusion of this work, my humble contribution to legal knowledge in my country.

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The final product is mine, with all its warts! The usual disclaimers therefore apply.

Penuell Mpapa Maduna
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INTRODUCTION

South Africa, then with a great potential for an unprecedented racial conflagration caused essentially by the system of apartheid, surprised itself and the world by eventually embarking upon a relatively peaceful transition from apartheid to a society governed on the basis of the will of the majority, irrespective of race and gender. Today, though the period of transition is still at its nascent stage, the country is governed at all three levels of government by men and women appropriately elected and mandated by the governed.

In addition, there are many fundamental constitutional changes that have taken place since the advent of non-racial and non-sexist democracy in South Africa. A political and constitutional miracle of ingenuity has been performed! A brief summary of some of these changes is provided hereunder.

The basic objective of this thesis is to assess the impact and influence of our Constitutional Court in the first two years, the formative years of our democracy that was ushered in by the (interim) **Constitution**¹ which came into effect on 27 April 1994. To achieve this objective, a few of the definitive, and in some instances somewhat controversial cases that have been dealt with and decided by the Constitutional Court since its inception have been selected and analysed in an attempt to glean some jurisprudential perspective of the Court. The Constitutional Court has, however, been in existence for a period which is now a little longer than two years, which, to plagiarise some of the work of Dennis Davis,² "is too short a period in which to formulate a coherent jurisprudential framework which might assist in characterizing the work of the court. A longer run of cases is required before we shall understand the jurisprudence of the Chaskalson court."

It needs to be emphasised that the thesis focuses on the work of the Constitutional Court and other Courts over the past two years not only because at the time of concluding it there were no cases decided under the new **Constitution**, but precisely because I regard the first two years of the existence of the Constitutional Court as critical in the development of our nascent non-racial and non-sexist democracy based on liberty and equality.

Though, as stated above, the basic objective of this thesis is to analyse and discuss our constitutional court and its impact and influence on our legal system in the course of the development of our democracy, the broader aspects of constitutional change, within which the constitutional court exists and functions, will be gone into as well.

CONSTITUTIONAL CHANGES

The process of constitutional transformation in South Africa brought in its train many fundamental changes which ushered in a united, democratic, non-racial and non-sexist society based on equality and liberty. Some of these are the following:

A NEW GRUNDNORM

One of the fundamental constitutional changes was the departure from parliamentary sovereignty³ to a constitutional state predicated upon constitutional supremacy.⁴ Thus, today, Parliament itself can make no law, and the executive (and the administration) can take no action or decision, or perform any act, which is at variance with the **Constitution**.

In the new era, South African courts, particularly the new Constitutional Court, are destined to play an important role with regard to constitutional validity and the protection of human rights. Danie Olivier, then Vice President of the Transvaal Law Society, quite correctly observed that:

Die begrip van 'n Konstitusionele Hof is vreemd in Suid-Afrika. Vóór 27 April het Parlement in Suid-Afrika die absolute mag gehad om wette te maak soos wat hy

mag beslis. Buiten vir 'n paar uitsonderings kon geen hof uitspraak lewer oor die geldigheid van 'n wet van die Parlement nie.

"Maar sedert die verkiesing kan 'n hof wel uitspraak gee oor die geldigheid van wette. Verskeie faktore kan deur die hof in ag geneem word, soos of die wet inbreuk maak op iemand se fundamentele regte.⁵

The era where Parliament could make any encroachment it chose upon the life, liberty or property or any individual subject to its sway, where the role of the courts was confined to enforcing its will, is gone for ever.⁶ A new constitutional order has been born, and, as Langa J put it,

[o]ne of the implications of the new order is that old rules and practices can no longer be taken for granted; they must be subjected to constant re-assessment to bring them into line with the provisions of the Constitution.⁷

A CHAPTER ON FUNDAMENTAL RIGHTS

Another important change was the adoption of a chapter on fundamental rights which is binding upon all legislative and executive organs of state at all levels of government.⁸ This chapter, the provisions of which were not absolute,⁹ applied to all law in force and all administrative decisions taken and acts performed during the period of operation of the (interim) **Constitution**,¹⁰ and no law, whether a rule of the common law, customary law or legislation, could limit any of the rights encapsulated and entrenched therein.¹¹ Where, and to the extent that the nature of the rights contained in the chapter permitted, the rights were available to juristic persons as well,¹² while appropriate measures designed to prohibit unfair discrimination by bodies and persons other than the legislatures and the executive at all levels of government were not precluded.¹³

LOCUS STANDI IN IUDICIO

Of particular note is that our law on *locus standi in iudicio* has been fundamentally impacted upon. Whereas prior to the coming into operation of the **Constitution**,¹⁴ only a person with a peculiarly personal interest in a matter could approach our courts for relief, today any person acting on his or her own interest,¹⁵ or an association acting in the interest of its own members,¹⁶ or a person acting on behalf of another person or other persons who is/are not in a position to seek such relief in his or her or their own

name/s,¹⁷ or a person acting as a member of or in the interest of a group or class of persons,¹⁸ or even a person acting purely in the public interest,¹⁹ is entitled to approach a competent court of law for appropriate relief, which may include a declaration of rights, in the face of an actual or threatened infringement of any of the rights contained in the chapter on fundamental rights. Thus, under the **Constitution**, the institutions of justice would be much more accessible to the ordinary person and class actions would be available in South Africa at long last.

NEW ENFORCEMENT MECHANISMS

In addition to the courts, new human rights enforcement mechanisms, namely the office of a Public Protector,²⁰ a Human Rights Commission,²¹ a Commission on Gender Equality²² and a constitutional court,²³ were established.

APPOINTMENT OF JUDGES

Prior to the coming into operation of the interim **Constitution** South African judges were appointed by the President.²⁴ Today, however, they are appointed differently: The **Constitution** established a special machinery, the Judicial Service Commission²⁵ which makes recommendations regarding, *inter alia*, the appointment of judges of the Supreme Court.²⁶ Thus, today, fit and proper persons are appointed judges of the Supreme Court of South Africa by the President acting on the advice of the Judicial Service Commission.²⁷ A fit and proper person is appointed a Chief Justice of the Supreme Court of South Africa by the President in consultation with the Cabinet and after consultation with the Judicial Service Commission.²⁸

JUDICIAL REVIEW

A provincial or local division of the Supreme Court today has, in addition to its constitutionally guaranteed inherent jurisdiction,²⁹ full powers of judicial review within its area of jurisdiction.³⁰ Moreover, in certain circumstances, a provincial or local division of the Supreme Court may hear evidence on issues falling within the exclusive jurisdiction of the Constitutional Court before referring them to the latter court.³¹

THE IDEA OF A CONSTITUTIONAL COURT

The emergence of the South African Constitutional Court was preceded and accompanied by a very interesting debate in political as well as legal circles. The initial debate took place in a particular context, where South Africa could not be described as a democracy by any stretch of the imagination. To paraphrase John Dugard, it could be aptly described as a pigmentocracy in which all political power was vested in a white oligarchy which was controlled by an Afrikaner elite.³²

The judiciary, which at that stage was drawn solely from the white minority,³³ was in many circles justifiably regarded as a handmaiden of the system of apartheid. It was at that stage that lawyers such as Anton Lubowski concluded that our Appeal Court had in various areas, but especially in that of administrative law, acted as an arm of the National Party and had become part and parcel of the oppression of the black majority.³⁴ As Dugard had previously pointed out, our judiciary, whether they supported the National Party and its regime or not, had one basic premise in common - loyalty to the *status quo ante*.³⁵

In a nutshell, our debate about the constitutional court was, as was the case in continental Europe, informed by intense distrust of the judiciary that would be inherited from the *ancien regime*. Like in continental Europe after World War II,³⁶ it was unthinkable in anti-apartheid struggle circles that a judiciary inherited from the apartheid regime would exercise full and untrammelled judicial review. Joe Slovo, in an unpublished address to the South African Legal Defence Fund dinner held in Johannesburg on 6 November 1992, at 8, pithily pointed out that

for us, it is inconceivable that the judiciary as at present constituted can ever be the guardian of the new Constitution, the ultimate guardian of the rights of South Africa's citizens. Its long history as an institutionalised pillar of the apartheid regime makes it unfit to play this kind of role. It is for this reason that we are proposing that South Africa should have a Constitutional Court which must be the guardian of the Constitution and the final arbiter of all constitutional and Bill of Rights matters. For such a court to enjoy legitimacy it will have to be differently constituted from the present judiciary. The South African Law Commission and the South African government also propose a Constitutional Court but they see it simply as an extension of the existing Appellate Division. This is totally unacceptable. In our view a Constitutional Court will have to be completely independent of the present Appellate Division ... It must be seen from the very inception that this Constitutional Court is a court with a difference

committed to the preservation of the human rights of all South Africans - and not the privileges of a few.

In the course of this debate the concept of a constitutional court for South Africa obviously had both proponents and opponents.

Proponents of a Constitutional Court

Among those persons who proposed that South Africa should have a constitutional court was Joe Slovo who advocated a constitutional court completely separate from the Supreme Court.³⁷ John Dugard, arguing that a case could be made out for a special constitutional court consisting of judges and lawyers who are capable of exercising review powers, similarly pointed out that as all South African judges were white, they inevitably, consciously or sub-consciously, reflected the racial attitudes of the white community. In addition, their legal education and training rendered them 'psychologically incapable of the value-oriented, quasi-political functions involved in judicial review'.³⁸

On an earlier occasion, at the Symposium on a Bill of Rights for South Africa held at the University of Pretoria on 1-2 May 1986, Arthur Chaskalson, who was destined to become the first President of the South African Constitutional Court, had said that:

... the power to enforce the bill of rights should be vested in a court. The judiciary in South Africa is presently an all-white judiciary. If the court enforcing a bill of rights is to enjoy the support of the population as a whole, it must reflect the values of all sections of the population and not merely the section which for so long has been the dominant group. This may be achieved more easily by the appointment of a special constitutional court. And although I am in principle opposed to the institution of special courts, and normally favour the vesting of all judicial powers in the ordinary courts of the land, I would favour it in this case. I think that in the peculiar circumstances of South Africa the special court may, in fact, turn out to be necessary.³⁹

Anton Lubowski proposed "a special constitutional court that would decide only questions arising from the constitution or a Bill of Rights. If such questions arose in the context of an ordinary court case, they would have to be referred to the constitutional court for a ruling. Such a court might occupy a quasi-political position, and it could be composed of legally trained judges along with judges from other areas of expertise."⁴⁰

Penuell Maduna also expressed himself on this concept. He suggested that

[t]he process of building the new nation and fashioning its institutions, structures, and values is an integral part of the struggle to eradicate the apartheid system, which is a negation of all individual rights and freedoms. As the struggle continues, the new judicial cadre, which has not soiled its hands by agreeing to serve the cause of the apartheid tyrants, will emerge. Then, and only then, will our people cease to wonder who can be entrusted with the power of judicial review and given the honorable title of protector of the will of the people.

It may be worthwhile to study the operation and functions of constitutional courts which, in some countries, employ non-lawyers.⁴¹

Subsequently, Maduna also said that

[t]he ANC is fully committed to a constitutionally entrenched and justiciable Bill of Rights. We have a problem, however, with the (SA Law) Commission's apparent assumption that the enforcement of the Bill of Rights will be the responsibility of the 'Supreme Court of the Republic of South Africa'. If this implies continuity of the current judiciary which has done everything to discredit itself and legality in the eyes of the majority of South Africans, we wonder if the oppressed will lend their support to the project. We would suggest that we either look for alternative enforcement mechanisms, such as a Constitutional Court (which will comprise both lawyers and lay people), or that we indeed have a fully representative and non-racial judiciary the basic thrust of which will be directed towards seeing that justice is done.⁴²

In its perspective of a future democratic South Africa, the African National Congress (ANC) made provision for a constitutional court.⁴³ It suggested that such a court, which would draw on the experiences and talents of the whole population, could be appointed by the President (of the Republic) on the recommendations of a judicial service commission or by other methods acceptable in a democracy and should be composed of judges, legal practitioners and academics.⁴⁴

Lastly, Nicholas RL Haysom also proposed a constitutional court for South Africa that would help obviate a role of judicial review for a judiciary that would be stalked by the stigma of apartheid for a long time to come.⁴⁵ As can be seen from all this, uppermost in the minds of all the proponents of a constitutional court for South Africa was the need to produce a non-racial, representative judiciary that would be granted the awesome power of constitutional review.

Opponents of a Constitutional Court

One of the ironies of our times is that an erstwhile ardent opponent of the constitutional court, John Didcott, was appointed one of its eleven judges when it was established. Commenting on this idea at the 1986 University of Pretoria Symposium on a Bill of Rights for South Africa, the learned judge had said:

[i]t is suggested sometimes that litigation under a bill of rights should be entrusted to a specially created constitutional court dealing with such matters alone. I do not like the idea in the least, I must say, for this country at all events. Issues concerning a bill of rights often have a strong political flavour. Often they are politically controversial. They have political consequences. Appointments on political grounds to a special constitutional court would surely prove to be likelier in those circumstances than politically inspired appointments to the ordinary courts of the land, where the need for judges with experience of and expertise in the daily round of litigation, much of it highly sophisticated, serves as a filter a good deal of the time. Nor would it be the end of the problem to devise a system which met satisfactorily the danger of political appointments. One would be left with the unhealthy situation in which, because the constitutional court did nothing but work noticeably political, the public suspected its decisions, imputing political reasons to and looking for political motives behind such. It would tend to be distrusted, one fears in short, much more than the ordinary courts. For litigation involving a bill of rights to be kept within the mainstream of the judicial process would, I feel sure, be much better.⁴⁶

The South African Law Commission initially rejected the idea of a constitutional court on the pretext that it would "be distrusted as a loaded or political court".⁴⁷ Idolizing, and extolling the virtues of, the Supreme Court in the face of overwhelming evidence to the contrary, the Commission, instead, claimed that the public would have a large measure of confidence in the courts it already knew.⁴⁸

However, the Commission subsequently came round to accepting the need for a special constitutional court.⁴⁹ It conceded, albeit grudgingly, that such a court would be a proper tribunal for declaring invalid all legislation and executive or administrative acts which violated a bill of rights. It proposed that the constitutional court should be "a fully fledged Chamber of the Appellate Division of the Supreme Court."⁵⁰ As such, the constitutional court would deal with appeals in constitutional questions adjudicated upon by the lower courts in the ordinary manner. Such appeals would be referred to the constitutional court by the Chief Justice if he was of the opinion that they solely or predominantly involved constitutional disputes.⁵¹

THE SITUATION TODAY

Today South Africa has a constitutional court. As stated above, its impact upon our legal system and its influence upon the development of democracy in South Africa will constitute the primary objective of this thesis. The basic thrust of this exercise will be directed towards an analysis of some of the most important decisions the court has made since its inception. Wherever possible and necessary, an attempt will be made to contrast the relevant court's decisions with decisions of courts in other jurisdictions on similar issues.

For this purpose, the thesis is divided into the following chapters:

Chapter 1, which deals in brief with the evolution of South Africa into a democracy. The first portion of this chapter grapples with the basics of the South African legal system prior to the beginning of the process of transformation. A brief survey of the evolution of our constitutional system, dating back from the pre-1910 colonial period through Union as well as the apartheid-based Republic of South Africa established in 1961 and its bantustan satellites as well as its self-governing territories, is provided. The second part gives a broad outline of the legal system in the post-April 1994 period of transformation, which, as was stated above, was ushered in by the (interim) **Constitution**.

Chapter 2 analyses the Constitutional Court from the point of view of, *inter alia*, its composition, jurisdiction and powers. The court is also contrasted with similar courts in other jurisdictions. The Court is further contrasted with the supreme courts of Canada and the United States which also exercise full judicial review.

Chapter 3 looks at the Constitutional Court from the point of view of its emerging jurisprudence. For this purpose, the Court's understanding of, and approach to, the question of the values, including "African values such as *ubuntu*", underpinning the post-apartheid society and its constitutional system is first looked into. In this regard, a case is made that the **Constitution** allowed the Court and, in effect, all our other

Courts, a *locus* of open-ended values and invited them to embrace substantive reasoning in reaching their decisions.

After that, the “values” are contrasted with “natural law”, taking into account the views expressed by some of the judges of the Constitutional Court. The conclusion reached in this regard is that the Court was referring not to some platonic ideals, but to the values of South African society as encapsulated in the **Constitution** and our law.

The next issue considered in this chapter is the issue of constitutional interpretation, which is contrasted with that of ordinary interpretation of statutes. It is, *inter alia*, emphasised that under the new constitutional system, where the **Constitution**, and not the Legislature, is supreme, it is no longer proper to be trying to decipher the subjective intention of the latter; our Courts are now required to determine the purpose of the law being interpreted, be it the **Constitution** or some other ordinary statute. For this reason, the conclusion is reached that there is basically no material difference between the interpretation of ordinary statutes and constitutional interpretation.

A brief look is also taken at how our Courts, including the Constitutional Court, have grappled with the place and role of comparable foreign case law. The conclusion reached is that comparable foreign case law does not constitute canonical texts or formal reasons for the decisions of our Courts and must be approached with circumspection because of the difference between our new constitutional system and those of various other jurisdictions.

The way some of our Courts and the Constitutional Court’s various judges looked at the verticality-horizontality dichotomy is then considered. The conclusion reached is that this question has since been settled by the Constitutional Assembly in favour of a horizontal application of the new Bill of Rights “if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.”⁵²

The last but one issue looked into is whether or not our statutes have any retrospective application under the new constitutional system. The conclusion reached after a careful

scrutiny of the Constitutional Court's view is that our common law in this regard has not undergone any fundamental metamorphosis in this regard.

Last but not least, the issue of equality before the law is looked at from the point of view of some of our courts. The views expressed by our Courts in this regard bring one to the conclusion that to some of our judges the question of equality turns on something much more fundamental than "an abstract, formal equality which prescribes equal treatment of individuals regardless of their actual circumstances",⁵³ which "is blind to entrenched, structural inequality."⁵⁴ At the same time, to others, mere formal equality suffices. I spelt out my own personal predilection, namely that both forms of equality are, or should be, applicable.

Chapter 4 deals with the now constitutionally guaranteed right against self-incrimination and our company law. This was done because in the two Constitutional Court cases discussed in this chapter, namely **Ferreira v Levin NO and Others**; and **Vryenhoek and Others v Powell NO and Others**,⁵⁵ and **Bernstein and Others v Bester NO and Others**,⁵⁶ the gist of the issue was the effect of certain provisions of the **Companies Act**⁵⁷ on the right against self-incrimination, though in both instances the applicants were not accused persons as envisaged in Section 25(3) of the (interim) **Constitution**. In my view the Court correctly held that the phrase "... and any answer to any such question may thereafter be used in evidence against him" in the relevant provisions was in conflict with the (interim) **Constitution**.

The views of some of the judges of the Constitutional Court on the issue of standing are also discussed. Needless to say, I agree with Chaskalson P that the Courts have to adopt a broader approach to the issue of standing, which accords with the Courts' mandate to uphold the **Constitution**.

Chapter 5 too deals with the right to a fair trial as guaranteed in our new constitutional order and collection of evidence by the State. The constitutionality of questions such as provisions relating to search and seizure, and the taking of fingerprints, is looked into. For this purpose, decisions of both the Supreme Court (as it then was referred to) and the Constitutional Court are analysed. The conclusion reached is that it is better to

leave the question of the admissibility of evidence gathered in violation of the rights of an accused person to the discretion of trial officers who are better situated to assess the impact of such evidence on the substantive fairness of each trial.

Chapter 6 involves an analysis of the way the Constitutional Court grappled with certain statutory presumptions which worked in favour of the State in criminal prosecutions. The starting point in the chapter is an analysis of the presumption of innocence, an old integral component of our criminal justice system which has since been accorded constitutional recognition and protection; the presumption of innocence is contrasted with the relevant statutory presumptions the validity of which was raised in the cases discussed therein.

The first case dealt with in this instance is that of **S v Zuma and Others**,⁵⁸ in which the Constitutional Court quite correctly held that the presumption in the provisions of Section 217(1)(b)(ii) of the **Criminal Procedure Act** was inconsistent with the (interim) **Constitution** and therefore invalid. The next one is that of **S v Mhlungu and Others**,⁵⁹ where, in addition to reaffirming its decision in **Zuma**, the Constitutional Court held that *in casu* the (interim) **Constitution** applied retrospectively. The position of the Court regarding statutory presumptions in general is also analysed.

Then a cluster of cases dealing with the validity of certain provisions of the **Drugs and Drug Trafficking Act**,⁶⁰ starting with the Constitutional Court's decision in **S v Bhulwana; S v Gwadiso**.⁶¹ While my conclusion is that the Court correctly held that the relevant provisions were in conflict with the (interim) **Constitution**, I am unreservedly critical of its tendency to concentrate only on what it has been called upon to decide when it is convenient to do so. I show through subsequent cases that if it had in **Bhulwana** dealt with all similarly worded presumptions in Section 21 of the Act, it would have been unnecessary to revisit the issue.

The last reverse *onus* presumption dealt with is that contained in Section 40(1) of the **Arms and Ammunition Act**,⁶² in terms of which the presumption of possession by an occupant arose from proof that a relevant article had at any time been on or in such

premises. I fully accept the Constitutional Court's decision that the said provisions were in conflict with the (interim) **Constitution**.

In sum, in respect of all the reverse *onus* presumptions the Constitutional Court, the position of our common law⁶³ has basically been reinstated. However, as the chapter shows, I am indeed critical of the Court's cautious and narrow approach and preference to deal with each of the similarly worded reverse *onus* presumptions.

In Chapter 7 an analysis of two cases, namely **S v Ntuli**,⁶⁴ and **S v Rens**,⁶⁵ in which the Constitutional Court dealt with the constitutional validity of some aspects of our appeals procedures, is done. This, in each case, follows the state of the law prior to the intervention of the Court.

While I accept the Court's ruling in **S v Ntuli**, I am unreservedly critical of its failure to deal once and for all time with the provisions of Section 305 of the **Criminal Procedure Act** which have the same discriminatory effect as the successfully impugned provisions of Section 309(4)(a) of the Act. This was yet another instance where the Court, presumably because of its tendency to be cautious, left an obvious element of unconstitutionality for future determination merely because it had not been called upon to deal with it.

I fully accept the ruling by Madala J in **S v Rens**. An absolute right of appeal, which, in any event, was not envisaged in the (interim) **Constitution**, would compound cumbersome work, and increase the load, of our appeal courts, thus unjustly delaying the conclusion of even worthy cases.

Chapter 8 deals with the Constitutional Court's approach to an indigent accused person's right to be assisted by a lawyer at state expense "where substantial injustice would otherwise result".⁶⁶ Before discussing the Court's ruling in **S v Vermaas; S v Du Plessis**,⁶⁷ a brief discussion of the state of the law and an analysis of some of our judgments prior to the commencement of the (interim) **Constitution** are indulged in.

While I lament the fact that the Court, and Didcott J in particular, missed the very first opportunity to address one of the major flaws in our legal system, I accept that it is probably better to leave at the discretion of the trial court the decision as to whether in a particular case "substantial injustice would otherwise result" if an indigent accused person is not represented by a lawyer at state expense. However, cases subsequent to the Court's decision in **S v Vermaas; S v Du Plessis** demonstrate the problems and controversies that might ensue as the Courts begin to exercise their discretion in this regard.

Chapter 9 deals with the Constitutional Court's approach to the question of a fair trial and access to information. An analysis is done of the way the Court handled the special common law privilege⁶⁸ which operated in favour of the State and in terms of which, in general, an accused person had no right of access to information in the possession of the State which was relevant to his or her case.

The Constitutional Court, in **Shabalala and Others v Attorney-General of the Transvaal and Another**,⁶⁹ whilst rejecting the special common law privilege in favour of the State, which was confirmed by the Appellate Division in **R v Steyn**,⁷⁰ correctly held that the accused does not have a blanket right of access to relevant information and State witnesses. The matter is now left to the trial court which is required in each case to balance the accused person's right to a fair trial against the legitimate interests of the State and, exercising its discretion, to decide whether to grant or deny the accused such access. In view of the Court's decision where the State refuses an accused person access to relevant information in its possession or to State witnesses, our Courts should decide objectively whether or not to use their discretion in favour of such an accused person.

A critical view is taken of the Court's suggestion that the whole question turns solely on the right to a fair trial, and the apparent relegation of the right to access to information to a lesser status.

Chapter 10 involves an analysis of the way the Constitutional Court dealt with the thorny issue of the death penalty in **S v Makwanyane and Another**.⁷¹ The chapter first

looks at how each of the judges who delivered their own judgments arrived at the conclusion that the death penalty was in conflict with the (interim) **Constitution**. In this regard, it is interesting that, whilst for Chaskalson P the death penalty was unconstitutional primarily because it was a form of "cruel, inhuman or degrading treatment or punishment", for many of the judges who concurred in his judgment it was unconstitutional primarily because it violated the constitutionally guaranteed right to life.

Secondly, the chapter looks at the inexplicable way the otherwise cautious Court was prepared to go beyond what it was called upon *in casu* to deal with, namely the constitutionality of the provisions of Section 277(1)(a) of the **Criminal Procedure Act**.⁷² While I accept this decision, I am needless to say critical of the Court's reluctance to go the whole hog and declare the whole death penalty unconstitutional instead of limiting its order to the provisions of Section 277(1)(a), (c), (d), (e) and (f) of the Act.

Chapter 11 deals with the way the Constitutional Court handled corporal punishment in **S v Williams**.⁷³ I note with regret that Langa J decided not to follow the Court's approach in **Makwanyane** and declare that corporal punishment in its entirety as sanctioned by our law is unconstitutional precisely for the reasons the Learned Judge gave in his judgment. Instead, the Learned Judge ignored even the views many of our judges had expressed on this question and the human rights jurisprudence that has accumulated in neighbouring states on it, and preferred to concentrate on what the Court had been called upon to decide, namely whether juvenile whipping was consistent with the (interim) **Constitution**. The chapter then demonstrates the absurdity this cautious and narrow approach unavoidably leads to.

Chapter 12 analyses the Constitutional Court's decision in **Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others**,⁷⁴ in which it declared committal to prison for debt unconstitutional and therefore invalid. The chapter, *inter alia*, looks at the application of the two-stage approach to constitutional adjudication, as well as the question of severability as it arose *in casu*. The chapter then looks at the debt collection system in the aftermath of the Court's decision that the arrest and incarceration of persons for

contempt of court arising solely from failure to comply with a court order *ad pecuniam solvendam* was unconstitutional and therefore invalid.

Chapter 13 looks at two of the cases in which the provinces clashed with the national government on the distribution of powers between provinces and the national government. While in the one case⁷⁵ the applicants achieved a pyrrhic victory, in the other one⁷⁶ the applicants were not successful at all. The two cases are instructive as they deal, *inter alia*, with the Constitutional Court's approach to the thorny issues of the nature of the South African state, the place of our provinces in the polity and the distribution of powers between the provinces and the national government.

The last chapter, Chapter 14, deals with the Constitutional Courts's approach to its work pertaining to the certification of two constitutions, namely the Constitution of the Province of KwaZulu-Natal⁷⁷ and the new **Constitution of the Republic of South Africa**.⁷⁸ The two cases where certification of constitutions was involved were instances where the Court dealt with critical issues that were not necessarily concerned with the Chapter on Fundamental Rights.

In both instances the salient features are analysed. The conclusion arrived at is that the Court acquitted itself well in handling the controversial quasi-political questions that arose in both cases.

ENDNOTES - INTRODUCTION

1. The **Constitution of the Republic of South Africa**, 200 of 1993 (hereinafter referred to as the **Constitution**). In all the chapters of this thesis as well as in the conclusion, wherever and whenever "the **Constitution**" is referred to, unless it is expressly stated or it is clear from the context, the **Constitution** referred to shall be the interim **Constitution**, during the life of which the work of the Constitutional Court being dealt with herein was done.

2.. 'The Underlying Theory that Informs the Wording of Our Bill of Rights', in (1996) 113 **The South African Law Journal (SALJ)** 385.

3.. Due to this, Parliament could make laws on any subject it pleased and no court of law could inquire into the validity of any act of Parliament except one which affected the equal language rights of Afrikaans and English; even then, the court could only inquire whether Parliament had followed the correct procedure.

According to Heinz Klug 'Historical Background' in Mathew Chaskalson, Janet Kentridge, Jonathan Klaaren, Gilbert Marcus, Derek Spitz and Stuart Woolman **Constitutional Law of South Africa** (Juta & Co, Cape Town, 1996) at 2-1, "... it was the rise and dominance of parliamentary sovereignty that shaped South Africa's modern constitutional history. Consensus on the adoption of a justiciable Constitution, as one of the defining features of a democratic South Africa, may be understood as a response to the historical experience of parliamentary sovereignty in the Apartheid era."

4.. In terms of Section 4(1) and (2) of the (interim) the **Constitution**, which was binding upon all legislative, executive and judicial organs of state at all levels of government, was the first ever supreme law of the Republic and any law or act inconsistent with its provisions should, unless otherwise provided expressly or by necessary implication in it, to the extent of the inconsistency, be of no force and effect to the extent of the inconsistency.

5.. See "*Suid-Afrika het vir Eerste Keer só 'n Hof*", in **Beeld** July 27 1994.

6.. See **Sachs v Minister of Justice**, 1934 AD 11 at 37 and **Nxasana v Minister of Justice and Another**, 1976 (3) SA 745 (D) at 747-8 on how judges generally perceived their judicial impotence and role in the past.

7.. In **S v Williams and Others**, 1995 (7) BCLR 861 (CC) at 866F, paragraph 8.

8.. Section 7(1) of the **Constitution**.

9.. Each of the rights contained in this chapter is subject to Section 33(1), the limitation clause of the **Constitution**.

10.. Section 7(2) of the **Constitution**.

11.. Section 33(2) of the **Constitution**.

12.. Section 7(3) of the **Constitution**.

13.. Section 33(4) of the **Constitution**.

14.. In terms of Section 251(1) of the **Constitution**, it came into operation on 27 April 1994.

15.. Section 7(4)(b)(i) of the **Constitution**.

16.. Section 7(4)(b)(ii) of the **Constitution**.

17.. Section 7(4)(b)(iii) of the **Constitution**.

- 18.. Section 7(4)(b)(iv) of the **Constitution**.
- 19.. Section 7(4)(b)(v) of the **Constitution**.
- 20.. Section 110(1) of the **Constitution**.
- 21.. Section 115(1) of the **Constitution**.
- 22.. Section 119(1) of the **Constitution**.
- 23.. Section 98(1) of the **Constitution**.
- 24.. See Section 10 of **Supreme Court Act**, Number 59 of 1959.
- 25.. Section 105(1) of the **Constitution**. In an article entitled "*Court in the Act*", in the **Finance Week**, June 2-8 1994, at 14, the Judicial Service Commission was described as the most important body to regulate the administration of justice and as a welcome departure from the past practice of ministerial authority which was unknown to have allowed political appointments to the bench.
- 26.. Section 105(2)(a) of the **Constitution**.
- 27.. Section 104(1) of the **Constitution**.
- 28.. Section 97(1) of the **Constitution**.
- 29.. Section 101(2) of the **Constitution**.
- 30.. Section 101(3) and (4) of the **Constitution**. Note, however, that, in terms of Section 101(3)(c), Acts of Parliament are specifically excluded from the jurisdiction of the Supreme Court, though Section 101(6), subject to Section 102(12), allows the Supreme Court to adjudicate upon any other matters if parties thereto agree to its jurisdiction. Note further that in terms of Section 101(5), the Appellate Division of the Supreme Court has no jurisdiction over matters falling within the exclusive jurisdiction of the Constitutional Court; even where a constitutional issue reaches it by way of appeal, it is required under Section 102(6) to refer it to the Constitutional Court for its decision, unless it can dispose of the appeal without dealing with the constitutional issue, in which event the provisions of Section 102(5) become operative.
- 31.. Section 102(1) of the **Constitution**.
- 32.. See John Dugard, **Human Rights and the South African Legal Order** (Princeton University Press, Princeton, New Jersey, 1978), at 7.
- 33.. C Forsyth, **In Danger for Their Talents: A Study of the Appellate Division of the Supreme Court of South Africa 1950-1980** (Juta & Co, Cape Town, 1985) at 44-46, ably and amply demonstrated that our judges were not even representative of the white minority as between 1950 and 1980, for example, the Appellate Division was dominated by Afrikaner males born in the then Orange Free State who had spent time either at the Pretoria Bar or as civil servants.
- 34.. See Anton Lubowski, "*Democracy and the Judiciary*", in Hugh Corder (ed), **Democracy and the Judiciary** (IDASA, Mowbray, 1989) 13 at 21. Hugh Corder, "*The Record of the Judiciary (2)*", in Corder, *ibidem* at 50 also said that the Supreme Court, while maintaining a formal impartiality, had for decades in effect consistently acted in the interests of the dominant group of which it formed a part.
- 35.. Dugard, **Human Rights and the South African Legal Order**, *supra* at 380.
- 36.. According to Mauro Cappelletti, "*The Future of Legal Education: A Comparative Perspective*", in (1992) 8 **South African Journal on Human Rights (SAJHR)** 1 at 4-5, "... no system of judicial review would be acceptable unless the full independence of the court or courts involved is assured. The judiciary invested with this power must be one deserving general confidence of being able and willing to interpret and implement the spirit of a Constitution and a Bill of Rights. One reason why Continental European

countries in the aftermath of World War II established new Constitutional Courts instead of entrusting the judicial review role to the ordinary courts after the American model, was the well justified distrust in the capacity of the old judges to be the proper interpreters and enforcers of the new Charters of Rights. This was true for Austria, Germany and Italy, and later for Spain and Portugal, after the fall of their authoritarian regimes. Perhaps ... a similar course might be advisable for South Africa as well."

37.. *Opere citato*.

38.. John Dugard, "*The Quest for a Liberal Democracy in South Africa*", in TW Bennett et al (eds), **Law Under Stress: South African Law in the 1980s** (Juta & Co, Cape Town, 1988) 237 at 254-255.

39.. In JH van der Westhuizen and HP Viljoen, **A Bill of Rights for South Africa** (Butterworths, Durban, 1988), 146 at 147.

40.. Lubowski, "*Democracy and the Judiciary*", in Corder, *supra* at 18-19.

41.. Penuell M Maduna, "*Judicial Review and Protection of Human Rights Under a New Constitutional Order in South Africa*", in (1989) 21 **Columbia Human Rights Law Review**, 73 at 82-83.

42.. See Penuell M Maduna, "*Joining in the Constitutional Debate*", in **Die Suid-Afrikaan**, February 1990.

43.. See Article 16(2) of the ANC's draft entitled **A Bill of Rights for a New South Africa** (Centre for Development Studies, Bellville, 1990).

44.. See the ANC's Constitutional Committee's **Discussion Document: Constitutional Principles and Structures for a Democratic South Africa** (Centre for Development Studies, University of the Western Cape, Bellville, 1991), at 16 and 26.

45.. **Constitutional Court for South Africa** (CALS, Johannesburg, 1991) at 15. See also JD van der Vyver, "*Constitutional Options for Post-Apartheid South Africa*", in (1991) 40 **Emory Law Journal**, 745 at 804.

46.. See "*Practical Workings of a Bill of Rights*", in JV van der Westhuizen and HP Viljoen (eds), **A Bill of Rights for South Africa**, 52 at 53-54. See also JC Heunis, in the debate on the 1983 Constitution, in **House of Assembly Debates**, col 11491 (17 August 1983); RN Leon, "*A Bill of Rights for South Africa*", in (1986) 2 **SAJHR**, 60 at 64-65; and Michael Cowling, "*Judges and the Protection of Human Rights in South Africa: Articulating the Inarticulate Premiss*", in (1987) 3 **SAJHR**, 177 at 184-187.

47.. See **Group and Human Rights: Working Paper 25** (1989) (hereinafter referred to as **Working Paper 25**) at 449.

48.. *Ibidem*.

49.. See its **Interim Report on Group and Human Rights** (1991) (hereinafter referred to as the **Interim Report**), at 669.

50.. *Ibidem*.

51.. *Ibidem*.

52.. Section 8(2) of the (new) **Constitution of the Republic of South Africa**, 108 of 1996.

53.. Catherine Albertyn Janet Kentridge, 'Introducing the Right to Equality in the Interim Constitution', in (1994) 10 **SAJHR** 149 at 152.

54.. *Ibidem*.

55.. 1996 (1) BCLR 1 (CC).

- 56.. 1996 (4) BCLR 449 (CC).
- 57.. To wit Section 417(2)(b) of Act No 61 of 1973.
- 58.. 1995 (2) SA 642 (CC).
- 59.. 1995 (3) SA 867 (CC).
- 60.. Act No. 140 of 1992.
- 61.. 1995 (12) BCLR 1579 (CC).
- 62.. Act No. 75 of 1969.
- 63.. Namely that, as was held in **R v Ndhlovu**, 1945 AD 369 at 386, “[i]n all criminal cases it is for the Crown to establish the guilt of the accused, not for the accused to establish his innocence. The onus is on the Crown to prove all averments to establish his guilt.”
- 64.. 1996 (1) BCLR 141 (CC).
- 65.. 1996 (2) BCLR 155 (CC).
- 66.. Section 25(3)(e) of the (interim) **Constitution**. It is noted that Section 35(3)(g) of the (new) **Constitution** is a rehash of this provision.
- 67.. 1995 (7) BCLR 851 (CC).
- 68.. For which see **R v Steyn**, 1954 (1) SA 324 (A), *inter alia*.
- 69.. 1995 (12) BCLR 1593 (CC).
- 70.. *Supra*.
- 71.. 1995 (3) SA 391 (CC).
- 72.. That is whether, *stricto sensu*, the death penalty was an appropriate penalty for murder.
- 73.. *Op cit*.
- 74.. 1995 (10) BCLR 1382 (CC).
- 75.. **Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others**, 1995 (10) BCLR 1289 (CC).
- 76.. **Premier of KwaZulu-Natal and Others v President of the Republic and Others**, 1995 (12) BCLR (CC).
- 77.. Which was required in terms of Section 160(4) and (5) of the (interim) **Constitution**.
- 78.. As required under Section 71(2) of the (interim) **Constitution**.

CHAPTER ONE

FROM THE OLD TO A NEW CONSTITUTIONAL SYSTEM

INTRODUCTION

On 27 April 1994 the **Constitution of the Republic of South Africa, 1993**,¹ came into effect. This **Constitution** brought to an end the old constitutional system, the main features of which dated back to the very foundation of the Union of South Africa.² For the purposes of this chapter, a synopsis of the constitutional development of South Africa from the colonial days, through the period of the Act of Union, to the constitutional order established in 1993, will be provided. This, needless to say, is essential if one is to fully grasp and understand the impact of the fundamental changes brought about by the 1993 **Constitution**.

In addition to that, a summary of the basic features of the 1993 **Constitution** will also be given. These are the features which set the scene for the functioning of the Constitutional Court of the Republic.

FROM THE ACT OF UNION TO 1961

The Union of South Africa was a culmination of a process of unification³ which brought together under one flag⁴ the four British colonies consisting of the two Boer Republics, namely the Transvaal and the Orange Free State, as well as the Cape⁵ and Natal.

Before then, the four colonies were disparate polities, a brief summary of the constitutional systems of which is presented below. The importance of this exercise will become self-evident below.

THE PRE-UNION SITUATION

The Cape Colony

The second British occupation of the Cape in 1806 finally brought the the rule of the Dutch East India Company to an end. For the first two decades thereafter, virtually all powers of government were vested in the Governor, whose legislative and executive powers were subject only to orders in council, letters patent and the royal instructions.⁶

In 1825 a nominated Advisory Council, comprising the Chief Justice and leading officials, was created. Legislation was now technically in the hands of the Governor-in-Concil, but the Council had such limited powers of control over the Governor that it proved ineffectual.⁷ The subsequent addition of two unofficial members two years later did not help improve the situation.

In 1827, the legal system was transformed when magistrates replaced the *landdrosten* and *heemraden* who had been inherited from the Dutch era. Despite this development, however, practice still lagged behind policy - and at first anyone could become a magistrate on payment of a fee. Consequently, legal procedure, particularly in the rural areas, was often casual and slipshod. What helped improve the situation was the introduction of the first Charter of Justice in 1827.

Under the Charter of Justice, which *inter alia* introduced trial by jury, the courts, for the first time, could hear complaints from servants and receive evidence from *Christian* slaves. Because the Charter made no reference to the colour or class of litigants or witnesses, it could be concluded that technically there was no discrimination. However, in practice, with the exception of a few law agents and court interpreters, *the administration of justice was exclusively white*. Most civil disputes involved white litigants, whereas most criminal prosecutions were against black accused persons. The

“local public” referred to in numerous proclamations and ordinances in practice meant the local white public. Slaves and Khoisan servants had little access to the law, and juries, in practice, consisted of white men only.

One of the major grievances of the Boers was that disputes which had once been settled by informal discussion and negotiation were now debated in court. Regular circuit courts which were established in 1811 were conducting proceedings in public. It was a rude shock for whites to find that their black employees could now take them to court and theoretically win a suit against them.⁸ A farmer would now have to travel long distances to lodge a complaint against an offending servant, whereas previously he could have dispensed his own version of justice literally from the comfort of his home. Now, if he chose that course, he could well find himself the defendant rather than the plaintiff.

A new constitution for the colony was introduced in 1834. It provided for a non-elective legislative council comprising the Governor, the four most senior officials, the Attorney-General and from five to seven unofficial nominees of the Governor. The legislative council was competent to legislate on a restricted number of topics. Furthermore, the British Crown could still legislate for the colony, disallow legislation or even allow it to lapse by not approving it within three years as was required.

The 1834 Constitution further provided for an executive council which consisted of the Governor and the four most senior officials. The Governor presided over the executive council's meetings. Although the Executive Council exercised control over the Governor's powers in theory, he remained extremely powerful in practice, since he had both a deliberative and a casting vote in the Council and, moreover, retained the power of disallowance.⁹

This state of affairs was to continue till 1853 when a new constitution was introduced. For the first time, the colony saw a Parliament consisting of the Governor¹⁰ and two elective Houses, an upper House, the Legislative Council, and a lower House, the House of Assembly.¹¹ Franchise qualifications were, by the standards of those days, low¹² and the franchise was thus theoretically generally enjoyed by all men on a non-

discriminatory basis. This was one of the few most notable virtues of British liberalism of that age, a movement that began by seeking the abolition of slavery and went on to seek a more representative government, that found its way to the Cape Colony in the early years of the 19th century.

However, as Jack and Ray Simons pointed out, precisely because class and colour coincided so closely that the constitutional system was colour-blind only in form, this Parliament was a parliament of masters which showed small sympathy with the working man (sic!),¹³ who in the majority of cases was non-white. In the Eastern Cape, where in some constituencies the "*Kaffir vote*" made up around 40% after the annexation of the Transkeian territories, many liberals favoured individual land tenure in the stead of the traditional system of collective or communal ownership. The Registration Act of 1887 made it clear that communal land tenure did not count as a qualification towards the franchise, thus effectively excluding many blacks.

By 1892 the qualification had been raised, thus requiring voters to occupy premises valued at at least seventy-five Pounds or to earn at least fifty Pounds per annum. In addition, each voter had to be able to write his name, address and occupation.¹⁴ In practice, therefore, the franchise discriminated against a colour-class, so that even at the best of times non-whites in the Cape Colony never succeeded in returning any of their own people to Parliament. Parliament effectively "remained at all times a bourgeois institution of white landowners, merchants, company directors and professional men, in which the working class, white or coloured, had no representative of their own."¹⁵

The 1853 constitution of the Cape Colony also made provision for an executive authority, the Executive Council. Members of the Executive Council could sit and speak, but not vote, in both Houses of Parliament. However, other than the Governor, the members of the Executive were not eligible for membership of Parliament.

While the new constitution gave the Cape Colony a representative government, unlike Canada and Australia, it did not give the colony a responsible form of government until 1872.¹⁶

Natal

Before the British occupied Natal in 1842, thus subjecting the territory to British colonial rule till the establishment of the Union of South Africa, the majority of the Boer *trekkers*¹⁷ who had settled in Natal in 1838¹⁸ had established the Republic of Natalia and drafted the *Grondwet* of Natal which took the form of Instructions for the Council of Representatives of the People.¹⁹ The *Grondwet* made provision for the annual election of a *Volksraad* which sat in Pietermaritzburg, and theoretically under the jurisdiction of which fell the *trekkers* who had remained behind in Winburg as well as those who had settled in Potchefstroom.

This situation was not to last long; as stated above, the British annexed Natal in 1842 following military intervention,²⁰ and allegiance to Britain was accepted in 1843 and the territory was to remain a British Colony till Union. Initially, from late in 1845, Natal under British colonial rule was governed as a district of the Cape by a Lieutenant-Governor and an Executive Council of five officials.²¹ However, governing the territory from the Cape soon became too cumbersome.

In 1847 a nominated Legislative Council consisting of the Officer Administering the Government and two or three other persons was set up by letters patent. Three persons were subsequently added to the Council in terms of Royal instructions.²² This situation, despite incessant demands for representative institutions, continued till 1856 when the Charter of 1856 was granted following the recommendations of Sir George Grey, then Governor at the Cape.²³

Following the precedents of New South Wales and the West Indies, a unicameral legislature, the Legislative Council, three quarters of the members of which were elected and one-quarter of whom were nominated, was established.²⁴ Though initially there was no explicit colour bar, "the franchise qualifications were high enough to ensure that virtually no Non-Whites would qualify."²⁵ The Natal Constitution effectively denied the franchise to blacks, although, theoretically, a black male could obtain a vote. First, he had to be literate and be the owner of fixed property. He could then petition the Lieutenant-Governor for exemption from customary law, which was granted or denied

at the discretion of the Lieutenant-Governor. If granted the exemption, the man was then placed under the restraints and penalties of Roman-Dutch law and, after a period of seven years - provided he had resided in Natal lawfully for at least twelve years - he could then apply for registration as a voter. The application had to be accompanied by a certificate of recommendation *endorsed by at least three white voters* and signed by a Justice of the Peace. Again, the final arbiter in this regard was the discretion of the Lieutenant-Governor.

Thus, all in all, only three blacks were granted the vote in the entire life of the colony of Natal. Eventually a law disenfranchising all non-whites, including Indian indentured labourers who had come to Natal in 1860, was passed in 1896.

The Orange Free State

The 1854 Constitution²⁶ of the Orange Free State created a unitary state with a unicameral legislature, the *Volksraad*.²⁷ The American influence was palpable.²⁸ A non-sovereign legislature²⁹ was established; certain rights, such as the right to vote,³⁰ the right of peaceful assembly and petition,³¹ the right to private property, the right of personal freedom, the right of freedom of the press and equality before the law,³² were guaranteed. Of particular note is that there was no guarantee of freedom of worship under the *Grondwet*. The *Volksraad* was compelled to promote and support the *Nederlandsche Hervormde Kerk*, later called the *Nederduitsch Gereformeerde Kerk*.³³

The franchise was given to "citizens" only. Citizenship was granted to all white persons³⁴ who had been resident in the Orange Free State for not less than six months. As was to be expected, the unicameral legislature, the *Volksraad*, provided for under the *Grondwet* was elected by whites only.³⁵

Under the *Grondwet*, which was the fundamental law of the Orange Free State, the *Volksraad* was elected for four years, with half the members retiring every two years as was the case under the Dutch Constitution. Until 1866, candidates for *Volksraad* membership did not have to be citizens of the Orange Free State. White persons who had attained the age of twenty-five years, who had been resident in the Orange Free

State prior to their election, and who possessed unencumbered immovable property worth at least two hundred pounds, were all eligible for Volksraad membership.

As stated above, the *Volksraad* was a non-sovereign legislature. Judge JBM Hertzog, later to become Prime Minister of South Africa, had in effect held in **The State v Gibson**³⁶ that though the *Volksraad* was beyond any doubt *the highest legislative authority* in the Orange Free State, it was still not unqualifiedly *the highest authority*. Above the *Volksraad* stood the constitution-giving authority, the sovereign people, to whom the majesty belonged.

Persons entitled to vote for the *Volksraad* were also entitled to vote for the President of the Orange Free State, who was elected by popular vote, who held the office for five years,³⁷ and whose main function was executive,³⁸ but who was also expected to advise the *Volksraad*, at the meetings over which he did not preside. Candidates for the presidency were not subject to any qualifications whatsoever - they did not even have to be "citizens" or be domiciled in the territory of the Orange Free State.

The President alone, and not the Executive Council, was responsible to the *Volksraad*. He was responsible for the functioning of government departments and the public service and had many other executive responsibilities.³⁹ According to Carpenter,⁴⁰ in practice, the President of the Orange Free State "was the dominant figure in both the executive and the legislature. Even though the legislature appeared in theory to be in a strong position *vis-à-vis* the President, the latter called the tune ...".

However, the *Volksraad* did have some judicial powers. As is the case with the Congress of the US, it could, for example, decide on the validity of the election of a member and could impeach the President. If it mustered a three-quarters majority of its members present at a full *Volksraad*, it could try the President and other public officers for treason, bribery and other "serious crimes" and, if they were found guilty, dismiss them from office and bar them from future public office. Moreover, any appeal against the actions of the President had to be lodged with the *Volksraad*.⁴¹

The Constitution was a rigid one, with an onerous amendment procedure⁴² to prevent it from being amended at the whim of any ruling party. Like the Constitution of the United States of America, it made no specific provision for judicial review and, therefore, like in the United States of America, judicial review was assumed to be an inherent feature of the Constitution.⁴³

Shorn of the racism and sexism immanent within it, the *Grondwet*, in the words of James Bryce,⁴⁴

came as near as any set of men ever have come to the situation which philosophers have so often imagined, but which has so rarely in fact occurred - that of free and independent persons uniting in an absolutely new social compact for mutual help and defence, and thereby creating a government whose authority has had, and can have had, no origin save in the consent of the governed.

The South African Republic (the Transvaal)

The Constitution of the Transvaal,⁴⁵ on the other hand, was blatantly racist and less sophisticated than the one of the Orange Free State. It expressly provided that:

the People desire to permit no equality between coloured people and the white inhabitants, either in Church or State.⁴⁶

Article 9 of the *Grondwet* of the South African Republic actually provided that "[t]he people will not permit equality between coloured persons and the white inhabitants, either in Church or State."⁴⁷

From this it followed that, as was the case under the Constitution of the Orange Free State, both citizenship and the franchise were confined to whites.

Though there were a few provisions in the *Grondwet* which vaguely suggested that it contained some level of entrenchment of civil liberties, it would be erroneous to conclude from that it guaranteed basic civil rights. It was not clear either whether the *Grondwet* was fundamental legislation superior even to the legislature (ie the *Volksraad*), though there were several articles from which it could be gleaned that the people (and not the *Volksraad*) were the sovereign.

Vague procedures were prescribed for the enactment of ordinary legislation, and more often than not such procedures were dispensed with. The validity of such informal laws (the *Volksraad besluiten*) later led to a constitutional crisis when Chief Justice JG Kotzé, the first Chief Justice of the Transvaal High Court which was established in 1877, clearly acting under the influence of American jurisprudence, asserted the right to judicial review.⁴⁸

Before the constitutional crisis, the *Volksraad besluiten* were upheld as valid in cases such as those of **Nabal v Bok N.O.**,⁴⁹ **McCorkindale's Exors v Bok N.O.**,⁵⁰ and **Dom's Trustees v Bok N.O.**,⁵¹ despite their glaring incompatibility with the *Grondwet*. However, Kotzé CJ began adopting a different attitude in an *obiter dictum* in **Hess v The State**.⁵² His vacillation precipitated the constitutional crisis which began with his decision in **Brown v Leyds N.O.**,⁵³ in which the Chief Justice and Ameshoff J held that the affected *besluiten* were incompatible with the *Grondwet* and therefore invalid. In this judgment the court had further held that sovereignty vested in the people and not in the *Volksraad*, that the *Grondwet* was a fundamental law with which the *Volksraad* had to comply, and that the Court, therefore, had a bounden duty to declare invalid all legislation that was not in conformity with it (ie the *Grondwet*). The effect of this decision was to nullify quite a large body of legislation which was incongruous with the *Grondwet*.

Needless to say, Paul Kruger, then President of the Transvaal, was not amused:⁵⁴ he swiftly pushed a bill⁵⁵ through the *Volksraad* denying the right of the Court to exercise judicial review and empowering the President to dismiss any judge who failed or refused to give him the assurance that he would not exercise the testing right. The judges themselves responded by simply adjourning the High Court *sine die*, after which the Chief Justice of the Cape Colony, Sir Henry de Villiers, came to persuade both the President and the judiciary of the Transvaal to iron out their differences.

A compromise was reached and the judges agreed to forego the testing right in exchange for an undertaking that the *Grondwet* would be amended to guarantee the independence of the judiciary as well as to ensure protection of the Constitution from amendment except by special procedure. When the government procrastinated, Kotzé

CJ informed President Kruger that his undertaking to foreswear the testing right had since lapsed, whereupon he was summarily dismissed as a judge.

When President Kruger was swearing in the new Chief Justice, R Gregorowski, he delivered a homily in which he described the testing right as a principle of the Devil which had been introduced to test the word of God.⁵⁶ President Kruger had thus won the day and the Transvaal had rejected the notion of a rigid constitution in favour of the idol of parliamentary supremacy and the entrenchment of racial inequality.

The other basic features of the Transvaal *Grondwet* were the following:

A clear separation of powers between the three organs of state; a unicameral legislature (the *Volksraad*) elected by popular universal white male vote, the members of which had to belong to the Dutch Reformed Church;⁵⁷ a popularly elected State President⁵⁸ who presided over an Executive Council comprising a popularly elected Commandant-General, officials and nominees of the *Volksraad*, all of whom had to belong to the Dutch Reformed Church, and which executive was not responsible to the *Volksraad*; an independent judiciary which comprised elected *landdrosten* and *heemraden*, all of whom had to be members of the Dutch reformed Church. Unlike in the Orange Free State, there were no constitutionally guaranteed civil rights.⁵⁹

FROM 1902 TO 1909

THE FRANCHISE

The most intractable question in the constitutional debate of those days proved to be the franchise. As Heinz Klug⁶⁰ summarised the issue,

[w]hile each of the territories that came together in the Union had its own franchise system, their notions of citizenship were fundamentally at odds. The Cape, with its qualified, non-racial franchise, recognized equal rights for 'all civilized men'. The Transvaal, with its racial but otherwise unqualified franchise, specifically declared that no equality shall be permitted between 'coloured people and the white inhabitants, either in Church or State'. The Cape franchise reflected a notion of citizenship not unlike contemporary British norms, in which adult males who met certain cultural or property

standards had a right to participate in governance. The Transvaal maintained a clearly racist distinction and even attempted to restrict franchise rights in presidential and *Volksraad* elections to those who, besides being naturalized citizens, had lived in the Republic for fourteen years. Natal formally adopted a 'civilized' standard, but the colony was able, through 'a number of ingenious conditions attached to the franchise', to ensure that by 1907 over 99 per cent of registered voters were white and only six Africans had managed to register as voters. The Orange Free State had a racially exclusive franchise. Citizenship in the Cape and Natal was thus formally tied to a process of assimilation to colonial standards of education and property, while in the Transvaal and the Orange Free State citizenship had an expressly racial construction.

After a lengthy debate, a compromise was reached, in terms of which the Cape was allowed to retain its "colour-blind" franchise qualifications,⁶¹ while the three northern provinces were constitutionally permitted to exclude blacks from participation in the electoral process.⁶² This compromise was given constitutional entrenchment.⁶³ The Coloured and (Cape) African males⁶⁴ thus retained their voting rights till their removal as described below.

As part of the Vereeniging settlement, the victorious Brits gave the vanquished Boers an assurance that the franchise would not be extended to blacks in the ex-republics before the restoration of self-government. Thus, when the representatives of the parliaments of the four colonies met to discuss the possibility of unification, the strong hand of the Transvaal and the Orange Free State, allied with Natal, was able to keep blacks effectively off the common voters' roll;⁶⁵ the Cape merely secured the constitutionally entrenched continuance of the existence of its "colour-blind" franchise.⁶⁶ Thus, just after eight years of their defeat at the hands of British imperialism, a new breed of Afrikaners who dominated the process leading to unification established the Union of South Africa as a whiteman's country, "a state which was already providing more than a quarter of the world's gold."⁶⁷

Thus emerged a modern capitalist state in southern Africa that was "supported by the power of the mining magnates and identified with the interests of British imperialism."⁶⁸ As will appear more fully below, the exercise of power and all the organs, agencies and institutions of state were based on race, with the black majority lingering on the fringes of society, in conditions akin to slavery, with no vote and no say on public affairs.

On the basis of the **Colonial Laws Validity Act, 1865**,⁶⁹ which made it clear that colonial legislatures were subordinate to the British Parliament and that any colonial law

repugnant to a British Act of Parliament extending to the affected colony was null and void, the Parliament of the Union of South Africa was, at least in theory, subject to British control. In practical terms, however, this situation was not problematic for those who wielded race-based power as there was, at the same time, a commonwealth convention which prevented Britain from legislating for the Dominions without their consent.

Twenty-one years after the formation of the Union in 1910, the enactment of the **Statute of Westminster, 1931**,⁷⁰ which repealed the **Colonial Laws Validity Act** and thus effectively placed the Union of South Africa out of British suzerainty, a debate arose as to whether the entrenched clauses of the **South Africa Act** were not affected by the repeal of the **Colonial Laws Validity Act**. It was argued that now that South Africa had a sovereign Parliament, she could no longer be subjected to entrenched legislative procedures "as in some quarters they were seen to be entirely dependent upon an Act of the British Parliament."⁷¹

In 1924 the (Afrikaner Nationalist) National Party and the (white working class) Labour Party formed the "Pact" government. Government efforts to remove Africans from the common voters' roll started in earnest immediately thereafter. In 1927 Parliament enacted the **Native Administration Act**⁷² which, according to Klug,⁷³ "implemented the system of bureaucratic governance over African communities implicit in the Union Constitution". The Act was unsuccessfully challenged in **R v Ndobe**⁷⁴ as an illegal attack on the Cape franchise.

In 1936, Barry Hertzog had finally persuaded Jan Smuts to support a package that stripped the indigenous Africans of the vote, setting up a Natives' Representative Council and consolidating the land proposals made in 1913. Africans were thus left with only 13% of the land.⁷⁵ Despite all the assurances⁷⁶ that any proposed legislative changes would not derogate from the entrenched clauses, the unicameral procedure prescribed in the entrenched clauses was used to pass the **Representation of Natives Act, 1936**,⁷⁷ which removed Africans from the Cape common voters' roll and gave all of them separate, race-based representation.

In terms of the new political configuration, the indigenous Africans were allowed to elect three white representatives to the House of Assembly. At the same time, provision was made for four white Senators, elected by electoral colleges, to represent the Africans in the whole national territory.

The **Representation of Natives Act** was challenged by one Albert Ndlwana, a registered Cape Native voter,⁷⁸ who sought an interdict against the removal of his name from the Cape common voters' roll on the basis that the unicameral procedure was no longer applicable in the aftermath of the enactment of the **Statute of Westminster** in 1931. The Appellate Division of the Supreme Court, in dismissing the appeal in **Ndlwana**, held per Stratford ACJ (as he then was) that:

Parliament, composed of its three constituent elements, can adopt any procedure it thinks fit; the procedure expressed or implied in the South Africa Act so far as the Courts of Law are concerned is at the mercy of Parliament like everything else ... *Parliament's will ... as expressed in an Act of Parliament cannot now in this country, as it cannot in England, be questioned by a Court of Law, whose function is to enforce that will, not question it ... It is obviously senseless to speak of an Act of a Sovereign law making body as ultra vires. There can be no exceeding of power when that power is limitless.*⁷⁹ (my emphasis)

The major premise in the **Ndlwana** judgment was that the effect of the **Statute of Westminster** was to make the Union Parliament a sovereign Parliament of exactly the same nature and status as the Parliament of the United Kingdom.⁸⁰ In the light of **Ndlwana**, it was generally accepted that the entrenched clauses of the **South Africa Act** had lost their legal efficacy and were at the mercy of a transient parliamentary majority.⁸¹

Twelve years after the disenfranchisement of the Cape indigenous Africans, DF Malan, the new Prime Minister, obviously "fortified by the decision in Ndlwana's case",⁸² announced that the Coloureds too would be disenfranchised.⁸³ Buoyed by this,⁸⁴ and yet as they surely lacked the necessary support for the unicameral procedure prescribed in the entrenched clauses, the Malan apartheid regime thought the legislative changes they sought could be effected by a simple majority vote in both Houses of Parliament sitting separately. In 1951, despite massive and vigorous opposition, they pushed through both Houses, sitting separately, the **Separate**

Representation of Voters Act⁸⁵ which sought to remove the Coloured community from the mainstream of South African political life.

This Act was promptly challenged in the Cape Provincial Division of the Supreme Court by four Coloured persons who sought to have it declared null and void. The Court, however, felt it was bound by the Appellate Division decision in **Ndlwana** and, therefore, gave judgment for the respondents. The matter went on appeal and the process culminated in the first "Vote case", **Harris v Minister of the Interior**,⁸⁶ in which the Court, in a judgment delivered by Centlivres CJ, unanimously upheld the contention that the **Separate Representation of Voters Act** was null and void and overruled the **Ndlwana** decision.

In a swift response to this development, Malan fulminating in the House of Assembly on the same day as the **Harris** judgment was passed, declared that:

*Neither Parliament nor the people of South Africa will be prepared to acquiesce in a position where the legal sovereignty of the lawfully and democratically elected representatives of the people is denied, and where appointed judicial authority assumes the testing right, namely, the right to pass judgment on the exercise of its legislative powers by the elected representatives of the people ... It is imperative that the legislative sovereignty of Parliament should be placed beyond any doubt, in order to ensure order and certainty.*⁸⁷ (my emphasis)

After the Appellate Division had declared the **Separate Representation of Voters Act** invalid, the apartheid regime responded by enacting, again by the ordinary bi-cameral method, the **High Court of Parliament Act**,⁸⁸ in terms of which a High Court of Parliament was established to consider the legality of Acts of Parliament. The High Court of Parliament, comprising all the members of Parliament, from both the Senate and the House of Assembly, was empowered to review any judgment of the Appellate Division invalidating an Act of Parliament.

This brings us to the doctrine of parliamentary sovereignty.

THE DOCTRINE OF PARLIAMENTARY SOVEREIGNTY

When the **South Africa Act** was drafted, the doctrine of parliamentary sovereignty,⁸⁹ a concept which was inherited from English legal tradition, was a predominant feature of the jurisprudence espoused by the founders of the Union of South Africa.⁹⁰ For those persons, steeped as they were in English legal history and jurisprudence, which they venerated, no other form of constitution was possible.⁹¹ The resultant bi-cameral Parliament was an institution that was omnipotent, that could legislate on any subject and in any terms it chose, and no other institution constituted a source of legislation superior to Parliament or was empowered constitutionally to declare its Acts invalid;⁹² the institution was *legibus solutus*. To paraphrase Dicey, there was no power which, under that system, could come into rivalry with the legislative sovereignty of Parliament.⁹³ The doctrine of parliamentary sovereignty had thus become the *grundnorm* of the South African constitutional system.

The High Court of Parliament,⁹⁴ as was to be expected, reversed the decision of the Appellate Division in **Harris v Minister of the Interior**.⁹⁵ Subsequently, the validity of the **High Court of Parliament** itself was challenged in the Cape Provincial Division, where the applicants' contention was upheld. The Minister of Interior then took the matter on appeal in **Minister of the Interior v Harris**.⁹⁶ The Appellate Division refused the appeal on the grounds that Section 152 of the **South Africa Act** guaranteed certain rights; that these rights would be meaningless if the Supreme Court could not protect them against infringement; and the so-called High Court of Parliament was not a court of law, but simply Parliament masquerading in the robes of a court of law. After carefully analysing and comparing the High Court of Parliament with other courts, Centlivres CJ concluded that:

[w]hen ... one looks at the substance of the matter, the so-called 'High Court of Parliament' is not a Court of Law but simply Parliament functioning under another name ... Parliament cannot by passing an Act giving itself the name of a Court of Law come to any decision which will have the effect of destroying the entrenched provisions of Section 152 of the Constitution.⁹⁷

Having thus once again been defeated, and in its determination to remove every vestige of non-white representation in Parliament, the National Party government resorted to enlarging the Senate⁹⁸ from forty-eight to eighty-nine members to provide the ruling party with the necessary two-thirds majority. Furthermore, legislation⁹⁹ was enacted to reconstitute the Appellate Division itself, so that it would consist of eleven (and not five) members when adjudicating upon constitutional matters.

The Constitution was amended by the **South Africa Act Amendment Act**,¹⁰⁰ which reinstated the **Separate Representation of Voters Act**, removed the provisions of Section 35 of the Constitution from the entrenching procedure and provided explicitly that:

no court of law shall be competent to enquire into or pronounce upon the validity of any law passed by Parliament other than a law which alters or repeals or purports to alter or repeal the provisions of Section 137 or 152 of the South Africa Act, 1909.

The reconstituted Appellate Division then heard an appeal against the Cape Provincial Division decision in **Collins v Minister of the Interior**,¹⁰¹ refusing to declare invalid both the **Senate Act** and the **South Africa Act Amendment Act**. The Court held the legislation valid by a majority of ten to one,¹⁰² the dissenting judge being Schreiner JA.¹⁰³ To paraphrase Centlivres CJ, the fact that the Senate had been enlarged solely to obtain a two-thirds majority for the purpose of altering the Coloured¹⁰⁴ franchise was irrelevant. The learned Chief justice held, *inter alia*, that:

[i]f a legislature has plenary power to legislate on a particular matter, no question can arise as to the validity of any legislation on that matter and such legislation is valid *whatever the real purpose of that legislation is*. If Parliament sitting bicamerally has power to reconstitute the Senate, ie if its powers are not restricted by any other provision in the South Africa Act, then evidence as to the purpose of the Senate Act is irrelevant.¹⁰⁵ (my emphasis)

The Appellate Division of the Supreme Court had thus capitulated and the National Party government had achieved its aspirations, not so much by sticking to its old guns and returning to the Transvaal-type constitution or its 1942 draft constitution,¹⁰⁶ as by simply accepting and using the British doctrine of parliamentary sovereignty "in its pristine purity, cleansed of the devilish testing right".¹⁰⁷ The foundation had thus been laid for the future constitutional order which began in 1961, when white South Africa,

without bothering to consult the other inhabitants of the national territory,¹⁰⁸ established the Republic of South Africa.

THE CONSTITUTION

The end product of the process that culminated in the adoption of the Act of Union was, in a nutshell, a flexible British-type constitution which would not brook any attempt at political subordination of Parliament to any checks and balances. In a word, no bill of rights was provided for in the document. Having learnt that a flexible constitution provided no legal safeguards against arbitrary government, and being men with such a great penchant for racism, it is not surprising that none of them was prepared to press for a rigid constitution with as much as a semblance of a bill of rights. With both the collusion and the connivance of the British Empire, they ushered in a race-based oligarchy, the chief violator of human rights and freedoms, that ravaged and lorded it over the country for eighty-four years.

There was no distinction between the Constitution and ordinary legislation; the **South Africa Act** was an ordinary statute and not a fundamental law of the Union.

However, though the Constitution was modeled on the British constitutional system, it was not absolutely flexible; it had elements of rigidity, namely the issues of the franchise and the equal status accorded to English and (initially Dutch) Afrikaans. These two issues were guaranteed under Sections 35 and 137 respectively, with Section 152 thereof providing explicitly that none of these two sections could be amended, save by a two-thirds majority vote of members of both Houses of Parliament in a joint sitting at the third reading of the Bill seeking an amendment.

BLACKS AND NATIONAL PARTY RULE

As Dugard pointed out, for some time after the National Party had won the 1948 election, “[n]o real effort was made to provide an institutional framework for the promised vertical separate development ...”¹⁰⁹ However, an indication of the direction things would take with regard to participation of the indigenous Africans in public affairs

was given by the enactment of the **Bantu Authorities Act**¹¹⁰ which gave recognition to traditional, tribal authorities, all of which were confined to thirteen per cent of the national territory.

Subsequently, after HF Verwoerd had become Prime Minister in 1958, the white parliamentary representatives of Africans were removed, thus preparing for the launch of apartheid's Grand Design, namely separate development. The first step in this direction was the enactment of the **Promotion of Bantu Self-Government Act**,¹¹¹ in terms of which the so-called Bantu peoples of South Africa, who, according to the preamble to the Act, did not form one homogenous group but constituted eight separate national units according to language and culture, which would one day form separate self-governing national units.

During the 1960s, the traditional, tribal authorities that were given recognition under the **Bantu Authorities Act** of 1951 were substantially developed. In 1963, one such political entity, the Transkei, was hurriedly given the status and the trappings of constitutional self-government. The territory's Constitution,¹¹² which remained in force till 26 October 1976, when the Transkei acquired 'independence' from Pretoria,¹¹³ was the constitutional model for the rest of the bantustans that subsequently acquired the status of self-government from 1971.¹¹⁴ Under its Constitution, the Transkei established its own Legislative Assembly,¹¹⁵ its own executive led by a Chief Minister, acquired its own flag, anthem and Isi-Xhosa was recognised as an official language in addition to Afrikaans and English. While under international law they remained citizens of the Republic, blacks 'nationals' of the Transkei acquired Transkeian 'citizenship'.

While the Transkei Legislative Assembly thus established had certain legislative competences,¹¹⁶ including the power to repeal the laws of the Republic dealing with matters falling under its jurisdiction, the Parliament of the Republic remained supreme over the whole of South Africa. The power of the South African Parliament to legislate over the Transkei was not ousted.¹¹⁷ As such, the statutes of the Republic might not be challenged in the light of the provisions of Section 59(2) of the South African Constitution of 1961.

Moreover, the South African Government retained an ultimate veto over Transkeian legislation because all enactments of the Legislative Assembly required the imprimatur of the State President, acting on the advice of his white executive. This, indeed, was the height of the politics of domestic colonialism.¹¹⁸

The principal objective of Pretoria in all this was to lead the bantustans/homelands to self-government and eventually to independence. Thus, in 1970, the South African Parliament enacted the **Bantu Homelands Citizenship Act**¹¹⁹ which¹²⁰ provided that every indigenous African who was not a 'citizen' of a self-governing territory would become a 'citizen' of the bantu territorial area to which he/she was attached by birth, domicile or cultural affiliation. In 1971, the **Bantu Homelands Constitution Act**,¹²¹ which empowered the South African Government to grant constitutions substantially similar to the 1963 Transkeian Constitution to the other territorial areas *after consultation with* them, was enacted.

The basic objective of the National Party Government was then to grant 'independence' to all the ten bantustans it had thus created. While the 'independence' was recognised only by the affected bantustans and the National Party Government, some scholars of constitutional law were tempted to accord respect to it. Carpenter, for example, erroneously assumed that, as a result, the constitutions of the four bantustans that had opted for full independence did not belong in a discussion of *South African* constitutional law.¹²²

An 'Independent' Transkei

The so-called Republic of Transkei came into being on 26 October 1976. Carpenter quite correctly observed that, whereas the South Africa Act was an Act of the British Parliament, the Republic of Transkei Constitution Act was an enactment of the Transkeian Parliament. To pave the way for the independence of the territory, the South African Parliament had to pass legislation empowering the Transkeian legislature to take this step. The legislative assembly then adopted a motion requesting independence and establishing a recess committee and a working committee of experts to negotiate independence and devise an independence constitution.¹²³ The

independence of the Transkei was granted and given recognition by the National Party Government through the **Status of the Transkei Act** of 1976.¹²⁴ In terms of this Act, the Republic of South Africa relinquished sovereignty over Transkei. The Act further provided for the continued existence of the treaties, conventions and agreements applicable to Transkei, for the validity of all agreements entered into by the Republic of South Africa and Transkei prior to the latter territory's acquisition of 'independence', as well as for the change-over from South African to Transkeian citizenship.¹²⁵

The **Status of the Transkei Act** provided for mandatory denationalisation: It provided that, in addition to those persons born in the Transkei or directly descended from Transkeians, any person who was a 'citizen' of the Transkei before 'independence' or who had cultural or linguistic ties with the territory ceased to be a citizen of the Republic.¹²⁶ This was an act of denationalisation which Leonard Gering¹²⁷ likened to the Nazi decree of 1941 which deprived Jews of German citizenship.

The independence constitution adopted by Transkei, though it had "African characteristics", was basically modeled on the South African Constitution of 1961,¹²⁸ a Westminster-type of constitution in many respects.¹²⁹ Like that Constitution, it was a flexible, and not a rigid, Act.

The Transkei constitution provided for a legislature which comprised the President,¹³⁰ and the National Assembly, half of the members of which were elected and the rest of whom were "traditional headmen and captains."¹³¹ Like the pre-1994 South African Parliament, the legislature of Transkei was supreme; the *grundnorm* of Transkei was parliamentary sovereignty. As such, no court could impugn the validity of its enactments.

The Transkeian constitution, like the pre-1994 South African constitution, made no provision for a bill of rights. There were no guaranteed fundamental rights and freedoms that could serve as a benchmark for the Courts.

Three other bantustans subsequently acquired 'independence' from Pretoria. These were Bophuthatswana,¹³² Venda¹³³ and the Ciskei.¹³⁴ Though Bophuthatswana and the

Ciskei had bills of rights and pretended to be protective of basic human rights and freedoms, a cursory analysis of their constitutions and/or their human rights records would prove otherwise.

Bophuthatswana

The Bophuthatswana Constitution,¹³⁵ an inflexible law which required a two-thirds majority vote of members present in the National Assembly for amendment, in its Chapter II, contained an impressive 'Declaration of Fundamental Rights', which were "binding on the legislature, the executive and the judiciary" and were "directly enforceable law".¹³⁶ However, most of those fundamental rights were subject to limitations imposed by an Act of Parliament, leaving a wide scope for interpretation.

The Bophuthatswana Constitution, therefore, provided "a powerful tool for the judiciary to test any Executive orders and even Acts of Parliament against the bill of rights."¹³⁷ Indeed, the (South African) Appellate Division took advantage of the space thus provided and held that the (South African) **Terrorism Act**,¹³⁸ which Bophuthatswana had inherited when it became 'independent', was inconsistent with the Bophuthatswana Constitution and, therefore, invalid in the bantustan.¹³⁹

Bophuthatswana also had established the office of an ombudsman who was appointed by the legislature to hear complaints from individuals about executive action. The office was vested with powers to advise the executive, but not to overrule or compel it.

The Ciskei

The Ciskei provided for a number of basic human rights and freedoms in Chapter III of its Constitution, titled 'Declaration of Fundamental Rights'. The collection of human rights and freedoms was not much different from many that could be found in bills of rights belonging to democracies. However, the provisions of Section 19(3), which were to the effect that no law made by the National Assembly or which continued in force in the Ciskei under the Constitution could be declared invalid by any court of law by reason of the fact that it contravened or was contrary to Chapter III, virtually nullified

their value. In such circumstances, the Ciskei government had little to fear from the courts, and if the courts ruled against government abuses and issued orders to stop them, the authorities simply ignored them.¹⁴⁰

Venda

The Venda self-governing territory was granted 'independence' on 13 September 1979 in terms of the **Status of Venda Act, 1979**.¹⁴¹ The Venda National Assembly enacted an 'independence' Constitution which was "neither a Westminster-type constitution like that of Transkei nor a rigid constitution with an entrenched bill of rights like that of Bophuthatswana."¹⁴²

There were no entrenched provisions in the Venda Constitution. All legislation might be passed by a simple majority of votes of members present. No courts of law were competent to adjudicate upon the validity of any law passed by the National Assembly,¹⁴³ a body which, like the legislatures of the other bantustans, was not a wholly elected institution.

The Venda President, who did not act on the advice of his Cabinet but in consultation with it,¹⁴⁴ had a real veto over bills passed by the National Assembly. He could withhold his assent or return a bill to the National Assembly with his recommendations. If the amended bill was not acceptable to the National Assembly, the Assembly could pass its own bill by a two-thirds majority vote of members present, in which event the signature of the Speaker would replace that of the President.¹⁴⁵

Indians and Coloureds

Though in anti-apartheid circles the term 'black' is normally used in a generic sense to denote all non-white persons, for purposes of this chapter it is useful to treat the Indians and Coloureds separately. This is because under white rule these nationality group had their own separate political institutions. However, no provision was made for territorial homelands for these two groups; denied the right to participate in the mainstream of

public life, they were, instead, given councils with limited powers over 'their own people'.

Coloureds

The Coloureds,¹⁴⁶ who, as was stated above, had lost their franchise after the Appellate Division ruling in **Collins v Minister of the Interior**, were given separate white representation in the House of Assembly. In 1968 the National Party repealed this token representation¹⁴⁷ and replaced it with a Coloured Persons' Representative Council.¹⁴⁸ This Council, which consisted of forty *elected* and twenty nominated members, was intended to represent all Coloured persons in the Republic.

The Council had power to make laws affecting Coloureds on agriculture, community welfare and pensions, education, finance, local government and rural settlements. However, bills could not be introduced in the Council prior to, and without, approval by the Minister of Coloured Relations. Moreover, bills passed by the Council had to be approved by the (white) cabinet to become law. If a Council bill conflicted with an Act of Parliament, it was invalid *ab initio*.

Administrative functions relating to Coloureds were to be performed by an executive of five persons, four of whom were elected by the Council, and chairman nominated by the (white) State President on the advice of his white cabinet.

Indians

In 1946 Indians¹⁴⁹ were, in terms of the **Asiatic Land Tenure [and Indian Representation] Act**,¹⁵⁰ granted separate representation by three white members of Parliament and two Senators in the central Legislature. After the rejection of this token representation by the Asiatic people, the National Party Government repealed it in terms of the **Asiatic Laws Amendment Act**, 1948.¹⁵¹

In 1968, a non-legislative and initially non-elective South African Indian Council, initially consisting of twenty-five Indian persons *appointed*¹⁵² by the Minister of Indian Affairs,

was established under the **South African Indian Council Act, 1968**. In 1974, the Council was increased in size, in terms of the **South African Indian Council Amendment Act, 1972**,¹⁵³ to thirty Indian persons, fifteen of whom were *appointed* by the Minister of Indian Affairs, while the rest were elected indirectly through electoral colleges in the four provinces composed largely of elected members of Indian local authorities.

The Indian Council had an executive committee consisting of a chairman *appointed* by the Minister of Indian Affairs from among members of the Indian Council, and four members elected by the Indian Council. The Minister of Indian Affairs was empowered to delegate certain executive powers relating to Indian education and community welfare to the executive committee of the Indian Council.

In 1976 the South African Prime Minister announced the formation of an Inter-Cabinet Council as a liaison machinery consisting of white, coloured and Indian members drawn from the white cabinet, the Coloured Person's Representative Council and the South African Indian Council. He rejected the notion of urban indigenous Africans, the 'Bantu', participating in the Council and emphasised that Africans would have to exercise their political rights in the respective homelands,¹⁵⁴ with which they were required to maintain a healthy relationship. As MC Botha declared, Government policy then was that all 'Bantu' persons in the White area, *whether they were born there or not*, remained members of their respective *nations*; the basis on which they were in the White area was to sell their labour, and nothing else.¹⁵⁵

The Prime Minister explained that the Inter-Cabinet Council would operate like all Cabinets and its decisions would be based on consensus purportedly reached after incisive discussion. However, the Council would have no legislative authority, though decisions of the (white) cabinet would ultimately become legislation.¹⁵⁶

On an earlier occasion, on 23 March 1973, the Government had appointed the Theron Commission,¹⁵⁷ which was required to make recommendations within eighteen months on all matters relating to the Coloured people.¹⁵⁸ Questioned in the House of Assembly in April 1976, the Prime Minister said that the Commission had not been appointed to

devise a Coloured policy for his Government as it already had a policy. He had merely wanted the Commission to identify objectively, and bring to his attention, all points of friction to his Government. Whatever recommendations the Commission made were to be submitted to National Party congresses for decision.¹⁵⁹ Of critical importance, the Commission recommended that "[p]rovision should be made for *satisfactory forms of direct Coloured representation and decision-making at the various levels of authority and of government.*"¹⁶⁰ (my emphasis)

Needless to say, the response of the Government to this was predictable: It declared that any recommendation to the effect that direct representation be granted to Coloureds in Parliament, provincial and local government institutions was unacceptable to it.¹⁶¹

FROM 1961 TO 1983

By a narrow margin,¹⁶² white South Africa had, in an all-white referendum, elected to become a republic. However, the **Republic of South Africa Constitution Act**¹⁶³ brought about very little change in institutional terms: The (British) Queen was replaced as Head of State by the State President who retained virtually all the powers and prerogatives of the Queen.

PARLIAMENTARY SOVEREIGNTY

The Constitution of the Republic¹⁶⁴ reaffirmed that Parliament would remain the sovereign legislative authority. Seemingly with the purpose of eliminating once and for all time the right of the courts to test the validity of Acts of Parliament, the provisions of the **South Africa Act Amendment Act**¹⁶⁵ were *mutatis mutandis* reenacted: The document provided that:

*[n]o court of law shall be competent to enquire into or pronounce upon the validity of any Act passed by Parliament, other than an Act which repeals or amends or purports to repeal or amend the provisions of section one hundred and eight or one hundred and eighteen.*¹⁶⁶ (my emphasis)

The ruling party had found it politically expedient to retain the flexibility of the British constitutional model predicated upon the doctrine of parliamentary sovereignty. Pleading utter powerlessness in the face of that constitutional system, Didcott J, who was destined to be one of the first judges of our new Constitutional Court, ruefully proclaimed that:

... under a constitution like ours, Parliament is sovereign, and the Courts can no more assume a power which it has decreed that they shall lack, or set its enactments at nought, than can anyone else ... *Our Courts are powerless to legislate or to veto legislation. They can only interpret it, and then implement it in accordance with their interpretation of it ... effect must likewise be given to stringent enactments which are positively shown by Parliament's choice of plain words to have been meant, however offensive to conventional legal standards they may be.*¹⁶⁷ (my emphasis)

THE UNENTRENCHED PROVISIONS

An example of an unentrenched provision was Section 114 of the 1961 Constitution, which was a replica of the amended Section 149 of the **South Africa Act**. This provision, which, according to Carpenter,¹⁶⁸ was a procedural 'manner and form' issue, was concerned with protection of both the territorial integrity of the four original provinces and the provincial system.

Needless to say, the territorial integrity of the four original provinces was affected when the various bantustans were created as stated above.¹⁶⁹ The provincial councils themselves were eventually abolished by Section 2 of the **Provincial Government Act**, 1986.¹⁷⁰ According to Carpenter, who referred to the Supreme Court decision in **Mpangele v Botha (1)**¹⁷¹ and **Mpangele v Botha (2)**,¹⁷² our Courts readily accepted that "s 114 was not entrenched and that, therefore, the procedure prescribed was not binding on Parliament but depended for their observance on good faith, the electorate or public opinion ... the court simply held that Parliament could amend or repeal s 114 either expressly or by necessary implication - by not following the prescribed procedure."¹⁷³

However, not all South African jurists accepted this viewpoint. Jurists such as Van der Vyver¹⁷⁴ and Boule, Harris and Hoexter,¹⁷⁵ held a contrary view, namely that Parliament could not be allowed to flout its own procedures at the expense of human rights. A

judge of the Supreme Court, Van der Heever J also stated in an *obiter dictum* in **Cowburn v Nasopie (Edms) Bpk**¹⁷⁶ that:

Ek het, met eerbied, bedenkenge oor die hof *a quo* se besliste bevinding ... dat die Parlement nie gebind is deur art 114 van die Grondwet 32 van 1961 nie. Dit kan betoog word dat vir so lank as wat die Parlement art 114 ongewysig laat, is hy gebonde aan die reëls wat hy self bepaal het ...

A BILL OF RIGHTS?

Once again, pleas for the inclusion of an entrenched bill of rights¹⁷⁷ were dismissed as the ruling party felt that such a scheme would mean sacrificing the holy cow of the doctrine of parliamentary sovereignty. Taking the doctrine to its logical and brutal conclusion, the government of the day rode roughshod over individual human rights and basic freedoms with impunity. The black majority, the voiceless victims of rampant apartheid were, not surprisingly, having no faith in any of the structures and institutions of the regime.

The courts, having deliberately decided to confine their role to interpretation and enforcement of the will of the omnipotent sovereign which had the power to make any encroachment it chose "upon the life, liberty or property of any individual subject to its sway",¹⁷⁸ expected the individual to find solace in the unreliable tradition of interpretation of statutory ambiguities *in favorem libertatis*. As Hugh Corder, after a seminal examination of the record of the judiciary between 1910 and 1985, observed, the Supreme Court, while maintaining a formal impartiality, had in effect consistently acted in the interests of the dominant group in the social structure of which it was a critical part.¹⁷⁹

In such circumstances, without the shield of a bill of rights, while there can be no doubt that the apartheid legislature and executive were the primary sources of many of the shackles on the South African judicial process, there was equally no doubt that the judiciary was too easily prepared to accept such limitation and to add a few of its own making.¹⁸⁰ In other words, judicial activism and creativity were on occasion used to further state lawlessness, rather than inhibit it.¹⁸¹

THE FRANCHISE

Needless to say, the franchise in the common area was reserved for whites only. A unique feature of the South African constitutional system then was the exclusion from any participation in government of the great majority of its citizens. This was so even if one regarded as valid the bantustan policy, which had led to the unilateral denationalisation of some eight million South Africans who had been fobbed off with a dubious bantustan citizenship.

FROM 1983 TO 1993

In 1983 (the South African) Parliament adopted a new Constitution, the **Republic of South Africa Constitution Act**,¹⁸² which replaced Act 32 of 1961. The 1983 Constitution, like its predecessors, did not enjoy an enhanced status in relation to other legislation, despite the presence of entrenched clauses. It was not a higher law to which all other laws were subordinate, and which served as a touchstone for other laws. Furthermore, the Constitution was a flexible when compared to the rigid US Constitution, although it was less so when compared with its two predecessors.

New political institutions were established under the 1983 Constitution.

PARLIAMENT

As a result of the adoption of the 1983 Constitution, Parliament was drastically altered; a single Parliament, consisting of three race-based Houses, the House of Assembly for whites, the House of Representatives for Coloureds, and the House of Delegates for Indians, was created. 'Blacks' (ie the indigenous African majority) were presumed to be politically catered for in the bantustans and thus excluded completely from the central government.

Though, in terms of the Constitution, the State President and Parliament constituted “the sovereign legislative authority in and over the Republic,”¹⁸³ the legislation passed by a single House was, like that passed by the whole of (the tri-cameral) Parliament, Acts of Parliament. Acts of the central Parliament, therefore, did not enjoy a superior status.

AN EXECUTIVE STATE PRESIDENT

With merger of the positions of State President and Prime Minister, the State President under the 1983 Constitution ceased being a figure-head with few real powers, performing largely neutral tasks or merely placing the formal seal of office on decisions actually taken by party political leaders; he was both head of State and government. He was not popularly elected; he was elected by a parliamentary ‘college’, the majority of which was white.¹⁸⁴ He was assisted by a President’s Council¹⁸⁵ which was heavily weighted in favour of whites and the ruling National Party. The State President was not a member of (the tri-cameral) Parliament. However, together with Parliament, the State President formed the legislative authority of the Republic.¹⁸⁶

The powers of the State President were not confined to those stipulated in Section 6 of the Constitution Act. He also had a legislative role; he had the sole discretion to decide whether a bill was affecting the ‘own affairs’ of a particular population group; he was constitutionally required to give his assent to all bills passed by Parliament and the three Houses before they became law.¹⁸⁷ As the so-called supreme chief of the black population,¹⁸⁸ he had considerable legislative powers and could even repeal or amend Acts of Parliament by proclamation. He was even authorised, under the **National States Constitution Act, 1971**, to promulgate legislation creating constitutions for the six bantustans which did not acquire ‘independence’.¹⁸⁹

The State President also had the power to convene and prorogue Parliament,¹⁹⁰ which he exercised in consultation with the (whites-only?) Cabinet.¹⁹¹

THE EXECUTIVE

The executive consisted of the State President as head of the executive authority, and was divided into four entities, namely the central Cabinet, and three executive entities (Ministers' Council) serving each of the three race-based Houses of Parliament.

In terms of Section 24(1) of the Constitution Act, the State President appointed members of the Cabinet to administer state departments or to perform such other functions as he might determine. Such persons might either be members of a House of (the tri-cameral) Parliament or, if not, become one within twelve months of appointment as a Minister.¹⁹² The Cabinet was responsible for 'general affairs', which included the administration of the affairs of the indigenous African majority. All such persons held office as Ministers of the Republic during the State President's pleasure.¹⁹³

There was no requirement that members of the Cabinet should be members of the ruling party, unless they were members responsible for 'own affairs', in which event they had to be members of their respective population groups.¹⁹⁴

Chairpersons of Ministers' Councils were designated as such by the State President if, in his opinion, they had the support of the majority in their respective Houses;¹⁹⁵ members of the various Ministers' Councils were appointed on the advice of such Chairpersons. Members of the Ministers' Councils were politically responsible for the 'own affairs' of their respective population groups.

No distinction was made between the Ministers who were members of the Cabinet and those who were members of the three Ministers' Councils; all were simply referred to as 'Ministers of the Republic'.¹⁹⁶ The State President either acted *in consultation with* the (central) Cabinet¹⁹⁷ or *on the advice of* the Ministers' Council affected,¹⁹⁸ except in regard to certain specific matters or where otherwise expressly stated or by necessary implication.¹⁹⁹

THE PRESIDENT'S COUNCIL

The President's Council, a substitute legislator which was established under Section 70(1) of the 1983 Constitution to deal with, and resolve, conflicts among the three Houses of Parliament, was an important institution in the legislative process.

The Council's function was to advise the State President on any matter which he referred to it, and on any matter, except for draft legislation, which it regarded as a matter of public interest.²⁰⁰ Of particular note was its power to decide whether a bill (or where there were more than one version thereof, which version) should be signed by the State President in the event of a conflict between the three Houses of Parliament over 'general affairs' legislation.²⁰¹

Though neither the State President nor the President's Council was part of (the tri-cameral) Parliament, and though Parliament as an institution was described as "the sovereign legislative authority in and over the Republic",²⁰² it was thus possible under the previous constitutional order for a bill to become law despite its rejection by two of the three Houses of (the tri-cameral) Parliament. A glaring example of the utilisation of that undemocratic constitutional device was the **Further Indemnity Act, 1992**,²⁰³ the provisions of which were passed this way when the special session of Parliament held in October 1992 could not enact it.

PARLIAMENTARY SOVEREIGNTY AND THE TESTING RIGHT

The *grundnorm* of South African constitutional law, parliamentary sovereignty, was essentially preserved, albeit in diluted form. Section 34 of the 1983 Constitution, a rehash of its predecessor, Section 59(2) of the the previous Constitution, provided that, save as was provided in subsection (2), thereof, no court of law was competent to inquire into or pronounce upon the validity of an Act of Parliament.

During the debates on the Constitution, the Government had actually rejected the idea of a testing right in regard to the contents of legislation as, according to Chris Heunis,

then Minister of Constitutional Development and Planning, it implied that the courts would perform a typically legislative function and in certain cases would be the final legislator.²⁰⁴

However, unlike its predecessors, the 1983 Constitution added an express exception to the rule that courts did not have any competence to inquire into or pronounce upon the validity of Acts of Parliament. In terms of Section 34(2)(a) thereof, any division of the Supreme Court of South Africa was competent to inquire into and pronounce upon the question as to whether the provisions of the Constitution were complied with in connection with any law which purported to have been enacted by the State President and Parliament. This limited testing right was subject to the provisions of Section 18 of the Constitution.

Section 18 manifestly excluded judicial review of the *substance* of the State President's decision as to whether a bill dealt with 'own' or 'general' affairs. It also sought to restrict the court's role to the issue of whether or not the State President had, in terms of Section 17(2)(a) of the Constitution, consulted the Speaker of Parliament or, as the might have been, the Chairpersons of the various Houses of Parliament. Otherwise the courts could enquire into matters covered by Section 18(2)²⁰⁵ of the Constitution when there was a suggestion of *mala fides*, or to determine whether the State President's decision was made fairly and in good faith.

Section 34(2)(a) granted the Supreme Court a limited testing power to examine the procedure whereby legislation had been passed. The Supreme Court was not granted the full testing right to consider the merits, the *substance*, of an Act of Parliament. To paraphrase JD van der Vyver, provided the structural requirements of legality were complied with, Acts of Parliament could thus not by reason of their contents be invalidated by the Supreme Court. The Supreme Court was entrusted with the power of procedural review only.²⁰⁶

Thus, the Supreme Court could declare invalid all legislation passed by incorrect procedure.²⁰⁷ The Court could thus declare that Parliament had not acted where correct procedures had not been followed;²⁰⁸ in other words, no Act had been passed because

correct procedures or methods had not been observed.²⁰⁹ This limited testing right was intentionally extended to both entrenched and unentrenched provisions of the Constitution.²¹⁰

However, the Constitution,²¹¹ *ex abundanti cautela*,²¹² expressly excluded this limited testing right in respect of rules and orders of a House of Parliament and joint rules and orders of the three Houses of Parliament.

As is clear from what has been said above, there was, *stricto sensu*, no change in the testing rights of the courts regarding the content or *substance* of legislation. The doctrine of parliamentary sovereignty still constituted the *grundnorm* of our legal system. The end result was that the courts could not police legislation; they could not enquire into the reasonableness or fairness of legislation. As long as Parliament observed the prescribed procedures, it was both omniscient and omnipotent and could still make laws on any subject-matter and in any terms it chose. There were no legal restraints upon Parliament's will.²¹³

THE TESTING RIGHT AND OTHER ACTS OF GOVERNMENT

However, it needs to be pointed out that, in principle, our Courts were competent to examine the validity of any act of the executive, whether the act was performed by virtue of a statute or by virtue of a common-law power such as a prerogative.²¹⁴ Furthermore, our Courts had the power of judicial review, in terms of our administrative law, over the exercise of delegated power. The grounds upon which they could do so were established in our common law. Thus, for instance, the Courts could exercise judicial review over executive action in the case of *mala fides* or if an executive official or body had exceeded his or her or its power, ie acted *ultra vires*. I respectfully submit that, in such circumstances, they could use their inherent power even in the face of ouster clauses expressly excluding their jurisdiction.

At the same time, the Courts would generally not interfere if a discretionary power had been validly exercised; they would not go into the merits of an executive action unless there were irregularities. 'Reasonableness' was, unfortunately, not recognised in our

common law as one of the grounds of review. As Lawrence Baxter pointed out, from 1894, our Courts had “often appeared anxious to disavow any power to set aside administrative action on the ground of unreasonableness.”²¹⁵ They tended to confine the use of their inherent jurisdiction to “matters involving the legality of administrative action.”²¹⁶

In addition to the power to review delegated power, the Courts, had review power over delegated legislation, such as regulations. However, delegated legislation, unlike executive action, could be declared invalid by the Courts, including the magistrates’ courts, on much wider grounds, though there was said to be a doctrine of *benevolent interpretation*²¹⁷ applicable to delegated legislation emanating from municipal councils and other local authorities.²¹⁸

Lastly (in this regard), the Courts had review power over provincial legislation, on both substantive and procedural grounds, just like ordinary delegated legislation discussed above. The Supreme Court also had the power of substantive judicial review over laws enacted by the legislative assemblies of self-governing territories created under the **National States Constitution Act**.²¹⁹ As such territories were not sovereign entities, their laws could also be challenged and declared invalid on the basis of the *ultra vires* doctrine, though the Courts could not easily and lightly declare that Acts of such a legislative assembly were *ultra vires*.²²⁰

PARLIAMENTARY SOVEREIGNTY AND THE STATE PRESIDENT

Parliamentary sovereignty was, however, further diluted, to a large extent, by the extensive powers and competences of the executive State President on the legislative terrain. A careful analysis of the matters referred to in the first schedule²²¹ to the Constitution would suggest that, though the list consisted of matters that could be regarded as ‘own affairs’ of a particular population group, such matters were subject to, and could be overridden by, any ‘general affairs’ legislation on them.

The State President had the sole discretion to decide whether a matter was an ‘own affair’ of a particular population group or a ‘general’ affair’.²²² Of particular note was the

fact that the State President's discretion in this regard was not subject to judicial review,²²³ except in the limited sense explained earlier, on procedural grounds. If he so wished, the State President could refer a matter being considered by him under Section 16 to the President's Council for its advice,²²⁴ which was not binding upon him.²²⁵

Before the State President could decide to certify a bill dealing with a matter as an 'own affair' bill in terms of Section 31(1) of the 1983 Constitution, he was required to consult with the Speaker of the whole of Parliament and with the Chairpersons of the three Houses of Parliament in a manner he deemed fit.²²⁶ It was not clear from the word 'consult' whether he was constitutionally obliged to heed the advice of such persons.²²⁷ Moreover, as the decision whether a matter was an 'own affair' of a particular population group, the State President was required to make *in consultation* with the Ministers who were members of the (whites-only) Cabinet.²²⁸

As stated above, the decisions of the State President in this regard, the making of which was simply an administrative function, were not subject to judicial review.²²⁹ According to Boule, Harris and Hoexter,²³⁰ Section 18(1) of the Constitution was designed to exclude judicial review of the *substance* of the State President's decision on the question of whether a Bill dealt with 'own affairs', and to confine the courts' review powers to the issue of whether the State President had consulted with the Speaker of Parliament and with the Chairpersons of the various Houses as he was required to do under Section 17(2) of the Constitution Act.

THE FRANCHISE

The right to vote in the common territory of the Republic of South Africa was confined to the whites, Coloureds and Indians, all of whom were expected to vote for candidates to represent them in their respective Houses of (the tri-cameral) Parliament. The indigenous African majority were expected to exercise their right to vote in their respective bantustans.

A BILL OF RIGHTS?

The 1983 Constitution contained no bill of rights furnishing protection against both legislative and executive encroachment.²³¹ A proposal by the Progressive Federal Party that a bill of rights and a constitutional court, to protect the rights of the individual, be included in the 1983 constitutional bill, was firmly rejected by the ruling National Party, with the New Republic Party voting against the view and the Conservative Party abstaining. The PFP had argued that that the constitutional court would be the final arbiter in the protection and enforcing of the constitution and its conventions and would, as such, pronounce upon the validity of certain presidential decisions and protect the rights of individuals and groups.²³²

The idea of a bill of rights was rejected for one simple reason: parliamentary sovereignty facilitated constitutional domination of a disenfranchised black majority. A white-controlled Parliament was empowered to enact any legislation it deemed fit for the unrepresented black majority, without the restraints associated with a bill of rights and judicial review.²³³

None of the Constitution's provisions could be regarded as sacrosanct. The entrenched provisions of the Constitution simply meant that certain amendments to the Constitution might be achieved only by means of a specific procedure, not that legislation in general could be declared invalid because it was in conflict with the spirit and values of the Constitution.

FROM 1994 TO 1996

After a long period of negotiations, the World Trade Centre, Kempton Park talks gave birth to the (interim) **Constitution of the Republic of South Africa, 1993**,²³⁴ under which South Africa was governed till the beginning of 1997, when the (new) **Constitution of the Republic of South Africa, 1996**,²³⁵ became law. The (interim) **Constitution** replaced the apartheid constitutional order which was predicated upon a division of the national territory into the common area, four provinces, numerous local

government entities, and the ten bantustans, four of which had opted for, and been granted, apartheid-style independence.²³⁶

A new, democratic, non-racial and non-sexist constitutional order and a united country were thus established.²³⁷ Such an order would be predicated upon a common South African citizenship, a constitutional state, equality between men and women and people of all races and a condition that would enable all citizens to enjoy and exercise their fundamental rights and freedoms. A few of the salient features of the (interim) **Constitution** warrant mention for purposes of this chapter.

PARLIAMENT

The tri-cameral Parliament, the legislatures of the four 'independent' bantustans, as well as the legislative assemblies of the six (non-independent) self-governing territories were abolished by the (interim) **Constitution**.²³⁸ In their place was established a new, non-racial and democratically constituted Parliament consisting of two Houses, namely the National Assembly and the Senate,²³⁹ in which institution vested the legislative authority of the Republic.²⁴⁰

Parliament exercised its legislative power as such subject to, and in accordance with, the (interim) **Constitution**.²⁴¹ In other words, it did not have any power to do anything that was not, either expressly or by necessary implication, sanctioned by the document.

THE PROVINCES

The (interim) **Constitution** established nine new provinces in the stead of the original four provinces and ten bantustans.²⁴² Each of the provinces had its own legislature²⁴³ and executive authority which vested in a premier²⁴⁴ and his/her executive council.²⁴⁵

Each provincial legislature had "the power to make laws for the province in accordance with" the (interim) **Constitution**,²⁴⁶ as well as "laws reasonably necessary for or incidental to the effective exercise of such legislative competence."²⁴⁷ Unless otherwise sanctioned by an Act of Parliament, the laws made by a provincial legislature would not

have any extra-territorial effect; they would "be applicable only within the territory of the province" concerned.²⁴⁸ The legislative²⁴⁹ and executive²⁵⁰ competencies of the provinces were subject to the (interim) **Constitution**.

Parliament was entitled to intervene and make laws with regard to the spheres of legislative competence of the provinces.²⁵¹

THE CONSTITUTION

A Fundamental Law

First and foremost, the (interim) **Constitution**²⁵² was "the supreme law of the Republic";²⁵³ it was, unlike in the previous constitutional orders²⁵⁴ discussed briefly above, not an ordinary Act of Parliament subject to the will of that institution. In the new order, the (interim) **Constitution** as "the supreme law of the Republic" ruled, and all law, including laws passed by Parliament and other legislatures, had to conform to "the highest law". The document specifically provided that "any *law or act* inconsistent with its provisions ... unless otherwise provided expressly or by necessary implication", was "of no force and effect to the extent of the inconsistency."²⁵⁵ (my italics) The country and its people were, for the first time ever since the founding of the Union, no longer subjected to the whims of a transient parliamentary majority or, for that matter, of the President of the Republic and the executive authority.

A Rigid Constitution

Secondly, unlike its predecessors, the (interim) **Constitution** was a rigid, and not a flexible, constitution. As an inflexible constitution enjoying an elevated status, it could be amended or repealed only by a special procedure. As part of such a procedure, a Bill seeking to amend the (interim) **Constitution** "required to be adopted at a *joint sitting* of the National Assembly and the Senate *by a majority of at least two-thirds* of the total number of members of both Houses" for its passing by Parliament.²⁵⁶ (my italics)

There was, in addition to that, a special procedure affecting the amendment of the legislative competencies and executive authority of the provinces. The (interim) **Constitution** provided that amendments affecting these two areas would “be of no force and effect unless passed *separately* by both Houses *by a majority of at least two-thirds* of all the members in each House”.²⁵⁷ (my italics) Moreover, the boundaries and legislative and executive competencies of a province could “not be amended without the consent of a relevant provincial legislature.”²⁵⁸

Constitutionalism

Finally, constitutionalism was accepted in the South African political scene. From the time when the (interim) **Constitution** became our supreme law, our politicians accepted that the output of the majoritarian legislature and executive would “be filtered by radically different concepts of constitutional law.”²⁵⁹ Notwithstanding Parliament’s and the executive’s democratic pedigree, their acts and decisions would from then on be subject to the **Constitution** and the Chapter on Fundamental Rights. In short, the Republic had accepted to bind itself “to certain values which trump the output of a transient legislature.”²⁶⁰

The Franchise

For the first time in the history of South Africa, the vote was constitutionally extended to all South Africans, on a non-racial basis, over the whole of the national territory. Thus, every South African citizen,²⁶¹ or non-citizen where appropriate,²⁶² of or over the age of eighteen years²⁶³ and not subject to any disqualifications as might have been prescribed by law,²⁶⁴ became entitled “to vote in elections of the National Assembly, a provincial legislature or a local government and in referenda or plebiscites” contemplated in the (interim) **Constitution** “in accordance with and subject to the laws regulating such elections, referenda and plebiscites.”²⁶⁵

A Bill of Rights

Unlike its predecessors again, the (interim) **Constitution** contained a set of entrenched fundamental rights and freedoms. A good network of institutions, in addition to the courts of law, was established under the (interim) **Constitution** for the promotion and protection of the fundamental rights.²⁶⁶

The Chapter on Fundamental was binding "on all legislative and executive organs of state at all levels of government."²⁶⁷ The (interim) **Constitution**²⁶⁸ defined an 'organ of state' as including 'any statutory body or functionary'. Thus, the chapter was binding on any body that performed a state function and not only on bodies established by statute.

In addition, it applied "to *all law* in force and all administrative decisions taken and acts performed during the period of the operation of" the (interim) **Constitution**.²⁶⁹ Thus, other than labour relations laws which were temporarily insulated from the application of the chapter,²⁷⁰ Acts of Parliament, statutes and ordinances of provincial government, municipal bye-laws, regulations, customary law and the rules of the common law were affected by the chapter.

Making the chapter applicable to '*all law* in force', including the common law, made it applicable horizontally to relations between persons and not merely to the vertical relationship between the state and a subject of the state. This approach, which made 'all law in force' the focus, introduced the German concept of *drittwirkung* and subjected our private law to the strictures of the chapter.

Juristic Persons

After a lengthy debate in the course of the constitutional negotiations, the issue of whether juristic persons ought to be the bearers of fundamental rights and freedoms was, unfortunately, left to interpretation by the courts of law and, therefore, to litigation. The (interim) **Constitution** merely provided that juristic persons should be entitled to the rights it guaranteed where, and to the extent that the nature of the rights permitted.²⁷¹

However, the very nature of some of the rights enshrined in the chapter clearly weighed in favour of the inclusion of juristic persons in their enjoyment, while the nature of other rights made them incapable of enjoyment by juristic persons.²⁷² Even where a juristic person clearly does not enjoy a right because, by its very nature, the right cannot be enjoyed by any person other than a natural person, Cachalia et al,²⁷³ citing the Canadian case of **R v Big M Drug Mart Ltd**,²⁷⁴ argued that a juristic person would not lack *locus standi* merely because of that. In that case, *it was the law, and not the status of the accused, that was in issue*, the Court pointed out.²⁷⁵

Locus Standi

Before the changes effected by the (interim) **Constitution**, our common law on standing required the challenger to establish that some direct, personal (and possibly special) legal right or *recognised interest*, and not a mere 'sentimental prejudice',²⁷⁶ was at stake. In order to succeed, the applicant or challenger was required to show that he or she had a sufficient, personal and direct interest in the case; "a legally recognised reason, as it were, for claiming the court's attention."²⁷⁷

The *recognised interest* was supposed to be capable of *individuation*. Fortunately, however, a legally recognised interest was not supposed to be capable of being measured in pecuniary²⁷⁸ or proprietary terms for this purpose. Personal liberty, as was demonstrated by the Appellate Division decision in **Wood and Others v Ondangwa Tribal Authority**,²⁷⁹ was one of the strongest of all, and litigation based on any invasion of any of the rights and civil liberties traditionally recognised under our common law was seldom, if ever, met with a challenge to the *locus standi* of the complainant.

With certain limited exceptions, the law was that, in order to have standing, an individual was required to prove that he/she had suffered some 'direct injury or damage',²⁸⁰ or some 'material injury',²⁸¹ or that he/she had some 'valid interest',²⁸² or a 'direct interest',²⁸³ or a 'sufficient interest',²⁸⁴ among others.

The (interim) **Constitution** introduced important and substantial changes to the common law on *locus standi in iudicio*. A list of persons who would, under the (interim)

Constitution, be entitled to apply to a competent court of law for appropriate relief, including a declaration of rights, was given.²⁸⁵ Naturally, the list included “a person acting in his or her own interest”.²⁸⁶

Of particular note, however, is that it also included “an association acting in the interest of its members”.²⁸⁷ Thus, the jurisprudential hostility of the past towards granting standing to an association which had no direct substantial interest in the subject matter of a dispute, which was exhibited in cases such as **Ahmadiyya Ishaati-Islam Lahore (SA) v Muslim Judicial Council (Cape) and Others**,²⁸⁸ and **South African Optometric Association v Frames Distributors (Pty) Ltd t/a Frames Unlimited**,²⁸⁹ was ended.

Standing was also given constitutionally to any “person acting as a member of or in the interest of a group or class of persons”.²⁹⁰ This constitutionalisation of the principle in **Patz v Greene & Co**²⁹¹ certainly helped in the development of our democracy and jurisprudence.

By allowing *locus standi* to “a person acting on behalf of another person who is not in a position to seek ... relief in his or her own name”,²⁹² the (interim) **Constitution** reaffirmed a South African common law position, namely that, as an exception to the ordinary rules of standing, in cases affecting individual liberty a person might approach an appropriate court of law to seek the release of a detained person. This approach had previously been adopted in cases such as **Bozzoli v Station Commander, John Vorster Square, Johannesburg**,²⁹³ and **Wood and Others v Ondangwa Tribal Authority**.²⁹⁴

Finally, the (interim) **Constitution**, by also allowing standing to any “person acting in the public interest”,²⁹⁵ gave recognition to *actio popularis*. Before that development, our common law was as spelt out by Innes CJ in **Dalrymple v Colonial Treasurer**,²⁹⁶ put simply, except in limited, exceptional circumstances, our law did not recognise the right of any person who could not establish that he/she had either been owed a duty by the wrongdoer or that he/she had been caused some damage in law.²⁹⁷

Interpretation

Firstly, in this regard, all the courts were required to promote *the values which underlie an open and democratic society based on freedom and equality*. Secondly, a court interpreting the Chapter on Fundamental Rights was enabled to have regard to principles of international law and comparable foreign case law.²⁹⁸ Thus, even though some of the international human rights instruments, treaties and conventions may indeed not confer enforceable rights upon individuals in the Republic as they are not part of our law, *in so far as they are relevant*, they may now be referred to and used “as an aid to construction of enactments, including the Constitution”.²⁹⁹

At the same time, courts of law were required to presume impugned legislation to be constitutionally valid till a litigant who asserts that an Act or a regulation is unconstitutional has established that.³⁰⁰ The presumption of constitutionality is recognised in many democracies.³⁰¹

Lastly in this regard, the (interim) **Constitution** subjected all South African law, including the common law and customary law, “to the spirit, purport and objects” of the Chapter on Fundamental Rights, which courts of law would have regard to in interpreting, applying and developing our law.³⁰² Thus, if a law fell foul of such “spirit, purport and object”, it ought to be struck down as invalid. This praiseworthy innovation could have tremendous repercussions for our common law and customary law in particular.

Limitation

It was accepted by the founders of the new Republic of South Africa as trite that no right, whether entrenched or not, could be absolute. Thus, the fundamental rights and freedoms entrenched in the (interim) **Constitution** were subject to limitation by law of general application.³⁰³ However, such limitation was permissible only if it was, first and foremost, “reasonable”,³⁰⁴ “justifiable in an open and democratic society based on freedom and equality”,³⁰⁵ and if it would “not negate the essential content of the right in

question".³⁰⁶ Secondly, in respect of certain rights and freedoms, it was a requirement that the limitation, in addition to being reasonable, should be "necessary".³⁰⁷

State of Emergency and Suspension

The (interim) **Constitution** further provided for the suspension of certain rights under a state of emergency. It should be observed that our law on states of emergency underwent a fundamental transformation.³⁰⁸ Subject to minor omissions, the new regime tended to follow international human rights law and jurisprudence in regard to emergency powers.³⁰⁹

THE EXECUTIVE

The National Executive established under the (interim) **Constitution** consisted of the President, the Head of State,³¹⁰ who was to exercise his or her powers and perform his or her functions subject to the provisions of the **Constitution**.³¹¹ The first President, Nelson Rolihlahla Mandela, was elected by the National Assembly at its first sitting.³¹²

The President was to be assisted in the execution of his or her executive authority by Executive Deputy Presidents, Ministers and Deputy Ministers. The executive authority of the Republic, till the departure of the National Party from the Government of National Unity, consisted of members of the African National Congress, the majority party, the National Party and the Inkatha Freedom Party, the latter two parties having won not less than 10% of the national vote in the April 1994 elections.

THE JUDICIARY

The judicial authority of the Republic vested in the courts established by the (interim) **Constitution** and any other legislation.³¹³ In particular, the Supreme Court, which consisted of the Appellate Division and the rest of the Divisions established prior to the coming into effect of the (interim) **Constitution**,³¹⁴ as well as other pre-1994 courts,³¹⁵ were given constitutional recognition.

A new Court, the Constitutional Court, was established by Section 98(1) of the (interim) **Constitution**. The new Court would "have jurisdiction in the Republic as *the court of final instance* over all matters relating to the interpretation, protection and enforcement of the provisions of" the (interim) **Constitution**.³¹⁶

The Constitutional Court was further vested with the power to certify that all the provisions of a new constitutional text that was then to be passed by the Constitutional Assembly complied with a set of Constitutional Principles which were contained in Schedule 4 to the (interim) **Constitution**. Unless so certified, the new constitutional text would be of no force and effect.³¹⁷ The Court's decision certifying the new constitutional text as being in accordance with the Constitutional Principles would be final and binding; no court of law, not even the Constitutional Court itself, would "have jurisdiction to enquire into or pronounce upon the validity of such text or any provision thereof."³¹⁸

Similarly, the Constitutional Court had the power to certify that the text of a provincial constitution or any provision thereof, was not inconsistent with the (interim) **Constitution**.³¹⁹ Failing such certification, a provincial constitution would be of no force and effect. The Court's decision to certify a provincial constitution or any provision thereof as being not inconsistent with the (interim) **Constitution** would be final and binding; no court of law, not even the Constitutional Court itself, would "have jurisdiction to enquire into or pronounce upon the validity of such text or any provision thereof."³²⁰

Details about the Constitutional Court are dealt with in the next chapter.

Judicial Independence

The independence and impartiality of the Courts were spelt out and guaranteed in the (interim) **Constitution**.³²¹ No person and no organ of state was allowed to "interfere with judicial officers in the performance of their functions."³²²

To further enhance the independence and impartiality of our Courts, judges, who were to be fit and proper persons, could only "be appointed by the President acting on the

advice of the Judicial Service Commission".³²³ Their remuneration could not be reduced during their term of office.³²⁴ They could "only be removed from office by the President of the Republic on the grounds of misbehaviour, incapacity or incompetence established by the Judicial Service Commission and upon receipt of an address from both the National Assembly and the Senate praying for such removal."³²⁵ While the Judicial Service Commission was investigating a judge's misbehaviour, incapacity or incompetence, the President could, however, without an address from Parliament, suspend the judge pending the conclusion of the investigation.³²⁶

Judicial Review

The legal effect of making the Chapter on Fundamental Rights applicable to 'all law in force' subjected 'all law in force' during the currency of the (interim) **Constitution** to *judicial review*. A textual *litmus* against which the constitutional validity of 'all law', including Acts of Parliament, was to be tested, was thus established. From then on, any statute, ordinance, regulation, executive or administrative action, the common law and customary law, or any provision or rule thereof that was in conflict with the rights guaranteed in the Chapter might be struck down by the Courts as unconstitutional.

The provincial and local divisions of the Supreme Court were, in particular, given the power of judicial review to inquire into the constitutional validity of bills and statutes or ordinances of provincial legislatures within their jurisdiction.³²⁷ The Constitutional Court, "as the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of" the (interim) **Constitution**,³²⁸ was given the power to inquire "into the constitutionality of any law, including an Act of Parliament",³²⁹ passed or made prior or subsequent to the commencement of the (interim) **Constitution**, and to adjudicate "any dispute over the constitutionality of any Bill before Parliament or a provincial legislature".³³⁰

ADDITIONAL ENFORCEMENT AND PROTECTION MECHANISMS

The Courts were not the only mechanisms for enforcing the rights and freedoms guaranteed in the (interim) **Constitution**. Three additional mechanisms, namely the

office of the Public Protector,³³¹ the Human Rights Commission³³² and the Commission on Gender Equality,³³³ were established.

The Public Protector

The Public Protector, a fit and proper South African citizen,³³⁴ a person "nominated by a joint committee of the Houses of Parliament ... and approved by the National Assembly and the Senate by a resolution adopted by a majority of at least 75 per cent of the members present and voting at a joint meeting",³³⁵ was to be appointed by the President of the Republic whenever it became necessary; but the first such officer would be appointed as soon as possible after the first sitting of the Senate under the (interim) **Constitution**.³³⁶ Unless the new constitutional text would provide otherwise, the Public Protector would hold office for a period of seven years.³³⁷

Like judges, the Public Protector, an independent and impartial person subject solely to the (interim) Constitution,³³⁸ could be removed from office by the President of the Republic "on the grounds of misbehaviour, incapacity or incompetence, determined by a joint committee of the Houses of Parliament ... and upon receipt of an address from both the National Assembly and the Senate requesting such removal."³³⁹ Again like judges, a Public Protector who might be subject to an investigation with the view to removal from office might be suspended by the President pending a decision in such investigation.³⁴⁰

The powers and functions of the Public Protector were stipulated in the (interim) **Constitution**.³⁴¹ In addition to such powers and functions, Parliament could, by law, give powers and functions to the Public Protector.³⁴² However, the Public Protector was specifically precluded from investigating "the performance of judicial functions by any court of law."³⁴³

Provincial legislatures too were empowered to, if they so wished, provide for the establishment, appointment, powers and functions of their own provincial public protectors.³⁴⁴ Provincial public protectors could be appointed by the Premiers *in consultation with* the (national) Public Protector;³⁴⁵ after that, confirmation "by a

resolution of a majority of at least two-thirds of all the members” of the relevant provincial legislature was required before the appointment could be effected.³⁴⁶

A law providing for a provincial public protector should not in any way derogate from the powers and functions of the (national) Public Protector.³⁴⁷ Moreover, a provincial public protector should exercise his or her powers and perform his or her functions *in consultation with* the (national) Public Protector who was given concurrent jurisdiction in the provinces.³⁴⁸

The Human Rights Commission

The Human Rights Commission was to consist of a chairperson and ten members, all of whom were to be fit and proper South African citizens, broadly representative of the South African community.³⁴⁹ The members of the Commission were to elect one person from their own ranks as Chairperson and another as Deputy Chairperson.³⁵⁰

The powers and functions of the Commission could be assigned by an Act of Parliament, in addition to those that were stipulated in the (interim) **Constitution**.³⁵¹ In particular, if the Commission was of the opinion that any proposed legislation might be contrary to the Chapter on Fundamental Rights or to norms of international human rights law which form part of South African law or to other relevant norms of international law, it was required to immediately bring that fact to Parliament or the relevant legislature.³⁵² The Commission could also take up the cudgels for victims of human rights violations. It was even constitutionally obliged to assist such victims and other persons adversely affected by such violations to secure redress. Where necessary, it could even approach a competent court for the necessary relief.³⁵³

The Commission on Gender Equality

This Commission, which should consist of a chairperson and a number of members determined by Parliament, all of whom should be fit and proper South African citizens “broadly representative of the South African community”,³⁵⁴ was intended “to promote gender equality and to advise and to make recommendations to Parliament or any other

legislature with regard to any laws or proposed legislation" affecting gender equality and the status of women.³⁵⁵ Its composition, powers, functions and functioning and all related matters would be provided for in an Act of Parliament.³⁵⁶

CONCLUSION

A new politico-legal system, which, though mired in the socio-economic consequences of our country's past characterised by extreme and grinding poverty resulting from a maldistribution of wealth, resources, opportunities and income, was unpolluted by apartheid, was thus born. Civil and political rights and freedoms, and to some extent socio-economic rights, were guaranteed to the individual on a non-racial basis for the first time in the history of South Africa. This, in a nutshell, was the Republic of South Africa in which the Constitutional Court functioned for a period of two years before the adoption of the new Constitution of the Republic of South Africa.

ENDNOTES - CHAPTER ONE

1. Act No. 200 of 1993. As was evident from the provisions of Section 73(1) of the **Constitution**, this was an interim constitution as a new constitutional text was to be passed by the Constitutional Assembly established under Section 68(1) "within two years from the date of the first sitting of the National Assembly under this Constitution." This was indeed done, and the new **Constitution of the Republic of South Africa, 1996**, was passed by the Constitutional Assembly and duly certified by the Constitutional Court in terms of Section 71(2) of the (interim) **Constitution**.
2. °. From 1910 to 1961 the Union of South Africa was governed under the **South Africa Act, 9 Edward VII c 9** which received the (English) royal assent on 20 September 1909 and came into force on 31 May 1910.
3. °. Which started with the end of the South African War at the conference table in Vereeniging and the signing of peace in Pretoria shortly before midnight on 31 May 1902.
4. °. But it failed to unite the country. By excluding the black majority it sowed the seeds of discontent and bitterness that another generation, in another epoch in South Africa's history, could help address.
5. °. The whites-only representatives of which had not only secured the continuance of their existing 'colour-blind' franchise, but had also had it entrenched in the Act of Union, albeit for a short duration.
6. See Gretchen Carpenter **Introduction to South African Constitutional Law** (Butterworths, Durban, 1987) at 59.
7. *Ibidem*.
8. Especially with the assistance of white missionaries, a thorn in the flesh of the Boers, who took advantage of the new court system and forwarded complaints on behalf of servants. It is noted, however, that the missionaries did so by manipulating the machinery of white power rather than by organising black resistance to it.
9. °. Carpenter, *op.cit*.
10. °. Who had to convene Parliament once a year.
11. °. Members of which were elected. See Carpenter, *ibidem* at 60 for details.
12. °. Jack and Ray Simons **Class and Colour in South Africa 1850-1950** (International Defence and Aid Fund for Southern Africa, London, 1983) at 23 said that the franchise was "open to any *man* who for twelve months preceding registration had occupied property worth twenty-five pounds or received an aggregate wage of either fifty pounds or twenty-five pounds with board and lodging. This was Porter's 'low franchise', which the Colonial Office adopted *in the hope that it would foster common loyalties and interests among all subjects* without distinction of class or colour." (my emphaiss)
13. °. *Ibidem*.
14. °. Dougie Oakes (ed) **Illustrated History of South Africa: The Real Story** (The Reader's Digest Association, New York, 1989) at 129.
15. °. Jack and Ray Simons, *op cit* at 23.
16. °. See Carpenter **Introduction to South African Constitutional Law**, *supra* at 61, for some of the constitutional changes that took place in the Cape Colony between 1872 and the turn of the century.

17. ^o. As a result of the Great Trek from the Cape Colony, for which see any good history book on the subject.
18. ^o. After they had defeated Dingane, then King of the Zulu people.
19. ^o. See HR Hahlo and E Kahn **The Union of South Africa: The Development of its Laws and Constitution** (Juta, Cape Town, 1960), at 61.
20. ^o. A decision which, according to Oakes, **Illustrated History of South Africa**, *supra* at 155, was prompted by a fear that, otherwise, another European power might occupy Durban, and so deny Britain a potential harbour on the eastern trade route.
21. ^o. *Ibidem*.
22. ^o. See Carpenter **Introduction to South African Constitutional Law**, *supra* at 62 for the powers of the Legislative Council.
23. ^o. *Ibidem* at 63.
24. ^o. See Carpenter, *ibidem* for the powers of this Legislative Council.
25. ^o. *Ibidem*. The author further said that: "In 1865 all Blacks were disenfranchised except for those specially enfranchised by the Lieutenant-Governor. A Native Trust, administered by the Lieutenant-Governor and members of the executive, had been set up in 1864 to administer communal land occupied by Blacks."
26. ^o. Referred to as *Die Grondwet*.
27. ^o. The basic function of which, according to Hahlo and Kahn **The Union of South Africa: The Development of its Laws and Constitution**, *supra* at 76, was "to make the law, regulate the government and the finances of the country".
28. ^o. See Carpenter **Introduction to South African Constitutional Law**, *supra* at 64-65 in this regard.
29. ^o. A basic feature which, according to John Dugard **Human Rights and the South African Legal Order** (Princeton University Press, Princeton, 1978) at 18, the Orange Free State shared with the Transvaal.
30. ^o. Which was confined to *white males* over the age of eighteen years. See DH Heydenrych, 'The Boer Republics, 1852-1881', in Trewheila Cameron (ed) **An Illustrated History of South Africa** (Johannesburg, 1986) at 146.
31. ^o. Which the *Volksraad* was basically not empowered to curtail. See Carpenter, **Introduction to South African Constitutional Law**, *supra* at 65.
32. ^o. Which was clearly approached in accordance with the views and the philosophy of the *Voortrekkers*, namely that equality between blacks and whites in Church or State was anathema; whites were to be more equal than the rest. See DV Cowen, 'The Entrenched Sections of the South Africa Act: Two Great Legal Battles', in (1953) **South African Law Journal** at 238-239 about the position in the Orange Free State under Article 1 of the Orange Free State Constitution of 1854 which specifically confined civil and political rights to white persons. See also **Cassim and Solomon v The State**, (1892) **Cape Law Journal** 58 for an illustration of this.
33. ^o. *Ibidem* at 65.
34. ^o. Hahlo and Kahn **The Union of South Africa: The Development of its Laws and Constitution**, *supra* at 74-76.
35. ^o. Carpenter, **Introduction to South African Constitutional Law**, *supra* at 64.

36. ^o. (1898) 15 Cape Law Journal 1 at 4.
37. ^o. But was eligible for re-election. Unlike the President of the USA, the President of the Orange Free State could hold the office for more than two consecutive terms.
38. ^o. In the performance of which he was assisted by an Executive Council comprising the *landdrost* of the Capital, the Government Secretary and three unofficial members appointed by the *Volksraad*.
39. ^o. See Carpenter, **Introduction to South African Constitutional Law**, *supra* at 66-67.
40. ^o. *Ibidem* at 67.
41. ^o. *Ibidem* at 66.
42. ^o. According to Carpenter, *ibidem* at 65, any amendment to the *Grondwet* required adoption by a three-quarters majority in three successive annual sittings.
43. ^o. The leading United States case in this regard was the famous one of **Marbury v Madison**, 1803 1 Cranch 137 (US). See also **Cassim and Solomon v The State**, *supra*, and **The State v Gibson**, (1898) 15 Cape Law Journal 1.
44. ^o. **Studies in History and Jurisprudence** (1901) Vol 1 at 360-361, quoted from Hahlo and Kahn **The Union of South Africa: The Development of its Laws and Constitution**, *supra* at 73.
45. ^o. Also called *Die Grondwet*.
46. ^o. See Dugard **Human Rights and the South African Legal Order**, *supra* at 20. See also Brian Bunting **The Rise of the South African Reich** (International Defence and Aid Fund for Southern Africa, London, 1986) at 14.
47. ^o. DV Cowen, 'The Entrenched Sections of the South Africa Act: Two Great Legal Battles', *supra* at 238 noted that, although Article 9 referred to coloured people (the *gekleurden*), the non-Europeans were predominantly Africans and not persons of mixed blood, and that, therefore, Article 9 clearly sought to distinguish between white and non-white persons.
48. ^o. For a brief discussion of that constitutional crisis, see Dugard **Human Rights and the South African Legal Order**, *supra* at 20-25. See also JD van der Vyver, 'The Concept of Political Sovereignty', in C Visser (ed) **Essays in Honour of Ellison Kahn** (Juta & Co, Cape Town, 1989) 289 at 322-324.
49. ^o. (1883) 1 SAR 6.
50. ^o. (1884) 1 SAR 202.
51. ^o. (1887) 2 SAR 189, in which Kotzé CJ and Esselen J divided the Court two to one (the dissenting minority being Jorissen J) in favour of the validity of the *besluiten*.
52. ^o. (1895) 2 Off Rep 112 at 116, where the learned Chief Justice proclaimed that: "[t]he duly expressed will of the *Volksraad* is law. This will must be declared in due form, and the law duly promulgated. *Of this matter, and of the question whether the law is in conflict with the Grondwet, the court must judge*, but it is not competent to decide upon the internal value and policy of the law. Whether a law is in the interest of society, whether it be necessary or cannot brook delay, is not for the court to determine." (my emphasis)
53. ^o. (1897) 4 Off Rep 17.
54. ^o. See in general Dugard **Human Rights and the South African Legal Order**, *supra* at 22 for Kruger's response.
55. ^o. Which culminated in (Transvaal) Act 1 of 1897.

56. ^o. See JG Kotzé **Memoirs and Reminiscences**, Vol 2 (Maskew Miller Ltd, Cape Town, 1949) at xli-xlii.
57. ^o. Which was stipulated to be the state church, with the state's antipathy towards the Roman Catholic Church being clearly stated. Though these two elements were subsequently dropped, ostensibly to foster good relations with Portugal, non-protestants, like blacks and probably all women, were excluded from the *Volksraad* and the executive throughout the history of the Transvaal Republic. The religious requirement for voters was abolished in 1858 while the religious test for membership of the *Volksraad* was liberalised in 1873.
58. ^o. Who had to be at least a thirty-five year old citizen of the Transvaal Republic enfranchised at least for five years and a member of the *Nederduitsch Herfiovormde Kerk*.
59. ^o. See, further on the constitutional history of these four British colonies before Union, Hahlo and Kahn **Union of South Africa: The Development of its Laws and Constitution**, *supra* at 110-115.
60. 'Historical Background' in Mathew Chaskalson et al **Constitutional Law of South Africa** (1996), at 2-6 to 2-7.
61. ^o. Cowen 'The Entrenched Sections of the South Africa Act: Two Great Legal Battles', *supra* at 241, and Dugard *op cit* 26-27. Govan Mbeki **The Struggle for Liberation in South Africa: A Short History** (David Philip, Cape Town, 1992) at 12 described this compromise as "a flimsy protective cover which in time would be scrapped and thereby render all Africans voiceless, and place the Afrikaner and the English in a position to determine the place of the Africans in their scheme of things."
62. ^o. Dugard *op cit* 26.
63. ^o. Section 35, read with Section 36 of the **South Africa Act**. In terms of the compromise and the resultant entrenchment procedure, no change affecting black voting rights might be effected without a two-thirds majority vote of both Houses of Parliament sitting jointly.
64. ^o. Brian Bunting **The Rise of the South African Reich** (International Defence and Aid Fund, London, 1986) at 37 said that white (European) women were enfranchised only in 1930 while non-white women remained voteless.
65. ^o. An outcome that was in keeping with the philosophy of Alfred (Lord) Milner then British High Commissioner in South Africa and Governor of the conquered Boer republics, who firmly believed in the political superiority of whites and who declared in a speech in 1903 that: "A political equality of white and black is impossible. The white man must rule, because he is elevated by many, many steps above the black man; steps which it will take the latter centuries to climb, and which it is quite possible that the vast bulk of the black population may never be able to climb at all." *Vide* Oakes, *op cit* 266.
66. ^o. See Section 36 of the **South Africa Act**, in terms of which the *status quo* was retained in all the four provinces.
67. ^o. Oakes, *op cit* 266.
68. ^o. *Ibidem*.
69. ^o. 28 & 29 Victo c 63, 1865.
70. ^o. 22 Geo V c 4, 1931.
71. ^o. Dugard *op cit* 28-29.
72. Act No. 38 of 1927.
73. 'Historical Background', *op cit* 2-7.

74. 1930 AD 484.
75. ^o. Oakes, *op cit* 264.
76. ^o. See **House of Assembly Debates** vol 17 col 2762 (22/04/1931), and **Senate Debates** col 485 (08/05/1931) about the political assurances given.
77. ^o. Act No. of 1936.
78. ^o. In **Ndlwana v Hofmeyer N O**, 1937 AD 229. For a discussion of this case, see Cowen "The Entrenched Sections of the South Africa Act: Two Great Legal Battles", *supra* at 247-252. See also Dugard *op cit* 29 and Carpenter *op cit* 140ff. Cf **R v Ndobe**, 1930 AD 484. Note that the first case in which this Act was challenged was **Masai v Jansen N O**, 1936 CPD 361.
79. ^o. **Ndlwana**, at 236-238.
80. ^o. It is to be noted that the **Ndlwana** decision had been preceded by two Privy Council decisions, namely: **Moore v Attorney-General for the Irish Free State**, [1935] AC 484 (PC), in which it was held that, subsequent to the enactment of the **Statute of Westminster**, the Irish Parliament could change the Irish Constitution in a way which was contrary to the Anglo-Irish Treaty; and **British Coal Corporation v The King**, [1935] AC 500 (PC), in which it was held that the Canadian Parliament was competent to abolish constitutional guarantees contained in the Constitution.
81. ^o. See Dugard, *op cit* 29. See also AB Keith **The Dominions as Sovereign States** (1938), at 177; KC Wheare **The Statute of Westminster and Dominion Status** (1949); HJ May **The South African Constitution** (2nd ed, Juta, Cape Town, 1949), at 33; Geoffrey Marshall **Parliamentary Sovereignty and the Commonwealth** (Clarendon Press, Oxford, 1957), at 139-248; and Hahlo and Kahn *op cit* 151-163.
82. ^o. See GA Mulligan 'The Senate Case', in (1957) **SALJ** at 8.
83. ^o. See Brian Bunting **The Rise of the South African Reich**, *supra* at 37-38 for the promise Malan, as Minister of the Interior, had made in 1925 with regard to the political rights of the Coloured community.
84. ^o. See Carpenter, *op cit* 141 for the authorities they sought to rely on in this regard.
85. ^o. Act No. 46 of 1951.
86. ^o. 1952 (2) SA 428 (AD).
87. ^o. **House of Assembly Debates**, vol 78, col 3124 (25 March 1952) See also TE Donges, then Minister of the Interior, *ibidem* cols 5497-5498.
88. ^o. Act No. 35 of 1952.
89. ^o. See AV Dicey **Introduction to the Study of the Law of the Constitution** (10th ed; Liberty Classics, Indianapolis, 1959), at 39-40, for a definition of the doctrine. See also O. Hood Phillips **Constitutional and Administrative Law** (6th ed; Sweet and Maxwell, London, 1978), at 27.
90. ^o. See Leonard M Thompson **The Unification of South Africa 1902-1910** (Clarendon Press, Oxford, 1960), at 95, 97 and 174-175, for the legal orientation of those who participated in the drafting of the **South Africa Act**.
91. ^o. John Dugard **Human Rights and the South African Legal Order**, *supra* at 25-26.
92. ^o. See JD van der Vyver 'Sovereignty and Human Rights in Constitutional and International Law', in (1991) 5 **Emory International Law Journal** 321 at 356-360 for a discussion of the constitutional implications of the doctrine.

93. °. Dicey, *op cit* 70.
94. °. Referred to above.
95. °. In which the Appellate Division had declared the **Separate Representation of Voters Act** null and void.
96. °. 1952 (4) SA 769 (AD).
97. °. *Ibidem* at 784.
98. °. By means of the **Senate Act**, Number 53 of 1955, which was passed bicamerally. This Act allowed for the nominated members of the Senate to be increased from eight to sixteen and for the method of the election of the other Senators to be changed.
99. °. The **Appellate Division Quorum Act**, Number 27 of 1955, which was passed bicamerally.
100. °. Act No. 9 of 1956, which was passed by the requisite two-thirds majority of both Houses of Parliament in a joint sitting at the third reading of the Bill.
101. °. 1957 (1) SA 552 (AD).
102. °. HWR Wade 'The Senate Act Case and the Entrenched Sections of the South Africa Act' in (1957) **SALJ** 160 at 162.
103. °. For Schreiner JA's minority judgment, see in general Marinus Wiechers 'The Fundamental Laws behind our Constitution: Reflections on the Judgment of Schreiner JA in the Senate Case' in Ellison Kahn (ed) **Fiat iustitia: Essays in Memory of Oliver Deneys Schreiner** (Juta & Co, Cape Town, 1983) 383-394.
104. °. GA Mulligan 'The Senate Act Case' in (1957) **SALJ** at 9 noted that the Chief Justice had conceded that that was the sole purpose of the **Senate Act**.
105. °. In **Collins v Minister of the Interior**, *supra*, at 565.
106. °. For the full text of that document, see International Commission of Jurists **South Africa and the Rule of Law** (Geneva, 1960) at 111. See Brian Bunting **The Rise of the South African Reich** (1986) at 105ff for a discussion thereof. See also Dugard **Human Rights and the SA Legal Order** (1978) at 32-33.
107. °. Dugard, *op cit* 33.
108. °. Nelson Mandela 'I am Prepared to Die' in Nelson Mandela **The Struggle is my Life** (International Defence and Aid Fund for Southern Africa, London, 1978) 155 at 158 said in this regard that: "[i]n 1960 the Government held a referendum which led to the establishment of the Republic. Africans, who constituted approximately 70 per cent of the population of South Africa, were not entitled to vote, and were not even consulted about the proposed constitutional change." (my emphasis)
109. °. **Human Rights and the South African Legal Order** (1978) at 90.
110. °. Act No. 68 of 1951.
111. °. Act No. 46 of 1959.
112. °. Act No. 48 of 1963.
113. °. In terms of the **Status of the Transkei Act**, Number 100 of 1976, under which South Africa renounced all authority over the territory and declared Transkei to be "a sovereign and independent State" which, according to Section 1, had ceased "to be part of the Republic of South Africa."

114. ^o. See Dugard **Human Rights and the South African Legal Order** (1978) at 93 for the list of the rest of the bantustans which were in existence by 1978. Subsequently, self-governing status was accorded to the Southern Ndebele and Swazi groups. See Geoffrey Bindman (ed) **South Africa and the Rule of Law** (Pinter Publishers, London, 1988) at 130 for the full list.
115. ^o. Which originally had 109 members, sixty-four of whom were traditional leaders, many of whom were appointed as such by the South African Government. The rest, forty-five in number, were elected members.
116. ^o. These were powers over local matters such as inferior courts, finances, agriculture, education, soil conservation, and after 1972, legal aid, housing and health. Certain vital matters, such as defence, external affairs, aviation, railways, national roads, postal, telephone, and radio affairs, as well as control the South African Police units charged with internal security, were expressly excluded from the jurisdiction of the Legislative Assembly.
117. ^o. See in general on the Transkei Constitution Ellison Kahn 'Some Thoughts on the Competency of the Transkeian Legislative Assembly and the Sovereignty of the South African Parliament', in (1963) 80 **SALJ** 473.
118. ^o. See Gwendolen M Carter, Thomas Karis and Newell M Stultz **South Africa's Transkei: The Politics of Domestic Colonialism** (Northwestern University Press, Evanston, 1967).
119. ^o. Act No. 26 of 1970.
120. ^o. As amended by Act 70 of 1974.
121. ^o. Act No. 21 of 1971. This Act was subsequently rechristened and called the **National States Constitution Act**.
122. ^o. **Introduction to South African Constitutional Law**, *supra* at 410.
123. ^o. *Ibidem*.
124. ^o. By which, as stated above, the Transkei was granted 'independence'.
125. ^o. Carpenter, *op cit* 410-411.
126. ^o. See Section 6 read with Schedule B of the Act.
127. ^o. Cited by Patrick Laurence **The Transkei: South Africa's Politics of Partition** (Ravan Press, Johannesburg, 1976) at 13-14.
128. ^o. Act No. 32 of 1961 discussed below. As Carpenter, *op cit* 412 observed, many of the provisions of the Transkei Constitution were in fact taken *verbatim* from the 1961 South African Constitution.
129. ^o. See Carpenter, *op cit* 411 for a summary of the salient features of the document.
130. ^o. Who headed the executive, on the advice of which he acted.
131. ^o. Carpenter, *op cit* 411.
132. ^o. **Status of Bophuthatswana Act**, Number 89 of 1977.
133. ^o. **Status of Venda Act**, Number 107 of 1979.
134. ^o. **Status of the Ciskei Act**, Number 110 of 1981. Bindman, *op cit* 131 quite correctly noted that though the inhabitants of the territory were all Xhosa-speaking indigenous Africans who were not different in any way whatsoever from those of the much larger Transkei to its north, the government of the Ciskei always frantically tried to pretend that there was "a special Ciskeian national identity."

135. ^o. Act No. 18 of 1977. Section 7(1) of this Constitution provided that the document was the supreme law of the territory and Section 7(2) provided that any law passed *after* its commencement and inconsistent with its provisions, was, to the extent of the inconsistency, null and void.
136. ^o. Section 8(1) of the Bophuthatswana Constitution.
137. ^o. Bindman, *op cit* 136.
138. ^o. Act No. 83 of 1967.
139. ^o. In **S v Marwane**, 1982 (3) SA 717 (A).
140. ^o. Bindman, *op cit* 132.
141. ^o. Act No. 107 of 1979.
142. ^o. Carpenter, **Introduction to South African Constitutional Law**, *supra* at 415.
143. ^o. *Ibidem* at 416.
144. ^o. *Ibidem* at 415.
145. ^o. *Ibidem* at 416.
146. ^o. That is, persons of racially mixed parentage, who, under Sections 1 and 5(5) of the **Population Registration Act**, Number 30 of 1950, were neither white persons nor Bantus.
147. ^o. Under the **Separate Representation of Voters Amendment Act**, Number 50 of 1968.
148. ^o. Under the **Coloured Persons' Representative Amendment Act**, Number 52 of 1968, read with Act 49 of 1964.
149. ^o. That is, all persons of Asiatic extraction, regardless of whether or not they had originated from India.
150. ^o. Act No. 28 of 1946.
151. ^o. Act No. 47 of 1948.
152. ^o. Act No. 31 of 1968.
153. ^o. Act No. 67 of 1972.
154. ^o. South African Institute of Race Relations, **A Survey of Race Relations in South Africa**, 1976, at 184.
155. ^o. **Rand Daily Mail**, 21 August 1976.
156. ^o. *Ibidem* at 21.
157. ^o. The Commission of Enquiry into Matters Relating to the Coloured Population Group, which was led by Dr Erica Theron.
158. ^o. The Commission's far-reaching Report, RP 38/1976, constituted the gist of the 1983 constitutional changes which are discussed below.
159. ^o. **Hansard**, cols 5133-4 and 5275-6.

160. ^o. South African Institute of Race Relations, **A Survey of Race Relations in South Africa**, 1976, at 12.
161. ^o. *Ibidem*, where the 1976 White Paper, entitled the **Provisional Comments by the Government on the Recommendations of the Commission of Enquiry into Matters Relating to the Coloured Population Group**, was quoted.
162. ^o. According to Dugard, *op cit* 34, at the 1960 referendum 850 458 votes (ie 52.3%) were cast in favour of the Republic, while 775 878 (47.7%) votes were cast against it.
163. ^o. Act No. 32 of 1961.
164. ^o. Section 59(1).
165. ^o. Which were referred to above.
166. ^o. Section 59(2).
167. ^o. In **Nxasana v Minister of Justice and Another**, 1976 (3) SA 745 (D) at 747-748. However, jurists such as Laurence J Boule, Bede Harris and Cora Hoexter **Constitutional and Administrative Law: Basic Principles** (Juta & Co, Cape Town, 1989) at 145; and JD van Der Vyver 'The Section 114 Controversy and Governmental Anarchy' in (1980) 97 SALJ at 363 held a contrary viewpoint. For the position in English law, see **Anisminic Ltd v Foreign Compensation Commissioner**, [1969] 2 AC 147.
168. ^o. *Op cit* 148.
169. ^o. See JD van der Vyver, 'The Section 114 Controversy - And Governmental Anarchy', in (1980) 97 SALJ 363 at 365. Note that, according to LJ Boule, 'The Resurrection of Section 114 of the Constitution', in (1978) 95 SALJ 583 at 584-585, the provisions of Section 114 and its predecessor had been violated so many times that a challenge to central legislation contravening Section 114 would have been an exercise in futility.
170. ^o. Act No. 69 of 1986.
171. ^o. 1982 (3) SA 633 (C).
172. ^o. 1982 (3) SA 638 (C).
173. ^o. **Introduction to South African Constitutional Law**, *supra* at 149.
174. ^o. In 'The Section 114 Controversy - And Government Anarchy', *supra* at 369.
175. ^o. *Op cit* 144-145.
176. ^o. 1980 (2) SA 547 (NC) at 554.
177. ^o. See the **Report of the Molteno Commission**, Donald Molteno, Chairman, 'Franchise Proposals and Constitutional Safeguards', (Johannesburg, 1960), (1960) **Annual Survey of South African Law** at 12; and Ellison Kahn **The New Constitution (supplement to Hahio and Kahn, South Africa: The Development of its Laws and Constitution)** (Juta & Co, Cape Town, 1962) at 2.
178. ^o. See **Sachs v Minister of Justice**, 1934 AD 11 at 37.
179. ^o. 'The Record of the Judiciary' in H Corder (ed) **Democracy and the Judiciary** (IDASA, Cape Town, 1989) at 50. See also John Dugard 'The Quest for a Liberal Democracy in South Africa' in **Law Under Stress: South African Law in the 1980s** (Juta & Co, Cape Town, 1988) at 254-255.

180. °. Corder, *ibidem* at 53-54. See, for example, **R v Pitje**, 1960 (4) SA 709 (AD) and **Rossouw v Sachs**, 1964 (2) SA 551 (AD), where Steyn CJ and Ogilvie Thompson JA respectively made law against individual liberty where, otherwise, none existed.
181. °. Corder, *ibidem*.
182. °. Act No. 110 of 1983.
183. °. *Ibidem*, Section 30.
184. °. Sections 7 and 8 of the Constitution Act. The electoral college, which was chaired by the Chief Justice who was not a member and who did not possess a vote, consisted of eighty-eight members of Parliament, ie fifty members of the (white) House of Assembly, twenty-five members of the (Coloured) House of Representatives and thirteen members of the (Indian) House of Delegates. The whites had a built-in majority in the college as the Coloureds and the Indians put together (thirty-eight) constituted a minority.
185. °. Discussed briefly below.
186. °. Section 30 of the Constitution Act.
187. °. *Ibidem*, Section 33(1).
188. °. *Ibidem*, Section 93.
189. °. As the Appellate Division decision in **Government of the Republic of South Africa v Government of KwaZulu**, 1983 (1) SA 164 (A) amply demonstrated, the State President did not possess any authority to retract the legislative freedom of those bantustans once he had granted it.
190. °. Section 38(1) of the Constitution Act.
191. °. It is noted in passing that, because of the provisions of Section 20(d) of the Constitution Act, it was theoretically possible for non-white members of Ministers' Councils to be members of the Cabinet.
192. °. Section 24(3)(a) of the Constitution Act.
193. °. Section 24(2) of the Constitution Act.
194. °. Section 24(3)(b)(i) and (ii) of the Constitution Act.
195. °. Section 21(2) of the Constitution Act.
196. °. Section 24(2) of the Constitution Act.
197. °. In regard to matters that were regarded as 'general affairs'; Section 19(1)(b) of the Constitution Act.
198. °. In regard to matters that were regarded as 'own affairs'; Section 19(1)(a) of the Constitution Act.
199. °. Section 19(2) of the Constitution Act.
200. °. Section 78(1) of the Constitution Act.
201. °. *Ibidem*, Section 78(5).
202. °. *Ibidem*, Section 30.
203. °. Act No. 151 of 1992.

204. °. See the **House of Assembly Debates**, col 11369, 16 August 1983.
205. °. That is whether matters mentioned in a decision of the State President were 'own affairs' or not 'own affairs' of a population group.
206. °. 'Judicial Review under the New Constitution' in (1986) 103 **SALJ** 241-242. See also Dion Basson and Henning Viljoen **South African Constitutional Law** (Juta & Co, Cape Town, 1988) at 194.
207. °. See GM Cockram **Interpretation of Statutes** (2nd ed, Juta & Co, Cape Town, 1983) at xxx. See also Van der Vyver, 'Judicial Review under the New Constitution', *supra* at 237.
208. °. Interestingly enough, this was a return to the pre-Union position which Kotzé CJ had stated in an *obiter dictum* in **Hess v The State**, (1895) 2 Off Rep 112 at 116, namely that the Court could indeed declare an instrument which had not been passed according to constitutional law procedures as not being a statute.
209. °. Basson and Viljoen, *op cit* 178.
210. °. Boule, Harris and Hoexter, *op cit* 147.
211. °. Section 34(2)(b).
212. °. Boule, Harris and Hoexter, *op cit* 147 (footnote 94), quite correctly pointed that this was unnecessary as, in terms of the common law, the courts had "never had the power to enquire into whether Parliament had adhered to its own internal rules of procedure."
213. °. Bindman, *op cit* 7.
214. Prerogatives were no longer immune from judicial review. See Friedman J in **Boesak v Minister of Home Affairs**, 1987 (3) SA 665 (C) at 681, for a ruling that the withdrawal of a passport, by way of exercising a prerogative power, was subject to judicial review.
- Note, however, that a special category of prerogatives, acts of State, defined by Dumbutshena CJ in **Patriotic Front-ZAPU v Minister of Justice, Legal and Parliamentary Affairs**, 1986 (1) SA 532 (ZSC) at 539 as the type of prerogatives "connected and concerned with external affairs or, more specifically, with foreign states and their subjects", were immune from judicial review.
215. **Administrative Law** (1984) at 478. See also Stratford JA in **Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Ltd**, 1928 AD 220, at 236-237 in this regard.
216. Baxter, *ibidem*, at 305.
217. *Ibidem*, at 492. See also Lord Russell in **Kruse v Johnson**, [1898] 2 QB 91 at 99.
218. See Lord Russell in **Kruse v Johnson**, *supra* at 99-100 for the four basic grounds of attack in this regard. See also Schreiner JA in **Sinovich v Hercules Municipal Council**, 1946 AD 783, at 802-803.
219. Section 19(1) and (2) of Act 21 of 1971 as amended.
220. See Grosskopf JA in **Makhasa v Minister of Law and Order**, 1988 (3) SA 701 (A), at 723.
221. °. Read with Section 14(2) of the Constitution.
222. °. *Ibidem*, Section 16(1)(a). See also Carpenter, *op cit* 302-303; and Boule, Harris and Hoexter, *op cit* 158ff on this question.
223. °. *Ibidem*, Section 18(2).
224. °. *Ibidem*, Section 17(1).

225. ° See Boulle, Harris and Hoexter, *op cit* 167.
226. ° Section 17(2) of the Constitution Act.
227. ° See Boulle, Harris and Hoexter, *op cit* 160.
228. ° Section 19(1)(b) of the Constitution Act.
229. ° See in this regard JD van der Vyver 'The 1983 Constitution - An Exercise in Consociationalism?', in (1986) 2 **SAJHR** 341 at 346.
230. ° *Op cit* 148.
231. ° The idea was in fact rejected by the Constitutional Committee of the (original) President's Council. See **The Adaptation of Constitutional Structures in South Africa** (PC 3/1982, Ch 6); see also the (1982) 36 **Survey of Race Relations in South Africa** (South African Institute of Race Relations) at 4. The views of HJ Coetsee, then Minister of Justice, were expressed in this regard in an article by him entitled 'Hoekom Nie 'n Verklaring van Mensregte Nie!' in (1984) 9 **Tydskrif vir Regswetenskap** at 5.
232. ° See the (1983) 37 **Survey of Race Relations in South Africa** (South African Institute of Race Relations) at 77.
233. ° See John Dugard 'A Bill of Rights for South Africa?' in (1990) 23 **Cornell International Law Journal** 441 at 443.
234. ° Act No. 200 of 1993 which, it must be pointed out, was enacted by the tri-cameral Parliament which consisted of whites, coloureds and Indians and which excluded the indigenous African majority.
235. ° Act No. 108 of 1996.
236. ° Section 230(1) of the (interim) **Constitution**, read with Schedule 7 thereto, for a list of the apartheid laws that were repealed with immediate effect.
237. ° See the preamble to the (interim) **Constitution**.
238. ° See Schedule 7 to the (interim) **Constitution** for the list of laws, under which such institutions were established, which were repealed.
239. ° Section 36, read with Sections 40(1) and 48(1), of the (interim) **Constitution**.
240. ° Section 37 of the (interim) **Constitution**.
241. ° *Ibidem*.
- 242.. Section 124(1), read with Part 1 of Schedule 1 to the (interim) **Constitution**.
- 243.. Section 125(1), read with Section 127.
- 244.. Section 144(1), read with Sections 145(1)(a), 146 and 147.
- 245.. Section 144(1), read with Section 149(1).
- 246.. Section 125(2), read with Section 126(1).
- 247.. Section 126(2).
- 248.. Section 125(3).
- 249.. Section 126(1) and (2), read with Schedule 6 to the (interim) **Constitution**.

250.. Section 144(2).

251.. Section 126(2A).

252. °. Which, in terms of Section 4(2), bound "all legislative, executive and judicial organs of state at all levels of government."

253. °. Section 4(1) of the (interim) **Constitution**.

254. °. In which the will of the legislature was supreme - even over the constitution.

255. °. *Ibidem*.

256. °. Section 62(1).

257. °. Section 62(2).

258. °. See the proviso to Section 62(2).

259.. Dennis Davis, Mathew Chaskalson and Johan de Waal 'Democracy and Constitutionalism: The Role of Constitutional Interpretation' in Dawid van Wyk et al **Rights and Constitutionalism: The New South African Legal Order** (Juta & Co, Cape Town, 1994) at 1.

260.. *Ibidem*.

261.. Section 6(a)(i).

262.. Section 6(a)(ii).

263.. Section 6(b).

264.. Section 6(c).

265.. Read the Section 6 in its entirety.

266.. See Chapter 8 of the (interim) **Constitution** for these institutions.

267.. *Ibidem*, Section 7(1).

268.. *Ibidem*, Section 233(1)(ix).

269.. Section 7(2).

270.. Section 33(5).

271.. Section 7(3).

272.. See Azhar Cachalia et al, **Fundamental Rights in the New Constitution** (Juta & Co, Cape Town, 1994) at 22-23 for a brief discussion of the categories of rights that were thus affected.

273.. *Ibidem*, at 22.

274.. 18 DLR (4th) 321 at 336-337.

275.. *Ibidem*.

276.. Per Buchanan ACJ in **Clark v Cape Town Council**, (1896) 6 CTR 365, at 367.

277.. See Boule, Harris and Hoexter, *op cit* 266.

278.. See Innes CJ in **Dalrymple v Colonial Treasurer**, 1910 TS 372, at 377. See also **Director of Education, Transvaal v McCagie**, 1918 AD 616, at 629; and **Bitcon v City Council of Johannesburg and Arenow Behrman & Co**, 1931 WLD 273, at 288-290. See further **Henri Viloen (Pty) Ltd v Awerbuch Bros**, 1953 (2) SA 151 (O) at 169H; **United Watch and Diamond Co (Pty) Ltd v Disa Hotels Ltd**, 1972 (4) SA 409 (C) at 415E-H; and **PE Bosman Transport Works Committee v Piet Bosman Transport (Pty) Ltd**, 1980 (4) SA 801 (T) at 804B-E.

279.. 1975 (2) SA 294 (A) at 310, where this liberal approach to standing was extended by the Court to the case of an application not for *habeas corpus*, but for a prohibitory interdict *in anticipation* of an unlawful arrest.

280.. **Bagnall v The Colonial Government**, (1907) 24 SC 470 at 476.

281.. *Ibidem*, at 470.

282.. **Riddelsdell v Hall**, (1883) 2 SC 356 at 358. The concept of a personal interest was obviously a conveniently flexible one, consonant with "the ever-varying circumstances of our social life", as was noted by Juta AJA in **Director of Education, Transvaal v McCagie**, 1918 AD 616 at 627.

283.. **Roodepoort-Maraisburg Town Council v Eastern Properties (Pty) Ltd**, 1933 AD 87, at 101.

284.. **Director of Education, Transvaal v McCagie**, *supra* at 628. See also **Smalberger v Cape Times Ltd**, 1979 (3) SA 457 (C) at 462; and **The Administrator, Transvaal and The Firs Investments (Pty) Ltd v Johannesburg City Council**, 1971 (1) SA 56 (AD) at 70.

285.. Section 7(4)(a).

286.. Section 7(4)(b)(i). Cachalia et al, *op cit* 23, noted that 'interest' was not defined, however.

287.. Section 7(4)(b)(ii).

288.. 1983 (4) SA 855 (C).

289.. 1985 (3) SA 100 (O).

290.. Section 7(4)(b)(iv).

291.. 1907 TS 427 at 433.

292.. Section 7(4)(b)(iii).

293.. 1972 (3) SA 934 (W), in which the principal of the University of the Witwatersrand was accorded standing to apply for an *interdictum de libero homine exhibendo*.

294.. Which has been referred to and commented upon above.

295.. Section 7(4)(b)(v).

296.. *Supra*, at 379. See also **Bagnall v The Colonial Government**, (1907) 24 SC 470.

297.. See, for example, **Bamford v Minister of Community Development and State Auxiliary Services**, 1981 (3) SA 1054 at 1059E-G; and **Kendrick v Community Development Board**, 1983 (4) SA (W) at 539-540.

298.. Section 35(1) of the (interim) **Constitution**.

299.. Per Aguda JA in **Unity Dow v A-G Botswana** (Civil Appeal 4/91).

300.. Section 35(2).

- 301.. See, for instance, the Zimbabwe Supreme Court's decision in **Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd**, 1984 (2) SA 778 (ZS) at 783A-D on the *presumption of constitutionality*. As the Ontario Court of Appeal in **Haig v Canada**, (1992) 9 OR (3d) 495 (CA) also demonstrates, Canadian courts have even been prepared to read words into a statute in order to preserve its constitutionality.
- 302.. Section 35(3).
- 303.. Section 33(1).
- 304.. Section 33(1)(a)(i). See Cachalia et al, *op cit* 111-114 for a brief discussion of this requirement.
- 305.. Section 33(1)(a)(ii). See Cachalia et al, *ibidem*, at 114-115 for a brief discussion of this requirement.
- 306.. Section 33(1)(b).
- 307.. Section 33(1)(b)(aa) and (bb). See Cachalia et al, *ibidem* at 115-116 for a brief discussion of this requirement.
- 308.. See Anthony Mathews **Freedom State Security and the Rule of Law: Dilemmas of the Apartheid Society** (Sweet & Maxwell, London, 1988) at 192-215 for a discussion of emergency powers under the *ancien régime*.
- 309.. Section 34. See Cachalia et al, *ibidem* at 116-121 for a brief discussion of this topic.
- 310.. Section 76.
- 311.. Section 75, read with Section 82.
- 312.. In terms of Section 77(1)(a) of the (interim) **Constitution**.
- 313.. Section 96(1).
- 314.. Section 101(1), read with Sections 241 and 242.
- 315.. Section 103(1), read with Sections 241 and 242.
- 316.. Section 98(2).
- 317.. Section 71(2).
- 318.. Section 71(3).
- 319.. Section 160(4).
- 320.. Section 160(5).
- 321.. Section 96(2).
- 322.. Section 96(3).
- 323.. Section 104(1), read with Section 105.
- 324.. Section 104(2).
- 325.. Section 104(4).
- 326.. Section 104(5).

- 327.. Section 101(3)(c) and (e).
- 328.. Section 98(2).
- 329.. Section 98(2)(c).
- 330.. Section 98(2)(d).
- 331.. Section 110(1).
- 332.. Section 115(1).
- 333.. Section 119(1).
- 334.. See Section 110(4) of the (interim) **Constitution** for the basic qualifications required.
- 335.. Section 110(2)(a) and (b).
- 336.. Section 110(3).
- 337.. Section 110(5).
- 338.. Section 111(1).
- 339.. Section 110(8).
- 340.. Section 110(9).
- 341.. Section 112(1).
- 342.. *Ibidem*.
- 343.. Section 112(2).
- 344.. Section 114(1).
- 345.. Section 114(3).
- 346.. *Ibidem*.
- 347.. Section 114(2).
- 348.. Section 114(4).
- 349.. Section 115(1) read with Section 115(3).
- 350.. Section 115(5).
- 351.. Section 116.
- 352.. Section 116(2).
- 353.. Section 116(3).
- 354.. Section 119(1) and (2).
- 355.. Section 119(3).
- 356.. Section 120.

CHAPTER TWO

THE SOUTH AFRICAN CONSTITUTIONAL COURT

INTRODUCTION

The confusion and controversy that preceded the establishment of the Constitutional Court of South Africa continued as the Court was being launched. The **Finance Week**,¹ commenting on the (then) new Constitutional Court said the Court faced the devil of a time. Its role would be central to the democratic state particularly as the Chapter on Fundamental Rights would rely on it for interpretation. Its onerous burden would be compounded by the fact that it would operate parallel to, rather than as a part of the Supreme Court. Disputes pertaining to rights entrenched in the Constitution would be taken directly to the Constitutional Court, from which there would be no appeal. The Constitutional Court was destined to become a most practical instrument of societal change.

There was a lot of speculation as to who would be appointed as the first judges of the Court. What made speculation about appointments particularly tantalising was the fact that judges of the new Court would not be drawn exclusively from the Bench, the Bar or the Side Bar.² Law lecturers who had worked as such for a cumulative period of at least ten years,³ and, at the most, two persons who, by virtue of their training and experience, had acquired expertise in the field of constitutional law relevant to the application of the **Constitution**⁴ and the law of the Republic, could be appointed to the Court.⁵ Needless to say, there was general befuddlement about the precise interpretation of the latter provision, with some people believing that it might have been designed to accommodate returning exiles who might have qualified or practised

outside the Republic and others suggesting that it could clear the way for some 'wise person'.⁶

Willem Venter, then President of the Association of Law Societies, was quoted as having said that we would be "continuing with judicial structures which we had always had. We have superimposed on those the notion of a Constitutional Court ... A difficulty is whether the Appellate Division should be placed next to the Constitutional Court or below it."⁷

An unnamed senior legal academic was also quoted as having complained that the Constitutional Court would marginalise the existing judiciary. The academic complained that the Magistrates' courts would have no constitutional jurisdiction; neither would the Appeal Court. The provincial divisions of the Supreme Court might decide on some constitutional questions but not others. The Constitutional Court would have exclusive jurisdiction over some matters and be a Court of Appeal for others.⁸

PUBLIC PERCEPTIONS AND EXPECTATIONS

These concerns notwithstanding, there was a public perception and an expectation that the Constitutional Court would help the nascent democracy to restore public confidence in the South African legal system. The majority of ordinary people, whose lives had become unbearable under the yoke of apartheid, would be looking to the Court for protection of their rights.⁹ It was for this reason that Anne-Marie Mischke said the following about it:

Die Konstitusionele Hof is nie sommer net nóg 'n hof nie. Dis ook nie sommer net nóg 'n rat in die nuwe stelsel nie ...

Dié hof - soos ook die landdroshowe en die Hooggeregshof in meer plaaslike en provinsiale sake - is die toevlug vir elke burger wat reken die Regering (op enige vlak) tas sy regte aan.¹⁰

It was also expected that the Constitutional Court would be utilised to speedily and spectacularly bring suitably qualified blacks and women on the Bench in order to

address the imbalance inherited from our apartheid past. According to the **Finance Week**,¹¹ Tony Leon had even argued that in our abnormal society affirmative action was imperative in this regard because people had been barred from posts through discrimination in the past. Carmel Rickard, noting that four members of the Constitutional Court would come from the Supreme Court and that Arthur Chaskalson, a white, had already been appointed its President, then remarked that:

[f]or the sake of legitimacy, most if not all the remaining six places will go to candidates who will help the court better to reflect the composition of society - in other words, probably no more white men.¹²

According to **The Star**,¹³ Neil Coleman of the Congress of South African Trade Unions (COSATU) expressed a fear that the Constitutional Court could serve as a counterweight to the new Government and Parliament, and become a site of resistance to democratisation if it were to be dominated by conservatives. Susan Russell reported that Coleman also said that as the Constitutional Court would play an important role in the realisation of the objectives of the Reconstruction and Development Programme, the public needed to be satisfied that its judges would be sensitive to issues of concern to a broad spectrum of the public.¹⁴

In this chapter, the composition, place, powers and functions of the Constitutional Court, as well as how it was to relate to the ordinary courts of the land, will be grappled with. Wherever necessary and possible, an attempt will be made to compare our Constitutional Court with similar courts in countries such as Austria, Germany, Italy, Portugal, Spain and Turkey.

Furthermore, an attempt will be made to contrast the Constitutional Court to courts in countries such as Canada, the United States of America and Venezuela,¹⁵ where judicial or constitutional review is allowed. France, which does not have a constitutional court *par excellence* but a Constitutional Council¹⁶ and a Council of State,¹⁷ will also be considered.

THE COMPOSITION OF THE CONSTITUTIONAL COURT

The South African Constitutional Court consists of a President and ten other judges,¹⁸ all of whom were initially appointed for a non-renewable period of seven years,¹⁹ unless the new constitutional text provided otherwise.²⁰

THE PRESIDENT AND DEPUTY PRESIDENT OF THE COURT

The President of the Constitutional Court was appointed by the President of the Republic *in consultation with* the Cabinet and *after consultation with* the Chief Justice.²¹ The (interim) **Constitution**, *ex abundanti cautela* in my opinion, specifically provided that the first appointment of the President of the Constitutional Court after its commencement would not be made on the recommendations of the Judicial Service Commission.²²

The (interim) **Constitution** prescribed that the President of the Constitutional Court, like all the judges of this Court, had to be a South African citizen,²³ who was fit and proper to be appointed to the Court,²⁴ and who was either a judge of the Supreme Court, or was qualified to be admitted to practise as an advocate or attorney and had, for a cumulative period of not less than ten years after having so qualified, practised as an advocate or attorney or lectured in law at a university.²⁵ In theory at least, even a person who, by virtue of his or her training and experience, had acquired expertise in a field of constitutional law relevant to the application of the **Constitution** and the law of the Republic could, with the approval of the Cabinet, be appointed as the President of the Constitutional Court.²⁶

Some concern was raised about the old-style secret process of the appointment of the President of the Constitutional Court. It was commented that the President, unlike the rest of the judges of the Court, would not be appointed after public hearings, with the input of the Judicial Service Commission.²⁷ This, as will be observed below, was not

accurate as public scrutiny would also not apply to the four judges of the Supreme Court who were similarly appointed by the President of the Republic.²⁸

At the request of the President of the Constitutional Court, the President of the Republic should appoint a Deputy President of the Court from its own ranks.²⁹ The Deputy President of the Court, who might be appointed either for the duration of his or her membership of the Court or for such shorter period as might be determined by the President of the Republic,³⁰ was, in the absence of the President of the Court, to perform the functions of the latter, as well as any functions the President of the Court might assign to him or her.³¹

IN THE OTHER JURISDICTIONS

It is noteworthy that South Africa seems to have followed, but adapted, the example of Austria where the President and Vice President of the Constitutional Court are appointed by the Federal President on the recommendations of the Federal Government. They are selected from among judges, administrative officials and professors holding a chair in law.³²

In Spain the President of the Constitutional Court is appointed by the King from the ranks and on the recommendations of the members of the Court.³³ He or she is appointed for a period of three years.³⁴

In Germany, Portugal and Turkey, the executive do not play much of a role in the appointments. The President and the Vice President of the German *Bundesverfassungsgericht*³⁵ are not appointed³⁶ by the executive but are elected by the two federal legislative bodies, namely the *Bundestag*³⁷ and the *Bundesrat*³⁸ from the ranks of the five highest federal courts of Germany.³⁹ Once elected, the President of the Court (as well as the rest of its judges) is formally appointed by the Federal President to serve, under oath, for a period not exceeding twelve years, whereafter he or she may not be re-elected.

In Portugal the President of the Constitutional Court is appointed by the other judges of the Court from their own ranks.⁴⁰ In Turkey, while all the judges of the Constitutional Court, which was established in 1982,⁴¹ are appointed by the President of Turkey in a convoluted system of nominations,⁴² its President and Vice President are elected by the Court from its own ranks for a renewable term of four years (and, like all the judges of the Court, both serve in a full-time capacity till retirement age of sixty-five, unless they are dismissed).⁴³

In France the President of the Republic selects the President of the Constitutional Council who has a deciding vote in the event of a tie.⁴⁴

THE TEN OTHER MEMBERS OF THE COURT

The rest of the members of the Constitutional Court, all of whom should be appropriately qualified South African citizens would be appointed as follows:

Appointments from Serving Judges of the Supreme Court

The President of the Republic would appoint four judges of the existing Supreme Court *in consultation* with the Cabinet and with the Chief Justice.⁴⁵ It should be noted that the Judicial Service Commission would play no role in the selection of these four judges; all that would be required would be the approval of the Cabinet and the Chief Justice. Neither would these judges submit to public scrutiny as was demanded by the likes of Dennis Davis,⁴⁶ since the President of the Republic would not consult the Cabinet and the Chief Justice in public on these appointments.

Appointments on the Recommendations of the Judicial Service Commission

The last six of the judges were appointed by the President of the Republic *in consultation with* the Cabinet and *after consultation with* the President of the Constitutional Court.⁴⁷ Of these, not more than two persons should be appointed solely on the basis of their having, by virtue of their training and experience, acquired

expertise in the field of constitutional law relevant to the application of the **Constitution** and the law of the Republic.⁴⁸

The President of the Republic made these appointments from the recommendations of the Judicial Service Commission which submitted a short list of ten nominees.⁴⁹ In the event the President of the Republic and the Cabinet did not approve of a nominee, the Judicial Service Commission would have been told as much and furnished with reasons therefor.⁵⁰ The Judicial Service Commission would thereupon be required and entitled to submit further recommendations, "whereafter the appointing authorities shall make the appointment or appointments from the recommendations as supplemented ..."⁵¹

Precisely because the World Trade Centre negotiators and drafters of the **Constitution** as well as Parliament were aware of our past and the popular expectations, a constitutional injunction was imposed upon the Judicial Service Commission to ensure that, when making its recommendations, it had to have "regard to the need to constitute a court which is independent and competent and representative in respect of race and gender."⁵² This was in addition to the requirement that the nominees, like the President of the Court, had to be fit and proper⁵³ as well as appropriately qualified⁵⁴ South African citizens.⁵⁵ In other words, as was pointed out above, even among the negotiators and drafters of the **Constitution** there was an expectation that the appointment of the last six of the judges of the Court could be used to redress the apartheid-created imbalances in respect of race and gender.

CRITICISM

The involvement of the executive in the appointment of judges, even from the recommendations of a body such as the Judicial Service Commission may be problematic in future particularly when the constraint of a government of national unity predicated upon the need to strive for consensus is no longer there. As is known, the appointment of the judges of the South African Constitutional Court by the President of the Republic *in consultation with* the Cabinet is not a mere formality; the "appointing authorities" may reject all or some of the recommendations of the Judicial Service Commission, even though they have to furnish reasons therefor.⁵⁶

Furthermore, in our system no room is left for lay participation. Virtually all the members of the Constitutional Court are lawyers or, in the case of not more than two of them, persons with a legal background of some sort at the very least.

Lastly, the negotiators and drafters of the **Constitution** inadvertently did not state what categories of persons would be excluded from membership of the Constitutional Court. Thus, theoretically, it is, for example, possible for members of Parliament and/or of the provincial legislatures with the prescribed qualifications to become members of the Court if not now, then immediately after they have ceased being such members, as is apparently the case in Germany. Arguably, though, the Judicial Service Commission will not recommend such persons to the President who must appoint members of the Constitutional Court; however, legal certainty in this regard is preferable.

It is, in my opinion, instructive for South Africa to study how matters of this nature are handled in countries with similar courts.

APPOINTMENTS IN THE OTHER JURISDICTIONS

Austria

The Austrian Constitutional Court consists of a President, a Vice President, twelve additional members and six substitute members. The President, the Vice President, half of the additional members of the Court, and half of the substitute members are appointed by the Federal President on the recommendations of the Federal Government, from the ranks of judges, administrative officials and professors holding a chair in law. The rest of the members and substitute members are appointed by the Federal President on recommendations of each of the two Houses of Parliament listing three candidates for each position, with the lower House of Parliament submitting three names of additional members and two names of substitute members and the upper House submitting three names of additional members and one substitute member. The voting in the two Houses in this regard is based on proportional representation. Those thus selected "must have completed their studies in law and political science and for at

least ten years have held a professional appointment which prescribes the completion of these studies."⁵⁷

Furthermore, unlike in South Africa, members of the Austrian Federal or *Land* governments, members of either House of Parliament, employees of, or office bearers in political parties, or members of "any other popular representative body", are excluded from membership of the Constitutional Court for the duration of their membership of such bodies. In addition, any person who held office or appointment in such bodies for the preceding four years is not eligible for appointment to the Constitutional Court.⁵⁸

France

The French Constitutional Council comprises nine judges, all of whom serve for a non-renewable period of nine years. Three of the judges are appointed by the President of the Republic, while three are appointed by the Chairperson of the Senate and the remainder by the Chairperson of the National Assembly. One third of the membership of the Council is renewable every three years.

Unlike under Article 3(2) of the German Law on the Federal Constitutional Court, 1951, there is no requirement that members of the Council should have legal qualifications or be eligible for appointment to judicial office. Former Presidents of the Republic are *de jure* members of the Council, though none of them has served thereon since 1962. Mauro Cappelletti⁵⁹ concluded from this (ie that former presidents serve on the Council), *inter alia*, that this Council is, *stricto sensu*, not a judicial organ.

Membership of the Council precludes membership of certain offices. For instance, members of the Council cannot be members of Parliament or the Government.⁶⁰ Neither can they be members of the French Economic and Social Council or be appointed to any public office for the duration of their membership of the Council.

Germany

The German Federal Constitutional Court is a "twin court" consisting of two panels, each of which has eight judges and which are independent each of the other. Together, however, the sixteen judges of the Court constitute its plenum.⁶¹

The composition of the German Federal Constitutional Court is laid down in the Basic Law⁶² as well as in the Law on the Federal Constitutional Court of 1951.⁶³ In terms of the Basic Law, half of the judges of each of the two panels of the Court are elected by each of the two federal legislative bodies, namely the *Bundestag* and the *Bundesrat*. In each case the Law on the Federal Constitutional Court requires the presence of at least two thirds of the members of the *Bundestag* and the *Bundesrat* respectively when judges of the Court are elected.

While the *Bundestag* sets up an electoral committee of twelve⁶⁴ to elect its half of the judges of the Court, the *Bundesrat*, on the other hand, does so directly. To ensure that the Court includes members with long standing as judges, three of the judges of each panel are selected from the ranks of the five highest federal courts.⁶⁵

Once elected, each of the judges of the Federal Constitutional Court is formally appointed by the Federal President to serve for a period not exceeding twelve years, whereafter he or she may not be re-elected. In all instances, however, a judge of the Federal Constitutional Court has to retire once he or she reaches the age of sixty-eight. Judges of the Court may at any time request to be released from service, and they may be retired or forced to resign against their will only pursuant to a plenary decision of the German Parliament subject to stringent conditions.⁶⁶

The Law on the Federal Constitutional Court⁶⁷ requires that each candidate must have reached the age of forty, be eligible for election to the *Bundestag*, have stated in writing that he or she is willing to become a member of the Court, and be qualified to exercise the functions of a judge pursuant to the Law on German Judges. While in office, a judge of the Court may not be a member of the *Bundestag* or the *Bundesrat*, or the Federal

government, or any of the corresponding organs of any *Land*.⁶⁸ His or her position and functions as a judge of the Court preclude any other professional occupation except that of a lecturer of law at a German institution of higher learning; the latter position should not take precedence over his or her position as a judge of the Court.

Italy

The Italian Constitutional Court consists of fifteen judges, five of whom are appointed by the Italian President, five by Parliament in a joint sitting, and the rest by the Supreme Courts (ie the Council of State, the Court of Cassation and the Court of Auditors).⁶⁹ Those judges appointed by the President and Parliament must be magistrates of the superior courts (even if retired), or attorneys of at least twenty years' standing, or full university law professors. The rest are selected by the judges of the Supreme Courts from their own ranks. All the judges of the Italian Constitutional Court hold office for a period of nine years and are not eligible for immediate reappointment.⁷⁰

Portugal

The composition of the Portuguese Constitutional Court is governed by the 1982 Portuguese Constitution.⁷¹ The Court comprises thirteen judges, ten of whom are appointed by the legislature, the Assembly, on a two-thirds majority basis, while the rest are co-opted by the appointed members.

Three of the ten appointed members of the Court, as well as all the co-opted ones, are compulsorily selected from the ranks of the other courts of Portugal while the rest come from the ranks of jurists. The Constitution, albeit opaquely, also allows for the inclusion of non-specialised sections of society for the purposes of concrete scrutiny of legislation for constitutionality and legality.⁷²

Judges of the Portuguese Constitutional Court, as pointed out above, select the President of the Court from their own ranks. All of them serve for a period of six years, which is renewable without any limit.

Spain

The Spanish Constitutional Court consists of twelve members appointed by the King.⁷³ Four of these judges are *elected* by the Congress of Deputies (the lower House) by a special majority of three-fifths of its members, four by the Senate with the same special majority, two by the Government and the rest by the General Council of the Judiciary.⁷⁴

Judges of the Spanish Constitutional Court are *elected* and formally *appointed* for a period of nine years, with one third of their seats being renewable every three years. They are appointed from the ranks of judges, magistrates and prosecutors, university professors of law, public officials and lawyers, all of whom must be jurists of recognised standing with at least fifteen years' experience in the exercise of their professions.⁷⁵

The Spanish Constitutional Court is independent and its members may not be removed from office for the duration of their term of office. Membership of the Court is incompatible with any representative function, any political or administrative office, political party employment or office, a career as a judge or prosecutor, and any professional or commercial activity.⁷⁶

Turkey

The Turkish Constitutional Court consists of eleven regular judges and four substitute members, all of whom are appointed by the President of Turkey through a rather intricate process of nomination.⁷⁷ The High Court of Appeals (from the ranks of which two regular members and one substitute member are chosen), the Council of State, the highest reviewing body for administrative matters (from the list of which two regular members and one substitute member are chosen), the Military High Court of Appeals (which provides one member), the High Military Administrative Court (which provides one member), the Audit Court (which also provides one member), the Higher Education Council (from the list of which one member is chosen), senior administrative officials and lawyers (from whose list three regular members and one substitute member are chosen), all participate in the nomination of members of the Constitutional Court.

The non-judicial members of the Court must be over forty years of age or have worked for a period of fifteen years as higher education teachers or public servants or must have practised law for the same period before they become eligible for nomination and appointment.⁷⁸ All the members of the Court serve in a full-time capacity until they reach retirement at the age of sixty years, and can be dismissed if convicted of offences requiring dismissal from judicial office or for failure to perform their duties due to ill-health (after a decision of the majority of the members of the Court).⁷⁹

THE PLACE OF THE CONSTITUTIONAL COURT VIS-A-VIS THE OTHER COURTS

Since the adoption of the interim **Constitution** the role of South African courts has been tremendously enhanced. The doctrine of parliamentary sovereignty was replaced by the concept of a *rechtsstaat*, a state based on constitutional supremacy, thus enabling both the newly established Constitutional Court and the Supreme Court⁸⁰ to exercise the full power of judicial review of law and administrative acts. Therefore, the question of the place of the Constitutional Court in the new judicial configuration became an extremely important one.

The **Finance Week**⁸¹ stated that the South African Constitutional Court would operate "parallel to, rather than as part of, the Supreme Court". On the other hand, **The Star**⁸² called it "the highest court in the land". In the meantime, Danie Olivier said

... daar is besluit Suid-Afrika moet 'n *afsonderlike Konstitusionele Hof* kry om uitspraak te lewer oor verskeie grondwetlike kwessies.

Die nuwe hof is dus nie deel van enige van die hofstrukture wat tot 26 April bestaan het nie.⁸³ (my italics)

THE HIERARCHY OF SOUTH AFRICAN COURTS

Prior to the 27 April 1994 elections, our judiciary in general terms consisted of the following courts:

The Supreme Court

The Supreme Court, during the first two years of the existence of the Constitutional Court was,⁸⁴ consisting of:-

the Appellate Division, which in 1950 replaced the Privy Council as the highest appellate tribunal in the land and which would have only an appellate role in both civil and criminal matters;⁸⁵

the Provincial Divisions of the Supreme Court which functioned as courts of first instance as well as as courts of appeal from the lower courts (ie the magistrates' courts and regional magistrates' courts), with both civil and criminal jurisdiction; and

the Local Divisions of the Supreme Court which were staffed by judges of the provincial courts of their respective provinces and which function as courts of first instance only.⁸⁶

In addition to those divisions, provision was made in the **Supreme Court Act**⁸⁷ for circuit local divisions of the Supreme Court which would go on circuit at least twice every year to the outlying districts of a province to hear mainly criminal cases.⁸⁸

Whereas the **Constitution** prescribed the qualifications of members of the Constitutional Court,⁸⁹ it was noticeably silent on the qualifications of judges of the Supreme Court. All that it provided for was that they should be fit and proper persons.⁹⁰ In terms of Constitutional Principle VII,⁹¹ members of the judiciary should, *inter alia*, be appropriately qualified for appointment to the bench. This, over time, has tended to mean that our judges are basically selected from the ranks of senior practising members of the bar, though senior attorneys and legal academics have been appointed to the bench since the advent of the interim **Constitution**.

Lastly, whereas members of the Constitutional Court were appointed for one non-renewable term of seven years, judges of the Supreme Court enjoy tenure for life, though they customarily retire at the age of seventy.

Other Superior Courts

The (interim) **Constitution** further provided that "[t]he establishment, jurisdiction, composition and functioning of all other courts shall be as prescribed by or under a law."⁹² This was in recognition of the fact that the Republic had other courts, superior and inferior. For the purposes of this thesis, it should suffice merely to list the other superior courts.

Special Criminal Courts

The President has power to constitute a special criminal court if an attorney-general decides to arraign an accused before a superior court upon a charge relating to the security of the state, and the Minister of Justice is of the opinion that in view of the circumstances relating to such charge, the interests of justice will be best served if such a court is established.⁹³ Such a court consists of three judges,⁹⁴ and may sit anywhere within the jurisdiction of the attorney-general of the relevant province.⁹⁵ An appeal from such a special criminal court lies to five judges of the Appellate Division of the Supreme Court.⁹⁶

Water Courts

Chapter IV of the **Water Act**⁹⁷ constitutes water courts which correspond to the provincial divisions of the Supreme Court,⁹⁸ and which are presided over by judges of the relevant division of the Supreme Court.⁹⁹ The jurisdiction of the water courts enables them to make orders in respect of public and subterranean water and public streams.¹⁰⁰

Some of the orders of a water court are not appealable.¹⁰¹ Moreover, parties to a water matter may agree to accept a decision of the water court as final.¹⁰² Otherwise, appeals from water courts lie directly to the Appellate Division, without leave thereto having to be obtained from any court.¹⁰³

Special Income Tax Courts

The **Income Tax Act**¹⁰⁴ provides for special courts¹⁰⁵ with jurisdiction to hear appeals from persons dissatisfied with rulings of the commissioner for inland revenue pertaining to their income tax assessments.¹⁰⁶ Since 1991, these courts also hear appeals from persons dissatisfied with decisions of the recently instituted regional tax boards,¹⁰⁷ the jurisdiction of which is limited to cases where the disputed tax amount does not exceed the sum of R20 000.

These courts are each presided over by a judge of the Supreme Court as president, sitting together with an accountant of not less than ten years standing, and a representative of the commercial world.¹⁰⁸

Decisions of these special courts are appealable by or at the instance of either the commissioner for inland revenue or the taxpayer affected.¹⁰⁹ Appeals from these courts lie either to the provincial division of the Supreme Court with jurisdiction in the province where each of the special income tax courts sits, or, with special leave obtained from the president of the special court, directly to the Appellate Division.¹¹⁰ It is worthy of note that both questions of fact and questions of law may form the subject matter of an appeal against a decision of the special income tax courts.¹¹¹

Courts Dealing with Patent Rights, Trade Marks and Copyright

Under the **Patents Act**¹¹² a judge of the Transvaal Provincial Division¹¹³ may be appointed as commissioner of patents.¹¹⁴ As such, the judge thus appointed acts as a court of first instance to hear all cases involving patent rights, including appeals against decisions of the registrar of patents.¹¹⁵ Appeals against decisions of the judge acting as commissioner lie to the full bench of the provincial division,¹¹⁶ although further appeals to the Appellate Division are also possible.¹¹⁷

Similar appeal provisions were made in respect of trade marks.¹¹⁸

The judge who is the commissioner of patents is also authorised to act as the copyright tribunal from time to time.¹¹⁹ As the copyright tribunal the judge adjudicates disputes between licensing bodies and persons requiring licenses or organisations claiming to be representatives of such persons.¹²⁰ Decisions of the copyright tribunal are reviewable by a full bench of the provincial division having jurisdiction.¹²¹

The Special Court Set up under the Maintenance and Promotion of Competition Act¹²²

This special court, which consists of a judge of the supreme court who acts as president thereof and two other members who are specially qualified in economic and business matters generally,¹²³ hears appeals by persons affected by executive decisions which are to the effect that restrictive practices or acquisitions are unlawful. While the judge alone decides questions of law, decisions of the majority are otherwise decisions of the special court.¹²⁴ Its decisions are not subject to appeal or review by any other court of law.¹²⁵

The Lower Courts

The lower courts were, and still are, divided into the magistrates' courts (formerly District Courts), which have both civil and criminal jurisdiction, and Regional Magistrates' Courts, which have criminal jurisdiction only.

Judgments of these courts are reviewable by and appealable to the Supreme Court.

Furthermore, the magistrate of each district is *ex officio* a commissioner of child welfare.¹²⁶ As such, he or she presides over the children's court in his or her district, and performs tasks outlined in the **Child Care Act** and regulations promulgated in terms thereof.¹²⁷

In addition, every magistrate's court is a maintenance court for the area in which it has jurisdiction.¹²⁸ Appeals against decisions of a maintenance court lie to the provincial division of the Supreme Court having jurisdiction in the court's area.¹²⁹

Miscellaneous

Provision is also made for short process courts¹³⁰ and small claims courts.¹³¹ Both these courts are, *stricto sensu*, not civil courts, however.

Lastly, since the inurement of the **Special Courts for Blacks Abolition Act**,¹³² chiefs' and headmen's courts are all that remain of the rump of an extensive system of courts that were specifically created in the nineteenth century to cater solely for the indigenous Africans under traditional and customary law. These courts have both civil and criminal jurisdiction and appeals against their decisions lie to the magistrates' courts in their districts.¹³³

THE CONSTITUTIONAL COURT

The (interim) **Constitution**, as stated earlier on in this thesis, established a new court, the Constitutional Court, in addition to this hierarchy. The Supreme Court was, subject to the **Constitution**, allowed to retain and exercise the jurisdiction it had immediately before the 27 April 1994 elections, including its inherent jurisdiction.¹³⁴ The provincial and local divisions also had comprehensive jurisdiction regarding constitutional review extended to them,¹³⁵ while the Appellate Division was, inexplicably, expressly precluded from exercising such jurisdiction.¹³⁶ Furthermore, parties to matters falling outside the additional jurisdiction of the provincial and local divisions could extend the jurisdiction of such divisions to such matters even if such matters involved questions of constitutionality which otherwise fell within the exclusive jurisdiction of the Constitutional Court.¹³⁷

An even more interesting development in this regard was that, as a result of the provisions of Section 101(6) of the **Constitution**, provincial and local divisions of the Supreme Court had arguably acquired the power to enquire into the validity of Acts of Parliament. Whilst acknowledging that the jurisdiction to pronounce upon the validity of Acts of Parliament vested solely in the Constitutional Court, Levinsohn J remarked, with regard to Section 101(6), in **S v Shangase and Another**¹³⁸ that:

After giving this subsection some anxious consideration, I was satisfied that indeed it does confer jurisdiction upon this Court by consent. I think that the words 'The parties' referred to in that subsection can mean parties to both civil and criminal proceedings and there seems to me to be no bar to an accused concluding such an agreement within the meaning of this subsection ...

I therefore hold that *this Court has jurisdiction* and I now proceed to determine the constitutionality of s 217(1)(b)(ii) of Act 51 of 1977.¹³⁹ (my italics)

This was subsequently confirmed by the Constitutional Court in **S v Zuma and Others**¹⁴⁰ where Kentridge AJ held that "[b]y reason of the consent of the parties under s 101(6) the issue of the constitutionality of s 217(1)(b)(ii) of the Criminal Procedure Act no longer remained within the exclusive jurisdiction of this Court, and fell within the jurisdiction of Hugo J."¹⁴¹ Appeals affecting decisions of the provincial or local divisions in this regard lie to the Constitutional Court,¹⁴² and not to the Appellate Division.¹⁴³

The question of the place of the Constitutional Court in our judicial hierarchy was not covered in the **Constitution**. It was not expressly or implicitly stated whether or not the Court would be the highest court in the land, or whether it would operate parallel to the Supreme Court. All that was stated expressly was that the Court would be "the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of" the **Constitution**.¹⁴⁴ The Appellate Division of the Supreme Court was expressly denied "jurisdiction to adjudicate any matter within the jurisdiction of the Constitutional Court";¹⁴⁵ it was further emphasised¹⁴⁶ that the Constitutional Court would basically be the only court having the jurisdiction allotted to it in the **Constitution**.¹⁴⁷

In my opinion, the Constitutional Court, "the most powerful constitutional body"¹⁴⁸ in the country, with power to overturn parliamentary legislation deemed unconstitutional, was the highest court in the land with regard to issues of constitutional validity;¹⁴⁹ as such, this Court was the guardian of the **Constitution**.¹⁵⁰

However, this left unanswered the question of what court was responsible for the development of our ordinary criminal law, private law, and of the rights deriving from our common law, indigenous law or ordinary legislation.¹⁵¹ The Appellate Division of the Supreme Court,¹⁵² which was headed by the Chief Justice of the Republic, was the final authority with regard to the latter.¹⁵³ The unfortunate thing, however, is that, in terms of this constitutional configuration, the Chief Justice and the Appellate Division did not

have any role in the development of our constitutional law and human rights jurisprudence. This situation has, fortunately, changed to a certain extent in the (new) **Constitution**.¹⁵⁴

THE POWERS AND FUNCTIONS OF THE CONSTITUTIONAL COURT

The (interim) **Constitution** allocated several powers and functions¹⁵⁵ to the Constitutional Court. These included the power to certify the new constitutional text or a provincial constitutional text as not being inconsistent with the **Constitution** or the Constitutional Principles set out in Schedule 4 of the **Constitution**; the power to decide with finality all matters relating to the interpretation, protection and enforcement of the provisions of the **Constitution**; the power to adjudicate upon the constitutional validity of Acts of Parliament and executive or administrative acts; and the power of judicial preview.¹⁵⁶

THE CONSTITUTIONAL COURT AND THE CONSTITUTION-MAKING PROCESS

In this regard, the South African Constitutional Court was meant to play a vital role in two areas, namely in the making of the new constitutional text for the whole of the Republic and in the making of provincial constitutions in cases where provinces wished to have their own constitutions as well.

The New Constitutional Text

For the new Constitution to be valid, the Constitutional Court had to certify that it complied with the 34 constitutional principles enshrined in the (interim) **Constitution**.¹⁵⁷ Without such certification, the new constitutional text would be of no force and effect.¹⁵⁸ The certification by the Constitutional Court that the provisions of the new constitutional text complied with the Constitutional Principle would be final and binding and no court of law¹⁵⁹ would have jurisdiction to enquire into or pronounce upon the validity of such text or any of its provisions.¹⁶⁰

In addition, if, during the proceedings of the Constitutional Assembly, a dispute arose over whether a proposal complied with any of the 34 principles, it could be referred to the Constitutional Court if the chairperson of the Assembly was petitioned to do so by at least 20% (ie 98) of the members of the Constitutional Assembly.¹⁶¹

Provincial Constitutions

The **Constitution** allowed the legislature of each of the nine provinces, if it so wished, to make and pass a constitution for its province "by a resolution of a majority of at least two-thirds of all its members."¹⁶² So long as a provincial constitution thus made was not inconsistent with any of the provisions of the **Constitution**, "including the Constitutional Principles set out in Schedule 4",¹⁶³ a provincial legislature could make such arrangements as it deemed appropriate in connection with its proceedings relating to the drafting and consideration of a constitution for its province.¹⁶⁴

It was expressly provided that no constitutional text passed by a provincial legislature or provisions thereof would be of force and effect unless the Constitutional Court had certified it or them as not being inconsistent with the **Constitution**.¹⁶⁵ Further, it was expressly provided that a decision of the Constitutional Court to the effect that a constitutional text passed by a provincial legislature was not inconsistent with the Constitution or any provision thereof would be final and binding; no (other) court of law would "have jurisdiction to enquire into or pronounce upon the validity of such text or any provision thereof."¹⁶⁶

THE JURISDICTION OF THE CONSTITUTIONAL COURT

As stated above, the Constitutional Court had "jurisdiction in the Republic as the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of" the **Constitution**. As such, it had wide powers in this regard and is the ultimate court which can say with authority and precision what the **Constitution** of the Republic is.¹⁶⁷

Save where otherwise provided in the **Constitution**, the Constitutional Court was the only court having jurisdiction over all matters referred to in Section 98(2) of the **Constitution**.¹⁶⁸ In other words, in certain respects, the Constitutional Court had exclusive jurisdiction while in other constitutional matters it had concurrent jurisdiction with the provincial and local divisions of the Supreme Court. The Appellate Division, as was pointed out previously, was expressly precluded from dealing with and adjudicating any matter which fell within the jurisdiction of the Constitutional Court.¹⁶⁹

Exclusive Jurisdiction

The Constitutional Court, as pointed out above, had exclusive jurisdiction in respect of certain constitutional matters.¹⁷⁰ However, even in respect of such matters, which are discussed below, parties thereto could agree to the jurisdiction of a provincial or local division of the Supreme Court.¹⁷¹ In such instances, appeals would still lie to the Constitutional Court.¹⁷²

In my opinion, even if none of the parties appeals in such a case, the provincial or local division disposing of the matter might, in appropriate circumstances, refer the constitutional issue to the Constitutional Court for a decision, "notwithstanding the fact that the matter has been disposed of".¹⁷³

Constitutionality of Acts of Parliament

The Constitutional Court was granted the exclusive power to deal with "any inquiry into the constitutionality of any law, including an Act of Parliament, irrespective of whether such law was passed or made before or after the commencement of" the **Constitution**.¹⁷⁴ A cursory analysis of this suggests that no law was immune to or insulated from the scrutiny of the Constitutional Court. Thus, the Constitutional Court could be approached to test the validity of any law, including Acts of Parliament, subordinate legislation (such as proclamations), provincial legislation, bye-laws made by local governments, the common law as well as customary law.

The provincial and local divisions of the Supreme Court, notwithstanding their "inherent jurisdiction",¹⁷⁵ did not have jurisdiction to enquire into the constitutionality of Acts of Parliament.¹⁷⁶ They did, however, have jurisdiction to inquire into the constitutionality of any laws passed or made by the legislatures of the former TBVC States if such laws were applicable within their jurisdiction,¹⁷⁷ because such laws were not Acts of Parliament.¹⁷⁸

The decisions of the Constitutional Court, which bound "all persons and all legislative, executive and judicial organs of state",¹⁷⁹ would annul a law or a statute which was adjudged to be constitutionally invalid (either completely or to the extent of its inconsistency with the **Constitution**)¹⁸⁰ with general, *erga omnes*, *ex nunc* and *pro futuro* effects.¹⁸¹ In other words, the Court's decisions would have a constitutive effect; they would determine that a statute or any provision thereof was a nullity because, and to the extent, of its unconstitutionality. The Court might, "in the interests of justice and good government", also make an order invalidating anything done or permitted under a law or a provision thereof which existed at the commencement of the **Constitution**.¹⁸²

However, the Constitutional Court also had a discretion to put Parliament or any competent authority on terms if the interests of justice and good government so require. Thus, instead of declaring a law or any provision thereof invalid, it might require Parliament or any competent authority, within a period it might specify, "to correct the defect in the law or provision, which shall then remain in force pending correction or the expiry of the period so specified."¹⁸³

It is not clear, however, whether the Constitutional Court was confined to the assertions or averments of applicants or to the issues referred to it when reviewing the constitutionality of laws.¹⁸⁴ Consequently, as will become clear in the next chapters of this thesis, the Court in general tended to follow the United States "cases and controversies" approach.¹⁸⁵ Due to this approach, it is my contention that the Court had in certain instances tended, wittingly or unwittingly, to leave intact glaring elements of unconstitutionality in some of the laws it had been called upon to review.¹⁸⁶

Adjudication over the Constitutionality of Bills before Parliament

The Constitutional Court was given exclusive jurisdiction to adjudicate disputes over the constitutionality of any bill before Parliament.¹⁸⁷ The provincial or local divisions of the Supreme Court were not given this jurisdiction; they were confined to adjudicating disputes over the constitutionality of bills before provincial legislatures.¹⁸⁸

This jurisdiction, however, could be exercised only at the request of the Speaker of the National Assembly, the President of the Senate or the Speaker of a provincial legislature, all of whom were constitutionally constrained to "make such a request to the Court upon receipt of a petition by at least one-third of all the members of the National Assembly, the Senate or such provincial legislature, as the case may be, requiring him or her to do so."¹⁸⁹ In other words, without such a request, the Court could not adjudicate any dispute over the constitutionality of a bill before Parliament or a provincial legislature.

It is noteworthy that there was no requirement for the petitioners to, at the very least, state a *prima facie* case before the relevant authority's request could be made to the Constitutional Court. All that they were required to do was to cobble together the support of at least one-third of all the members of the National Assembly, the Senate or, as the case may be, a provincial legislature. Neither was the Constitutional Court given power to take punitive measures against frivolous or vexatious uses of this procedure. In other words, there was no disincentive to those who might seek to abuse it and minority parties could, therefore, use the procedure for political reasons rather than to deal with elements of unconstitutionality in a Bill before Parliament or before a provincial legislature.

The Portuguese Constitutional Court is another example of a court which has this power. It may be called upon by the Portuguese President - or, in certain circumstances, by the Prime Minister or one-fifth of all the members of Parliament - to scrutinise contested legislation for constitutionality before it is passed.¹⁹⁰

Adjudication of Disputes between National Organs of State

The Constitutional Court was the only Court that could adjudicate disputes of a constitutional nature between organs of state at the national level of government.¹⁹¹ Thus, for instance, any dispute of a constitutional nature between the President of the Republic and Parliament could be dealt with only by the Constitutional Court.¹⁹²

Concurrent Jurisdiction

In certain areas, the Constitutional Court and provincial and local divisions of the Supreme Court had concurrent jurisdiction. Consequently, as will be shown below, the Constitutional Court allowed direct access to it only in exceptional cases. It also did not take kindly to referrals that were made to it in relation to matters which the provincial and local divisions were competent to deal with.

Protection of Human Rights

The Constitutional Court, as the court of first and final instance,¹⁹³ was given the power to adjudicate with finality any alleged violation or threatened violation of any fundamental right entrenched in the **Constitution**.¹⁹⁴ Thus, as a competent court of law, in the event of an infringement of or threat to any of the constitutionally entrenched rights, it might be approached for appropriate relief, including a declaration of rights.¹⁹⁵

Provincial and local divisions of the Supreme Court too had this authority within their areas of jurisdiction.¹⁹⁶ Thus, persons could bring actions before these courts in respect of any violation or threatened violation of their entrenched fundamental rights. Appeals against their decisions in this regard went direct to the Constitutional Court,¹⁹⁷ and not to the Appellate Division.¹⁹⁸

Adjudication of Disputes over the Constitutionality of Executive and Administrative Actions

The Constitutional Court and provincial and local divisions of the Supreme Court were constitutionally empowered to adjudicate any dispute over the constitutionality of any

executive or administrative act or conduct or threatened executive or administrative act or conduct of any organ of state.¹⁹⁹

For the Supreme Court this was not a new power; it had always had inherent jurisdiction to examine the validity of executive and administrative actions. Exercising as they do statutory or delegated powers, the decisions of the executive and the administration, notwithstanding numerous statutory attempts to oust the courts' jurisdiction, have always been reviewable by the courts under our common law on various grounds established in administrative law.²⁰⁰

For example, under the (interim) **Constitution** the Transvaal Provincial Division²⁰¹ and subsequently the Durban and Coast Local Division²⁰² of the Supreme Court indeed used this jurisdiction to test the validity of a **Presidential Act**.²⁰³ In the two cases the learned judges came to two interesting and yet diametrically opposed conclusions on whether or not fathers in prison with children under twelve could benefit from the provisions of the **Presidential Act**.

Enquiry into the Constitutionality of Provincial and Subordinate Legislation

Both the Constitutional Court and the provincial and local divisions of the Supreme Court had jurisdiction to enquire into the constitutionality of any law of a provincial legislature, or any subordinate legislation, irrespective of whether such law was passed or made before or after the commencement of the **Constitution**.²⁰⁴

Again it is noteworthy that the Supreme Court has always had jurisdiction to enquire into the validity of subordinate legislation.²⁰⁵ For example, in **Government of the Republic of South Africa v Government of KwaZulu**,²⁰⁶ the Appellate Division, exercising this power, held that in issuing a proclamation without first consulting the then KwaZulu Government as required in terms of the **National States Constitution Act**,²⁰⁷ the State President had acted *ultra vires* and that, therefore, the proclamation was invalid.

What is clear is that, in the light of the provisions of Section 101(5) of the **Constitution**, the Appellate Division lost this power. In the light of these provisions and the provisions of Section 102(12), it indeed lost the power to deal with appeals regarding the constitutionality of even subordinate legislation. For from then on, all "[a]ppels arising from matters referred to in section 101(3) and which relate to issues of constitutionality" lay to the Constitutional Court.²⁰⁸

Adjudication of Disputes between the Lower Rungs of Government

The Constitutional Court²⁰⁹ and provincial and local divisions of the Supreme Court²¹⁰ had concurrent jurisdiction to adjudicate disputes of a constitutional nature between local governments and also between a local government and provincial government.

Adjudication of Disputes over the Constitutionality of Bills before Provincial Legislatures

The **Constitution** gave both the Constitutional Court²¹¹ and the provincial and local divisions of the Supreme Court²¹² jurisdiction to adjudicate any dispute over the constitutionality of a bill before a provincial legislature. In both instances, this power could be exercised only pursuant to a request made by a Speaker of the relevant provincial legislature who was constrained to make such a request upon receipt of a petition by at least one-third of all the members of the legislature requiring him or her to do so.²¹³

Lastly, both the Constitutional Court and provincial and local divisions of the Supreme Court had concurrent jurisdiction to determine whether any matter fell within their respective jurisdiction²¹⁴ as well as to determine any other matters entrusted to them by the Constitution or by any other law.²¹⁵

While the Constitutional Court and provincial and local divisions of the Supreme Court had concurrent jurisdiction on all these matters, for some unfathomable (political?) reasons the Appellate Division was specifically precluded from dealing with any matter falling within the jurisdiction of the Constitutional Court. As Carpenter pointed out,

[t]his is one of many anomalies in the constitution. It certainly strikes one as strange that a single (possibly fairly junior) judge of a provincial or local division has the jurisdiction to deal with constitutional issues and a panel of five of the most senior appellate judges (possibly including the country's chief justice) does not.²¹⁶

ENGAGING THE CONSTITUTIONAL COURT

The Constitutional Court might be approached either by way of direct access, or by reference or by appeal.

Direct Access

The **Constitution** allowed the Constitutional Court to formulate its own rules regarding direct access to it if it was in the interest of justice to do so in respect of any matter over which it had jurisdiction.²¹⁷ In this regard the **Rules of the Constitutional Court**²¹⁸ provide that:

(1) The Court shall allow direct access ... in exceptional circumstances only, which will ordinarily exist only where the matter is of such urgency, or otherwise of such public importance, that the delay necessitated by the use of ordinary procedures would prejudice the public interest or prejudice the ends of justice and good government.

(2) The special procedure referred to in subrule (1) may be sanctioned by the Court on application made to it in terms of these Rules.²¹⁹

Due to the liberalisation of our law on *locus standi* in the area of entrenched rights, it is no longer necessary for a person to establish a personal and direct interest in the matter before approaching the Constitutional Court for appropriate relief. Any person acting on his or her own behalf, any association acting in the interest of its members, any person acting on behalf of another who is not in a position to do so in his or her own name, any person acting as a member of or in the interest of a group or class of persons, and any person acting in the public interest, may approach the Constitutional Court as a competent court for an appropriate remedy.²²⁰ It would appear that even public officials would be entitled to approach the Constitutional Court directly and raise constitutional matters.²²¹

However, the Constitutional Court does not encourage a resort to Rule 17(1) just in any setting. It must be satisfied that the circumstances are indeed of a truly exceptional kind before it can allow direct access to it.²²² Ordinarily the other courts, including the Appellate Division, were required to deal with matters before them and conclude them, if possible, without reaching any issues of a constitutional nature.²²³

An example of a case where a successful application for direct access to the Constitutional Court was made is **S v Zuma and Others**.²²⁴ This was despite the fact that the referral to the Court by Hugo J in that case was wholly incompetent.²²⁵ The Court accepted that there were indeed special circumstances which warranted the grant of audience in that instance.²²⁶

Another instance where direct access to the Constitutional Court was granted was **Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others**.²²⁷ The dispute in that case involved the validity of certain presidential proclamations which provided the framework for the holding of local government elections. The Court, in granting direct access on the basis of urgency, considered the possibility that invalidation of the proclamations could jeopardise the whole electoral process.

Reference

Disputes²²⁸ could also reach the Constitutional Court by way of reference. However, not all persons were entitled to refer disputes to the Court; the **Constitution** mentioned specifically who or what institutions could, or were constrained to, do this, subject to the **Constitution**.

It should be noted that, though the Constitutional Court did have features of the power of *abstract review*,²²⁹ more emphasis was put on concrete cases or disputes. It frowned upon being utilised by anyone or by any organ of the state as a sounding board; neither could it be used by anyone merely soliciting an opinion on any matter. In **Zantsi v Council of State, Ciskei and Others**,²³⁰ the Constitutional Court made it clear that:

It is not ordinarily desirable for a Court to give rulings in the abstract on issues which are not the subject of controversy and are only of academic interest.²³¹

However, I am prepared to venture an opinion that the Court might be approached by any organ of state on an *ex parte* basis to, for example, determine the constitutionality of any law, including an Act of Parliament or any provision thereof. A careful reading of Section 98(2)(c) of the **Constitution** suggests that there need not have been a dispute or a controversy before this could be done.²³²

The following personages and institutions were allowed to refer matters or disputes to the Constitutional Court:

Reference by the Chairperson of the Constitutional Assembly

The **Constitution** allowed the Chairperson of the Constitutional Assembly²³³ to, during the course of the proceedings of the Constitutional Assembly, refer to the Constitutional Court any proposed draft, or any part or provision, of the new constitutional text, if petitioned to do so by at least one fifth of all the members of the Assembly.²³⁴ This would enable the Chairperson of the Assembly to obtain an opinion from the Court as to whether the proposed new text, or part or provision thereof, would, if adopted by the Assembly, comply with the Constitutional Principles²³⁵ contained in Schedule 4 of the **Constitution**. The procedure to be followed in this regard was outlined in the **Rules of the Constitutional Court**.²³⁶

Reference by the President of the Republic

The President of the Republic might, as stated above, refer disputes of a constitutional nature between parties represented in Parliament or between organs of state at any level of government to the Constitutional Court, *inter alia*, for resolution.²³⁷ The Court's jurisdiction was wide enough to encompass this,²³⁸ and its decision on a matter thus referred to it was, needless to say, binding upon "all persons and all legislative, executive and judicial organs of state."²³⁹ The procedure to be followed in this regard was laid out in the **Rules of the Constitutional Court**.²⁴⁰

The President's power in this regard, limited as it was to referring disputes of a constitutional nature to the Court, did not allow him or her to use this to solicit the Court's views on the constitutionality of any law, including an Act of Parliament.²⁴¹ He or she could, therefore, not use it to intervene even in cases of palpable unconstitutionality. There must first have been a dispute of a constitutional nature either between parties represented in Parliament or between organs of state at any level of government before he or she could consider using the power to refer disputes to the Constitutional Court.

Reference by Parliament and Provincial Legislatures

Disputes relating to the constitutionality of Bills before Parliament or provincial legislatures might, as stated above, also reach the Constitutional Court by way of reference.²⁴² The **Constitution** provided that the Speaker of the National Assembly, the President of the Senate, or the Speaker of a provincial legislature, should, upon receipt of a petition by, at the very least, one-third of all the members of their respective bodies, request the Constitutional Court to exercise its power of judicial preview and adjudicate upon such disputes.²⁴³ The procedure to be followed in this regard was outlined in the **Rules of the Constitutional Court.**²⁴⁴

It is arguable that the President of the Republic too could use his or her constitutional power to refer disputes on the constitutionality of Bills before Parliament or provincial legislatures, without being limited by any of the constraints affecting the Speaker of the National Assembly and the other officials.²⁴⁵

Reference by the Supreme Court

The Appellate Division, in the course of exercising its appellate jurisdiction, might hear all appeals against civil and criminal decisions of provincial and local divisions of the Supreme Court, *even in cases where constitutional issues had arisen*, if such appeals could be disposed of without it adjudicating upon the constitutional issues.²⁴⁶ However, if it was necessary, in order to dispose of an appeal, for the constitutional issue to be decided, the Appellate Division was required to "refer such issue to the Constitutional

Court for its decision."²⁴⁷ The procedure to be followed in this regard was outlined in the **Rules of the Constitutional Court.**²⁴⁸

Matters might also reach the Constitutional Court by way of reference from provincial and local divisions of the Supreme Court. A decisive issue which fell within the exclusive jurisdiction of the Constitutional Court was required to be referred to the Constitutional Court for its decision if a provincial or local division hearing a matter considered it to be in the interest of justice do so.²⁴⁹ The relevant court might do so after hearing evidence and making a finding thereon, if the court deemed it necessary for evidence to be heard for the purposes of deciding the case.²⁵⁰

The Constitutional Court did not allow the provincial and local divisions of the Supreme Court to resort to referrals too quickly.²⁵¹ It insisted that they should make their own decisions on constitutional issues within their jurisdiction.²⁵² As Kentridge AJ put it in **S v Zuma and Others,**²⁵³

Even if a rapid resort to this Court were convenient that would not relieve the judge from making his own decision on a constitutional issue within his jurisdiction. The jurisdiction conferred on Judges of the Provincial and Local Divisions of the Supreme Court under s 101(3) is not an optional jurisdiction. *The jurisdiction was conferred in order to be exercised.* (my italics)

Kentridge AJ, commenting further on the practice of referrals to the Constitutional Court under Section 102(1) of the **Constitution** correctly pointed out in **S v Mhlungu and Others**²⁵⁴ that:

[t]he fact that an issue within the exclusive jurisdiction of this Court arises in a Provincial or Local Division does not necessitate an immediate referral to this Court. Even if the issue appears to be a substantial one, the Court hearing the case is required to refer it only

- (i) if the issue is one which may be decisive for the case; and
- (ii) if it considers it to be in the interest of justice to do so.²⁵⁵

In other words, issues not falling within the exclusive jurisdiction of the Constitutional Court might not be referred to it by a provincial or local division.²⁵⁶ Moreover, it was not sufficient that an issue fell within the exclusive jurisdiction of the Constitutional Court.

Regarding the provisions of Section 102(1), the Constitutional Court also emphasised in **S v Vermaas; S v Du Plessis**²⁵⁷ that:

[w]hat we have to decide on a referral ordered under the subsection is a specific "issue" falling within our exclusive jurisdiction which has arisen in the "matter" so referred, and not the "matter" in its entirety. To solicit a decision on an "issue" of that sort is the very purpose of any such referral, after all, and the only one. The subsection recognises the restricted ambit of the enquiry when it directs the referring court to hear and make findings on any evidence needed "for the purposes of deciding such issue".²⁵⁸

If, on the other hand, a constitutional issue falling within the exclusive jurisdiction of the Constitutional Court was properly referred to it, it was provided that the relevant court "shall suspend the proceedings before it, pending the decision of the Constitutional Court."²⁵⁹

Furthermore, any division of the Supreme Court which disposed of a matter in which a constitutional issue had been raised might, if it was "of the opinion that the constitutional issue is of such public importance that a ruling should be given thereon", refer the relevant constitutional issue to the Constitutional Court for a decision, even after the matter itself had been disposed of.²⁶⁰ As Chaskalson P pointed out in **Zantsi v Council of State, Ciskei and Others**,²⁶¹ however,

[b]efore an issue can be referred to this Court in terms of section 102(8) three requirements must be satisfied. First, a constitutional issue must have been raised in the proceedings; secondly, the matter in which such issue was raised must have been disposed of by the Supreme Court; and thirdly, the division of the Supreme Court which disposed of the matter must be of the opinion that the constitutional issue is of sufficient public importance to call for a ruling to be made thereon by this Court.²⁶²

Lastly, the **Constitution**²⁶³ allowed disputes arising between organs of state²⁶⁴ regarding the constitutionality of any executive or administrative act or conduct or any threatened executive or administrative act or conduct of one of those organs to be referred by provincial or local divisions of the Supreme Court to the Constitutional Court for its decision. If the provincial or local division approached by way of application granted the order sought in this regard, the party who or which requested such a dispute to be referred to the Constitutional Court was required to lodge with the registrar of the Constitutional Court the order of court and a proper notice within fifteen days of the order.²⁶⁵

Reference by the Other Courts

The other courts²⁶⁶ did not adjudicate matters of constitutionality. Such matters were dealt with only by the provincial and local divisions of the Supreme Court and by the Constitutional Court subject to the **Constitution**.²⁶⁷ Where it was alleged in a matter before a court falling in this category that a law or a provision thereof was incompatible with the **Constitution** and therefore invalid, such a court should essentially decide the matter on the assumption that the relevant law or provision was valid.²⁶⁸ Such a court might also not refer any matter to the Constitutional Court.²⁶⁹

Although the other courts might not directly refer any dispute to the Constitutional Court, it is arguable that they might do so in a rather circuitous and, needless to say, expensive manner. Provision was made for this in the sense that if the presiding officer of any of the other courts was of the opinion that the interests of justice so warranted, and where there were reasonable prospects of success,²⁷⁰ the proceedings before the court might be postponed to enable a party whose case turned on the question of constitutional validity of a law to approach a provincial or local division of the Supreme Court for appropriate relief. The provincial or local division itself should then refer the matter to the Constitutional Court if the matter fell within the exclusive jurisdiction of the latter court.²⁷¹ Even if the issue did not fall within the exclusive jurisdiction of the Constitutional Court, it might still be referred to it under the **Constitution**.²⁷²

Needless to say, the decisions of the Constitutional Court in all the matters thus referred to it were binding on "all persons and all legislative, executive and judicial organs of state."²⁷³

With regard to all referrals from the Supreme Court to the Constitutional Court, the Constitutional Court cautioned our judges against hastily referring matters to it; it wanted them to decide issues, wherever possible, without constitutional issues having to be addressed.²⁷⁴ Kentridge AJ stressed this in **S v Mhlungu and Others**²⁷⁵ when he pointed out that:

[t]he reasonable prospect of success is ... to be understood as a *sine qua non* of a referral, not as in itself a sufficient ground. It is not always in the interest of

justice to make a reference as soon as the relevant issue has been raised. Where the case is not likely to be of long duration, it may be in the interests of justice to hear all the evidence or as much of it as possible before considering a referral. Interrupting and delaying a trial, and above all a criminal trial, is in itself undesirable, especially if it means that witnesses have to be brought back after a break of several months. Moreover, once the evidence in the case is heard, it may turn out that the constitutional issue is not after all decisive. I would lay it down as 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 ...* In any event, the convenience of a rapid resort to this Court would not relieve the trial Judge from making his own decision on a constitutional issue within his jurisdiction. (my italics)

Appeals

Lastly, disputes could also reach the Constitutional Court by way of appeal. It was stated explicitly in the **Constitution** that all appeals arising from the exercise of additional jurisdiction by the provincial and local divisions of the Supreme Court "which relate to issues of constitutionality shall lie with the Constitutional Court."²⁷⁶

In this regard, the Constitutional Court functioned more like the Supreme Court of the United States. This meant that a provincial or local division of the Supreme Court was empowered to decide certain constitutional issues, but subject to the final say of the constitutional court.²⁷⁷

Furthermore, if a provincial or local division of the Supreme Court decided not to refer a dispute arising between organs of state regarding the constitutionality of an executive or administrative act or conduct or threatened act or conduct,²⁷⁸ the appeal against its decision would lie to the Constitutional Court.²⁷⁹ The same applied to a refusal by a provincial or local division to refer a constitutional issue arising in a matter in which the constitutional issue, which fell within the Constitutional Court's exclusive jurisdiction, was the only issue to be decided.²⁸⁰

In all these matters or appeals, leave to appeal to the Constitutional Court was a basic requirement.²⁸¹

Lastly in this regard,

[i]f an accused person who has been convicted and sentenced at a criminal trial *before a provincial or local division of the Supreme Court*, wishes to appeal against such conviction or sentence *only on a constitutional issue* and no other court has jurisdiction to hear and determine such appeal, the accused person shall be entitled to appeal to the Court.²⁸² (my emphasis)

The same applied to appeals against decisions of provincial or local divisions of the Supreme Court in criminal matters deriving from decisions of magistrates' courts, in which accused persons wished to appeal against the conviction or sentence *solely on the grounds of a constitutional question which fell within the exclusive jurisdiction of the Constitutional Court*.²⁸³ As, in any case, the Appellate Division of the Supreme Court had no jurisdiction to adjudicate any matter which fell within the jurisdiction of the Constitutional Court,²⁸⁴ this Rule, in my opinion, was made *ex abundanti cautela*.

Intervention

By Governments and Executive Authorities

In matters in which the validity of laws, including Acts of Parliament, was in dispute, the (interim) **Constitution**²⁸⁵ entitled governments²⁸⁶ not cited as parties in proceedings relevant to their line functions to intervene as parties before our courts, including the Constitutional Court, or to submit written arguments to the courts in question. As the **Constitution** specifically restricted this right to intervene to issues involving the validity of laws, it could be assumed that the various governments could not intervene if the validity of a Bill before Parliament or of a provincial legislature was in dispute.

In addition, the **Rules of the Constitutional Court**²⁸⁷ required a party challenging the constitutionality of any executive or administrative act or conduct or any threat thereof, or of any law, including an Act of Parliament, to serve notice and the relevant papers upon the executive authority responsible for the executive or administrative act or conduct or threat thereof, or for the administration of any such law (if not cited as a party to the proceedings), within five days of lodging same with the Registrar of the

Constitutional Court. The relevant executive authority might then decide whether to exercise its constitutional right to intervene.

By Amici Curiae

The **Rules of the Constitutional Court**²⁸⁸ also entitled *any person interested in an appeal or a reference or any other matter before the Constitutional Court* to, with or without the written consent²⁸⁹ of all the parties in the relevant matter to be admitted therein as *an amicus curiae*. For this purpose, such a person was required to, in an appropriate application, briefly describe his or her interest in the matter, briefly identify his or her proposed position in the proceedings and clearly, succinctly and briefly set out his or her submissions, their relevance to the proceedings and the reasons for his or her belief that the submissions would be useful to the Court and be different from those made by the other parties.²⁹⁰

ISSUES OF CONSTITUTIONALITY AND NOT OF FACTS

In all instances, the Constitutional Court concerned itself only with questions of law, constitutional validity, and not of facts.²⁹¹ The German Federal Constitutional Court too decides only whether or not an impugned statute is constitutionally valid; it does not decide on the legal dispute and the merits of the case referred to it. As Ipsen pointed out, "[t]he decision of the pending case is left to the court which put the issue before the Bundesverfassungsgericht."²⁹²

A CONSTITUTIONAL COURT AS OPPOSED TO A SUPREME COURT

It is important²⁹³ to, in a few words, contrast our Constitutional Court with the Supreme Court of the United States of America and that of Canada. As was pointed out earlier on, in the initial debate about whether or not South Africa should have a constitutional court, there were views that its powers and functions could be given to the ordinary

courts, particularly the Supreme Court, for, it was argued, it would be better for litigation involving a bill of rights to be kept within the main stream of the judicial process.²⁹⁴

Though the Constitutional Court was a new court, it was to a great extent created in such a manner that the jurisdiction of the provincial and local divisions of the Supreme Court was extended (as shown above). However, as was also pointed out above, the Appellate Division was, as was pointed out above, expressly precluded from dealing with matters of constitutionality.

THE UNITED STATES SUPREME COURT

Jurisdiction

The United States is a classical example of a country that pursues the diffuse system of judicial review.²⁹⁵ It does not have a special constitutional court or tribunal dealing solely with constitutional matters. All United States courts exercise judicial review in the course of their ordinary day-to-day activities as such; the consideration and adjudication of constitutional issues is part of their normal jurisdiction.

The Supreme Court of the United States, "the tribunal of final review",²⁹⁶ and the chief interpreter of the Constitution of the United States, "is more than just an ordinary court. It is empowered to decide whether the other two branches of government live within the Constitution."²⁹⁷ It is the centre of coordination of the federal and state court systems with respect to questions which fall within the competence of the federal judicial power as defined in the Constitution. As the organ that speaks with the ultimate voice of authority²⁹⁸ in the determination of questions arising under the Constitution, treaties and laws of the United States, its nine unelected justices, like those of our own Constitutional Court, wield what has been described as an undemocratic and counter-majoritarian power.²⁹⁹

The US Supreme Court has very little by way of original jurisdiction,³⁰⁰ and it is settled that Congress cannot add to such jurisdiction.³⁰¹ Its original jurisdiction is as defined in, and governed by, the Constitution and is confined to cases affecting ambassadors,

other public ministers and consuls, controversies between the United States and a state, as well as cases to which a state is a party.³⁰²

The bulk of its work, consequently, arises in the exercise of its appellate jurisdiction. As AV Dicey pointed out more than a century ago, the Supreme Court of the United States

derives its importance from its appellate character; it is on every matter which concerns the interpretation of the Constitution a supreme and final Court of Appeal from the decision of every Court ... throughout the Union. It is in fact the final interpreter of the Constitution, and therefore has authority to pronounce finally as a Court of Appeal whether a law passed either by Congress or by the legislature of a state ... is or is not constitutional.³⁰³

Congress and the Supreme Court

Appeals to the Supreme Court of the US are permitted as a matter of right only in a limited category of cases, most of which involve discretionary review by the writ of *certiorari*.

Congress has tremendous power over the Court's jurisdiction to deal with constitutional matters.³⁰⁴ Although Congress has not used this power in more than a century, it remains a potentially significant threat to the Court's independence. At the same time, the nine justices, as the collective chief interpreter of the Constitution, are not a bunch of pushovers; for one thing, the US Constitution is what they said it is.³⁰⁵ Due to their power of judicial review, they have the final say on what the document means.

Within the limits of its appellate jurisdiction as regulated by Congress,³⁰⁶ the Supreme Court is free for the most part to determine what cases to review and, therefore, to determine the size and nature of its docket, and has been doing so especially since 1925.³⁰⁷

The Supreme Court, Abstract Review and Advisory Opinions

The US Constitution makes it clear that judicial power shall be exercised only in respect of "cases and controversies".³⁰⁸ Judicial power is thus invoked only in respect of adversary proceedings.

The Supreme Court does not have authority to issue advisory opinions³⁰⁹ whether at the instance of Congress with respect to the constitutionality of proposed legislation or at the instance of the President in respect of matters pertaining to executive authority. While this position is followed in the majority of the component states of the US, in a few states the highest courts are authorised expressly by state constitutions to render advisory opinions, in non-adversary proceedings, on the constitutionality of proposed legislation at the request of the governors or other state officials.³¹⁰ These advisory opinions, which thrust the courts into political controversy, are not regarded as legally binding judicial precedents when the same issues arise again in adversary proceedings.

Neither does the US Supreme Court practise abstract judicial review.³¹¹ Thus, for instance, Congress, the President, state legislatures or state governors cannot initiate suits to have Acts of Congress or state laws declared invalid on the grounds that they are unauthorised under the Constitution, or that they are in conflict with an Act of Congress, or that they exceeded the delegated powers of Congress.³¹²

Effect of Declaration of Invalidity

As constitutional questions are dealt with only in so far as they are relevant to the disposition of concrete cases or controversies, and even then only when they are ripe for judicial determination,³¹³ it is clear that in the United States no proceedings can be directed at a statute as such. In other words, when the question of constitutionality of a statute arises in a case before a court, the proceeding is not an *in rem* proceeding directed against the statute as such.

Consequently, the finding that a statute is valid or invalid, as the case may be, gives rise to no special form of decree relating to the statute itself. The effect on the statute is that it is not applicable in the particular case. *Stricto sensu*, a decision on a constitutional question has relevancy only for the parties to the case before the court,³¹⁴ ie its effects are *inter partes* and not *erga omnes*. The result of the decision is not that the statute is repealed or annulled since, according to American constitutional theory, only the legislature which enacted the statute has the power to repeal it.³¹⁵

The statute actually remains on the statute book, notwithstanding the adverse decision on its validity.³¹⁶ In practice, however, though it is not repealed, it is no longer enforceable³¹⁷ since it may be supposed that if any other proceedings are brought before a court under it, they too will result in dismissals by reference to the principle of *stare decisis et quieta non movere*. Moreover, a court which finds a statute unconstitutional and unenforceable in one instance will, it can be assumed, find it unconstitutional in subsequent proceedings too.

Lastly, American courts use their power of judicial review sparingly;³¹⁸ they are not too quick to pass judgment on the issue of constitutionality and generally presume a law's constitutionality.³¹⁹ Where a statute is partly valid, they save the valid part, unless the invalid part is so central to the statute that the remaining part becomes meaningless, or if otherwise it is clear that the enforcement of the truncated statute would be a distortion of the legislative intent.³²⁰

The principle of severability, as this procedure is known, was given constitutional recognition in our new legal system by the Constitutional Court in the judgment of Kriegler J in **Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others**.³²¹ As will appear more fully below, this principle is accepted in Canada too.

CANADA

Introduction

Canadian courts, unlike their British counterparts, began exercising the power of judicial review in the nineteenth century,³²² and assumed the power to declare Acts of Parliament or of provincial legislatures invalid³²³ if they found that the relevant legislature had acted outside its competence. They in the process also held invalid executive acts which judges found to be *ultra vires*.

However, unlike their US counterparts, Canadian courts³²⁴ for a long time exercised truncated judicial review. They were, till recently, confined to dealing with the division

and distribution of powers between the federal and provincial organs of government. For a long time they

refused to concern themselves with the wisdom or fairness of legislation, or even the possibility of abuse of legislative power, so long as the impugned legislation was not being used as a means of invading a forbidden area under the guise of exercising a power given to the enacting Legislature. That is, provided that the federal authorities did not infringe upon provincial powers, nor the provinces on the federal powers, the courts would not interfere.³²⁵

The adoption of the Canadian Constitution Act of 1982³²⁶ brought about the possibility of the courts enforcing wide-ranging and qualitative limitations on all legislative and administrative powers.

Jurisdiction

Canada, like the United States of America, follows the diffuse, and not the Austro-Germanic concentrated, system of judicial review. Generally speaking, therefore, *no Canadian court has exclusive jurisdiction over constitutional matters*: The law precludes no court from dealing with constitutional issues.

All Canadian bodies which exercise judicial power, including administrative tribunals, and at all levels, possess the power, and are in fact duty bound, to review the validity of legislation when the issue arises in proceedings before them. The exercise of judicial review, in other words, is not confined to the Supreme Court of Canada.

All Canadian courts are obliged to apply the 1982 Canadian Constitution³²⁷ whenever necessary or relevant in cases over which they, in terms of their constitutive laws, have jurisdiction in respect of the (non-constitutional) subject matter, the parties and the remedies sought. They only have to be "a court of competent jurisdiction".³²⁸

Constitutional Issues

A constitutional issue arises whenever the constitutionality of a statute which is applicable to the proceedings before a court is challenged. It arises in a civil case if, for instance, a party resisting the application avers that it is invalid. It may also arise when

a party seeks to overturn the decision of an executive official or an administrative tribunal on the basis that the executive official or the tribunal, as the case may be, has acted under or applied an invalid statute.

In a criminal case it arises if an accused argues that the statute under which he or she has been charged is invalid. It is also possible to bring proceedings before a Canadian court in which the only relief sought is a declaration that a statute is invalid.

Unlike in the United States, in Canada government can refer matters to the courts for a determination of constitutional issues. The various levels of government (and not individuals or groups) benefit from the unique procedure of reference whereby they may raise questions of law, including constitutional questions, in a court of law and acquire an advisory opinion.

In all these instances, the constitutional issue has to be settled by the relevant court handling the proceedings. However, while Canadian courts play a major role in ensuring that all governmental action generally corresponds to constitutional requirements and limitations, they do not have the power to initiate a review of governmental action. The process of judicial review is, in other words, commonly initiated by someone, an individual, a corporation, or frequently another level of government, with an interest in stopping an unconstitutional action. The courts intervene only after they have been appropriately approached for a ruling or an advisory opinion as to whether or not the legislative or administrative governmental action in question is valid.³²⁹

"Reading Down" a Statute

When a statute or a provision thereof appears on the face of it to be generally valid but also contains some broad terms which can be applied in a way that may contravene the Constitution, Canadian courts use a peculiar procedure called "reading down". This procedure enables them to accord the affected statute or provision the meaning that does not contravene the Constitution.³³⁰

The courts have, however, refused to use this procedure and read provisions into statutes in order to bring them into line especially with the provisions of the Charter of Rights and Freedoms. They take the view that, generally, it is not proper for any court to usurp the basic functions of the legislatures.³³¹ It is generally believed that it would be too presumptuous of the courts to supplement the words used by the law-makers with the words of people who have no legislative mandate.

The Courts and the Governments

Like in South Africa³³² and everywhere else, the rights and freedoms guaranteed in the Canadian Charter on Rights and Freedoms are not absolute but must yield to certain limitations.³³³ As the limits need to be prescribed by law, the legislatures are at liberty to limit the entrenched rights and freedoms if the limits they impose on them are demonstrably reasonable and justified in a free and democratic society.³³⁴

In the exercise of their power of judicial review, Canadian courts will ordinarily legally and factually presume an impugned statute to be valid and *intra vires* till the contrary is established. Thus, a person seeking to establish a conflict between such a statute and the Canadian Constitution or the Charter bears the initial burden to demonstrate such conflict. Once a court finds that a right or freedom guaranteed in the Charter has indeed been infringed, the presumption of validity lapses and the government agency seeking to rely on the provisions of Section 1 of the Constitution bears the burden to demonstrate that the limitation is reasonable and justifiable in a free and democratic society.

In addition, a direct denial of rights and freedoms otherwise constitutionally guaranteed can be effected by both the federal and provincial legislatures under Section 33(1) of the Canadian Charter.³³⁵ This section³³⁶ allows the legislatures override powers with regard to fundamental freedoms, legal rights and equality rights, though democratic, mobility or linguistic rights are not affected.³³⁷

Unlike the Section 1 limits, the override powers provided for under Section 33(1), if exercised, remove the statute containing the express declaration from the reach of the

relevant provisions of the Charter without the need to demonstrate 'reasonableness' or 'justification'. Once a Charter provision has thus been overridden by a statute, the Charter provision has no application whatsoever, for the duration of the override declaration.³³⁸

Lastly, Canadian law generally insists on the right of the various attorneys-general to be given appropriate notice advising them of impending attacks based on the validity of legislation.³³⁹ Thus, the Canadian government has a general right³⁴⁰ to be heard when the validity of legislation is in question, and the affected attorneys-general have to be notified of, and are entitled to appear in, matters dealing with constitutional litigation. The courts do not deal with any case involving the validity of legislation unless the constitutional issues have been stated clearly and the appropriate notice has been given to the affected attorneys-general. The underlying philosophy of this procedure seems to be that constitutional issues transcend the interests of the immediate parties before court and that, therefore, it is crucial that the public interest be protected by allowing the affected government/s sufficient opportunity to address the courts and be heard on issues of constitutional validity.

Effect of Declaration of Invalidity

In general, in Canadian jurisprudence, the consequence of a finding that a law or government action is inconsistent with the Constitution is total invalidity of such a law or action.³⁴¹ In short, a law enacted, or a government action taken, outside authority granted by the Constitution is *ultra vires*, invalid, void and a nullity.

However, a strict application of this approach would obviously result in untold injustice and misery and certainly not conduce to the development and maintenance of an orderly society. Canadian jurisprudence has thus developed the *de facto* doctrine to ameliorate the consequences of a declaration of invalidity in certain instances. The *de facto* procedure constitutes the basis for validating actions of unauthorised officials who have acted under colour of authority.

In terms of the *de facto* procedure, if a law is administered and is subsequently found by a court to be invalid, rights acquired, duties or obligations incurred, and steps taken thereunder remain valid, despite the finding of invalidity.³⁴² It is crucial to note that the law itself is void *ab initio* and that the *de facto* procedure cannot change that.³⁴³ Moreover, the authority of those who act under an impugned statute ceases immediately upon a finding of invalidity.³⁴⁴

Though a finding of invalidity is in general retroactive,³⁴⁵ in the **Reference Re Language Rights in Manitoba**³⁴⁶ case the Supreme Court of Canada devised a solution amounting to a prospective overruling of the affected statutes of Manitoba as a means of maintaining good government and an orderly society.³⁴⁷ It gave the province of Manitoba sufficient time to remedy the situation and pass laws in keeping with the Constitution and ordered that all statutes which were otherwise invalid were deemed to be temporarily valid till the expiry of the period necessary for the legislature to address the problem identified.³⁴⁸

"Severance"

When Canadian courts realise that a statute or a provision can be saved by excising that portion of it which is invalid without affecting the validity of the rest thereof, they use, with great reluctance and scepticism,³⁴⁹ the procedure allowing them to do so, which is referred to as "severance". In this regard, as the Judicial Committee of the Privy Council pointed out in **A-G Alta v Attorney-General Canada**,³⁵⁰

[t]he real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is *ultra vires* at all.³⁵¹

ENDNOTES - CHAPTER TWO

- 1.. June 2-8 1994, in Charlene Smith's article entitled "*Court in the Act*", at 14.
- 2.. *Ibidem*.
- 3.. Section 99(2)(c)(i) of the **Constitution**.
- 4.. Unless otherwise specifically indicated or implied in the context of this chapter, the 'Constitution' refers to the interim **Constitution**.
- 5.. Section 99(2)(c)(ii), read with the proviso in Section 99(4), of the **Constitution**.
- 6.. **Finance Week**, *supra* at 14.
- 7.. *Ibidem* at 16.
- 8.. *Ibidem*.
- 9.. See Carmel Rickard, "*The Man Who Must Win Back Public Respect for the Law*", in the **Sunday Times**, June 12 1994.
- 10.. "*Gewone Man kan Toevlug Neem tot SA se Nuwe Hof*", in **Rapport**, June 12 1994.
- 11.. See "*Court in the Act*", *supra*. Note, however, that in this article, Edwin Cameron is said to have cautioned against attempts to go overboard in the redress of the imbalances; for him a judiciary that understood oppression and discrimination in the broadest context was preferable.
- 12.. See "*The Man Who Must Win Back Public Respect for the Law*", *supra*.
- 13.. See Patrick Laurence, "*Judges 'Must Face Public Scrutiny'*", in the issue of June 10 1994.
- 14.. See "*Open Postings to Scrutiny*", in **Business Day**, June 10 1994.
- 15.. The Republic of Venezuela in particular, is of great interest to us for, though the country does not have a special, separate tribunal called a constitutional court, which deals with matters of constitutionality, its Supreme Court of Justice, when dealing with constitutional issues, performs a constitutive act just like a constitutional court and its decisions have *erga omnes* effects just like those of such a tribunal. See Allan R Brewer-Carias **Judicial Review in Comparative Law** (Cambridge University Press, Cambridge, 1989) at 281.
- 16.. The *Conseil Constitutionnel* which, according to Mauro Cappelletti "*Comparative Cases and Materials on Constitutional Guarantees Governing Judicial Proceedings*", (reprinted) in John Henry Merriman and David S Clark **Comparative Law: Western European and Latin American Legal Systems - Cases and Materials** (The Michie Company, Charlottesville, 1978), 758 at 759-760, for its first 13 years, was merely an auxiliary of the executive *vis-a-vis* Parliament.
- 17.. The *Conseil d'Etat*, which, in its composition, jurisdiction and functioning, is fundamentally different from constitutional courts. According to Cappelletti, *ibidem*, the *Conseil d'Etat* has the exclusive competence to deal with executive legislation while the *Conseil Constitutionnel* deals with parliamentary legislation only.
- 18.. Section 98(1) of the **Constitution**. See G Carpenter, "Public Law: Constitutional Law", in WJ Hosten, AB Edwards, Francis Bosman, and Joan Church (eds), **Introduction to South African Law and Legal Theory** (2nd ed, Butterworths, Durban, 1995), 943 at 1016-1017, about the qualifications for appointment to, and tenure of members of, the Constitutional Court.

19.. See Sections 97(2)(b) and 99(1) of the **Constitution** respectively. This idea might have been borrowed from Article 135 of the Italian Constitution which prescribes that judges of the Italian Constitutional Court hold office for a period of nine years and are not eligible for immediate reappointment, and was adapted to our own domestic conditions. The judges of the German Federal Constitutional Court too are *elected* and *appointed* for a non-renewable period not exceeding twelve years.

20.. It is noted that, in terms of Section 176(1) of the (new) **Constitution of the Republic of South Africa**, 1996, a Constitutional Court judge is now appointed for a non-renewable term of twelve years, but must retire at the age of seventy.

21.. Section 97(2)(a) of the **Constitution**.

22.. See Section 99(6) of the **Constitution**.

23.. Section 99(2)(a). This, for understandable reasons, would exclude otherwise suitably qualified temporary or permanent residents of the Republic. As Sections 42(1), 50 and 132(1) of the **Constitution** showed, the same applied to membership of the National Assembly, the Senate and provincial legislatures, whose laws and acts the Constitutional Court would be adjudicating upon.

24.. Section 99(2)(b).

25.. Section 99(2)(c)(i). It is noteworthy that it was theoretically possible for a person without the degree *baccalaureus legum*, a traditional requirement for the Supreme Court, to be appointed to the Constitutional Court if such a person had practised law as an attorney for a cumulative period of at least ten years, for, under the **Attorneys Act**, 53 of 1979, the degree *baccalaureus legum* is not a prescribed requirement for admission and enrolment as an attorney; an ordinary *baccalaureus procurationis* suffices.

Furthermore, it was not clear from the wording of this subsection whether or not a person considered for appointment to the Constitutional Court should have practised as an advocate or attorney, or lectured in law at a university, only in South Africa.

26.. Section 99(2)(c)(ii) of the **Constitution**.

27.. See Rickard, "*The Man Who Must Win Back Public Respect for the Law*", *supra*.

28.. See Section 99(3) of the **Constitution**.

29.. See Section 12(a), added to the (interim) **Constitution** by Section 1 of the **Constitution of the Republic of South Africa Second Amendment Act**, 44 of 1995. It is noted that, in terms of Section 167(1) of the (new) **Constitution**, the Constitutional Court consists of a President, a Deputy President and nine other judges; the position of Deputy President of the Court is now formally provided for in the **Constitution**.

30.. Section 12(b) of the **Constitution** as amended.

31.. Section 12(c) of the **Constitution** as amended.

32.. See Penuell Mpapa Maduna, **Judicial Control of Executive and Legislative Powers of Government**, an unpublished dissertation submitted in November 1992 to the University of the Witwatersrand in fulfilment of the requirements for the Master of Laws degree, at 329.

33.. See Article 159(5) of the Constitution of Spain.

34.. *Ibidem*.

35.. The German Federal Constitutional Court, for the composition of which see Article 94 of the German Constitution, which is called the **Basic Law**.

36.. In the South African sense of the word.

- 37.. The German National Assembly.
- 38.. The upper House of the German Parliament.
- 39.. See Maduna, **Judicial Control of Executive and Legislative Powers of Government**, *supra* at 307 for details on these federal courts.
- 40.. See Maduna, **Judicial Control of Executive and Legislative Powers of Government**, *supra* at 341.
- 41.. See Articles 146 and 153 of the Turkish Constitution.
- 42.. About which see below.
- 43.. See Maduna, **Judicial Control of Executive and Legislative Powers of Government**, *supra* at 348.
- 44.. Section 56 of the French Constitution.
- 45.. Section 99(3) of the **Constitution**.
- 46.. See Patrick Laurence, "*Judges 'Must Face Public Scrutiny'*", *supra*. To his credit, Davis did, according to Susan Russell, "*Open Postings to Scrutiny*", in **Business Day**, June 10 1994, say that public hearings were just as important in respect of the four judges who would be chosen from the Bench as it was in the case of the six judges who would be appointed from the recommendations of the Judicial Service Commission. This view, according to **The Citizen**, 10 June 1994, was also supported by Neil Coleman of the COSATU. **The Citizen**, *ibidem* also said Davis had remarked that "[t]here was no reason why judges who had served under the old apartheid regime should not go through the same transparent process as newcomers to the bench."
- 47.. Section 99(4) of the **Constitution**.
- 48.. *Ibidem*.
- 49.. Section 99(5)(a) of the **Constitution**.
- 50.. Section 99(5)(b) of the **Constitution**.
- 51.. Section 99(5)(c) of the **Constitution**.
- 52.. Section 99(5)(d) of the **Constitution**.
- 53.. Section 99(2)(b) of the **Constitution**.
- 54.. Section 99(2)(c) of the **Constitution**.
- 55.. Section 99(2)(a) of the **Constitution**.
- 56.. See Section 99(5)(b) of the **Constitution**.
- 57.. See Article 147 of the Austrian Constitution.
- 58.. See Maduna, **Judicial Control of Executive and Legislative Powers of Government**, *supra* at 329.
- 59.. "Comparative Cases and Materials on Constitutional Guarantees Governing Judicial Proceedings", (reprinted) in John Henry Merriman and Davis S Clark **Comparative Law: Western European and Latin American Legal Systems - Cases and Materials** (The Michie Company, Charlottesville, 1978) 758 at 759.
- 60.. Section Article 57 of the French Constitution.

- 61.. The role of which will become clearer below.
- 62.. See Article 94 of the Basic Law.
- 63.. As published in 1971.
- 64.. The composition of which is determined proportionately on the basis of the strength of the parties in the *Bundestag*.
- 65.. See Maduna, **Judicial Control of Executive and Legislative Powers of Government**, *supra* at 307 for details.
- 66.. See Article 105 of the Law on the Federal Constitutional Court.
- 67.. Article 3(1) and (2).
- 68.. See Article 3(4) of the Law on the Federal Constitutional Court.
- 69.. See John H Merryman and David S Clark, **Comparative Law: Western European and Latin American Legal Systems** (The Michie Company, Virginia, 1978) at 290.
- 70.. See Article 135 of the Italian Constitution.
- 71.. Article 284 of the Portuguese Constitution.
- 72.. See Article 285 of the Portuguese Constitution.
- 73.. See Article 159 of the Spanish Constitution.
- 74.. The General Council of the Judiciary is the governing body of the judges and magistrates which appoints, promotes and disciplines judges and magistrates. See Article 122 of the Spanish Constitution for its composition.
- 75.. Article 159(2) of the Spanish Constitution.
- 76.. See Article 159(4) of the Spanish Constitution.
- 77.. Article 146 of the Turkish Constitution.
- 78.. See Article 146 of the Turkish Constitution.
- 79.. Article 147 of the Turkish Constitution.
- 80.. Now referred to as the High Court under the (new) **Constitution**. Thus, in this thesis, unless the context indicates otherwise, reference to the Supreme Court relates to the High Court.
- 81.. See "*Court in the Act*", in the issue of June 2-8 1994, at 14.
- 82.. See Michael Morris, "*Counsel for the Constitution*", in the issue of June 9 1994.
- 83.. See "*SA het vir Eerste Keer só 'n Hof*", in **Beeld** July 27 1994.
- 84.. Section 101(1) of the (interim) **Constitution**. It is noted that, with effect from 4 February 1997, when the (new) **Constitution** came into effect, the Appellate Division of the Supreme Court was renamed the Supreme Court of Appeal. At the same time, a provincial or local division of the Supreme Court or a supreme court of a formerly independent homeland or a general division of such a court became a high court. See Section 166(b) and (c) of the (new) **Constitution**.

85.. The Appellate Division does not function as a court of first instance; it does not have original jurisdiction and therefore it cannot be approached directly. As its name indicates, its basic role is to hear and finalise criminal and civil matters that reach it by way of appeal from the lower level of the Supreme Court or from the other superior courts.

In terms of Section 20(4) the **Supreme Court Act** [No. 59 of 1959], leave to appeal to the Appellate Division must first be given by the court *a quo*, failing which the Chief Justice may be petitioned. The constitutional validity of the need for leave to appeal has since been reaffirmed by Madala J in **S v Rens**, 1996 (2) BCLR 155 (CC) at 165, paragraph 30, in which the learned judge of the Constitutional Court held that the provisions of Section 316 of the **Criminal Procedure Act**, 51 of 1977, were not inconsistent with Section 25(3)(h) or Section 8 of the (interim) **Constitution**.

Prior to the commencement of the (interim) **Constitution**, the Appellate Division could deal with appeals regarding the validity of Acts of Parliament, for which purpose its quorum was increased to eleven judges. See Section 12(1)(b) of the **Supreme Court Act**. However, the constitutional validity of this is in doubt in the light of the provisions of Section 101(5) of the (interim) **Constitution**, which prevented the Appellate Division from adjudicating any matter which fell within the jurisdiction of the Constitutional Court.

86.. In terms of Section 6(2) of the **Supreme Court Act**, provincial divisions of the Supreme Court have concurrent jurisdiction with local divisions within their areas of jurisdiction. Thus, the parent provincial divisions are not precluded from adjudicating a cause of action merely because it falls within the areas of their local divisions.

87.. Section 7(1), (2) and (3).

88.. In **Vermeulen v Vermeulen; Buffel v Buffel**, 1989 (2) SA 771 (NC) at 774, it was held that the circuit local divisions do have jurisdiction to hear divorce matters as well if the parties thereto satisfy the necessary statutory requirements.

89.. See Section 99(2).

90.. Section 104(1). It is noted that Section 174 (1) of the (new) **Constitution** uses the same formulation with regard to the appointment of judicial officers.

91.. See Schedule 4.

92.. Section 103(1).

93.. Section 148(1) of the **Criminal Procedure Act**, No. 51 of 1977.

94.. Section 148(3) of the **Criminal Procedure Act**.

95.. Section 148(2)(a) of the **Criminal Procedure Act**.

96.. Section 148(5), read with Section 315(1), of the **Criminal Procedure Act**, and with Section 12(1)(bA) of the **Supreme Court Act**.

97.. Act No. 54 of 1956.

98.. Section 34(1) of the **Water Act**.

99.. Section 35, read with Section 36, of the **Water Act**.

100.. Section 40 of the **Water Act**. See also **Mathee v Lerm**, 1980 (3) SA 742 (C) at 744E.

101.. Section 41, read with Section 41(5), of the **Water Act**.

102.. Section 50(1) of the **Water Act**.

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- 103.. Section 49(1) and (2), read with Section 41(5), of the **Water Act**. See also Grosskopf JA in **Kruger v Le Roux**, 1987 (1) SA 866 (A) at 871E.
- 104.. Act No. 58 of 1962.
- 105.. Section 83 of the **Income Tax Act**.
- 106.. Section 83(1) of the Act.
- 107.. Section 83A of the **Income Tax Act**, inserted by Section 37 of Act 129 of 1991.
- 108.. Section 83(2) of the **Income Tax Act**. Where the business of mining is involved, the third member of the special court may, if the appellant so requests, be a qualified mining engineer, instead of a representative of the commercial world.
- 109.. Section 86A of the **Income Tax Act**.
- 110.. Section 86A(2)(b), read with Section 86A(5), of the **Income Tax Act**.
- 111.. Section 86A(1), read with Section 86A(3), of the **Income Tax Act**.
- 112.. Act No. 57 of 1978.
- 113.. Because the patents office is situated in Pretoria.
- 114.. Section 8 of the **Patents Act**.
- 115.. Section 75 of the **Patents Act**.
- 116.. Section 76(1), read with Section 76(2)(a), of the **Patents Act**.
- 117.. Section 76(2)(a) of the **Patents Act**.
- 118.. See Section 63 of the **Trade Marks Act**, 62 of 1963.
- 119.. Section 29(1) of the **Copyright Act**, 98 of 1978.
- 120.. Section 30 of the **Copyright Act**.
- 121.. Section 36 of the **Copyright Act**.
- 122.. Act No. 96 of 1979.
- 123.. Section 15(3)(a) and (b) of the **Maintenance and Promotion of Competition Act**.
- 124.. Section 15(11) of the Act.
- 125.. Section 15(13) of the Act.
- 126.. Section 6(1) of the **Child Care Act**, 74 of 1983.
- 127.. Section 7(1) of the **Child Care Act**.
- 128.. Section 2 of the **Maintenance Act**, 23 of 1963.
- 129.. Section 7(1) of the **Maintenance Act**.

- 130.. Established under the **Short Process Courts and Mediation in Certain Civil Cases Act**, 103 of 1991, and, in terms of Section 7 of that Act, presided over by adjudicators drawn from the ranks of attorneys, advocates, law teachers and persons who have served as magistrates before.
- 131.. Established under the provisions of the **Small Claims Court Act**, 61 of 1984, and presided over by commissioners who are qualified lawyers, usually with long experience as attorneys, advocates, law teachers or former magistrates.
- 132.. Act No. 34 of 1986.
- 133.. Section 12(4) of the **Black Administration Act**, 38 of 1927, read with Section 29A(1) and(2) of the **Magistrates' Courts Act**, No. 32 of 1944.
- 134.. Section 101(2) of the **Constitution**.
- 135.. Section 101(3) of the **Constitution**.
- 136.. See below.
- 137.. Section 101(6), read with Section 102(12), of the **Constitution**.
- 138.. 1995 (1) SA 425 (D).
- 139.. At 429. See also **S v Zuma and Others**, 1995 (1) BCLR 49 (N) at 50, where Hugo J said: "Prior to leading evidence ... counsel indicated that a constitutional issue arises or may arise in relation to the provisions of section 217(1)(b)(ii) of Act 51 of 1977. Counsel for the State and for the defence consented to this Court deciding the issue of whether this subsection and in particular subsection (ii) is proscribed by the Constitution. This they did in terms of section 101(6) of Act 200 of 1993. I accept for purposes of this judgment the consent achieved what the parties intended, namely *to vest jurisdiction in this Court to decide this constitutional issue*. What such consent could not and did not in my view do was to vest exclusive jurisdiction in this Court and in particular it did not deprive this Court of its obligations in terms of section 102(1) of the Constitution." (my italics)
- 140.. 1995 (2) SA 642 (CC).
- 141.. At 649, paragraph 10.
- 142.. Section 102(12) of the **Constitution**.
- 143.. Section 101(5), read with Section 102(6), of the **Constitution**.
- 144.. Section 98(2).
- 145.. Section 101(5), read with Section 102(5), (6) and (7), of the **Constitution**.
- 146.. *Ex abundanti cautela*, in my opinion.
- 147.. Section 98(3) of the **Constitution**.
- 148.. Senator Rosier de Ville of the Freedom Front quoted in "*Government Supports All Public Decision-Making: Omar*", in **The Citizen** July 1 1994.
- 149.. Carpenter, *op cit* 1016 was of the same view. This question has since been clarified by Section 167(3)(a) of the (new) **Constitution** which provides explicitly that "[t]he Constitutional Court is the highest court in all constitutional matters".
- 150.. It is noted, however, that unlike the German Federal Constitutional Court, the South African Constitutional Court is not the highest court in the land, though it decides questions of constitutionality and interprets the **Constitution** with final binding force. See Maduna, **Judicial Control of Executive and**

Legislative Powers of Government, *supra* at 309-310.

- 151.. The entrenchment of the Chapter 3 rights was not at the expense of other rights recognised and conferred by the common law, customary law and legislation. See Section 33(3) of the **Constitution**.
- 152.. Which is now called the Supreme Court of Appeal. See Section 168 of the (new) **Constitution**.
- 153.. Carpenter, *op cit* 1017 confirms this. See also Section 168(3) of the (new) **Constitution**.
- 154.. Sections 168(3) and 172(2)(a) of the (new) **Constitution**.
- 155.. According to Carpenter, *ibidem* at 1016, the Constitutional Court was allotted two basic functions, namely adjudication of the constitutionality of laws and executive acts, and certification of constitutions. The way the Court has handled the certification of constitutions is discussed more fully in Chapter 14 below.
156. That is the power to review Bills before they become legislation.
- 157.. See Schedule 4 for these constitutional principles.
- 158.. Section 71(2) of the **Constitution**.
- 159.. Not even the Constitutional Court itself!
- 160.. Section 71(3) of the **Constitution**.
- 161.. Section 71(4) of the **Constitution**.
- 162.. Section 160(1) of the **Constitution**.
- 163.. Section 160(3) of the **Constitution**. Note the proviso to this subsection.
- 164.. Section 160(2) of the **Constitution**.
- 165.. Section 160(4) of the **Constitution**.
- 166.. Section 160(5) of the **Constitution**.
- 167.. Like the German Federal Constitutional Court, its decisions are, in terms of Section 98(4) of the **Constitution**, binding upon all persons, and upon all legislative, executive and judicial organs of the State. See Walter F Murphy and Joseph Tanenhaus, **Comparative Constitutional Law: Cases and Commentaries** (Macmillan, London, 1977) at 31-32 about the position in Germany.
- 168.. Section 98(3).
- 169.. Section 101(5) of the **Constitution**.
- 170.. Section 98(3) of the **Constitution**. Note from the provisions of this section that an Act of Parliament could arguably confer jurisdiction upon provincial or local divisions of the Supreme Court to adjudicate matters which otherwise fell within the exclusive jurisdiction of the Constitutional Court.
- 171.. Section 101(6), read with Section 98(3), of the **Constitution**. See also Carpenter, *op. cit.* 1019.
- 172.. Section 102(12).
- 173.. Section 102(8) of the **Constitution**. The remarks of Chaskalson P in **Zantsi v Council of State, Ciskei and Others**, 1995 (10) BCLR 1424 (CC) at 1427-1428 are referred to below.

174.. Section 98(2)(c) of the **Constitution**. Note that, in terms of Section 101(3)(c) of the **Constitution**, provincial and local divisions of the Supreme Court were expressly precluded from adjudicating upon the constitutionality of Acts of Parliament.

175.. Which was entrenched in Section 101(2) of the **Constitution**. Commenting on this, Trengove AJ, speaking for the Constitutional Court, said in **Zantsi v Council of State, Ciskei and Others**, 1995 (10) BCLR 1424 (CC) at 1436, paragraph 32, that: "whatever the scope of the Supreme Court's inherent jurisdiction immediately before the commencement of the Constitution might have been, *its inherent jurisdiction as entrenched in section 101(2) does not include the power of review of the constitutionality of Acts of Parliament.*" (my italics)

176.. See Section 101(3)(c), read with Sections 98(2)(c) and 98(3), of the **Constitution**. Commenting on this, Trengove AJ, *ibidem* at 1438, paragraph 38, remarked that the clear purpose of these "provisions was to ensure that the Constitutional Court would be the only Court with jurisdiction to set aside an Act of Parliament." See also 1439, paragraph 41, on this question.

However, as pointed out above, Section 101(6), read with Section 101(3)(c), of the **Constitution** might arguably enable a provincial or local division of the Supreme Court to adjudicate the constitutionality of an Act of Parliament if the parties to a matter falling within the exclusive jurisdiction of the Constitutional Court agreed thereto. Section 101(3)(c) was, after all, "subject to the Constitution", ie it was in the context of the **Constitution** subordinate to Section 101(6), which allowed parties to agree to the jurisdiction of a provincial or local division of the Supreme Court to adjudicate any matter otherwise falling within the exclusive jurisdiction of the Constitutional Court, "notwithstanding any provision to the contrary". See Miller JA in **S v Marwane**, 1982 (3) SA 717 (A) at 747H-748A, whose reasoning in this regard was quoted with approval by Trengove AJ in **Zantsi**, *op cit* 1434, paragraph 27.

177.. Trengove AJ, *ibidem*.

178.. According to Trengove AJ, *ibidem* at 1437, paragraph 35, "In the context of the Constitution as a whole, 'Act of Parliament' means an act of the South African Parliament sitting in Cape Town." Thus, it would not be proper for Parliament or anyone to refer to the (new) **Constitution** as Act 108 of 1996 as it was passed by the Constitutional Assembly and not by Parliament. The (new) **Constitution**, in other words, is, *stricto sensu*, not an Act of Parliament.

179.. Section 98(4) of the **Constitution**.

180.. In terms of Section 98(5) of the **Constitution**, it had the power to declare any law or any provision thereof, which it had found to be inconsistent with the **Constitution**, invalid to the extent of the inconsistency.

181.. See Section 98(6)(b) of the **Constitution**.

182.. This is deduced from the provisions of Section 98(6)(b) of the **Constitution**.

183.. See the proviso to Section 98(5) of the **Constitution**. This power was used in **S v Ntuli**, 1996 (1) BCLR 141 (CC) at 153, paragraph 30, for instance. Interestingly enough, the directive of the Court was not complied with, and when an extension of time was applied for, the Constitutional Court would not grant it. See **S v Ntuli**, CCT 15/97 (of 5 June 1997).

184.. The German Federal Constitutional Court, for instance, is specifically authorised by Article 78 of the (German) Law on the Federal Constitutional Court of 1951, to review an impugned law in every conceivable aspect. If, in the process, it finds other provisions of the same law to be incompatible with the Basic Law or federal legislation, it declares them null and void even if not asked to do so by applicants or in a referral.

185.. See, for example, Chaskalson P in **Zantsi v Council of State, Ciskei and Others**, 1995 (10) BCLR 1424 (CC) at 1427-1429.

186.. See, for example, **S v Makwanyane and Another**, 1995 (3) SA 391 (CC) where the Court, for the right reasons, declared unconstitutional and invalid the provisions of 277(1)(a), (c), (d), (e) and (f) of the **Criminal Procedure Act**, No. 51 of 1977, and yet left Section 277(1)(b) of the Act intact, thus not abolishing the death penalty as a form of punishment in our criminal justice system. In particular, note that the Court was, however, prepared, *mero motu*, to extend its decision beyond the validity of Section 277(1)(a) of the Act which it had been called upon to decide.

See also **S v Williams and Others**, 1995 (7) BCLR 861 (CC) where the Court, once again for the right reasons, declared juvenile corporal punishment meted out by our Courts unconstitutional while leaving adult corporal punishment intact. If anything, this decision amply demonstrates the absurdity of this US approach, which, while it may be correct when followed by ordinary courts of law, including the Appellate Division, may lead to absurdity when pursued and applied by our Constitutional Court.

187.. Section 98(2)(d) of the **Constitution**. It is noted that the Constitutional Court was also given similar jurisdiction with regard to bills before any provincial legislature, so that provincial legislatures could also refer to it disputes over the constitutionality of bills before them. This section was used in **In re: The National Education Policy Bill No 83 of 1995**, 1996 (4) BCLR 518 (CC).

For examples of cases where the provisions of this section were used in connection with bills before provincial legislatures, see **In re: The School Education Bill of 1995 (Gauteng)**, 1996 (4) BCLR 537 (CC) and **In re: KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995**; **In re: Payment of Salaries, Advances and Other Privileges to the Ingonyama Bill of 1995**, 1996 (7) BCLR 903 (CC).

188.. Section 101(3)(e) of the **Constitution**.

189.. Section 98(9) of the **Constitution**. See **In re: National Education Policy Bill No 83 of 1995**, 1996 (4) BCLR 518 (CC); and **In re: The School Education Bill of 1995 (Gauteng)**, 1996 (4) BCLR 537 (CC) for examples where this power was exercised by the Constitutional Court.

190.. See Maduna, in **Judicial Control of Executive Legislative Powers of Government**, *supra* at 342.

191.. Section 98(2)(e) of the **Constitution**.

192.. See Carpenter, *op cit* 1019.

193.. See Carpenter, *op cit* 1016.

194.. Section 98(2)(a) of the **Constitution**.

195.. Section 7(4)(a) of the **Constitution**.

196.. Section 101(3)(a) of the **Constitution**.

197.. Section 102(12) of the **Constitution**.

198.. Section 101(5) of the **Constitution**.

199.. Sections 98(2)(b) and 101(3)(b), read with Sections 98(7) and 101(4), of the **Constitution** respectively.

200.. See Lawrence Baxter, **Administrative Law** (Juta & Co Ltd, Cape Town, 1984), at 304-305. See also Marinus Wiechers, **Administrative Law** (Butterworths, Durban, 1985), at 266; Gretchen Carpenter, **Introduction to South African Constitutional Law** (Butterworths, Durban, 1987), at 269-270; and Laurence Boule, Bede Harris and Cora Hoexter, **Constitutional and Administrative Law: Basic Principles** (Juta & Co Ltd, Cape Town, 1989), at 172.

201.. In **Kruger and Another v Minister of Correctional Services and Others**, 1995 (2) SA 803 (T).

- 202.. See Magid J in **Hugo v State President**, 1996 (6) BCLR 876 (D).
- 203.. Act No. 17 of 1994, in terms of which, *inter alia*, most mothers in prison on 10 May 1994 with children under the age of twelve had the remainder of their sentences remitted.
- 204.. Sections 98(2)(c) and 101(3)(c) of the **Constitution** respectively.
- 205.. See Boule et al, **Constitutional and Administrative Law**, *supra* at 350-351. See also Carpenter, **Introduction to South African Constitutional Law**, *supra* at 160; and Dion Basson and Henning Viljoen, **South African Constitutional Law** (Juta & Co Ltd, Cape Town, 1988) at 277.
- 206.. 1983 (1) SA 164 (A).
- 207.. Act 21 of 1971 (which, as the rechristened **Self-governing Territories Act**, was repealed as a whole in April 1994 by the **Constitution**).
- 208.. Section 102(12) of the **Constitution**.
- 209.. Section 98(2)(e) of the **Constitution**.
- 210.. Section 101(3)(d) of the **Constitution**.
- 211.. Section 98(2)(d) of the **Constitution**.
- 212.. Section 101(3)(e) of the **Constitution**.
- 213.. Section 98(9) of the **Constitution**.
- 214.. Sections 98(2)(f) and 101(3)(f) of the **Constitution** respectively.
- 215.. Sections 98(2)(g) and 101(3)(g) of the **Constitution** respectively.
- 216.. In Hosten et al, *op. cit.* 1019, footnote 35. However, this has, as stated above, been addressed in the (new) **Constitution**.
- 217.. Section 100(2) of the **Constitution**.
- 218.. For which see **Government Gazette** No. 16204 dated 6 January 1995.
- 219.. Rule 17(1) and (2). Rule 17(7) allows the Court to order that the costs of an action contemplated in this Rule be paid by the State or a particular party.
- 220.. Section 7(4)(b) of the **Constitution**. It is noteworthy that in Germany Article 93(1) 4a of the Basic Law allows any person, including a body corporate and a *commune*, to submit to the FCC a complaint of unconstitutionality concerning alleged violations by public authorities of the basic rights of the individual guaranteed under Article 1(3) of the Basic Law. Thus, persons claiming that public officials, including judges, have deprived them of their rights are entitled to file constitutional complaints with the Federal Constitutional Court, without the need to pay court fees and without the need for lawyers.

However, "the requirement for lodging such a complaint is that there should be no other remedy (or other means of eliminating the violation) available to the complainant; the complainant must first have, in other words, exhausted all the remedies available within the relevant judicial branch before having direct recourse to the Federal Constitutional Court." See Maduna, **Judicial Control of Executive and Legislative Powers of Government**, *supra* at 320. Furthermore, Article 93(1) of the Law on the Federal Constitutional Court prescribes that the FCC must be approached within one month after a decision of the lower court. For this purpose, according to Ipsen "Constitutional Review of Laws", *op cit* 126, "[l]eave must be granted to the individual complainant by the Bundesverfassungsgericht before the actual review can start."

221.. The Attorney-General of the Republic of Namibia, for instance, did this in **Ex Parte Attorney-General, Namibia: In Re Corporal Punishment by Organs of State**, 1991 (3) SA 76 (NmSC).

222.. See Kentridge AJ in **S v Zuma and Others**, 1995 (2) SA 642 (CC) at 650, paragraph 11; and Didcott J in **S v Vermaas; S v Du Plessis**, 1995(7) BCLR 851 (CC) at 858, paragraph 13 on this. See further O'Regan J in **Besserglik v Minister of Trade, Industry and Tourism and Others**, 1996 (6) BCLR 745 (CC) at 748, paragraph 6; and **Transvaal Agricultural Union v Minister of Land Affairs and Another**, 1996 (12) BCLR 1573 (CC) at 1579-1580, paragraphs 16-18.

223.. **S v Vermaas; S v Du Plessis**, *op cit* 856.

224.. 1995 (4) BCLR 401 (A).

225.. See Kentridge AJ at 649, paragraph 10.

226.. *Ibidem*, at 649-650, paragraph 11.

227.. 1995 (10) BCLR 1289 (CC).

228.. A dispute is defined by AS Hornby in the **Oxford Advanced Learner's Dictionary of Current English** as an argument, a controversy, a debate or a quarrel. It was not clear whether any significance attached to the use of the word "dispute/s" in, *inter alia*, Sections 22, 82(1)(d), 98(2)(b), (d) and (e), as opposed to the word "matter/s" which was used in, *inter alia*, Sections 98(2)(f) and (g), 100(2), and 101(3) of the **Constitution**. From the look of things, none did; the two words seem to have been used interchangeably to mean matters in dispute and, by implication, the existence of parties to the disputes. However, see **S v Vermaas; S v Du Plessis**, *op cit* 855, paragraph 7 and 857, paragraph 12.

229.. Carpenter, in Hosten et al, *op. cit.* 1015-1016 cites the provisions of Sections 7(4)(b)(v), 82(1)(d) and 102(8) of the **Constitution** as proof of this.

South Africa, however, does not have a provision similar to Article 93(1)2 of the German Basic Law which allows the Federal Constitutional Court the power of abstract judicial review to determine the compatibility of any Federal or *Land* (State) law in form and substance with the Basic Law or the compatibility of *Land* law with federal law at the instance of the Federal Government, or a *Land* Government or of one third the members of the *Bundestag*. In such proceedings, the Federal Constitutional Court decides the issue of constitutionality without a specific dispute. Despite this however, according to Murphy and Tanenhaus **Comparative Constitutional Law** *op. cit.* 29, "[a] decision in an abstract judicial review proceeding, even though non-adversary, is binding and so is not an advisory opinion." The Federal Constitutional Court does not hear a moot case; its power to give advisory opinions was abolished in 1956.

It should be noted that in Germany, abstract judicial review affects only statutes which have already been passed and not Bills, and is therefore, not available prior to the enactment of a piece of legislation. However, see Jorn Ipsen, "Constitutional Review of Laws", in Christian Starck (ed) **Main Principles of the German Basic Law: The Contributions of the Federal Republic of Germany to the First World Congress of the International Association of Constitutional Law** (Nomos Verlagsgesellschaft, Baden-Baden, 1983) 107 at 120 for an exception to this rule covering treaties.

In Venezuela, the President has the power, in terms of Article 173 of the 1961 Venezuelan Constitution, to request the Supreme Court of Justice to consider questions of validity prior to the promulgation of laws.

In France, like in Venezuela, the President of the Republic, the Prime Minister, the presidents of the two Houses of Parliament and (since a 1974 constitutional amendment) sixty members of either House of Parliament are allowed a discretion to submit laws to the Constitutional Council before their promulgation. In other words, as Cappelletti "Comparative Cases and Materials on Constitutional Guarantees Governing Judicial Proceedings", in Merriman and Clark *op. cit.* 759, pointed out, the Council may only review legislation between its enactment and promulgation; after its promulgation, the Council is without jurisdiction.

230.. 1995 (10) BCLR 1424 (CC).

231.. Per Chaskalson P, *ibidem* at 1429.

232.. A quintessential example the Court might have had to follow in such a case is **Ex Parte Attorney-General, Namibia: In Re Corporal Punishment by Organs of State**, 1991 (3) SA 76 (NmSC).

In Germany, for example, the power of abstract judicial review is used by the Federal Constitutional Court, when asked to do so by the Federal Government, a *Land* government, or one-third of the members of the *Bundestag*, to determine the constitutionality of any law.

233.. That is the National Assembly and the Senate sitting jointly, under Section 68(1) of the **Constitution** for the purpose of making a new constitutional text for the Republic.

234.. Section 71(4) of the **Constitution**.

235.. *Ibidem*.

236.. See Rule 12.

237.. Section 82(1)(d) of the **Constitution**.

238.. Section 98(2)(e) of the **Constitution**.

239.. Section 98(4) of the **Constitution**.

240.. See Rule 14. In an appropriate case, the Court may, in terms of Rule 14(3), order that the costs of such a reference be paid by the State or by a particular party.

241.. Thus, the President, unlike the President of the Republic of Venezuela for example, cannot request the Constitutional Court to consider the constitutionality of a law passed by Parliament before its promulgation. See Article 173 of the 1961 Venezuelan Constitution, which allows the President of Venezuela to request the Supreme Court of Justice to consider questions of constitutionality before laws are promulgated.

242.. As this procedure is confined to Bills, it is different from the German procedure of abstract judicial review (*abstrakte Normenkontrolle*) which, as stated above, allows the Federal Government, a State (*Land*) Government or one third of the membership of the *Bundestag* (the lower House of the Federal Legislature) to request a decision of the Federal Constitutional Court on the question whether a certain statute or executive order is valid or not.

In this regard, it needs to be emphasised that the German Federal Constitutional Court does not hear a moot case. There must exist a difference of opinion or doubts on the formal and material compatibility of a statute with the Basic Law before the *abstrakte Normenkontrolle* procedure can be set in motion.

243.. Section 98(9), read with Sections 98(2)(d) and 101(3)(e), of the **Constitution**.

244.. See 13. Of particular note is that, in terms of Rule 13(5), the Constitutional Court may make an order for the costs of the type of reference contemplated in Section 98(9), read with Sections 98(2)(d) and 101(3)(e), of the **Constitution**, to be paid by the State or a particular party. This may go some way in curbing any potential abuse of the Section 98(9) procedure.

245.. Section 82(1)(d) of the **Constitution** allows for this, in my opinion, as such disputes are disputes of a constitutional nature.

246.. Section 102(4) and (5) of the **Constitution**.

247.. Section 102(6) of the **Constitution**.

248.. See Rule 23.

249.. Section 102(1) of the **Constitution**. See Rule 22 of the **Rules of the Constitutional Court** for the procedure to be followed in this regard.

Note that, in terms of Section 101(7) of the **Constitution** (added by Section 3 of Act 44 of 1995), any division of the Supreme Court has, in addition, jurisdiction to grant **an Interim Interdict or similar relief** in respect of matters falling within the exclusive jurisdiction of the Constitutional Court, "notwithstanding 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."

250.. Section 102(1) of the **Constitution**. See Rule 22 of the **Rules of the Constitutional Court** for the procedure to be followed in this regard.

251.. In Germany too this is the case when judges are dealing with actual cases or controversies by means of concrete judicial review provided for in Article 100(1) of the Basic Law read with Article 13(11) of the Federal Constitutional Court Act, 1951. All German judges are entitled, and in effect duty-bound, to examine whether legal provisions are constitutionally valid.

They only suspend proceedings and refer matters to the FCC if they are of the opinion that a relevant statute or provision is unconstitutional. As Hans H Rupp, "Judicial Review in the Republic of Germany", (reprinted) in John Henry Merriman and David S Clark **Comparative Law: Western and Latin American Legal Systems - Cases and Materials** (The Michie Company, Charlottesville, 1978), 742 at 743 put it, "Every court, a municipal magistrate as well as higher federal court, no matter what type of case or what amount of money - if any - is involved, is required to refer the constitutional issue to the Federal Constitutional Court *if it deems the statute invalid*. Contrary to American practice, *it is not necessary that the constitutional question be raised by one of the parties to the proceeding*, nor is it required that the question be put in issue in the court of first instance." (my emphasis)

Furthermore, as Ipsen "Constitutional Review of Laws", *op cit* 114 pointed out, "The procedure of concrete judicial review provided for in Article 100(1) of the Grundgesetz is ... only permitted if the supposedly unconstitutional statute is relevant to the issue."

It needs to be pointed out that in Venezuela, Article 20 of the Venezuelan Civil Proceedings Code allows all courts and tribunals to declare all normative state acts inapplicable in a given case if they consider them to be unconstitutional. Judicial review is not only the responsibility of the Supreme Court of Justice; Venezuelan judges in general, whatever their rank, are a collective custodian of the Constitution, which they apply preferentially over ordinary laws.

252.. See Kentridge AJ in **S v Mhlungu and Others**, 1995 (3) SA 867 (CC) at 895, paragraph 59.

253.. 1995 (2) SA 642 (CC) at 649, paragraph 10.

254.. *Supra*.

255.. At 894-895, paragraph 59.

256.. See Kentridge AJ, *ibidem* at 894, paragraph 56, where he said that he could not read "s 102 as entitling the Judge to refer to this Court a constitutional issue which is within his own jurisdiction."

See also Didcott J in **S v Vermaas; S v Du Plessis**, 1995 (7) BCLR 851 (CC) at 855, paragraph 7, and at 857, paragraph 12, where the learned judge said: "*no issue which the division has the power to decide may properly be referred to us while the litigation raising it remains in progress there*. The judge hearing the case must determine the issue for himself or herself. It may be presented to us on appeal, should it fall within our field, when the litigation has ended in the court below. Or, in the special situation covered by section 102(8), the judge may refer it to us after disposing of the case." (my italics)

257.. *Supra*.

258.. Per Didcott J, *ibidem* at 856, paragraph 10.

259.. Section 102(2) of the **Constitution**.

260.. Section 102(8) of the **Constitution**. See Rule 24 of the **Rules of the Constitutional Court** for the procedure to be followed in this regard. In terms of Section 102(9) of the **Constitution** the Minister of Justice is under a constitutional constraint to appoint counsel to argue such an issue before the Constitutional Court.

261.. *Op cit*.

262.. At 1427-1428, paragraph 1.

263.. Section 102(13), read with Sections 102(14) and 102(15).

264.. Note that disputes of a constitutional nature between local governments or between a local government and a provincial government referred to in Section 101(3)(d) of the **Constitution** were, in terms of Section 102(13), specifically excluded from this.

265.. See Rule 22(1) of the **Rules of the Constitutional Court** in this regard.

266.. Section 103(1) of the **Constitution**.

267.. In this regard South Africa was unlike the Republic of Venezuela where, as stated above, all judges, as the collective custodian of the Constitution, are, in certain instances, allowed to *ex officio* raise constitutional issues in concrete litigation and declare all normative state acts inapplicable in a given case if they consider them to be unconstitutional.

268.. Section 103(2) of the **Constitution**.

269.. This was unlike in Germany where, according to Rupp, "Judicial Review in the Republic of Germany", in Merriman and Clark *op cit* 743, constitutional questions are directly referred from even municipal magistrates to the Federal Constitutional Court by the trial judge without an intermediary.

270.. See Kentridge AJ in **S v Mhlungu and Others**, *op cit* 895.

271.. Section 103(3) and (4) of the **Constitution**. See Rule 22 of the **Rules of the Constitutional Court** for the procedure to be followed in this regard.

272.. The relevant court may arguably act under the provisions of Section 102(1) and (8) of the **Constitution** in this regard.

273.. Section 98(4) of the **Constitution**.

274.. See Chaskalson P in **Zantsi v Council of State, Ciskei and Others**, *op cit* 1429.

275.. *Op cit* 895.

276.. Section 102(12) of the **Constitution**. See Rule 19 of the **Rules of the Constitutional Court** for the appropriate procedure to be followed in this regard.

277.. Carpenter, in Hosten et al, *op cit* 1015.

278.. See Sections 102(13) and 102(14) of the **Constitution**.

279.. Section 102(16) of the **Constitution** read with Rule 19 of the **Rules of the Constitutional Court**.

280.. Section 102(17) of the **Constitution** read with Rule 19 of the **Rules of the Constitutional Court**.

281.. Section 102(11) of the **Constitution**, read with Rule 18 of the **Rules of the Constitutional Court**.

- 282.. Rule 20(1) of the **Rules of the Constitutional Court**. Note that, in terms of Rule 18, leave to appeal is not a requirement in this instance.
- 283.. *Op cit* Rule 21(1). Note that Rule 18 dispenses with the requirement of leave to appeal in such a case.
- 284.. Section 101(5), read with Section 102(5) and (6), of the **Constitution**.
- 285.. Section 102(10).
- 286.. That is the national, provincial and local tiers of government.
- 287.. See Rule 4(8).
- 288.. See Rule 9, which was subject to Section 102(10) of the **Constitution**.
- 289.. If, for any reason, the consent required in terms of Rule 9(1) could not be obtained, the affected person might, in terms of Rule 9(4), apply to the President of the Constitutional Court to be admitted as an *amicus curiae* in the matter before the Court.
- 290.. Rule 9(6). Rules 9(7), 9(9) and 9(11) are also of great importance. It is noted that intervention by *amici curiae* occurred in many matters before the Constitutional Court.
- 291.. For example, Section 102(1) of the **Constitution** made it clear that provincial and local divisions of the Supreme Court should hear all evidence and make a finding thereon, before referring a matter to the Constitutional Court. See also Section 102(6) and (12) of the **Constitution**. The remarks of Didcott J in **S v Vermaas; S v Du Plessis**, *loc cit* 856, are important in this regard.
- 292.. In "Constitutional Review of Law", *op cit* 116.
293. Because, for one thing, though our system differs somewhat from those of these countries, our Courts tend to refer to decisions of their Courts.
- 294.. See, for example, the South African Law Commission, **Working Paper 25** at 479. See also John Didcott, "Practical Workings of a Bill of Rights", in JV van der Westhuizen and HP Viljoen (eds), **A Bill of Rights for South Africa**, 52 at 53-54; RN Leon, "A Bill of Rights for South Africa", in (1986) 2 **SAJHR** 60 at 64-65; and Michael Cowling, "Judges and the Protection of Human Rights in South Africa: Articulating the Inarticulate Premiss", in (1987) 3 **SAJHR** 177 at 184-187.
- 295.. As opposed to the *concentrated* system of judicial review characterised by the existence of a special constitutional court dealing solely with constitutional matters.
- 296.. Walter F Murphy and Joseph Tanenhaus, **Comparative Constitutional Law: Cases and Commentaries** (Macmillan, London, 1977) at 5.
- 297.. Louis Fisher, **American Constitutional Law** (McGraw-Hill Inc, 1990) at 49.
- 298.. See Everett C Ladd, **The American Polity: The People and Their Government** (2nd edition, WW Norton & Co, New York, 1987) at 258-259.
- 299.. Justice Felix Frankfurter, in **Minersville School District v Gobitis**, 310 US 586 (1940) described this power as a limitation upon popular government.
- 300.. See Ladd, *loc cit* at 280.
- 301.. The Supreme Court itself held in **Marbury v Madison**, 1 Cranch (5 US) 137, 2 L Ed 60 (1803), that Congress could not validly enlarge this jurisdiction.

302.. See Section 2 of Article III of the Constitution of the United States.

303.. In **Introduction to the Study of the Law of the Constitution** (Liberty Classics, Indianapolis, 1982), at 89.

304.. See Alpheus Thomas Mason, William M Beaney and Donald Grier Stephenson, **American Constitutional Law: Introductory Essays and Selected Cases** (7th ed, Prentice Hall, New Jersey, 1983) at 33.

305.. See Mason, Beaney and Stevenson, *ibidem* at 27 where it was said that: "Charles Evans Hughes bluntly asserted that 'The Constitution is what the Judges say it is'."

306.. Section 2 of Article III of the US Constitution provides that the Court's right to hear appeals on federal questions is subject to "such exceptions, and under such regulations as the Congress shall make". In short, as Louis Henkin, "Judicial Power", in HW Chase (ed) **The Guide to American Law** (West Publishing Co, New York, 1984), 364 at 365 pointed out, "the Supreme Court ... has the power to exercise appellate jurisdiction only as conferred on it by Congress."

Congress has vested the Supreme Court with a broad appellate jurisdiction, and may, by constitutional amendment, change the Court's decisions on constitutional issues [see, for example, **United States v Southeastern Underwriters**, 322 US 533 (1944) and **Jencks v United States**, 353 US 657 (1957)], or even alter or deny its jurisdiction. Congress did this, for example, to prevent the Court from adjudicating the constitutionality of the reconstruction Acts.

307.. Murphy and Tanenhaus, *op cit* 5.

308.. Section 2, Article III.

309.. Fellman, "Judicial Review", *op cit* 375, observed that: "the Court will hear only cases or controversies; that is to say, actual live disputes between adversary parties asserting valuable legal rights. Therefore, the Court will not consider abstract or purely hypothetical issues or give *advisory opinions* as distinguished from binding judgments." (my italics) See also Henry J Abraham, **The Judiciary: The Supreme Court in the Governmental Process** (6th ed, Allyn and Bacon, Boston, 1983), at 177.

310.. See Virginia Gray, Herbert Jacob and Robert B Albritton, **Politics in the American States: A Comparative Analysis** (1990) at 278.

311.. Fellman, *loc cit*. It is important to distinguish abstract judicial review from the declaratory judgment procedure which is available in federal courts [for which see US Code, Section 2201; **Nashville C & St L Ry Co v Wallace**, 288 US 249 (1933); and **United Public Workers of America v Mitchell**, 330 US 75 (1947)] as well as in some state courts.

312.. See, for instance, **Massachusetts v Mellon**, 262 US 447 (1923).

313.. See Burger CJ in **Laird v Tatum**, 408 US 1 (1972).

314.. See AR Brewer-Carias, **Judicial Review in Comparative Law** (Cambridge University Press, Cambridge, 1989), at 149.

315.. See the South African Law Commission, **Interim Report on Group and Human Rights** (1991) at 619.

316.. A legislature may, in the exercise of its power, amend or repeal such a statute. If this is not done, the statute lies dormant and may be enforceable if in a later case or controversy, the court, either because it regards the earlier decision as incorrect or because new circumstances have intervened, now finds it not unconstitutional.

317.. In fact, Field J, in **Norton v Shelby County**, 118 US 425 (1986) at 442, said that: "An unconstitutional Act is not law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

318.. Abraham, **The Judiciary: The Supreme in the Governmental Process**, *supra* at 163. Fellman, "Judicial Review", *op cit* 375 said that: "[t]he Court has usually exercised its great power to invalidate legislation with great restraint. Prior to the Civil War there were only two cases holding acts of Congress unconstitutional."

319.. Fellman, "Judicial Review", *op. cit.* 375 said that: "the most important rule of judicial self-restraint is that statutes are presumptively valid, which means that judges assume that the legislators did not intend to violate the Constitution. It follows that the burden of proof is on the party who raises the issue of unconstitutionality."

As Chief Justice Hughes put it in **National Labour Relations Board v Jones and Laughlin Steel Corp**, 301 US 1 (1937), they endeavour to "save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and the other valid, our plain duty is adopt that which will save the act."

320.. See **Williams v Standard Oil Co of Louisiana**, 278 US 235 (1929) for a discussion of this problem.

321.. 1995 (10) BCLR 1382 (CC) at 1392, paragraph 16 and at 1393-1394, paragraph 19. This case is discussed in a different chapter in this thesis.

322.. Two years after the creation of the Dominion of Canada on 1 July 1867 by Britain by means of the British North America Act, 1867, 30 & 31 Vict c 3 (UK) of 29 March 1867.

323.. See, for instance, **R v Chandler; Re Hazleton**, [1869] 12 NBR 556 (CA); **L'Union St-Jacqués de Montréal v Belisle**, [1872] LC Jur 29 (Que QB); **Severn v The Queen**, [1878] 2 SCR 70; and **Valin v Langlois**, [1879] 3 SCR 1 *affd* 5 App cas 115 (PC).

324.. Hampered as they were by parliamentary sovereignty which, as A Bayefsky "Parliamentary Sovereignty and Human Rights in Canada", (1983) 3 **Political Studies**, at 239, pointed out, played a crucial role in, and had a tremendous influence upon, the development of Canadian constitutional law and jurisprudence.

325.. Barry L Strayer, **The Canadian Constitution and the Courts - The Function and Scope of Judicial Review** (3rd ed Butterworths, Toronto/Vancouver, 1988), at 4-5.

326.. Which incorporates the entrenched Canadian Charter of Rights and Freedoms.

327.. This Constitution, like our **Constitution**, is, in terms of Section 52(1) thereof, the supreme law of Canada, and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect.

328.. Section 24(1) of the Canadian Constitution.

329.. Strayer, **The Canadian Constitution and the Courts**, *supra* at 1.

330.. The South African equivalent of this is Section 35(2) of the **Constitution** of the Republic.

331.. See, for instance, **R v Rao**, [1984] 9 DLR (4th) 542 (Ontario CA); and **R v Coombs**, [1985] 6 Nfld & PEIR 12, 23 CCC (3rd) 356.

332.. Section 33(1) of the **Constitution**.

333.. See Section 1 of the Canadian Constitution which provides that: "The ... Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

As Strayer, *The Canadian Constitution and the Courts*, *op cit* 60, pointed out, however, there is a presumption in favour of the entrenched rights and freedoms which will necessarily prevail if the legislatures do not specifically pay attention to their limitation and also if the legislatures cannot demonstrate the need for their limitation before the courts of law.

334.. See *R v Oakes*, [1986] 1 SCR 103 at 137-138, on how Canadian courts approach the problems emanating from the application of the provisions of Section 1 of the Canadian Charter of Rights and Freedoms.

335.. In terms of which "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in Section 2 or Sections 7 to 15 of this Charter." See, for example, *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 353.

336.. Note that there is no South African equivalent of this. In our jurisdiction, it is only the Constitutional Court, acting under the provisions of Section 98(5) of the **Constitution**, which can, in the interests of justice and good government, preserve an Act or a provision thereof which it has otherwise adjudged to be inconsistent with the **Constitution** and therefore invalid, for a specified period, to enable Parliament or the relevant legislature to correct the flaw or flaws identified in it.

337.. See Strayer, *The Canadian Constitution and the Courts*, *op cit* 65-66; and Peter W Hogg, *Constitutional Law of Canada* (2nd ed, The Carswell Co Ltd, Toronto, 1985) at 691-692, for the rights that fall under these categories. See also JD van der Vyver, 'Constitutional Options for Post-Apartheid South Africa', in (1991) 40 *Emory Law Journal*, 745 at 818-819.

338.. Unless re-enacted, Section 33(3) of the Charter provides that the Section 33(1) declaration "shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration." See Hogg *Constitutional Law of Canada*, *op cit* 692 on this.

339.. Section 8 of the Saskatchewan Constitutional Questions Act, as amended in 1984, is a quintessential example of this. This requirement too has no equivalent in South Africa. If the government wishes to join or intervene in an action, it was, however, entitled to do so as was envisaged in Section 102(10) of the (interim) **Constitution**.

340.. Which dates back to 1882 when Quebec passed An Act to Facilitate the Intervention of the Crown in Civil Cases in which the Constitutionality of a Federal or Provincial Act is in Question, SQ 1882, c 4 s 1.

341.. See *In Reference Re: Language Rights in Manitoba*, [1985] 1 SCR 721.

In this regard, see Section 98(5) of the **Constitution** of the Republic, the provisions of which were, unfortunately, confined to questions of validity of legislation.

342.. See Section 98(6)(a) of the **Constitution** of the Republic for our equivalent of this.

343.. In *Reference Re Language Rights in Manitoba*, *op cit* 756-757, it was held that: "The application of the *de facto* doctrine is ... limited to validating acts which are taken under invalid authority; it does not validate the authority under which the acts took place. In other words, *the doctrine does not give effect to unconstitutional laws*. It recognises and gives effect only to the justified expectations of those who have relied upon the acts of those administering the invalid laws and to the existence and efficacy of public and private bodies corporate, though irregularly or illegally organised." (my italics)

344.. See Section 98(4) of the **Constitution** of the Republic in this regard.

345.. In the sense that it invalidates the impugned law from the very outset.

346.. *Supra*.

347.. As Strayer, **The Canadian Constitution and the Courts**, *op cit* 305 pointed out, this helped in "avoiding legal chaos but ultimately ensuring the enforcement of the Constitution."

In the Republic this is catered for in the proviso to the provisions of Section 98(5) of the **Constitution**.

348.. For the implications of this unique situation, see Gibson and Lercher 'Reliance on Unconstitutional Laws: The Saving Doctrines and Other Protections', (1986) 15 **Manitoba Law Journal** 305.

349.. Even where legislatures provided that if they found a statute or a provision thereof invalid, if they could save the remainder thereof by excising the invalid portions thereof they could do so, they have generally refused to do so. See, for example, **Attorney-General BC v Attorney-General Canada**, [1937] AC 377 at 388.

350.. [1947] AC 503.

351.. At 518.

CHAPTER THREE

THE CONSTITUTIONAL COURT AND A NEW JURISPRUDENCE

INTRODUCTION

As the death knell of the apartheid system sounded, the interim¹ **Constitution of the Republic of South Africa Act**² ushered in a *Rechtsstaat*, a state based on constitutionalism,³ which replaced the former state which was predicated upon the sovereignty and supremacy of Parliament.⁴ Section 4(1) of the **Constitution** made it clear that the document was the supreme law of the Republic and that any law or act inconsistent with its provisions was, unless otherwise provided expressly or by necessary implication in the **Constitution**, of no force and effect to the extent of the inconsistency. Its provisions were binding upon all legislative, executive and judicial organs of state at all levels of government.⁵ Thus, as stated in Chapter 1, a state based upon the supremacy of the **Constitution**⁶ and buttressed by a Chapter on Fundamental Rights⁷ emerged from the rubble of the apartheid constitutional system. For the first time in the history of South Africa, the rights of the individual would, subject to Section 33(1) of the **Constitution**,⁸ prevail over the interests of the state. To paraphrase Dennis Davis, Mathew Chaskalson and Johan de Waal,⁹ a legal revolution was produced: South African law, which hitherto had been dominated by English antecedence, both in its structure and content, was bound to change fundamentally. A new social compact was established, in terms of which the majority of the citizenry had agreed to abandon their struggle for political change in exchange for the new State, a constitutional State, which assumed the obligation to protect and promote the rights of all South Africans irrespective of race, colour, gender, social status or origin.

As the supreme law of the land, the **Constitution** was not only dealing with the institutional structures of government and regulating the distribution and utilisation or exercise of state power, but was basically a value-laden document.¹⁰ In interpreting the provisions of its Chapter on Fundamental Rights, our courts were obliged to promote the values underlying an open and democratic society based on freedom and equality.¹¹ Because the **Constitution** was the supreme law against which all law was to be tested, Froneman J quite rightly pointed out in **Qozeleni v Minister of Law and Order and Another**¹² that

it must be examined with a view to extracting from it those principles or values against which such law ... can be measured.¹³

As such, the document had a tremendous impact on our jurisprudence.¹⁴ The response of the Constitutional Court, the guardian and chief enforcer of the **Constitution**,¹⁵ to this historic development, constitutes the theme of this chapter. The role of this Court and its contribution to the establishment of a human rights culture in the Republic and the general development of our human rights jurisprudence are crucial; its decisions will define what our constitutional order is. In particular, it will be necessary to observe whether, to paraphrase Hiemstra CJ in **Smith v Attorney-General, Bophuthatswana**,¹⁶ this Court exercises its powers of controlling legislation with a scalpel or with a sledgehammer, ie whether it tends to confine itself to those matters it has been called upon to decide or it extends its powers and strikes down even those provisions of an Act it has not been called upon to consider¹⁷ if it finds them to be unconstitutional.

THE CONSTITUTIONAL COURT ENTERS THE SCENE

As Alfred Cockrell¹⁸ pointed out, in the first year of its existence the Constitutional Court was "faced with the task of creating a theory of constitutional review from nothing." While this was in one sense a bane, it was, in another, a boon in that it "presented an opportunity for the Constitutional Court to write the first chapter in the great South African novel of constitutional review."¹⁹ The Court thus had ample opportunity to

fundamentally transform our jurisprudence in the course of its interpretation of the **Constitution** and the law.

The questions canvassed below are, for various reasons, extremely important. For one thing, they constitute the gist of the jurisprudence that is emerging in our fledgling democracy. The Constitutional Court's approach to each one of them is, therefore, crucial for it may, in certain instances, impact upon the way each one of them was dealt with by our Courts in the previous constitutional era.

"VALUES"

The **Constitution** introduced a legal system in which certain fundamental rights were given greater weight than decisions of Parliament; South Africans thus bound themselves to certain values which would "trump the output of a transient legislature."²⁰ As Froneman J pointed out in **Qozeleni v Minister of Law and Order and Another**,²¹ the **Constitution** was to be interpreted so as "to give clear expression to the values it seeks to nurture for a future South Africa." These values, to paraphrase Nwabueze, should be the fundamental values of a given society which express its way of life and uphold its members' personality and individual rights.²²

In order to understand the response of the Constitutional Court to this mammoth task, namely the transformation of our jurisprudence, the starting point should be its understanding and use of the concept "values". The Constitutional Court itself stated in many cases that the interpretation of Chapter 3 of the **Constitution** involved "the making of a value judgment".²³ In other words, as Sachs J pointed out in **Coetzee v Government of the Republic of South Africa: Matiso v Commanding Officer, Port Elizabeth Prison**,²⁴ the Courts must adopt a "holistic, value-based" view in constitutional adjudication.

According to Langa J, the values underlying the **Constitution** were "the values of South African society as articulated in the Constitution and in other legislation, in the decisions of our Courts and, generally, against our own experience as a people",²⁵ "the values we find inherent in or worthy of pursuing in this society, which has only recently embarked

on the road to democracy.”²⁶ Sachs J, obviously bearing in mind that the values that underlay South African society in the apartheid era when the majority of the population were denied their basic democratic rights on the basis of race and colour were not the values that could bind all South Africans,²⁷ qualified this and stated that “[t]he values that must suffuse the whole process are derived from the concept of an open and democratic society based on freedom and equality.”²⁸

Thus, in the adjudicative process, our Courts have now been compelled to make a transition from the era when they were preoccupied with “formal reasons” to the post-apartheid era where they are required to grapple with “substantive reasons” in the form of moral and political values.²⁹ They now have to interpret all legislation in the light of fundamental rights such as were initially enumerated in Chapter 3 of the **Constitution**.³⁰ Our law has indeed shifted significantly from **S v Rudman and Another; S v Mthwana**,³¹ in which Nicholas AJA had stated authoritatively that a court of criminal appeal did not enquire whether the trial was fair in accordance with notions of basic fairness and justice or with the ideas underlying the concept of justice which are the bases of all civilised systems of criminal administration,³² to **S v Zuma and Others**,³³ where Kentridge AJ observed that the provisions of Section 25(3) of the **Constitution** precisely required criminal trials to be conducted in accordance with just those notions of basic fairness and justice.³⁴

To paraphrase Cockrell,³⁵ the significance of Chapter 3 of the **Constitution** lay in the fact that it functioned as a *locus* of open-ended values and invited our Courts to embrace substantive reasoning in reaching their decisions. Suddenly, our judges were confronted with a situation where they could no longer conveniently latch onto determinate rules and apply formal reasoning in reaching their decisions “irrespective of the underlying reasons of substance.”³⁶ They were from then on required to go behind the textual rules and engage with the substantive reasons underlying them; in their day-to-day activities as judges, they could no longer avoid engaging “in a particular variant of moral and political reasoning.”³⁷

However, the task of our Courts has not become easy as a result of the adoption of the first Chapter on Fundamental Rights in the history of our country as some values may

indeed conflict intrinsically; our Courts will thus have to accept that in concrete situations there will always be a need to choose between conflicting values, and to sacrifice some values to others in the course of adjudication.³⁸ As Cockrell³⁹ pointed out, “constitutional adjudication is about hard choices, where some values will have to be preferred over others and in the course of which some members of the community will necessarily be left to feel disappointed.” The brave and publicly controversial decision of the Constitutional Court in **S v Makwanyane and Another**,⁴⁰ as will appear more fully in Chapter 10 below, is a striking example of a case when the Court did this.

Needless to say, the transition was traumatic virtually for all our judges, none of whom⁴¹ had any constitutional adjudication experience to write home about.⁴² Cockrell⁴³ suggested that the Constitutional Court itself, consisting as it did of products of our legal system, did not in the first year of its existence consistently adhere to the paradigm shift towards the substantive vision of law. In his view, “the most striking feature of the record of the Constitutional Court in the first year has been the absence of ... a jurisprudence of substantive reasoning. Or, rather, the absence of a *rigorous* jurisprudence of substantive reasoning, for what we have been given is a quasi-theory so lacking in substance that I propose to call it rainbow jurisprudence”.⁴⁴ There was, in other words, no visible jurisprudential theory exhibited and pursued by the Court in that year.

VALUES AND NATURAL LAW

HR Hahlo and Ellison Kahn⁴⁵ defined “natural law”, a concept which has meant different things to different people at different times, as “an ideal system of law founded in the nature of the universe and the essence of men as rational beings”, a plan and norm, an ideal to which all positive law should conform.⁴⁶ An obviously important question is whether the values we are talking about derive from such an ideal system of law or from our nascent constitutional system. In other words, are they part of such a superior body of legal principles or part of the actual body of our positive law which “is but an imperfect reflection”⁴⁷ thereof?

Prior to the adoption of the **Constitution**, the South African Law Commission⁴⁸ and our Courts were certainly “tempted to cast their eyes towards the mountains of natural

law.”⁴⁹ Thus, for example, two years before the historic 27 April 1994 elections, Friedman J in **Nyamakazi v President of Bophuthatswana**,⁵⁰ remarked with regard to the Bophuthatswana Bill of Rights that “[t]he belief in natural law and humanity is the basic source of human rights and human rights is the expression of that belief ... It consists of universal laws, approximating to political morality, which if they had not been committed to writing would have had to be written down.”⁵¹ Subsequent to the April elections, Friedman JP once again remarked⁵² that “[f]reedom of contract is ... is regarded as having its origins in natural law”.⁵³ Sachs J’s view too⁵⁴ was that constitutionalism was the historical product of an enlightenment idea that “all persons had certain inherent rights that come with their humanity”.

However, it would appear from the remarks of Chaskalson P that “[w]ithout law, individuals in society have no rights”⁵⁵ that the Constitutional Court was focussed on institutional rights guaranteed in the **Constitution**. Indeed, as Sachs J pointed out in **Coetzee v Government of the Republic of South Africa**,⁵⁶ “rather than speak of values as platonic ideals, the Judge must situate the analysis in the facts of the particular case, weighing the different values represented in that context.” To paraphrase Langa J,⁵⁷ it is the values of South African society as articulated in the **Constitution** and in other legislation that our Courts were talking about. In other words, it is the values underlying, *inter alia*, the text of our **Constitution**, the model of the state and legal order brought about by the **Constitution**, the historical evolution and context of the new constitutional system, the principles of our common law, the rules of natural justice, tradition and usage, the (erstwhile) legal presumptions and, where appropriate principles derived from legal-comparative sources, that should guide and inform our Courts as they go about their work.⁵⁸

“VALUES” VERSUS “RULES”

It is also noteworthy that, on the assumption that a constitution is *sui generis* and, therefore, requires its own rules of interpretation, the Constitutional Court may have been tempted to juxtapose “values” to “rules”. For example, Sachs J in **S v Mhlungu and Others**,⁵⁹ stated that the **Constitution** “is a momentous document, intensely value-laden. To treat it with the dispassionate attention one might give to a tax law would be

to violate its spirit as set out in unmistakably plain language." This *dictum* gives one the impression that to Sachs J ordinary legislation, which is less value-laden than the **Constitution**, consists merely of a series of rules with its own appropriate style of interpretation and requires nothing more than the dispassionate attention that is more akin to "*ad hoc* technicism".⁶⁰

The reasoning of Sachs J suggested that it was permissible to put an artificial screen between constitutional interpretation and ordinary interpretation of statutes. The logic of this was that the substantive approach was applicable only to constitutional interpretation, and that judges could use formal reasoning in the interpretation of ordinary statutes. This, despite a clear constitutional injunction that in the interpretation of any law and in the application and development of the common law and customary law our Courts should have due regard to the spirit, purport and objects of Chapter 3 of the **Constitution**.⁶¹

"LEGAL REASONING" VERSUS "SUBSTANTIVE REASONING"

Sachs J's consistency was further confirmed when he said in **S v Makwanyane and Another**⁶² that:

[w]e are not called upon to decide between these positions. They are essentially emotional, moral and pragmatic in character and will no doubt occupy the attention of the Constitutional Assembly. Our function is to interpret the text of the Constitution as it stands. Accordingly, *whatever our personal views on this fraught subject might be, our response must be a purely legal one.* (my emphasis)

However, Sachs J seems to have contradicted himself when he said in **Coetzee v Government of the Republic of South Africa**⁶³ that:

[t]here is no legal yardstick for achieving this. In the end, we will frequently be unable to escape making difficult value judgments where... logic and precedent are of limited assistance ... what must be determinative in the end is the Court's judgment, based on an understanding of the values our society is being built on and the interests at stake in the particular case; this is a judgment that cannot be made in the abstract, and, rather than speak of values as platonic ideals, the judge must situate the analysis in the facts of the particular case weighing the different values represented in that context.

Kriegler J too fell into the same groove. He said in **S v Makwanyane and Another** that:

... the methods to be used are essentially legal, not moral or philosophical. To be true the judicial process cannot operate in an ethical vacuum. After all, concepts like "good faith", "unconscionable", "reasonable" import value judgments into the daily grind of courts of law. And it would be foolish to deny that the judicial process, especially in the field of constitutional adjudication, calls for value judgments in which extra-legal considerations may loom large. Nevertheless, the starting point, the framework and the outcome of the exercise must be legal. The incumbents are Judges, not sages; their discipline is the law, not ethics or philosophy and certainly not politics.⁶⁴ (my emphasis)

The first impression these statements give is that constitutional adjudication in the Republic comes in its pristine, unsullied, "legal" condition. Our judges seem to have been eager to emphasise that they have a different, purely legal role to play in society. By virtue of their legal training and experience, and as the collective ostensibly guided and propelled by objectivity,⁶⁵ they pride themselves in being able to guard against what Didcott J called "the trap of undue subjectivity."⁶⁶ So the transcendental objects called value judgments entailed in constitutional adjudication and interpretation can only be identified and articulated by them⁶⁷ and them alone presumably because politicians, in particular, are prone to subjectivity.

The second impression is that our Constitutional Court fell into the trap of denying that, precisely because a bill of rights is a constitutional and therefore a political document, interpreting it "is in consequence a political activity, and inescapably so. But it is a political activity of a special kind",⁶⁸ and differs from party political activity.

This approach, however, was clarified and perhaps even ameliorated by Mahomed J (as he then was) who acknowledged this truism and pointed out that:

[t]he difference between a political election made by a legislative organ and decisions reached by a judicial organ, such as the Constitutional Court, is crucial. The legislative organ exercises a political discretion, taking into account the *political preferences* of the electorate which votes political decision-makers into office. Public opinion therefore, legitimately plays a significant, sometimes even decisive, role in the resolution of a public issue ... The judicial process is entirely different.⁶⁹

Indeed, there is a fundamental distinction between the legislative and judicial organs of state; their roles in society differ in many essential ways and must never be conflated if tyranny is to be avoided.⁷⁰ However, the distinction must not be exaggerated;

inasmuch as the legislative organ cannot ignore what the judicial organ does and the consequences of what it does as such, the judicial organ cannot pretend that the rules the judges interpret and apply in many different situations are completely free from the politics of their day.⁷¹ Neither can the two organs pretend that there is no relationship between themselves and between their respective roles. The development of our constitutional jurisprudence ultimately depends on a proper understanding and management of this relationship, rather than on a denial of its existence.⁷²

CONSTITUTIONAL INTERPRETATION AND INTERPRETATION OF STATUTES

An important development in the advent of the **Constitution** is that our Courts⁷³ will now indulge in constitutional interpretation in addition to ordinary interpretation of statutes. Our Courts, which, *stricto sensu*, are neither makers of law nor the formulators of policies, will now be required to strike a fine balance between strict positivism and mere subjective value judgments when interpreting either our *Grundnorm*-type and value-laden **Constitution** or ordinary legislation.

Constitutional Adjudication

In his seminal article, Du Plessis said that:

a constitution, professing to be the *supreme law* of a country and including a *justiciable bill of rights*, is a legislative instrument *sui generis* which requires, for its proper construction, an equally *sui generis* hermeneutical approach.⁷⁴

This suggests that there is a basic difference between the approach to be adopted in interpreting a constitution and interpreting an ordinary Act.⁷⁵ Botha⁷⁶ even instructed us that "constitutional interpretation is a complex field of study", while Cachalia et al said that:

[t]he constitution cannot be read clause by clause nor can any clause be interpreted without an understanding of the framework of the instrument. *In interpreting a constitutional instrument courts have to strike a balance between allowing the democratic process of an elected parliament to take its natural course while ensuring that the framework of values as contained in the instrument continue to form the broad context within which social, political and economic activity take place.*⁷⁷ (my emphasis)

And yet one of the basic consequential changes in our jurisprudence was that, unlike in the past, our Courts were in the new constitutional order that was ushered in by the **Constitution** required to establish the purpose of the legislation being construed and give effect to it,⁷⁸ instead of searching for the subjective "intention of the legislature"⁷⁹ in the interpretation of statutes. The purposive mode of interpretation has been established, and our Courts now have to interpret *all legislation* in the light of constitutionally guaranteed fundamental rights. Thus, today, even if the words of the particular statute may seem to have one unambiguous meaning, "the most important rule of statutory interpretation is: the interpretation must ultimately reflect the purpose of the legislation."⁸⁰ In other words, our judges are now required to "function in an unapologetically purposive fashion and not be afraid to acknowledge that they can and do rectify the text when the words used in a particular formulation defeat or go against the general purpose of the statute."⁸¹ Furthermore, as was stated above, in the interpretation of any law and the application and development of the common law and customary law, the Courts were constrained to have due regard to the spirit, purport and objects of the Chapter on Fundamental Rights.⁸²

However, whilst approving of an approach that is generous and purposive, in a judgment in which all the judges of the Constitutional Court concurred, Kentridge AJ in **S v Zuma and Others**⁸³ cautioned against ignoring all the principles of law which had hitherto governed our Courts. In their attempt to address the "mischief" that was represented by the previous constitutional system, our Courts were advised to bear such principles in mind as they "obviously much of lasting value."⁸⁴

In other words, according to Kentridge AJ, the basic rules of statutory interpretation which our Courts were guided by prior to the enactment and coming into effect of the (interim) **Constitution** are still applicable, save that our Courts now search for and apply the purpose of the relevant statute⁸⁵ in the light of the Bill of Rights.

Language

Thus, for a example, our Courts cannot ignore the language of a statutory instrument, including the **Constitution**,⁸⁶ though a constitution is *sui generis*,⁸⁷ and thus calls for "principles of interpretation of its own".⁸⁸ As Kentridge AJ observed in **S v Zuma and Others**, "[w]hile we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument ... a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination."⁸⁹

Mahomed J (as he then was) too did not improve the position when he observed in **S v Mhlungu and Others**,⁹⁰ that "[a]n interpretation ... which withholds the rights guaranteed by chap 3 of the Constitution ... would not give to that chapter a construction which is most beneficial to the widest possible amplitude and should therefore be avoided *if the language and context ... reasonably permits such a course.*" (my emphasis) In his remarks, the learned Deputy President of the Constitutional Court merely reiterated a position of the Botswana courts which is that in general, a constitution "embodying fundamental rights should *as far as its language permits* be given a broad construction".⁹¹

I sense in all this a tendency on the part of the Constitutional Court to equate language and meaning, or even to elevate language over meaning. It certainly did not take our law beyond the position propounded by Miller JA who had prior to the enactment and coming into force of the **Constitution** concluded in **S v Marwane**⁹² that:

[w]hether our Courts were to regard an Act creative of a Constitution as it would any other statute, or as an Act *sui generis*, when construing a particular provision therein, they would give full effect to the ordinarily accepted meaning and effect of the words used and would not deviate therefrom unless to give effect to the ordinary meaning would give rise to glaring absurdity; or unless there were indications in the Act (considered as a whole in its own peculiar setting and with due regard to its aims and objects) that the legislator did not intend the words to be understood in their ordinary sense.

As for me, while language is important in both constitutional interpretation and ordinary interpretation of statutes, nothing much turns solely on it; I am personally inclined to agree with Du Plessis that:

[m]eaning is not inherent in the language of the text only. Language is but a *medium* of meaning and not meaning itself. To equate language and meaning is to confuse a means of meaning with meaning itself as an end.

... There is, as a matter of fact, no such thing as clear and unambiguous language in the abstract or even 'in context' *prior* to meaning having been established 'with the help of the context'. The language of a statute can in other words only be said to be clear once its meaning ... has somehow been determined.⁹³

While the importance of language is acknowledged, our Courts have recognised that the **Constitution**, as the supreme law of the land, must be given a generous and purposive interpretation.⁹⁴ In other words, while it is recognised that historical context and comparative interpretation do not in themselves reflect a purpose that is not supported by the constitutional text, a mechanical adherence to the strict austerity of literal legalism must be avoided like a plague.⁹⁵ To paraphrase Dickson J (as he then was) in **R v Big M Drug Mart Ltd**,⁹⁶ the interpretation should, as far as possible, be a *generous rather than a legalistic one*, aimed at fulfilling the purpose of the individual rights and freedoms guaranteed in the **Constitution**. This goes to show that constitutional interpretation⁹⁷ is "an open-ended process of elucidation and commentary which explores, reads into, derives and attaches significance to every word, section or clause in relation to the whole context."⁹⁸

The same, in my opinion, applies to ordinary statutory interpretation. Though the **Constitution** as the supreme law of the land is not identical to other legislation, in terms of the **Constitution** all law must be interpreted in the light of the spirit of the constitutionally guaranteed fundamental rights. Thus, as Botha⁹⁹ quite rightly pointed out, "the method used to interpret ordinary legislation belongs to the same theoretical family (contextual and purposive) as the prevailing approach to constitutional interpretation." The most important rule of interpretation of statutes today being the determination of the purpose of the legislation, the need to continuously maintain a balance between the words or language used in the text being interpreted and the

context of the legislation in the determination of the purpose of the legislation cannot be over emphasised.

Context

Secondly, as our Courts have held in the past, it is indeed permissible in interpreting a statute to consider the purpose and background of the legislation in question.¹⁰⁰ Thus, the words used in the statute "must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that the 'context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background."¹⁰¹

However, though Chaskalson P was prepared to accept that *in other countries where the constitution is similarly the supreme law of the land it is not unusual for the courts to have regard to debates in Parliament, including statements by Ministers responsible for legislation, and explanatory memoranda providing reasons for new Bills in the interpretation of statutes*, he was not prepared to extend the same approach to South Africa.¹⁰² The learned President of the Constitutional Court instead remarked that whether or not our Courts should follow such examples and extend the scope of what is admissible as background material for the purpose of interpreting a statute did not arise in **S v Makwanyane and Another**¹⁰³ for the Court was dealing with the interpretation of the **Constitution** and not the interpretation of ordinary legislation.¹⁰⁴ It is my contention that the Constitutional Court thus missed a golden opportunity to use the provisions of Section 35(1) of the **Constitution** and benefit from comparable foreign case law.

It should be clear from the foregoing remarks that, as for me, there is not a fundamental difference between constitutional interpretation and ordinary interpretation. While constitutional interpretation relates to the authoritative interpretation of the **Constitution** by our Courts in the course of judicial review of the constitutionality of legislation and government action, both forms of interpretation deal with the

interpretation of legislative instruments and are interrelated. The difference is that, as Froneman J observed in **Matiso v Commanding Officer, Port Elizabeth Prison**,¹⁰⁵ while constitutional interpretation is directed at ascertaining the foundational values inherent in a constitution,

the interpretation of the particular legislation will be directed at ascertaining whether that legislation is capable of an interpretation which conforms with the fundamental values or principles of the Constitution.

Thus, nothing much turns on the mere assertion that a constitution is a *sui generis* statute which requires a *sui generis* hermeneutical approach. The common law principles of interpretation, in sum, require the interpreter to ascertain what the position was before the enactment of a relevant statute, identify the "mischief" which the statute seeks to remedy, ascertain the remedy provided by the new provisions and ascertain the reason for the remedy. There is, in my view, no material difference between that common law approach and the special approach to constitutional interpretation being advocated by some.¹⁰⁶

VALUES AND POPULAR MORALITY

It has been stated above that our Courts now have to grapple with "substantive reasons" in the form of political and moral values. The Constitutional Court in the first year of its existence was also preoccupied with the extent to which it is appropriate for it to have regard to popular morality in the interpretation of statutes and the protection of rights in the context of a bill of rights regime. It adopted the position that popular morality and public opinion in essence have no role in the interpretation of a bill of rights as the very purpose of a bill of rights is to withdraw certain subjects from the vicissitudes of political controversy, to put them beyond the reach of majorities and officials and establish them as principles to be applied by the Courts.¹⁰⁷ As Chaskalson P pointed out,

[i]f public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new order established by the 1993 Constitution ... The very reason for establishing the new legal order, and for vesting the power of

judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process.¹⁰⁸

However, in the same breath, Chaskalson P seems to have been prepared to defer to some degree to the place and role of legislators when it came to the weighing up of competing interests in the interpretation of the general limitation clause.¹⁰⁹ The learned President of the Constitutional Court said that:

[i]n the process regard must be had to the provisions of s 33(1) and the underlying values of the Constitution, bearing in mind that, as a Canadian Judge has said, "the role of the Court is not to second-guess the wisdom of policy choices made by legislators".¹¹⁰

There does not appear to be any real and logical reason for confining this to the general limitation clause. On the contrary, it may indeed be proper in certain circumstances for the Courts to leave decision-making to the elected law-makers.

For the learned President of the Constitutional Court, particularly in matters of policy, it would not be appropriate for an unelected court to second-guess the executive or legislative organs of government and to substitute its own opinion of what is reasonable or necessary for that of the legislators. Obviously endorsing Canadian jurisprudence, Chaskalson P declared that:

[w]here choices have to be made between "differing reasonable policy options", the courts will allow the government the deference due to legislators.¹¹¹

Furthermore, for Kentridge AJ, if public opinion on a particular question is clear, it cannot be totally ignored. The accepted mores of a judge's society do have some relevance in the interpretation of statutes, in other words.¹¹²

"AFRICAN VALUES AND INDIGENOUS LAW"

Is there a place and a role for "African values" in the interpretation of statutes and in the determination of the constitutionality of laws in the new era? In this regard, Mokgoro J declared that:

when our Courts promote the underlying values of an open and democratic society in terms of s 35 when considering the constitutionality of laws, they should recognise that *indigenous* South African values are not always irrelevant nor unrelated to this task.¹¹³ (my emphasis)

The learned judge of the Constitutional Court indeed regarded the indigenous value systems as "a premise from which we should proceed",¹¹⁴ while Langa J spoke of "a spontaneous call ... among sections of the community for a return to ubuntu".¹¹⁵ Sachs J also committed himself to "the need to take account of the traditions, beliefs and values of all sectors of South African society when developing our jurisprudence."¹¹⁶ Madala J accepted that there was indeed a need "to bring in the traditional African jurisprudence to these matters, to the extent that such is applicable, and would not confine such research to South Africa only, but to Africa in general."¹¹⁷

Needless to say, this perspective is laudable. It would help in properly locating in the new constitutional order indigenous values and indigenous law, which, like the common law, according to the **Constitution**, should be recognised and applied by the Courts, subject to the provisions of the **Constitution** and legislation dealing specifically with it.¹¹⁸ It would indeed help give "long overdue recognition to African law and legal thinking as a source of legal ideas, values and practice",¹¹⁹ and generally to "the value systems of the formerly marginalised sectors of society in creating a South African jurisprudence".¹²⁰ As Cockrell said, "African sources can provide a valuable repository of values to be trawled in the process of constitutional adjudication."¹²¹

However, as Madala J quite rightly pointed out, if this perspective would entail that the Courts have to canvass public opinion among blacks before they make their decisions, then it would be unacceptable.¹²² Furthermore, such values do not justify themselves merely by virtue of their being "African" and, as Sachs J said,

[w]e do not automatically invoke each and every aspect of traditional law as a source of values, just as we do not rely on all features of the common law ... there are many aspects and values of traditional African law which will also have to be discarded or developed in order to ensure compatibility with the principles of the new constitutional order.¹²³

THE CONSTITUTIONAL COURT AND COMPARABLE FOREIGN CASE LAW

Lastly, it behoves us to take a brief look at how our Courts have dealt with public international law and comparable foreign case law. Section 35(1) of the **Constitution** provided that:

[i]n interpreting the provisions of this Chapter a court of law ... shall, *where applicable*, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, *and may have regard to comparable foreign case law*. (my emphasis)¹²⁴

The Constitutional Court has had occasion to comment on the usefulness of comparable foreign case in the development of our jurisprudence. In the light of my remarks above, it is important to canvass this area as well. Langa J, in a curious *obiter dictum* in **S v Williams**,¹²⁵ said that:

[t]he decisions of the Supreme Courts of Namibia and of Zimbabwe are of special significance. Not only are these countries geographic neighbours, but South Africa shares with them the same English colonial experience which has had a deep influence on our law; we of course also share the Roman-Dutch legal tradition.¹²⁶

It is, however, not clear from the reasoning of Langa J why the decisions of the Supreme Courts of Namibia and of Zimbabwe should be preferable to those of the Courts of other countries if there is no formal reason for following foreign case law in the first place. It seems as though the learned judge of the Constitutional Court was suggesting that, merely because there is indeed a lot in common between us and our neighbours, our Courts are obliged to implicitly follow the decisions of their Courts without any substantive grounds. In this regard, however, the trend-setting remarks of Chaskalson P¹²⁷ are of extreme importance:

[c]omparative "bill of rights" jurisprudence will no doubt be of importance, particularly in the early stages of the transition when there is no developed indigenous jurisprudence in this branch of the law on which to draw. Although we are told by s 35(1) that we "may" have regard to foreign case law, it is important to appreciate that this will not necessarily offer a safe guide to the interpretation of chap 3 of our Constitution. This has already been pointed out in a number of decisions of the Provincial and Local Divisions of the Supreme Court, and is implicit in the injunction given to the Courts in s 35(1), which in permissive terms

allows the Courts to "have regard to" such law. There is no injunction to do more than this ...

We can derive assistance from public international law and foreign case law, but we are *in no way bound to follow it*. (my emphasis)¹²⁸

In other words, the approach of our Courts to foreign case law is that, while such case law may be a useful guide and indeed a store-house, a repository of principles to be raided for guidance when necessary and appropriate, it does not provide canonical texts or formal reasons for the decisions of our Courts.¹²⁹ Though our Courts may be too eager at times to turn to the experience of other countries, foreign case law is generally approached "with circumspection because of the differing contexts within which foreign constitutions were drafted and operate in, and the danger of unnecessarily importing doctrines associated with those constitutions into an inappropriate South African setting."¹³⁰

THE VERTICALITY-HORIZONTALITY DICHOTOMY

The question whether the Chapter on Fundamental Rights was applicable vertically¹³¹ only or both vertically and horizontally¹³² came before the Supreme Court in a few cases before it was eventually dealt with by the Constitutional Court. For example, in **Mandela v Falati**,¹³³ Van Schalkwyk J had held that the Chapter 3 constitutionally guaranteed rights operated horizontally, between citizen and citizen,¹³⁴ while Van Dijkhorst J, in **De Klerk and Another v Du Plessis and Others**,¹³⁵ after an analysis of certain provisions of the **Constitution** had held that they were of vertical application only.¹³⁶ In **Motala and Another v University of Natal**¹³⁷ Hurt J held that at least the equality clause as well as the clause on education¹³⁸ had horizontal application as well "against individuals, natural or juristic, who may be disposed to threaten them or interfere with the exercise of them."¹³⁹

Constitutional Provisions

Before dealing with how this dichotomy was resolved by the Constitutional Court, it is imperative to look at certain sections of the **Constitution**. In the first place, it provided explicitly that Chapter 3 "shall bind all legislative and executive organs of state at all

levels of government.”¹⁴⁰ This clearly indicated, as LM du Plessis quite rightly pointed out,¹⁴¹ that the Chapter was predominantly vertical in its application and was, as such, an instrument essentially intended to protect the individual against abuse of State power.¹⁴²

However, Chapter 3 was also specifically made applicable “to all law in force ... during the period of operation of this Constitution.”¹⁴³ (my emphasis) Furthermore, the common law and customary law were specifically subjected to the rights contained in the Chapter,¹⁴⁴ with any common-law or customary-law limitation being rendered unconstitutional unless it conformed to the general limitation clause.¹⁴⁵ Moreover, our Courts were required to “promote the values which underlie an open and democratic society based on freedom and equality”;¹⁴⁶ they were also explicitly enjoined to have “due regard to the spirit, purport and objects” of the Chapter when interpreting any law and when applying or developing the common law and customary law.¹⁴⁷

It is further noteworthy that, under the **Constitution**, “measures designed to prohibit unfair discrimination by bodies and persons other than those” constituting organs of state, could be adopted.¹⁴⁸ As Friedman J pointed out in **Baloro and Others v University of Bophuthatswana and Other**,¹⁴⁹ this was a clear encroachment on the domain of private law, with a horizontal dimension. Thus, for example, “a school, whether public or private, would not be entitled to refuse a pupil admission on the grounds of the pupil’s race or colour. This would amount to unfair discrimination.”¹⁵⁰

Lastly, the **Constitution** also provided that the entrenchment of the rights in terms of Chapter 3 should not be construed as denying the existence of any other rights or freedoms recognised or conferred by our common law, customary law or legislation to the extent that they were not inconsistent with the provisions of Chapter 3.¹⁵¹ Furthermore, save as was provided in the general limitation clause or in any other provision of the **Constitution**, “no law, whether a rule of the common law, customary law or legislation”, could limit any of the rights entrenched in Chapter 3.¹⁵² (my emphasis)

The Constitutional Court's Decision

In view of the conflicting decisions of the Supreme Court, Van Dijkhorst J referred the constitutional issues to the Constitutional Court for its decision.¹⁵³ The question unleashed a very interesting jurisprudential debate among the judges of the Constitutional Court which is summarised below. As will become clearer later, the idiosyncrasies and predilections of some of our Constitutional Court judges became manifest in the course of this debate.

In **Du Plessis and Others v De Klerk and Another**,¹⁵⁴ Kentridge AJ, after carefully considering the provisions of Section 7(1) and (2)¹⁵⁵ of the **Constitution**, concluded that the Chapter 3 constitutional rights could "be invoked against an organ of government but not by one private litigant against another."¹⁵⁶ In other words, as the learned acting judge pointed out, Chapter 3 was

not intended to be applied directly to common law issues between private litigants.¹⁵⁷

In private litigation any litigant could nonetheless contend that a statute (or executive act) relied upon by his or her opponent was invalid as being inconsistent with the limitations placed upon the legislature and the executive under Chapter 3.¹⁵⁸ Furthermore, as the Chapter applied to the common law, governmental acts or omissions in reliance on the common law could be attacked by a private litigant as being inconsistent with the Chapter.¹⁵⁹

The learned acting judge further stated that the powers of the Constitutional Court to enquire "into the constitutionality of any law, including an Act of Parliament",¹⁶⁰ were confined to statutes as Section 98¹⁶¹ of the **Constitution** nowhere provided for a declaration that a rule of the common law was invalid.¹⁶² While conceding that Section 35(3), which as stated above obliged the Courts to "have due regard to the spirit, purport and objects of" Chapter 3, introduced the indirect application of the fundamental rights to private law, Kentridge AJ significantly pointed out that:

[t]he lawgiver did not say that courts should invalidate rules of common law inconsistent with Chapter 3 or declare them unconstitutional. The fact that courts do no more than have regard to the spirit, purport and objects of the Chapter indicates that *the requisite development of the common law and customary law is not to be pursued through the exercise of the powers of this Court under section 98 of the Constitution*. The presence of this sub-section ensures that the values embodied in Chapter 3 will permeate the common law in all its aspects, including private litigation.¹⁶³ (my emphasis)

Of particular note was the fact that the learned acting judge quoted with approval the views of a Canadian judge, Lacobucci J, who said in **R v Salituro**¹⁶⁴ that while judges can and should develop and adapt the common law to reflect the changing social, moral and economic fabric of the country,

*in a constitutional democracy ... it is the Legislature and not the courts which has the major responsibility for law reform ... The Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.*¹⁶⁵ (my emphasis)

Kentridge AJ then came to the conclusion that Chapter 3 of the **Constitution** did not have a general direct horizontal application though it could and should have an influence upon the development of the common law and customary law governing relations between individuals.¹⁶⁶ He conceded (grudgingly perhaps?) however, that in a proper case it might be open to a private litigant to argue that some particular Chapter 3 provisions might by necessary implication have direct horizontal application.¹⁶⁷

In particular, the learned acting judge pointed out that Section 15(1) of the **Constitution**, which protected the right to freedom of speech and expression, did not have horizontal application.¹⁶⁸ Its provisions were, in other words, confined to the vertical relationship between the state and the individual.¹⁶⁹

For Mahomed DP (as he then was), the starting point was the society the **Constitution** sought to establish after the demise of the system of apartheid, namely a defensible society based on freedom and equality, setting its face firmly and vigorously against racism. From this perspective, the learned Judge correctly reasoned that:

*[t]o leave individuals free to perpetuate advantages, privileges and relations, quite immune from the discipline of Chapter 3, would substantially be to allow the ethos and pathology of racism effectively to sustain a new life, subverting the gains which the Constitution seeks carefully to consolidate.*¹⁷⁰

However, when the Learned Deputy President of the Constitutional Court looked at the provisions of Section 7(1) and (2) of the **Constitution**, he pointed out that he found it difficult to understand why, if it was the intention of the lawmakers to resolve the verticality/horizontality dichotomy, they did not say so "in clear terms or at least in language which clearly permitted that inference to be made."¹⁷¹ He was "not persuaded that the lawmakers would wish such a crucial issue to be left for discovery and inference by astute judicial craftsmanship and nimble argumentation."¹⁷²

The learned Deputy President of the Constitutional Court proffered the view that the lawmakers could indeed use the provisions of Section 33(4) of the **Constitution** to pass substantive legislation designed to extend to other bodies and persons the duties placed on government in terms of Section 7(1) in order prohibit unfair discrimination by such other bodies and persons.¹⁷³ In other words, Mahomed DP too accepted the approach adopted by Iacobucci J in **R v Salituro**,¹⁷⁴ namely that law reform should rather be left to the Legislature. He agreed to the order proposed by Kentridge AJ.¹⁷⁵ However, his concern that the approach of Kentridge AJ might mean, "in practice, that the Constitution was impotent to protect those who have so manifestly and brutally been victimised by the private and institutionalized desecration of the values now so eloquently articulated" still lingered on.¹⁷⁶ He was certain that

*those responsible for the enactment of the Constitution never intended to permit the privatisation of Apartheid or to allow the unfair gains of Apartheid or the privileges it bestowed on the few, or the offensive attitudes it generated amongst many to be fossilized and protected by courts rendered impotent by the language of the Constitution.*¹⁷⁷ (my emphasis)

He then reasoned that, fortunately,

most of the common law rules, upon which reliance would have to be placed by private persons seeking to perpetuate unfair privilege or discrimination, would themselves be vulnerable to invasion and re-examination in appropriate circumstances.¹⁷⁸

This, the Learned Deputy President of the Court maintained, could be done without necessarily extending the application of the provisions of Section 7(1) of the **Constitution**, but under Section 35(3) thereof. In other words, the Courts could intervene in this regard in the course of their participation in the development of the

common law and customary law as they have regard to the spirit, purport and objects of the new constitutional system.¹⁷⁹

Unfortunately, Mahomed DP, as he then was, like the rest of the judges who concurred in the judgment of Kentridge AJ, did not comment on the constitutional provision which specifically protected fundamental rights and freedoms deriving from the common law, customary law or legislation, as long as they were not inconsistent with Chapter 3.¹⁸⁰ It is my view that in a proper case a private litigant could argue that a right deriving from the common law or customary law or legislation, could not be relied upon by any person, private or public, if it was inconsistent with Chapter 3.¹⁸¹ I further submit that no court of law could, in any event, allow any litigant, private or public, to rely upon a common law or customary law limitation of a Chapter 3 right unless such a limitation complied with the general limitation clause.¹⁸²

Like Kentridge AJ, Ackermann J too came to the conclusion "that the framers of our **Constitution** did not intend that the Chapter 3 fundamental rights should, save where the formulation of a particular right expressly or by necessary implication otherwise" indicated, apply directly to legal relations between private persons.¹⁸³ In his view, it could never have been the intention of the framers of the **Constitution** "to constitute Chapter 3 as a *super civil code*, to which the private common law is directly subject."¹⁸⁴ (my emphasis)

Curiously though, despite the clear provisions of Section 33(2) which, as stated above, specifically subjected the common law, customary law and legislation to the general limitation clause, Ackermann J did not seem to see any need to refer to Section 33(1) of the Constitution in this regard.¹⁸⁵

Kriegler J, in an interesting minority judgment, suggested that his colleagues erred - and did so fundamentally - when they concluded that the individual's rights that were guaranteed in Chapter 3 were directly enforceable only against the state.¹⁸⁶ For him, it was common cause that Chapter 3 did not operate only as against the state but also "horizontally" as between individuals where legal relationships were involved.¹⁸⁷ As will become clearer below, Madala J too took the same position;¹⁸⁸ while acknowledging

that the **Constitution** had vertical operation and dealt with the relationship between the state and the individual, he did not subscribe to the view that its operation was limited to verticality only.¹⁸⁹

While Kriegler J referred to the majority judgment presented by Kentridge AJ as being reflective of the more conservative view,¹⁹⁰ Madala J blamed Kentridge AJ for dealing with the verticality-horizontality dichotomy on too narrow a basis.¹⁹¹ Their two judgments, the gist of which I would personally prefer, unfortunately do not constitute the law as the majority ruled differently on this question.

Kriegler J¹⁹² rightly pointed out that the **Constitution** held no hidden message of so-called verticality; it nowhere provided that Chapter 3 governed only the vertical relationship between the state and the individual. On the contrary, he declared, Section 4(1), in terms of which the whole **Constitution** was the supreme law of the Republic, made the **Constitution** as a whole applicable to all law and to all legal relationships. According to him, in order to address the inequities of South Africa's past, the framers of the **Constitution** had "unequivocally proclaimed much more sweeping aims than those identified by the judge *a quo*"¹⁹³ and apparently accepted in the more conservative judgment of Kentridge AJ in which the majority of the Court concurred. The manifest intention of the makers of the **Constitution** was, as Section 4(2) showed, "to expand its scope to the widest limit their language could express."¹⁹⁴ They had even expressly extended the provisions of Chapter 3 to juristic persons and *locus standi* to representative actors, group, class and even public interest claimants, their clear intention throughout being "to stretch the purview of Chapter 3 to its outermost boundaries".¹⁹⁵

For Kriegler J¹⁹⁶ and Madala J,¹⁹⁷ the provisions of Section 33(2)-(4) of the **Constitution** were critical as far as the question of the application of Chapter 3 was concerned. In particular, Kriegler J rightly pointed out that Section 33(4) did not support a vertical reading of Chapter 3;¹⁹⁸ it merely proclaimed that nothing in the Chapter could preclude the adoption of measures, whether legislative or executive, intended to prevent and combat privatised unfair discrimination.¹⁹⁹

Madala J²⁰⁰ said that the **Constitution** allowed both for the direct application of a relevant Chapter 3 right and the interpretation, application and development of our law, including the common law and customary law, by having regard to the spirit, purport and objects of the Charter in terms of Section 35(3) of the **Constitution**. In other words, a person, either natural or juristic, would be entitled, under Section 22 of the **Constitution**, to approach a Court of law directly if any of his/her/its rights were affected or threatened.

While acknowledging the importance of the provisions of Section 35(3) of the **Constitution**, Kriegler J held the view that they were manifestly intended to govern a residuary category not governed by the rest of Chapter 3.²⁰¹ The purpose of Section 35(3), he said, was to ensure that the **Constitution** permeated all that judges did as it was to permeate all that the legislature and the executive, at all levels of government, did.²⁰² The section was to be used in all cases where there was no direct challenge based on one or more of the rights and freedoms entrenched in Chapter 3, he said.²⁰³ All Courts, including the Constitutional Court, were constitutionally bound to follow its provisions.²⁰⁴

Kriegler J²⁰⁵ also disagreed with Kentridge AJ who said that the Courts did not acquire jurisdiction to invalidate and declare unconstitutional rules of common law inconsistent with Chapter 3.²⁰⁶ For him,²⁰⁷ the Constitutional Court, as “the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of” the **Constitution**,²⁰⁸ had jurisdiction to enquire into and adjudicate “any alleged violation or threatened violation of any fundamental right entrenched in Chapter 3”,²⁰⁹ and to indulge in “the determination of any other matters as may be entrusted to it by this Constitution or any other law.”²¹⁰

The Constitutional Assembly Intervenes

The verticality-horizontality dichotomy was eventually resolved by the Constitutional Assembly which provided in Section 8(2) of the (new) **Constitution**²¹¹ that:

[a] provision of the Bill of Rights binds *natural and juristic persons* if, and to the extent that, it is applicable, taking into account the nature of the right and of any duty imposed by the right. (my emphasis)

The Constitutional Court rejected the argument that this introduction of horizontality, which would impose obligations upon persons other than organs of state, violated Constitutional Principle II as horizontality is not universally recognised. First and foremost, the Court held that nothing in Constitutional Principle II *per se* prevented the Constitutional Assembly from including in the new Bill of Rights provisions which are not universally accepted.²¹²

Secondly, the Court, rejected the notion that a horizontal application of the Bill of Rights would violate a basic tenet of our law, *separation of powers*, and thus allow the courts to encroach upon the sacred terrain of the legislature and “alter” legislation and the common law. Reaffirming that the courts always use the power of judicial review to “alter” legislation in ways they may consider desirable, the Court held that the argument failed to acknowledge that:

the courts have always been the sole arm of government responsible for the development of the common law.²¹³

Lastly in this regard, the Court rejected the argument that horizontality would impose obligations upon individual persons who were otherwise entitled to be beneficiaries of “universally accepted fundamental rights, freedoms and civil liberties”. The Court held that the provisions of Constitutional Principle II would not be violated by a horizontal application of the Bill of Rights as it was implicitly recognised that:

even if only the state is bound, rights conferred upon individuals will justifiably be limited in order to recognise the rights of others in certain circumstances.²¹⁴

Thus, today, our Bill of Rights binds natural and juristic persons, albeit to a limited extent. It will only bind natural and juristic persons if applicable, after taking into account the nature of the right in question and any duty imposed by such right. Our Courts will be required to treat each case on its own merits and decide whether the right which allegedly was breached by private action should be given horizontal application. In a small way, this is a victory for the reasoning in the minority judgment of Kriegler J and Madala J in **Du Plessis and Others v De Klerk and Others**, with which I associated

myself above; the new Bill of Rights has indeed ventured out and intervened in the sacred territory of our private law.

Our Courts are allowed and constrained, in order to give effect to the rights in the Bill of Rights, to apply, and where necessary, develop our common law. In the process, the Courts may even develop the rules of our common law to limit some of the rights in the Bill, "provided that the limitation is in accordance with section 36(1)" of the (new) **Constitution**. However, it is not clear from Section 8(3) which comes first: The right or the common law when a right is being applied "horizontally". One interpretation is that you start with the common law. The provision does not say you first have to look at what a constitutionally guaranteed right should or does mean, and then "test" the common law against it. Hopefully, the Constitutional Court will soon provide guidance in this regard.

RETROSPECTIVITY²¹⁵

The Constitutional Court has also had occasion to consider the question of retrospective operation of statutes, including the **Constitution**. The first case in which the Court had to deal with this question was **S v Mhlungu and Others**.²¹⁶ The second one was **Du Plessis and Others v De Klerk and Another**,²¹⁷ while the third one was **Key v Attorney-General, Cape of Good Hope Provincial Division and Another**.²¹⁸ However, the starting point, in my opinion, should be what our common law and statutory position was in 1994 when the (interim) **Constitution** came into effect.

The Common Law Position

In our common law there was a presumption that "statutes will not be held to take away existing rights retrospectively unless they so provide expressly or by necessary intendment."²¹⁹ The common law position was spelt out by Innes CJ who said in **Curtis v Johannesburg Municipality**²²⁰ that:

[i]n the absence of express provision to the contrary, statutes should be considered as affecting future matters only and more especially ... they should if possible be so interpreted as not to take away rights actually vested at the time of their promulgation.

In other words, the rule was that “the lawgiver is presumed to legislate only for the future”,²²¹ “and not for the past”,²²² and that “statutes should be interpreted, if possible, so as to respect vested rights”.²²³ It was not to be presumed that interference with existing rights was intended by the legislature, unless the words used were clear and unambiguous.²²⁴ If the words were ambiguous, the Courts leaned towards the interpretation that favoured existing rights.

Furthermore, if a right was acquired by virtue of some statute, it would not be taken away by the subsequent repeal of the statute under which it was acquired.²²⁵ As Botha JA stated in **Bell v Voorsitter van die Rasklassifikasieraad**,²²⁶ even where a statute was amended retrospectively while a suit was pending, the rights of the parties to the action, in the absence of a contrary intention, ought to be decided in accordance with the statutory provisions in force at the time of the institution of the action.

This presumption applied to both statutory and common law rights.

The Statutory Presumption against Retrospectivity

Where a statute repeals an earlier statute, the **Interpretation Act**²²⁷ provides that “unless the contrary intention appears ... the repeal shall not ... affect any right, privilege, obligation or liability acquired, accrued, or incurred under any law so repealed.”²²⁸ James J (as he then was) in **Browne v Incorporated Law Society of Natal**²²⁹ set out three basic requirements which must be satisfied before this statutory presumption against retrospectivity could come into operation.

The Law after the April 1994 General Elections

The (interim) **Constitution** did not have any apparent retrospective operation; it applied “to all law in force and all administrative decisions taken and acts performed *during the period of* its operation.”²³⁰ With regard to the judgments of the Constitutional Court on issues of constitutionality, it is worthy of note that the **Constitution** itself provided specifically that:

[u]nless the Constitutional Court in the interests of justice and good government orders otherwise, and save to the extent that it so orders, the declaration of invalidity of a law or a provision thereof -

(a) existing at the commencement of this Constitution, shall not invalidate anything done or permitted in terms thereof before the coming into effect of such declaration of invalidity.

In **S v Mhlungu and Others**²³¹ the Constitutional Court dealt, *inter alia*, with the implications of Section 241(8) of the **Constitution**.²³² The Court held that the purpose of Section 241(8) was essentially to preserve the authority of pre-Constitution Courts to continue to adjudicate in cases then pending before our Courts.²³³ The constitutional guarantees that became available as from 27 April 1994 were extended to accused persons in pending cases.²³⁴ Accordingly, Mhlungu and the others were entitled to invoke their constitutional rights so as to preclude the use against them of the presumption contained in Section 217(1)(b)(ii) of the **Criminal Procedure Act**²³⁵ which the Court had earlier on²³⁶ held to be unconstitutional and hence invalid.

Mahomed J was at great pains to show that the **Constitution** did not *per se* operate retrospectively.²³⁷ As Kentridge AJ subsequently pointed out in **Du Plessis and Others v De Klerk and Another**,²³⁸

[i]t was in that limited sense, if at all, that *S v Mhlungu and Others* ... held that Chapter 3 had 'retrospective' operation. It most certainly did not decide that the Constitution operated retroactively in the meaning which I endeavoured to explain in my dissenting judgment in that case.

Kentridge AJ then held that the **Constitution** did not operate retroactively in the sense that it enacted that as at a date prior to its commencement the law should be taken to be that which it was not.²³⁹ There was nothing in the **Constitution** suggesting that conduct unlawful before its commencement was now to be deemed to be lawful by virtue of Chapter 3 thereof.²⁴⁰ Furthermore, Kentridge AJ held that there was no warrant in the **Constitution** for depriving a person of property or an existing right which he/she/it lawfully held before its commencement by invoking against him/her/it a right which did not exist at the time when the right or property vested in them.²⁴¹

However, as the learned acting judge of the Constitutional Court pointed out, "[t]he consequences of that general principle are ... not necessarily invariable."²⁴² The Court

curiously and without giving any examples, left "open the possibility that *there may be cases where the enforcement of previously acquired rights would in the light of our present constitutional values be so grossly unjust and abhorrent that it could not be countenanced, whether as being contrary to public policy or on some other basis.*"²⁴³

(my emphasis) I am prepared to hazard a guess that this could be one area where the Courts could use the provisions of Section 35(3) of the **Constitution**²⁴⁴ as they interpret, develop and apply our statutes, the common law and customary law. Furthermore, the provisions of Section 33(2) and (3) of the **Constitution** could, in my view, come in handy in this regard.

In **Key v Attorney-General, Cape of Good Hope Provincial Division and Another**,²⁴⁵ the Court dealt with a contention seeking to impugn a criminal case on the basis that a search, seizure and disclosure of documents in a manner which was inconsistent with the **Constitution** were unlawful. Kriegler J, in whose judgment all the other judges of the Court concurred, held that the commencement of the **Constitution** could not, by affording rights and freedoms which had not existed before such commencement, render unlawful actions that were lawful at the time they were taken.²⁴⁶ It was not open to any person, it was further held, to challenge the constitutionality of legislative provisions on the basis of actions taken prior to the commencement of the (interim) **Constitution**, which, had they been taken after its commencement, would have breached their fundamental rights. The relevant actions could not constitute a breach of any person's fundamental rights, as such rights had not yet come into existence at the time the search, seizure and disclosure took place.²⁴⁷ In particular, it was held that a disclosure of the information lawfully obtained before the **Constitution** came into force to the court or other persons for the purposes of the criminal proceedings could not be said to infringe the applicant's right to privacy under the **Constitution**.²⁴⁸

Of particular note, the learned Judge then continued and held that there was nothing inherently unfair in receiving in evidence material which was properly garnered in the course of a lawful search and seizure. There was no warrant in justice for retroactively casting a blanket of illegality over what was properly unearthed according to the law as it stood at the time.²⁴⁹

What all these cases amply demonstrate is that our common law in this regard has not changed in any fundamental way since the advent of the **Constitution**. As Kriegler J indeed concluded,

... save possibly in exceptional circumstances involving gross injustice abhorrent to our present constitutional values, *the courts apply the law as it was before the Constitution came into force.*²⁵⁰ (my emphasis)

EQUALITY

The (interim) **Constitution**²⁵¹ provided for “the right to equality before the law and to equal protection of the law.” Furthermore, provision was made for the right not to be unfairly discriminated against directly or indirectly.²⁵² Our Courts, including the Constitutional Court, had to grapple with the meaning of these rights in a few cases. As their judgments amply demonstrate, our Courts at the very outset attached a great deal of importance to these rights.

This was because in the new constitutional order, in view of our apartheid-based past, equality was given pride of place.²⁵³ As the Constitutional Court pointed out in many of its earlier judgments,²⁵⁴ the (interim) **Constitution** was an emphatic renunciation of our past in which inequality was systematically entrenched.

Section 8(1) of the (Interim) Constitution

Kroon J and Froneman J in **Qozeleni v Minister of Law and Order and Another**²⁵⁵ dealt with the right to equality in relation to the right of access to information.²⁵⁶ In this regard, the judges, whose view was that the two sections ought to be read together,²⁵⁷ said that:

the right to disclosure in other jurisdictions has not always been based on a separate constitutional right of access to information, but on ... the basis that a fair trial envisages an “equality of arms” and that therefore all parties must have the same access to the records and other documents in the case ...²⁵⁸

In **East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council and Others**,²⁵⁹ the applicant, an owner of a business situated in the jurisdiction of the

Empangeni/Ngwelezane Transitional Local Council, had opposed an application by one of the respondents, the owner of a neighbouring property, for the rezoning of such a property. The rezoning had proceeded despite the objection. Applicant, as an aggrieved objector, had no right of appeal to the fourth respondent, the Town and Regional Planning Commission for KwaZulu-Natal, in terms of the provisions of the Town Planning Ordinance 27 of 1949 (Natal). The same provisions, however, in the case of an exempted local authority allowed a right of appeal to the fourth respondent to an unsuccessful applicant who felt aggrieved by a decision of the local authority not to proceed with a proposed rezoning.

This raised the question whether such unequal treatment infringed the provisions of Section 8(1) of the (interim) **Constitution**. The Court observed that the equality clause:

does not forbid classification or distinction which rests on a reasonable basis, ie where the distinction is founded on an intelligible *differentia* which has a rational relation to the object sought to be achieved by the statutes.²⁶⁰

The Court held that the distinction *in casu* did not have a reasonable basis and was not founded on such *differentia*.²⁶¹ It further held that, to the extent that the relevant provisions did not accord a right of appeal to an objector in the circumstances of the applicant, such provisions were indeed inconsistent with the equality clause.²⁶²

In **S v Ntuli**,²⁶³ the Constitutional Court held that the provisions of Section 309(4)(a)²⁶⁴ read with Section 305 of the **Criminal Procedure Act** violated, *inter alia*, the provisions of the (interim) **Constitution** which guaranteed everyone equality before the law.²⁶⁵ The relevant provisions of the **Criminal Procedure Act** impugned *in casu* were found not to be reasonable and justifiable as required in the general limitation clause of the **Constitution** and could, therefore, not be allowed to stand.²⁶⁶

Section 8(2) of the (Interim) Constitution

An interesting case dealing with the prohibition of unfair discrimination as then encapsulated in Section 8(2) of the (interim) **Constitution** was that of **Motala and Another v University of Natal**.²⁶⁷ In that case, the applicants, the parents of one Fathima, an exceptionally gifted minor, had brought an urgent application against the respondent arising from the latter's refusal of Fathima's application for admission to the respondent's faculty of medicine. Fathima was apparently a casualty of an "affirmative action" programme then operated by the University of Natal, which was, for a number of years faced with a dilemma about the selection of students for first year medicine. The respondent's "affirmative action" programme was structured in such a manner that African students, then victims of Bantu education with poor Matric results, could also be accommodated. In order to compensate for the defect of the education then available to African matriculants, African applicants were, in other words, assessed on a different basis to Indian applicants.

The question which arose was whether treating members of the latter community differently when they themselves had suffered substantial disadvantages as a result of discrimination prior to April 1994 constituted unfair discrimination as envisaged in, and proscribed under, Section 8(2) of the (interim) **Constitution**. Another question was whether the "affirmative action" programme infringed the right to "equal access to educational institutions" then entrenched in Section 32(a) of the (interim) **Constitution**.

With regard to both questions, Hurt J concluded that:

[w]hile there is no doubt whatsoever that the Indian group was decidedly disadvantaged by the apartheid system, the evidence before me establishes clearly that *the degree of disadvantage to which African pupils were subjected under the "four tier" system of education was significantly greater than that suffered by their Indian counterparts*. I do not consider that a selection system which compensates for this discrepancy runs counter to the provisions of sections 8(1) and 8(2). As to the submissions based on section 32(a), as I read that section, the expression "educational institutions" is to be read in the context of the reference in this subsection to "educational institutions" and is to be taken to include a reference to "institutions of higher learning" (the expression used in section 14(1)), then it seems to me that the right in section 32(a) would have to be limited by the provisions of section 8(3) in circumstances such as those faced by the respondent.²⁶⁸ (my emphasis)

In other words, for Hurt J, *formal equality* which “presupposes that all persons are equal bearers of rights with a just social order”²⁶⁹ and which “is blind to entrenched, structural inequality”²⁷⁰ is anathema. Hence the learned Judge could not ignore “actual social and economic disparities between groups and individuals”²⁷¹ and pretend that there was equality between products of Bantu education and pupils from the Indian community, though both groups had undoubtedly been victims of apartheid. The learned Judge visibly preferred *substantive equality* which “requires us to examine the actual social and economic conditions of groups and individuals in order to determine whether the Constitution’s commitment to equality is being upheld.”²⁷²

So, for judges like Hurt J, it would not be enough that a person is either black or female or both; an inquiry would have to be conducted into the personal circumstances of the person in order to determine whether, for example, they should benefit from any of the “affirmative action” measures or programmes then envisaged in Section 8(3)(a) of the (interim) **Constitution**.²⁷³

Another interesting case was that of **Hugo v State President of the Republic of South Africa and Another**.²⁷⁴ In that case, the applicant, a widower and the father of a son then aged eight years, was a prisoner serving a sentence of imprisonment for *robbery*. In terms of the **Presidential Act**, 17 of 1994, the President of the Republic had, in his magnanimity, provided for certain categories of prisoners to be granted a special remission of the remainder of their sentences. One such category, as it turned out, was that of “all *mothers* in prison on 10 May 1994, with minor children under the age of 12 years”, (my emphasis) who had not been convicted of a number of offences, including *robbery with aggravating circumstances*.

The *gravamen* of the applicant’s complaint was that he, as a *father* of a child under the age of 12 years, was unfairly discriminated against in violation of the provisions of Section 8(2) of the (interim) **Constitution**. Magid J held that, but for the Presidential Act which made “an adverse distinction” between similarly situated mothers and fathers of children under the age of twelve years, the applicant would have benefitted from the remission of sentence. The **Presidential Act** clearly discriminated against the applicant

and, more so, against his son.²⁷⁵ Such *prima facie* discrimination was affected by the Section 8(4) presumption, the Learned Judge held.²⁷⁶ The Learned Judge was not persuaded that the respondents had discharged the *onus* which, in terms of Section 8(4) of the (interim) **Constitution**, rested upon them.²⁷⁷ Accordingly, the Court held that the Presidential Act was in breach of Section 8 of the (interim) **Constitution** and ordered that it be rectified within six months from the date of its Order.²⁷⁸

A similar position was taken by the Constitutional Court in **Fraser v Children's Court, Pretoria North and Others**.²⁷⁹ In that case the applicant, the natural father of a child born out of wedlock, challenged the validity of the provisions of Section 18(4)(d) of the **Child Care Act**²⁸⁰ in so far as they dispensed with the father's consent for the adoption of such a child. The applicant's submission was that the impugned provisions violated both Sections 8(1) and 8(2) of the (interim) **Constitution**.

Mahomed DP (as he then was) accepted that Section 18(4)(d) of the Act offended the equality clause as it impermissibly discriminated between the rights of a *father* in certain unions, such as Black customary unions, and those in other unions, such as unions solemnised in terms of the tenets of the Islamic faith.²⁸¹ The Learned Judge further said that the impugned provisions could also be attacked on the basis that they discriminated unfairly against the fathers of certain children on the basis of their gender or their marital status.²⁸²

However, Mahomed DP (as he then was) was averse to a blanket rule which would either automatically give to both parents of a child a right to veto adoption or arbitrarily deny such a right to all fathers of children born out of wedlock.²⁸³ After looking at how an issue of this nature has been dealt with in other jurisdictions, the Learned Judge, acting in terms of the proviso to Section 98(5) of the (interim) **Constitution**, held that the question should be referred to Parliament which would formulate what it considered to be an appropriate statutory response to the matter.²⁸⁴ Parliament was given a period of two years within which to cure the defect in Section 18(4)(d) of the Act; pending that, the provisions of Section 18(4)(d) should remain in force.²⁸⁵ This, needless to say, was a quintessential pyrrhic victory for the applicant!

In **Brink v Kitshoff NO**,²⁸⁶ the Constitutional Court dealt for the first time with the provisions of Section 8(2) of the (interim) **Constitution**. In that case the Court was called upon to deal with the constitutionality of the provisions of Section 44(1) and (2) of the **Insurance Act**.²⁸⁷

For O'Regan J,²⁸⁸ when dealing with the concept of equality, our history and especially the plight of blacks under apartheid, was of particular relevance.²⁸⁹ However, the learned Judge pointed out that though race was the most visible and vicious basis of discrimination in our history, "other systematic motifs of discrimination were and are inscribed on our social fabric."²⁹⁰ She observed that though in our society gender discrimination had not been as visible or as widely condemned, it had "nevertheless resulted in deep patterns of disadvantage."²⁹¹

O'Regan J had no difficulty to find that the provisions of Section 44(1) and (2) of the **Insurance Act** violated Section 8(2), and were not saved by Section 8(3), of the (interim) **Constitution**.²⁹² She also did not hesitate to conclude that, in the light of the clear purposes of the Act, the discrimination occasioned by those provisions could not be said to be reasonable and justifiable as required in terms of the general limitation clause.²⁹³

Some of the cases dealt with above seem to make much of the difference between formal and substantive equality. The Constitutional Court itself, per Goldstone J, held in **The President of the Republic and Another v Hugo**,²⁹⁴ that:

[w]e need ... to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon *identical treatment* in all circumstances before that goal is achieved. *Each case ... will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.* (my emphasis)

At paragraph 43 the learned Judge then went on to proffer the view that:

[t]o determine whether that impact was unfair it is necessary to look not only at the group that has been disadvantaged but at the nature of the power in terms

of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination.

While this, in a sense, may be right, I personally prefer a combination of the two. The perspective which I prefer is the one that will allow our Courts, in certain instances, to strike down unfair discrimination even before conducting the enquiry required of us by substantive equality. After all, both forms of equality are envisaged in our new constitutional order; discrimination on the basis of race, gender or sexual preference, for instance, is *per se* frowned upon.²⁹⁵ In addition, where action is required to promote the achievement of equality and to redress the imbalances of the past which have engendered untold disabilities afflicting the majority of our people, the new order allows for appropriate measures to be taken.²⁹⁶

ENDNOTES - CHAPTER THREE

- 1.. As Sections 68-74 of the **Constitution** showed, a new constitutional text was to be drafted and adopted as envisaged in it by the National Assembly and the Senate sitting jointly for this purpose as the Constitutional Assembly. Chaskalson P also pointed out in **S v Makwanyane and Another**, 1995 (3) SA 391 (CC) at 402, paragraph 7, that the **Constitution** "is a *transitional constitution* but which itself establishes a new order in South Africa; an order in which human rights and democracy are entrenched ..." (my emphasis)
- 2.. Act No. 200 of 1993, hereinafter referred to as the **Constitution**.
- 3.. See Azhar Cachalia, Halton Cheadle, Dennis Davis, Nicholas Haysom, Penuell Maduna and Gilbert Marcus, **Fundamental Rights in the New Constitution** (Juta & Co Ltd, Cape Town, 1994), at 4. According to Dion Basson and Henning Viljoen, **South African Constitutional Law** (Juta & Co Ltd, Cape Town, 1988), at 219, "Constitutionalism ... means that government authority is bound by the law and is not arbitrary." BO Nwabueze, **Constitutionalism in the Emergent States** (C Hurst & Co, London, 1981), at 10 identified the core and the substantive element of constitutionalism as "the limitation of government by a constitutional guarantee of individual civil liberties enforceable by an independent tribunal." For a detailed exegesis on the doctrine of constitutionalism, see also Laurence Boule, Bede Harris and Cora Hoexter **Constitutional and Administrative Law** (Juta & Co Ltd, Cape Town, 1989), at 20-55.
- 4.. Under the previous constitutional systems, South Africa did not have a bill of rights. Thus, the Supreme Court's competency to pronounce upon the validity of Acts of Parliament was confined to "manner and form" issues, ie whether procedural requirements stipulated in the previous constitutions had been satisfied in passing an Act. See in this regard Section 2 of the **South Africa Act Amendment Act**, 9 of 1956, and Section 59(2) of the **Republic of South Africa Constitution Act**, 32 of 1961, as well as Section 34(3), read with Section 34(2) of the last apartheid-based **Republic of South Africa Constitution Act**, 110 of 1983. Furthermore, as Basson and Viljoen, **South African Constitutional Law**, *supra* at 229 pointed out, because of the principle of parliamentary sovereignty, the rights of the subject could be violated at any time by means of legislation.
- 5.. Section 4(2) of the **Constitution**.
- 6.. As Shadrack BO Gutto, 'Case Notes' in (1996) 12 **South African Journal on Human Rights (SAJHR)** at 48 pointed out, "[w]here constitutional supremacy reigns, all three organs ... of government, the legislature, the judiciary and the executive, have limited power and are subordinated to the Constitution, with the judiciary having the supervisory or monitoring role."
- 7.. The introduction of which, to paraphrase Johan Kruger and Brian Currin (eds), **Interpreting a Bill of Rights** (Juta & Co Ltd, Cape Town, 1994) at vii, amounted to a giant quantum leap, a re-ordering of the legal system.
- 8.. The limitation clause, which prescribed that the rights entrenched in the **Constitution** could, without negating the essential content of the right in question, be limited by law of general application which was reasonable, justifiable in an open and democratic society based on freedom and equality and, in respect of certain rights, also necessary.
- 9.. 'Democracy and Constitutionalism: The Role of Constitutional Interpretation', in Dawid van Wyk, John Dugard, Bertus de Villiers and Dennis Davis (eds) **Rights and Constitutionalism: The New South African Legal Order** (Juta & Co Ltd, Cape Town, 1994), at 1.
- 10.. Sachs J in **S v Mhlungu and Others**, 1995 (3) SA 867 (CC) at 913, paragraph 111, described the **Constitution** as a momentous document, intensely value-laden. Langa J, in **S v Makwanyane and Others**, 1995 (3) SA 391 (CC) at 480D, paragraph 222, said that: "[i]mplicit in the provisions and tone of the Constitution are values of a more mature society, which relies on moral persuasion rather than force, on example rather than coercion." On an earlier occasion, Henk Botha 'The Values and Principles Underlying the 1993 Constitution' in (1994) 9 **SAPL** 233 had stated that the **Constitution** was a repository

of values.

11.. Section 35(1) of the **Constitution**.

12.. 1994 (3) SA 625 (E) or 1994 (1) BCLR 75 (E).

13.. At 633H (SA) and at 80 (BCLR).

14.. In this chapter the word "jurisprudence" is used in the same way as it was used by RWM Dias in **Jurisprudence** (4th ed, Butterworths, London, 1976), at 17, namely to deal "with thought about law rather than with knowledge of what the law is in various branches."

15.. As stated elsewhere, Section 98(2) of the **Constitution** provided that "[t]he Constitutional Court shall have jurisdiction in the Republic as the court of final instance over all matters relating to the interpretation, protection and enforcement of" its provisions.

16.. 1984 (1) SA 196 (B) at 200C.

17.. Such as happened, for example, in **S v Marwane**, 1982 (3) SA 717 (A), a Bophuthatswana human rights case in which the provisions of the South African **Terrorism Act**, 83 of 1967, were dealt with.

18.. 'Rainbow Jurisprudence' in (1996) 12 **SAJHR**, 1.

19.. *Ibidem*.

20.. Davis et al, 'Democracy and Constitutionalism: The Role of Constitutional Interpretation', *op cit* 1.

21.. *Op cit* 634C (SA) and at 80 (BCLR).

22.. **Constitutionalism in Emergent States**, *op cit* 10.

23.. Per Langa J in **S v Williams and Others**, 1995 (3) SA 632 (CC) at 639F, paragraph 22.

24.. 1995 (10) BCLR 1382 (CC) at 1403H-I, paragraph 46.

25.. In **S v Williams and Others**, *supra* at 650D, paragraph 59.

26.. *Ibidem* at 648C-D, paragraph 50.

27.. For, as Froneman J pointed out in **Qozeleni v Minister of Law and Order and Another**, *supra* at 635B-C (SA) or at 81 (BCLR), the previous constitutional system was the fundamental "mischief" to be remedied by the new **Constitution**.

28.. In **Coetzee v Government of the Republic of South Africa**, *op cit* 1403I-1404A, paragraph 46. However, the past cannot be forgotten or totally ignored in constitutional adjudication. See AJ van der Walt, 'Tradition on Trial: A Critical Analysis of the Civil-law Tradition in South African Property Law', in (1995) 11 **SAJHR** 169 at 192, where the author said that "the Constitution must be interpreted in terms of values which take the past into account, but in doing so it looks towards the future, towards reconstruction and reconciliation in an 'open and democratic society based upon freedom and equality'."

29.. Cockrell, 'Rainbow Jurisprudence', *op cit* 3. At 10 the author pointed out that this was "no mere cosmetic change, but a paradigm shift with profound implications." He emphasised that the Constitutional Court's obsession in the first year of its existence with the role of "values" was not "some pathological manifestation of a curial neurosis, but rather ... the verbalization of a *shift towards the substantive vision of law*." (my emphasis)

30.. This could be gleaned from the provisions of Section 35(1) of the Constitution. The Courts would ordinarily look at such substantive constitutionally entrenched rights only when a law was being interpreted and its constitutionality was at issue. See CJ Botha, **Statutory Interpretation: An Introduction for**

Students (2nd ed, Juta & Co Ltd, Cape Town, 1996) at 153.

31.. 1992 (1) SA 343 (A).

32.. *Ibidem* at 377B.

33.. 1995 (2) SA 642 (CC).

34.. *Ibidem* at 652D, paragraph 16.

35.. *Op cit* 8.

36.. *Ibidem*.

37.. *Ibidem* at 10.

38.. See the quotation from Isaiah Berlin's **Four Essays on Liberty**, (1969) 11, in the judgment of Ackermann J in **Ferreira v Levin NO and Others and Vryenhoek and Others v Powell NO and Others**, 1996 (1) BCLR 1 (CC) at 32, paragraph 53.

39.. 'Rainbow Jurisprudence', *op cit* 37.

40.. *Op cit*. In that case, the Constitutional Court, against popular sentiment, declared invalid the provisions of Section 277(1)(a), (c), (d), (e) and (f) of the **Criminal Procedure Act**, 51 of 1977, which authorised capital punishment.

41.. With the possible exception of Mahomed DP.

42.. It is noteworthy that all our Constitutional Court judges were nurtured in the hegemonic tradition in South Africa which advocated an unduly narrow, mechanical or phonographic approach to the interpretive function and which avidly denied a creative role in judicial law-making. Kruger and Currin, **Interpreting a Bill of Rights**, *op cit* vii, in fact spoke of the damage which had been caused to human rights due to the approach to interpretation which had hitherto been followed by most southern African courts.

43.. 'Rainbow Jurisprudence', *op cit* 10. At 3 the author said that "... judges who were accustomed to working with *formal reasons* are now required to engage with *substantive reasons* in the form of moral and political values. We would expect the transition to a substantive vision of law to be traumatic, and ... the judgments of the Constitutional Court in 1995 exhibit many of the signs of such trauma." (my emphasis)

44.. *Ibidem* at 11.

45.. In **The South African Legal System and its Background** (Juta & Co Ltd, Cape Town, 1973), at 13.

46.. See also Robert L Calhoun, 'Democracy and Natural Law' in (1960) 5 **Natural Law Forum**, (Notre Dame Law School) at 31.

47.. Roscoe Pound, **Interpretations of Legal History** (Cambridge, 1930) at 133.

48.. Which stated in **Group and Human Rights, Working Paper 25, Project 38** (1989) 2 that "human rights are the modern application of natural rights".

49.. Cockrell, 'Rainbow Jurisprudence', *op cit* 27.

50.. 1992 (4) SA 540 (BGD).

51.. At 563C-D.

52.. In **First National Bank of Southern Africa Ltd v Bophuthatswana Consumer Affairs Council**, 1995 (2) SA 853 (BGD).

- 53.. At 863F-G.
- 54.. As expressed in **S v Makwanyane and Another**, *op cit* 520E-F, paragraph 389.
- 55.. *Ibidem* at 442C, paragraph 117.
- 56.. *Op cit* 1405A-B, paragraph 46.
- 57.. In **S v Williams and Others**, *op cit* 650D, paragraph 59.
- 58.. See Johan Kruger, 'Towards a New Interpretive Theory' in Kruger and Currin, **Interpreting a Bill of Rights**, *op cit* 103 at 125.
- 59.. *Op cit* 913, paragraph 111.
- 60.. For which phrase see Sachs J in **Coetzee v Government of the Republic of South Africa: Matiso v Commanding Officer, Port Elizabeth Prison**, *op cit* 1404C, paragraph 46.
- 61.. Section 35(3) of the **Constitution**.
- 62.. *Op cit* 511F, paragraph 349.
- 63.. *Supra* at 1404C-1405A, paragraph 46.
- 64.. *Op cit* 476, paragraph 207.
- 65.. Despite the injunction of Ronald Dworkin who said in 'My Reply to Stanley Fish (and Walter Ben Michaels): Please Don't Talk about Objectivity Anymore', in WJT Mitchell (ed) **The Politics of Interpretation** (1983) 287 at 298: "I have no interest in trying to compose a general defense of the objectivity of my interpretive or legal or moral opinions. In fact, I think that the whole issue of objectivity, which so dominates contemporary theory in these areas, is a kind of fake. We should stick to our knitting. We should account to ourselves for our own convictions as best we can, standing ready to abandon those that do not survive reflective inspection."
- 66.. In **S v Makwanyane and Another**, *op cit* 462D, paragraph 177.
- 67.. See, for example, Mahomed AJA (as he then was) in **Ex parte Attorney-General Namibia; In re Corporal Punishment by Organs of State**, 1991 (3) SA 76 (NmS) at 86I and Langa J in **S v Williams and Others**, *op cit* 639F, paragraph 22. In **S v Makwanyane and Another**, *op cit* 492H, paragraph 278, Mahomed J talks of "a value judgment which requires objectively to be formulated ..." while Mokgoro J, *ibidem* at 499E, paragraph 304, piously proclaims that: "By articulating rather than suppressing values which underlie our decisions, we are not being subjective. On the contrary, we set out in a transparent and objective way the foundations of our interpretive choice and make them available for criticism."
- 68.. Lourens M Du Plessis, 'The Interpretation of Bills of Rights in South Africa: Taking Stock' in Kruger and Currin (eds) **Interpreting a Bill of Rights**, *op cit*, 1 at 20. At 21 the author said that: "The judiciary is inevitably confronted with *political realities*. The best way to deal with these realities is to face up to them and then determine the confines of judicial involvement in them ..." (my emphasis)
- 69.. **S v Makwanyane and Another**, *supra* at 489C-D, paragraph 266.
- 70.. It was undoubtedly with this view in mind that Chaskalson P in **Ferreira v Levin**, *op cit* 106, paragraph 183, pointed out that: "In a democratic society *the role of the legislature as a body reflecting the dominant opinion should be acknowledged*. It is important that we bear in mind that there are functions that are properly the concern of the courts and others that are properly the concern of the legislature. At times these functions may overlap. But *the terrains are in the main separate, and should be kept separate*." (my emphasis)

71.. Kentridge AJ in **S v Makwanyane and Another**, *op cit* 473D-E, paragraph 200, grudgingly acknowledged this and said that: "... public opinion, even if expressed in Acts of Parliament, cannot be decisive. If we were simply to defer to public opinion we would be abdicating from our constitutional function. Yet, were public opinion on the question clear, *it could not be entirely ignored*. The accepted mores of one's own society must have some relevance to the assessment whether a punishment is impermissibly cruel and inhuman." (my emphasis)

72.. Chaskalson P, being not only aware of this relationship but also being sensitive to the tension that may exist between the two organs of state where matters of policy are concerned, said in **S v Makwanyane and Another**, *op cit* 437G-438A, paragraph 107, that: "Where choices have to be made between differing reasonable policy options, the courts will allow the government *the deference due to legislators*." (my emphasis)

73.. Botha, **Statutory Interpretation: An Introduction for Students**, *op cit* 153 quite rightly in my opinion said that: "Every court will in effect have to become involved to some degree in constitutional interpretation. Even the decision by a magistrate's court to refer a so-called constitutional issue to the Supreme Court or the Constitutional Court involves a degree of constitutional interpretation."

74.. 'The Interpretation of Bills of Rights in South Africa: Taking Stock', in Kruger and Currin (eds), **Interpreting a Bill of Rights**, *op cit* 5-6. See also Lord Wilberforce in **Minister of Home Affairs (Bermuda) and Another v Collins MacDonald Fisher and Another**, 1980 AC 319 (PC) at 328-329.

75.. In **Hunter et al v Southern Inc**, (1985) 11 DLR (4th) 641 at 649 the Canadian Supreme Court indeed said that: "[t]he task of expounding a constitution is crucially different from that of construing a statute."

76.. **Statutory Interpretation: An Introduction for Students**, *op cit* 153.

77.. In **Fundamental Rights in the New Constitution**, *op cit* 9.

78.. As Froneman J explained in **Matiso v Commanding Officer, Port Elizabeth Prison**, 1994 (4) SA 592 (SE) at 592, "The interpretive notion of ascertaining the intention of the Legislature does not apply in a system of judicial review based on the supremacy of the Constitution, for the simple reason that the Constitution is sovereign and not the Legislature. This means that *both the purpose and method of statutory interpretation should be different from what it was before the commencement of the Constitution on 27 April 1994*." (my emphasis)

79.. A concept which originated in, and was inextricably bound up with, the principle of the sovereignty and supremacy of Parliament.

80.. Botha, **Statutory Interpretation: An Introduction for Students**, *op cit* 43.

81.. Sachs J in **S v Mhlungu and Others**, 1995 (3) SA 867 (CC) at 917, paragraph 124, paraphrasing Cross.

82.. Section 35(3) of the **Constitution**.

83.. *Op cit* 652H, paragraph 17.

84.. *Ibidem*.

85.. And not the intention of the legislature any longer.

86.. As Lord Wilberforce pointed out in the Privy Council decision in **Minister of Home Affairs (Bermuda) v Fisher**, [1979] 3 All ER 21 or [1980] AC 319 at 329E-F, "[a] constitution is a legal instrument giving rise, among other things, to individual rights capable of enforcement in a court of law. Respect must be given to *the language which has been used* and to the traditions and usages which have given meaning to that language." (my emphasis)

- 87.. **Government of the Republic of Namibia and Another v Cultura 2000 and Another**, 1994 (1) SA 407 (NmS) at 418F. See also Du Plessis, 'The Interpretation of Bills of Rights in South Africa', *op cit* 5-6.
- 88.. Lord Wilberforce in **Minister of Home Affairs (Bermuda) v Fisher**, *op cit* 328. See also Du Plessis, 'The Interpretation of Bills of Rights in South Africa', *op cit* 5-6.
- 89.. *Op cit* 652H-653A, paragraphs 17 and 18. With due respect, the learned acting judge was exhibiting a commitment to the literal approach to constitutional interpretation such as was evident in the judgment of Miller JA in **S v Marwane**, 1982 (3) SA 717 (A) at 749D-F, and that of Galgut AJA in **Government of the Republic of Bophuthatswana v Segale**, 1990 (1) SA 434 (BA) at 448F. For further examples of this hidebound approach to constitutional interpretation, see **Cabinet of the Transitional Government for the Territory of South West Africa v Elms**, 1988 (3) SA 369 (A); and **Cabinet for the Territory of South West Africa v Chikane and Another**, 1989 (1) SA 349 (A).
- 90.. 1995 (3) SA 867 (CC) at 874, paragraph 9.
- 91.. **Attorney-General v Moagi**, 1982 (2) Botswana LR 124 at 184. This is important to bear in mind because, as Sachs J observed in **S v Mhlungu and Others**, *supra* at 917, paragraph 125, "[a] purposive and mischief-orientated reading as against a purely literal one always involves a degree of strain on the language."
- 92.. *Op cit* 749D-E. This position was legitimately criticised by Du Plessis in 'The Interpretation of Bills of Rights in South Africa' *op cit* 6 as "a restatement of the South African judiciary's profoundly defective *literalist-cum-intentionalist* approach to statutory interpretation".
- 93.. *Ibidem* at 19.
- 94.. See, for example, **Nyamakazi v President of Bophuthatswana**, 1992 (4) SA 540 (B) at 567H; and **Shabalala v Attorney-General, Transvaal**, 1994 (6) BCLR 85 (T) at 100H.
- 95.. See, for example, **Shabalala v Attorney-General, Transvaal**, *op cit* 95F-G.
- 96.. (1985) DLR (4th) 321 at 395-396.
- 97.. Which Botha in **Statutory Interpretation: An Introduction for Students**, *op cit* 159 described as "an exercise in the balancing of various societal interests and values."
- 98.. **Nyamakazi v President of Bophuthatswana**, *supra* at 566G.
- 99.. **Statutory Interpretation: An Introduction for Students**, *supra* at 27.
- 100.. See Chaskalson P in **S v Makwanyane and Another**, *op cit* 403, paragraph 10.
- 101.. Per Schreiner JA in **Jaga v Dönges NO and Another**, 1950 (4) SA 653 (AD) at 662G-H.
- 102.. It is also noteworthy that even in England, as the judgment of Lord Browne-Wilkinson in **Pepper (Inspector of Taxes) v Hart and Related Appeals**, [1993] AC 593 (HL (E)) at 634D-E shows, the Courts have recently accepted this approach to interpretation of statutes, though the United Kingdom still has to abandon the doctrine of parliamentary sovereignty as the *grundnorm* of its constitutional system.
- 103.. *Op cit* 405, paragraph 15.
- 104.. *Ibidem* at 407, paragraph 19, the Learned President of the Constitutional Court actually said that: "[b]ackground evidence may ... be useful to show why particular provisions were or were not included in the Constitution. *It is neither necessary nor desirable at this stage in the development of our constitutional law to express any opinion on whether it might also be relevant for other purposes, nor to attempt to lay down general principles governing the admissibility of such evidence.* It is sufficient to say that where the background material is clear, is not in dispute, and is relevant to showing why particular provisions were or were not included in the Constitution, it can be taken into account by a Court in interpreting the

Constitution."

105.. 1994 (4) SA 592 (SE) at 597G-H.

106.. See, in general, the judgment of McLaren J in **Potgieter en 'n Ander v Kilian**, 1995 (11) BCLR 1498 (N).

107.. In **S v Makwanyane and Another**, *op cit*, both Chaskalson P (at 432C, paragraph 89) and Didcott J (at 468F-G, paragraph 188) quoted with approval the view of Justice Jackson in **West Virginia State Board of Education v Barnette**, 319 US 624 (1943) at 638, which is paraphrased herein, in this regard.

108.. In **S v Makwanyane and Another**, *op cit* 431C-E, paragraph 88. See also Langa J in **S v Williams and Others**, *op cit* 644B, paragraph 36.

109.. Section 33(1) of the **Constitution**.

110.. In **S v Makwanyane and Another**, *op cit* 436F-G, paragraph 104.

111.. *Ibidem* at 437G-438A, paragraph 107. See also Chaskalson P in **Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others**, 1995 (10) BCLR 1289 (CC) at 1331J, paragraph 99. See further Sachs J in **Coetzee v Government of the Republic of South Africa**, *op cit* 1421F-G, paragraph 76.

112.. In **S v Makwanyane and Another**, *op cit* 473D-E, paragraph 200.

113.. *Ibidem* at 498C-D, paragraph 300.

114.. *Ibidem* at 498H-I, paragraph 302.

115.. *Ibidem* at 481I, paragraph 227. It is noted that the value of *ubuntu* was specifically mentioned in the post-amble to the **Constitution** as a value to be pursued in the new constitutional order instead of retaliation, vengeance and victimisation. See the remarks of RB Mqoke, 'Customary Law and Human Rights', in (1996) 113 **The South African Law Journal (SALJ)** at 364 on this.

116.. *Ibidem* at 514C, paragraph 361.

117.. *Ibidem* at 487B, paragraph 258.

118.. See Constitutional Principle XIII, paragraph 1 in Schedule 4 to the **Constitution**.

119.. Per Sachs J in **S v Makwanyane and Another**, *op cit* 514H, paragraph 365.

120.. Per Mokgoro J, *ibidem* at 500D, paragraph 306.

121.. In 'Rainbow Jurisprudence', *op cit* 25.

122.. In **S v Makwanyane and Another**, *op cit* 486G, paragraph 255.

123.. *Ibidem* at 518, paragraph 383.

124.. On this question, see in general O Kahn-Freund 'On Uses and Misuses of Comparable Law', (1974) 37 **Modern Law Review**, 1.

125.. *Op cit*.

126.. At 642D-E, paragraph 31.

127.. In **S v Makwanyane and Another**, *op cit*.

128.. *Ibidem* at 414E-415F, paragraphs 37-39.

129.. Cockrell, 'Rainbow Jurisprudence', *op cit* 26.

130.. Per Froneman J in **Qozeleni v Minister of Law and Order**, *op cit* 633F-G. See also **S v Botha**, 1994 (4) SA 799 (W) at 820A-B; and **Shabalala v Attorney-General, Transvaal**, 1995 (1) 608 (T) at 642 H-I.

131.. That is to say whether the Chapter was intended only as a protection against the legislative and executive powers of the state.

132.. That is to say whether the Chapter 3 rights could also be extended to the relationships between individuals and could, therefore, be invoked in private law disputes.

133.. 1994 (4) BCLR 1 (W) or 1995 (1) SA 251 (W).

134.. At SA 257I-J.

135.. 1994 (6) BCLR 124 (T) or 1995 (2) SA 40 (T).

136.. At SA 49G-H the learned judge said that he could not "imagine that the drafters of the Constitution intended the whole body of our private law to become unsettled ... There was no need for constitutional invasion of the private law. Parliament is empowered to alter the existing law wherever the shoe pinches." See also McLaren J in **Potgieter en 'n Ander v Kilian**, 1995 (11) BCLR 1498 (N).

137.. 1995 (3) BCLR 374 (D). Friedman J in **Baloro and Others v University of Boputhatswana and Others**, 1995 (8) BCLR 1018 (B) at 1054H-I, came to the conclusion that the fundamental rights contained in Chapter 3 were, within certain limits, to be applied horizontally.

138.. Which, as the learned judge said at 382F-H, were the only entrenched rights in issue before him.

139.. *Ibidem*.

140.. Section 7(1), read with Section 233(1)(ix) of the **Constitution**. It is noteworthy that, unlike in Article 1(3) of the German Basic Law, reference to the judiciary was conspicuously absent in Section 7(1). According to Kentridge AJ in **Du Plessis and Others v De Klerk and Another**, 1996 (5) BCLR 658 (CC) at 683F-G, paragraph 47, one of the effects of this was "to exclude the equation of a judgment of a court with state action and thus prevent the importation of the American doctrine developed in *Shelley v Kraemer* ..."

It needs to be noted, however, that, in terms of Section 4(2), the **Constitution**, of which Chapter 3 was in my opinion the most important component, bound "all legislative, executive and judicial organs of state at all levels of government."

141.. 'The Genesis of the Provisions Concerned with the Application and Interpretation of the Chapter on Fundamental Rights in South Africa's Transitional Constitution', in (1994) 4 **Tydskrif vir die Suid-Afrikaanse Reg**, at 710.

142.. *Ibidem* at 712.

143.. Section 7(2) of the **Constitution**.

144.. Section 33(2) of the **Constitution**.

145.. Section 33(1) of the **Constitution**.

146.. Section 35(1) of the **Constitution**.

147.. Section 35(3) of the **Constitution**.

148.. Section 33(4) of the **Constitution**.

149.. *Op cit* 1056G.

150.. *Ibidem*.

151.. Section 33(3) of the **Constitution**.

152.. As was pointed out in Cachalia et al, **Fundamental Rights in the New Constitution**, *op cit* 20, Section 33(2) of the **Constitution** specifically subjected the common law, customary law and legislation to the rights contained in Chapter 3 and rendered any common law or customary law or legislative limitation of a Chapter 3 right unconstitutional unless it conformed to the requirements of the general limitation clause, namely Section 33(1).

153.. In terms of Section 102(2) of the **Constitution**, alternatively in terms of Section 102(8) thereof.

154.. 1996 (5) BCLR 658 (CC).

155.. The learned acting judge of the Constitutional Court pointed out at 684, paragraph 47, that "law" as used in Section 7(2) was not "reg" in Afrikaans but "wet", which he said unambiguously connoted a statute. This, he said, affected only the relationship between the individual and the legislative organ and not between opposing private litigants. At 699, paragraph 77, Mahomed DP stated that, while having no doubt that the phrase "all law" used in that sub-section included the common law, he agreed with Kentridge that this related to the persons referred to in Section 7(1) of the **Constitution**. According to Mahomed DP (*ibidem*), the provisions of Section 4 of the **Constitution** could not be used to extend the application of Section 7(1) to bodies or persons not otherwise envisaged in terms of the latter section to be bound by Chapter 3.

However, Kriegler J, *ibidem* at 718-719, paragraphs 129 and 130, declared that "all law in force ..." meant all law, and that Chapter 3 governed all law. Madala J, *ibidem* at 730, paragraph 159, also declared that "all law" included statutes, the common law and customary law. And Sachs J, *ibidem* at 736, paragraph 177, said that there was no sector where law dwelt, that was not reached by the principles and values of the **Constitution**, unless the **Constitution** itself specifically protected it from legal intervention.

156.. *Ibidem* at 684-685, paragraph 49.

157.. *Ibidem* at 688, paragraph 57.

158.. *Ibidem* at 684-685, paragraph 49.

159.. *Ibidem*. In this regard, the learned acting judge cited the Court's decision in **Shabalala and Others v The Attorney-General of the Transvaal and Another**, 1996 (1) SA 725 (CC); 1995 (12) BCLR 1593 (CC) as an example.

160.. Section 98(2)(c) of the **Constitution**.

161.. The only source of the Constitutional Court's jurisdiction!

162.. At 686, paragraph 52. However, Kriegler J, *ibidem* at 718-719, paragraphs 129 and 130, and Sachs J *ibidem* at 736, paragraph 177, held the view that there was no sector of our law that was not reached by the values and principles of the **Constitution**.

163.. *Ibidem* at 691, paragraph 60. Note, however, that at 693, paragraph 63, Kentridge AJ pointed out that, though the application and development of the common law did not fall within the jurisdiction of the Constitutional Court under Section 98 of the **Constitution**, the Constitutional Court, as the court of final instance over all matters pertaining to the interpretation, protection and enforcement of the provisions of the **Constitution**, had control over the development of the common law and customary law and jurisdiction to determine what the "spirit, purport and objects" of Chapter 3, which the courts had to have regard to, were.

164.. (1992) 8 C.R.R. (2d) 173.

165.. *Ibidem* at 185 and 189. See also **Hill v Church of Scientology of Toronto**, (1995) 126 D.L.R. (4th) 129 at 156, where the Court emphasised that "the common law must be interpreted in a manner which is consistent with Charter principles. This obligation is simply a manifestation of the inherent jurisdiction of the courts to modify or extend the common law in order to comply with prevailing social conditions and values."

166.. **Du Plessis and Others v De Klerk and Another**, *supra* at 692-693, paragraph 62.

167.. *Ibidem*.

168.. *Ibidem*.

169.. Chaskalson P, Mahomed DP, Ackermann J, Langa J, Mokgoro J, O'Regan J and Sachs J concurred in the judgment of Kentridge AJ.

170.. *Ibidem* at 698, paragraph 75.

171.. *Ibidem* at 698-699, paragraph 76.

172.. *Ibidem*. However, as Mahomed DP's own judgment in **S v Mhlungu and Others**, *op cit*, amply demonstrates, this is precisely the case when clear language used in a statute may otherwise yield an absurd and obviously unintended result; for the right reasons, judges indeed use "astute judicial craftsmanship and nimble argumentation."

173.. *Ibidem* at 699-700, paragraph 78.

174.. *Supra*.

175.. **Du Plessis and Others v De Klerk and Another**, *op cit* 703, paragraph 88.

176.. *Ibidem* at 702, paragraph 85.

177.. *Ibidem*.

178.. *Ibidem* at 702-703, paragraph 86.

179.. *Ibidem*. See also Ackermann J, *ibidem* at 711, paragraph 110.

180.. Section 33(3) of the **Constitution**.

181.. That is the suggestion we sought to make with Cachalia et al, **Fundamental Rights in the New Constitution**, *op cit* 20.

182.. *Ibidem* for our reference to Section 33(2) of the **Constitution**.

183.. **Du Plessis and Others v De Klerk and Another**, *supra* at 709, paragraph 106.

184.. *Ibidem* at 711, paragraph 111.

185.. *Ibidem* at 711-712, paragraph 112.

186.. *Ibidem* at 714, paragraph 118.

187.. *Ibidem* at 715, paragraph 119.

188.. *Ibidem* at 730-731, paragraph 159, where the Learned Judge of the Constitutional Court declared that, in his view, the provisions of Chapter 3 had not gone as far as subjecting the State to its rigours only, but had in fact "ventured out and colonised the common law."

189.. *Ibidem* at 727, paragraph 154.

190.. *Ibidem* at 715, paragraph 121.

191.. *Ibidem* at 727, paragraph 153.

192.. *Ibidem* at 718, paragraph 128.

193.. *Ibidem* at 717, paragraph 125.

194.. *Ibidem* at 718-719, paragraph 130.

195.. *Ibidem* at 719, paragraphs 131 and 132.

196.. *Ibidem* at 719-720, paragraphs 133 and 134.

197.. *Ibidem* at 730-731, paragraph 159.

198.. *Ibidem* at 719-720, paragraph 134.

199.. *Ibidem*.

200.. *Ibidem* at 731, paragraph 160.

201.. *Ibidem* at 722, paragraph 140.

202.. *Ibidem*, paragraph 141.

203.. *Ibidem* at 722-723, paragraph 142.

204.. *Ibidem* at 722, paragraph 141. At 723, paragraph 143, the learned judge of the Constitutional Court disagreed with Kentridge AJ who seemed to suggest in his judgment, *ibidem* at 693, paragraph 63, that the "indirect" application of Section 35(3) was limited to the jurisdiction of the Supreme Court, with our Constitutional Court having some overriding review power akin to that of the German Federal Constitutional Court.

205.. *Ibidem* at 723, paragraph 143.

206.. *Ibidem* at 691, paragraph 60.

207.. *Ibidem* at 723, paragraph 143.

208.. Section 98(2) of the **Constitution**.

209.. Section 98(2)(a) of the **Constitution**.

210.. Section 98(2)(g) of the **Constitution**.

211. It is noteworthy that Section 8(1) of the (new) **Constitution** leaves very little, if any, room for ambiguity; unlike the (interim) **Constitution**, the 1996 Bill of Rights expressly "applies to all law and binds the legislature, the executive, *the judiciary*, and all organs of state." (my italics)

212.. *In re: Certification of the Constitution of the Republic of South Africa, 1996*, 1996 (10) BCLR 1253 (CC) at 1280, paragraph 53.

213.. *Ibidem*, at 1280-1281, paragraph 53.

214.. *Ibidem*, at 1281, paragraph 56.

215.. In this regard, a distinction is made between a retrospective statute and an *ex post facto* one. According to Chase J in (the American case of) **Calder v Bull**, (1798) 3 Dallas (U.S.) 386 at 391, "[e]very *ex post facto* law ... must necessarily be retrospective, but every retrospective law is not an *ex post facto* law. Every law that takes away or impairs rights vested agreeably to existing laws is retrospective, and is generally unjust and may be oppressive; it is a good general rule that a law should have no retrospect effect ..." (my emphasis) See also **R v Margolis & Others**, 1936 TPD 143 at 144; and **Shewan Tomes and Co Ltd v Commissioner of Customs and Excise**, 1955 (4) SA 305 (A) at 311.

216.. 1995 (3) SA 867 (CC) or 1995 (7) BCLR 793 (CC).

217.. *Op cit.*

218.. 1996 (6) BCLR 788 (CC).

219.. Per Fieldsend CJ in **Pretorius v Minister of Defence**, 1981 (1) SA 1174 (ZAD) at 1177-1178.

220.. 1906 TS 308 at 311.

221.. Per Innes JA in **Mahomed NO v Union Government**, 1911 AD 1 at 8.

222.. Per Wessels JA in **Katzenellenbogen Ltd v Mullin**, 1977 (4) SA 855 (A) at 884A.

223.. Per Bowen LJ in **Hough v Windus**, (1884) 12 Q.B.D. 224, at 237.

224.. To paraphrase Lord Ashbourne in **Smith v Callander**, [1901] A.C. 297 at 305, it was competent for Parliament, in its wisdom, to make the provisions of an Act retrospective, provided that that appeared very clearly in the terms of the Act or by necessary implication.

225.. SGG Edgar, **Craies on Statute Law** (7th ed, Sweet and Maxwell, London, 1971), at 415.

226.. 1968 (2) SA 678 (A), at 684.

227.. Act No. 33 of 1957.

228.. Section 12(2)(c) of the **Interpretation Act**.

229.. 1968 (3) SA 535 (N) at 537, where the learned Judge said: "... if the applicant seeks to rely upon the provisions of the Interpretation Act, he must establish:

(a) that sec. 3 of Act 26 of 1965 in fact repealed the provisions of the law as it previously existed,
(b) that Act 26 of 1965 was not intended to take away such rights as may have been in existence at the date upon which it was brought into operation, and,
(c) that he had, as that date, a right or privilege which he had acquired or which had accrued to him under the repealed law."

230.. Section 7(2) of the **Constitution**.

231.. *Op cit.*

232.. The Court's judgment in **Mhlungu** is dealt with more fully in a later chapter in this thesis.

233.. See Mahomed J (as he then was), in 1995 (3) SA 867 (CC) at 879, paragraph 24 and at 883, paragraph 30.

- 234.. Mahomed J, *ibidem* at 889, paragraph 46. See also Kriegler J, *ibidem* at 906, paragraph 91 and at 909, paragraph 98.
- 235.. Act No. 51 of 1977.
- 236.. In **S v Zuma and Others**, 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC), which is discussed more fully in Chapter 6 in this thesis.
- 237.. In **S v Mhlungu and Others**, *supra* at 887-888, paragraphs 39 and 41. See also Sachs J, *ibidem* at 918, paragraph 132, and at 921, paragraph 144.
- 238.. 1996 (5) BCLR 658 (CC) at 669, paragraph 13.
- 239.. *Ibidem* at 672, paragraph 20.
- 240.. *Ibidem* at 669, paragraph 14.
- 241.. *Ibidem* at 672, paragraph 19.
- 242.. *Ibidem*, paragraph 20.
- 243.. *Ibidem*.
- 244.. Section 39(2) of the (new) **Constitution**.
- 245.. *Op cit*.
- 246.. *Ibidem* at 792-793, paragraphs 6 and 7. The Constitutional Court thus reaffirmed the provisions of Section 12(2)(d) of the **Interpretation Act**, 1957, which stated that "where a law repeals any other law, then unless the contrary intention appears, the repeal shall not affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed ... and any ... legal proceeding ... may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed".
- 247.. *Ibidem* at 792, paragraph 6.
- 248.. *Ibidem* at 796, paragraph 15.
- 249.. *Ibidem* at 792-793, paragraph 7.
- 250.. *Ibidem* at 791, paragraph 4. See also O'Regan J in **Tsotetsi v Mutual and Federal Insurance Company Ltd**, 1996 (11) BCLR 1439 (CC) at 1442-1444, paragraphs 7, 8, 9 and 10.
- 251.. Section 8(1). Section 9(1) of the (new) **Constitution** is slightly different and provides that: "[e]veryone is equal before the law and has the right to equal protection *and benefit* of the law." (my emphasis) In my humble view, if the Canadian Supreme Court decision in **Bliss v Attorney-General of Canada**, (1979) 92 DLR (3rd) 417 is anything to go by, the addition of the phrase "equal benefit of the law" is likely to have limited impact (if any) since the concept of equality before the law and equal protection of the law encompasses equal benefit of the law in any event.
- 252.. Section 8(2) of the (interim) **Constitution**. See Section 9(3), (4) and (5) of the (new) **Constitution**.
- 253.. See the preamble to, as well as the provisions of Section 33(1)(a)(ii) of, the (interim) **Constitution**.
- 254.. Such as **S v Makwanyane and Another**, 1995 (3) SA 391 (CC) at paragraphs 218, 262 and 322; **Shabalala and Others v Attorney-General, Transvaal and Another**, 1995 (12) BCLR 1593, at paragraph 26.
- 255.. 1994 (1) BCLR 75 (E).

256.. As was then contained in Section 23 of the (interim) **Constitution**.

257.. **Qozeleni**, *op cit* 88H.

258.. *Ibidem*, paragraph I-J.

259.. 1996 (11) BCLR 1545 (N).

260.. Per Thirion J, at 1555J-1556A. See also the decision of Waddington J in **Larbi-Odam and Others v Member of the Executive Council for Education and Another**, 1996 (12) BCLR 1612 (B), where it was found that a regulation reserving public service jobs such as teaching posts for South African citizens was not *ultra vires* and did not constitute unfair discrimination against aliens who sought to compete for such jobs.

261.. *Ibidem*, at 1556J. See also the decision of Van Dijkhorst J in **Walker v Stadsraad van Pretoria**, 1997 (3) BCLR 416 (T), where the differentiation between areas in respect of levying and collection of service charges by a local authority was described as unfairly discriminatory against residents of former whites-only areas and therefore as being unconstitutional and *contra bonos mores*.

262.. *Ibidem*, at 1557A. See also the Order of the Court in this regard.

263.. 1996 (1) BCLR 141 (CC).

264.. In terms of which those unrepresented convicts seeking to appeal against decisions of lower courts could not prosecute their appeals or reviews in person unless they had judges' certificates confirming that there were reasonable grounds for their appeals or reviews.

265.. See Didcott J (in whose judgment the rest of the members of the Court concurred) at 150, paragraphs 18 and 19, and at 152, paragraph 25.

266.. *Ibidem*, at 153, paragraph 30.

267.. *Op cit*. Note that at 382G-H Hurt J held, as already stated above, that the equality clause was "enforceable not only against the State or its organs ... *but also against individuals, natural or juristic*, who may be disposed to threaten them or interfere with the exercise of them." (my emphasis)

268.. *Ibidem*, at 383C-E.

269.. Catherine Albertyn and Janet Kentridge, 'Introducing the Right to Equality in the Interim Constitution', in (1994) 10 **SAJHR** 149 at 152.

270.. *Ibidem*.

271.. *Ibidem*.

272.. *Ibidem*.

273.. See Section 9(2) of the (new) **Constitution**.

274.. 1996 (6) BCLR 876 (D), which must be contrasted with the decision of Van Schalkwyk J in **Kruger v Minister of Correctional Services**, 1995 (2) SA 803 (T).

275.. At 884H-885A.

276.. At 885B.

277.. At 885J.

278.. At 886. It is noted that when this matter came before the Constitutional Court on appeal, Goldstone J, with the concurrence of the majority of the judges of the Constitutional Court, held in **The President of the Republic of South Africa and Another v Hugo** (an unreported case cited as Case CCT 11/96 given on 18 April 1997), at paragraph 53 that the provisions of the **Presidential Act** were not inconsistent with the (interim) **Constitution**. In paragraph 47 the learned Judge held that, while the **Presidential Act** had indeed denied fathers in the circumstances of the Respondent an opportunity it afforded women, the impact it had upon the fathers was not unfair. The Court held at paragraph 52 that the President had exercised his discretion fairly and in a manner that was consistent with the (interim) **Constitution**.

279.. 1997 (2) BCLR 153 (CC).

280.. Act No. 74 of 1983.

281.. **Fraser**, *supra* at 163, paragraph 23 and at 162, paragraph 21.

282.. *Ibidem* at 163, paragraph 24.

283.. *Ibidem* at 164-165, paragraphs 27 and 28.

284.. *Ibidem* at 171, paragraph 43.

285.. *Ibidem* at 174, paragraph 52.

286.. 1996 (6) BCLR 752 (CC).

287.. Act No. 27 of 1943. The relevant provisions of the Act were impugned because they treated married women and married men differently and unfairly discriminated against married women.

288.. In whose judgment the rest of the members of the Court concurred.

289.. **Brink**, *op cit* 768H, paragraph 40

290.. *Ibidem* at 769A, paragraph 41.

291.. *Ibidem*, paragraph 44.

292.. *Ibidem*.

293.. *Ibidem* at 771D-F, paragraph 50.

294. *Op cit*, paragraph 41.

295.. See Section 9(3) and (4) of the (new) **Constitution**, the provisions of which allow for both vertical and horizontal application of the equality clause.

296.. *Ibidem*, Section 9(2).

CHAPTER FOUR

THE RIGHT AGAINST SELF- INCRIMINATION AND OUR COMPANY LAW

INTRODUCTION

Under the South African **Companies Act**,¹ in the winding-up of a company *unable to pay its debts*,² the Master of the Supreme Court or a provincial or local division of the Supreme Court may, at any time after a winding-up order has been made, summon before him/her/it, and examine on oath or affirmation, any director or officer of the company or person known or suspected to have in his or her possession any property of the company or believed to be indebted to the company, or any person whom the Master or the Court deems capable of giving information concerning the trade, dealings, affairs or property of the company.³ If the person who has been duly summoned fails to attend the enquiry, the Master or the Court may cause him or her to be apprehended and brought before him/her/it for examination.⁴ Unless the Master or the Court directs otherwise, the examination or enquiry is private and confidential;⁵ this, needless to say, denies all persons access to the examination or enquiry and related matters.

The Master or the Court, as the case may be, may refer the whole or any part of such an examination or enquiry to a commissioner⁶ who has the same powers of summoning and examining witnesses and of requiring the production of documents.⁷ The commissioner may or may not be within the jurisdiction of the Court which has issued the winding-up order.⁸

For the purpose of a Section 417 examination and any other enquiry under the Act in connection with the winding-up of any company, every magistrate and every other person appointed by the Master or the Court is a commissioner.⁹ Ordinarily, if the

person appointed as a commissioner for this purpose is not a magistrate, the appointee is an officer connected with the administration of the Act or a senior counsel.¹⁰ If the commissioner is a magistrate, he or she also has the powers of punishing defaulting or recalcitrant witnesses, or causing defaulting witnesses to be apprehended, and of determining questions relating to any *lien* with regard to documents as the Court.¹¹

The person summoned under Section 417¹² may be examined either orally or on written interrogatories and the Master or the Court may reduce the answers he or she gives to writing and require him or her to sign them.¹³ Furthermore, such a person may be required to produce any books or papers in his or her custody or under his or her control relating to the company.¹⁴ If such a person fails, without sufficient cause, to answer fully and satisfactorily any question put to him or her, he or she is guilty of an offence¹⁵ and shall be liable upon conviction to a fine not exceeding R2000 or to imprisonment for a period not exceeding six months or to both such fine and imprisonment.¹⁶

There does not seem to be any limitation upon the matters which the Section 417 examination or enquiry may cover, provided that they concern or relate to the trade or dealings or affairs or property of the company. Furthermore, the examination may be directed solely at the general credibility of an examinee where the establishment of such a person's veracity is necessary in order to decide whether to embark upon a trial to obtain what is due to the company being wound up.¹⁷

It is implied in the Act¹⁸ that other persons too may apply for an examination or enquiry under Section 417, provided that they bear all "the costs and expenses incidental" thereto, unless the Master or the Court directs that they or any portion thereof be paid out of the assets of the company. Thus, a creditor or a liquidator or a judicial manager of the company who is ready to personally bear all the costs and expenses of the examination may apply for a Section 417 examination. This seems to be an effective deterrent to those persons who may otherwise seek to use the Section 417 procedure for purposes other than the achievement of a beneficial winding-up or judicial management. The power of the Master or the Court to order that the costs and expenses incidental to the examination be paid from the assets of the company

certainly assists those persons who act *bona fide* and reasonably, irrespective of the outcome of the examination.

Lastly, as the provisions of Section 417 of the Act relate specifically to the winding-up of a company which is *unable to pay its debts*, it would appear that this procedure applies only in cases of compulsory winding-up.¹⁹ Moreover, it is noteworthy that Section 417 applies to judicial management cases as well²⁰ and can be invoked in South Africa even by a foreign liquidator who has obtained recognition as such by a South African Court.²¹

The next question to be considered is whether this (potentially oppressive) procedure²² is necessary in our corporate law, bearing in mind the emergence of a human rights-oriented legal system in our society.

THE PURPOSE OF THE PROCEDURE

The basic objective of this procedure is to assist liquidators of companies to discharge their statutory duties so that, as Van Winsen J²³ observed, "they may determine the most advantageous course to adopt in regard to the liquidation of the company." Company liquidators are, in terms of the Act, required to, *inter alia*, recover and reduce into possession all the movable and immovable assets and property of the company,²⁴ give to the Master such information and assistance as may be required for enabling him or her to perform his or her duties under the Act,²⁵ examine the affairs and transactions of the company before its winding-up in order to ascertain whether any contravention of the Act has taken place and whether any director has to be disqualified from office as such,²⁶ and, where the company has failed, to report to the general meeting of its creditors and contributories the causes of its failure.²⁷

In short, the procedure helps the liquidator²⁸ to achieve his or her primary objective, "namely the ascertainment of the assets and liabilities of the company, the recovery of the one and the payment of the other, according to law and in a way which will best

serve the interests of the company's creditors."²⁹ From this point of view, the procedure is reasonable and justifiable.³⁰

THE NATURE OF THE EXAMINATION

Bearing in mind that the mechanism established under Sections 417 and 418 of the Act is triggered pursuant to a winding-up order³¹ made in respect of a company *unable to pay its debts*, it is important to characterise the proceedings conducted thereunder.

The Master, the Court³² or, as the case may be, a commissioner appointed in terms of Section 418(1)(a) of the Act does not function as a court of law when conducting an examination or enquiry under Sections 417 and 418 of the Act. The proceedings are not judicial proceedings; they are not even quasi-judicial, for they decide or determine nothing; they do not even decide whether or not there is a *prima facie* case. Their purpose is only to investigate and report. Thus, the proceedings are merely administrative.

However, the importance of the examination is not thereby diminished. Serious consequences, including an adverse impact on the rights and interests of an examinee and criminal prosecution, may flow from a report of such an examination. For this reason, the Master, the Court or a commissioner must act fairly and display a great measure of natural justice in the conduct of the proceedings.³³ In principle, the examinee has become entitled to all the rights to all the constitutional rights relating to administrative action which were ushered in by the (interim) **Constitution**.³⁴

THE RIGHT AGAINST SELF-INCRIMINATION

Prior to the intervention of the Constitutional Court,³⁵ a person duly summoned under the Act could be required to answer any question put to him or her at the examination, notwithstanding that the answer might tend to incriminate him or her, and any answer given to any such question could thereafter be used in evidence against him or her.³⁶

This was despite the fact that, under our common law, it was an established principle that no one could be compelled to give evidence incriminating himself or herself. He or she could not be forced to do that either before the trial, or during the trial.³⁷ Despite numerous statutory interventions which subverted this right, especially during the apartheid era, the old maxim *nemo pro se prodere tenetur*,³⁸ which neatly encapsulates this principle, was always an important part of the development of our jurisprudence.

The statutory interventions affecting this right were possible in the past constitutional dispensation which was predicated upon unbridled parliamentary sovereignty and in which there was no Bill of Rights protecting fundamental rights. Under the (interim) **Constitution**, every person arrested for the alleged commission of an offence acquired the constitutional rights, *inter alia*, "promptly to be informed ... that he or she has the right to remain silent and to be warned of the consequences of making any statement",³⁹ "not to be compelled to make a confession or admission which could be used in evidence against him or her",⁴⁰ and "not to be a compellable witness against himself or herself".⁴¹ It was thus not surprising at all when the validity of the provisions of Section 417(2)(b) of the **Companies Act** was the subject of challenge before the Constitutional Court in the cases discussed hereunder.⁴²

FERREIRA V LEVIN NO AND OTHERS AND VRYEHOEK AND OTHERS V POWELL NO AND OTHERS⁴³

In this case, the applicants summoned for examination under Section 417(1) of the **Companies Act** had unsuccessfully sought a temporary interdict in the Court *a quo* prohibiting their further examination pending a determination of the constitutionality of the provisions of Section 417(2)(b) of the Act. Basing their attack oddly enough not on Section 25(2)(b) and (c) but on the provisions of Section 25(3) of the (interim) **Constitution**, the applicants contended that the right against self-incrimination was not limited to the cases of arrested, detained or accused persons; it could be extended under the (interim) **Constitution**, they contended, to extra-curial proceedings, including proceedings at an examination or enquiry envisaged in Section 417 of the Act.

THE CONSTITUTIONAL COURT RULES

The gist of the complaint of the applicants was that, in terms of Section 417(2)(b) of the **Companies Act**, they were required to answer questions at the Section 417 examination, the answers to which might incriminate them, and which might thereafter be used in evidence against them. This, they contended, would be in violation of their constitutionally guaranteed rights. As will appear more fully later, the applicants in this case were not attacking the provisions of Sections 417 and 418 in their entirety.

The Question of Invalidity

An important question the Court had to settle first and foremost was whether or not the question of invalidity of a statute or a provision thereof was determined by an objective or subjective enquiry. According to Ackermann J, the answer to this question was that the enquiry is an objective one.⁴⁴ In other words, the fact that a statutory provision was inconsistent with the (interim) **Constitution** and, therefore, to the extent of the inconsistency, invalid and of no force and effect,⁴⁵ would not depend on the subjective positions in which the parties to a dispute found themselves. As Ackermann J pointed out,

[t]he Constitutional Court, or any other competent Court for that matter, ought not to restrict its enquiry to the position of one of the parties to a dispute in order to determine the validity of a law ... laws are objectively valid or invalid depending on whether they are or are not inconsistent with the Constitution. The fact that a dispute concerning inconsistency may only be decided years afterwards, does not affect the objective nature of the invalidity. The issue of whether a law is invalid or not does not in theory therefore depend on whether, at the moment when the issue is being considered, a particular person's rights are threatened or infringed by the offending law or not.⁴⁶

While Ackermann J acknowledged that it was one of the Constitutional Court's functions to determine and pronounce upon the validity of laws, including Acts of Parliament,⁴⁷ he was not, however, prepared to declare whether the Court could *mero motu* tackle elements of unconstitutionality in legislation. He merely quoted a German authority⁴⁸ who reasoned that "[a]n unconstitutional law is from its inception (*ex tunc*) and without need for any further constitutive act (*ipso iure*) inoperative ..."

This, needless to say, would not help a person who is suddenly confronted with an obviously unconstitutional law, the invalidity of which has not yet been declared; neither does it help an administrator who has a gut feel that he or she is administering an otherwise invalid law. In practice, the law remains on the statute book and is implemented till its invalidity is appropriately declared; the administration has no choice but to implement all the laws given to it by the legislatures till their invalidity has been declared. In the meantime, the implementation of such a law could have grave consequences. It would thus be helpful if in our new legal system the executive and the administration were allowed the power to approach a competent Court with a question of law concerning the validity of legislation it is administering.

Locus Standi

The next important question was whether or not the applicants had *locus standi* to bring the matter before the Court. In other words, could the applicants, as examinees under Section 417 of the Act, and not as accused persons,⁴⁹ be permitted to invoke the jurisdiction of the Court under the (interim) **Constitution**⁵⁰ to solve their legal problem?

Ackermann J⁵¹ was prepared to acknowledge that a person faced with the dilemma to choose between refusing to answer incriminating questions under Section 417 of the Act and getting punished for such refusal, and answering incriminating questions and risk the use of the answers in a subsequent criminal trial might have had a sufficient interest of his or her own which could entitle him or her to apply to a competent Court of law for appropriate relief. However, after a lengthy analysis of the provisions of Section 7(4)(a) and (b) of the **Constitution**, the learned judge came to the conclusion that the applicants did not have *locus standi* to approach the Court as they were not accused persons as envisaged in Section 25(3) of the (interim) **Constitution**.⁵² Of particular note was his statement that as the Section 417 examinees were not accused persons, it was a matter of pure speculation whether they would ever become accused persons in a criminal prosecution.⁵³ Even when they became accused persons, they could use the shield of the privilege against self-incrimination only if and when an attempt to use the evidence gathered in terms of Section 417(2)(b) of the Act was

made, and not immediately they were charged with the commission of an offence relating to their involvement with the company.⁵⁴

Chaskalson P, for the majority, held a different view. The President of the Court was of the opinion that the Court had to adopt a broad approach to the issue of standing in constitutional cases.⁵⁵ Such an approach, he held, would be consistent with the mandate of the Court to uphold the (interim) **Constitution** and would serve to ensure that constitutional rights enjoyed the full measure of protection to which they were entitled.⁵⁶

After an analysis of Canadian jurisprudence on this issue, Chaskalson P held that Section 7(4) of the (interim) **Constitution** did not deny the applicants the right to approach the Court.⁵⁷ The applicants were direct victims of an unconstitutional provision which affected their common law rights. Non-compliance with such a provision had possible criminal consequences for them and, therefore, they had sufficient standing to secure a declaration from the Constitutional Court as to the constitutionality of Section 417(2)(b) of the **Companies Act**.⁵⁸ The applicants could rely on the jurisdiction vested in the courts by Section 98(2)(a) and Section 101(3)(a) of the (interim) **Constitution** to deal with "any alleged violation or threatened violation of any fundamental right entrenched in Chapter 3" and on the general jurisdiction of the Constitutional Court to interpret, protect and enforce the (interim) **Constitution**.⁵⁹

Chaskalson P further pointed out that what Section 7(4)(b)(i) of the **Constitution** required was that the person concerned should make the challenge of a law in his or her own interest. It was for the Court to decide what was a sufficient interest.⁶⁰

The Court's Ruling

The majority of the Constitutional Court held that the provisions of Section 417(2)(b) of the **Companies Act** were inconsistent with the (interim) **Constitution** and agreed to the order proposed by Ackermann J.⁶¹ According to Chaskalson P, Section 417(2)(b) infringed the rule against self-incrimination which "is inextricably linked to the right of an accused person to a fair trial."⁶²

For this purpose, it is interesting to note that Chaskalson P was prepared to use the Constitutional Court's "general jurisdiction to enquire into and declare an Act of Parliament or any provision thereof to be invalid",⁶³ even though the provisions of Section 25(3) of the (interim) **Constitution** specifically related to accused persons, and not to persons envisaged in Section 417(1) of the Act.⁶⁴ The learned President of the Court was even prepared to make the following statement:

[t]he right to challenge the constitutionality of a statute which affects you directly cannot be made dependent on the finding of some other constitutional right on which to base the challenge. What if there is no such right?⁶⁵

This, in my view, was a correct approach to the Court's work. The Court should be able to use its general jurisdiction to defend and expand human rights, even if the offending provision does not violate any specific right guaranteed in a constitution.⁶⁶

Though there is an off chance that a person summoned to appear at a Section 417 enquiry or examination may subsequently be charged with an offence under the law, it is equally true that "the procedure provided in sections 417 and 418 of the Companies Act is not primarily concerned with the prosecution of offenders."⁶⁷ Be that as it may, Chaskalson P was right in observing that it would be highly technical to suggest that a person summoned in terms of Section 417(1) of the **Companies Act** to appear at a Section 417 examination, who genuinely feared prosecution if he or she was called upon to answer questions in violation of the rule against self-incrimination, should not be able to approach the Court to have the relevant provision declared invalid merely because he or she had not yet been charged.⁶⁸ Due to the fact that the impugned provisions of the **Companies Act** had a direct bearing on the applicants' common law rights, and non-compliance with which had possible criminal consequences, the learned President of the Court was of the view that they had sufficient *locus standi* to secure a declaration from the Court as to the constitutionality of Section 417(2)(b).⁶⁹

The Court's Order

As stated above, the Court agreed to the order proposed by Ackermann J. Pursuant to Section 98(5) of the **Constitution**, the Court thus declared the provisions of Section 417(2)(b) of the **Companies Act**, with immediate effect, invalid to the extent only of the

phrase: "... and any answer to any such question may thereafter be used in evidence against him."⁷⁰

Of particular note is the fact that the Court's order was specifically made retrospective. The Court declared that as from the date of its order,⁷¹ no incriminating answer given pursuant to the provisions of Section 417(2)(b) of the Act on or after 27 April 1994⁷² shall be used in evidence in criminal proceedings against the person who gave it,⁷³ unless the proceedings in which such a person stands trial are based on a charge relating to the administering or taking of an oath or the administering or making of an affirmation or the giving of false evidence or the making of a false statement in connection with the Section 417 questions and answers or to a failure to answer lawful questions fully and satisfactorily.⁷⁴

BERNSTEIN AND OTHERS V BESTER NO AND OTHERS

In **Bernstein and Others v Bester NO and Others**,⁷⁵ the Constitutional Court had another occasion to revisit the issue of the constitutionality of the provisions of Sections 417 and 418 of the **Companies Act**. The attack in this case went broader than in **Ferreira v Levin**⁷⁶ and sought the striking down of Sections 417 and 418 of the **Companies Act** in their entirety.

The essence of the dispute between the parties was whether the (interim) **Constitution** precluded the respondents from continuing with the examination of the applicants under Sections 417 and 418 of the Act. The Constitutional Court was called upon to determine whether the two sections were inconsistent with the (interim) **Constitution** and, consequently, invalid and of no force and effect.

THE GROUNDS OF THE ATTACK

The applicants impugned the provisions of the two sections on four grounds which are canvassed in brief hereunder. The order in which these grounds were identified by the Court will be varied slightly in order to deal with the provisions of Section 417(2)(b) of the Act first.

1) Section 417(2)(b) of the Act

The question of the validity of Section 417(2)(b) of the Act arose in this case as well. In this regard, the Court merely reaffirmed its order in **Ferreira v Levin**.⁷⁷

2)(a) Violation of Section 11(1) of the Constitution

The applicants contended that the provisions of Sections 417 and 418 violated Section 11(1) of the (interim) **Constitution** which provided that: "[e]very person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial." The applicability of this section of the **Constitution** had already been dealt with in **Ferreira v Levin**⁷⁸ and the Court would not deviate from its ruling in this regard.

Ackermann J,⁷⁹ for the majority, concluded that, though the statutory compulsion⁸⁰ to obey a subpoena might infringe Section 11(1) of the (interim) **Constitution**, it was a limitation manifestly justified under the general limitation clause.⁸¹

2)(b) Violation of Section 13 of the Constitution

Firstly, the applicants contended that the statutory compulsion⁸² of a witness to disclose his or her confidential books and documents and information clearly violated Section 13 of the (interim) **Constitution**.⁸³ For Ackermann J, the nature of privacy implied in the right to privacy "relates only to the most personal aspects of a person's existence, and not to every aspect within his/her personal knowledge and experience."⁸⁴

The learned Judge held that engaging in the activities of a company which conducts its business on the basis of limited liability and operates through the mobilization of funds belonging to members of the community, is not a private matter. An examinee can thus not hide behind the right to privacy and refuse to answer questions and divulge information.⁸⁵ He further held that Section 418(5)(b)(iii)(aa) of the Act⁸⁶ constituted a limitation on the right to privacy which was justified under the general limitation clause.⁸⁷

Secondly, the applicants contended that the statutory compulsion⁸⁸ to produce books and documents constituted a seizure of private possessions and thus violated the right not to be subjected to the seizure of private possessions guaranteed in Section 13 of the (interim) **Constitution**. Ackermann J⁸⁹ thought that this argument too should be disposed of in the same manner as the previous one based on the general right to personal freedom.

The learned Judge of the Constitutional Court, whilst recognising that the relevant right was subject to the general limitation clause, held that the statutory compulsion must be *read down* to prevent a compulsion to produce books or papers which would violate the Section 13 constitutional right not to be subjected to a seizure of personal possessions.⁹⁰ He considered that it was possible, in a proper case, for a person to refuse to produce his or her personal books and documents on the basis of the Section 13 right; such refusal would constitute 'sufficient cause' as envisaged in Section 418(5)(b)(iii)(bb) of the Act, unless it failed the Section 33(1) constitutional test.⁹¹

The learned Judge again observed that there was a distinction between private possessions and books and papers relating to a company. He found it difficult to see how documents which were truly relevant to the matters legitimately being examined could be said to be private documents.⁹² If it turns out that even what may be regarded as private possessions relate to the company, and therefore relevant to the enquiry, the Master or the Court should be permitted to compel the production thereof under Sections 417 and 418 of the Act; such compulsion would be justifiable under the general limitation clause.⁹³

In both instances Ackermann J held that it was, in his opinion, the task of the Supreme Court to develop the concept, the contents and the limits of the right to privacy and the right not to be subjected to the seizure of private possessions. This was an indication of the fact that the development of our common law is left to "ordinary" Courts.

3) Violation of Section 24 of the Constitution

It was the submission of the applicants that the whole mechanism set up under Sections 417 and 418 of the Act violated Section 24 of the (interim) **Constitution** in that it permitted an enquiry in violation of paragraphs (b)⁹⁴ and (c)⁹⁵ of Section 24. As Ackermann J regarded the examination or enquiry under Sections 417 and 418 as "an integral part of the liquidation process pursuant to a court order",⁹⁶ he syllogically found it difficult to fit the examination into the mould of administrative action.⁹⁷

The learned Judge refrained from characterising the Section 417 or 418 proceedings. However, even assuming that the proceedings indeed constituted administrative action, he did not see how the provisions of Section 24(b) and (c) of the (interim) **Constitution** could help the applicants as there was nothing in any of the provisions of Section 417⁹⁸ or 418 which was inconsistent with Section 24 of the (interim) **Constitution**. If they were not accorded fairness by the commissioner, they could have approached the ordinary courts for an appropriate remedy,⁹⁹ without impugning the mechanism of Sections 417 and 418.

4) Violation of Section 8 of the Constitution

Lastly, the applicants submitted that the Section 417 mechanism, especially the provisions of Section 417(2)(b) of the Act,¹⁰⁰ violated the (interim) **Constitution** in that it treated examinees and liquidators or creditors unequally by giving the latter an unfair advantage over them. In other words, they submitted that the liquidator and creditors could get a complete preview of their opponent's case and obtain discovery of documents from them, thus being afforded an overwhelming advantage in subsequent civil litigation.

The Court had to determine whether the statutory mechanism set up under Sections 417 and 418 denied anyone the right to equality before the law as guaranteed in Section 8(1) of the (interim) **Constitution**. Ackermann J said he failed to see how this could be so, regard being had to the purpose of the proceedings under Sections 417 and 418 of the Act.¹⁰¹ The learned judge held that Sections 417 and 418 did not deny the applicants the right to equality before the law or the right to equal protection under the law or the right not to be unfairly discriminated against; thus, they were not inconsistent with the (interim) **Constitution**.¹⁰²

The Court's Order

The Constitutional Court¹⁰³ ordered that, save to the extent the provisions of Section 417(2)(b) of the Act were declared to be invalid in **Ferreira v Levin**,¹⁰⁴ the provisions of Sections 417 and 418 were declared not to be inconsistent with the (interim) **Constitution**. Thus, other than that, answers which tend to incriminate an examinee may not be used against him or her in any subsequent criminal proceedings (other than those special cases exempted in terms of the Court's order in **Ferreira v Levin**), the mechanism of Sections 417 and 418 of the **Companies Act** remains intact.

However, as Ackermann J¹⁰⁵ pointed out, the order in **Ferreira v Levin** left the question regarding the constitutionality of the use in civil proceedings of answers given under Section 417(2)(b) of the Act open. The learned Judge, after scrutinising available comparative material from other jurisdictions, concluded that:

[t]here is ... no indication that the use of compelled testimony in civil proceedings is prohibited or held to be unconstitutional in other open and democratic societies based on freedom and equality.¹⁰⁶

Thus, the Court's order in **Ferreira v Levin** was confined to the use of compelled self-incriminating testimony given at the Section 417 enquiry in subsequent criminal proceedings against the examinee.

JURISPRUDENTIAL IMPLICATIONS

The provisions of Sections 417 and 418 of the **Companies Act** are intact, save for that portion covered in the **Ferreira v Levin** order. A few interesting jurisprudential consequences flow from the Court's refusal to tamper with them beyond the extent of the **Ferreira v Levin** order.

Firstly, the two judgments of the Constitutional Court did not affect the power of the Master or the Court¹⁰⁷ or, as the case may be, a commissioner,¹⁰⁸ to summon and examine witnesses concerning the trade, dealings, affairs or property of a company being wound-up. The Master or the Court,¹⁰⁹ or a commissioner who is a magistrate,¹¹⁰ may cause a witness who fails, without lawful excuse, to attend the examination to be apprehended and brought before them for examination.

Secondly, an examinee may be required to answer any and all questions put to him or her at the Section 417 enquiry, notwithstanding that the answer might tend to incriminate him or her.¹¹¹ He or she cannot refuse to answer questions on the basis that the answers may incriminate him or her¹¹² or, as the case may be, be used in a subsequent civil action against him or her.¹¹³ Failure on the part of an examinee, *without sufficient cause*, to answer fully and satisfactorily any question lawfully put to him or her in the enquiry is a punishable offence.¹¹⁴

In addition, the two judgments preserved the statutory compulsion, through a *subpoena duces tecum*,¹¹⁵ to produce or reveal relevant information, books and documents. Thus, an examinee cannot hide behind the shield of the right to privacy and refuse, *without sufficient cause*, to disclose at the enquiry information concerning the affairs of the company.¹¹⁶

However, like in the United States,¹¹⁷ for example, while the witness may not refuse to comply with an order to give testimony on the basis of the privilege against self-incrimination, the testimony or other information compelled under the order to testify

may not be used against him or her in a subsequent criminal case, save to the extent of the **Ferreira v Levin** order. It can be used only in civil proceedings as the privilege against self-incrimination does not extend to such proceedings.

Lastly, while there is no limitation upon the matters about which a Section 417 examination may be held, provided that they are matters concerning the trade, dealings, affairs or property of the company, the Constitutional Court has acknowledged and reaffirmed the jurisdiction of the Supreme Court to deal with any problems relating to the conduct of such an examination. Thus, for example, the Supreme Court may intervene and refuse the invocation of the procedure if the circumstances of an existing or a proposed litigation persuade it that the applicant is not legitimately seeking information *qua* liquidator or judicial manager but an unfair advantage *qua* litigant or potential litigant.¹¹⁸ The Supreme Court, in other words, has a discretion but, as Sir Nicolas Browne-Wilkinson V-C pointed out in **Cloverbay Ltd (joint administrators) v Bank of Credit and Commerce International SA**,¹¹⁹

in exercising the discretion the court has to balance the requirements of the liquidator against any possible oppression to the person to be examined. Such balancing depends on the relationship between the importance to the liquidator of obtaining the information on the one hand and the degree of oppression to the person sought to be examined on the other.¹²⁰

In my opinion, the Constitutional Court in **Bersntein** did nothing to reinforce confidence in our system of administrative justice as was then encapsulated in the provisions of Section 24 of the (interim) **Constitution**. In fact, it used doubtful classifications to avoid the issue.

ENDNOTES - CHAPTER FOUR

- 1.. Act No. 61 of 1973, hereinafter referred to as the Act.
 - 2.. A company is deemed to be unable to pay its debts if: (a) it fails for three weeks after demand left at its registered office to pay or to secure a debt of not less than R100; or (b) if the sheriff or messenger of the court has filed a *nulla bona* return in respect of a judgment against the company; or (c) if it is proved to the satisfaction of the court that, taking into account its contingent and prospective liabilities, it is unable to pay its debts.
 - 3.. Section 417(1) and (2)(a) of the Act. Any other person applying for such an examination or enquiry is required to bear the costs and expenses incidental thereto, unless the Master or the Court directs otherwise. See Section 417(6) of the Act.
 - 4.. Section 417(4) of the Act.
 - 5.. Section 417(7) of the Act.
 - 6.. In terms of Section 418(1)(b) of the Act.
 - 7.. Section 418(2) of the Act.
 - 8.. Section 418(1)(b) of the Act.
 - 9.. Section 418(1)(a) of the Act.
 - 10.. See **Lipkie v Bloemfontein Auctioneers & Agencies (Pty) Ltd**, 1960 (4) SA 672 (O) at 673. See also **Anderson v Dickson NO (Intermenua (Pty) Ltd intervening)**, 1985 (1) SA 93 (N) at 111.
 - 11.. Section 418(2) of the Act. It is noteworthy that the powers of the Court to punish recalcitrant witnesses are those available to it in the case of contempt *in facie curiae* only. See **Van der Berg v Schutte**, 1990 (1) SA 500 (C) at 509-511.

Regarding what happens to a person who, without sufficient cause, fails to attend at the time and place specified in the summons issued by a commissioner who is not a magistrate, see Section 418(5)(a) of the Act.
 - 12.. Or under Section 418 of the Act. For our purposes, we shall refer to the examination or enquiry as the Section 417 examination or enquiry.
 - 13.. Section 417(2)(a) of the Act. Note, however, that the examinee is entitled to an opportunity to read the transcript before signing it, to make corrections in the margin and to sign subject to such corrections. See **Re Milton Hindle Ltd**, [1963] 3 All ER 161 (Ch).
- Note further that, in terms of Section 417(1A), such examinee may be legally represented at the examination or enquiry.
- 14.. Section 417(3) of the Act.
 - 15.. Section 418(5)(b)(iii) of the Act.
 - 16.. *Ibidem*, Section 441(1)(f).

- 17.. See **Pretorius and Others v Marais and Others**, 1981 (1) SA 1051 (A) at 1063H-1064A.
- 18.. Section 417(6).
- 19.. Though, arguably, a Court acting under Section 388 of the Act may extend the application of the provisions of Section 417 to cases of voluntary winding-up.
- 20.. In terms of Section 439(2) of the Act.
- 21.. See **Moolman v Builders and Developers (Pty) Ltd: Jooste Intevening**, 1990 (1) SA 954 (A) at 959-961.
- 22.. Which a British judge, Bowen L.J, commenting more than a century ago on Section 115 of the (British) Companies Act, 1862, referred to in the following terms in **In re North Australian Territory Company**, (1890) 45 Ch 87 at 93: "It is an extraordinary power; it is a power of an inquisitorial kind which enables the Court to direct to be examined - not merely before itself, but before the examiner appointed by the Court - some third person who is no party to a litigation. That is an inquisitorial power, which may work with great severity against third persons, and it seems to me to be obvious that such a section ought to be used with the greatest care, so as not unnecessarily to put in motion the machinery of justice where it is not wanted, or to put it in motion at a stage when it is not clear that it is wanted, and certainly not to put it in motion if unnecessary mischief is going to be done or hardship inflicted upon the third person who is called upon to appear and give information."
- 23.. In **Western Bank Ltd v Thorne NO and Others NNO**, 1973 (3) SA 661 (C) at 666F.
- 24.. Section 391 of the Act.
- 25.. *Ibidem*, Section 392.
- 26.. *Ibidem*, Section 400(1).
- 27.. *Ibidem*, Section 402(b).
- 28.. Who, as Megarry J pointed out in **Re Rolls Razor Ltd (2)**, [1969] 3 All ER 1386 at 1396-1397, is necessarily placed in difficulty, usually coming as he or she does "as a stranger to the affairs of the company which has sunk to its financial doom. In that process, it may well be that some of those concerned in the management of the company, and others as well, have been guilty of some misconduct or impropriety which is of relevance to the liquidation. Even those who are wholly innocent of any wrongdoing may have motives for concealing what was done. In any case, there are almost certain to be many transactions which are difficult to discover or to understand merely from the books and papers of the company. Accordingly, the legislature has provided this extraordinary process so as to enable the requisite information to be obtained ... There is here an extraordinary and secret mode of obtaining information necessary for the proper conduct of the winding-up." See **Van de Berg v Schulte**, 1990 (1) SA 500 (C) at 506-507; and Hefer JA in **Moolman v Builders and Developers (Pty) Ltd (In Provisional Liquidation): Jooste Intervening**, 1990 (1) SA 954 (A) at 960G-I.
- 29.. **Merchant Shippers SA (Pty) Ltd v Millman NO and Others**, 1986 (1) SA 413 (C) at 417D-E.
- 30.. See Hurt J in **Lynn NO and Another v Kreuger and Others**, 1995 (2) BCLR 167 (N) at 170D-F.
- 31.. Section 417(1) provides that the summoning of an affected person, and *a priori*, the examination may be done "at any time after a winding-up order has been made".
- 32.. Acting in terms of Section 417(2)(a) of the Act.
- 33.. See Lord Denning in **Re Pergamon Press Ltd**, [1971] Ch 388 (CA) at 399D-H, and Sachs LJ, *ibidem* at 402G-403A.
- 34.. See Jones J in **Jeeva v Receiver of Revenue, Port Elizabeth**, 1995 (2) SA 433 (SE) at 443I.

- 35.. A subject which is discussed more fully later in this chapter.
- 36.. Section 417(2)(b) of the Act. It is noted the provisions of this section were not unprecedented or confined to the Republic; Section 597(12) of the Australian Corporations Amendment Act, 1990, which provides that: "A person is not excused from answering a question put to the person at an examination ... on the ground that the answer might tend to incriminate the person or make the person liable to a penalty", is a good example of this.
- 37.. Per Innes CJ in **R v Camane**, 1925 AD 570 at 575.
- 38.. That is to say, one should not be compelled to produce evidence against oneself.
- 39.. Section 25(2)(a) of the **Constitution**.
- 40.. Section 25(2)(c) of the **Constitution**.
- 41.. *Ibidem*, Section 25(3)(d).
- 42.. It is noted in passing, however, that in the United Kingdom, the Court of Appeal held per Dillon LJ in **Bishopsgate Investment Management Ltd v Maxwell**, [1992] 2 All ER 856 (CA) at 876 that a director was not entitled to rely on the privilege against self-incrimination in refusing to answer questions under Sections 235 and 236 of the Insolvency Act, 1986 as it was a requirement of public policy that the law should be able to deal adequately with dishonesty or malpractice on the part of bankrupts or company directors. See also Lord Browne-Wilkinson in **Re Arrows Ltd (No 4) Hamilton v Naviede**, [1994] 3 All ER 814 (HL) at 821-822.
- 43.. 1996(1) BCLR 1 (CC).
- 44.. **Ferreira v Levin NO and Others**, at 20, paragraph 26.
- 45.. In terms of Section 4(1) of the **Constitution**.
- 46.. **Ferreira v Levin NO and Others**, at 21, paragraphs 26 and 27. This seems to fly in the face of the "cases and controversies" approach the Court seems to be in favour of, however. I cannot imagine the Court allowing anyone at any time being competent to challenge any legal provision for unconstitutionality though.
- 47.. *Ibidem*, paragraph 27.
- 48.. *Ibidem*, at 22, paragraph 29.
- 49.. That is prior to the stage when the incriminating answers given under Section 417(2)(b) of the Act could be made use of.
- 50.. Section 7(4)(b).
- 51.. **Ferreira v Levin NO and Others**, at 23-24, paragraph 33.
- 52.. *Ibidem* at 24-26, paragraphs 34-41.
- 53.. *Ibidem* at 26, paragraph 41.
- 54.. *Ibidem*. See also Kriegler J, *ibidem* at 110-111, paragraph 199, and at 112-113, paragraphs 205-206, for a discussion of the concept of ripeness of an action or case.
- 55.. *Ibidem* at 98, paragraph 165.
- 56.. *Ibidem*.

57.. *Ibidem* at 98-99, paragraph 167.

58.. *Ibidem* at 98, paragraph 166.

59.. *Ibidem* at 98-99, paragraph 167.

60.. *Ibidem* at 99-100, paragraph 168.

61.. See Chaskalson P at 95, paragraph 158. Note that the majority of the Court, represented by the learned President of the Court, otherwise disagreed with Ackermann J on the question of *locus standi* and on his interpretation of Section 11(1) of the **Constitution**.

62.. *Ibidem*, paragraph 159.

63.. *Ibidem* at 96, paragraph 161.

64.. In this regard, it is necessary to refer to the judgment of Kriegler J, *ibidem* at 112, paragraphs 203 and 204, where the learned Judge of the Constitutional Court said, *inter alia*, that the **Constitution** did not make any provision for "a general - or independent - right against self-incrimination." He further said that, on the clear wording and self-evident context of the relevant constitutional provisions, it was clear that such provisions related to the proceedings during a criminal trial, and to nothing else. He then concluded: "To my mind it is not possible to read those provisions as embodying the general privilege against self-incrimination. Nor can I read them as referring to any process so far removed from, and antecedent to, a trial as an enquiry under section 417 of the Companies Act."

65.. At 97, paragraph 163.

66.. At 99, paragraph 167, where the learned President of the Constitutional Court, after once again alluding to the general jurisdiction of the Court to interpret, protect and enforce the provisions of the **Constitution**, pointed out that the constitutionality of a law could be challenged on the basis that it was inconsistent with provisions of the **Constitution** other than those then contained in Chapter 3 of the **Constitution**. As far as he saw it, nothing in Section 7(4) or in any other provision of the **Constitution** denied the applicants the right that a litigant had to seek a declaration of rights in respect of the validity of a law which directly affected his or her interests adversely.

67.. Per Hurt J in *Lynn NO and Another v Kreuger and Others*, *supra* at 170D.

68.. *Ferreira v Levin and Others*, at 97, paragraph 163.

69.. *Ibidem* at 98, paragraph 166.

70.. *Ibidem* at 94, paragraph 157.

71.. 6 December 1995.

72.. The date when the **Constitution** came into effect.

73.. At 95, paragraph 157.

74.. *Ibidem* at 94-95, paragraph 157.

75.. 1996 (4) BCLR 449 (CC). This case, it will be recalled, related to the collapse of Tollgate Holdings Ltd, a public investment company that was listed on both the Johannesburg and London Stock Exchanges.

76.. *Supra*.

77.. At 94-95, paragraph 157.

- 78.. See the judgment of Chaskalson J at , paragraphs 169-185.
- 79.. paragraph 55.
- 80.. Contained in the mechanism of Sections 417 and 418.
- 81.. Section 33(1) of the **Constitution**.
- 82.. Contained in Sections 417(3) and 418(2) of the Act.
- 83.. Which provided that: "[e]very person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications."
- 84.. **Bernstein v Bester** at 490, paragraph 79.
- 85.. *Ibidem* at 491-492, paragraph 85.
- 86.. The statutory compulsion to answer fully and satisfactorily any question lawfully put to an examinee.
- 87.. *Ibidem*.
- 88.. Section 417(3) read with Section 418(5)(b)(iii)(bb) of the Act.
- 89.. At 492-493, paragraph 88.
- 90.. *Ibidem*.
- 91.. *Ibidem*.
- 92.. *Ibidem* at 493, paragraph 89.
- 93.. *Ibidem* at 493, paragraph 90 and at 494, paragraph 92. Note that the US Supreme Court came to the same conclusion in **Hale v Henkel**, 201 US 43 (1906) at 73 and at 74-75, namely that examinees cannot invoke the protection which the Fourth Amendment to the US Constitution affords against searches and seizures.
- 94.. Which guaranteed *every person* the right to procedurally fair administrative action where any of his or her rights or legitimate expectations was affected or threatened.
- 95.. Which guaranteed to every person the right to be furnished with reasons in writing for administrative action which affected any of his or her rights or interests unless the reasons for such action had been made public.
- 96.. At 496-497, paragraph 97. Needless to say, I disagree with the Learned Judge on this question; note how I have characterised the nature of the proceedings myself where I discuss '**The Nature of the Examination**', relying on Lord Denning's decision in **Re Pergamon Press Ltd**, *supra* at 399D-H and Jones J's decision in **Jeeva v Receiver of Revenue, Port Elizabeth**, *supra* at 443i.
- 97.. *Ibidem*.
- 98.. Other than the relevant portion of Section 417(2)(b) of the Act, for which refer to **Ferreira v Levin**, *supra*.
- 99.. **Bernstein**, *op cit* 497-498, paragraphs 100 and 101.
- 100.. With regard to which refer to the Constitutional Court's order in **Ferreira v Levin**, *supra* at 94-95, paragraph 157.

- 101.. **Bernstein**, *op cit* 503, paragraph 121.
- 102.. *Ibidem*, paragraphs 121 and 122.
- 103.. *Ibidem* at 504, paragraph 125.
- 104.. *Op cit*.
- 105.. In **Bernstein v Bester** at 500, paragraph 108.
- 106.. *Ibidem* at 503, paragraph 120.
- 107.. Section 417(1) and (2)(a) of the **Companies Act**.
- 108.. Section 418(2) of the **Companies Act**.
- 109.. Section 417(4) of the Act.
- 110.. Section 418(2) of the Act.
- 111.. Section 417(2)(b) of the Act, subject to the **Ferreira v Levin** order.
- 112.. A position which is accepted in other democratic jurisdictions based on freedom and equality. See, for example, Section 6003 of Title 18 of the United States Code. See also Section 5(1) of the Canada Evidence Act, 1985. For the position under English law, see **Blunt v Parklane Hotel Ltd and Another**, [1942] 2 KB 253; **Re Westinghouse Electric Corporation Uranium Contract Litigation MDL Docket No 235 (No 2)**, [1977] 3 All ER 717 (CA) at 721; and **R v Kansal**, [1992] 3 All ER 844 (CA) at 850.
- 113.. For a comparative position, see Section 5(1) of the Canada Evidence Act, 1985.
- 114.. Section 418(5)(b)(iii)(aa) read with Section 441(1)(f) of the **Companies Act**.
- 115.. For the position in the United States, see **Hale v Henkel**, 201 US 43 (1906) at 73 and 74-75.
- 116.. Section 418(5)(b)(iii)(bb) read with Section 441(1)(f) of the **Companies Act**.
- 117.. See Section 6002 of Title 18 of the United States Code.
- 118.. See, for example, **Ex parte Brivik**, 1950 (3) SA 790 (W) at 791; and **Botha v Strydom**, 1992 (2) SA 155 (N) at 160.
- 119.. [1991] 1 All ER 894.
120. *Ibidem*, at 900.

CHAPTER FIVE

THE RIGHT TO A FAIR TRIAL AND THE COLLECTION OF EVIDENCE IN CRIMINAL MATTERS

INTRODUCTION

After the adoption of the (interim) **Constitution**, our Courts had an opportunity to grapple with the constitutional validity of some of the provisions of the **Criminal Procedure Act**¹ and the principles of our law of evidence, which deal with the collection of evidence in criminal cases or with the admissibility of evidence collected in violation of the (interim) **Constitution**. Most of these cases turned on *the right to a fair trial* as encapsulated in the provisions of Section 25(3) of the (interim) **Constitution**. It is noteworthy that, according to Kentridge AJ, the right to a fair trial thus conferred by the (interim) **Constitution** was broader than the list of specific rights set out in paragraphs (a) to (j) of that subsection.² As such, the right to a fair trial “embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force.”³

Others turned on the right or privilege against self-incrimination, an old principle of our common law⁴ which finds expression in the maxim *nemo tenetur se ipsum prodere*.⁵ This principle was given constitutional status when the (interim) **Constitution** became law.⁶

Yet others turned on the right of every person to his or her *personal privacy*, which included “the right not to be subject to searches of his or her person, home or property,

the seizure of private possessions or the violation of private communications.”⁷ Invariably in such cases it was always argued that the evidence obtained in the course, or as a result, of illegal searches should be excluded on the basis of their ostensible violation of the right to privacy.

Unfortunately, all these cases, with the exception of the two that were handled by the Constitutional Court, were all confined to the territorial jurisdiction of the Courts that decided them; none of them was a Constitutional Court or an Appellate Division decision on the matters they raised. On the basis of the *stare decisis* principle, they would thus be binding only in those areas or provinces.

The cases that were dealt with only by the High Court at the time of writing are included in this chapter to illustrate that the issues that were raised in them are very much alive. Unfortunately, due to the Constitutional Court’s “cases and controversies” approach, which would prevent it from dealing with such issues *mero motu*, they may only come to its attention in cases that are appropriately brought before it.

SECTION 37 OF THE CRIMINAL PROCEDURE ACT

The provisions of Section 37 of the Act allow police officers to ascertain the bodily features, including marks and prints of any person falling within any of the categories referred to in subsection (1) thereof, with or without the affected person’s consent, and by force if necessary. By legalising acts which might otherwise give rise to criminal or delictual liability, these provisions make serious inroads upon the bodily integrity of the individual accused of the commission of a crime. However, these inroads should be excusable if seen in the light of the fact that the ascertainment of the bodily features and ‘prints’ of an accused person often forms an essential component of the investigation of crime, a prerequisite for the effective administration of any criminal justice system and the proper adjudication of a criminal trial.

In **S v Maphumulo and Another**,⁸ for example, the investigating officer desired to take the fingerprints of the accused for evidential purposes. Instead of doing so by force in

terms of Section 37(1), the prosecuting authority sought an order under Section 37(3) of the Act compelling the accused to submit to the taking of their fingerprints. The apparent reason was the fear that if the provisions of Section 37(1) of the Act were relied upon, the privilege against self-incrimination as encapsulated and enshrined in Section 25(2)(c) of the (interim) **Constitution** might be violated.

Though counsel in the matter referred pertinently to the right of every person not to be compelled to be a witness against himself or herself,⁹ Combrink J considered the provisions of Section 25(2)(c) of the (interim) **Constitution** to be more apposite to the issue.¹⁰ The Court had to determine whether the taking of an accused's fingerprints constituted a violation of Section 25(2)(c). The learned Judge, for this purpose, made a clear distinction between an accused person's bodily features, such as a facial scar, a crooked nose, an artificial leg, footprints, palm prints and fingerprints, on the one hand, and his or her statements or communications, on the other.¹¹ For the learned Judge, the question was settled by Watermeyer JA in **Ex parte Minister of Justice in re: R v Matemba**.¹² He thus ruled that "the police are ... entitled in terms of the power conferred upon them by the provisions of section 37(1), to take the accused's fingerprints forcibly if necessary. In doing so, however, the police are enjoined to exercise discretion and care, and to have due regard to the dignity of the accused."¹³

SEARCH AND SEIZURE PROVISIONS: SECTION 22 OF THE ACT

In **S v Motlousi**,¹⁴ the State sought to tender the evidence of the finding and seizure by the police of bloodstained banknotes which were found in the course of a search¹⁵ of the room occupied by the accused person. The Court found on the facts that the police could not have acted *bona fide* in this case.

Similarly in **S v Mayekiso en Andere**,¹⁶ the State sought to tender the evidence of the findings of certain items which were seized during a search¹⁷ of a bag found at the residence of the first accused. It appeared that when the search was conducted, the police had no reason to believe that the deceased had been killed at the residence or that the third accused, the owner of the bag, had been involved in the killing. In other

words, the police had no reason to believe that the requirements of the **Criminal Procedure Act**¹⁸ relating to searches and seizures were satisfied and that a search warrant would have been issued. It therefore followed that the police would not have been entitled to act under Section 22 of the Act. The Court found on the facts that the search of the bag constituted an infringement of the owner's fundamental right.

In both **Motlousi** and **Mayekiso** Farlam J and Van Reenen J respectively rejected the Canadian¹⁹ and United States²⁰ approaches and, instead, followed the Irish approach adopted by Kingsmill Moore J in the **People (Attorney-General) v O'Brien**²¹ decision. In a nutshell, the approach adopted in **O'Brien** was that where evidence is obtained as a result of illegal action it is a matter for the trial judge to decide, in his or her discretion, whether to admit or reject it. In exercising that discretion, Courts have to make a choice between two desirable ends which may be incompatible.²² The **O'Brien** approach would thus, in some instances, justify the admission of evidence despite the fact that it was illegally obtained in breach of the constitutional rights of the accused.

Applying the **O'Brien** approach in **Motlousi**²³ and **Mayekiso**,²⁴ Farlam J and Van Reenen J respectively declared the tendered evidence inadmissible *in casu*. In my view, the **O'Brien** approach seems to be fully in accordance with our law and I would be surprised if the Constitutional Court, which, unfortunately did not address this issue, came to a different conclusion.²⁵

SECTION 112(1)(B) OF THE CRIMINAL PROCEDURE ACT

In **S v Maseko**,²⁶ the Witwatersand Local Division of the Supreme Court dealt with the validity of the provisions of Section 112(1)(b) of the Act²⁷ in relation to *the right to remain silent during plea proceedings*.²⁸ On an earlier occasion, though under the previous constitutional order the issue was not clear, the Appellate Division had held that an accused had a right to remain silent when questioned by a magistrate in terms of this section.²⁹

In **Maseko**, Borchers J accepted that the accused, a youth then aged about 18 years, who had appeared before a court without any legal assistance, did not know that he had a right to remain silent during the plea proceedings.³⁰ The learned Judge also accepted that the accused had not been informed that he had such a right and had thus proceeded to make incriminating statements against himself.³¹ The learned Judge opined that the common law position that the accused questioned under Section 112(1)(b) of the Act had no right to be warned of his or her right to remain silent³² was no longer truly reflective of our legal position in the light of the (interim) **Constitution**.³³

To give content to the accused's right not to incriminate himself or herself during plea proceedings, Borchers J held³⁴ that if an accused person incriminates himself or herself in ignorance of his or her right to remain silent, "a fundamental right expressly granted ... by the Constitution has been violated."³⁵ Holding that statements made under Section 119 of the Act by such an accused person should not be used as evidence against him or her, the learned Judge nonetheless refused to refer the matter to the Constitutional Court under Section 102(1) of the (interim) **Constitution** for its decision.³⁶ In his view, the provisions of Section 112(1)(b) were not in conflict with the (interim) **Constitution** merely because they did not expressly make provision for the right to remain silent during plea proceedings.³⁷

POINTINGS OUT AS EVIDENCE: SECTION 218(2) OF THE ACT

In our common law, the pointing out³⁸ by an accused person of a certain fact, the existence or discovery of which was in itself highly relevant to the crime under investigation and which, therefore, tended to establish a link between the knowledge on the part of the accused person of that fact and the commission of the crime, amounted to an admission by conduct on the part of the accused person.³⁹ In 1991, the Appellate Division held in its landmark decision in **S v Sheehama**⁴⁰ that pointings out were, in appropriate circumstances, to be viewed as admissions by conduct and that their admissibility was, accordingly, to be governed by the provisions of the **Criminal Procedure Act** relating to the admissibility of admissions and confessions. In other words, the admissibility of a pointing out, as an extra-curial admission by the accused,

is governed by the common law rule that it must have been made freely and voluntarily, which is now embodied in the provisions of Sections 217, 218 and 219A of the Act.

The issue is, however, also governed by Section 218(2) of the Act, which provides that evidence of a pointing out is admissible, notwithstanding the fact that it forms part of an inadmissible confession or statement. In other words, this section seemingly renders the fact that a pointing out forms part of an inadmissible confession irrelevant.⁴¹

The Court, in **S v Melani and Others**,⁴² dealt with, *inter alia*, the issue of the admissibility of evidence obtained as a result of a pointing out. Professing to be guided by the tenor and spirit of the decision of the Constitutional Court in **S v Zuma and Others**,⁴³ which the Court admitted did not directly grapple with “[t]he question of whether evidence obtained in breach of the provisions of section 25 of the Constitution is admissible in a criminal trial”,⁴⁴ Froneman J dealt with the constitutional questions begged by the issue of the admissibility of pointings out in the post-1994 situation.

The learned Judge’s starting point was the right to consult with a legal practitioner during the pre-trial procedure, as well as the right to be informed about this right, all of which were then contained in Section 25(1)(c) of the (interim) **Constitution**.⁴⁵ The Learned Judge concluded on the facts of the case that this right had been infringed.⁴⁶

Froneman J further looked at the rights then guaranteed in Sections 25(2)(a), 25(2)(c), 25(3)(c) and 25(3)(d) of the (interim) **Constitution**. The learned Judge concluded that the provisions of the (interim) **Constitution** had provided a further basis for the exclusion of the evidence obtained in breach of the rights guaranteed to an accused person.⁴⁷ This, he opined, would “help ensure the fairness and integrity of the criminal process at least from arrest up to and including the trial.”⁴⁸ On the basis of this, he held that the alleged evidence of pointing out by two of the accused persons *in casu* was inadmissible and should therefore be disregarded.⁴⁹

However, the learned Judge was worried about “an absolute exclusionary rule”; he preferred that the Courts should have a discretion “to allow the evidence despite it being obtained in an unconstitutional manner”, though the position was not clear in our

law. He derived solace from the fact that, at least in New Zealand, the Courts did have this discretion.⁵⁰

As the learned Judge quite correctly pointed out, however, the issue of whether our judges have such a discretion would have to be settled once and for all time by the Constitutional Court;⁵¹ in the meantime, the old common law position pertains nationally, except in the area of the territorial jurisdiction of the Court that decided **Melani**. In Gauteng the judges are divided on the issue; Strydom J's decision in **Malefo**⁵² was not supported by Claassen J.⁵³ In effect Claassen J disagreed with Froneman J too on the approach the latter adopted in his decision in **Melani**.⁵⁴

THE CONSTITUTIONAL COURT

In the same period, the Constitutional Court had occasion to deal with the constitutionality of two of the provisions of the **Criminal Procedure Act**. These were Sections 205 and 22.

SECTION 205 OF THE ACT

Section 205 provides an evidence-gathering mechanism whereby a person who is likely to give material or relevant information as to any alleged offence but who will not furnish such information in the ordinary course may be required or subpoenaed by a judicial officer to appear before him or her for examination by a prosecuting authority. Where such a person gives the requisite information before the stated date, the obligation to so appear lapses.

However, should such a person fail or refuse, without a just cause, to appear before the judicial officer and give the requisite information, provision is made in the Act for the imposition of a sentence of imprisonment for a period not exceeding two years.⁵⁵ But, since 1993, before such a sentence can be imposed, the judicial officer must also be "of the opinion that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order."⁵⁶ The sentence imposed under Section

189(1) for the purposes of the Section 205(1) enquiry is "subject to appeal in the same manner as a sentence imposed in any criminal case".⁵⁷

It is important to note that an enquiry under Section 189 does not create an offence.⁵⁸ The recalcitrant examinee does not, therefore, go to prison for a criminal offence;⁵⁹ if, at a later stage, he or she becomes willing to testify and does comply with the provisions of Section 205(1) of the Act, this would entitle him or her to immediate release.⁶⁰

The Act⁶¹ further makes provision for the discharge of such a person from prosecution where he or she has answered all relevant questions frankly and honestly. It also precludes the use of such evidence at a later trial of such a person if he or she does not qualify for a discharge from prosecution,⁶² unless he or she is prosecuted for perjury arising from the giving of evidence under Section 205.⁶³

In **Nel v Le Roux NO and Others**,⁶⁴ the Constitutional Court was, pursuant to a Section 103(4) referral, called upon to deal with the issue of the constitutionality of the provisions of Section 205 which were attacked on the basis that they were inconsistent with the (interim) **Constitution**. Its unanimous judgment was delivered by Ackermann J.

Ackermann J scoured the bases of the constitutional attack on the provisions of Section 205. The learned Judge held, for example that the recalcitrant examinee could not be sentenced under Section 189 if he or she furnished "a just excuse" or "sufficient cause", the two expressions which he said do not differ materially from each other.⁶⁵ It was the duty of the judicial officer before whom the recalcitrant examinee appears, to determine, bearing in mind the spirit, purport and objects of the fundamental rights guaranteed in the (interim) **Constitution**, whether the examinee has a just excuse or sufficient cause to refuse to testify, the learned Judge held.⁶⁶

The learned Judge further held that the provisions of Section 205 were not trumped by the general limitation clause. He held in particular that:

[w]e are not alone in adopting a procedure such as that embodied in section 205. Other open and democratic societies based on freedom and equality do the same.⁶⁷

As the Section 205 examinee is not an accused person, it would be a misnomer to talk of "a fair trial" in this regard. Ackermann J held that:

[t]he imprisonment provisions in section 189 constitute nothing more than process in aid of the essential objective of compelling witnesses who have a legal duty to testify to do so; it does not constitute a criminal trial, nor make an accused of the examinee. This disposes of the attack directly based on the ... fair trial right.⁶⁸

The Court, after a meticulous examination of all the issues raised in the case, concluded and declared that the provisions of Section 205 of the Criminal Procedure Act were not inconsistent with the (interim) **Constitution**.⁶⁹

SECTIONS 6 AND 7 OF THE INVESTIGATION OF SERIOUS ECONOMIC OFFENCES ACT

In **Key v Attorney-General, Cape of Good Hope Provincial Division and Another**,⁷⁰ the applicant was indicted on a number of charges arising from the collapse of the Tollgate group of companies. Representatives of the Office for Serious Economic Offences, acting on the strength of an order issued in terms of Section 6(1) of the **Investigation of Serious Economic Offences Act**,⁷¹ searched his residence and offices and certain seized documents. Such documents were made available to investigative accountants under Section 7 of the Act, on whose report, the applicant contended, the criminal case against him was built.

The Constitutional Court was called upon to determine, *inter alia*, whether the provisions of Sections 6 and 7 of the **Investigation of Serious Economic Offences Act** were inconsistent with the right to privacy which was then enshrined in Section 13 of the (interim) **Constitution**. However, the first question the Court had to decide was whether it was open to the applicant to challenge the validity of those provisions of the Act in respect of conduct that had occurred before the commencement of the (interim) **Constitution**. The Court unanimously agreed to follow its earlier decision in **Du Plessis and Others v De Klerk and Another**,⁷² in which it had held that the (interim) **Constitution** did not operate retrospectively.⁷³

Rejecting the applicant's contention, Kriegler J observed that as virtually all the events complained of had taken place prior to the commencement of the (interim) **Constitution**, none of them could be said to have constituted a breach of any of the applicant's rights guaranteed in the (interim) **Constitution**. As the learned Judge pointed out, "[s]uch rights had not yet come into existence when the events took place. Nor did - nor could - the subsequent advent of the Constitution, by affording rights and freedoms which had not existed before, render unlawful actions that were lawful at the time at which they were taken."⁷⁴ In particular, the learned Judge held that there was "nothing inherently unfair in receiving in evidence material which was properly garnered in the course of *a lawful search and seizure*. And there is no warrant in justice for retroactively casting a blanket of illegality over what was properly unearthed according to the law as it stood at the time."⁷⁵ (my italics)

In the result, Kriegler J made no order as to the constitutionality of the provisions of Sections 6 and 7 of the **Investigation of Serious Economic Offences Act** and, instead, held that the evidence procured pursuant to those sections which was obtained before the commencement of the (interim) **Constitution** was not rendered inadmissible in the criminal proceedings against the applicant by virtue of the constitutional changes that took place on 27 April 1994.⁷⁶

THE O'BRIEN APPROACH

It is noteworthy, however, that without any reference to the Irish decision in **People (A-G) v O'Brien**,⁷⁷ which was quoted with approval by Farlam J in **Motlousi**⁷⁸ and by Van Reenen J in **Mayekiso**,⁷⁹ Kriegler J, with reference to the admissibility of evidence obtained in violation of an accused person's fundamental right to a fair trial, made this remark:

[t]he question whether the admission of such evidence would in any way infringe the applicant's right to a fair trial is *a matter to be decided by the trial judge on the facts and circumstances established at the trial*.⁸⁰ (my italics)

This was precisely the approach taken by Kingsmill Moore J in **O'Brien**. It is for the trial judge to decide, in his or her discretion, whether or not to admit the evidence, regard being had to the spirit, the purport and objects of our new constitutional order! Thus, the

Constitutional Court has, arguably, rejected the Canadian and American approaches in this regard.⁸¹

The issue has to be looked at in the context of the fairness of the trial.⁸² And, as Kriegler J put it,

[u]ltimately ... fairness is an issue which has to be decided upon the facts of each case, and the trial judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted.⁸³

ENDNOTES - CHAPTER FIVE

- 1.. Act No. 51 of 1977, hereinafter referred to as the Act.
- 2.. In **S v Zuma and Others**, 1995 (2) SA 642 (CC) at 651-652, paragraph 16.
- 3.. *Ibidem*.
- 4.. See, for example, Innes CJ in **R v Camane**, 1925 AD 570 at 575.
- 5.. No one is bound to incriminate or betray himself or herself.
- 6.. Section 25(2)(c).
- 7.. Section 13 of the (interim) **Constitution**.
- 8.. 1996 (2) BCLR 167 (N). See also **S v Huma and Another**, 1996 (1) SA 232 (W). See further **Msomi v Attorney-General of Natal and Others**, 1996 (8) BCLR 1109 (N), where the accused unsuccessfully attempted to have the question of the constitutionality of the provisions of Section 225(2) of the **Criminal Procedure Act**, which provide that evidence of, *inter alia*, fingerprints is not rendered inadmissible by reason only of the fact that such prints were taken against the wish or will of the accused concerned, referred to the Constitutional Court for its decision.
- 9.. Section 25(3)(d) of the (interim) **Constitution**.
- 10.. **Maphumulo**, *op cit* 170B.
- 11.. *Ibidem* at 171.
- 12.. 1941 AD 75 at 82-83. For comparative foreign case law, see **Schmerber v California**, (1966) 384 US 757 at 764-765; **R v Beare**, (1989) 36 CRR 90 at 90; and **R v Walters**, (1993) 12 CRR 159.
- 13.. **Maphumulo**, *op cit* 173C. See also Claassen J in **S v Huma and Another**, *op cit* 237J-240, where the Learned Judge concluded that "[t]he privilege against self-incrimination does not apply to procedures relating to the ascertainment of bodily features such as the procedures involved in identification parades, the taking of finger- and footprints, blood samples and the showing of bodily scars. These procedures relate to the furnishing of what has been termed 'real evidence', as opposed to the furnishing of oral or testimonial evidence by the accused."
- 14.. 1996 (2) BCLR 220 (C).
- 15.. Conducted under the provisions of Section 22 of the **Criminal Procedure Act** which constitute a permissible limitation on the right of an accused person.
- 16.. 1996 (9) BCLR 1168 (C).
- 17.. Conducted in terms of Section 22 of the **Criminal Procedure Act**.
- 18.. Section 21(1)(a).
- 19.. For which see Section 24(2) of the Canadian Charter of Rights and Freedoms.
- 20.. Which is an absolute and inflexible rule of inadmissibility which excludes "the fruits of the poisoned tree". See, for example, **Mapp v Ohio**, (1961) 367 US 643. This rule obviously prevents the admission of otherwise relevant and vital facts even where unintentional or trivial infractions have been committed in the course of ascertaining them.

- 21.. (1965) IR 142 at 160-161 and 170.
- 22.. Namely the public interest which requires that crime should be detected and punished, on the one hand, and, on the other, the public interest which requires that individuals should not be subjected to illegal or inquisitorial methods of investigation and that the State should ordinarily not be permitted to combat crime by using the fruits of such methods. See Kingsmill Moore J at 160-161 for a discussion of the nature of the discretion and the manner of its exercise.
- 23.. At 230D.
- 24.. At 1175F-H.
- 25.. See the brief discussion of **Key v Attorney-General, Cape of Good Hope Provincial Division and Another**, 1996 (6) BCLR 788 (CC) below.
- 26.. 1996 (9) BCLR 1137.
- 27.. Which were apparently designed to protect, in particular, an uneducated and undefended accused person from the adverse consequences of an ill-considered plea of guilty. See Botha JA in **S v Naidoo**, 1989 (2) SA 114 (A) at 121F. The provisions help a court to establish not only that an accused person who pleads guilty committed the act but that he or she committed it unlawfully and with the necessary *mens rea*.
- 28.. Then guaranteed in Section 25(3) of the (interim) **Constitution**.
- 29.. In **S v Nkosi en `n Ander**, 1984 (3) SA 345 (A). See also Milne JA in **S v Mabaso and Another**, 1990 (3) SA 185 (A) at 211C.
- 30.. **S v Maseko**, *op cit* 1140A-C.
- 31.. *Ibidem*.
- 32.. For which see **S v Nkosi en `n Ander**, *op cit* 353B; and the majority judgment of Hoexter JA in **S v Mabaso and Another**, *op cit* 205I-J.
- 33.. **S v Maseko**, *op cit* 1141B-H, where Borchers J preferred the minority, dissenting judgment of Milne J.
- 34.. Correctly in my view.
- 35.. *Ibidem* at 1142F.
- 36.. *Ibidem* at 1143A-E.
- 37.. *Ibidem*.
- 38.. Hoexter J defined a pointing out in **S v Nkwanyana**, 1978 (3) SA 404 (N) at 405H as "an overt act whereby the accused indicates physically to the inquisitor the presence or location of some thing or some place actually visible to the inquisitor."
- 39.. See **R v Samhando**, 1943 AD 608 with regard to involuntary pointings out..
- 40.. 1991 (2) SA 860 (A). See also **S v January; Prokereur-Generaal, Natal v Khumalo**, 1994 (2) SACR 801 (A) at 806H-807E-G.
- 41.. **S v Masilela**, 1987 (4) SA 1 (A). However, see Grosskopff JA in **Sheehama**, *op cit* 84-85, for the Appellate Division's subsequent clarification of its position in this regard.
- 42.. 1996 (2) BCLR 174 (E).

- 43.. *Op cit.*
- 44.. **Melani**, *op cit* 187A-B.
- 45.. *Ibidem.*
- 46.. *Ibidem* at 190D.
- 47.. *Ibidem* at 190G.
- 48.. *Ibidem.* The Learned Judge was supported in this regard and quoted with approval by Cameron J in the unreported judgment of **S v Johan Marx and Another**, WLD Case Number 153/95 dated 29 March 1996; and by Strydom J in another unreported judgment of **S v David Malefo and Others**, WLD Case Number CC 216/95 dated 10 May 1996.
- 49.. *Ibidem* at 192F.
- 50.. *Ibidem* at 190I-191B. See also Strydom J in **S v David Malefu and Others**, *op cit*, on this, where the Learned Judge referred to the seminal article by SE van der Merwe, 'Unconstitutionally Obtained Evidence: Towards a Compromise between the Common Law and the Exclusionary Rule', in (1992) 2 **Stellenbosch Law Review** 173 at 198-200, and quoted Ackermann J's decision in **Ferreira v Levin and Others; Vryenhoek and Others v Powell NO and Others**, 1996 (1) SA 984 (CC) at 1077G-1078B, paragraph 153, in support of his view that judges do have such a discretion.
- 51.. *Ibidem* at 191C.
- 52.. *Op cit.*
- 53.. See **S v Mathebula and Another**, 1997 (1) BCLR 123 (W) at 133H-134C and at 135J-136C.
- 54.. *Ibidem* at 136B-C.
- 55.. Section 189, read with Section 205(2) of the Act.
- 56.. Section 205(4) of the Act, inserted by Section 11 of Act 204 of 1993.
- 57.. Section 189(4) of the Act.
- 58.. See Steyn CJ in **S v Heyman**, 1966 (4) SA 598 (A) at 601G.
- 59.. **Natal Law Society v N**, 1985 (4) SA 115 (N) at 116F.
- 60.. **S v Heyman**, *op cit* 601H; see also Section 189(3) of the Act.
- 61.. Section 204(2), read with Section 205(2) of the Act.
- 62.. Section 204(4)(a) of the Act.
- 63.. Section 204(4)(b) of the Act.
- 64.. 1996 (4) BCLR 592 (CC).
- 65.. *Ibidem* at 598-599, paragraphs 5 to 7.
- 66.. *Ibidem* at 599-600, paragraph 8.
- 67.. *Ibidem* at 599D-E, paragraph 7.

- 68.. *Ibidem* at 601A-B, paragraph 11. A Section 205 examinee seems to me basically to be in the same position as an examinee under Sections 417 and 418 of the **Companies Act**, which provisions were discussed in Chapter 4 above.
- 69.. *Ibidem* at 606A, paragraph 25 and at 607, paragraph 27.
- 70.. 1996 (6) BCLR 788 (CC).
- 71.. Act No. 117 of 1991.
- 72.. 1996 (5) BCLR 658 (CC).
- 73.. At 672, paragraph 20.
- 74.. **Key**, *op cit* 792, paragraph 6.
- 75.. *Ibidem* at 792-793, paragraph 7.
- 76.. *Ibidem* at 796, paragraph 16.
- 77.. *Op cit*.
- 78.. *Op cit*.
- 79.. *Op cit*.
- 80.. **Key**, *op cit* 796, paragraph 16.
- 81.. For which see the brief discussion of the **Motlousi** and **Mayekiso** decisions above.
- 82.. That is, as was pointed out in **Zuma**, *loc cit*, the broad concept of "substantive fairness which is not to be equated with what might have passed muster in our criminal courts before" the advent of the (interim) **Constitution**.
- 83.. **Key**, *op cit* 796A-B, paragraph 13.

CHAPTER SIX

THE RIGHT TO A FAIR TRIAL AND STATUTORY PRESUMPTIONS

INTRODUCTION

Under the (interim) **Constitution**¹ every person was, as stated earlier on, granted *the right to a fair trial*.² This is a standard clause found in numerous international human rights instruments and in constitutions of many countries with bills of rights.

However, as was stated in an earlier chapter,³ prior to 27 April 1994, this right was not constitutionally guaranteed as there was no bill of rights in our country then. It could be overridden by any Act of Parliament as the will of a transient majority in that institution was the law.

Thus, South African statutory law is replete with statutory presumptions, some of which may tamper with the right to a fair trial. Depending on the context and the general policy of the Acts in which these are found, some of them use certain forms of words to impose an *onus* of proof while others merely place a duty to adduce contrary evidence upon the parties against whom they operate.

The phrase "shall be *prima facie* evidence or proof" is used in many of our statutes. According to LH Hoffmann and DT Zeffertt, "[t]he normal meaning of such provisions is that in the absence of some evidence to the contrary, the fact in issue either may or must be taken to be proved."⁴ The *onus* is not affected; the *onus* remains upon the party required to prove a fact. If the accused leads sufficient evidence to raise a doubt, he or she is entitled to an acquittal.⁵

In other statutes the phrase "in the absence of evidence to the contrary" is used. "These words", according to Hoffmann and Zeffertt, "also have the effect of placing a duty to adduce evidence upon the party against whom they operate."⁶

In statutes such as the **General Law Amendment Act**,⁷ and **Stock Theft Act**,⁸ which deal with the possession of stock, produce or other goods which are reasonably suspected of having been stolen, the phrase "give a satisfactory account of such possession" is utilised. According Hoffmann and Zeffertt,⁹ the phrase imposes no onus upon the accused and he or she merely has a duty to adduce evidence showing that his or her explanation may reasonably be true and satisfactory.

Yet in others the phrase "*unless the contrary is proved*" is utilised.¹⁰ This phrase, as can be gleaned from **Ex parte Minister of Justice: in re R v Jacobson and Levy**,¹¹ unlike the other two above, clearly imposes an *onus* upon the opposing party. One of the presumptions in which this phrase was used was to be found in Section 217(1)(b)(ii) of the **Criminal Procedure Act**,¹² the provisions of which the Constitutional Court was called upon to deal with in **S v Zuma and Others**¹³ and **S v Mhlungu and Others**.¹⁴

Subsequently, in **S v Bhulwana; S v Gwadiso**,¹⁵ the Constitutional Court also had occasion to deal with the provisions of Section 21(1)(a)(i) of the **Drugs and Drug Trafficking Act**,¹⁶ where a similar phrase was used. However, as will be pointed out later, the Court in this case, most unfortunately, confined its declaration of invalidity to the provisions of Section 21(1)(a)(i) of the Act.

Then in February 1996 the Constitutional Court gave its judgment in **S v Mbatha; S v Prinsloo**,¹⁷ a case in which the Court dealt with the constitutionality of the presumption in Section 40(1) of **Arms and Ammunition Act**.¹⁸ The contention of the applicants was that the said presumption violated the "fair trial" provisions of the (interim) **Constitution**, in particular the privilege against self-incrimination and the right to be presumed innocent.

Lastly, in **Scagell and Others v Attorney-General of the Western Cape Others**,¹⁹ the Constitutional Court dealt with the constitutionality of, *inter alia*, the similarly worded

Section 6(4) of the **Gambling Act**.²⁰ It also dealt with the constitutionality of the slightly differently worded provisions of Section 6(3) of that Act.²¹

THE PRESUMPTION OF INNOCENCE

The presumption of innocence²² is an integral component of our legal system.²³ As a basic tenet of the South African system of criminal justice, it finds expression in the rule that the burden of proving the guilt of an accused person is placed firmly on the prosecution,²⁴ "unless the legislature directs otherwise."²⁵ The accused is presumed to be innocent and the prosecution should ordinarily bear the *onus* on all issues,²⁶ the only common law exception to this principle being that where the accused raises a defence of insanity, he or she bears the *onus* to prove such insanity.²⁷

The presumption of innocence²⁸ was reaffirmed by our (interim) **Constitution** which stated that every person charged with the alleged commission of an offence shall have the right to a fair trial which includes the right "to be presumed innocent".²⁹ Due to this, as Cachalia et al quite correctly suggested, the "numerous statutory provisions that place some form of *onus* upon an accused person ... will now be subject to constitutional review."³⁰ Statutory presumptions, needless to say, would in appropriate "cases and controversies", give our Courts ample opportunity to intervene on the basis of the presumption of innocence.

The right to be presumed innocent till found guilty by a court of law is a very important component of democracy and is guarded jealously in all democratic societies. In the United States, for example, the presumption of innocence, although not specifically articulated in the Constitution, is accepted as a basic component of a fair trial under their system of criminal justice.³¹ Moreover, as Roberts J pointed out, due process clauses,³² limit the power of Congress or state legislatures to make the proof of one fact or group of facts evidence of the ultimate fact upon which guilt is predicated.³³

The Canadian Constitution, like ours, provides that:

[a]ny person charged with an offence has the right ... to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal ...³⁴

In a very important Canadian case in this regard, Dickson CJC said that the presumption of innocence, "a hallowed principle lying at the very heart of criminal law", protects the fundamental liberty and human dignity of all persons accused by the State of criminal conduct. It ensures that the State proves all the necessary elements of an offence beyond all reasonable doubt, failing which a person accused of the commission of an offence is innocent. "This is essential in a society committed to fairness and social justice."³⁵

Linked to the right to be presumed innocent are rights such as the right to remain silent after arrest,³⁶ the right not to be compelled to make a confession or admission which can be used in evidence against him or her,³⁷ and the right not to be a compellable witness against oneself.³⁸ These rights are part and parcel of the criminal justice systems of all civilised societies,³⁹ and have since been reaffirmed in our (interim) **Constitution**.⁴⁰

SECTION 217(1) OF THE CRIMINAL PROCEDURE ACT

It needs to be pointed out that it is an old requirement of our common law that extra-judicial statements made by accused persons, whether incriminating or exculpatory,⁴¹ can be given in evidence by the state only if the prosecution can prove beyond a reasonable doubt that they were made freely and voluntarily.⁴² Section 217(1) of the **Criminal Procedure Act** is the general provision which deals with the admissibility of confessions made by accused persons. It provides that:

[e]vidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such an offence.

Thus, under this sub-section, if the prosecution wishes to put a confession⁴³ in evidence, it is *normally* required to prove beyond a reasonable doubt that the

confession was made by the accused freely and voluntarily, in his or her sound and sober senses, and without any undue influence.⁴⁴ At the very least, this means that for a confession to be admissible, proof is required that it was not induced by violence, or by threats or promises made by a person in authority.⁴⁵

However, the sub-section is followed by a proviso which excludes all confessions made to peace officers other than magistrates and justices of the peace.⁴⁶ This proviso is to the effect that a confession made to a peace officer other than a magistrate or justice of the peace will not be admissible in evidence unless it is confirmed and reduced to writing in the presence of a magistrate or justice who should, of course, be satisfied, and record that he or she is satisfied, that the confession was indeed made freely and voluntarily and without any undue influence.

Furthermore, under Section 217(1)(b)(i), upon its mere production at the proceedings, a confession made to a magistrate and reduced to writing by him or her, or which is confirmed and reduced to writing in the presence of a magistrate is admissible against the accused if it appears from the document containing it that it was made by a person whose name corresponds to that of the accused. In the case of a confession made to a magistrate or confirmed and recorded in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such document declaring that he or she interpreted truly and correctly and to the best of his or her ability with regard to both the contents of the confession and any question put to the accused by the magistrate, the confession is similarly admissible.⁴⁷ Once these basic facts are proved, "this then triggers off the presumption in regard to the accused's state of mind. Thereafter an *onus* is cast on the accused to prove the contrary."⁴⁸

Section 217(1)(b)(ii) of the **Criminal Procedure Act**, which was under attack in the **Shangase**,⁴⁹ **Zuma** and **Mhlungu** cases, provided that where a confession was made to a magistrate and reduced to writing by him or her, or was confirmed and reduced to writing in the presence of a magistrate,⁵⁰ upon its mere production at the proceedings, it would be presumed, *unless the contrary was proved*, to have been freely and voluntarily made by the accused in his or her sober senses and without any undue influence, if it appeared from the document in which it was contained that it had not

been made improperly. In other words, this "reverse *onus* clause"⁵¹ placed on an accused the burden⁵² of proving that the confession recorded by or confirmed and recorded in the presence of a magistrate was tainted, that is, that it was not freely and voluntarily made by him or her, in his or her sound and sober senses, and without his or her having been unduly influenced to make it. For this purpose, a *voir dire*,⁵³ in which the prosecution and the defence would lead evidence about the circumstances in which the confession was made or obtained, was held. Failure to hold a *voir dire* when an accused disputed the admissibility of a confession would constitute a material irregularity.⁵⁴

This reverse *onus* was required to be discharged on a balance of probabilities⁵⁵ and not by merely raising a doubt. As this was a rebuttable presumption, the state was allowed to lead evidence in rebuttal to the evidence led by the accused.⁵⁶ If at the end of the trial within a trial the probabilities were evenly balanced, or, to put it simply, if the accused had failed to discharge the reverse *onus*,⁵⁷ the presumption would prevail.⁵⁸

THE CONSTITUTIONAL COURT INTERVENES

In both **S v Zuma and Others**⁵⁹ and **S v Mhlungu and Others**⁶⁰ the Constitutional Court had occasion to grapple with the validity of the provisions of Section 217(1)(b)(ii) of the **Criminal Procedure Act**. In the former case the question of validity was the sole question for decision while in the latter one the other question related to the applicability or otherwise of a declaration of constitutional invalidity of the said provisions to criminal trials commenced on or before 27 April 1994.⁶¹

In **Zuma** the accused were indicted on two counts of murder and one of robbery. Two of the accused had made statements to a magistrate which the state sought to rely on as confessions on the basis of the provisions of Section 217(1)(b)(ii) of the **Criminal Procedure Act**. As the affected accused alleged that the statements had been induced by assaults and fear of further assaults, the defence contested their admissibility and a trial-within-a-trial was subsequently held.

It is noteworthy that while the court *a quo* was not entirely satisfied that the statements had not been made freely and voluntarily and without any undue influence,⁶² the accused themselves had failed to discharge the onus imposed upon them by the provisions of Section 217(1)(b)(ii) of the **Criminal Procedure Act**. Hugo J expressed doubt over the constitutional validity of Section 217(1)(b)(ii).⁶³ However, though the state and the defence had consented to the issue of the constitutional validity of these provisions to be decided by the trial judge,⁶⁴ the court *a quo* nonetheless refrained from giving a decision on the issue, referred the matter to the Constitutional Court and adjourned the trial *sine die*.⁶⁵ This helped in creating legal certainty as far as the validity of the provisions of Section 217(1)(b)(ii) was concerned, something which the doctrine of *stare decisis* would obviously have prevented if Hugo J had decided the issue at his level in the judicial hierarchy.

Similarly, in **Mhlungu** the accused were charged with, *inter alia*, murder, to which they had pleaded not guilty. The state sought to rely on confessions made by the accused, contending that, in respect of two of the confessions, the requirements of Section 217(1)(b)(ii) had *prima facie* been satisfied.

The gist of the defences' attack on the provisions of Section 217(1)(b)(ii) in both cases was that they violated certain basic rights guaranteed to all persons charged with the alleged commission of an offence and were, therefore, in conflict with the **Constitution**. In **Mhlungu**, however, there were two additional questions, namely:

(1) whether the proceedings could be said to have been 'pending' immediately prior to the commencement of the **Constitution**; and

(2) if so, whether, in the light of the provisions of Section 241(8) of the **Constitution**, the provisions of the **Constitution** were applicable to the trial.

These questions will be dealt with separately below. By way of conclusion, the implications of the ruling on the question of the validity of the Section 217(1)(b)(ii) presumption will be dealt with.

THE VALIDITY OF SECTION 217(1)(B)(II) OF THE CRIMINAL PROCEDURE ACT

As pointed out above, Levinsohn J had earlier on dealt with the constitutionality of the provisions of Section 217(1)(b)(ii) of the **Criminal Procedure Act**.⁶⁶ The learned judge had found that the said provisions fell foul of the **Constitution** and held that the *onus* of proving the voluntariness of confessions thus rested with the state.⁶⁷ However, despite the **Shangase** judgment,⁶⁸ in **S v Zuma and Others**,⁶⁹ as Hugo J felt that the site of the *onus* would be decisive in so far as the admissibility of the confessions made by Accused 1 and 2 was concerned, the matter was referred to the Constitutional Court.⁷⁰

In **Zuma** this question was canvassed at great length by Kentridge AJ.⁷¹ For this purpose the learned acting judge of the Constitutional Court traversed the jurisprudence of countries such as the United States of America, the United Kingdom and Canada, where the courts had had occasion to look into the validity of similar legal provisions. He also considered decisions of the Privy Council and of the European Court of Human Rights.⁷²

In all these jurisdictions, where reverse *onus* provisions are not uncommon,⁷³ courts have grappled with the problem of reconciling such provisions with the need to preserve the presumption of innocence. The courts of the United States, including the Supreme Court,⁷⁴ have tried over a long period to enunciate a governing principle in this regard.⁷⁵

In numerous judgments Canadian courts too have grappled with this conundrum. Of particular importance was the judgment of Dickson CJC, who said in **R v Oakes**⁷⁶ that:

[i]n general one must, I think, conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence ... If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt. This would arise if the accused adduced sufficient evidence to raise a reasonable doubt as to his or her innocence but did not convince the jury on a balance of probabilities that the presumed fact was untrue.⁷⁷ (my italics)

Two years later Dickson CJC stated this position much more forcefully in **R v Whyte**⁷⁸ which dealt with a presumption contained in a statute creating the offence of having care or control of a motor vehicle while one's ability to drive was impaired by alcohol. Under the relevant statute, proof that an accused occupied the driver's seat was sufficient as the accused was presumed to have the care and control of the motor vehicle unless he or she established on a preponderance of probabilities that he or she did not enter the vehicle for the purpose of setting it in motion. For the learned Chief Justice, it was irrelevant that the presumption did not relate to an 'essential element' of the offence; in this regard he said:

[t]he exact characterization of a factor as an essential element, a collateral factor, an excuse, or a defence should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive. *If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused.*⁷⁹ (my italics)

After considering a few important cases from these jurisdictions, the Constitutional Court came to the right conclusion that, by shifting the burden of proof onto the accused,⁸⁰ the provisions of Section 217(1)(b)(ii) of the **Criminal Procedure Act** indeed violated the **Constitution**.⁸¹ It thus ruled⁸² that the said provisions were invalid and declared that its decision would invalidate the application of Section 217(1)(b)(ii) in any criminal trial which commenced on or after 27 April 1994, in which the verdict had not yet been given.⁸³

Though Kentridge AJ listened to the state's argument that the Section 217(1)(b)(ii) presumption "did not relate to any element of the offence charged, but merely to the voluntary character of the confession",⁸⁴ the learned acting judge, following the reasoning in the Canadian judgment in **R v Whyte**, remarked that it would be possible in some cases for a conviction to be based solely on a confession admitted under of Section 217(1)(b)(ii), "notwithstanding the Court's reasonable doubt that it was freely and voluntarily made. The practical effect of the presumption is that the accused may be required to prove a fact on the balance of probabilities in order to avoid conviction."⁸⁵

Regarding the state's further argument that the court could in appropriate cases reject admissible but unfairly prejudicial evidence, he ruled that the presumption of innocence could not depend on the exercise of a judicial discretion, the authority for the existence of which was still in dispute.⁸⁶ After carefully considering the state's argument that, in the alternative, the Section 217(1)(b)(ii) presumption could be salvaged by the limitation clause,⁸⁷ he concluded that it did not meet the criteria laid down in the limitation clause, and should, therefore, be declared invalid.⁸⁸

THE (INTERIM) CONSTITUTION AND MATTERS 'PENDING' BEFORE 27 APRIL 1994

Before the intervention of the Constitutional Court, this question was a subject of heated debate in various courts.⁸⁹ At the heart of it all was a proper meaning to be ascribed to the controversial provisions of Section 241(8) of the (interim) **Constitution**, which were to the effect that:

[a]ll proceedings which immediately before the commencement of this Constitution were pending before any court of law, including any tribunal or reviewing authority established by or under law, exercising jurisdiction in accordance with the law then in force, *shall be dealt with as if this Constitution had not been passed*: Provided that if an appeal in such proceedings is noted or review proceedings with regard thereto are instituted after such commencement such proceedings shall be brought before the Court having jurisdiction under this Constitution. (my italics)

On this question the judges of the Constitutional Court themselves were divided in **S v Mhlungu and Others**.⁹⁰ On the one hand, Kentridge AJ, for the minority of the judges,⁹¹ on the basis that the Court was "not entitled to depart from the clear language of the section,"⁹² concluded that Section 241(8) excluded the application of the substantive provisions of the **Constitution** in cases that were pending when the **Constitution** became law.⁹³ Thus, for them, the Constitutional Court's ruling in **S v Zuma and Others** "must remain limited to ... proceedings which began on or after 27 April 1994, ie which were not pending on that date. We cannot override Section 241(8)."⁹⁴

On the other hand, Mahomed J (as he then was), for the majority,⁹⁵ supported by Kriegler J and Sachs J,⁹⁶ ruled that, properly construed, the provisions of Section 241(8) of the **Constitution**, the basic object of which the learned judge said was merely "to

preserve the authority of Courts dealing with pending matters to continue to discharge their functions as such Courts",⁹⁷ did not preclude the enjoyment of the benefits of the **Constitution**, especially Chapter 3 thereof, by persons whose cases were pending before 27 April 1994 when the **Constitution** became operative. Agreeing with Mahomed J, Kriegler J pithily stated that he shared with Mahomed J and Sachs J

a profound disbelief that the framers of the Constitution could conceivably have purported to give, with one hand, the fundamental rights and freedoms to all, only, surreptitiously with the other, to withhold its benefits from many thousands of persons whose criminal cases must have been pending on 27 April 1994.

On this basis, the majority of the judges concluded that the accused "were entitled to invoke the protection of the Constitution in the attack on s 217(1)(b)(ii) of the Criminal Procedure Act ..."⁹⁸ They thus extended the benefits of the Constitutional Court's decision in **S v Zuma and Others**⁹⁹ to all cases, irrespective of whether they "commenced before, on or after 27 April 1994 ... in which the final verdict was or may be given after 27 April 1994."¹⁰⁰

THE IMPLICATIONS OF THE TWO DECISIONS

The presumption contained in the provisions of Section 217(1)(b)(ii) of the **Criminal Procedure Act** has, since the advent of the (interim) **Constitution**, ceased being part of our law.¹⁰¹ Thus, in all cases where the state seeks to rely on a confession, irrespective of when they commenced, it will now have to prove beyond a reasonable doubt that such a confession was made by the accused freely and voluntarily and without any undue influence. Our courts, like courts in all civilised societies, are once again in a position to insist that "before extra-judicial statements can be admitted in evidence the prosecution must ... prove beyond reasonable doubt that the statement was not obtained in a manner which should be reprobated and was therefore in the truest sense voluntary."¹⁰²

However, though the Section 217(1)(b)(ii) presumption is now gone, confessions made to peace officers other than magistrates are still inadmissible in evidence in terms of the remainder of the proviso to Section 217(1) of the **Criminal Procedure Act**, unless they are confirmed and reduced to writing in the presence of a magistrate or justice.

Moreover, the provisions of Section 217(1)(b)(i), which, in my opinion, would make sense only if linked to the now invalid Section 217(1)(b)(ii), are still intact, so that a confession made to a magistrate and reduced to writing by him or her or which has been made and reduced to writing in his or her presence is admissible in evidence upon its mere production if it meets the requirements of this sub-paragraph.

If this unnecessary encumbrance and pretence¹⁰³ too could be removed, our system of criminal justice shall have fully reverted to the common law position as reflected in Section 217(1) of the **Criminal Procedure Act**, where the only enquiry is whether or not the confession was made by the accused freely and voluntarily, in his or her sound and sober senses, without any undue influence, and not also to whom it was made. In other words, it is my contention that the whole proviso to Section 217(1) is unnecessary.

It is obvious that in this respect as in many others, at the very least, an amendment to the **Criminal Procedure Act** is required. I join Langa J in his hope that "it will not be long before a revised Criminal Procedure Act, consistent with the Constitution, is put in place."¹⁰⁴ That may help address numerous shortcomings and obvious elements of unconstitutionality in the Act which otherwise will have to wait till proper "cases and controversies" are appropriately before the Constitutional Court.

THE COURT AND STATUTORY PRESUMPTIONS IN GENERAL

The Constitutional Court, it should further be observed, carefully pointed out that its decision in **Zuma** was not doing away with all statutory provisions which create presumptions in criminal cases.¹⁰⁵ Nor does it seek to invalidate every reverse *onus* provision in our law.¹⁰⁶ The Court fully recognised "the social need for effective prosecution of crime", and that in certain instances some reasonable presumptions may indeed come in handy in this regard.¹⁰⁷ In other words, precisely because statutory presumptions are not intrinsically constitutionally invalid, the merits and demerits of each one of them will have to be evaluated.

In Canada too, not all statutory presumptions, not even those found in reverse *onus* clauses, are *per se* invalid. In **R v Appleby**,¹⁰⁸ for example, the Canadian Supreme

Court held that the presumption of innocence did not preclude all reverse onus clauses; a clause of that nature would be valid if it had four characteristics, namely:

- (1) it must apply only after certain facts have been established by evidence led by the Crown;
- (2) there must be a "rational connection" between the *facta probanda*¹⁰⁹ and the conclusions to be deemed under the reverse *onus* clause;
- (3) the proof required of the accused must be of facts which he or she could *reasonably* be expected to prove or disprove;¹¹⁰ and
- (4) the standard of proof required of the accused must be a balance of probabilities and not proof beyond a reasonable doubt.¹¹¹

In **R v Shelley**¹¹² the Canadian Supreme Court, using these characteristics, held that a reverse *onus* clause which failed to meet anyone of them would be invalid. An even more interesting decision in **R v Oakes**,¹¹³ which is relevant to the discussion of Section 21(1)(a)(i) of the **Drugs and Drug Trafficking Act**¹¹⁴ which follows hereunder, was based on the same considerations.

SECTION 21(1)(A)(I) OF THE DRUGS AND DRUG TRAFFICKING ACT

Under the provisions of Section 21(1)(a)(i) of the **Drugs and Drug Trafficking Act** persons convicted of possession of more than 115 grams of *dagga*¹¹⁵ were presumed to be dealing in the drug, until the contrary was proved by them on a balance of probabilities.

THE VALIDITY OF SECTION 21(1)(A)(I) OF THE DRUGS AND DRUG TRAFFICKING ACT

The case of **S v Bhulwana; S v Gwadiso**,¹¹⁶ in which the accused had been found guilty in magistrates' courts of possession of *dagga* in excess of 115 grams came before the Constitutional Court by way of reference from the Cape Provincial Division of the Supreme Court¹¹⁷ in terms of the (interim) **Constitution**.¹¹⁸ In both **Bhulwana**¹¹⁹ and **Gwadiso** the Cape Provincial Division held that the evidence would not have been

sufficient to convict the accused of dealing in dagga but for the presumption in Section 21(1)(a)(i) of the **Drugs and Drug Trafficking Act**. The Constitutional Court was thus called upon to determine the constitutionality of the presumption, upon which depended the correctness of the conviction of the accused.

The plain effect of Section 21(1)(a)(i) of the **Drugs and Drug Trafficking Act**, as Marais J correctly pointed out in **S v Bhulwana**,¹²⁰ was that once the accused was proved to have been in possession¹²¹ of dagga in excess of 115 grams, he or she was presumed to have been dealing in the drug,¹²² unless he or she established the contrary on a balance of probabilities. In other words, once the State had proved possession of the drug in excess of the statutory limit, the *onus* shifted to the accused.¹²³ However, for this presumption to come into operation, the State, according to the Appellate Division in **S v Jacobs**,¹²⁴ was also required to prove that the accused knew that what he or she was in possession of was dagga. Moreover, as Trollip JA pointed out in **S v Majola**,¹²⁵ the presumption could not operate where the possession of dagga was not proved but presumed.

Furthermore, this reverse *onus* presumption, according to a Natal judgment in **S v Kubheka**,¹²⁶ applied only in respect of prepared or dried dagga and not to a dagga plant or freshly cut, moist dagga. However, it is to be noted that watering a single dagga plant with the necessary intention was regarded as dealing in the drug.¹²⁷

The Constitutional Court once again traversed our own, as well as foreign, case law for the meaning of the phrase "unless the contrary is proved", which was contained in the relevant provision. It concluded that Section 21(1)(a)(i) constituted a reverse *onus* provision which shifted the burden of proof onto the accused. The effect of this was that, even where the accused raised a reasonable doubt as to whether or not he or she was dealing in dagga, if he or she failed to show on a balance of probabilities that he or she was not dealing in the drug, he or she would be convicted of dealing in it.¹²⁸

Because of the likelihood of a conviction despite the existence of a reasonable doubt as to the accused's guilt, the Court also dealt with the justifiability of the Section 21(1)(a)(i) presumption under Section 33(1) of the (interim) **Constitution**.¹²⁹ It

concluded that the Section 21(1)(a)(i) presumption could not be justified in terms of Section 33(1) of the **Constitution**. Although the Court accepted the social need to suppress illicit drug trafficking as an urgent and a pressing one, it could not see how the presumption furthered such an objective. While the presumption constituted a palpable infringement of the right to be presumed innocent till proven guilty beyond reasonable doubt, it also could not see any logical connection between the proved possession of dagga and the presumed dealing therein.¹³⁰

In sum, O'Regan J, in whose judgment the rest of the members of the Constitutional Court concurred, found that the presumption in Section 21(1)(a)(i) of the **Drugs and Drug Trafficking Act** was invalid because it infringed the right to a fair trial which was guaranteed in the (interim) **Constitution**. In particular it concluded that the Section 21(1)(a)(i) presumption violated the presumption of innocence and therefore offended Section 25(3)(c) of the **Constitution**.¹³¹ It thus declared that the provisions of Section 21(1)(a)(i) as well as the words "dagga or" in Section 21(1)(a) were invalid and of no force or effect.¹³² In order to obviate a situation where the litigants who were otherwise successful, were not to obtain the relief they were entitled to, the Court then ruled in terms of Section 98(6)(a) of the (interim) **Constitution** that the order invalidating Section 21(1)(a)(i) presumption should also invalidate any application thereof "in any criminal trial in which the verdict of the trial court was entered after the Constitution came into force, and in which, as at the date of this judgment, either an appeal or review is pending or the time for the noting of an appeal has not yet expired."¹³³

THE LEGAL EFFECT OF THE BHULWANA JUDGMENT

In the light of this judgment, the State now has to prove beyond reasonable doubt that an accused charged with dealing in dagga was actually dealing in the drug and was not merely in possession thereof. Otherwise the accused will be convicted of possession of the drug only.

Of particular note, however, is the fact that the **Bhulwana** judgment was, as stated above, confined specifically to the provisions of Section 21(1)(a)(i) of the **Drugs and Drug Trafficking Act**; the Court, in other words, was, wittingly or unwittingly, concerned

with the application of the presumption in dagga cases as referred to in Section 21(1)(a) only.¹³⁴ As a result of this narrow approach, the Section 21(1)(a) reverse *onus* presumption in respect of dealing in drugs other than dagga was left intact.¹³⁵ Therefore, a person found in possession of cocaine or mandrax, for example, would still be affected by the reverse *onus* presumption and denied his or her basic constitutional right to be presumed innocent as though the **Bhulwana** judgment of the Constitutional Court had not been pronounced. If he or she failed to rebut the presumption, he or she might be found guilty of dealing in drugs other than dagga even if he or she had raised a reasonable doubt, the mischief O'Regan J had apparently set out to address in **Bhulwana**.¹³⁶

Though it accepted that in general to shift the *onus* to an accused would offend the right to be presumed innocent,¹³⁷ the Court was, for some strange reason, not prepared *mero motu* to extend the declaration of invalidity to other similarly worded presumptions in the **Drugs and Drug Trafficking Act** as it had earlier on done in **S v Makwanyane and Another**,¹³⁸ for example. If anything, its earlier decision¹³⁹ to tread rather cautiously in the area of statutory presumptions was reaffirmed in **Bhulwana**. However, one is left to wonder why, if the relevant reverse *onus* presumption was inconsistent with the **Constitution** in respect of dagga, it was not regarded as being similarly inconsistent with regard to other drugs and narcotics as well.

Thus, unless Parliament intervened and passed appropriate legislation, the obviously offensive and unconstitutional reverse *onus* provisions in the **Drugs and Drug Trafficking Act** (and in other statutes) would obviously remain applicable¹⁴⁰ till their validity was raised in concrete proceedings. Accused persons affected by them might be prejudiced for a very long time unless and until someone was prepared to contest their validity or some judge raised *mero motu* their validity and referred the question to the Constitutional Court for a decision.¹⁴¹

THE CONSTITUTIONALITY OF SECTION 21(1)(A)(III) OF THE DRUGS AND DRUG TRAFFICKING ACT

Gutto¹⁴² ascribed this narrow incremental approach adopted by the Court when confronted with a challenge to strike down legislation to 'caution', which he said "is a recognised rule in the interpretation of laws relating to rights and freedoms". Precisely because of this 'caution', it was not surprising at all that, within a short space of time, the Constitutional Court had, to, once again, consider the validity of a similar reverse *onus* presumption contained in the provisions of the **Drugs and Drug Trafficking Act**. In **S v Julies**¹⁴³ the Court had to deal with the provisions of Section 21(1)(a)(iii) of the Act, in terms of which, if an accused person had been proved in a prosecution to have been "found in possession of any undesirable dependence-producing substance, *other than dagga*", it was presumed, until the contrary was proved by the accused person, that he or she dealt in such substance.

Needless to say, the Court, observing that the same reasoning it had previously adopted in **S v Bhulwana; S v Gwadiso** applied *a fortiori* to the presumption in question,¹⁴⁴ came to a unanimous conclusion that the provisions of Section 21(1)(a)(iii) of the Act were in conflict with the (interim) **Constitution** and declared them to be invalid and of no force and effect.¹⁴⁵ The **Julies** case, in my humble submission, could have been avoided if the Court had utilised its power in terms of Section 98(2) of the (interim) Constitution and dealt once and for all with all similar presumptions in the Act in **Bhulwana**, and not piecemeal.

THE CONSTITUTIONALITY OF SECTION 40(1) OF THE ARMS AND AMMUNITION ACT

As stated above, the question of the validity of the presumption contained in Section 40(1) of the **Arms and Ammunition Act** was dealt with by the Constitutional Court in **S v Mbatha; S v Prinsloo**,¹⁴⁶ in which the applicants had faced charges for illegal

possession of arms and ammunition in contravention of Sections 32(1)(a) and 32(1)(e) of the **Arms and Ammunition Act**. Langa J, speaking on behalf of the Court, pointed out that as a legal presumption, it had similar features to the one discussed in the **Bhulwana** case above, the effect of which was to relieve the prosecution of the burden of proof with regard to an essential element of the offence.¹⁴⁷ On the basis of O'Regan J's ruling in **Bhulwana**, the learned judge of the Constitutional Court easily came to the conclusion that the Section 40(1) presumption indeed violated the right of an accused to be presumed innocent in terms of Section 25(3)(c) of the **Constitution**.¹⁴⁸

The next question the learned judge considered was whether the presumption could, nevertheless, be salvaged by the general limitation clause.¹⁴⁹ After subjecting it and the contention of the State to the test developed by Chaskalson P in **S v Makwanyane and Another**,¹⁵⁰ Langa J came to the conclusion that the Section 40(1) presumption was not shown to be reasonable and justifiable as required by the **Constitution**.¹⁵¹ Having found the presumption to have been inconsistent with the **Constitution** and unreasonable and unjustifiable in an open and democratic society based on freedom and equality, the learned judge then declared that it was, with effect from the date of the **Mbatha** judgment, invalid and of no force or effect.¹⁵²

THE LEGAL IMPLICATIONS OF THE MBATHA DECISION

Due to the Constitutional Court's well-reasoned decision in **Mbatha**, the prosecution now has to prove possession of arms and/or ammunition beyond reasonable doubt before a court can convict an accused person thereon. In this regard, the right of an accused person "to be presumed innocent and to remain silent ... and not to testify during trial"¹⁵³ has thus been accorded full respect.

However, the **Mbatha** decision too did not deal with all the similarly worded presumptions in the Act, some of the provisions of which were being impugned; the Constitutional Court simply concerned itself with the question that arose in, and was referred to it by, the Court *a quo*, namely the constitutionality of Section 40(1) of the **Arms and Ammunition Act**.

The presumption that a person who was found in possession of an arm or ammunition at any particular time in violation of Section 37(1) of the **Arms and Ammunition Act** was a juvenile under the age of sixteen years, for instance, was left intact. Thus, until either a proper referral is made to the Constitutional Court in this regard, or Parliament intervenes and changes the law, such a person shall, upon proof of possession by him, or her, as the case may be, "be presumed then to have been under the age of sixteen years, *until the contrary is proved*."¹⁵⁴ (my emphasis)

The same applies to the reverse *onus* presumption affecting any accused person who it is alleged permitted or enabled a juvenile under the age of sixteen years to be in possession of an arm or ammunition. Despite the **Mbatha** decision, "such a person shall, upon proof of possession by the juvenile of such arm or ammunition, be presumed to have permitted or enabled the juvenile to be in possession of such arm or ammunition, until it is proved that he was unable to prevent the juvenile from obtaining possession of the arm or ammunition."¹⁵⁵

Lastly, **Mbatha** left the presumptions in Sections 40(2) and 40(3) of the **Arms and Ammunition Act** intact. I venture to suggest that all the problems Langa J quite rightly identified with regard to Section 40(1) of the Act would equally apply to the provisions of these sections as well, and for the same reasons, ought to have been declared invalid and of no force and effect. All these presumptions too could lead to the conviction of innocent persons who fail to disprove them on a balance of probabilities.

THE VALIDITY OF SECTIONS 245 AND 332(5) OF THE CRIMINAL PROCEDURE ACT

The Constitutional Court found occasion in **S v Coetzee and Others**¹⁵⁶ to grapple with the validity of Sections 245¹⁵⁷ and 332(5)¹⁵⁸ of the **Criminal Procedure Act**. As Langa J pointed out, the presumption in Section 245 fell into the class of "reverse onus" provisions that had already been dealt with previously by the Court.¹⁵⁹ The learned Judge had no problem finding that the provisions of Section 245 clearly infringed "the presumption of innocence ... entrenched in ... the Constitution."¹⁶⁰ He also found that the provisions of Section 245 did not pass the test of the general limitation clause.¹⁶¹

Similarly, the learned Judge did not find it difficult to come to the conclusion that Section 332(5) offended against the right to be presumed innocent which was enshrined in the (interim) **Constitution**.¹⁶² The provisions of Section 332(5) could not be salvaged by the general limitation clause, the learned Judge further found.¹⁶³

In the result, the Court declared both sections to be inconsistent with the (interim) **Constitution**, invalid and of no force or effect.¹⁶⁴

ENDNOTES - CHAPTER SIX

1.. Section 25(3).

2.. The expansion and analysis of the definition of the (now) constitutionally entrenched *right to a fair trial* by Kentridge AJ in **S v Zuma and Others**, 1995(2) SA 642 (CC) at 651-652, paragraph 16, ought to be borne in mind.

3.. Chapter 1.

4.. In **The South African Law of Evidence** (3rd ed, Butterworth, Durban 1981) at 441. See also Centlivres JA in **R v Abel**, 1948 (1) SA 654 (A) at 661 and Steyn CJ in **R v Chizah**, 1960 (1) SA 435 (A) at 442.

Note, however, that in a different context and for reasons of commercial convenience and considerations peculiar to bills of exchange, in **Nelson v Marich**, 1952 (3) SA 140 (A), Centlivres JA decided that this self-same phrase imposed an *onus* upon the defendant who had signed a bill to prove that he had not done so as a party for value.

5.. Hoffman and Zeffertt, *op cit*.

6.. *Supra* at 443. See also Horwitz J in **R v Epstein**, 1951 (1) SA 278 (O).

7.. Section 36, Act 62 of 1955.

8.. Section 2, Act 57 of 1959.

9.. *Op cit* at 443-444.

10.. A good example of this is to be found in the provisions of Section 245 of the **Criminal Procedure Act**, 51 of 1977, which were originally inserted by Act 75 of 1959. That section provides that: "if at criminal proceedings at which an accused is charged with an offence of which a false representation is an element, it is proved that the false representation was made by the accused, he shall be deemed, *unless the contrary is proved*, to have made such representation knowing it to be false." (my emphasis) Unfortunately, our Courts had, at the time of this research, not pronounced themselves on the validity of that section. See the judgment of Godtblatt J in **S v Friedland and Another**, 1996 (8) BCLR 1049 (W), in which Claassen J concurred.

11.. 1931 AD 466.

12.. Act No. 51 of 1977. Similar words are also to be found in Section 32(5)(a), (b) and (c) of the **Aliens Control Act**, No. 96 of 1991 as amended.

13.. *Op cit*. See, for example, Shadrack BO Gutto, 'The Constitutional Court's Opening Salvo in Confronting the Fundamental Mischief of the Past and Sowing Seeds for the New South African Jurisprudence', in (1996) 12 **SAJHR** at 47.

14.. 1995 (3) SA 867 and 1995(7) BCLR 793 (CC).

15.. 1995 (12) BCLR 1579 (CC); 1996 (1) SA 388 (CC).

16.. Act 140 of 1992. The relevant section provided that if it was proved that an accused "was found in possession of dagga exceeding 115 grams ... it shall be presumed, *until the contrary is proved*, that the accused dealt in such dagga ..." (my italics)

17.. 1996 (3) BCLR 293 (CC).

18.. Act 75 of 1969. The relevant provisions the validity of which was contested were to the effect that: "Whenever in any prosecution for being in possession of any article contrary to the provisions of this Act, it is proved that such article has at any time been on or in any premises, including any building, dwelling, flat, room, office, shop, structure, vessel, aircraft or vehicle or any part thereof, any person who at that time was on or in or in charge of or present at or occupying such premises, shall be presumed to have been in possession of that article at that time, until the contrary is proved."

19.. 1996 (11) BCLR 1446 (CC).

20.. Act No. 51 of 1965. See O'Regan J, *ibidem* at 1452, paragraph 7, for the Court's characterisation of the said provisions.

21.. The phrase used in Section 6(3) was "shall be *prima facie* evidence". See O'Regan J, *ibidem* at 1453-1454, paragraphs 11 and 12 for the jurisprudential difference between the phrase used in Section 6(3) and the one used in Section 6(4) of that Act.

22.. Hoffmann and Zeffertt, *op cit* 399, said that this is not a presumption in the usual sense but a general rule of policy placing the burden of proof in criminal matters upon the prosecution.

23.. In 1883, Buchanan J declared in **R v Benjamin**, 3 EDC 337 at 338 that: "... in a criminal trial there is a presumption of innocence in favour of the accused, which must be rebutted. Therefore there should not be a conviction unless the crime charged has been clearly proved to have been committed by the accused. Where the evidence is not reasonably inconsistent with the prisoner's innocence, or where a reasonable doubt as to his guilt exists, there should be an acquittal."

24.. In this regard, Davis AJA held in **R v Ndhlovu**, 1945 AD 369 at 386 that: "In all cases it is for the Crown to establish the guilt of the accused, not for the accused to establish his innocence. The *onus* is on the Crown to prove all averments necessary to establish his guilt."

25.. John Dugard, **Human Rights and the South African Legal Order** (1978), at 262. See also Peter W Hogg, **Constitutional Law of Canada** (2nd ed, The Carswell Co Ltd, Toronto, 1985), at 768.

26.. **R v Britz**, 1949 (3) SA 293 (A) at 302.

27.. **R v Ndhlovu**, *op cit*.

28.. Which Azhar Cachalia et al, **Fundamental Rights in the New Constitution** (Juta & Co, Cape Town, 1994), at 85 said was inherited from English common law. See also Kentridge AJ in **S v Zuma and Others**, *op cit* 656. The leading English case on this was the judgment of Viscount Sankey in **Woolmington v Director of Public Prosecutions**, (1935) AC 462 (HL) at 481.

29.. Section 25(3)(c) of the Constitution.

30.. *Op cit* 86.

31.. See, for example, **Re Winship**, 397 U.S. 358 (1970); **Estelle v Williams**, 425 U.S. 501 (1976); and **Taylor v Kentucky**, 436 U.S. 478 (1978).

32.. Which are to be found in the fifth and fourteenth amendments to the American Constitution. Note that the sixth amendment gives to an accused the right to a public trial by an impartial jury.

33.. In **Tot v The United States**, 319 U.S. 463 (1943) at 467. As was restated in **Re Winship**, 397 U.S. 358 (1970), due process requires proof of guilt beyond a reasonable doubt.

34.. Section 11(d) of the Canadian Charter of Rights.

- 35.. In **R v Oakes**, (1986) 26 DLR (4th) 200 at 212-213.
- 36.. Section 25(2)(a) of the (interim) **Constitution**.
- 37.. *Ibidem*, Section 25(2)(c).
- 38.. *Ibidem*, Section 25(3)(c). As Innes CJ pointed out in **R v Camane**, 1925 AD 570 at 575, "it is an established principle of our law that *no one can be compelled to give evidence incriminating himself*. He cannot be forced to do that either before the trial or during the trial. The principle comes to us through the English law and its roots go far back in history." (my italics)
- 39.. For instance, in a recent appeal to the Privy Council from Hong Kong, Lord Griffiths said in **Lam Chi-Ming v R**, [1991] 3 All ER 172 at 178 that their Lordships were of the opinion that "the rejection of an improperly obtained confession is not dependent only upon possible unreliability but also upon the principle that a man cannot be compelled to incriminate himself and upon the importance that attaches in a civilised society to proper behaviour by the police towards those in their custody. All three of these factors have combined to produce the rule of law applicable in Hong Kong as well as in England that a *confession is not admissible in evidence unless the prosecution establish that it was voluntary*. This, perhaps is the most fundamental principle of the English criminal law ..." (my italics)
- 40.. See Sections 25(2)(a), (c), 25(3)(c) and (d) of the **Constitution**.
- 41.. See **R v Burton**, 1946 AD 773.
- 42.. See **S v Cele**, 1965 (1) SA 82 (A). This position has now been buttressed by our new constitutional system which provides, *inter alia*, that every person arrested for the alleged commission of an offence has the right to remain silent and to be warned of the consequences of making any statement, as well as the right not to be compelled to make a confession or admission which could be used in evidence against him or her. See Section 25(2)(a) and (c) of the (interim) **Constitution** respectively. See also Section 35(1)(a) and (c) of the (new) **Constitution**, Act No. 108 of 1996.
- 43.. Which De Villiers ACJ, in **R v Becker**, 1929 AD 167 at 171 defined as "an unequivocal acknowledgement of guilt, the equivalent of a plea of guilty before a court of law." See also Trollip JA in **S v Grove-Mitchell**, 1975 (3) SA 417 (A).
- 44.. See, for example, **R v Gumede**, 1942 AD 388 at 408, 425; **R v Burton**, 1946 AD 773; **R v Jacobs**, 1954 (2) SA 320 (A) at 323; and **S v W**, 1963 (3) SA 516.
- 45.. See Innes CJ in **R v Barlin**, 1926 AD 459 at 462. See also **R v Nhleko**, 1960 (4) SA 712 at 720; and **S v Mpetsha and Others (2)**, 1983 (1) SA 576 (C) at 581 where Williamson J observed that undue influence can be brought to bear upon an accused person by anyone, and not only by a person in authority.
- 46.. See Section 217(1)(a) of the **Criminal Procedure Act**. Note that, in terms of Section 4 of the **Justices of the Peace and Commissioners of Oaths Act**, No. 16 of 1963 (read with the First Schedule to that Act) a commissioned police officer is, *ex officio*, a justice of the peace and, as such, is entitled to take confessions. The fact that he or she is attached to a police unit investigating the offence to which the confession he or she takes relates, does not, according to **S v Mavela**, 1990 (1) SACR 582 (A), constitute an irregularity.
- 47.. This was obviously intended to obviate the hearsay rule which otherwise requires that when the services of an interpreter have been used, the interpreter should himself or herself testify to the accuracy of his or her translation. See, for example, **R v Mutche**, 1946 AD 874; **R v Tsheutaundzi**, 1960 (4) SA 569 (A) at 573; and **S v Naidoo**, 1962 (2) SA 625 (A) at 632.
- 48.. Per Levinsohn J in **S v Shangase and Another**, 1995(1) SA 425 (D) at 431.

49.. *Ibidem*. Note that Levinsohn J, using the jurisdiction conferred upon him by the parties in terms of Section 101(6) of the **Constitution**, proceeded to determine the constitutionality of the provisions of Section 217(1)(b)(ii) of the **Criminal Procedure Act**. See 429 of the law report.

50.. The shift of the *onus* in respect of voluntariness from the prosecution to the accused occurred only if the confession was made to, or confirmed by, a magistrate and not a justice of the peace. See **S v Maluma en Andere**, 1990 (1) SACR 65 (T) at 73.

The magistrate was not confined to the role of a mere recording machine when taking or confirming a confession; he or she had a particular duty to investigate the possibility of assaults or threats or any undue influence. See **S v Mpetha and Others (2)**, 1982 (2) SA 406 (C); **S v Kekane and Others**, 1986 (4) 466 (W) at 474 and 477; and **S v Jakatyana and Others**, 1990 (1) SACR 420 (Ck) at 421.

51.. See Kentridge AJ in **S v Zuma and Others**, *op cit* 656.

52.. Note the phrase "unless the contrary is proved".

53.. That is, a trial within a trial. See **R v Dunga**, 1934 AD 223.

54.. **S v Mofokeng**, 1992 (2) SACR 261 (O).

55.. See **S v Nene and Others**, 1979 (2) SA 521 (D); and **S v Mkanzi en 'n Ander**, 1979 (2) SA 757 (T). Cf **S v Mbonane**, 1979 (3) SA 182 (T).

56.. Section 217(2) of the **Criminal Procedure Act**.

57.. As was the case in **S v Zuma and Others**, 1995 (1) BCLR 49 (N); see the remarks of Hugo J, *ibid* at 54.

58.. See **S v Mphahlele and Another**, 1982 (4) SA 505 (A) at 512.

59.. *Op cit*.

60.. *Op cit*.

61.. The date upon which the (interim) **Constitution** became operative.

62.. Which, but for the proviso in sub-section (1)(b)(ii), was, and still is, a basic requirement under Section 217(1).

63.. In **S v Zuma and Others**, 1995 (1) BCLR 49 (N) at 54.

64.. In terms of Section 101(6) of the **Constitution**.

65.. The Attorney-General of Kwa-Zulu/Natal, McNally SC, made an application for the referral to the Constitutional Court as he believed that its decision would dispel the prevailing uncertainty as to the constitutionality of Section 217(1)(b)(ii).

66.. In **S v Shangase and Another**, 1995 (1) SA 425 (D).

67.. *Ibidem* at 432.

68.. Which Kentridge AJ confirmed. See **S v Zuma and Others**, 1995 (2) SA 642 (CC) at 662.

69.. 1995 (1) BCLR 49 (N) at 54.

70.. *Ibidem* at 55.

71. In whose judgment all the other judges of the Constitutional Court concurred.

72.. This the Constitutional Court was entitled to do by virtue of the provisions of Section 35(1) of the **Constitution**, which, as was stated above, allows our courts to have regard to comparable foreign case law in the interpretation of the rights guaranteed in it.

73.. For instance, in **R v Appleby**, (1971) 3 C.C.C. (2d) 354 (S.C.C), the Supreme Court of Canada upheld a Criminal Code reverse *onus* provision. Ritchie J, speaking for the majority of the Court, stated at 363-364 that "the words 'presumed innocent until proved guilty according to law' as they appear in s. 2(f) of the Canadian Bill of Rights, must be taken to envisage a law which recognizes the existence of statutory exceptions reversing the onus of proof with respect to one or more ingredients of an offence in cases where certain specific facts have been proved by the Crown in relation to such ingredients."

74.. Which, as the highest court in the land, "stands at the heart of American life." See Lawrence Baum, **The Supreme Court** (Ohio State University, 1981) at ix.

75.. See, for example, Roberts J in **Tot v United States**, 319 U.S. 463 (1943) at 467-468; Harlan J in **Leary v United States**, 395 U.S. 6 (1969) at 36; and, in particular, Stevens J who said in the majority judgment in **County Court of Ulster County, New York, et al v Allen et al**, 442 U.S. 140 (1979) at 167 that, "since the prosecution bears the burden of establishing guilt, it may not rest its case entirely on a presumption unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt."

76.. (1986) 26 DLR (4th) 200 (SCC). This case is even more important with regard to the provisions of Section 21(1)(a)(i) of our **Drugs and Drug Trafficking Act**, the validity of which were dealt with in which is discussed below.

77.. At 222.

78.. (1988) 51 DLR (4th) 481 (SCC).

79.. *Ibid* at 493.

80.. To paraphrase Stratford CJ in **Tregea and Another v Godart and Another**, 1939 AD 16 at 32, if a rebuttable legal presumption shifts the *onus* of proof, it is not a mere rule of evidence but a matter of substantive law.

81.. **S v Zuma and Others**, at 659 and 664.

82.. Utilising its constitutional power contained in Section 98(5), read with Section 98(6)(b), of the **Constitution**.

83.. In **S v Zuma and Others**, *op cit* 664.

84.. *Ibid* at 657.

85.. *Ibid*.

86.. *Ibid*.

87.. Section 33(1) of the **Constitution**.

88.. At 662.

89.. See, for example, **Qozeleni v Minister of Law and Order**, 1994 (3) SA 625 (E); **Gardener v Whitaker**, 1995 (2) SA 672 (E); **S v Willimans and Five Similar Cases**, 1994 (4) SA 126 (C); **Shabalala v Attorney-General, Transvaal**, 1995 (1) SA 608 (T); **Jurgens v Editor, Sunday Times Newspaper, and Another**, 1995 (2) SA 52 (W); and **Kalla and Another v The Master and Others**, 1995 (1) SA 261 (T).

90.. See Kriegler J at 905.

- 91.. With Chaskalson P, Ackerman J and Didcott J concurring in his judgment.
- 92.. At 904.
- 93.. At 902.
- 94.. Per Kentridge AJ at 905. Eduard Fagan, 'The Longest Erratum Note in History', in (1996) 12 **SAJHR** 79ff supported the approach of the minority in the **Mhlungu** case. In the author's view, the clear and unambiguous language of Section 241(8) of the (interim) **Constitution** ought to have been applied, irrespective of the consequences. At 89, the author said: "the Constitution affords the courts untold opportunities for extending the protection of human rights to citizens. Where it doesn't, they shouldn't." However, see Nicholas Smith, 'The Purposes Behind the Words', in (1996) 12 **SAJHR** at 90ff for a different view.
- 95.. With Langa J, Madala J, Mokgoro J and O'Regan J concurring.
- 96.. Albeit for different reasons. See 905-906 of the law report.
- 97.. At, *inter alia*, 876, 879 and 883 of the law report.
- 98.. Per Mahomed J at 889-890.
- 99.. In which the provisions of Section 217(1)(b)(ii) of the **Criminal Procedure Act** were declared constitutionally invalid.
- 100.. Per Mahomed J at 890-891. Fagan *op cit* 89 concluded that the majority in the matter, whom he accused of having striven "to find the words for a predetermined meaning", erred. However, see Nicholas Smith, *op cit*.
- 101..The effect of this was felt in the case of **S v Mvelase**, 1996 (8) BCLR 1055 (N), which was decided by Levinsohn J, with Howard JP concurring. See *ibidem*, particularly at 1056H-1057J.
- 102.. Per Lord Hailsham in **Wong Kam-ming v R**, [1979] 1 All ER 939 at 946.
- 103.. See Section 217(1)(a) of the **Criminal Procedure Act**. As stated above, because commissioned police officers are, in terms of Section 4 (read with the First Schedule to the Act) of the **Justices of the Peace and Commissioners of Oaths Act** *ex officio* justices of the peace, the police can always get these in-house justices involved in the taking and recording of confessions even in cases in the investigation of which they are involved, without referring to magistrates. This practice, which, as the **Mavela** decision shows, the Appellate Division has found not to be irregular, surely denies the accused the opportunity to make confessions before impartial judicial officers.
- 104..In **S v Coetzee and Others**, 1997 (4) BCLR 437 (CC) at 442-443, paragraph 1.
- 105.. At 662-663.
- 106.. *Ibidem* at 662.
- 107.. *Ibidem*.
- 108.. (1972) S.C.R. 303.
- 109.. The facts to be proved.
- 110.. Kentridge AJ, in **S v Zuma and Others**, at 662 seems to have had this characteristic in mind when he said some of our own reverse **onus** clauses "may be justifiable as being rational in themselves, requiring an accused person to prove only facts to which he or she has easy access, and which it would be unreasonable to expect the prosecution to disprove."

- 111.. This position was subsequently upheld in **R v Whyte**, (1983) 6 D.L.R. (4th) 263 (B.C.C.A.) where the provisions of Section 11(d) of the **Canadian Charter of Rights and Freedoms** were used.
- 112.. (1981) 2 S.C.R. 196.
- 113.. (1983) 40 O.R. (2d) 660 (Ont. C.A.).
- 114.. As it turned on the constitutional validity of a reverse *onus* clause then found in the Canadian **Narcotic Control Act**.
- 115.. Hemp, also called cannabis or marijuana, used as a narcotic.
- 116.. *Op cit.* For a summary of the facts of this case, see Tshepo L Mosikatsana, 'The Presumption of Innocence and Reverse Onus: Due Process under the South African Bill of Rights', in (1996) 12 **SAJHR** 125 at 126.
- 117.. Which was supposed to deal with the two cases by way of automatic review under Section 302(1)(a) of the **Criminal Procedure Act**.
- 118.. Section 102(1).
- 119.. **S v Bhulwana**, 1995 (1) SA 509 (C).
- 120.. 1995 (1) SA 509 (C) at 510, where the learned judge correctly pointed out that the Section 21(1)(a)(i) presumption was "in direct conflict with the accused's entrenched right 'to be presumed innocent' of dealing in dagga."
- 121.. Which is a substantive offence under Section 4, and which carries, at worst, a sentence of imprisonment not exceeding a period of 15 years in terms of Section 17(d), of the **Drugs and Drug Trafficking Act**.
- Our Courts, it needs to be pointed out, make a distinction between *possession* and *being found in possession* of a drug. See **R v Moosa**, 1960 (3) SA 517 (A), at 530; **S v Wilson**, 1962 (2) SA 619 (A); **S v Majola**, 1975 (2) SA 727 (A) at 735; and **S v Hoosain**, 1987 (3) SA 1 (A) at 11.
- 122.. Which is a more serious offence under Section 5, and which carries, at worst, a heavier sentence of imprisonment for a period not exceeding 25 years under Section 17(e), of the **Drugs and Drug Trafficking Act**.
- 123.. As Tebbutt AJ put it in **S v Qunta**, 1984 (3) SA 334 (C) at 338, "... what the State must establish, in order to bring the presumption ... that an accused person dealt in dagga, into operation, is that such accused was found in possession of more than 115 grams of dagga in the sense that he had it in his physical possession and also that he had the necessary *animus* to possess it ... It then becomes incumbent upon such accused person to rebut that presumption, which would include his establishing on a balance of probabilities an absence of *mens rea*."
- 124.. 1989 (1) SA 652 (A) at 659 and 662.
- 125.. 1975 (2) SA 727 (A) at 735.
- 126.. 1972 (1) PH H(S) 58 (N).
- 127.. See Bekker J in **S v Kgupane and Andere**, 1975 (2) SA 73 (T).
- 128.. See O'Regan J in **S v Bhulwana; S v Gwadiso**, 1996 (1) SA 388 (CC) at 393, paragraph 8.
- 129.. *Ibidem* at 394-395, paragraphs 16 and 17.
- 130.. *Ibidem* at 397, paragraph 24.

131.. *Ibidem* at 394, paragraph 15.

132.. *Ibidem* at 400, paragraph 34.

133.. *Ibidem*.

134.. The dramatic result of this approach was the decision in **S v Manyonyo**, 1996 (11) BCLR 1463 (E), a case involving possession of dagga, in which the prosecution had relied on the similarly worded presumption contained in 21(1)(c) of the Act to get a conviction for dealing in dagga. While the magistrate had taken cognisance of the **Bhulwana** decision of the Constitutional Court, he had pointed out, and Erasmus J, with Jones J concurring, accepted, that **Bhulwana** had left intact the presumption in Sections 20 and 21(1)(c) of the Act. Thus, while Erasmus J was of the opinion that it was "probable that the Constitutional Court will declare section 21(1)(c) of the Act invalid", he referred the matter of the constitutionality of both sections to the Constitutional Court for its decision. See Erasmus J, *ibidem* at 1468B-1469B.

135.. See Section 21(1)(a)(ii) and (iii) of the Act.

136.. At 393, paragraph 8, where the learned Judge of the Constitutional Court acknowledged that: "The effect of imposing the legal burden on the accused may ... result in a conviction for dealing despite the existence of a reasonable doubt as to his or her guilt."

137.. A position which was adopted by Dickson CJC in the leading decision of the Canadian Supreme Court in **R v Oakes**, *op cit* 345, which dealt with the constitutionality of the provisions of Section 8 of the (Canadian) **Narcotic Control Act**.

138.. 1995 (3) SA 391 (CC) at 452 and 453 where Chaskalson P, in whose judgment all the judges of the Constitutional Court concurred, when dealing with the constitutionality of Section 277(1)(a) of the **Criminal Procedure Act**, deliberately and *mero motu* extended the declaration of invalidity to the provisions of Section 277(1)(c), (d), (e) and (f) of the said Act.

139.. See Kentridge AJ in **S v Zuma and Others**, at 662-663.

140.. Despite, and in flagrant violation of, the clear provisions of Section 4(1) of the **Constitution**.

141.. As was done by Marais J, with Brand J concurring, in **S v Bhulwana**, 1995 (1) SA 509 (C), for example.

142.. *Op cit* 52.

143.. 1996 (7) BCLR 899 (CC).

144.. *Ibidem* at 900-901, paragraphs 3 and 4.

145.. *Ibidem* at 901, paragraph 5.

146.. 1996(3) BCLR 293 (CC).

147.. At 299, paragraph 9.

148.. *Ibidem* at 300, paragraph 12.

149.. Section 33(1) of the **Constitution**.

150.. 1995 (3) SA 391 (CC) at 436, paragraph 104.

151.. See **S v Mbatha**; **S v Prinsloo**, *supra* at 306, paragraph 27, where the learned judge said that "Section 40(1) of the Act is unconstitutional inasmuch as it is an unreasonable and unjustifiable violation of the presumption of innocence."

152.. *Ibidem* at 308-309, paragraph 34.

153.. Section 25(3)(c) of the **Constitution**.

154.. Section 37(4)(a) of the Act.

155.. Section 37(4)(b) of the Act.

156. 1997 (4) BCLR 437 (CC).

157. Which provided that "If at criminal proceedings at which an accused is charged with an offence of which a false representation is an element, it is proved that the false representation was made by the accused, he shall be deemed, unless the contrary is proved, to have made such representation knowing it to be false."

158. Which provided that "When an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body was liable to prosecution any person who was, at the time of the commission of the offence, a director or servant of the corporate body shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it, and shall be liable to prosecution therefor, either jointly with the corporate body or apart therefrom, and shall on conviction be personally liable to punishment therefor."

159. At 443, paragraph 6.

160. At 444, paragraph 8.

161. At 446, paragraph 17.

162. At 456, paragraph 44.

163. At 457-458, paragraph 49.

164. At 459, paragraph 52.

CHAPTER SEVEN

THE RIGHT TO A FAIR TRIAL AND OUR APPEALS PROCEDURES

INTRODUCTION

In **S v Ntuli**¹ and in **S v Rens**,² the Constitutional Court had occasion to grapple with the right to a fair trial³ in relation to some aspects of our appeals procedures. As Didcott J noted in **S v Ntuli**,⁴ the processes involved in the two matters, which related to affording access, for the purposes of the order or relief sought, to a court higher than the court of first instance, had some features in common.

In the first case, the issue was whether the provisions of Section 309(4)(a)⁵ of the **Criminal Procedure Act**,⁶ were unconstitutional. Essentially this section provided that no person who had been convicted by a lower court of an offence, and was undergoing imprisonment for that offence or for any other offence, was entitled to prosecute *in person* any proceedings for appeal against the proceedings relating to such conviction unless a judge of the provincial or local division having jurisdiction had certified that there were reasonable grounds for appeal.

With the provisions of this section, which limited the right of appeal of a prisoner without professional legal assistance, the legislature ostensibly wished to prevent prisoners from abusing the right to conduct their own appeals.⁷ As the purposes of review and appeal as well as the procedures which ought to be followed in regard to the one or the other differ, the prisoner-applicant seeking, and the judge issuing, a judge's certificate would have to indicate clearly whether appeal or review was being referred to.⁸

The requisite judge's certificate, it must be noted, did not grant a prisoner leave to appeal; it merely granted him or her leave to prosecute *in person* an appeal already noted under Section 309 of the **Criminal Procedure Act**. Thus, the refusal to grant such a certificate was not a refusal to allow an appeal to be prosecuted in the usual way.⁹

In the second case, the question to be determined was whether the relevant provisions of the **Criminal Procedure Act**¹⁰ requiring a person convicted by a superior court of an offence to apply for leave to appeal against such conviction and sentence,¹¹ and, in the course of such application, to satisfy the trial court on a balance of probabilities that there were reasonable prospects of success on appeal, were unconstitutional by reason of inconsistency with Section 25(3)(h) of the (interim) **Constitution**.¹² The relevant provisions of the Act were inherited from our past criminal justice systems,¹³ and had been applied in many instances in the history of our legal system before the Constitutional Court's judgment in **S v Rens**.¹⁴

Applications for leave to appeal may be made orally at the end of the trial by the accused person or by his or her legal representative. Alternatively, the person affected may apply in writing for leave to appeal within a specified period. The procedure allows for condonation of late applications in appropriate instances. The test for reasonable prospects of success on appeal is lower than that applied to determine whether the appeal should succeed.¹⁵ All that is required is that there should be a reasonable prospect of success on appeal.¹⁶ The test of reasonable prospects of success on appeal applies to both questions of law and fact.¹⁷

In principle, leave to appeal is granted only after a sentence has been imposed. This principle helps prevent appeals from being handled piecemeal.¹⁸ However, in very rare and special circumstances, such as was the case in **S v Majola** and **S v Augustine**,¹⁹ for example, a departure from this principle is allowed.

According to Section 316(1), an accused person convicted of any offence before a superior court may apply for leave to appeal against his or her "conviction or against any sentence or order following thereon". An accused person convicted of any offence

before any such court on the basis of a plea of guilty may only note an appeal and apply for leave to appeal only against any sentence or order following thereon. However, as the Appellate Division decision in **S v Mavhungu**²⁰ shows, the fact that a person pleaded guilty in a superior court to a charge of *murder* does not prevent him or her from appealing against a conviction which was based on such a plea.

A judge granting leave to appeal is required not only to give reasons for his or her decision but also to indicate in respect of which aspects of the matter that is done.²¹

The two cases are now to be discussed *seriatim*.

S V NTULI

SECTION 309(4)(A)

In this case, the person concerned, Nicko Ntuli, who had not been legally represented at his trial, was convicted by a regional magistrate of rape, attempted murder and assault with intent to do grievous bodily harm, and sentenced to imprisonment for an effective aggregate period of thirteen years. Ntuli noted an appeal and sought to prosecute it personally as he apparently could not, at that stage,²² afford the costs of legal representation. Due to the relevant provisions of the **Criminal Procedure Act**,²³ however, he could not do so. Though Cloete J of the Witwatersrand Local Division, within the jurisdiction of which the matter fell, concluded that there were no prospects of success on appeal whatever, the matter was nonetheless *mero motu* referred²⁴ to the Constitutional Court for its decision.

The Constitutional Court itself, after a perusal of the record, instructed both sides to also address it on whether the relevant provisions of the **Criminal Procedure Act**, which applied only to *convicts who were not legally represented*,²⁵ infringed the provisions of Section 8(1)²⁶ or (2)²⁷ [or both] of the (interim) **Constitution**, and if so, whether the infringement was permissible under the (interim) **Constitution**.²⁸ The Court acknowledged that the Section 309(4)(a) requirement of a judge's certificate obviously

operated, in each case affected by it, as a restriction on the full access to the Supreme Court which was enjoyed by those who were free to prosecute their similar appeals to finality and usable for the determination of the appeals themselves.²⁹ It further held that that requirement, which sounded rather vague and which frustrated the enjoyment of a basic right, namely access to a higher court than that of first instance, was incompatible with the provisions of Section 25(3)(h) of the (interim) **Constitution**.³⁰

Didcott J also held that it followed, in his opinion, that the requirement was also inconsistent with the equality clause, particularly Section 8(1) of the (interim) **Constitution**.³¹ Though accepting it as trite that "differentiation does not amount *per se* to unequal treatment in the constitutional sense",³² the learned judge of the Constitutional Court held that the relevant provisions of the **Criminal Procedure Act** violated both Sections 25(3)(h) and 8(1) of the (interim) **Constitution**,³³ as they unfairly discriminated against particularly those who laboured under the greatest disadvantage in managing their appeals without that extra handicap, namely the Section 309(4)(a) requirement.

The next question to be considered was whether the provisions of Section 309(4)(a) of the Act were, nonetheless, saved by the general limitation clause.³⁴ Didcott J opined that the statutory provisions failed both the test of reasonableness and that of justifiability in an open and democratic society based on freedom and equality.³⁵ Therefore, they could not be allowed to stand.³⁶

The Court then had to grapple with the possibility of abuse of a total abolition of the requirement of the judges' certificates. After having considered the statistics presented to the Court in argument, Didcott J assumed that, for the time being at any rate, the total of appeals from magistrates' courts would be swollen substantially by allowing prisoners who until then needed certificates to appeal in future without them. The learned judge was of the opinion that Parliament needed time to address the issue and concluded that it was in the interests of justice and good government for the Court to provide the opportunity for it to do so.³⁷

In the result, the provisions of Section 309(4)(a) were adjudged to be invalid on the score of their inconsistency with the (interim) **Constitution**.³⁸ The Court,³⁹ however, suspended the declaration of invalidity and ordered Parliament to remedy the defect by 30 April 1997;⁴⁰ pending action by Parliament within the specified period, the provisions of Section 309(4)(a) of the **Criminal Procedure Act** would thus remain valid. The matter was remitted to the Witwatersrand Local Division which was instructed to deal with it accordingly.

SECTION 305

The most unfortunate thing is that the Constitutional Court did not extend this judgment to the provisions of Section 305 of the **Criminal Procedure Act**. Therefore, pending successful litigation on this point, though Section 305 would have the same discriminatory effect as the impugned Section 309(4)(a) of the Act, which were quite correctly adjudged to be constitutionally invalid, a person convicted by a lower court of an offence and undergoing imprisonment for that offence or any other offence, shall still not be entitled to prosecute *in person* any proceedings for the *review* of the proceedings relating to such conviction unless a judge of the provincial or local division having jurisdiction has certified that there are reasonable grounds for review. Once again, the Constitutional Court was not prepared to use its power as the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of the (interim) **Constitution**⁴¹ to intervene and curb the obvious injustice and unconstitutionality immanent within Section 305.

S V RENS

In this case, the applicant⁴² had been convicted in criminal proceedings before a provincial division of the Supreme Court sitting as a court of first instance. After conviction and sentence, the applicant had applied for leave to appeal. Though the court *a quo* had concluded that there were no reasonable prospects of success on appeal, it had nonetheless referred the question of whether the provisions of the **Criminal Procedure Act**,⁴³ in terms of which an appeal in the case of proceedings in a

superior court shall lie only as provided in Section 316 to 319 of the Act, and not as a matter of right, were unconstitutional by reason of their apparent inconsistency with the provisions of the (interim) **Constitution**.⁴⁴

The **Criminal Procedure Act**,⁴⁵ as stated above, requires a person who has been convicted by a superior court to apply for leave to appeal against both conviction and sentence, if he or she wishes to appeal. If the trial court refuses leave to appeal, the Act⁴⁶ makes provision for the convicted person to petition the Chief Justice. Apparently, the underlying purpose of these provisions, which were even given constitutional recognition,⁴⁷ is to ensure that the work load of appellate courts is not made more cumbersome by requiring them to deal with appeals where there are no reasonable prospects of success.

On the face of it, the provisions requiring leave to appeal⁴⁸ seem to have been repugnant to and in conflict with the provisions of Section 25(3)(h) of the (interim) **Constitution** which, as stated above, guaranteed to every accused person the right to a fair trial, including the right "to have recourse by way of appeal or review to a higher court than the court of first instance". However, the provisions of Section 25(3)(h) seem to have been qualified by Section 102(11) of the (interim) **Constitution**.⁴⁹ It would thus appear that appeals to the Appellate Division and the Constitutional Court were not automatic. To paraphrase Magid J, the right to appeal to the Appellate Division or the Constitutional Court was not an absolute right of appeal.⁵⁰

The Constitutional Court had to reconcile those two seemingly conflicting provisions of the (interim) **Constitution**. Madala J stated that, as a matter of principle,

[i]t is not to be assumed that provisions in the same constitution are contradictory and the two provisions should, if possible, be construed in such a way as to harmonise with one another.⁵¹

For the learned judge, the basic right protected by Section 25(3) was the fairness of the trial, a criterion with which Section 102(11) had to be consistent, whether interpreted narrowly or extensively.⁵² With particular reference to Section 25(3)(h), the learned judge concluded that what was required was that "provision be made either for an appeal in the conventional manner, or for a review in the sense of a re-assessment of

the issues by a court higher than that in which the accused was convicted. Such a construction would bring the provisions of section 25(3)(h) and section 102(11) into harmony with one another."⁵³

Madala J concurred with Magid J who concluded in **S v Bhengu**⁵⁴ that Section 25(3)(h) of the (interim) **Constitution** had not created an absolute right of appeal.⁵⁵ The learned judge considered the provisions of Sections 316-319 of the **Criminal Procedure Act** not to be unfair, though no provision for oral argument or a full re-hearing of the matter was made.⁵⁶

The learned judge further reaffirmed (*ex abundanti cautela*) that "[t]he full bench is clearly a higher tribunal than a court composed of a judge sitting alone with or without assessors."⁵⁷ Thus, an appeal to a court higher than that of first instance may also mean an appeal to the full bench. Only the Appellate Division is entitled to grant leave to appeal against a decision or order of a full court acting as a court of appeal.

Though in the heads of argument the applicant had not mentioned the applicability of the equality clause to his matter, Madala J canvassed that issue after it had been presented in argument. The learned judge's conclusion was that the equality clause would not help the applicant in his matter. Of particular note was the learned judge's statement that:

[t]he principle that there be equality before the law and equal protection of the law does not require identical procedures to be followed in respect of appeals from or to different tiers of courts. As long as all persons appealing from or to a particular court are subject to the same procedures the requirement of equality is met ... it is quite rational that different procedures be followed in the different courts given the different circumstances.⁵⁸

The Court⁵⁹ thus found that the provisions of Section 316 of the **Criminal Procedure Act** were not inconsistent with Section 8 or 25(3)(h) of the (interim) **Constitution**.⁶⁰

ENDNOTES - CHAPTER SEVEN

- 1.. 1996 (1) BCLR 141 (CC).
- 2.. 1996 (2) BCLR 155 (CC).
- 3.. Particularly the provisions of Section 25(3)(h) of the (interim) **Constitution** which were to the effect that every accused person had the right "to have recourse by way of appeal or review to a higher court than the court of first instance".
- 4.. *Supra* at 147, paragraph 8.
- 5.. Read with Section 305.
- 6.. Act No. 51 of 1977.
- 7.. **S v Muniohambo**, 1983 (4) SA 791 (SWA) at 792.
- 8.. *Ibidem*.
- 9.. **R v Gibbs**, 1959 (2) SA 84 (C) at 85C. See also **R v Nel**, 1960 (4) SA 228 (O) at 229B-E; and **S v Thos en 'n Ander**, 1976 (2) SA 408 (O) at 410B-E.
- 10.. To wit Section 316, read with Section 315(4).
- 11.. It is noted in passing that leave to appeal from the trial court was abolished and replaced by an automatic right of appeal where a sentence of death was imposed. See Section 316A(1) of the **Criminal Procedure Act**, which was inserted by means of Section 11 of the **Criminal Law Amendment Act**, 107 of 1990.
- 12.. The same issue had arisen in an unreported CPD case before Conradie J, namely **S v Madasie and Others**, Case No. SS 105/94. See page 2 for the ruling of the Court in that case. See also **S v Bhengu**, 1995 (3) BCLR 394 (D).
- 13.. Section 369 of the **Criminal Procedure and Evidence Act**, 31 of 1917; and Section 363 of the **Criminal Procedure Act**, 56 of 1955.
- 14.. See, for example, **R v Ngubane and Other**, 1945 AD 185 at 186-187; **R v Baloi**, 1949 (1) SA 523 (A) at 524-525; **S v Shabalala**, 1966 (2) SA 297 (A); and **S v Sikosana**, 1980 (4) SA 559 (A) at 561-562.
- 15.. **S v N**, 1991 (2) SACR 10 (A) at 13B-C.
- 16.. **S v Ackerman en 'n Ander**, 1973 (1) SA 765 (A) at 767G-H.
- 17.. **R v Khuzwayo**, 1949 (3) SA 761 (A) at 765.
- 18.. **S v Majola**, 1982 (1) SA 125 (A) at 132F-G.
- 19.. 1980 (1) SA 503 (A).
- 20.. 1981 (1) SA 56 (A) at 63G-H.
- 21.. **S v Sikosana**, *supra* at 563A-E.
- 22.. His position had subsequently changed when the Legal Resources Centre had stepped in and acted for him *pro amico*.

- 23.. Section 309(4)(a), read with Section 305.
- 24.. In terms of Section 102(1) of the (interim) **Constitution**.
- 25.. And not to represented prisoners or convicted persons, legally represented or unrepresented, who were not serving sentences of imprisonment.
- 26.. Which provided that "every person shall have the right to equality before the law".
- 27.. Which proscribed 'unfair discrimination' against anyone.
- 28.. Section 33(1).
- 29.. See Didcott J in **S v Ntuli**, *supra* at 150, paragraph 17.
- 30.. *Ibidem*.
- 31.. *Ibidem*, paragraph 18.
- 32.. *Ibidem*, paragraph 19.
- 33.. *Ibidem* at 150-151, paragraphs 20 and 21.
- 34.. Section 33(1) of the (interim) **Constitution**.
- 35.. **S v Ntuli**, *supra* at 152, paragraph 25.
- 36.. *Ibidem*.
- 37.. *Ibidem* at 152-153, paragraphs 27-28.
- 38.. *Ibidem* at 153, paragraph 30.
- 39.. Acting in terms of Section 98(5) of the (interim) **Constitution**.
- 40.. **S v Ntuli**, *supra* at 153, paragraph 30.
- 41.. Section 98(2) of the (interim) **Constitution**.
- 42.. So-called solely for the sake of convenience. See Madala J at 158, paragraph 3.
- 43.. Section 316, read with Section 315(4).
- 44.. Section 25(3)(h) referred to above in the discussion of **S v Ntuli**.
- 45.. Section 316(1).
- 46.. Section 316(6).
- 47.. See Section 102(11) of the (interim) **Constitution**.
- 48.. Specifically Section 316(1)(b) of the **Criminal Procedure Act**.
- 49.. Which provided that "Appeals to the Appellate Division and the Constitutional Court shall be regulated by law, including the rules of such courts, which may provide that *leave of the court from which the appeal is brought, or to which the appeal is noted, shall be required as a condition for such appeal.*" (my emphasis)
- 50.. In **S v Bhengu**, *supra* at 397f.

51.. **S v Rens**, at 161, paragraph 17.

52.. *Ibidem* at 162, paragraph 18.

53.. *Ibidem*, paragraph 21.

54.. *Supra* at 397I-398A.

55.. **S v Rens**, *supra* at 163, paragraph 22.

56.. *Ibidem* at 163-164, paragraphs 23-25. Note the foreign cases cited in paragraph 24 on the question of an oral argument or a re-hearing of the matter.

57.. *Ibidem* at 164, paragraph 27.

58.. *Ibidem*, paragraph 29.

59.. With the rest of the members of the Court concurring in Madala J's judgment.

60. *Ibidem* at 165-166, paragraph 30.

CHAPTER EIGHT

THE RIGHT TO A FAIR TRIAL AND THE RIGHT TO LEGAL ASSISTANCE

INTRODUCTION

The right of access to one's legal adviser¹ and the right to professional legal assistance² are inextricably bound up with the right to a *fair trial*,³ a principle which even in the heyday of apartheid was accorded respect by our judiciary.⁴ As NC Steytler pointed out,

[o]ne of the fundamental principles of a fair trial is that the accused should be afforded the opportunity to participate in the decision-making processes which may affect his interests. To assist him in such participation he is entitled to be represented by a lawyer, whose duty it will be to ensure that the opportunity to participate is afforded and utilized fully. In undefended cases, on the other hand, the accused bears that responsibility.⁵

The nature of our accusatorial trial system⁶ makes legal representation in our criminal trials extremely desirable, irrespective of the station in life an accused person occupies. In this regard, the remarks of Sutherland J in *Powell v Alabama*⁷ are apposite. The learned judge of the US Supreme Court said that:

[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he may not be guilty, he faces the danger of conviction, because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and the illiterate or those of feeble intellect.⁸

Prior to the adoption of the (interim) **Constitution**, however, the accused in criminal proceedings did not have a right to be assisted in their defence at the instance of the *fiscus*. The government in fact once saw providing legal aid to the indigent accused as *subsidizing crime*.⁹ Though the right to professional legal assistance was recognised in the **Criminal Procedure Act**,¹⁰ all it entailed was that an accused person may not be deprived of the opportunity to engage the services of a lawyer, if he or she could afford the cost of his or her (ie the lawyer's) services.¹¹ Where an accused could not afford the services of a lawyer, he or she had no right to demand that a lawyer should be appointed on his or her behalf.¹²

Under our law the right of access to a legal adviser is available to the person who can afford the cost of legal services from the time of his or her arrest.¹³ This right exists whether or not he or she has been formally charged with the commission of an offence; it can thus be exercised even where such a person has been detained as a suspect.¹⁴ Refusal on the part of the authorities to allow a person who has been arrested an opportunity to contact and be assisted by his or her legal adviser is not only contrary to the **Criminal Procedure Act**, but may also constitute an abuse of power.¹⁵

However, this fundamental due-process right, needless to say, was available only to the affluent who could afford the cost of legal services, and not to the indigent.¹⁶ It was, as Didcott J remarked, "a right to representation which no pauper can hope to exercise."¹⁷

To paraphrase Steytler,¹⁸ the majority of accused persons in South Africa, who are indigent, illiterate or under-educated, inexperienced and unfamiliar with the official languages used in our Courts, would not be able to participate effectively in court proceedings without professional legal assistance. They, the wretched of the earth, would routinely confront the criminal justice system, in a foreign and hostile territory, completely unassisted. And yet the mighty State would be utilising the financial resources at its disposal to hire as prosecutors persons trained in law.¹⁹

Needless to say, the majority of the indigent accused persons, to whom the criminal justice system was, and still is, inaccessible, were, and still are, blacks. The grave injustice done to such persons is there for all and sundry to see: "Many are illiterate or

barely literate. Few speak or understand either official language, or cope well enough to hold their own in a tongue that remains foreign to them. What is said in our courtrooms to each of the rest, what he in turn says there, must therefore be interpreted, word for word. But he is still not orientated. For much of our jurisprudence is alien to the culture and traditions of the society from which he springs. So are some of our procedures. Entangled in the workings of a legal machinery that bewilders him, he has the most to gain from a lawyer's help and the most to lose from the lack of it. Yet *the barrier of poverty stands highest in his very case.*²⁰ (my emphasis)

Our Courts intervened and, as a *mere rule of practice*,²¹ ensured that, at the very least, indigent accused persons in capital cases in the Supreme Court²² had the services of *pro Deo* counsel²³ who were independent members of the bar and not in any way connected to the police and the prosecution.²⁴ In most cases *pro Deo* counsel were junior members of the bar who were usually not assisted by instructing attorneys.²⁵ Moreover, our Courts had no power to compel members of the bar to appear as *pro Deo* counsel in any matter;²⁶ they could not properly issue a *mandamus* ordering the State to pay for professional legal assistance rendered to an accused person.²⁷

The provision of legal aid was for the first time given statutory footing with the enactment of the **Legal Aid Act**.²⁸ However, besides the attitude of the State,²⁹ there was always the problem of affordability.³⁰ Thus, the Legal Aid Board issued a stringent **Legal Aid Guide** which, *inter alia*, excluded indigent accused persons who, according to legal aid officers, led a criminal life or were unemployed for no good reason, or who were involved in cases where *pro Deo* counsel was provided. The **Legal Aid Guide** also excluded accused persons in respect of offences for which an admission of guilt had been determined, or which could be compounded, or where the commission of the offence was admitted, or where the defence was so simple that it could be handled by the accused person himself or herself. Unless the director of legal aid granted permission due to exceptional circumstances, traffic offences and all offences connected with the use of a motor vehicle were also excluded.³¹

In other words, from the very outset, our legal aid scheme was never intended to be the kind of legal aid envisaged in US Court decisions such as **Gideon v Wainwright**³² and

Argersinger v Hamlin,³³ for instance. However, as will be shown below, some of our brave and human rights-oriented judges tried, in very difficult and trying circumstances prior to the adoption of the (interim) **Constitution**, to ameliorate the position of the indigent accused. Some of them certainly might have thought that some space for innovation and judicial creativity had become open to them when the preamble to the **Republic of South Africa Constitution Act, 1983**³⁴ solemnly declared "one of our national goals" to be "the equality of all under the law".³⁵

THE RIGHT TO BE INFORMED OF THE RIGHT TO COUNSEL

As observed above, our Courts have for a very long time recognised the importance of assistance by counsel in criminal proceedings, wherever possible and necessary, to ensure that every accused person has a fair trial. In **S v Baloyi**,³⁶ for example, Margo J acknowledged that:

[t]here are cases where, because of the gravity of the charge or the complexity of the matter, the accused ought in the interests of justice to be represented, even though he cannot afford it. In such cases, if a *pro deo* defence is not provided, it would be the duty of the Court to refer the matter to one of the legal aid bodies or to invoke the assistance of one or other of the professional bodies to appoint a legal adviser to act without remuneration.³⁷

However, prior to the decision of Goldstone in **S v Radebe; S v Mbonani**,³⁸ though some magistrates did advise the accused that they had a right to seek the assistance of legal counsel, the practice was far from universal. In other words, there was no firm rule along those lines. Goldstone J, a human rights standard-bearer of international repute, remarked that:

[i]f there is a duty upon judicial officers to inform unrepresented accused of their legal rights, then I can conceive of no reason why the right to legal representation should not be one of them ... depending upon the complexity of the charge or of the legal rules relating thereto and the seriousness thereof, an accused should not only be told of this right but he should be encouraged to exercise it. He should also be informed in appropriate cases that he is entitled to apply to the Legal Aid Board for assistance. *A failure on the part of a judicial officer to do this, having regard to the circumstances of a particular case, may result in an unfair trial in which there may well be a complete failure of justice.* I should make it clear that I am not suggesting that the absence of legal representation *per se*, or the absence of the suggested advice to an accused person *per se*, will necessarily result in ... an unfair trial and the failure of justice.

Each case will depend on its own facts and peculiar circumstances.³⁹ (my emphasis)

In **S v Khanyile and Another**,⁴⁰ Didcott J agreed fully with Goldstone J. However, the learned judge of the Natal Provincial Division of the Supreme Court (as he then was) expressed displeasure that Goldstone J's judgment had not gone far enough in that it postulated an "accused person managing to obtain representation once he is advised that he may and should have it."⁴¹

Didcott J suggested that the time had come for our Courts to acknowledge that "relatively few of those charged in this country with crimes can afford to pay for the hire of a lawyer ...", and for the spotlight to shift "from the right to a representation that is obtainable" to "a right to be provided with representation once it is wanted but otherwise out of reach."⁴² Putting it pithily and bluntly, he said:

[a]nd the question arising is whether the time has not come at last for our Courts, which have long recognised and upheld the first right, to proclaim the second as a corollary, *in some situations at least*.⁴³ (my emphasis)

However, Didcott J acknowledged that there were two basic constraints afflicting our criminal justice system, namely inadequate funding of legal aid⁴⁴ and the paucity of persons trained and experienced in the practice of law.⁴⁵ For him these constraints entailed that as a jurisdiction we would "[f]or the time being ... have to manage as best we can with a dimmer light";⁴⁶ he recognised, he declared,⁴⁷ that we could not as yet attain the heights US jurisprudence had reached when the **Gideon v Wainwright**⁴⁸ case was decided.

Heath J and Liebenberg AJ too, in **Nakani v Attorney-General and Another**,⁴⁹ agreed with Goldstone J that an accused person should be told of his or her right to legal representation. However, the two learned judges disagreed with the decision of Didcott J in **Khanyile** that an indigent accused person was entitled to defence at State expense in certain circumstances. In **S v Mabaso and Another**,⁵⁰ Hoexter JA too expressed his entire agreement with Goldstone J that an accused person had a right to be informed of his or her right to legal representation.

Subsequently, in **S v Davids; S v Dladla**,⁵¹ Didcott J⁵² declared⁵³ that his decision in **S v Khanyile and Another**⁵⁴ “was not the fashioning of a brand new right, but the elaboration and development of one well embedded in our law, *the right to a fair trial* or, to narrow that down to the component of it which interests us now, the right to be represented on trial.” (my emphasis) As David McQuoid-Mason also pointed out,⁵⁵ the decision in **S v Khanyile and Another** was “still decades behind notions of a fair trial in Anglo-American and Continental jurisdictions”. It was “but a small step towards achieving ‘equality of all under the law’ ... in our criminal justice system and should not be seen as a giant leap by the Courts.”

According to Didcott J, mistrials declared on the grounds of no representation, as opposed to denials thereof, were to be restricted to cases of extreme hardship. These would be cases “where the lack of help had rendered the trials in all the circumstances ‘palpably and grossly unfair’.”⁵⁶ Nienaber J, in a dissenting judgment, rejected this notion,⁵⁷ suggesting instead that, “whatever the position may be in countries other than our own, no rule of law, practice or procedure is transgressed should a court decide to proceed with a trial notwithstanding the absence of legal representation for the accused.”⁵⁸ As though this was not enough, the learned judge then crudely, cynically and insensitively added that “[t]hat this is so is, no doubt, a sad commentary on our inability to provide adequate and comprehensive legal aid to all in need of it ... But in the meantime the trial ... must proceed, affording proof of yet another of the inequities of poverty.”⁵⁹

Bristowe J, while agreeing with Didcott J, said that the extension of the right as envisaged in **S v Khanyile and Another** should be applied conservatively.⁶⁰ The learned judge described the decision in **Khanyile** as an extension of the right because before **Khanyile** no one had “ever insisted that an accused appearing in the magistrate’s court must be represented upon pain of his conviction being set aside.”⁶¹

Lastly, Didcott J then said that “[i]t would no doubt have been better all round had the Appellate Division rather than a subordinate one responded to our social needs and the beckoning of modern jurisprudence by developing the right to representation in this part of the world. Apart from other benefits, the course it charted would have had to be

followed then throughout the land."⁶² As luck would have it, the opportunity for the Appellate Division to do so arose in **S v Rudman and Another; S v Mthwana**.⁶³

THE APPELLATE DIVISION INTERVENES

In **S v Rudman; S v Mthwana**,⁶⁴ the Appellate Division had to decide a question of procedure, namely whether an indigent accused person, who could not pay for his or her own defence, was entitled to be provided at his or her trial with legal representation, if necessary at the expense of the State. As Nicholas AJA pointed out, "[n]o such rule had ever been recognised in South Africa until it was proclaimed by Didcott J, with Friedman J concurring" in **S v Khanyile and Another**.⁶⁵ Indeed, before the **Khanyile** decision, it had been suggested that "a criminal trial conducted without such representation was irregular or illegal."⁶⁶

The learned acting judge of appeal did personally seem to be averse to Didcott J's decision in **Khanyile**; he in effect said that the maxim *judicis est ius dicere sed non dare*⁶⁷ was not an obstacle to the adoption of the **Khanyile** rule.⁶⁸ He further said that he did not think that the Appellate Division "would be precluded by the present state of the law on the point from adopting the *Khanyile* rule."⁶⁹ The learned acting judge of appeal seems indeed to have been bowled over by the premise on which the **Khanyile** decision was based, the trenchant and persuasive appeal of which he found to be irresistible.⁷⁰

He then said that in order to decide whether or not to adopt the **Khanyile** rule, a question of principle and the question of feasibility would have to be considered.⁷¹ On the first, being excessively careful not to adopt a rule that "would be coercive, if not with intention, then at any rate in effect", and being aware that "the Supreme Court has no power to issue a *mandamus* on the Government to provide legal aid", Nicholas AJA declared that the Court "should not adopt a rule the tendency of which would be to oblige the Government to do so."⁷² He also concluded that the implementation of the **Khanyile** rule would not be feasible in the Republic at the present time.⁷³

THE POST-APRIL 27 1994 SITUATION

The **Constitution** provided that every accused person "shall have the right to a fair trial, which shall include the right ... to be represented by a legal practitioner of his or her choice or, *where substantial injustice would otherwise result*, to be provided with legal representation at state expense, and to be informed of these rights."⁷⁴ (my emphasis) Thus, the decision in **S v Khumalo en Andere**,⁷⁵ namely that there is no legal requirement that a person must at the time of his or her arrest be informed that he or she is entitled to legal representation, is no longer part of our law.

The common law position propounded by Goldstone J in **S v Radebe; S v Mbonani**⁷⁶ has thus been given constitutional status. Accused persons are now to be informed at the beginning of their cases, as the constitutional system now requires them peremptorily to be, of their right to acquire the services of lawyers either on their own, if they can afford to, or, where they cannot, if substantial injustice may otherwise result, at the expense of the State.

In **S v Lombard en 'n Ander**⁷⁷ and in **S v Vermaas**,⁷⁸ both of which were concerned with charges of a commercial nature which had developed into trials of considerable dimensions, the Transvaal Provincial Division of the Supreme Court stopped the proceedings and referred questions relating, *inter alia*, to whether or not the accused could not benefit from the provisions of Section 25(3)(e) of the **Constitution** and have legal representatives appointed for their defence at the expense of the State. Du Plessis⁷⁹ further wanted the Court to rule on whether, by virtue of that section, he had a right to be assisted and defenced by a lawyer of his own choice at the expense of the State.

THE CONSTITUTIONAL COURT ENTERS THE FRAY

In **S v Vermaas; S v Du Plessis**,⁸⁰ the Constitutional Court was called upon to decide whether Vermaas and Du Plessis were, or either of them was, entitled, on the strength of Section 25(3)(e) of the **Constitution**, to obtain legal representation at the cost of the State. Didcott J⁸¹ refused to venture an opinion on this question as the Court was ill-equipped for the factual findings and assessments which the enquiry entailed.⁸² According to the learned judge of the Constitutional Court, a decision on this question

is pre-eminently one for the judge trying the case, a judge much better placed ... by and large to appraise, usually in advance, its ramifications and their complexity or simplicity, the accused person's aptitude or ineptitude to fend for himself or herself in a matter of those dimensions, how grave the consequences of a conviction may look, and any other factor that needs to be evaluated in the determination of the likelihood or unlikelihood that, if the trial were to proceed without a lawyer for the defence, the result would be "substantial injustice".⁸³

The question was, therefore, remitted to the Courts *a quo*.⁸⁴ Both the trial judges would have to consider the question more fully and dispose of the cases one way or the other.

The next question the Court had to grapple with was whether or not an indigent accused person, in whose interest the State supplied the services of a lawyer, could, once again on the strength of the provisions of Section 25(3)(e) of the **Constitution**, choose a lawyer for his or her defence. Didcott J agreed with Hartzenberg J that "no such right was derived from section 25(3)(e) when the State supplied the lawyer's services."⁸⁵ The right to choose a lawyer was reserved for those who could afford the lawyers' fees, in other words. Didcott J said that the effect of the disjunctive "or" which appeared in the section immediately before the reference to the prospect of "substantial injustice" was to differentiate clearly between two situations, the first being where the accused person could make his or her own arrangements for legal representations and the second being where the assistance of the State became imperative if substantial injustice was to be averted. The right to choose a lawyer belonged to the former category and not to the latter one.⁸⁶

JURISPRUDENTIAL IMPLICATIONS

Ultimately, Didcott J reluctantly conceded that his long cherished ideal of a situation in South Africa where the *fiscus* would be willing and able to provide free legal assistance and representation in all cases involving the indigent *where substantial injustice would otherwise result*, would flounder on the rocks of affordability. He declared that “the Constitution does not envisage, and it will surely not brook, an undue delay in the fulfilment of any promise made by it about a fundamental right. One can safely assume that, in spite of section 25(3)(e), the situation still prevails where during every month countless thousands of South Africans are criminally tried without legal representation because they are too poor to pay for it. They are presumably informed ... of their right to obtain that free of charge in the circumstances it defines. *Imparting such information becomes an empty gesture and makes a mockery of the Constitution, however, if it is not backed by mechanisms that are adequate for the enforcement of the right.*”⁸⁷ (my emphasis) However, all is not lost; the basic principle that, *where substantial injustice would otherwise result*, the State has an obligation to provide legal aid to those accused persons who sorely need it, has been constitutionally established. It is now left to our Courts to determine what, in each case that comes before them, is in the interest of justice.

Our Courts have already started using the space created by the advent of the new constitutional system and by Didcott J’s interpretation of the fundamental right to legal representation. In **Msila v Government of the Republic of South Africa and Others**,⁸⁸ for example, Ludorf J ordered that the applicant be provided with professional legal assistance to argue an application for legal aid as well as in his then pending trial.⁸⁹ Subsequently, in **Legal Aid Board v Msila and Others**,⁹⁰ Kroon J, with the other members of the Court concurring, held that, while accepting that the Legal Aid Board was entitled to prescribe a *means test* due to its financial constraints, “the means test ... should not have come into the picture at all. As far as the applicant’s financial resources were concerned the only question to be decided was ... whether or not the applicant was factually in a position to pay for his own legal representation.”⁹¹

Judges such as Froneman J⁹² and Noorbhai J,⁹³ for example, have even regarded the mere failure on the part of a court to inform an accused person of his or her right to legal representation as a fatal irregularity and, in appropriate cases, even ordered the release of the affected persons from prison as a result. An interesting example of this was the case of one Patrick Mgcina, who had been convicted on charges of 'highjacking' and attempted murder and sentenced to imprisonment. According to Mungo Soggott, Mgcina was released from prison after serving only fifteen months of his sentence "when the Johannesburg High Court found that the magistrate who convicted him had not informed him of his right to a lawyer at the state's expense ... the judgment has created a crucial precedent and could have a huge impact as magistrates will now be forced to give accused people who do not have lawyers careful explanation of their constitutional right to representation."⁹⁴

According to the editor of the **Sunday Times**,⁹⁵ the release of Mgcina was "followed by rumbles from lobbyists who want the Constitution changed to curb the rights of the accused and convicts." The editor opined that the civil servants who dealt with the case, and not the **Constitution**, were to blame; if Mgcina had been given legal aid or told by the magistrate of his right to request it, his constitutional right to a fair trial would not have been violated and he would, therefore, not have been released so untimely.

ENDNOTES - CHAPTER EIGHT

1.. Which, in **S v Alexander (1)**, 1965 (2) SA 796 (A) at 808C-D, and subsequently in **Minister of Prisons v Cooper**, 1978 (3) SA 512 (C) at 520A, was described as a *fundamental common-law right*. In **Mandela v Minister of Prisons**, 1983 (1) SA 938 (A) at 957D this right was described as a corollary of the right of access to the Courts.

2.. About the recognition of which in our law and jurisprudence see generally **S v Mabaso and Another**, 1990 (3) SA 185 (A) at 201F-H.

3.. A concept which, according to Bristowe J in **S v Davids; S v Dladla**, 1989 (4) SA 172 (N) at 202I-J, is a relative one.

4.. In **S v Tyebela**, 1989 (2) SA 22 (A) at 29G-H, Milne JA indeed declared that '[i]t is a fundamental principle of our law, and indeed of any civilised society, that an accused person is entitled to a fair trial.'

5.. In **The Undefended Accused on Trial** (Juta & Co Ltd, Cape Town, 1988), at 63.

6.. In which, as Didcott J observed in **S v Khanyile and Another**, 1988 (3) SA 795 (N) at 799A-B, 'the judicial officer is no inquisitor conducting his own investigations but an adjudicator who by and large must leave the management of the trials he hears and the combat waged in them to the adversaries thus engaged.' It is noted that, in any event, as Didcott J himself pointed out, the trial judge would be no substitute for legal counsel. See *ibidem* at 798B-799B.

7.. 287 U.S. 45 (1932).

8.. *ibidem* at 68-69. Part of this passage was quoted with approval by Goldstone J in **S v Radebe; S v Mbonani**, 1988 (1) SA 191 (T) at 195E-G.

9.. Articulating the attitude of government, PC Pelser, then Minister of Justice in the (apartheid) Republic, is on record as having said that: "If legal aid is to give rise to the State having to guarantee to the skolly element who loaf about, snatch handbags, steal purses and remove money from people's pockets, the additional security of being defended free of charge by legal practitioners provided by the authorities when they appear in court, I can say even at this stage that the writing is on the wall. I want to put it very clearly that I shall never be a party to *subsidizing crime*." (my emphasis) See **House of Assembly Debates**, vol. 25, col. 1496 (26 February 1969).

10.. Act No. 51 of 1977, Sections 73(1) and (2) of which merely confirm the fundamental procedural right to legal representation. See Didcott J in **S v Khanyile and Another**, *supra* at 809B-C on the meaning of these provisions and their forerunners.

It is noted that Section 73(3) of the Act provides for situations where some qualified form of assistance may be rendered by third parties who are not lawyers.

11.. This picture, needless to say, has not changed fundamentally since John Dugard said this in his seminal work on human rights in South Africa, namely **Human Rights and the South African Legal Order** (Princeton University Press, Princeton, 1978) at 255.

12.. See generally **S v Chaane en Andere**, 1978 (2) SA 891 (A).

13.. Section 73(1) of the **Criminal Procedure Act**. The importance of the right to counsel at the pre-trial stage was emphasised by the US Supreme Court in **Escobedo v Illinois**, 378 U.S. 478 (1964) at 487-488; and in **Miranda v Arizona**, 384 U.S. 436 (1966).

14.. See **Ngqulunga v Minister of Law and Order**, 1983 (2) SA 696 (N) at 698B-C.

- 15.. See **S v Du Preez**, 1991 (2) SACR 372 (Ck). See also generally **Novick v Minister of Law and Order and Another**, 1993 (1) SACR 194 (W).
- 16.. Didcott J in **S v Khanyile and Another**, *supra* at 810C-D, said that “[e]very person accused of a crime *and able to get a lawyer* has the right to be defended by one. That he should be allowed to exercise the right is vital to the fairness of the proceedings ... A denial of the right ... makes the trial *per se* unfair. And any conviction that ensues will inevitably be upset. All this is by now, and has long been, axiomatic here.” (my emphasis)
- 17.. *Ibidem* at 811G-H.
- 18.. **The Undefended Accused on Trial**, *supra* at 14. See also Didcott J in **S v Khanyile and Another**, *supra* at 800F-G.
- 19.. *Ibidem*. See also Didcott J, *ibidem* at 811H-J.
- 20.. Per Didcott J, *ibidem* at 812I-813B.
- 21.. And not as a right. See **R v Mati and Others**, 1960 (1) SA 304 (A) at 306; and **S v Chaane en Andere**, *supra*.
- 22.. In **R v Mati and Others**, *supra* at 306H-307A, Schreiner JA said in this regard that: “There is no rule of law that a person who is being tried for an offence that may, if he is convicted, result in a death sentence must, unless he objects, be defended by counsel. But it is a well-established and most salutary *practice* that, *whenever there is a risk that the death sentence may be imposed ... the State should provide defence by counsel if the accused has not made his own arrangements in that behalf*. It is disquieting to think that under our system of procedure ... it is possible for an accused person to be ... sentenced to death after a trial in which, by reason of his poverty, he has had to conduct his own defence.” (my emphasis) See also Nicholas AJA in **S v Rudman; S v Mthwana**, 1992 (1) SA 343 (A) at 379I-J.
- 23.. It is noteworthy that in **S v Maduna and Others**, 1978 (2) SA 777 (D) *pro Deo* counsel was provided even to a witness who had been detained for interrogation under the provisions of Section 6 of the **Terrorism Act**, 83 of 1967.
- 24.. The trial judge was required in terms of this rule of practice to reassure the accused that this was indeed the case. See **S v Tyebela**, *supra*.
- 25.. See DL Carey-Miller ‘Some Aspects of Legal Aid in Criminal Proceedings’, in (1972) 89 **SALJ** 71, at 72. See also **S v Gibson**, 1979 (4) SA 115 (D). In **S v Mayo**, 1990 (1) SACR 659 (E) at 661C Jones J noted the difficulties experienced by *pro Deo* counsel who did not have the advantage of an instructing attorney.
- 26.. Per Nienaber J in **S v Davids; S v Diadla**, 1989 (4) SA 172 (N) at 197I-198A. However, the learned judge observed at 198J-199A that the bar had assumed the burden of providing, and the State had assumed the burden of paying for, *pro Deo* counsel.
- 27.. *Ibidem* at 198A. See also Bristowe J, *ibidem* at 206G.
- 28.. Act No. 22 of 1969, which came into effect on 29 March 1971.
- 29.. For which see Pelsler in the **House of Assembly Debates**, *supra*.
- 30.. See Steytler, **The Undefended Accused on Trial**, *supra* at 18.
- 31.. *Ibidem* at 17.
- 32.. 372 U.S. 335 (1963).
- 33.. 407 U.S. 25 (1972).

34.. Act No. 110 of 1983. Needless to say, the hateful system of apartheid, with all its warts, continued for another eleven years before its victims could exercise their inalienable right to vote, despite its perpetrators' avowed commitment to the principle of equality of all under the law.

35.. Save to say that, as Van Zyl Smit observed in (1988) 4 **SAJHR** 363 at 366, "[e]quality before the law is so manifestly incompatible with the possibility that an important right may be available only to a wealthy minority, those who can afford counsel, that judicial steps towards the elimination of this possibility" could not be regarded as a fundamental innovation.

36.. 1978 (3) SA 290 (T).

37.. *Ibidem* at 293H-294A.

38.. *Supra*.

39.. *Ibidem* at 196F-J. See also Didcott J in **S v Khanyile and Another**, *supra* at 818C-G.

See Seaton JA in **Re Ewing and Kearney and the Queen**, (1974) 18 CCC (2d) 356 at 365-366; and Osler J in **Re Ciglen and the Queen**, (1978) 45 CCC (2d) 227 at 231, for the position in Canada. For the position in the United States, see, for example, Sutherland J in **Powell v Alabama**, *supra* at 71-72; Black J in **Johnson v Zerbst**, 304 U.S. 458 (1937) at 462-463; Roberts J in **Betts v Brady**, 316 U.S. 455 (1941) at 471 and 473; Black J and Harlan J in **Gideon v Wainwright**, *supra* at 342, 344 and 350-351 respectively; and Douglas J in **Argersinger v Hamlin**, *supra* at 37 and 40.

40.. *Supra* at 800C-D. See also Didcott J in **S v Davids; S v Dladla**, 1989 (4) SA 172 (N) at 192H-193C; Nienaber J, *ibidem* at 194E-G, at 195A-196B and at 200C-D; and Bristowe J, *ibidem* at 204C-D and at 206I-J.

41.. *Ibidem* at 800E.

42.. *Ibidem* at 800F-J.

43.. *Ibidem* at 801A.

44.. *Ibidem* at 813E-F.

45.. *Ibidem* at 814B-C. See also Didcott J in **S v Davids; S v Dladla**, 1989 (4) SA 172 (N), at 184G-185A and at 186G-H.

46.. *Ibidem* at 814G. At 815C-816H Didcott J suggested what the Courts could do to determine the fairness or otherwise of acquiring or not acquiring legal aid or *pro bono* defence for an accused in a particular case.

47.. *Ibidem* at 814F-G.

48.. *Supra*.

49.. 1989 (3) SA 655 (Ck).

50.. 1990 (3) SA 185 (A) at 203D-G.

51.. 1989 (4) SA 172 (N) at 179.

52.. With whose approach Bristowe J broadly agreed after delivering his own judgment. *Ibidem* at 208J-209A.

53.. Quite correctly in my view.

54.. *Supra*.

- 55.. In (1989) 2 **South African Journal of Criminal Justice** 57 at 59 and 60.
- 56.. In **S v Davids; S v Dladla**, *supra* at 185B.
- 57.. *Ibidem* at 198F-I.
- 58.. *Ibidem* at 198D. See also 199F-200B.
- 59.. *Ibidem* at 200E.
- 60.. *Ibidem* at 205E.
- 61.. *Ibidem* at 205E-F.
- 62.. *Ibidem* at 180E-F.
- 63.. 1992 (1) SA 343.
- 64.. *Ibidem*.
- 65.. *Ibidem* at 373C. See also *ibidem* at 380F.
- 66.. *Ibidem* at 378H.
- 67.. Which, loosely translated, means that judges do not make law but merely declare it.
- 68.. *Ibidem* at 382H.
- 69.. *Ibidem* at 384F. In his concurring judgment, Corbett CJ too in principle had no problem with the **Khanyile** rule; he declared that "[t]he ideal for which Didcott J (and the judges who agreed with him) strove ... viz the provision of free legal representation to all indigent persons accused of serious crimes who desire such representation, is unquestionably a most worthy one. Indeed it is a *sine qua non* of a complete system of criminal justice; and any system which lacks it is flawed." *Ibidem* at 392F-G.
- 70.. *Ibidem* at 384C-D.
- 71.. *Ibidem* at 386F.
- 72.. *Ibidem* at 386G-H.
- 73.. At 392G, Corbett CJ said that the Didcott J ideal expressed in **Khanyile** was one "which under present circumstances in South Africa is not capable of attainment. All the same the ideal should never be lost sight of and it should continue to guide and stimulate all who are concerned with the improvement of our criminal justice system."
- 74.. Section 25(3)(e). This brought our constitutional system into line with international human rights instruments such as Article 14 of the **International Covenant on Civil and Political Rights** and Article 6 of the **European Convention on Human Rights**. The significance of the portion in italics will become apparent below.
- 75.. 1992 (1) SACR 28 (W). It is noted that this decision was, in this regard, contrary to that of Goldstone J in **S v Radebe; S v Mbonani**, *supra*.
- 76.. *Supra*.
- 77.. 1994 (3) SA 776 (T).
- 78.. 1994 (4) BCLR 18 (T).

79.. In **S v Lombard en `n Ander**, *supra*.

80.. 1995 (7) BCLR 851 (CC).

81.. In whose judgment all the other members of the Constitutional Court concurred. *Ibidem* at 860.

82.. *Ibidem* at 859, paragraph 15.

83.. *Ibidem*.

84.. *Ibidem* at 860, paragraph 17.

85.. *Ibidem* at 859, paragraph 15.

86.. *Ibidem*.

87.. *Ibidem* at 860, paragraph 16. See Corbett CJ in **S v Rudman; S v Mthwana**, *supra* at 392H-I.

88.. 1996 (3) BCLR 362 (C).

89.. At 368A. However, see Van Deventer J in **S v Mhlakaza**, 1996 (6) BCLR 814 (C) at 833 for a rather conservative view with regard to this right and the potential for abuse thereof.

90.. 1997 (2) BCLR 229 (E).

91.. At 242E-F. See *ibidem* at 243D-I for the questions which the Learned Judge said "arise when what is in issue is whether an accused person is entitled to legal representation at State expense" as envisaged in our new constitutional system.

92.. In **S v Melani and Others**, 1996 (2) BCLR 174 (E) at 187-188H.

93.. In **S v Ramuongiwa**, 1997 (2) BCLR 268 (V) at 272C. As the Learned Judge pointed out, "*Khanyile* has been resuscitated, is alive and well and indeed infuses and gives flesh and bone to the right to a fair trial."

94.. 'Landmark Ruling Sets Highjacker Free', in **Mail and Guardian**, April 18 to 24 1997.

95.. See the editorial, 'Constitution's not to Blame', 27 April 1997.

CHAPTER NINE

THE RIGHT TO A FAIR TRIAL AND ACCESS TO INFORMATION

INTRODUCTION

Prior to the advent of the **Constitution of the Republic of South Africa** and the intervention of the Constitutional Court in **Shabalala and Others v Attorney-General of the Transvaal and Another**,¹ statements taken by the police from potential witnesses in the investigation of crime were protected against disclosure by a special common law privilege which operated in favour of the State. Thus, every criminal trial in South Africa was, in general, conducted on the basis that an accused had no right of access to statements made to the police by witnesses the State sought to call to give evidence.

This privilege, as will appear more fully below, was a very wide one, covering not only the statements of witnesses, but, in certain circumstances, also entries in investigation diaries and police pocket books. The nature of this "blanket privilege", the validity of which was recognised by the Appellate Division of the Supreme Court in **R v Steyn**² as an established practice, was not exactly the same as that of the legal professional privilege, however.³

Furthermore, under our law, a practice, in terms of which the accused or his or her legal representative did not have any right to consult with witnesses for the State without the permission of the prosecuting authority, was accepted and given effect to by our courts.⁴ This practice, the origins of which do not seem to have been traceable to our common law or to any specific statutory provision, appears to have been based on ethical rules of professional practice in the Republic and abroad.⁵ A breach of this rule might, in

certain circumstances, constitute an irregularity in a trial.⁶ Besides, any legal practitioner who was in breach of this practice might be guilty of unprofessional and unethical conduct.⁷

In **Shabalala and Others v Attorney-General of the Transvaal and Another**,⁸ the Constitutional Court had to decide two issues⁹ that were referred to it by Cloete J who heard the matter in **Shabalala and Others v Attorney-General of the Transvaal and Others**.¹⁰ In the latter matter, the six applicants, who had been indicted in the eastern and south eastern circuit local division in Barberton on a count of murder, had, through their *pro deo* counsel, made an informal application from the Bar for access to the police dossier. Cloete J had then ruled that a substantive application be brought on notice of motion supported by affidavits.

In their applications, the applicants submitted that they were, as a matter of right,¹¹ entitled to access to the police dossier relevant to the matter, irrespective of whether or not further particulars had been requested or supplied under the **Criminal Procedure Act**.¹² They further applied for an order compelling the State to make available to the accused and/or to their legal representatives all the witnesses for the prosecution for the purposes of consultation with them in order to prepare for the trial.

The first respondent, the Attorney-General of the Transvaal, submitted that Section 23 of the **Constitution** should not be interpreted as conferring any rights on an accused in violation of the "blanket dossier privilege". On behalf of the second respondent, the Commissioner of the South African Police Services, it was contended that in essence the provisions of Section 23 of the **Constitution** had no application in criminal proceedings.¹³

For Cloete J, two questions arose in this regard, namely: (1) whether Section 23 could be used by an accused in criminal proceedings to obtain further information; and (2) if so, whether the applicants *in casu* should be given access to the police docket.¹⁴ In order to grasp the importance of the decision of the Constitutional Court in **Shabalala and Others**,¹⁵ it is essential to present a brief summary of the law in this regard prior to the Court's intervention.

THE LAW PRIOR TO SHABALALA AND OTHERS

Prior to the intervention of the Constitutional Court, police dockets were privileged and, therefore, generally inaccessible to the defence. The common law position relating to the contents of police dossiers was as defined in **R v Steyn**,¹⁶ namely that, statements procured from state witnesses for the purpose that what they said would be given in evidence in a lawsuit that was contemplated were protected against disclosure until, at least, the conclusion of the proceedings, which would include any appeal after the decision of the court of first instance.¹⁷ However, the Court acknowledged that, as the prosecution stands in a special relation to the court,¹⁸ where there was a serious discrepancy between such a statement and what the witness subsequently said on oath at the trial, the court had the right to expect the prosecutor to, *suo moto*, direct attention to the discrepancy and, unless there were special and cogent reasons to the contrary, make available to the defence for purposes of cross examination the statement and any other documents or copies thereof which would be handed in at the trial.¹⁹

SCOPE OF THE DOCKET PRIVILEGE

In subsequent cases this privilege was made applicable in many diverse circumstances. In one matter,²⁰ for example, it was extended to notes made by a state witness.²¹ It also affected statements taken by the police in contemplation of a prosecution,²² even if the witnesses were not used by the prosecution²³ and were given to the defence. In some circumstances, the police pocket books,²⁴ notes made by the investigating officer and the advice and instructions of a "checking officer",²⁵ and any and all communications and notes that constituted "part of the litigation brief" were covered by the privilege.²⁶

An interesting case was **Ex parte Minister van Justisie: In re S v Wagner**,²⁷ where the Appellate Division extended the privilege to a situation where the witness had refreshed his memory outside the court proceedings. In that case it was held that a prosecutor whose witness had refreshed his memory by reading his statement before he entered the witness box to give his testimony had not waived the docket privilege.²⁸ It would be a different matter altogether if the witness had refreshed his or her memory

in the witness-box with the express or tacit approval of the prosecutor.²⁹ In other words, while "[o]ne of the rules applicable to the use of notes to refresh memory is that a witness, who uses a document to refresh his memory, must be prepared to produce it for inspection to the opposing party and to the court",³⁰ a distinction was always made between the use of an *aide-mémoire* and testimony given from the statement by a witness in the box.³¹

WAIVER OF THE DOCKET PRIVILEGE

Although, as Williamson J said, there was "no inherent power in a court to override a legitimate claim of privilege",³² the dossier privilege could, of course, be waived either by the State³³ or by a party, expressly or tacitly,³⁴ in which event the opposing party would be entitled to see the relevant document. It could also be waived, as stated above, when a witness refreshed his or her memory by reading from a document in the witness box, as well as when the statement was made available to the defence because there was a material discrepancy between a State witness' statement and what he or she subsequently said in evidence in court.

OUR COURTS AND SECTION 23

Soon after the **Constitution** became the supreme law of the Republic,³⁵ a series of matters in which the validity of the blanket docket privilege was raised came before the courts. There was the cluster of three judgments, namely **S v Fani and Four Others**,³⁶ **S v James**,³⁷ and **S v Smith and Another**,³⁸ common to all of which was a recognition of the continued existence of the blanket docket privilege as recognised in **R v Steyn**.³⁹

In **S v Fani and Four Others**,⁴⁰ where the relevant accused, the applicant, was, together with four others, charged with murder and with malicious injury to property, applied for an order compelling the State to make available to him the contents of the police investigation docket. Jones J, observing that in a justice system such as ours, where the purpose of criminal proceedings is to hold a fair and objective inquiry so as to place the court in a position to arrive at the truth, took the view that an accused

person's right to a fair trial as envisaged in Section 25(3) of the **Constitution** entitled him or her to more information than was given subject to the docket privilege.⁴¹ He thus, in an *obiter dictum*, provided a list of what he thought ought to be timeously made available to an accused person before such a fair trial could be held.⁴²

However, the learned judge refused to part with the past judgments of the Supreme Court on this question. He said that:

[a] departure from those decisions may or may not prove necessary in the future to give effect to the provisions of the new Constitution. But such a departure will be radical. Radical and sweeping changes should not be made lightly, and certainly not by a judge of first instance who has not heard argument on all the possible consequences of the proposed change because these arguments are not necessary for purposes of the present ruling. Of course, judges of first instance must give effect to the provisions of the Constitution, even if this means a radical departure from pre-existing law. In this instance, however, it is neither necessary nor even desirable that I do so. This is because, *as I see it, effect can be given to the meaning and the spirit of the new Constitution without re-writing or even encroaching upon the common law of privilege.*⁴³ (my italics)

Accepting that the common law docket privilege was reasonable and justifiable in a society such as ours,⁴⁴ Jones J concluded that *in casu* it was not inconsistent with the right to a fair trial and the right to information held by the State. On the contrary, he held, it could coexist with the rights entrenched in Sections 23 and 25(3) of the **Constitution**.⁴⁵ On this basis, he then ruled that the defence was not entitled to, and the prosecution was not obliged to give it, access to the police docket.⁴⁶

In **S v James**,⁴⁷ where the accused was charged with murder and with attempted rape, the same issue arose. While accepting that information in the possession of the State as envisaged in Section 23 of the **Constitution** must be disclosed to the accused, Zietsman JP considered that this was done and achieved by requiring each state witness to testify in open court where their allegations can be challenged and refuted in cross-examination by or on behalf of the accused.⁴⁸

Zietsman JP was indeed averse to reading into Section 23 the notion that the common law docket privilege no longer applied to documents in the possession of the prosecution and that these must be supplied to the accused before he or she is asked to plead.⁴⁹ He did not accept Jones J's suggestion⁵⁰ that summaries of witness statements should be furnished to the accused either.⁵¹

The learned judge accepted that the Section 25(3)(b) constitutional requirement that an accused should be informed sufficiently of the charge against him or her required that the accused be given sufficient information to enable him or her to understand the allegations against him or her, as well as to prepare his or her defence and to plead to the charge/s.⁵² However, he held that what had been supplied *in casu* by way of the summary of substantial facts⁵³ and other information was adequate, and therefore dismissed the application.⁵⁴

In **S v Smith and Another**,⁵⁵ the two accused were charged with two counts of murder and one of robbery with aggravating circumstances. At the commencement of the trial in the Supreme Court, a similar request was made at the instance of Accused Number One for all state witness statements or, in the alternative, summaries of the evidence of all the key witnesses of the state.⁵⁶ The Court⁵⁷ referred with approval to the reasoning of Jones J in **S v Fani and Four Others**⁵⁸ that the common law docket privilege was not inconsistent with the **Constitution**.

However, because *in casu* the summary of substantial facts failed to inform the accused adequately of the charges he had to meet, the Court held that the most expeditious method of conveying the information necessary to achieve this object would be to order the state to furnish the defence with the statements of witnesses.⁵⁹ Van Rooyen AJ further stated in an *obiter dictum* that "[t]he accused are also entitled to be apprised of any information contained in the statements of *State witnesses who are not going to be called*, if that information tends in any way to assist the accused. That much seems to be plain from the provisions of section 23."⁶⁰ (my emphasis)

On the other hand, in **S v Sefadi**,⁶¹ where the accused was charged with murder and robbery with aggravating circumstances, the *pro deo* counsel asked for a ruling to the effect that he was,⁶² as such, entitled to access to information contained in the police docket. After a careful scrutiny of the submissions of the State and the defence in this regard, Marnewick AJ ruled that the State was obliged to provide the defence with summaries of the contents of all statements that had been taken by the police from all potential witnesses.⁶³ To the learned acting judge the common law docket privilege claimed by the State was "in apparent conflict with the provisions of Section 23 of the

Constitution".⁶⁴ This view, needless to say, was contrary to the one taken by Jones J in **S v Fani and Four Others**.⁶⁵

Of critical importance was the learned acting judge's observation that the blanket privilege, in its existing form, might even violate the provisions of Section 8(1)⁶⁶ of the **Constitution**. In this regard, he said that:

Section 25(3) guarantees every accused person a fair trial. A trial in a criminal case is in the nature of a contest. A fair trial requires, by its nature, *equality between the contestants* ... *When only one of the contestants has access to the statements taken by the police from potential witnesses, the contest can, in my judgment, be neither equal nor fair.*⁶⁷ (my italics)

The Court also considered whether the blanket docket privilege, as it stood, met the requirements of the general limitation clause.⁶⁸ For this purpose, the Court said, "the justification for the limitation of the relevant rights by the privilege must be sought in the underlying reasons for the privilege, not in the fact of the existence of the privilege."⁶⁹ After assessing the validity of the arguments of the State and the defence in this regard, and after peering into the jurisprudence of the United Kingdom, the United States and Germany for assistance, the Court concluded that the privilege, as it stood, constituted an unreasonable and unjustifiable limitation of the right of access to information held by the State and required for the protection and exercise of the accused's right to a fair trial.⁷⁰

However, the learned acting judge conceded that the relevant rights were not absolute. He cited the examples of England and Germany where appropriate limitations were acceptable.⁷¹

In **Shabalala and Others**,⁷² as stated above, the basic question was whether or not the "blanket dossier privilege" was consistent with the **Constitution**.⁷³ Cloete J⁷⁴ did not have any difficulty to conclude that Section 23 of the **Constitution** gave an accused the right of access to such information held by the attorney-general as is required for the exercise or protection of his or her constitutional right "to adduce and challenge evidence".⁷⁵ The learned judge rejected the contention of the second respondent that in criminal proceedings the provisions of Section 23 were superfluous as the accused already had the constitutional right⁷⁶ "to be informed with sufficient particularity of the

charge".⁷⁷ He also rejected a further submission by the second respondent that, in any event, because adequate provision had been made in the **Criminal Procedure Act** for this, it was unnecessary for the accused to rely on Section 23 as well.⁷⁸

However, Cloete J observed that Section 23 contained an important *internal limitation* relating to the purpose for which information in the possession of the State was "required".⁷⁹ This word, which was found in the *internal limitation*, and which the learned judge said postulated an element of necessity, showed, according to him, that it was not the intention of the drafters of the **Constitution** to, by means of Section 23, grant an accused person an automatic right of access to the police dossier.⁸⁰ The accused would be entitled to have access to the police dossier or part thereof *only if he or she could show that the information was "required" to exercise or protect any of his or her fair trial rights* in terms of Section 25(3) of the **Constitution**.⁸¹ In other words, the accused bore the *onus* to show that the information was so "required",⁸² while, as the learned judge further said, the prosecution bore the *onus* to rebut that under Section 33(1) of the **Constitution**, should it wish to do so.⁸³

When he applied this approach to the matter before him, Cloete J concluded that *in casu* the applicants failed at the first hurdle.⁸⁴ Having been unable to find reasons for allowing the applicants access to the whole dossier in the matter, he then dismissed the application. For the same reasons, he did not want, at the instance of the applicants, to depart from an old practice of allowing an accused or his/her legal representative to consult with state witnesses only with the consent of the prosecution.⁸⁵

Notwithstanding his conclusions, Cloete J,⁸⁶ relying on the provisions of Section 102(8) of the **Constitution**,⁸⁷ referred the matter to the Constitutional Court for its decision because he was of the view that constitutional questions of great public importance had been raised in the proceedings.

THE CONSTITUTIONAL COURT INTERVENES

The Constitutional Court's judgment in **Shabalala and Others v Attorney-General of the Transvaal and Another**⁸⁸ was given by Mahomed DP, (as he then was)⁸⁹ whose characteristic erudition and Solomonic wisdom once again shined through in the matter. Needless to say, the Court had to wade through the thick mass of judicial confusion that, as was shown above, had ensued as our judges were grappling with the provisions of Section 23 *vis-à-vis* the right to a fair trial guaranteed in the **Constitution**.

For Mahomed DP (as he then was), the starting point in respect of both questions that had to be decided by the Court⁹⁰ was the right to a fair trial as guaranteed in the provisions of Section 25(3) of the **Constitution**.⁹¹ The provisions of Section 23, although not unimportant, would, as the learned Deputy President of the Constitutional Court pointed out, not deny or give to the accused anything he or she was or was not legitimately entitled to under Section 25(3).⁹²

With regard to the first issue, the Court ruled that, because the "blanket docket privilege" from the pre-constitutional era recognised in **Steyn's** case denied an accused person access to the police docket in all circumstances, it could not survive the discipline of the **Constitution**.⁹³ The Court thus declared⁹⁴ that the privilege was, to the extent to which it protected from disclosure all the documents in a police docket, in all circumstances, regardless as to whether or not such disclosure was justified for the purposes of enabling the accused properly to exercise his or her right to a fair trial, inconsistent with the **Constitution**.⁹⁵

Similarly, the Court found that the blanket prohibition of consultation with state witnesses without the consent of the prosecuting authority, regardless of the circumstances, was too wide and might, in some cases, impair the right of the accused to a fair trial. Moreover, Mahomed DP (as he then was) said, such a blanket rule of exclusion could not be justified under the general limitation clause as it was unreasonable, unjustifiable in an open and democratic society based on freedom and equality and unnecessary.⁹⁶ Reaffirming that the accused had a right to consult with state witnesses without the permission of the prosecuting authority where his or her right to a fair trial would otherwise be impaired, he thus held that insofar and to the extent that such a rule of practice denied the accused such a right, in all cases and

regardless of the circumstances, it was inconsistent with the **Constitution**,⁹⁷ and therefore invalid.

In a nutshell, ordinarily the right to a fair trial would, according to the Court, encompass both the right of access to the statements of state witnesses as well as the necessary or relevant contents of a police docket, and a right to consult state witnesses without the permission of the prosecuting authority if, on the facts of a particular case, the accused cannot obtain a fair trial without such access and consultation. However, despite this reasoning, Mahomed DP refused to make any rigid rules and left the resolution of the two questions, wherever and whenever they arose, to the exercise of a proper discretion by the trial court having regard to the circumstances of each case.

In respect of both questions, the Court recognised the right of the State to resist a claim by the accused for access to any document in the police docket⁹⁸ or for consultation with state witnesses without the permission of the prosecuting authority. Where the State seeks to justify denial of such access or consultation, it is today left to the trial court to balance the accused's needs for a fair trial against the legitimate interests of the State and, exercising its discretion, to permit access and/or consultation in the interest of justice, subject to suitable safeguards.⁹⁹ The two questions, it must be emphasised, cannot be answered in the abstract; the trial court has to have regard to the particular circumstances of each case where they arise.

JURISPRUDENTIAL IMPLICATIONS

Today, in view of the Constitutional Court's decision in **Shabalala**, where the State refuses an accused person access to State witnesses for consultation with them or to *relevant* information in the police docket, our courts should decide *objectively*¹⁰⁰ whether or not to use their discretion in favour of an accused person and allow him or her or his or her legal representative to consult with witnesses for the prosecution or have access to all *relevant* information in the possession of the State; the State no longer has a final say in this regard. Instead, when challenged by an accused person, it bears the *onus*

to justify its opposition to allowing the accused person access to State witnesses for consultation with them¹⁰¹ or to disclosure of the *relevant* information.¹⁰²

For this purpose, the right of access to information guaranteed in Section 23 of the **Constitution** might come in handy. As pointed out above, however, Mahomed DP in the **Shabalala** case seems to have ascribed a minor, albeit not unimportant role, to the provisions of Section 23, because, for him, the whole question turned solely on the accused person's right to a fair trial.¹⁰³ A narrow and restrictive reading of his approach may unfortunately lead to an erroneous assumption that under our law the principle that "the fruits of the investigation which are in the possession of the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done"¹⁰⁴ has not yet been fully accepted. One can even imagine conservative elements in the employ of the State seeking to rely upon this to hide and hoard information and use it as a weapon to surprise their adversaries in criminal trials. The Court missed an opportunity to use two constitutionally guaranteed rights to bolster each other.

And yet, it is clear from his judgment that the learned Deputy President of the Constitutional Court accepted the principle that an accused is ordinarily entitled to discovery of documentation in the possession of the prosecuting authority in order to enable him or her properly to exercise the right to a fair trial.¹⁰⁵ In my opinion, therefore, Mahomed DP did not necessarily find any fault with Cloete J's basic reasoning that the accused were generally

entitled to invoke section 23 for the purpose of obtaining access to all information held by the attorney-general *in so far as such information is required for the exercise or protection of their right to a fair trial* and in particular, to adduce and challenge evidence.¹⁰⁶ (my italics)

Indeed, Mahomed DP did not seek to discard an important provision of the **Constitution** which, in its entirety, he said constituted "a decisive break from a culture of Apartheid and racism to a constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours",¹⁰⁷ and which, as he correctly pointed out, imported "a radical movement away from the previous state of the law."¹⁰⁸ The learned Deputy President of the

Constitutional Court could not have sought to discourage reliance upon the provisions of Section 23 which, to paraphrase Heath J, fitted in with this whole spirit of transparency and openness.¹⁰⁹

At no stage did Mahomed DP (as he then was) suggest that an accused person should find solace solely in the information the State provides under the **Criminal Procedure Act**;¹¹⁰ the critical thing was that the information requested from the State (whatever it was) by or at the instance of an accused person must be required for the exercise or protection of his or her right to a fair trial. As Cloete J¹¹¹ had quite correctly pointed out, though there might have been some overlapping with Section 23, Section 25(3)(b) of the **Constitution** which required that an accused should "be informed with sufficient particularity of the charge" was not exhaustive of an accused person's rights, and the former section was, therefore, not superfluous.

In other words, as is the case in Canada, in our law "[t]he principle has been accepted that *the search for truth is advanced rather than retarded by disclosure of all relevant material.*"¹¹² (my italics) If our criminal justice system is to be marked by a search for truth, rather than by a fiendish desire on the part of the State to secure easy conviction of accused persons, then disclosure and discovery of all relevant material as was envisaged in the provisions of Sections 23 and 25(3) of the **Constitution**, rather than suppression of information, must be the starting point.¹¹³ Though Mahomed DP in **Shabalala** stated the starting point to be the right to a fair trial, the conclusion would be the same: All the information required to enable an accused person to enjoy the right to a fair trial, including the right to adduce and/or challenge evidence, ought to be furnished to him or her by the prosecuting authority.

The right to a fair trial can, I submit, only be enhanced by access to all *relevant* information, and can suffer irreparably if *relevant* information is not disclosed. The provisions of Section 23 could only enhance, and certainly not undermine, an accused person's exercise or protection of his or her constitutionally guaranteed right to a fair trial. The Attorneys-General,¹¹⁴ as Cloete J pointed out, are part of the State and the reference in Section 23 to "all information held by the State or any of its organs at any level of government" included information held by the Attorney-General as such.¹¹⁵

Therefore, such information, to the extent that it was *required* for the purpose of exercising or protecting a basic right,¹¹⁶ could not be kept back from an accused person merely because Mahomed DP said he could not see how Section 23 could help where Section 25(3) could not.¹¹⁷ The provisions of the two sections were, I would submit, not mutually exclusive but mutually reinforcing.

ENDNOTES - CHAPTER NINE

- 1.. 1995 (12) BCLR 1593 (CC).
 - 2.. 1954 (1) SA 324 (A).
 - 3.. See Greenberg JA in **R v Steyn**, *ibidem* at 334D. See also **S v Nieuwoudt (2)**, 1985 (4) SA 507 (C) at 509I-J; and Erasmus J in **S v Jija and Others**, 1991 (2) SA 52 (ECD) at 63J-64F.
 - 4.. See, for example, **S v Hassim and Others**, 1972 (1) SA 200 (N); **S v Mangcola and Others**, 1987 (1) SA 507 (C); **S v Gquma and Others (3)**, 1994 (2) SACR 187 (C); and Cloete J in **Shabalala and Others v The Attorney-General of Transvaal**, 1994 6 BCLR 85 (T) at 121B-C. See also **S v Tjiho**, 1992 (1) SACR 639 (Nm) for the position in the Republic of Namibia.
 - 5.. In this regard, Rule 4.3.2 (a) and (b) of the **Uniform Rules of Professional Ethics** of the various Societies of Advocates was an important example.
 - 6.. **S v Mangcola and Others**, *supra* at 509-510.
 - 7.. **S v Hassim and Others**, *supra* at 201.
 - 8.. *Supra*.
 - 9.. Which, as rephrased by Mahomed DP, *ibidem* at 1599, paragraph 9, were namely whether or not: (1) the common law privilege pertaining to the contents of police dockets, and (2) the common law rule of practice which prohibited an accused person or his or her legal representative from consulting with a state witness without the permission of the prosecuting authority, were consistent with the **Constitution**. As will appear more fully below, these questions were also raised in the flurry of cases that ensued after the **Constitution** came into effect. The discussion below will show the divergent, and yet interesting, views and conclusions of our judiciary in this regard.
 - 10.. 1994 (6) BCLR 85 (T).
 - 11.. On the strength of the provisions of Section 23 of the **Constitution**, which guaranteed to every person "the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights." (my emphasis) See Cloete J, *ibidem* at 100B-101C, and Myburgh J in **Khala v The Minister of Safety and Security**, 1994 (2) BCLR 89 (W) at 94G-95D on the meaning and implications of this internal limitation.
- Note further that, according to Myburgh J *ibidem* at 96C-F, the provisions of Section 23 were not analogous to the American and Australian Freedom of Information Acts in that its provisions were both narrower and broader in scope.
- 12.. Act No. 51 of 1977, Section 144(3).
 - 13.. Note, however, that, as Heath J pointed out in **S v Majavu**, 1994 (2) BCLR 56 (CKGD) at 76F-H, "**Section 23 is not a criminal discovery measure** ... Section 23 should not be seen as a section making provision for discovery as such in criminal litigation ... **the provisions of section 23 confer a very wide and general entitlement to information**. Any organ of government is obliged to grant a person access to all information in its possession and is not entitled to limit such a right or to obstruct such access save on grounds provided for by the Constitution." (my emphasis) According to Kroon J and Froneman J in **Qozeleni v Minister of Law and Order and Another**, 1994 (2) BCLR 75 (E) at 89A-C, "Section 23 is ... something more than a mere constitutional right to discovery ... Its application need therefore not be restricted to the exercise or protection of rights by way of litigation, but would extend also to non-judicial remedies aimed at the exercise or protection of such rights."

14.. **Shabalala and Others**, 1994 (6) BCLR at 96.

15.. *Supra*.

16.. *Supra*.

17.. *Ibidem*, at 335A-B. Note that Rule 4.3.2 (c) of the **Uniform Rules of Professional Ethics** of the various Societies of Advocates broadly defines a witness for the prosecution in relation to any charge against an accused person, *inter alia*, as any person "from whom at any time, whether before or after the accused person was arrested or charged, the prosecutor has or the police have obtained a statement in connection with such charge or the events from which it has ensued".

18.. In **R v Holliday**, 1924 AD 250 at 255, Innes CJ made it clear that the primary duty of the prosecution is not to secure a conviction (at all costs) but *to assist the court in ascertaining the truth*. See also **R v Rieker**, 1954 (4) SA 254 (SW) at 261D-G; **R v M**, 1959 (1) SA 434 (A) at 439F; Erasmus J in **S v Jija and Others**, *supra* at 68A; and Cloete J in **Shabalala and Others v The Attorney-General of Transvaal and Others**, *op. cit.* 113D-J. See further **R v Berens** [1985] 176 ER 815, at 822; and Rand J in **Boucher v The Queen**, (1955) 110 CCC 263 [1955] SCR 16, 20 CR 1 at 270.

For this reason, as Innes CJ in **R v Holliday**, *ibidem*, pointed out, it is part of the duty of the prosecution to bring to the notice of the court information in its possession which may be favourable to the defence. See also **S v Van Rensburg**, 1963 (2) SA 343 (N); and Jones J in **S v Fani and Four Others**, 1994 (1) BCLR 43 (E) at 46. For the position adopted by the Canadian Supreme Court on this question, see Sopinka J in **R v Stinchcombe**, 1992 LRC (Crim) 68 at 76.

19.. **R v Steyn**, *op cit* 336, where Greenberg JA referred to what he described as "the practice of prosecutors, where there is a conflict between a statement by the witness and the evidence he gives in court, to make the statement available", and at 337, where the learned judge of the Appellate Division said he hoped that the duty to observe this practice would be carried out by every prosecutor.

20.. **S v Alexander and Others (1)**, 1965 (2) SA 796 (A).

21.. *Ibidem*, at 812G-H, where Ogilvie Thompson JA said: "... Kotzee's notes formed part of his witness-statement and, as such, were at the trial covered by the privilege attaching to that statement ..."

22.. **S v B and Another**, 1980 (2) SA 947 (A) at 952F-H where Van Winsen AJA (as he then was) said that statements taken by the police in the contemplation of a prosecution were, in regard to the privilege from disclosure, on the same footing as documents brought into existence for the purpose of civil litigation and were, therefore, similarly privileged.

23.. Van Winsen AJA, *ibidem*, concluded that the privilege extended not only to statements taken from the witnesses testifying in the case but also to statements taken from persons with a view to their testifying in contemplated litigation. However, in this regard see the *obiter* remarks of Van Rooyen AJ in **S v Smith and Another**, 1994 (1) BCLR 63 (SE) at 74D-E.

24.. In **S v Mayo and Another**, 1990 (1) SACR 659 (E) at 662G, for example, Jones J ruled that "at this stage the State is not obliged to disclose the content of the police pocket book to defence counsel. I need only add that this is a ruling which is reversible in the event of further cross-examination or further facts coming to light which show that in fact the contents of the pocket book are relevant." See also **S v Majikela and Others**, 1991 (1) SACR 509 (E) at 518F-G, where Cooper J (quoting from the judgment of Eksteen JA in **S v Mavela**, 1990 (1) SACR 582 (A) at 590G-591A) said that: "... a police pocket book is a private official document not accessible to public scrutiny. In the present instance it appears that the pocket books of the investigating team reflect their investigations relating to the present charges. The entries were made for the purpose of drafting their statements for their inclusion in the police docket for submission to the Attorney-General. Therefore they must be regarded as an integral part of the witness' statements. Accordingly they are privileged documents."

It is observed, however, that on an earlier occasion, Ogilvie Thompson JA, in **S v Alexander and Others**, *supra* at 811D-E had remarked that: "That a witness may be required to produce, and be cross-examined

on, notes contemporaneously made by him which are still in his possession is indisputable: a policeman's note-book affords a familiar example. Refusal so to produce such notes may, under certain circumstances, vitiate a conviction ..." (my emphasis) See also Mullins J in **S v Mpumlo and Others**, 1987 (2) SA 442 (SE) at 447G-H and at 449A-C.

25.. See Eksteen JA in **S v Mavela**, 1990 (1) SACR 582 (A) at 590G-J.

26.. In **S v Schreuder en 'n Ander**, 1958 (1) SA 48 (SWA) at 54A-D. See also **S v Yengeni and Others** (1), 1990 (1) SA 639 (C) at 642B-I.

27.. 1965 (4) SA 507 (A).

28.. See the remarks of Rumpff JA (as he then was), *ibidem* at 514B-D. See also Le Roux J in **Van den Berg en 'n Ander v Streekladdros, Vanderbiljpark en Andere**, 1985 (3) SA 960 (T), regarding the position where a witness refreshed his memory during an adjournment.

29.. See LH Hoffmann and D Zeffertt, **The South African Law of Evidence** (4th ed, Butterworths, Durban, 1989), at 265, where the authors submitted that where that happened, the prosecutor's conduct, if he or she allowed the witness to do so, had reached a point of disclosure, where fairness demanded that the privilege cease.

30.. *Ibidem*, at 264.

31.. See De Vos J in **S v Tshomi**, 1983 (1) SA 1159 (C).

32.. In **S v Mpetha and Others** (1), 1982 (2) SA 253 (C) at 259C.

33.. See Greenberg JA in **R v Steyn**, *op cit* 331D-E. See also Ogilvie Thompson JA in **S v Alexander and Others** (1), *op cit* 812G-H.

34.. **S v Mavela**, *op cit* 591B-E. See also **Ex parte Minister van Justisie: In re S v Wagner**, *supra* at 514G-H on this. See further **Burnell v British Transport Commission**, [1955] 3 All ER 822.

35.. It came into effect on 27 April 1994.

36.. 1994 (1) BCLR 43 (E).

37.. 1994 (1) BCLR 57 (E).

38.. 1994 (1) BCLR 63 (SE).

39.. *Supra*.

40.. *Supra*.

41.. *Ibidem*, at 46.

42.. *Ibidem*, at 46I-47G. Note that item 6 on the list included summaries of witness statements.

43.. *Ibidem*, at 48. Note that Cloete J in **Shabalala and Others v The Attorney-General of Transvaal and Others**, *op cit* 101E-H agreed to these views and even added that "the baby should not be thrown out with the bath water."

44.. In other words, that it did not violate the limitation clause.

45.. *Ibidem*, at 49.

46.. *Ibidem*.

47.. 1994 (1) BCLR 57 (E).

48.. *Ibidem*, at 61C-D.

49.. *Ibidem*, 61D-E, where (to paraphrase him) the learned judge further said that to hold that such documents should be supplied to the defence would destroy the necessary confidentiality and prejudice the interests of the prosecution, which was not the intention of the legislature.

50.. In **S v Fani and Four Others**, *supra* at 47.

51.. **S v James**, *supra* at 61F-I.

52.. *Ibidem*, at 61I-62B.

53.. *Ibidem*, at 62D-E. However, as Jones J pointed out in **S v Fani and Four Others**, *supra* at 46, it is noteworthy that the summary of substantial facts in practice "has not always ... measured up to the requirement of sufficient information to prepare properly for trial, and hence it does not necessarily facilitate a fair trial within the meaning of the new Constitution. It often says little more than the indictment itself ... the information contained in this document has become less and less informative as the years go by." See also Marnewick AJ in **S v Sefadi**, 1994 (2) BCLR 23 (D) at 36D.

Moreover, as Cloete J observed in **Shabalala and Others v The Attorney-General of Transvaal and Others**, 1994 (6) BCLR 85 (T) at 97, "[t]he content of the summary of substantial facts depends on the opinion of the attorney-general, and the opinions of attorneys-general have frequently been conservative ..."

Besides, as Cloete J, *ibidem* at 98B-D commented, not all accused persons are furnished with the summary of substantial facts; the accused appearing either in the regional or magistrates' courts, who constitute the majority of persons who appear daily before our courts on criminal charges, do not enjoy the advantage of this procedure. See also Mahomed DP in **Shabalala and Others v Attorney-General of the Transvaal and Another**, 1995 (12) BCLR 1593 (CC) at 1603, paragraph 21.

54.. *Ibidem*, at 62E.

55.. 1994 (1) BCLR 63 (SE).

56.. On the strength of the provisions of Section 23, read with Section 25(3)(b) and (d) of the **Constitution**.

57.. *Ibidem*, at 70H-71B, where Van Rooyen AJ said, *inter alia*, that "both section 23 and section 25(3) should be read against the background of the existence of a privilege attaching to the statements of State witnesses."

58.. *Supra*, at 49.

59.. **S v Smith and Another**, *supra* at 67D and at 72E-F.

60.. *Ibidem*, at 74D-E.

61.. 1994 (2) BCLR 23 (D).

62.. On the strength of Sections 23, 25 and 33(1) of the **Constitution**.

63.. **S v Sefadi**, *supra* at 25.

64.. *Ibidem*, at 27 and 38. At 39 Marnewick AJ concluded that: "the privilege in its existing form is ... in conflict with the provisions of sections 23 and 25(3) of the Constitution. In terms of Section 4(1) of the Constitution it therefore no longer has any force or effect." (my emphasis)

At 28 the judge said that "... the information contained in witness statements in the possession of the police or the prosecutor is a striking example of information held by the State ... which ... may be required for the exercise of a right, namely the right to a fair trial." See also *ibidem* at 36.

65.. *Supra* at 49.

66.. The equality clause.

67.. *Ibidem*, at 39. See also *ibidem* at 27G-28C. Further, see the remarks of Heath J in **S v Majavu**, 1994 (2) BCLR 56 (CkGD) at 77I-78B on the importance of the equality clause in this regard.

However, note that the fundamental flaw in this reasoning, according to Cloete J in **Shabalala and Others v The Attorney-General of Transvaal and Others**, *op cit* 114D-F, "is that an accused will never be in an equal position to the prosecutor for so long as he is entitled to remain silent during the proceedings and the trial and not to testify during trial - rights which are entrenched in section 25(3)(c) of the Constitution."

68.. Section 33(1) of the **Constitution**. At 28, Marnewick AJ outlined the four requirements in this regard. See also **Qozeleni v Minister of Law and Order and Another**, *op cit* 89H-I.

69.. *Ibidem*, at 37.

70.. *Ibidem*, at 38 and 39.

71.. *Ibidem*, at 39.

72.. 1994 (6) BCLR.

73.. Particularly Section 23.

74.. *Ibidem*, at 97.

75.. Section 25(3)(d) of the **Constitution**.

76.. Under Section 25(3)(b) of the **Constitution**. See the remarks of Heath J in **S v Majavu**, *supra* at 77F-G in this regard.

77.. **Shabalala and Others**, 1994 (6) BCLR at 97 and 119.

78.. *Ibidem*. At 98 the learned judge concluded that: "An accused may ... require information in addition to that for which provision is made in the Criminal Procedure Act in order to exercise or protect his right to adduce and challenge evidence ... As matters presently stand, section 23 of the Constitution is an accused's only means of obtaining such additional information." See also *ibidem*, at 100, where the learned judge further said that the applicants *in casu* were entitled to invoke Section 23 for the purpose of obtaining access to all information held by the attorney-general in so far as such information was required for the exercise or protection of their right to a fair trial and, in particular, to adduce and challenge evidence.

79.. *Ibidem*, at 100B-101C. For the various meanings of the word "required" which was used in Section 23, see Myburgh J in **Khala v The Minister of Safety and Security**, *op cit* 94G-95C. In this regard, see also Azhar Cachalia et al, **Fundamental Rights in the New Constitution** (Juta & Co Ltd, Cape Town, 1994) who said at 70, *inter alia*, that the Section 23 right was qualified in that the information requested must be required for the exercise or protection of a person's rights which were not limited to the rights contained in Chapter 3 of the **Constitution**.

80.. *Ibidem*, at 119G-H.

81.. *Ibidem*, at 119H. As Myburgh J pointed out in **Khala v The Minister of Safety and Security**, *op cit* 96E, unless that requirement was met, the State would not be obliged to make the relevant information available.

82.. *Ibidem*, at 119H-I. As Myburgh J pointed out in **Khala v The Minister of Safety and Security**, *op cit* 95C-D, "[t]he enquiry in each case should be a factual one: Is the information required for the protection or exercise of a person's rights?"

83.. *Ibidem*, at 119I-120A.

84.. *Ibidem*, at 120B.

85.. *Ibidem*, at 121B-C.

86.. *Ibidem*, at 121D-H.

87.. Which allowed *any division of the Supreme Court* to refer to the Constitutional Court for its ruling constitutional issues of public importance raised in a matter, notwithstanding the fact that the matter itself had already been disposed of.

88.. 1995 (12) BCLR 1593 (CC).

89.. In whose judgment all the other members of the Court concurred. See *ibidem*, at 1623.

90.. For which see *ibidem*, at 1599, paragraph 9.

91.. *Ibidem*, at 1607, paragraph 34, at 1608, paragraph 36, and at 1619, paragraph 63 respectively.

92.. *Ibidem*, at 1607, paragraph 34, and at 1608, paragraph 35.

93.. *Ibidem*, at 1616, paragraph 55.

94.. *Ibidem*, at 1621, paragraph 72.

95.. And, therefore, in terms of Section 4(1) thereof, to that extent, invalid.

96.. *Ibidem*, at 1620-1621, paragraphs 68-69.

97.. *Ibidem*, at 1622.

98.. In other words, the Court accepted that, as Sopinka J pointed in **R v Stinchcombe**, *supra* at 76, the obligation on the part of the State to discover and disclose information "is not absolute. It is subject to the discretion of Counsel for the Crown. **This discretion extends both to the withholding of information and to the timing of disclosure.**" Regarding what should be disclosed in this regard, Sopinka J's remarks, *ibidem* at 78, [namely that "**all relevant information must be disclosed** subject to the reviewable discretion of the Crown. The material must include not only that which the Crown intends to introduce into evidence but also that which it does not. No distinction should be made between inculpatory and exculpatory evidence ... The Crown must ... disclose **relevant material** whether it is inculpatory or exculpatory." (my emphasis)] will come in handy in our situation. Mahomed DP in **Shabalala**, *supra* at 1621I-1622B indeed acknowledged this.

99.. See Mahomed DP in **Shabalala**, at 1622 and 1623 respectively.

100.. Mahomed DP, *ibidem* at 1615, paragraph 55, and at 1621, paragraph 71, said that the test is an objective one and that "[i]t is not sufficient to demonstrate that the belief is held *bona fide*. It must be shown that a reasonable person in the position of the prosecution would be entitled to hold such a belief".

101.. *Ibidem*, at 1621, paragraph 71.

- 102.. *Ibidem*, at 1615, paragraph 55.
- 103.. *Ibidem*, at 1607, paragraph 34, and at 1608, paragraphs 35 and 36.
- 104.. Per Sopinka J in **R v Stinchcombe**, *supra* at 72.
- 105.. *Ibidem*, at 1622A-B.
- 106.. In **Shabalala and Others v The Attorney-General of Transvaal and Others**, *op cit* 100A. See also *ibidem*, at 119F-H. See further Heath J in **S v Majavu**, *op cit* 77F-G.
- 107.. In **Shabalala and Others v Attorney-General of the Transvaal and Another**, *op cit* 1605, paragraph 26. See also Mahomed J (as he then was) in **S v Mhlungu and Others**, 1995 (3) SA 867 (CC) at 873I-874C.
- 108.. *Ibidem*, at 1606, paragraph 29.
- 109.. In **S v Majavu**, *op cit* 76D
- 110.. A State submission which Cloete J quite correctly rejected in **Shabalala and Others v Attorney-General of Transvaal and Others**, *supra* at 97-98.
- 111.. *Ibidem*, at 97D-F.
- 112.. Per Sopinka J in **R v Stinchcombe**, *op cit* 74.
- 113.. See the Canadian case of **Regina v Bourget**, 1988 (41) DLR (4th) 756 at 757.
- 114.. In whom, in terms of Section 108(1) of the **Constitution**, vested the authority to institute criminal prosecutions on behalf of the State.
- 115.. In **Shabalala and Others v The Attorney-General of Transvaal and Others**, *op cit* 99H.
- 116.. Namely the right to a fair trial in this instance.
- 117.. In **Shabalala and Others v Attorney-General of the Transvaal and Another**, *op cit* 1607, paragraph 55.

CHAPTER TEN

THE DEATH PENALTY, HUMAN RIGHTS UNDER THE NEW CONSTITUTIONAL SYSTEM

INTRODUCTION

For a very long time our legal system was saddled with a controversy regarding the death penalty.¹ Civil libertarians² campaigned tirelessly for its abolition while there was also a strong lobby for its retention as a form of punishment.³ The most important reason advanced for the retention of the death penalty was, and still is, that society in general demands retribution for serious crimes.⁴ Some of the retentionists regard the death penalty as a reflection of the will of the Almighty,⁵ while others, though denying that they regard it as a panacea for our unacceptably high levels of crime, have argued that, "[t]o uphold law and order and to ensure respect and confidence in our criminal justice system, capital punishment in our particular circumstances is imperative."⁶

It is important to note that the chasm between the people who want the death penalty to be abolished and those who want it to be retained is not that wide; if anything, the distinction between them is as clear as muddy water and it depends on the levels of violent crime at any particular moment. However, the racial breakdown of the two camps, with indigenous Africans always dominating the abolitionist camp, confirms the public perception that the death penalty was essentially an instrument of apartheid.⁷

The legal position prior to the Constitutional Court's judgment in **S v Makwanyane**,⁸ the judgment of the Constitutional Court in **Makwanyane** itself, and subsequent

developments in respect of the right to life and the death penalty all constitute the subjects to be investigated in this chapter.

THE LAW PRIOR TO MAKWANYANE

For the purpose of this thesis, only the law of the old Republic of South Africa⁹ will be considered. The formerly nominally independent TBVC territories had similar legislation¹⁰ and only the Ciskei had formally abolished the death penalty¹¹ by the time the (interim) **Constitution** became law and when the **Makwanyane** decision of the Constitutional Court was given.

PRIOR TO 1990

Until 1958, there were only three capital crimes in South Africa, namely murder,¹² treason¹³ and rape.¹⁴ The death penalty was mandatory only in the case of murder where extenuating circumstances could not be found. In 1958 robbery and housebreaking with aggravating circumstances¹⁵ were added to these.¹⁶ Subsequently, sabotage,¹⁷ receiving training that could further the objects of communism or advocating abroad economic or social change in South Africa by violent means through the aid of a foreign government or institution where the accused was a resident or a former resident of the Republic,¹⁸ kidnapping and child stealing,¹⁹ and "participation in terroristic activities"²⁰ were added to the list of capital crimes.

Under the **Internal Security Act**,²¹ provision was made for the death penalty for "terrorism". This offence is very broadly defined and includes acts or threats of violence and attempted acts of violence carried out with the intent to, *inter alia*, overthrow or endanger the state authority, or bring about or promote any constitutional, political, industrial, social or economic change in the Republic,²² or to "induce the Government of the Republic to do or to abstain from doing any act or to adopt or to abandon a particular standpoint."²³ Conspiring with, or inciting, instigating, commanding, advising, aiding, encouraging or procuring any other person to commit terrorism as defined in the Act could also result in capital punishment.²⁴

Before 1990, there was no automatic right of appeal against the decision of the Supreme Court to, *inter alia*, impose the death penalty. The accused first had to apply to the trial judge for leave to appeal. If this was denied, the convicted person could petition the Chief Justice for leave to appeal to the Appellate Division of the Supreme Court; the Chief Justice's decision in this regard was final. If the condemned person was granted leave to appeal, the Appellate Division would then deal with the appeal and decide whether to confirm the sentence of death. If all else had failed, the person sentenced to death could appeal to the State President of the Republic for clemency. The State President could use the constitutional power to reprieve a condemned person by commuting his or her death sentence to any other competent sentence.²⁵ Therefore, as Mr HJ Coetsee, then Minister of Justice pointed out, no person could be executed before the death sentence had been confirmed by the Appellate Division and before the State President had decided whether or not to grant such a person a reprieve.²⁶

THE 1990 REFORMS

On 2 February 1990, Mr FW de Klerk, then State President, announced the *suspension* of the execution of the death penalty as part of an epoch-making speech which set South Africa on a new path.²⁷ The suspension of the execution of the death penalty was pending certain reforms which were subsequently brought about by means of the **Criminal Law Amendment Act**²⁸ on 27 July 1990.²⁹

Whereas before these reforms the death penalty was obligatory in all cases of murder where the court found no extenuating circumstances, in terms of the amended Section 277 of the **Criminal Procedure Act**³⁰ courts could choose not to impose capital punishment; after a conviction of murder, or of one of the other capital offences, the death penalty was a discretionary sentence. It was to be imposed only if the presiding judge or the court was satisfied that it was the only appropriate sentence.³¹ As Friedman AJA pointed out in **S v Masina and Others**,³² a completely new approach in this regard was embarked upon. If, in the circumstances of a particular case there was another appropriate sentence, for example life imprisonment, then the death penalty could not be regarded as the only proper sentence.³³ The consequences of this were very clear; those judges who had all along been agonising over the legitimacy of the death penalty

would now be at liberty to obviate its imposition and, instead, impose long sentences of imprisonment, including life imprisonment.³⁴

Furthermore, the narrow concept of extenuating circumstances the presence of which the accused had to establish on a balance of probabilities, was replaced by the broader concept of mitigating factors³⁵ which would allow the courts to take into account even factors that were unrelated to the crime, such as the accused's behaviour after the commission of the crime.³⁶

Lastly, before the 1990 amendment of Section 277 the death penalty was a matter for the presiding judge alone, in the decision of which the assessors (if any) did not play any formal role. However, under the amended Section 277 the judge was now to conjointly with the assessors make a finding on the presence or absence of mitigating or aggravating circumstances, and have to be satisfied that it was the only appropriate sentence before imposing it.³⁷

The sentence of death could be passed by a superior court only;³⁸ magistrates' courts did not have jurisdiction to pass this form of penalty. It could not be imposed upon any person "who was under the age of 18 years at the time of the commission of the act which constituted the offence concerned."³⁹ Where the age of an accused at the time of the commission of such an offence was placed in issue, the onus was upon "the State to show beyond reasonable doubt that the accused was 18 years of age or older at the relevant time."⁴⁰

The death penalty was to be imposed only in the most exceptional cases, where there were no prospects of rehabilitation and the objects of punishment could not be achieved in any other way.⁴¹ The Court was required to identify mitigating and aggravating factors, and the State bore the *onus* of proving beyond reasonable doubt the existence of aggravating factors and to negative beyond reasonable doubt the existence of mitigating factors relied upon by the accused.⁴² The subjective factors which might have influenced the accused's conduct were to be taken into account⁴³ and related to the main objects of punishment.⁴⁴ As Holmes JA said in **S v Letsolo**,⁴⁵ in this process,

every relevant consideration was to receive the most scrupulous care and reasoned attention.

A full right of appeal, including the right to dispute the sentence without having to establish an irregularity or misdirection on the part of the trial judge, was available to persons sentenced to death. The Appellate Division was empowered to set the sentence of death aside if it would not have imposed it itself and it had laid down criteria for the exercise of that power by itself and other Courts.⁴⁶ Even if the person sentenced to death did not appeal, the Appellate Division was required to review the case and to set aside the sentence if in its opinion it was not a proper sentence.⁴⁷

SECTION 9 OF THE (INTERIM) CONSTITUTION

Makwanyane was decided thirteen months after the adoption of the (interim) **Constitution** which provided, *inter alia*, that:

[e]very person shall have the right to life.⁴⁸

This formulation was, needless to say, a result of the compromise between two extremes, viz. abolition and retention of capital punishment, reached in the World Trade Centre negotiations. In the negotiations, the African National Congress,⁴⁹ on the one hand, supported by numerous groups such as a group of Western Cape lawyers,⁵⁰ demanded the absolute and unconditional abolition of the death penalty. The National Party, on the other, would make provision for the death penalty which would be imposed and executed subject to Article 6 of the United Nations **International Covenant on Civil and Political Rights**.⁵¹ The Democratic Party provided in its draft proposals submitted to the World Trade Centre negotiations that "no person shall be arbitrarily deprived of his or her life". The Inkatha Freedom Party, while itself unequivocally calling for the abolition of capital punishment, did so in a rather restrained fashion.⁵²

Though the Chief Justice, Michael M Corbett, submitted that Section 33(1)(b),⁵³ read with Section 9 of the (interim) **Constitution**, effectively abolished the death penalty,⁵⁴ the controversy over capital punishment had not ended. Section 9 of the Constitution could be interpreted in various ways, leading to different results.⁵⁵ On a matter such as

this, where the political divisions were unbridgeable, and where the (interim) **Constitution** itself did not abolish the death penalty in clear and unambiguous terms, an authoritative interpretation of the provisions of Section 9 could only be given by the Constitutional Court.⁵⁶

The South African Law Commission⁵⁷ and the Democratic Party⁵⁸ proposed that the issue of the death penalty ought to be referred to the then-to-be-formed constitutional court. The issue eventually came before the Constitutional Court, and, as will be shown below, the Court abolished the death penalty largely on the grounds that it was inconsistent with the right to life guaranteed in the **Constitution**,⁵⁹ despite the ruling in the unanimous judgment delivered by Chaskalson P, according to which the primary ground for finding the death penalty unconstitutional was that it violated the right not to be subjected to cruel, inhuman and degrading punishment.

THE CONSTITUTIONAL COURT INTERVENES

Eventually the issue came before the Constitutional Court which ruled that the death penalty was not compatible with the (interim) **Constitution** because it, *inter alia*, negated the seminal right to life enshrined in Chapter 3 of the (interim) **Constitution**.⁶⁰

THE CASE OF S V MAKWANYANE EN 'N ANDER⁶¹

In this matter, to which the case before the Constitutional Court was a sequel, the two accused had been convicted in the Witwatersrand Local Division of the Supreme Court on four counts of murder,⁶² one count of attempted murder and one count of robbery with aggravating circumstances,⁶³ all of which were committed during a robbery from a bank security vehicle which was delivering monthly wages to the Coronation Hospital in Johannesburg. They had appealed to the Appellate Division against both the convictions and the sentences and their appeals in respect of the convictions and long term sentences of imprisonment were dismissed. However, because of the issue of the validity of the death penalty, the Appellate Division⁶⁴ postponed the further hearing of

the appeals against the death sentences, pending a decision of the Constitutional Court.

Though the matter was not formally referred to the Constitutional Court by the Appellate Division,⁶⁵ the Constitutional Court had to decide two basic questions, namely:

(1) the constitutionality of the provisions of Section 277(1)(a)⁶⁶ of the **Criminal Procedure Act**; and

(2) the implications of the provisions of Section 241(8) of the (interim) **Constitution** with regard to all matters concluded prior to the date of commencement of the (interim) **Constitution**.⁶⁷

Unfortunately, in my opinion, the remark of Grosskopf JA that the further consideration of the appeals against the death sentences be postponed pending a decision of the Constitutional Court regarding the constitutional validity of the death penalty "*in gevalle soos hierdie*"⁶⁸ compelled the Constitutional Court to confine its work in this regard to the provisions of Section 277(1)(a) of the **Criminal Procedure Act**, instead of dealing comprehensively with the constitutional validity of the death penalty as a form of punishment *per se*.⁶⁹

THE CONSTITUTIONALITY OF THE DEATH PENALTY

For this purpose, Chapter 3 of the (interim) **Constitution**, which set out the fundamental rights which all persons would be entitled to in the nascent democracy, was relevant. The starting point for the Court was Section 9 which, without dealing specifically with the death penalty, merely provided that "[e]very person shall have the right to life."⁷⁰ Lamenting this, Chaskalson P remarked that:

[i]t would no doubt have been better if the framers of the Constitution had stated specifically, either that the death penalty is not a competent penalty, or that it is permissible in circumstances sanctioned by law. This, however, was not done and it has been left to this Court to decide whether the penalty is consistent with the provisions of the Constitution. That is the extent and limit of the Court's power in this case.⁷¹

The fact that, in the view of Chaskalson P, the **Constitution** did not specifically proscribe the death penalty did not deter the Court from proceeding to determine the

question, however. Chaskalson P suggested that the next logical thing to do would be to look at Section 11(2) of the (interim) **Constitution**,⁷² the constitutional provision which dealt specifically with the question of punishment; this was the section which prohibited "cruel, inhuman or degrading treatment or punishment" albeit without defining what constituted such treatment or punishment.⁷³ The Court then had to give meaning to these words⁷⁴ and relate them to the issue of capital punishment as then sanctioned by our law.

For this purpose, the Court acknowledged that it would have to go beyond the ordinary meaning of the words to be interpreted and look at both their context⁷⁵ and their purpose, as well as the history and background to the adoption of the (interim) **Constitution**. On this basis, Chaskalson P had no difficulty in concluding that, *prima facie*, the death penalty is indeed a cruel, inhuman and degrading form of punishment.⁷⁶ However, in the same breath, he said:

[t]he question is not, however, whether the death sentence is a cruel, inhuman or degrading punishment in the ordinary meaning of these words but whether it is a cruel, inhuman or degrading punishment within the meaning of s 11(2) of our Constitution. The accused, who rely on s 11(2) of the Constitution, carry the initial *onus* of establishing this proposition.⁷⁷

After a long excursion which took him through international human rights instruments and the experiences and practices of other countries, Chaskalson P indeed concluded that the carrying out of the death penalty destroyed life which was protected without reservation in Section 9, and that it annihilated human dignity protected under Section 10 of our **Constitution**. He thus declared that he was satisfied that in the context of our **Constitution** the death penalty was a cruel, inhuman and degrading punishment.⁷⁸

While Chaskalson P correctly understood the role of the Court to be to decide whether the provisions of pre-constitutional law making the death penalty *a competent sentence for murder and other crimes* were consistent with the (interim) **Constitution**,⁷⁹ he was not willing to go beyond the question that was referred to the Court by the Appellate Division, however. His judicial eye was always focused on the validity of capital punishment in respect of murder.⁸⁰

Thus, after he had concluded that the death penalty was indeed a cruel, inhuman and degrading punishment which violated our **Constitution**, he then sought to determine whether it was not, nevertheless, as a penalty for murder in the circumstances contemplated in Sections 277(1)(a), 316A and 322(2A) of the **Criminal Procedure Act**, protected by the limitation clause. For this purpose, using his legal scalpel, he dissected the arguments proffered by the Attorney-General, all of which were based on the foremost objects of punishment. At the end of this process, he came to the conclusion that:

the clear and convincing case that is required to justify the death sentence as a penalty for murder has not been made out. The requirements of s 33(1) have accordingly not been satisfied, and it follows that the provisions of s 277(1)(a) of the Criminal Procedure Act 51 of 1977 must be held to be inconsistent with s 11(2) of the Constitution.⁸¹

In other words, though he was amply aware that the Court was required to pronounce on the validity of capital punishment,⁸² instead of declaring capital punishment *per se* to be inconsistent with our **Constitution** and therefore invalid, the President of the Constitutional Court limited his enquiry to the validity of the penalty in cases of murder.⁸³ So, for him the question to be answered in **Makwanyane**⁸⁴ was whether the death penalty was justifiable under our **Constitution** as a penalty for murder, rather than as a penalty under our criminal justice system.⁸⁵

At the end of his lengthy, erudite and illuminating judgment, the President of the Court indeed confirmed this when he said that:

I have dealt in this judgment only with the provisions of s 277(1)(a) of the Criminal Procedure Act, but it is clear that if ss (1)(a) is inconsistent with the Constitution, ss (1)(c)-(f) must also be unconstitutional, so too must provisions of legislation corresponding to s 277(1)(a), (c), (d), (e) and (f) that are in force in parts of the national territory in terms of s 229 of the Constitution.⁸⁶ (my italics)

Thus, Chaskalson P neatly skirted around the provisions of Section 276(1)(a) of the **Criminal Procedure Act**, in terms of which the sentence of death may, subject to the provisions of this Act and any other law and of the common law, be passed upon a person convicted of an offence. Neither was he prepared to deal with the provisions of Section 277(1)(b) of this Act, in terms of which the sentence of death may be passed

by a superior court in the case of a conviction for "treason committed when the Republic is in a state of war." This, he said, was because:

[d]ifferent considerations arising from s 33(1) might possibly apply to para (b), which makes provision for the imposition of the death sentence for treason committed when the Republic is in a state of war. No argument was addressed to us on this issue, and I refrain from expressing any views thereon.⁸⁷

THE INDIVIDUAL PREDILECTIONS AND IDIOSYNCRASIES OF THE OTHER JUDGES OF THE CONSTITUTIONAL COURT

While all the judges of the Constitutional Court concurred in the judgment of Chaskalson P and in the order he gave, each one of them gave his or her own separate judgment which exhibited interesting personal nuances.⁸⁸ In their separate judgments most of the judges strike one as actually having sought a complete abolition of the death penalty as a form of punishment in the Republic. And yet they all prefaced their remarks by agreeing with Chaskalson P who deliberately confined his judgment to the constitutionality or otherwise of the provisions of Section 277(1)(a) of the **Criminal Procedure Act**.⁸⁹

For Ackermann J, however, the death penalty as a form of punishment was simply to be abolished.⁹⁰ The conclusion to which the learned judge of the Court came was that this form of punishment was arbitrary and unequal, and violated Section 9 of the (interim) **Constitution** which unquestionably encompassed the individual's "right not to be deliberately put to death by the State in a way which is arbitrary and unequal."⁹¹ However, if it was to be abolished, society ought to be given a guarantee by the State that it would be protected from further harm by unreformed recidivist murderers and rapists.

[w]ith the abolition of the death penalty society needs a firm assurance that the unreformed recidivist murderer or rapist will not be released from prison, however long the sentence served by the prisoner may have been, if there is a reasonable possibility that the prisoner will repeat the crime. Society needs to be assured that in such cases the State will see to it that such a recidivist will remain in prison permanently ... If there is an individual right not to be put to death by the criminal justice system, there is a correlative obligation on the State, through the criminal justice system, to protect society from once again being harmed by the unreformed recidivist killer or rapist. The right and the obligation are inseparably part of the same constitutional State compact.⁹²

Didcott J agreed with Chaskalson P that the Constitution outlawed capital punishment in the Republic "for the crimes covered by his judgment."⁹³ In other words, the learned judge, like Chaskalson P,⁹⁴ was prepared to confine the outlawing of capital punishment to murder, robbery or attempted robbery with aggravating circumstances, kidnaping, child-stealing and rape.

And yet, a careful reading of paragraph 174 of the judgment suggests that the learned judge actually wanted a complete abolition of capital punishment which he found to be a violation of the right to life⁹⁵ of every person and a contravention of the right of every individual not to be subjected to cruel, inhuman or degrading punishment, both of which were protected by Sections 9 and 11(2) of the **Constitution** respectively. For him, the provisions of the **Criminal Procedure Act**⁹⁶ that sanctioned sentences of death *were not saved from nullification* by the limitation clause⁹⁷ in their clash with Sections 9 and 11(2)⁹⁸ of the **Constitution**. In his concluding remarks, the learned judge then said:

South Africa has experienced too much savagery. The wanton killing must stop before it makes a mockery of the civilised, humane and compassionate society to which the nation aspires and has constitutionally pledged itself. And the State must set the example by demonstrating the priceless value it places on the lives of all its subjects, *even the worst*.⁹⁹ (my italics)

So, in essence, Didcott J did not completely agree with Chaskalson P in whose judgment he nonetheless concurred. He could not agree with Chaskalson P and adopt a position seeking to preserve the State's right to kill people for treason and terrorism committed while the Republic was in a state of war,¹⁰⁰ which is diametrically opposed to the position taken in his judgment, and, in the same breath, sustain his commitment to the abolition of the death penalty.

Though Kentridge AJ concurred in the judgment of Chaskalson P, for him the issue was simple; the framers of the (interim) **Constitution** had imposed upon the Constitutional Court the inescapable duty of deciding whether the death penalty for *murder* was consistent with Chapter 3 of the (interim) **Constitution**.¹⁰¹ Though the learned acting judge conceded that there was "ample objective evidence that evolving standards of civilisation demonstrate the unacceptability of the death penalty in countries which are or aspire to be free and democratic societies",¹⁰² and even though he was prepared to deprecate the deliberate execution of a human being, however depraved and criminal

his conduct, he was still talking about the constitutionality of capital punishment with regard to murder and murderers. He thus concluded that:

[a]s a civilised society it is not open to us, in my opinion, to express our moral outrage by executing *even the worst of murderers* any more than we could do so by the public hangings or mutilations of a bygone time.¹⁰³ (my italics)

If the Kentridge AJ approach¹⁰⁴ were to be followed, the question of the constitutionality of the death penalty would have to be dealt with separately in respect of each of the offences for which it could be imposed prior to the **Makwanyane** decision. But, fortunately, Chaskalson P was prepared to go beyond the validity of the provisions of Section 277(1)(a) of the **Criminal Procedure Act**, albeit cautiously and to a limited extent.¹⁰⁵

For Kriegler J, on the other hand, the issue for decision was simply whether the **Constitution** had outlawed capital punishment as sanctioned by relevant provisions of the **Criminal Procedure Act** and corresponding legislation in the then Transkei, Bophuthatswana and Venda.¹⁰⁶ For the purpose of answering this question, the learned judge used the provisions of Section 9 of the (interim) **Constitution** as the starting point, further than which he said one need not go.¹⁰⁷ To him, whatever else Section 9 might have meant, at the very least it indicated that the State may not deliberately deprive any person of his or her life. As against that general prohibition, the provisions of Section 277(1)¹⁰⁸ of the **Criminal Procedure Act**, which sanctioned a judicial order for the deprivation of a person's life, were unconstitutional and could be struck down under Section 4(1) of the (interim) **Constitution**.¹⁰⁹

Kriegler J then proceeded to look into whether or not the provisions of Section 277(1) could be salvaged by the limitation clause. After having considered the deterrent and retributive value of Section 277(1), he concluded that:

the death penalty has no demonstrable penological value over and above that of long-term imprisonment. No empirical study, no statistical exercise and no theoretical analysis has been able to demonstrate that capital punishment has any deterrent force greater than that of a really heavy sentence of imprisonment

...

... capital punishment cannot be vindicated by the provisions of s 33(1) of the Constitution. It simply cannot be reasonable to sanction judicial killing without knowing whether it has any marginal deterrent value.

Having concluded that *capital punishment is inconsistent with s 9 of the Constitution and cannot be saved by s 33(1)*, I find it unnecessary to consider its possible inconsistency with any other fundamental rights protected by chap 3.¹¹⁰
(my italics)

However, after taking such a great and clear stand against capital punishment, Kriegler J suddenly, in a footnote for that matter,¹¹¹ associated himself with the approach of Chaskalson P with regard to the provisions of Section 277(1)(b)¹¹² of the **Criminal Procedure Act**. The implications of this are discussed below.

Langa J, immediately after associating himself with the judgment of Chaskalson P, declared that the death sentence provided for in Section 277(1)¹¹³ of the **Criminal Procedure Act** was unconstitutional because it violated the right to life, the right to respect for human dignity and the right not to be subjected to cruel, inhuman and degrading punishment.¹¹⁴ However, the learned judge, whilst claiming to be putting more emphasis on the right to life, was quick to point out that the right to life did not mean that every person had the right not to be deliberately put to death by the State as punishment, as envisaged in Section 277(1) of the **Criminal Procedure Act**.¹¹⁵

After making this startling statement, he then looked into whether or not the provisions of Section 277(1) could be salvaged by the limitation clause. After that his judgment indulges in a discussion of *ubuntu*, an important concept which permeates our political, constitutional and social orientation and constitutes an important feature of the society South Africa seeks to become, before it returns to the conclusion that:

as a 'punishment' the death penalty is a violation of the right to life. It is cruel, inhuman *and* degrading. It is also a severe affront to human dignity ... Section 277 of the Criminal Procedure Act cannot be saved by the provisions of s 33(1) of the Constitution in respect of any of the rights affected. The punishment is not reasonable on any basis. In view of the available alternative sentence of a long term of imprisonment, it is also unnecessary.¹¹⁶

So for Langa J, the death penalty in its entirety was unconstitutional, though he too associated himself with the judgment and the order given by Chaskalson P.

For Madala J too, capital punishment was "clearly offensive to the cardinal principles for which our Constitution stands."¹¹⁷ His judgement, like that of Langa J, turned on the concept of *ubuntu*, which he said permeated the entire (interim) **Constitution** and carried in it "the ideas of humaneness, social justice and fairness."¹¹⁸

On the basis of *ubuntu*, he rejected capital punishment which he described as "a punishment which involves so much pain and suffering that civilised society ought not to tolerate it even in spite of the current high rate of crime. And society ought to tolerate the death penalty even less when considering that it has any greater deterrent effect on would-be murderers than life imprisonment."¹¹⁹ Believing as he did in rehabilitation of offenders,¹²⁰ the learned judge also said that:

the death penalty rejects the possibility of rehabilitation of the convicted persons, condemning them as "no good" once and for all, and drafting them to the death row and the gallows. One must then ask whether such rejection of rehabilitation as a possibility accords with the concept of *ubuntu*.¹²¹

Furthermore, the judge rejected capital punishment because it violated Section 11(2) of the Constitution. For a judge who rejected the death penalty in such clear and unambiguous terms¹²² to nonetheless, wittingly or unwittingly, associate himself with a position seeking to retain it in cases of treason committed while the Republic is in a state of war is surprising, to say the least.

Mahomed DP (as he then was) too, whose position on the death penalty was made clear at the very outset,¹²³ was nonetheless prepared, for inexplicable and unfathomable considerations, to leave the question of the validity of the provisions of Section 277(1)(b) of the **Criminal Procedure Act** open.¹²⁴ While his *ubuntu*-based approach would not permit him to countenance the deliberate annihilation of human life sanctioned by the death penalty,¹²⁵ he could not bring himself round to extending this approach to cases of treason committed while the Republic is in a state of war. While he, like Chaskalson P,¹²⁶ correctly pointed out that the framers of the (interim) **Constitution** had elected not to state their position on the death penalty in clearer

terms, but had left it to the Constitutional Court to deal with its constitutionality, he shrank from declaring capital punishment as null and void in absolute terms. Though in **S v Mhlongo**¹²⁷ he described it as the ultimate and the most incomparably extreme form of punishment involving the planned and calculated termination of life itself, he also left the question as to whether capital punishment negated the essential content of the right to life open.¹²⁸

In his characteristically erudite judgment, however, Mahomed DP (as he then was) demonstrated that capital punishment violated the right to life,¹²⁹ the right to equality,¹³⁰ the right human dignity¹³¹ and the right not to be subjected to cruel, inhuman and degrading punishment or treatment.¹³²

Mokgoro J,¹³³ whose judgment was also predicated upon *ubuntu*, unlike Mahomed DP (as he then was),¹³⁴ was prepared to declare that "[t]he death penalty violates the essential content of the right to life embodied in s 9, in that it extinguishes life itself."¹³⁵ For her, Section 277(1)¹³⁶ of the **Criminal Procedure Act**, was unconstitutional for violating the provisions of Sections 9, 10 and 11(2) of the **Constitution**.¹³⁷

Proceeding as she did from the *ubuntu* point of view, Mokgoro J could not countenance the deliberate and calculated killing of even the vilest human being by the State as a form of punishment. She, instead, expected the State, as the representative of its people, to set the standard for moral values in society, and not accord legal sanction to vengeance.¹³⁸

However, while, as far as she was concerned, there was no room for capital punishment in the new constitutional order, she too associated herself with the judgment and order given by Chaskalson P which skirted around the question of the validity of the death penalty in cases of treason committed while the Republic was at war.

For O'Regan J, put simply, the question to be decided by the Constitutional Court was whether capital punishment that had been imposed upon the accused in **S v Makwanyane en 'n Ander**¹³⁹ was constitutional. In other words, did "our Constitution

permit any convicted criminal, however heinous the crime, to be put to death by the Government as punishment for that crime?"¹⁴⁰

To answer this question, the learned judge began with Section 9 of the **Constitution**, the formulation of which she pointed out was unusual in human rights instruments and jurisprudence.¹⁴¹ Proceeding from the point of view of purposive interpretation of the right to life as encapsulated in the **Constitution**, she stated that the right to life was not confined to mere physical existence of a human being; it constitutes the essence of the new society that is emerging from the ruins of apartheid and is entwined with the right to human dignity, without which it is substantially diminished.¹⁴²

Moreover, for O'Regan J, all the rights entrenched in the **Constitution** were "available to all South Africans, no matter how atrocious their conduct."¹⁴³ Therefore, as Madala J put it in his own judgment, the death penalty would be unacceptable in such a society; it should not take its standards and values from the murderers, rapists, robbers and the like, but should seek to impose its own standards and values on them.¹⁴⁴

She did not find it difficult at all to say that, the purpose of capital punishment being to kill convicted criminals, to deprive them of their physical existence, "[i]ts inevitable result is the denial of human life. It is hard to see how this methodical and deliberate destruction of life by the Government can be anything other than a breach of the right to life ... The implementation of the death penalty is also a denial of the individual's right to dignity."¹⁴⁵ She was also not persuaded that the death penalty could be salvaged by the limitation clause as it did not meet the requirements of reasonableness, justifiability and necessity.¹⁴⁶

Without ever alluding to the provisions of Section 277(1)(b) of the **Criminal Procedure Act**, O'Regan J came to the conclusion that:

the death penalty is unconstitutional. It is a breach of the rights to life and dignity that are entrenched in ss 9 and 10 of our Constitution, as well as a breach of the prohibition of cruel, inhuman and degrading punishment contained in s 11(2). The new Constitution stands as a monument to this society's commitment to a future in which all human beings will be accorded equal dignity and respect. We cannot postpone giving effect to that commitment.¹⁴⁷

The last individual remarks in the **Makwanyane** judgment were made by Sachs J who first declared his full agreement with Chaskalson P and then expressed disappointment that the latter's judgment "places greater reliance on the prohibition of cruel, inhuman and degrading punishment than it does on the right to life."¹⁴⁸

For Sachs J, the starting-point in the analysis of capital punishment ought to be the right to life. For this purpose, the Court's primary duty was to interpret the provisions of Section 9 of the (interim) **Constitution**,¹⁴⁹ and not to articulate the personal views and feelings of its judges.¹⁵⁰

The unqualified and unadorned words of Section 9, in the judge's view, effectively outlawed capital punishment. The limitation clause¹⁵¹ could not save the death penalty from this as, according to the learned judge, the death penalty, by its very nature, entails not limiting a person's life but extinguishing it.¹⁵²

The judge also said that constitutionalism, on which our new order is based, was "about the protection and development of rights, not their extinction."¹⁵³ Thus, in the absence of a clear intention to the contrary, the unqualified and unadorned words of Section 9 should be read to mean exactly what they said. As the provision stood, the State was not given any power to use its sovereignty deliberately to take a person's life.¹⁵⁴

Lastly, while agreeing with Chaskalson P that the framers of the Constitution left the question of the validity of the death penalty for the Constitutional Court to decide,

they effectively closed the door by the language they used and the values they required us to uphold. It is difficult to see how they could have done otherwise. In a founding document dealing with fundamental rights you either authorise the death sentence or you do not. In my view, the values expressed by s 9 are conclusive of the matter. Everyone, *including the most abominable of human beings*, has the right to life, and capital punishment is therefore unconstitutional.¹⁵⁵ (my italics)

Once again, one wonders why this judge, like many others in **Makwanyane**, after succinctly and unequivocally declaring capital punishment to be unconstitutional, nonetheless decided to associate himself with the somewhat narrow, cautious and conservative position of the President of the Constitutional Court on the issue.

THE COURT AND PUBLIC OPINION

Part of the debate regarding the constitutionality of the death penalty was that it was necessary to consult the people by means of a referendum before a decision was made whether to retain or abolish it.¹⁵⁶ Participating in the parliamentary debate of 17 June 1993 on a free basis and propounding his own view, Mr NJJ Van R Koornhof MP (NP) said in this regard that:

[m]any people and especially the public argue that the death penalty should be retained simply because public opinion wants it. This is a fallacious argument. Nowhere in the world have leaders permitted themselves to be prescribed to by public opinion on such a moral case. If this were to be so, what would we do in this Parliament if public opinion chose torture. Would we introduce it?

... Public opinion in South Africa is emotionality loaded in favour of the death penalty at present. In such circumstances there is no answer. The public must not turn the death penalty into a magic formula, however, which will restore law and order. This will not happen.¹⁵⁷

In **Makwanyane** the Attorney-General had argued that contemporary public attitudes regarding what was cruel, inhuman or degrading were very important. He had also argued that South Africans in general would not regard capital punishment for extreme cases of murder as a cruel, inhuman or degrading punishment. Whilst Chaskalson P conceded that both propositions might be correct, he had the following to say in this regard:

[t]he question before us ... is not what the majority of South Africans believe a proper sentence for murder should be. It is whether the Constitution allows the sentence.

Public opinion may have some relevance to the enquiry, but, in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution. By the same token *the issue of the constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority*. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic

process. Those who are entitled to claim this protection include social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us that all of us can be secure that our rights will be protected.

This Court cannot allow itself to be diverted from its duty to act as an independent arbiter of the Constitution by making choices on the basis that they will find favour with the public.¹⁵⁸ (my italics)

THE JURISPRUDENTIAL IMPLICATIONS OF THE MAKWANYANE DECISION

In civil libertarian circles the historic **Makwanyane** decision was welcomed enthusiastically.¹⁵⁹ In general (and this phrase is used advisedly), the Constitutional Court ruled in favour of the right to life and adjudged the death penalty to be inconsistent with the (interim) **Constitution**. It emphasised, *ex abundanti cautela* in my opinion, that Makwanyane and the rest of those convicts who were awaiting their appointments with the executioner¹⁶⁰ would not be executed as the State and all its organs were bound by the decision.¹⁶¹ Our judges too will, again in general, no longer impose the death penalty as it has ceased being part of our system of criminal justice.

However, as stated above, Chaskalson P, whose judicial eye was obviously fixated upon murder, left the question of the applicability of the death penalty in respect of treason committed whilst the Republic is in a state of war¹⁶² open; the order he gave was specifically confined to the question of the validity of paragraphs (a),¹⁶³ (c),¹⁶⁴ (d),¹⁶⁵ (e)¹⁶⁶ and (f)¹⁶⁷ of Section 277(1) of the **Criminal Procedure Act** as well as to corresponding provisions of legislation then still applicable in certain parts of the national territory, which the Court declared to be in conflict with the (interim) **Constitution** and therefore invalid.¹⁶⁸ This, the learned President of the Constitutional Court said, was because "[d]ifferent considerations arising from s 33(1) might possibly apply to para (b), which makes provision for the imposition of the death sentence for treason committed when the Republic is in a state of war. No argument was addressed to us on this issue, and I refrain from expressing any views thereon."¹⁶⁹ (my italics) In other words, the Court felt that it was possible that "[a] punishment as extreme and as irrevocable as death"¹⁷⁰ could be reasonable, justifiable and necessary as a penalty for

treason committed when the Republic is in a state of war, even though it would negate the essential content of the right to life.

Neither was the question of the imposition of the death penalty in respect of acts of terrorism addressed.¹⁷¹ It is thus, in my opinion, still possible for the death penalty to be imposed in terms of the provisions of Section 54(1) of the **Internal Security Act**, albeit subject to the decision of the Appellate Division¹⁷² in **S v Mncube en 'n Ander**.¹⁷³

As a result, the death penalty in South Africa has not been completely ruled out as "the proper sentence";¹⁷⁴ it was declared to be inconsistent with the (interim) **Constitution** and therefore invalid *only* in respect of a conviction for murder, robbery or attempted robbery with aggravating circumstances, kidnaping, child-stealing and rape.¹⁷⁵ Thus, if it turns out to be the only appropriate sentence in respect of a person charged with and convicted of *the elastic crime of treason*¹⁷⁶ or, *a priori*, terrorism¹⁷⁷ "committed while the Republic is in a state of war",¹⁷⁸ the death penalty may still be imposed. If such a person has exhausted all the remedies available within the **Criminal Procedure Act** and has failed to gain a presidential reprieve, the State may, theoretically at least, still hang him or her¹⁷⁹ to crush political dissent.

The Constitutional Court, whose collective commitment to human rights could not be gainsaid, had a golden opportunity in **Makwanyane** to rid the Republic once and for all time of the scourge of capital punishment but refused to do so¹⁸⁰ in respect of treason and, *a priori*, terrorism.¹⁸¹ By doing so, it might have thought it wise to leave room for the State to act in "self-defence" when the nation is confronted by a real and immediate threat to the lives of many of its citizens and to its very survival. While this may be acceptable and indeed justifiable in any democracy, the death penalty may not be justified this way; for it "is not an act of self-defence against an immediate threat to life. It is the premeditated killing of a prisoner who could be dealt with equally well by less harsh means."¹⁸²

If the Constitutional Court thought that the threat of the death penalty might deter people from committing politically motivated crimes, it was grossly mistaken. "If anything, the possibility of political martyrdom through execution may encourage people

to commit such crimes."¹⁸³ The execution of many of our own people from Vuyisile Mini in the early sixties, through Solomon Mahlangu in the seventies, to Mosololi in the eighties for politically motivated crimes indeed spurred many young people on to struggle even more vigorously against the system of apartheid.

Because the Constitutional Court shrank from the task of declaring capital punishment as being inconsistent with the (interim) **Constitution** in respect of all offences, the debate and the political controversy generated by the issue of capital punishment continued. Only the Constitutional Assembly, in the course of making a new constitution for the Republic, or Parliament,¹⁸⁴ could be expected to resolve the issue, therefore. Needless to say, the Constitutional Assembly, or for that matter, Parliament, would, unfortunately, decide the issue by means of the vote. The Constitutional Assembly, in the (new) **Constitution of the Republic of South Africa**,¹⁸⁵ merely reiterated that: "[e]veryone has the right to life."

In sum, in its interpretation of the right to life as protected in our fundamental law, our Constitutional Court, the Court of final instance with the necessary constitutional power over all matters relating to the interpretation, protection and enforcement of the (interim) **Constitution**,¹⁸⁶ did not heed the remarks of Jackson J that:

[t]he very purpose of a bill of rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities ... and to establish them as legal principles to be applied by the courts. One's *right to life* ... and other fundamental rights may not be submitted to (the) vote; they depend on the outcome of no elections.¹⁸⁷ (my italics)

THE DEBATE CONTINUES

Despite, and perhaps due to, the judgment and the order of the Constitutional Court in **Makwanyane**, the debate about the death penalty continued unabated. As will be shown below, the retentionist lobby, even in Parliament, was extremely incensed by the judgment. The old, hackneyed argument, namely that the death penalty has a greater deterrent value than any other sentence, was pressed upon the public even more

vigorously. The abolitionist lobby, needless to say, emboldened and bolstered up by **Makwanyane**, fought back ferociously in and outside Parliament.

THE NATIONAL ASSEMBLY DEBATE

The National Party moved a motion in National Assembly, calling for a national referendum on the issue of the death penalty, which was debated on 19 June 1995. Presenting the motion, Mr DPA Schutte MP stated, *inter alia*, that the Constitutional Court had found that the (interim) **Constitution** did outlaw capital punishment.¹⁸⁸

Responding on behalf of the African National Congress, Mr JH de Lange MP accused the National Party of seeking to use the **Makwanyane** judgment in the context of the then impending local government elections¹⁸⁹ and also of attempting to undermine and discredit the Constitutional Court.¹⁹⁰ In the course of his input, he described the **Makwanyane** judgment as one of the greatest judgments ever handed down by a South African Court, the content and style of which were beyond reproach. As a result, he had come to the conclusion that in years to come it would "be extensively utilised and quoted not only in South Africa, but also in many other parts of the world."¹⁹¹ For Mr De Lange the proper place where the question as to whether to abolish or retain capital punishment as part of our criminal justice system was the Constitutional Assembly, where a new **Constitution** for the Republic was being made.¹⁹²

Lamenting the so-called abolition of the death penalty against the background of unprecedented levels of violent crime in our society, Mr J Chiolé, on behalf of the Freedom Front, requested the Government

to take the necessary constitutional steps to reintroduce the death sentence, after which reconsideration can again be given to the abolition thereof after five years if a drastic improvement is experienced.¹⁹³

Exhibiting his ignorance of how courts function in general, and, in particular, of the place and role of the new Court in our legal system, Mr Chiolé then berated the National Party for having negotiated the transitional Constitution on the basis of which the Constitutional Court *unilaterally* decided that the death sentence was unconstitutional.¹⁹⁴ It obviously had not dawned upon the Honourable Member of Parliament that the

Constitutional Court, as the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of the (interim) **Constitution**,¹⁹⁵ and the decisions of which were binding upon all persons and all legislative, executive and judicial organs of state,¹⁹⁶ had the right and the power, as such, to make decisions without any person or structure of government having the power to veto them.¹⁹⁷

In a similar vein, Ms NE Masango MP, speaking for the National Party, lamented that the death penalty was abolished, presumably by the Constitutional Court, *without consultation with the people*.¹⁹⁸ She reiterated Schutte's call for a referendum, failing which the people would "start resorting to unlawful means in order to appease revenge and avenge the victims of violence in South Africa."¹⁹⁹

Even more scathing in his attack on the Constitutional Court's decision in **Makwanyane** was Reverend KR Meshoe MP who said that:

the ACDP would like to record its rejection of the Constitutional Court's decision to abolish the death penalty without providing an effective alternative to deal with crime. Once again, the rights of criminals were favoured over the rights of peace-loving and law-abiding citizens. *The intellectual elite in the Constitutional Court* chose to undermine the wishes of the majority of South Africans who are concerned about their safety and about the escalating crime rate in this country.²⁰⁰ (my italics)

Describing the National Party's call for a referendum on the death penalty as a dangerous *danse macabre*, Mr AJ Leon MP mauled the National Party for its inconsistency²⁰¹ and for seeking to overturn the unanimous decision of the Constitutional Court in **Makwanyane**. He told the National Assembly he wondered how the NP would feel if certain other sensitive matters, such as expropriation of property without compensation and *Die Stem* as part of the national anthem, were subject to a popular vote.²⁰²

THE PUBLIC DEBATE

As luck would have it, the rate of violent crime, with a spate of motor-vehicle high-jackings accompanied by murder, gave the impression that the country had been turned into a jungle ruled by thugs of all hues after the **Makwanyane** judgment. As many people and communities were thrown into a state of panic, the cry for the return of the death sentence for murder and related offences grew even louder.²⁰³ The call for a referendum on the question became even stronger²⁰⁴ as people believed that the State had to adopt firmer measures against crime in the name of some greater good.²⁰⁵

As the press continued to quote Tokyo Sexwale, the Premier of Gauteng, as having said he believed a referendum should be held on the issue of capital punishment, the African National Congress issued a statement in which it said, *inter alia*, that it would not adopt any position that undermined the authority of the Constitutional Court to rule on constitutional matters without political interference.²⁰⁶ **The Citizen**²⁰⁷ quoted Mr Mosibudi Mangena, President of the Azanian People's Organisation (AZAPO) as having said that "although AZAPO in principle opposed the death penalty, once society had normalised and the courts were free of racism, the issue of the death penalty should be decided by the public in a referendum."

THE CONSTITUTIONAL ASSEMBLY DEBATE

The Constitutional Committee of the Constitutional Assembly did not help in laying the debate to rest either; instead, the country went back to square one. In the **Working Draft of the New Constitution**,²⁰⁸ it gave the citizenry an option between retaining the position in the (interim) **Constitution**²⁰⁹ and supporting an exception to the right to life, namely that this right could be limited by not being applicable in respect of the execution of a court sentence following conviction for a crime for which the death penalty is prescribed by an Act of Parliament.²¹⁰

Assuming we adopted the first option placed before us by the Constitutional Committee of the Constitutional Assembly, we would then be confronted with the Chaskalson P

interpretation in **Makwanyane** which, as stated above, did not effectively abolish the death penalty. As stated above, the Constitutional Assembly indeed opted for the first option and merely reiterated that "everyone has the right to life."²¹¹

THE LATEST DEVELOPMENT

The issue of the death penalty is now before Parliament. At the time of writing, the Minister of Justice had already tabled in Parliament a Bill²¹² intended, *inter alia*, to amend certain laws so as to repeal provisions relating to capital punishment".²¹³ Of particular note in this regard is that the Bill goes beyond the **Makwanyane** decision of the Constitutional Court and seeks to repeal the provisions of Section 277²¹⁴ of the **Criminal Procedure Act** in their entirety.²¹⁵ Should this Bill be passed, Parliament shall have expunged from our statute book capital punishment as a penal option.

ENDNOTES - CHAPTER TEN

1.. Amnesty International defines the death penalty as "the premeditated and cold-blooded killing of a human being by the state." See **When the State Kills: The Death Penalty versus Human Rights** (Amnesty International Publications, London, 1989), at 1.

2.. Such as the late Professor Barend van Niekerk who in 1970 was prosecuted for contempt of court arising from a scholarly article he had written on the death penalty entitled "Hanged by the Neck Until You are Dead", in (1969) 86 **SALJ** 457. See **S v Van Niekerk**, 1970 (3) SA 655 (T). Mrs Helen Suzman, then a Member of Parliament, also interested herself in the issue of the death penalty. See **House of Assembly Debates**, vol. 25, cols 2570ff (14 March 1969).

The chief opponent of the death penalty of long standing was undoubtedly the African National Congress. In June 1955 it had declared in the **Freedom Charter** *inter alia* that punishment "shall aim at re-education, not vengeance". The death penalty would, needless to say, be inconsistent with this philosophy.

3.. The National Party, then the ruling party, led the retentionists' campaign. See **Hansard**, col. 11319 (17 June 1993), for example, where Mr RJ Radue, then a Member of (the race-based tri-cameral) Parliament, reiterating their party's position, said that: "[i]n principle *the NP is in favour of the retention of the death penalty in the present and in the new South Africa. The NP believes that it is morally and legally correct and that it carries out the State's duty to protect the interests and lives of its citizens ...*" (my italics)

4.. The views of the abolitionists will be covered below in the discussion of the decision of the Constitutional Court in **S v Makwanyane and Another**, 1995 (3) SA 391 (CC).

5.. For example, Mr SD Fischer, then a Member of Parliament, said that: "... the holy character of God is the basis of capital punishment. God's character is of such a holy and righteous nature that it is moved to absolute revulsion and intolerance against anything which opposes or contradicts it ... In holy anger God is moved to destroy that which opposes Him ... The fact that God is holy and righteous, that He will not tolerate lawlessness, and that He seeks to punish it and expunge it from societies by placing a sword in the hands of the State, are foundational principles of our understanding of the legitimacy of capital punishment ... the civil government has the duty to put murderers to death ..." See **Hansard**, col. 11321 (17 June 1993)

6.. Mr DPA Schutte, MP, in the **Debates of the National Assembly**, col. 2827 (19 June 1995).

7.. See, for example, the speech of Mr DJ Dalling MP, in **Hansard**, col. 11345 (17 June 1993), where he said that "... in South Africa the death penalty has been and is a racist tool. It has also been a tool of repression ... Of the many thousands of people hanged in our country over the years, over 95% have been Black. Of the 286 persons at present in the death cells, only 7%, or 20 in number, are White. Every single one of the persons hanged in the past, or awaiting execution, were sentenced to death by a White judge appointed by a White Government."

In this regard, see also Professor GE Devenish, who, in his inaugural address delivered at the University of Natal on 25 April 1990 said: "According to a survey conducted by the National Institute for Crime Prevention and Rehabilitation of Offenders (NICRO) in South Africa the gap between those in favour of capital punishment and those against it is closing significantly. NICRO's survey found that 42 percent of the respondents questioned thought the death penalty should be retained, while 38 percent were against it and 20 percent were uncertain. It is significant to note that those most in favour of abolition were Africans (65 percent), followed by the Asians and Coloureds (55 percent). The survey also showed that 60 percent of the whites - 80 percent Afrikaners and 56 percent English-speakers - desired the retention of the death penalty. Even more startling were the results of a survey conducted by the research team of *Monitor*, the journal of the Port Elizabeth based Human Rights Trust. This survey, conducted in the Port Elizabeth black areas, found that 93,2 percent of the Africans, 66 percent of the South African Indians and 50 percent of the coloured community were opposed to capital punishment." **The Application of the Death Penalty in South Africa** (University of Natal Press, Pietermaritzburg, 1990) at 8.

8.. *Op cit.*

9.. That is, the Republic of South Africa prior to the reincorporation of the then nominally independent TBVC territories.

10.. In 1986, in **S v Chabalala**, 1986 (3) SA 623 (B), it was held that the death penalty was not in conflict with the Republic of Bophuthatswana Constitution Act, No 18 of 1977 and was accordingly a valid sentence.

11.. By means of the **Criminal Procedure Second Amendment Decree 16 of 1990 (Ck)** of 8 June 1990, which provided for "the abolition of the death penalty and related matters" in Ciskei. For purposes of Ciskei, Section 2 of the Decree amended Section 276(1)(a) of the **Criminal Procedure Act** by substituting the words "the sentence of death" with the words "life imprisonment", while Section 3 thereof repealed, *inter alia*, Section 279 of the **Criminal Procedure Act** which provided for how the death penalty was to be carried out. For a full discussion of the implications of this Decree, see the judgment of Diemont JA in **S v Qeqe and Another**, 1990 (2) SACR 654 (CKA).

12.. That is, "the unlawful and intentional killing of another person." See Jonathan Burchell and John Milton, **Principles of Criminal Law** (Juta & Co, Cape Town, 1991), at 410.

13.. Which is defined as "any overt act unlawfully committed by a person owing allegiance to a state, with intent to overthrow, impair, violate, threaten or endanger the existence, independence or security of the state or to overthrow or coerce the government of the state or change the constitutional structure of the state." See Burchell and Milton, *op cit* at 608. This crime, which does not require the presence of an element of violence, is, to paraphrase Anthony Mathews, **Freedom, State Security and the Rule of Law: Dilemmas of the Apartheid Society** (Sweet & Maxwell, London, 1988), at 219-220, so elastic that it can encompass virtually any innocent opposition to a governmental regime. According to CR Snyman, **Criminal Law** (3rd ed, Butterworths, Durban, 1995), at 298-299, "It is impracticable to posit a certain type of act as a requirement for the crime, because the hallmark of high treason is not a certain type of act but the hostile intent with which an act is committed. *Any act, however innocent it may seem to be when viewed objectively, may constitute high treason if it is committed with the necessary hostile intent.*" (my italics)

14.. Which Burchell and Milton, *op cit* at 435 defined as the "intentional unlawful sexual intercourse with a female without her consent."

15.. Which were constituted by the infliction or threat of serious bodily harm in the case of robbery and by the possession of a dangerous weapon or assault in the case of housebreaking.

16.. In terms of Section 4 of the **Criminal Procedure Amendment Act**, 9 of 1958.

In **R v Constance and Another**, 1960 (4) SA 629 (A) the Appellate Division held that where the accused, having committed a robbery, shot a person to make his getaway, the shooting constituted an aggravating circumstance and the accused was liable to be sentenced to death.

Note that the death sentence could not be imposed upon an accomplice to robbery unless he himself or she herself had inflicted or threatened the grievous bodily harm. See **R v Sisilane**, 1959 (2) SA 448 (A). The same applied where the accomplice had expressly or impliedly authorised the principal offender and thus made himself or herself a party to the infliction or threat of grievous bodily harm. See **R v Cain**, 1959 (3) SA 376 (A).

17.. In terms of Section 21 of the **General Law Amendment Act**, 76 of 1962, which extended "the penalties provided for by law for the offence of treason" to persons convicted of sabotage.

18.. Section 5 of the **General Law Amendment Act**, 37 of 1963. As John Dugard, **Human Rights and the South African Legal Order** (1978) at 155 pointed out, the definition of communism provided in the **Suppression of Communism Act**, 44 of 1950, was so wide that it encompassed even known ardent non-communists and churchmen who were radical opponents of the system of apartheid. Even they could theoretically face the death penalty for indulging in communism as defined in the said Act.

- 19.. Section 10 of the **Criminal Procedure Amendment Act**, Number 96 of 1965.
- 20.. **Terrorism Act**, 83 of 1967.
- 21.. Act No. 74 of 1982.
- 22.. See Section 54(1) of the **Internal Security Act**.
- 23.. Section 54(1)(c) of the **Internal Security Act**. Theoretically, therefore, people could be hanged for threatening to campaign violently to overthrow the system of apartheid.
- 24.. Section 54(1)(iii) and (iv) of the **Internal Security Act**. However, according to the Appellate Division in **S v Mncube en 'n Ander**, 1991 (3) SA 132 (A), terrorism in contravention of Section 54(1) of this Act would be punishable by death only if committed whilst the Republic was in a state of war.
- 25.. See Section 6(3)(d) of Act 110 of 1983. Arguably, subsequent to the commencement of the new constitutional system, this power could be exercised by the President under Section 82(1)(k) of the (interim) **Constitution**, if the execution of the death penalty had not been suspended in 1990.
- 26.. **Hansard**, col. 11313 (17 June 1993).
- 27.. It is noted that, according to Mr DP du Plessis MP, no death sentence had been carried out since 14 November 1989. See **Hansard**, col. 11376 (17 June 1993).
- 28.. Act 107 of 1990.
- 29.. The provisions of Section 19 of the **General Law Amendment Act**, No. 139 of 1992, which allowed the Minister of Justice to appeal against the imposition of the death penalty, with or without the consent of a person condemned to death before 27 July 1990, are also of great academic interest, but will not be discussed herein.
- 30.. See Section 4 of Act 107 of 1990. Note that, under this section, the death penalty could be imposed in the case of a conviction for murder, treason *committed when the Republic was in a state of war*, robbery or attempted robbery where the court found aggravating circumstances to have been present, kidnapping, child stealing and rape only.
- 31.. Section 277(2)(b) of the **Criminal Procedure Act** as amended. See the judgment of Grosskopf JA in **S v Senonohi**, 1990 (4) SA 727 (A) at 734 and, generally, for a discussion of the post-1990 approach adopted by our Courts after the abolition by the legislature of a mandatory death penalty for murder.
- 32.. 1990 (4) SA 709 (A).
- 33.. See Eksteen JA in **S v Mdau**, 1991 (1) SA 169 (A); Goldstone JA in **S v P**, 1991 (1) SA 517 (A); Preiss AJA in **S v McKlein**, 1992 (1) SACR 121 (A); and Ecksteen JA in **S v M**, 1993 (1) SACR 126 (A).
- 34.. See Ecksteen JA in **S v M**, *supra*.
- 35.. The court would, in terms of Section 277(3) have to make a finding on the presence of mitigating or aggravating circumstances before deciding whether the death penalty was the proper sentence. See **S v Mlumbi en 'n Ander**, 1991 (1) SACR 235 (A). The State had an obligation to establish beyond a reasonable doubt the presence of aggravating circumstances (if any) and negative beyond a reasonable doubt the presence of any mitigating circumstances. See Nestadt JA in **S v Nkwanyana and Others**, 1990 (4) SA 735 (A).
- 36.. See **S v Ramba**, 1990 (2) SACR 334 (A).
- 37.. Section 277(2)(a) and (b) of the Act as amended.
- 38.. Section 277(1) of the **Criminal Procedure Act**.

- 39.. Section 277(3)(a) of the **Criminal Procedure Act**. See also the Appellate Division judgment in **R v Rainers**, 1961 (1) SA 460 (A).
- 40.. *Ibidem*, Section 277(3)(b).
- 41.. **S v Senonohi**, 1990 (4) SA 727 (A) at 734G. See also **S v Nkwanyana**, 1990 (4) SA 735 (A) at 749A-D.
- 42.. **S v Nkwanyana and Others**, *op cit* 743E-745A.
- 43.. **S v Masina and Others**, 1990 (4) SA 709 (A) at 718G-H.
- 44.. See **S v J**, 1989 (1) SA 669 (A) at 682G.
- 45.. 1970 (3) SA 476 (A) at 477B. See also Nicholas AJA in **S v Dlamini**, 1992 (1) SA 18 (A) at 311-32A.
- 46.. Section 322(2A) of the **Criminal Procedure Act** (as amended by Section 13 of Act 107 of 1990)
- 47.. Section 416A(4)(a) of the **Criminal Procedure Act**.
- 48.. Section 9. Note that this section differed from the rather elaborate Article 6 of the Namibian Constitution which provides that: "The right to life shall be respected and protected. No law may prescribe death as a competent sentence. No Court or Tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia." Neither was it similar to Article 102 of The Basic Law of the Federal Republic of Germany which provides clearly that: "Capital punishment shall be abolished." For a discussion of the right to life, see Joanne Fedler 'Life' in Mathew Chaskalson et al **Constitutional Law of South Africa** (1996) at 15-1 to 15-9.
- 49.. See Article 2(3) of the **Preliminary Revised Version of the ANC's Draft Bill of Rights**, February 1993.
- 50.. Hugh Corder, Kahanovitz, Murphy, Kate O'Regan, Sarkin, Smith & N Steytler, **A Charter for Social Justice: A Contribution to the South African Bill of Rights Debate** (1992)
- 51.. See Article 4(2) of the **Charter of Fundamental Rights** proposed by the previous government of the old Republic of South Africa where the National Party was the ruling party. See also Mr HJ Coetsee MP (then Minister of Justice) in **Hansard**, col. 11314-11315 (17 June 1993), and Mr RJ Radue MP, *ibidem*, col. 11319 where it was said that "... the NP is in favour of the retention of the death penalty in the present and in the new South Africa ... However, the NP only favours retention on the basis that the death penalty shall be imposed by independent judges after due process of law and only in extreme cases. The NP believes that the provisions of article 6 of the International Covenant on Civil and Political Rights should be strictly applied."
- See further Lourens M du Plessis and JR de Ville, "Personal Rights: Life, Freedom and Security of the Person, Privacy, and Freedom of Movement", in Dawid van Wyk, John Dugard, Bertus de Villiers and Dennis Davis (eds), **Rights and Constitutionalism: The New South African Legal Order** (Juta & Co Ltd, Cape Town, 1994) at 224-225 for a brief discussion of the requirements of Article 6 of the **International Covenant on Civil and Political Rights**.
- 52.. See Article 18 of the proposed Constitution of the State of Kwazulu/Natal which was submitted to and adopted by the Kwa-Zulu Legislative Assembly on 1 December 1992.
- 53.. Which was then Clause 28(1)(b) when the learned Chief Justice made his comment.
- 54.. See paragraph 13.1 of the **Memorandum Submitted on Behalf of the Judiciary of South Africa on the Draft Interim Bill of Rights**.
- 55.. See Du Plessis and De Ville, *op cit* 227.

56.. This was noted by Chaskalson P in **Makwanyane** at 402.

57.. See the **Interim Report on Group and Human Rights: Project 58** (1991) at 277 where, after accepting that the right to life would have to be specifically guaranteed in a future constitution, the Commission then proposed as its Solomonic solution that the issue of the death penalty be referred to the Constitutional Court. It is interesting to note that the Commission regarded this as such an important task of the Constitutional Court that it said that the Court must not avoid it if we as a country are not to revert to parliamentary sovereignty.

58.. See Article 3 of the Democratic Party's proposed draft bill of rights submitted to the World Trade Centre negotiations prior to the adoption of the **Constitution**. See also **Hansard**, col. 11368 (17 June 1993), where, in the course of a debate as to whether the FW de Klerk moratorium on the death penalty should be lifted, Mr AJ Leon MP said that: "The DP and the SA Law Commission believe that a future, yet-to-be-established constitutional court must decide so fundamental an issue."

59.. That is, that the death penalty violated Section 9 of the (interim) **Constitution**.

60.. Section 9 of the **Constitution** which provided that "[e]very person shall have the right to life." Numerous articles were written on the Constitutional Court's decision. Some of them were the following: Gretchen Carpenter 'Constitutional Court Sounds the Death Knell for Capital Punishment' in (1996) 59 **THRHR** 145-164; Gretchen Carpenter 'Public Opinion and Legitimacy' in (1996) 11 **South African Public Law** 110-122; and Frans Viljoen 'Endnotes to the Death-Penalty Decision' in (1996) 113 **SALJ** 652-671.

61.. 1994 (3) SA 868 (A).

62.. On all of which they were sentenced to death in terms of Section 277(1)(a) of the **Criminal Procedure Act** as amended. The four people killed in the course of the robbery were two policemen and two bank security officials.

63.. On all of which they were sentenced to long terms of imprisonment.

64.. Which, in terms of Section 101(5), read with Section 98(2)(c), of the **Constitution** could not deal with matters of the constitutional validity of Acts of Parliament.

65.. As was required in terms of Section 102(6) of the **Constitution**.

66.. That is, *stricto sensu*, whether the death penalty was an appropriate sentence in respect of murder. Needless to say, and obviously for the right reasons, the Court went beyond the provisions of Section 277(1)(a) of the **Criminal Procedure Act**.

67.. See, in general, the decision of the Constitutional Court in **S v Mhlungu and Others**, 1995 (3) SA 867 (CC), where this question was dealt with. In **Makwanyane**, *op cit* 452, paragraph 148, Chaskalson P found it unnecessary to deal with this question as the Attorney-General had correctly conceded that if the death penalty for murder was unconstitutional, it would not be competent to carry out the death sentences that had already been imposed upon the accused.

68.. **S v Makwanyane en 'n Ander**, *op cit* 873E.

69.. Chaskalson P admitted as much when he said in **S v Makwanyane and Another**, *op cit* at 452, paragraph 149, that the Constitutional Court had "dealt in this judgment only with the provisions of s 277(1)(a) of the Criminal Procedure Act".

70.. Note that Ackermann J in **S v Makwanyane and Another**, *op cit* 454, paragraph 157, putting a lot of emphasis on "arbitrariness" in his judgment and describing this section as granting a textually unqualified right to life, said that the Constitutional Court was "free to look at the incidence and consequences of arbitrariness without being constrained by a constitutional authorisation (whether explicit or implicit) of the death penalty." See also 456, paragraph 162, where the learned judge of the Constitutional Court also talked of "a constitutional right to life unfettered by the restraints or interpretative problems of the right in the US Constitution".

71.. **S v Makwanyane and Another**, *op cit* at 402, paragraph 5. See also Mahomed J, *ibidem* at 489, paragraph 265, and O'Regan J, *ibidem* at 505, paragraph 324. It should be noted, however, that the issue for Ackermann J was clear; there was no "constitutional authorisation ... of the death penalty" constraining the Constitutional Court. *Ibidem*, at 454, paragraph 157. It should further be noted that Sachs J, *ibidem* at 520-521, paragraph 392, whilst agreeing with Chaskalson P that the Court was left to decide the issue after the framers of the (interim) **Constitution** had refused to make a political choice between abolition and retention, read Section 9 differently and concluded that it effectively outlawed the death penalty.

72.. It is noted that, while the President of the Constitutional Court correctly observed that, subject to the limitation clause, prisoners retain all the rights to which every person is entitled under Chapter 3 of the **Constitution**, for him no right was more important than the Section 11(2) right not to be subjected to cruel, inhuman or degrading treatment or punishment. See 451, paragraph 143. As far as he was concerned, the right to life was merely "another factor crucially relevant to the question whether the death sentence is a cruel, inhuman or degrading punishment within the meaning of s 11(2) of our Constitution." At 429, paragraph 80. See also 434, paragraph 95, where both the right to life and the right to human dignity are regarded in the same vein.

73.. *Ibid* at 403. It is important to note that the ANC-led government of the Republic, represented by George Bizos SC, accepted that the death penalty was a cruel, inhuman and degrading form of punishment which should be declared unconstitutional. See *ibid* at 404.

74.. *Ibidem*.

75.. Which included, in particular, other provisions of Chapter 3, such as Sections 8, 9 and 10, which the President of the Court treated as giving meaning to Section 11(2), the provision which dealt specifically with punishment.

76.. At 409-410, paragraph 26.

77.. *Ibidem*.

78.. At 434, paragraph 95.

79.. At 409, paragraph 25.

80.. *Ibidem*.

81.. At 451, paragraph 146.

82.. See his remark at 402, paragraph 5.

83.. At 434, paragraph 96.

84.. As raised by Grosskopf JA in **Makwanyane en 'n Ander**, *op cit* 873E.

85.. Although, in his rejection of retribution he was prepared to say that: "[t]o be consistent with the value of *ubuntu*, ours should be a society that 'wishes to prevent crime ... (not) to kill criminals simply to get even with them'." At 446, paragraph 131.

86.. At 452, paragraph 149.

87.. *Ibidem*.

88.. See PM Maduna, 'The Death Penalty and Human Rights', in (1996) 12 **SAJHR** 193 at 198ff for a brief discussion of the views of some the judges of the Constitutional Court in this regard. See also Heinz Klug, 'Striking Down Death', *ibidem*, 61 at 66.

89.. **S v Makwanyane and Another**, *op cit* 452, paragraph 149. However, he extended the order he gave to the provisions of sub-section (1)(c)-(f) of the Act and to provisions of legislation corresponding to these that were applicable in certain parts of the national territory.

90.. At 460, paragraph 171.

91.. At 458, paragraph 166.

92.. At 460, paragraphs 170 and 171.

93.. At 461, paragraph 173.

94.. For whose judgment, see **Makwanyane** at 452 paragraph 149.

95.. At 176, paragraph 176, the judge said that the proclamation of the right to life "and the respect for it demanded from the State must surely entitle one, at the very least, *not to be put to death by the State deliberately, systematically and as an act of policy* that denies in principle the value of the victim's life." (my italics)

96.. Such as Section 276(1)(a) and 277(1) of the Act.

97.. Section 33(1) of the **Constitution**.

98.. At 464, paragraph 179, Didcott J said that: "every sentence of death must be stamped, for the purposes of s 11(2), as an intrinsically cruel, inhuman and degrading punishment."

99.. At 469, paragraph 190.

100.. Which is implied in the judgment of Chaskalson P. See **Makwanyane**, at 452 and 453.

101.. At 469, paragraph 192. See also 471, paragraph 196, where the learned acting judge said that, in his opinion, the true issue for decision was whether or not *the death penalty for murder* was a cruel, inhuman or degrading punishment. In a sense, the learned acting judge might have been right in that this was indeed the primary question in **Makwanyane**. But then, as Chaskalson P pointed out at 402, paragraph 5, the issue the Court had to grapple with was larger than murder; it had been left to it to decide whether the death penalty *per se* was or was not inconsistent with the **Constitution**.

102. At 472, paragraph 199.

103.. At 475, paragraph 203.

104.. Which, incidentally he adopted even in **S v Zuma and Another**, at when dealing with statutory presumptions.

105.. See the discussion of the jurisprudential implications of **Makwanyane** below.

106.. At 475-476, paragraph 206.

107.. At 476, paragraph 208.

108.. As a whole, I suggest, and not only as far as sub-sections 1(a), (c), (d), (e) and (f).

109.. At 476-477, paragraph 208.

110.. At 478, paragraphs 212, 213 and 214.

111.. See 478, paragraph 213, footnote 205.

- 112.. That is the availability of capital punishment in cases of treason committed while the Republic is in a state of war.
- 113.. As a whole.
- 114.. See **Makwanyane**, at 479, paragraph 216.
- 115.. See **Makwanyane**, at 479, paragraph 217. This remark would seem to be contradicting Kriegler J's statement in paragraph 208 referred to above.
- 116.. At 483, paragraph 234.
- 117.. At 483, paragraph 235.
- 118.. At 484, paragraph 237.
- 119.. At 484, paragraph 239.
- 120.. *Ibidem*, paragraphs 242 and 243.
- 121.. *Ibidem*, paragraph 241.
- 122.. At 487, paragraph 260, the learned judge concluded his judgment, in which he did not even once refer to the question of the validity or otherwise of the provisions of Section 277(1)(b) of the **Criminal Procedure Act**, by stating that, in his view, "the death penalty does not belong to the society envisaged in the Constitution, is clearly in conflict with the Constitution generally and runs counter to the concept of *ubuntu*; additionally and just as importantly, it violates the provisions of s 11(2) of the Constitution and, for those reasons, *should be declared unconstitutional and of no force and effect.*" (my italics)
- 123.. At 489, paragraph 267, the learned judge stated categorically that the death penalty as a form of punishment violated crucial sections of the **Constitution** and could not be saved by the limitations permitted in terms of Section 33(1) thereof. See also 493, paragraph 282, and 497, paragraph 296.
- 124.. At 497, paragraph 297.
- 125.. See **S v Mhlongo**, 1994 (1) SACR 584 (A) at 587E-G, for how the learned judge had earlier on described capital punishment.
- 126.. At 402, paragraph 5.
- 127.. *Op cit* 587.
- 128.. See **Makwanyane**, *op cit* 497-498, paragraph 298.
- 129.. Which, at 489, paragraph 268, described as guaranteed in peremptory terms in Section 9 of the **Constitution**.
- 130.. As guaranteed in Section 8 of the **Constitution**. See Mahomed J at 491-492, paragraph 273.
- 131.. Section 10 of the **Constitution**. *Ibidem*, at 490, paragraph 271.
- 132.. Section 11(2) of the **Constitution**. *Ibidem*, at 492, paragraphs 275-281.
- 133.. Who hastened to point out, correctly in my view, that, although in the **Makwanyane** matter "the Court had been called upon to decide the issue of constitutionality and not to engage in a debate on the desirability of abolition or retention" of the death penalty, it was inevitable for it to make necessary value choices. See 498-499, paragraph 303.
- 134.. **Makwanyane**, *op cit* 497-498, paragraph 298.

- 135.. *Ibidem*, at 503, paragraph 313.
- 136.. In its entirety.
- 137.. At 503-504, paragraph 317.
- 138.. At 503, paragraph 316.
- 139.. *Op cit*.
- 140.. **S v Makwanyane and Another**, *op cit* 504, paragraph 320.
- 141.. At 505, paragraph 324, where she quite rightly pointed out that: "In choosing this formulation, the drafters ... specifically avoided either expressly preserving the death penalty or expressly outlawing it."
- 142.. At 506, paragraphs 326 and 327.
- 143.. At 507, paragraph 331.
- 144.. At 485, paragraph 247.
- 145.. At 508, paragraphs 334 and 335.
- 146.. At 510, paragraph 343.
- 147.. At 510, paragraph 344. See also 509, paragraph 337.
- 148.. At 510-511, paragraph 346. Note that O'Regan J too, at 509, paragraph 337, remarked that Section 277 of the **Criminal Procedure Act** was a violation not only of Section 11(2) of the **Constitution** as held by Chaskalson P, but was also a breach of the right to life and the right to dignity.
- 149.. Which, at 511, paragraph 350, the learned judge described as unqualified words which "are binding on the State ... and, on the face of it, outlaw capital punishment."
- 150.. *Ibidem*, paragraph 349.
- 151.. Section 33(1) of the **Constitution**.
- 152.. **Makwanyane**, *op cit* 511, paragraphs 350 and 351. See also 512, paragraph 354.
- 153.. At 513, paragraph 356.
- 154.. *Ibidem*.
- 155.. At 520-521, paragraph 392.
- 156.. Rev C Pillay MP, speaking for his party, Solidarity, said, *inter alia*, that: "a referendum should be conducted to ascertain the popular view of the majority of South Africans." See **Hansard**, col. 11332 (17 June 1993). However, as in terms of both the **Electoral Act**, 45 of 1979, and the **Constitution of the Republic of South Africa Act**, 110 of 1983, the indigenous African majority were not allowed the franchise, it should be noted that there was no way a referendum could have been used to ascertain their views on the death penalty then. The issue could have been decided, like everything else, by the white minority who then constituted the majority among those who were privileged to have the right to vote.
- 157.. *Ibidem*, col. 11340-11341.
- 158.. At 431, paragraphs 87 to 89 inclusive. See also Didcott J, *ibidem* at 468, paragraph 188; Madala J at 486-487, from paragraph 255 to 259 inclusive, and Mokgoro J, at 499-500, paragraph 305.

159.. See George Devenish, "Death Penalty: A Right to Life?", in **Focus** (University of Natal, Scottsville, Winter 1995), at 5.

160.. See Chaskalson P in **Makwanyane** at 402 about the numbers that were affected. Note that, according to Mr DP du Plessis MP, in **Hansard**, col. 11376 (17 June 1993), no death sentence had been carried out since 14 November 1989.

Note further that keeping people on death row for such long periods in harsh and degrading conditions, would, in Zimbabwe, have been unconstitutional. See the decision of the Zimbabwe Supreme Court, their equivalent of our Appellate Division, as given by Gubbay CJ in **Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General, Zimbabwe, and Others**, 1993 (4) SA 239 (ZS). See also Lord Griffiths in **Pratt v Attorney-General for Jamaica and Another**, [1993] 4 All ER 769 (PC) in this regard.

161.. At 452 and 453 of the judgment. This, in my opinion, would be a natural effect of the decision in terms of the provisions of Section 98(4) of the **Constitution**.

162.. Section 277(1)(b) of the **Criminal Procedure Act**.

163.. Murder.

164.. Robbery or attempted robbery, if the court finds aggravating circumstances to have been present.

165.. Kidnapping.

166.. Child-stealing

167.. Rape.

168.. **S v Makwanyane**, *op cit* at 453.

169.. *Ibidem* at 452. See also Kriegler J, *ibid* at 478, paragraph 213 (footnote 205), and Mahomed J, *ibidem* at 497, paragraph 297. Didcott J, *ibidem* at 461, paragraph 173, by implication, also left this question open. For Kentridge AJ, "the right to life must accommodate ... the right of the State to defend itself against insurrection." *Ibidem* at 469, paragraph 193.

170.. Per Wright CJ in **People v Anderson**, 493 P 2d 880 (Cal 1972) at 897.

171.. Presumably also because this question did not arise in **Makwanyane**.

172.. Now referred to as the Supreme Court of Appeal under Section 166(b) of the (new) **Constitution**.

173.. Namely that the death penalty can be imposed as the proper sentence only in respect of terrorism committed while the Republic is in a state of war.

174.. Further proof of this, if any is required, is that, unlike **Decree 16 of 1990 (Ciskei)**, the **Makwanyane** decision of the Constitutional Court did not deal with the constitutional validity of the provisions of Sections 276(1)(a) and 279 of the **Criminal Procedure Act** which, respectively, provide for "the sentence of death" as one of the "sentences which may be passed upon a person convicted of an offence" and how such a sentence should be carried out.

175.. **S v Makwanyane and Another**, *op cit* at 452 and 453.

176.. Section 277(1)(b) of the **Criminal Procedure Act**. Any act, by *commissio* or *ommissio* (**R v Labuschagne**, 1941 TPD 271 at 275; **S v Banda**, 1990 (3) SA 466 (B) 512A-B), if committed with the necessary hostile intent, is sufficient to constitute high treason; violence against the state, either actual or contemplated, is not a necessary element of the crime of high treason (**S v Mayekiso**, 1988 (4) SA 738 (W) at 751D).

177.. In terms of Section 54(1) of the **Internal Security Act**.

178.. That is, international or civil war.

179.. We should not easily lose sight of the fate of Jopie Fourie who was court martialled, sentenced to death on 19 December 1914 and executed by firing squad the following day for treason after allegedly joining a rebellion as an officer of the Union Defence Force.

180.. A careful reading of the remarks of Chaskalson P at 402, paragraph 5, and 452, paragraph 149, suggests that the Constitutional Court was not prepared to say that the death penalty *per se* was inconsistent with the **Constitution** but that, on the contrary, it was "permissible in circumstances sanctioned by law."

181.. Committed while the Republic is in a state of war.

182.. Amnesty International, *op cit* 2.

183.. *Ibidem*, at 5.

184.. Parliament could simply follow the example of **Decree 16 of 1990 (Ck)** and deal with specific provisions of the **Criminal Procedure Act** which sanction the death sentence. **The Citizen**, 28 November 1995, reported that Advocate AM Omar, the Minister of Justice, intended to introduce an **Abolition of the Death Penalty Bill** in Parliament, which would formally abolish the death penalty so as broadly speaking to bring our criminal law into line with the **Makwanyane** decision.

185.. Section 11.

186.. Section 98(2) of the **Constitution**.

187.. In **West Virginia State Board of Education v Barnette and Others**, 319 U.S. 624 (1943) at 638. A point which Chaskalson P made in **Makwanyane**, *op cit* 431.

188.. **Debates of the National Assembly**, col. 2826 (19 June 1995). According to Mr BM Skosana MP, *ibidem* col. 2833, "[t]he Constitutional Court ... stated that, in terms of our Constitution, the Government may not kill any wrongdoers in order to punish them. Today ... our Constitution tells us that Government may not resort to or employ capital punishment, and this is the supreme law of our land until it is changed by virtue of a constitutional amendment." However, a careful scrutiny of the **Makwanyane** judgment suggests that this view or conclusion was incorrect; Government may still kill persons guilty of treason or terrorism committed while the Republic is in a state of war.

189.. Which were scheduled to take place generally on 1 November 1995.

190.. *Ibidem*, col. 2828. See also *ibidem*, cols. 2829 and 2830. Mr BM Skosana MP expressed a similar concern on behalf of the IFP. *Ibidem*, col. 2832. See further Advocate AM Omar MP (the Minister of Justice), *ibidem*, col. 2848.

191.. *Ibidem*, col. 2829. Bearing in mind the international trend towards abolition, those countries that have already abolished capital punishment would have very little, if anything, to learn from **Makwanyane**.

192.. *Ibidem*, col. 2831. Needless to say, the issue of the death penalty would then have to be settled in the Constitutional Assembly by means of the vote! As stated above, the Constitutional Assembly did not address the issue; it merely reiterated that everyone has the right to life.

193.. *Ibidem*, col. 2834. In the light of the **Makwanyane** decision, Schutte MP too called "for the amendment of our Constitution to bring it in line with the constitutions of the USA and India, as well as with all major conventions and charters on human rights." *Ibidem*, col. 2844.

194.. *Ibidem*, col. 2836.

- 195.. Section 98(2) of the **Constitution**.
- 196.. Section 98(4) of the **Constitution**.
- 197.. A point which Ms TE Mtintso MP made succinctly. **Debates of the National Assembly**, *op cit* col. 2838.
- 198.. *Ibidem*, col. 2840.
- 199.. *Ibidem*.
- 200.. *Ibidem*, col. 2841-2842. See also Mr GC Oosthuizen MP (NP), who described the Court's ruling on the death penalty as, *inter alia*, lacking common sense. *Ibidem*, col. 2843.
- 201.. *Op cit* col. 2836-2837.
- 202.. *Ibidem*, col. 2837. See also RK Sizani MP, *ibidem*, col. 2841, and Advocate AM Omar MP, *ibidem*, col. 2849.
- 203.. See "Most South Africans Favour Death Penalty", in **The Citizen**, 1 December 1995, on the findings of a Market Research Africa survey in this regard. According to the results of that survey, more than 75% of South Africans wanted the death penalty to be reintroduced for serious crimes. Note in particular the observation that "[t]he more people earn, the more they want the death penalty reintroduced", and that "[m]ost 'don't knows' were in the lowest income group". See also "77% Poll in Favour of Death Penalty", in the **Pretoria News**, 4 December 1995.
- 204.. See "Death Penalty: Signatures Pour in", in **The Citizen**, 30 November, 1995.
- 205.. As Sharon Chetty, "Case against Hanging", in the **Sowetan**, 30 November 1995 said, "[t]he return of the death penalty has been equated with a drop in crime - *people fed up with living under siege believe only the hangman's noose would be a strong enough deterrent for criminals.*" (my italics)
- 206.. See "ANC Reiterates Stand on Death Penalty", in **The Citizen**, 28 November 1995. See also "ANC Youth Reject Death Penalty Call", in **The Citizen**, 30 November 1995.
- 207.. "People Can Decide on Death Penalty Later", 5 December 1995.
- 208.. Released in Johannesburg on 22 November 1995.
- 209.. That is, the position encapsulated in Section 9 of the (interim) **Constitution**.
- 210.. See Article 10 of the **Working Draft of the New Constitution**.
211. Section 11 of the (new) **Constitution**.
212. The **Criminal Law Amendment Bill** [B 46-97]
213. See the preamble to the Bill.
214. In terms of which a superior court might impose the sentence of death, *inter alia*, for "treason committed when the Republic is in a state of war".
215. See Clause 36 of the Bill.

CHAPTER ELEVEN

CORPORAL PUNISHMENT AND THE NEW CONSTITUTIONAL ORDER

INTRODUCTION

The **Criminal Procedure Act**,¹ among other statutes, provided for a whipping² as a sentence our courts may impose upon persons convicted of committing certain offences.³ The whipping may be imposed either in addition to or *in lieu* of any other punishment that may otherwise be imposed: Provided that courts shall not impose a whipping in addition to any sentence of imprisonment, with or without the option of a fine, unless the sentence of imprisonment is suspended wholly or partly.⁴

Whipping entails the use of a cane to administer cuts to an accused.⁵ The number of cuts, which a court has a discretion to impose, may not exceed the number of seven strokes.⁶ A heavy cane may not be used for the purpose of administering whipping.⁷ Neither may a lash⁸ nor a stick⁹ be used.

The **Criminal Procedure Act**, as stated above, provides a list of the offences for which a sentence of whipping may be imposed. It cannot be imposed for any other offence.¹⁰ Our Courts have a discretion in this regard and do not have an obligation to impose a sentence of whipping merely because one of the offences for which it may be imposed has been committed.¹¹

No person of or over the age of thirty years may be sentenced to a whipping.¹² Where an accused turns thirty on the day of the sentence, he is above the age of thirty for the purposes of a whipping as a sentence and, therefore, the sentence of a whipping may not be imposed upon him.¹³ This notwithstanding, a commissioned officer of the

correctional services, sitting as a court,¹⁴ may sentence a prisoner under the age of forty years to a whipping pursuant to prison proceedings.¹⁵ In other words, our correctional services have their own age limit, namely forty years, for purposes of the sentence of a whipping.¹⁶

No one may be subjected to a whipping more than twice.¹⁷ Furthermore, no person may be subjected to a whipping within a period of three years of the last occasion on which he was sentenced to a whipping.¹⁸

Where a psychoneurotic or psychopathic condition contributed towards the commission of the offence, our courts may not impose a sentence of whipping.¹⁹

Lastly, whipping as a sentence which our courts may impose is reserved for male offenders only.²⁰ Thus, a woman, regardless of her age, may not be subjected to a whipping, even where a whipping is compulsory for a particular crime.²¹

JUVENILE WHIPPING

Prior to the decision of the Constitutional Court in **S v Williams and Others**,²² the **Criminal Procedure Act** provided for juvenile whipping as a sentencing option affecting male persons under the age of twenty-one convicted of any offence.²³ Thus, a male person under the age of twenty-one, certified by a district surgeon or an assistant district surgeon to be in a fit state of health to undergo the whipping,²⁴ could, *in lieu of* any other punishment,²⁵ be sentenced to a moderate correction of whipping not exceeding seven strokes which were to be administered by a person and at a place to be determined by the court imposing the sentence.²⁶ The whipping was to be inflicted over the buttocks covered with normal attire.²⁷

The age²⁸ of the person convicted and thus sentenced was of great importance. Where the accused was below the age of puberty, whipping was usually not regarded as appropriate by our courts.²⁹

Where it was proved that a psychoneurotic or psychopathic condition had contributed towards the commission of the offence, the courts were by law not allowed to impose a whipping upon the juvenile offender affected. Furthermore, where a district surgeon or an assistant district surgeon had, after examining the convict, certified him not to be in a fit state of health to receive a whipping, the court might amend the sentence as it deemed fit.³⁰

Though a whipping was appropriate where an act of violence had been committed,³¹ it was not necessarily resorted to only in cases where there were aggravating circumstances.³²

OUR COURTS AND CORPORAL PUNISHMENT

For over three decades before the intervention of the Constitutional Court, some of our judges³³ were very critical of the use of corporal punishment as a method of dealing with crime. In **S v Kumalo and Others**,³⁴ for instance, Fannin J described it as "punishment of a particularly severe kind ... brutal in its nature ... a severe assault upon not only the person of the recipient but upon his dignity as a human being".³⁵ In **S v Myute and Others; S v Baby**,³⁶ De Wet CJ described it as "a very severe and humiliating form of punishment",³⁷ while Conradie J, in **S v Staggie**,³⁸ referred to it as "'n uiterste strafvorm".³⁹ For Steyn JA too corporal punishment was "'n erg vernederende en fisies baie pynlike vorm van bestraffing".⁴⁰

There was also ample evidence that civilised and reforming societies were abandoning corporal punishment as a mechanism for dealing with crime. In the United Kingdom, for example, this form of punishment was abolished for all common law offences in 1914.⁴¹ Subsequently, whipping as a sentence was abolished altogether in 1948,⁴² pursuant to the report of the Departmental Committee on Corporal Punishment (1938).⁴³ Canada abolished corporal punishment in 1972,⁴⁴ while the provisions of Article 1(1) and 2(2) of the German Constitution have been interpreted to mean that corporal punishment imposed by judicial officers is unconstitutional.

In Zimbabwe, Greenland J had no hesitation to rule that corporal punishment was a "cruel and inhuman punishment".⁴⁵ In Namibia, Mahomed AJA (as he then was) had no difficulty in coming to the conclusion that corporal punishment inflicted upon both adults and juveniles by organs of State in consequence of a sentence was indeed a form of inhuman or degrading punishment as envisaged in Article 8(2)(b) of the Namibian Constitution.⁴⁶

Against this background, Mr AP Dippenaar, who was the presiding officer in the matter involving Williams, doubting whether corporal punishment would not violate some of the provisions of the (interim) **Constitution**, decided to suspend the administration of the punishment to the accused and requested that the sentence he had imposed be subjected to special review.

THE CONSTITUTIONAL COURT INTERVENES

In **S v W and Others**,⁴⁷ the Full Bench of the Cape Provincial Division of the Supreme Court, dealing with six criminal review⁴⁸ cases in which sentences of whipping had been imposed, referred to the Constitutional Court for its decision the question of the constitutional validity of the provisions of the **Criminal Procedure Act** allowing for the imposition of such a penalty.⁴⁹

In **S v Williams and Others**, Langa J,⁵⁰ pointed out that, as the provisions being challenged related to juvenile whipping, the issue to be decided by the Court was whether juvenile whipping, on its own merits or demerits, was consistent with the (interim) **Constitution**.⁵¹ This was the position of the learned judge, notwithstanding the fact that when the matter was argued before the Constitutional Court, "it was common cause between the applicants and the State that the provisions in our law which authorised corporal punishment for adults are inconsistent with the Constitution."⁵² Neither was the learned judge prepared to deal with the constitutionality of corporal punishment in schools as that issue was not before the Court.⁵³

It was contended on behalf of the applicants that the relevant provisions of the **Criminal Procedure Act** were unconstitutional because they were inconsistent with certain provisions of the (interim) **Constitution**.⁵⁴ Mr Slabbert, a member of the Western Cape attorney-general's office who appeared before the Court as *amicus curiae*, argued that, while the infliction of corporal punishment upon an adult may be difficult to justify, juvenile whipping was no different from, and no more reprehensible than, other forms of punishment, and, therefore, did not constitute a violation of any of the rights of juveniles.⁵⁵

After considering international developments regarding the question of corporal punishment, as well as numerous South African judgments in which this form of punishment was severely criticised, Langa J had no difficulty in coming to the conclusion that "the institutionalised use of violence by the State on juvenile offenders authorised by section 294" of the **Criminal Procedure Act** was indeed a cruel, inhuman and degrading punishment, which violated Sections 10 and 11(2) of the (interim) **Constitution**.⁵⁶ Subsequent to this conclusion, he proceeded to determine whether the infliction of corporal punishment upon juveniles could not be salvaged by the general limitation clause.⁵⁷

It is noteworthy that the applicants had contended that the general limitation clause was not applicable as the rights protected by Section 11(2) of the (interim) **Constitution** were not capable of limitation. If this contention was accepted, it would mean that once a violation had been established, no further enquiry would ensue. In this regard, the learned judge refused to follow Mahomed AJA⁵⁸ and, following the reasoning of Chaskalson P in **S v Makwanyane and Another**,⁵⁹ decided that the general limitation clause was applicable.⁶⁰

The learned Judge carefully scrutinised the contention of Mr Slabbert that juvenile whipping was reasonable, justifiable and necessary as required in terms of the general limitation clause.⁶¹ In particular he rejected the notion that juvenile whipping constituted a better alternative to imprisonment and observed that there was indeed a shift of emphasis, albeit a painfully slow one, from retribution to rehabilitation.⁶² He also analysed the contention that corporal punishment had a deterrent effect and concluded

that whatever deterrent value it may have, it would not be sufficiently significant to enable the State to override a right entrenched in the (interim) **Constitution**.⁶³

On the basis of all this, the learned judge found that the provisions of Section 294 of the **Criminal Procedure Act**, which in their entirety violated the provisions of Sections 10 and 11(2) of the (interim) **Constitution**, were unconstitutional and could not be salvaged by the general limitation clause.⁶⁴ He then declared to be invalid and of no force and effect the provisions of Section 294 in their entirety, as well as the words "or a whipping" in Section 290(2) of the **Criminal Procedure Act**, with effect from the date of the order given in the matter. Thus, whatever sentences that might have been imposed by the Courts in terms of Section 294 could from then not be carried out.⁶⁵

THE JURISPRUDENTIAL IMPLICATIONS OF THE WILLIAMS JUDGMENT

Pursuant to the Constitutional Court's decision in **Williams**, it became unconstitutional for juvenile offenders to be whipped as punishment under our law. Binding as the decision was upon "all persons and all legislative, executive and judicial organs of state",⁶⁶ judicial juvenile whipping was thus effectively abolished and could not be imposed any longer.

However, as was pointed out above, Langa J confined his judgment to the provisions of Section 294 of the **Criminal Procedure Act** pertaining to juvenile whipping. Corporal punishment inflicted on male adults between the ages of 21 and 30 years, as well as whipping in the schools, were not affected as the sole issue the Court was called upon to determine was whether juvenile whipping was consistent with the (interim) **Constitution**.⁶⁷ Because of the relevance of the provisions of Section 290(2) of the **Criminal Procedure Act** to the question of juvenile whipping, the learned judge deemed it fit to extend his judgment and order to them.

The Constitutional Court, in other words, did not in the **Williams** judgment abolish corporal punishment *per se*. It simply did not regard it as its duty to do so.⁶⁸ The provisions of Sections 112, 276(1)(g), 292 and 293 of the **Criminal Procedure Act**, as

well as many other provisions in our law allowing for corporal punishment to be imposed by our Courts were, therefore, left intact.

While this judgment was, in a sense, confirming the Court's broad approach, namely that it confines its rulings to what it has been called upon to decide in the "cases and controversies" that are appropriately brought before it, it is noteworthy that in **Makwanyane** it was prepared to *mero motu* go beyond what it was called upon to decide. This does not augur well for the development of our human rights jurisprudence and constitutional adjudication. For one thing, it fosters casuistry and ad hoc development.

An anomalous situation thus resulted: While juveniles were no longer to be whipped, thanks to **Williams**, adults could still be whipped as a punishment under the law. This would be the case, notwithstanding the fact that Langa J acknowledged that when the matter was argued before the Constitutional Court, there was consensus between the parties that the provisions in our law which authorised judicial *corporal punishment for adults* were inconsistent with the (interim) **Constitution**.⁶⁹ This, moreover, was despite the fact that the learned judge had also acknowledged that South African jurisprudence had, for at least three decades before the **Williams** decision, "been experiencing a growing unanimity in judicial condemnation of corporal punishment for adults."⁷⁰ Despite all this, to paraphrase the learned Judge, judicial corporal punishment for male adults would remain in the statute book till it had either been set aside by a competent body or authority or till the relevant legislation had been repealed.⁷¹

Furthermore, whereas juveniles could no longer be whipped as a punishment imposed by the Courts, they could still be whipped at schools⁷² and in prison.⁷³

While, technically, it might be correct for judges to confine their judgments to issues that come before them for decision, it should always be borne in mind that the Constitutional Court is not akin to a division of the Supreme Court; it has "jurisdiction in the Republic as the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of" the (interim) **Constitution**,⁷⁴ and the exclusive power⁷⁵ to inquire "into the constitutionality of any law, including an Act of Parliament".⁷⁶

This awesome power, in my opinion, should enable the Court to help expand human rights as well as the values enshrined in the (interim) **Constitution**. It should be able to rummage through any law or statute, the provisions of which are sought to be impugned; the (interim) **Constitution** allows it to consider every conceivable aspect of the law without being confined to the averments of applicants or the formulations of questions referred to it. It can, therefore, not adopt a narrow view of its work and confine itself to the issues that come before it for determination particularly if doing so leads to absurd results such as leaving corporal punishment for male adults and for pupils at schools intact while abolishing judicial corporal punishment in respect of juveniles.

The approach of Langa J in **Williams** did not differ very much from that of the Supreme Court of Zimbabwe which, in **S v Ncube; S v Tshuma, S v Ndhlovu**,⁷⁷ first abolished judicial corporal punishment for adults on the basis that it violated the provisions of Section 15(1) of the Zimbabwe Constitution and subsequently in **S v A Juvenile**,⁷⁸ abolished judicial corporal punishment for juveniles on the same basis. Because Langa J, while accepting that the whipping of both adults and juveniles was, "in itself, a severe affront to their dignity as human beings",⁷⁹ refused to rule that the infliction of corporal punishment upon both adults and juveniles violated the (interim) **Constitution**, we would have to wait till concrete cases came before the Court in which the issues of corporal punishment for adults and corporal punishment at schools were raised, failing which Parliament would have to intervene and pass appropriate legislation in this regard. The presence on the Constitutional Court of Mahomed J⁸⁰ and Didcott J,⁸¹ obviously did not help.

Perhaps Langa J might have preferred the question to be determined by the Court in **Williams** to have been phrased the way it was formulated in **Ex Parte Attorney-General, Namibia: In Re Corporal Punishment by Organs of State**.⁸² However, in my opinion, it was not necessary for that to be the case; he could have dealt with the whole gamut of the question of corporal punishment authorised in our criminal justice and social system on the basis that it flew in the face of the values the emerging democratic South African society seeks to espouse.⁸³ Moreover, as the court of final instance in the interpretation, protection and enforcement of the provisions of the (interim) **Constitution**, the Court ought to be able to deal with broader issues relating

to a law or executive action being sought to be impugned, even if they are not, *stricto sensu*, relevant to a given case, so long as they are, for the same reasons, unconstitutional.⁸⁴

This will enable the polity to prevent an absolutely manifest unconstitutionality and injustice from continuing without anyone being able to do anything about it. As Langa J himself had quite correctly noted, the enactment of the (interim) **Constitution** created a framework within which significant changes could be brought about in our criminal justice system⁸⁵ if, in particular, the judges of our Constitutional Court were at all times prepared to act more robustly and imaginatively in defending and expanding human rights as they interpreted, protected and enforced the provisions of the (interim) **Constitution**.

Lastly, the approach of Langa J in **Williams** was, in any event, retrogressive when viewed against the decision the Constitutional Court had given three days before in **S v Makwanyane and Another**,⁸⁶ in which Chaskalson P was prepared, *mero motu*, to extend his order to the provisions of Section 277(1)(c), (d), (e) and (f) of the **Criminal Procedure Act**. The President of the Court, it is observed, did that, notwithstanding the fact that the issue that had been referred to it by the Appellate Division related solely to the constitutionality of the provisions of Section 277(1)(a) of that Act.⁸⁷ As a result, it became unnecessary for the Court to wait for further concrete proceedings or controversies in which it could determine the constitutionality of the death penalty as a punishment for robbery or attempted robbery (with aggravating circumstances), kidnaping, child-stealing and rape.

The learned judge and the Constitutional Court should, and could, have followed its own reasoning in **Makwanyane** in this regard, I contend. Doing so would have created certainty in our law with regard to the constitutionality of corporal punishment inflicted by organs of state upon both adults and juveniles. It would also have brought our law into line with the jurisprudence of many countries, including our neighbours, Zimbabwe and Namibia, on this question.

THE LATEST DEVELOPMENT

The whole issue of corporal punishment is now before Parliament. At the time of writing, the Minister of Justice had already tabled in Parliament a short Bill⁸⁸ which seeks "[t]o provide for the abolishment of corporal punishment authorised in the legislation".⁸⁹ The Bill thus goes beyond Langa J's decision in **Williams** and seeks to abolish all reference to corporal punishment in our statute book. This will help in addressing the anomaly of preserving this form of punishment for male adults below the age of thirty years, which was a direct consequence of Langa J's decision.

Should this Bill, for the passing of which only a simple majority is required, be enacted by Parliament, our country will have joined numerous other jurisdictions where corporal punishment has been totally abolished.

ENDNOTES - CHAPTER ELEVEN

1.. Act No. 51 of 1977.

2.. It is noted that Section 276(1)(g) of the **Criminal Procedure Act**, the general enabling statutory provision, provided for a whipping as one of the sentences that may be imposed upon a person convicted of an offence. See Mahomed AJA in **Ex Parte Attorney-General, Namibia: In Re Corporal Punishment by Organs of State**, 1991 (3) SA 76 (NmSC) at 78-84 for an impressive list of the legal provisions pertaining to corporal punishment under our criminal justice system.

3.. See Section 293 of the **Criminal Procedure Act** for the list of offences for which a whipping may be imposed by our courts.

4.. Section 292(1) of the **Criminal Procedure Act**.

5.. See Section 292(2) of the **Criminal Procedure Act** and Section 92(1)(c) of the **Magistrates' Act**, 32 of 1944.

6.. Section 292(2) of the **Criminal Procedure Act**.

7.. **S v Leshuwe**, 1962 (1) SA 560 (T).

8.. **S v Walker**, 1964 (3) SA 162 (C).

9.. **R v Maine en 'n Ander**, 1961 (3) SA 61 (O).

10.. **R v Luma**, 1956 (3) SA 575 (C); **R v Snyman**, 1960 (1) SA 663 (O); and **S v McDonald**, 1980 (1) PH 46 (C).

11.. **R v Anthony**, 1954 (1) SA 532 (C).

12.. Section 295(1) of the **Criminal Procedure Act** prevents the sentencing of any person of or above the age of 30 years to a punishment of a whipping. In other words, whipping as a form of punishment can be administered under our law to any male person from age 21 to 30.

13.. **S v Myende**, 1961 (3) SA 829 (N).

14.. Such an officer is an inferior court for this purpose. See **S v Abrahams**, 1966 (2) SA 171 (C); **S v Nkosi en Andere**, 1966 (2) SA 607 (O); and **S v Mphosi**; **S v Nxumalo**, 1966 (2) SA 609 (O).

15.. Section 54(1)(d) of the **Correctional Services Act**, No. 8 of 1959.

16.. **S v Dlakiya**, 1988 (1) SA 574 (T).

17.. Section 292(3) of the **Criminal Procedure Act**.

18.. *Ibidem*.

19.. Section 295(2) of the **Criminal Procedure Act**. See also **S v Sigenu**, 1977 (3) SA 1097 (C) at 1099.

20.. Section 295(1) of the **Criminal Procedure Act** provides specifically that no female should be sentenced by any court to the punishment of a whipping.

21.. **R v De Vos**, 1959 (1) SA 822 (E).

22.. 1995 (7) BCLR 861 (CC).

- 23.. Section 294(1)(a).
- 24.. Section 294(4) of the **Criminal Procedure Act**.
- 25.. Note that, in terms of Section 294(1)(b) of the **Criminal Procedure Act**, a person of or over the age of 17 but below the age of 21 years could not be sentenced to a whipping punishment *in addition to* any punishment other than imprisonment, unless the sentence of imprisonment was suspended.
- 26.. Section 294(1) of the **Criminal Procedure Act**. The punishment of a whipping could not be administered by any person designated by someone other than the court. See **S v S**, 1988 (3) SA 257 (C).
- 27.. Section 294(2) of the **Criminal Procedure Act**. See also **R v Dhlamini and Another**, 1947 (2) SA 971 (N). It is noted that when corporal punishment is inflicted upon a male adult, he is stripped naked and trussed, the strokes being delivered on naked flesh.
- 28.. Which ought to be fixed at the time of the commission of the offence for which the sentence was imposed, and not at the time of conviction or sentence. See **S v W**, 1990 (1) SACR 262 (NC) and **S v Sithole**; **S v Jiba**, 1990 (1) SACR 626 (N).
- 29.. **R v Brudd**, 1912 CPD 812; **S v Du Preez**, 1975 (4) SA 606 (C); **S v Khubeka en Andere**, 1980 (4) SA 221 (O).
- 30.. Section 294(5) of the **Criminal Procedure Act**.
- 31.. And not in cases of fraud. See **S v P**, 1985 (4) SA 105 (N).
- 32.. **S v Tshangelanga & Others**, 1965 (4) SA 546 (E); **S v Maisa**, 1968 (1) SA 271 (T).
- 33.. Needless to say, then without a constitutional provision allowing them to strike down Acts of Parliament.
- 34.. 1965 (4) SA 565 (N).
- 35.. At 574F-H. Leon J in **S v Masondo and Another**, 1969 (1) PHH 58 (N) also observed that "a whipping is not only an assault upon the person of a human being but also upon his dignity as such." See also **S v Maisa**, 1968 (1) SA 271 (T). The brutality of corporal punishment was also recognised by a Full Bench of the Transvaal Provincial Division in **S v Nkoana**, 1985 (2) SA 395 (T) at 401H-I.
- 36.. 1985 (2) SA 61 (Ck).
- 37.. At 62H.
- 38.. 1990 (1) SACR 669 (C).
- 39.. At 675C.
- 40.. See **S v V en 'n Ander**, 1989 (1) SA 532 (A) at 543D.
- 41.. By Section 36 of the Criminal Justice Administration Act, 1914.
- 42.. By Section 1 of the (British) Criminal Justice Act, 1948.
- 43.. Which was referred to as the Cadogan Committee. The Committee had pointed out in the report that: "In its own interests society should ... be slow to authorise a form of punishment which may degrade the brutal man still further and may deprive the less hardened man of the last traces of self-respect ..." (At 59)
- 44.. Through the (Canadian) Criminal Law Amendment Act 1972.

45.. In **S v F**, 1989 (1) SA 460 (Z) at 460I and 462I-J. For the position of the Zimbabwe Supreme Court, see, for example, **S v Ncube**; **S v Tshuma**; **S v Ndlovu**, 1988 (2) SA 702 (ZSC) at 721H-722D, where Gubbay JA, (as he then was) said with little hesitation that: "... the whipping each appellant was ordered to receive breaches s 15(1) of the Constitution of Zimbabwe as constituting a punishment which in its very nature is both inhuman and degrading ..." See also **S v A Juvenile**, 1990 (4) SA 151 (ZSC) at 168I-169B, where Gubbay JA said that juvenile whipping was "inherently brutal and cruel; for its infliction is attended by acute physical pain. After all, this is precisely what it is designed to achieve ... In short, whipping, which invades the integrity of the human body, is an antiquated and inhuman punishment which blocks the way to understanding the pathology of crime."

46.. See **Ex Parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State**, 1991 (3) SA 76 (NmSC) at 90, 92-93 and 95. At 95, the learned judge was even of the view that any corporal punishment inflicted upon students at Government schools under the Code issued by the (Namibian) Minister of Education, Culture and Sport, was also unconstitutional.

47.. 1994 (2) BCLR 135 (C).

48.. In terms of Sections 302(1)(a) and 304(4) of the **Criminal Procedure Act**.

49.. Namely Section 294.

50.. In whose judgment all the other judges of the Constitutional Court concurred. See 889. For a short comment on the case, see David Leibowitz and Derek Spitz 'Human Dignity' in Mathew Chaskalson et al **Constitutional Law of South Africa (1996)** 17-1 at 17-8.

51.. At 867-868, paragraph 13.

52.. At 866, paragraph 10.

53.. At 878, paragraph 49.

54.. Namely Sections 8, 10, 11(2) and 30 of the **Constitution**.

55.. At 875-876, paragraph 41.

56.. At 878-879, paragraphs 52 and 53.

57.. Section 33(1) of the **Constitution**.

58.. See **Ex Parte Attorney-General, Namibia: In Re Corporal Punishment by Organs of State**, *op. cit.* 86, where the learned judge of appeal had said that no derogation from the rights protected in Article 8 of the Namibian Constitution was permitted.

59.. 1995 (3) SA 391 (CC) at 435-436.

60.. At 879-880, paragraphs 55 and 56.

61.. In this regard, he stressed at 884, paragraph 76, that: "The enactment of the Constitution has created a framework within which significant changes can be brought about in the criminal justice system. The rights entrenched in Chapter 3 are available to 'every person'; that includes children and adults, women and men, prisoners and detainees. *The Constitution clearly places a very high premium on human dignity and the protection against punishments that are cruel, inhuman or degrading; very stringent requirements would have to be met by the State before these rights can be limited.*" (my italics)

62.. At 881-882, paragraph 65.

63.. At 886, paragraphs 84 and 86, as well as at 887-888, paragraph 91.

64.. At 888, paragraphs 91 and 92.

65.. *Ibidem*, paragraph 96.

66.. Section 98(4) of the **Constitution**.

67.. At 867-868, paragraph 13, where the learned judge emphasised that *the nub of the enquiry in Williams* was not the legality or otherwise of adult whipping, but whether juvenile whipping, on its own merits or demerits, was consistent with the **Constitution**. At 878, paragraph 49, the learned judge also said that: "the subject of *corporal punishment in schools* is not before us." (my italics)

68.. Langa J in fact pointed out at 867-868, paragraph 13, that his and the Court's duty was merely to determine whether *judicial corporal punishment*, on its own merits, was consistent with the **Constitution**.

69.. At 866, paragraph 10.

70.. At 867, paragraph 11.

71.. At 866-867, paragraph 10.

72.. See Langa J, *op. cit.* 878, paragraph 49.

73.. Under Sections 48(1) and 54(2)(d) of the **Correctional Services Act**, No. 8 of 1959.

74.. Section 98(2) of the **Constitution**.

75.. Section 98(3), read with Section 101(3)(c), of the **Constitution**. See also Trengove AJ in **Zantsi v Council of State, Ciskei and Others**, 1995 (10) BCLR 1424 (CC) at 1436, paragraph 32, and 1438, paragraph 38.

76.. Section 98(2)(c) of the **Constitution**.

77.. 1988 (2) SA 702 (ZSC) at 721H-722D.

78.. 1990 (4) SA 151 (ZSC) at 162H-J where Dumbutshena CJ, endorsing without reservation the reasoning of Gubbay in **S v Ncube and Others** (*supra*) held that: "... the imposition of a sentence of whipping or corporal punishment upon juveniles is an inhuman or degrading punishment or treatment which violates the prohibition against such punishment contained in s 15(1) of the Constitution of Zimbabwe. In my opinion, *judicial corporal punishment is unconstitutional and breaches s 15(1), whether it is imposed on an adult or a juvenile.*" (my italics)

79.. See **S v Williams and Others**, *op. cit.* 876-877, paragraph 45.

80.. Who concluded in **Ex Parte Attorney-General, Namibia: In Re Corporal Punishment by Organs of State**, *op. cit.* 93 that: "the infliction of all corporal punishment (in consequence of an order from a judicial or quasi-judicial authority) *both in respect of adults as well as juveniles*, constitutes degrading and inhuman punishment within the meaning of art 8(2)(b) of the Namibian Constitution." (my italics) See also *ibidem* at 95 for the learned judge's views on corporal punishment inflicted upon students at Government schools in Namibia.

81.. Who had remarked in **S v Machwili**, 1986 (1) SA 156 (N) at 157H-I, that: "When an adult is flogged ... nothing is achieved but revenge. Such is gained at a cost, what is more. Society's standards suffer. It stoops to the level of the criminal whom it punishes. It behaves with the same sort of barbarism as that which it condemned in him."

82.. *Op. cit.* 77.

83.. A factor which the learned judge accepted when he remarked at 874, paragraphs 37 and 38, that: "In determining whether punishment is cruel, inhuman or degrading within the meaning of our Constitution, the punishment in question must be assessed in the light of *the values which underlie the Constitution.*" This, according to the judge, meant, *inter alia*, that "... *punishment must respect human dignity* and be

consistent with the provisions of the Constitution." (my italics)

It is further noted that the learned judge, after observing at 876, paragraph 44, that "[d]ifferences between adult and juvenile whipping have ... little or no relevance to the enquiry", had quoted with approval the remarks of Mr Klecker who said in **Campbell and Cosans v United Kingdom**, (1980) 3 EHRR 531 at 556, that: "Corporal punishment amounts to a total lack of respect for the human being; *it therefore cannot depend on the age of the human being ...*" (my italics) At 877, paragraph 45.

84.. It is my contention, in other words, that the powers of our Constitutional Court are sufficiently broad not to warrant the enactment of a special provision similar to Article 78 of the (German) **Law on the Federal Constitutional Court** of 1951 which provides that: "If further provisions of the same law are incompatible with the Basic Law or other federal law *for the same reasons*, the Federal Constitutional Court may also declare them null and void." (my italics)

85.. **S v Williams**, *op cit* 884, paragraph 76.

86.. 1995 (3) SA 391 (CC).

87.. *Ibidem*, at 452, paragraph 149. However, it is noted that the general view of the President of the Constitutional Court with regard to constitutional adjudication is that: "It is not ordinarily desirable for a Court to give rulings in the abstract on issues which are not the subject of controversy and are only of academic interest..." See **Zantsi v Council of State, Ciskei and Others**, 1995 (10) BCLR 1424 (CC) at 1429. In other words, in his view, our Courts must decide no more than is necessary in any particular case.

88. The **Abolition of Corporal Punishment Bill** [B 20 - 97]

89. See the preamble to the Bill.

CHAPTER TWELVE

COMMITTAL TO PRISON IN RESPECT OF DEBT

INTRODUCTION

For a long time in the history of South Africa, prior to the decision of the Constitutional Court in **Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others**,¹ our law sanctioned the incarceration of judgment debtors for failure to satisfy their debts. This practice dated back to the pre-Union era, during which "[c]ivil imprisonment, as it applied in Holland by 1652, was part of the law in force at the Cape under Dutch rule."² Thus, for example, in 1813 imprisonment for debt under the **Proclamation of 5 February 1813** was limited to a maximum of six months' detention if the creditor's claim (excluding costs) did not exceed fifty rixdollars and to a maximum of one month's detention if it did not exceed twenty rixdollars.³ Such detention in no way discharged the debt or deprived the creditor of his or her other legal remedies.⁴

From 1944 civil imprisonment as was then understood ceased being part of the practice of magistrates' courts. However, the incarceration of judgment debtors did not end; instead, the **Magistrates' Courts Act, 1944**⁵ provided for the imprisonment of judgment debtors on the grounds of contempt of court⁶ arising from non-compliance with an order *ad pecuniam solvendam*.⁷ Under the Act, a judgment creditor could cause a notice to be issued calling upon the judgment debtor to appear at an inquiry into his or her financial affairs in a case where a judgment for the payment of money remained unsatisfied for a period of ten days, where it appeared *prima facie* that the debtor had no attachable movable assets for the purpose and yet where the debtor had not made a reasonable offer to liquidate the debt in instalments.⁸ At the inquiry into the judgment

debtor's financial position, the court could make an order for the debt to be settled in instalments.

For the purposes of the **Magistrates' Courts Act**, the notice to appear at such an inquiry was an order of court.⁹ Wilfully disobeying such an order or failure to comply with the court's order to pay the debt in instalments constituted an offence of contempt of court punishable, *inter alia*, by the imposition of a sentence of imprisonment for a period not exceeding three months.¹⁰

Eight years later, in 1952, the **Magistrates' Court Act** was amended¹¹ in this regard. While a judgment debtor who was in default of payment of his or her debt could still be called upon by notice to attend a financial enquiry where he or she would be ordered to pay the debt in instalments,¹² the court could under the new procedure issue a warrant for the arrest of a judgment debtor who failed to appear at the enquiry.¹³ When the debtor was brought before the court on the warrant, the court could summarily inquire into his or her failure to appear at the financial inquiry; if he or she did not have a reasonable excuse or explanation, it could sentence him or her, *inter alia*, to imprisonment for a period not exceeding three months.¹⁴ The court could, at the same hearing, also conduct a financial inquiry and order that the debt be paid in instalments.¹⁵ If the judgment debtor then failed to comply with the order to pay the debt in instalments, he or she would be called upon anew to appear in court;¹⁶ failing this, or if the court was not satisfied that the debtor's non-compliance was due to circumstances beyond his or her control, the court could then commit the debtor to prison for a period not exceeding thirty days.¹⁷ The court could at any time suspend or discharge the order of committal upon such terms as it might deem reasonable.¹⁸

Two years later, the **Magistrates' Courts Act** was once again amended¹⁹ to repeal the power of the court to inquire summarily into the judgment debtor's failure to comply with a notice to attend a financial inquiry and the accompanying punitive jurisdiction. However, the imposition of civil imprisonment for non-compliance with the court's order that the judgment be paid in instalments was retained. Fourteen years later, the requirement that a notice to attend a financial inquiry should be served upon the judgment debtor *personally* was done away with by means of a further amendment.²⁰

Thus, from then on, such a notice could be served upon the debtor in any of the diverse recognised modes of service.²¹

By means of the **Abolition of Civil Imprisonment Act**,²² Parliament finally abolished civil imprisonment. However, the old practice of committing judgment debtors to prison for contempt of court in the event of non-compliance with magistrates' orders to pay their debts in instalments or otherwise was further entrenched.²³

THE LAW AT THE POINT OF MATISO

When Melunsky J and Froneman J gave their judgment in **Matiso and Others v The Commanding Officer, Port Elizabeth Prison and Others**,²⁴ the legal position²⁵ regarding the enforcement of judgment debts could, for the purpose of this thesis, briefly be described as follows:

- 1) A judgment debtor who failed to comply with a court's judgment for the payment of a sum of money²⁶ or with an order to pay such a debt in specified instalments or otherwise within ten days from which the judgment or order was given, could, by *notice*,²⁷ be called upon to appear before the court in chambers to show cause why he or she should not be committed to prison for contempt of court, and why he or she should not be ordered to pay the debt in instalments or otherwise.²⁸ As pointed out above, in accordance with the rules of service, such a *notice* need not be served upon the judgment debtor personally.²⁹
- 2) Upon the return day of the *notice*, or, as the case may be, upon any date to which the proceedings might have been postponed, the court was required to inquire into the judgment debtor's financial position.³⁰ At the financial inquiry, the court could, *inter alia*, order that the judgment debt be paid in specified instalments.³¹ For this reason, the court could postpone the inquiry into the reasons why the judgment debtor should not be committed to prison.³²

- 3) Upon the return day of the *notice*, whether the judgment debtor did or did not appear (in person or through a representative) before the court in chambers, the court could grant an order for his or her committal to prison for contempt of court essentially for non-compliance with an order *ad pecuniam solvendam*,³³ for a period not exceeding ninety days or, in lieu thereof, sentence him or her to periodical imprisonment for a period not exceeding 2160 hours for failing to satisfy the judgment.³⁴ For this purpose, the court could authorise the issue of a warrant for his or her arrest and detention in any specified prison.³⁵
- 4) Ordinarily, the judgment debtor thus committed to prison would remain in prison till the expiry of the period for which he or she was so committed,³⁶ unless duly released upon an order given by a judge of the Supreme Court or by any judicial officer of the district in which the order for committal was made or of the district in which the prison where the judgment debtor was incarcerated was situate.³⁷
- 5) Otherwise, where the judgment creditor, or the judgment debtor's attorney, or the messenger of the court certified in writing that the judgment debt and costs had since been paid, or, in the case of an order that the debt be paid in instalments, that arrear instalments and any costs had since been paid, the judgment debtor was released forthwith from prison by the officer in charge of the relevant prison.³⁸
- 6) Lastly, the Transvaal Provincial Division of the Supreme Court had held (per Van Dijkhorst J) in **Quentin's v Komane**³⁹ that in the debt recovery procedure under Section 65A(1) of the **Magistrates' Courts Act** there could only be one notice and that a judgment debtor could be committed to prison for contempt of court for failure to comply with an order *ad pecuniam solvendam* once only.⁴⁰ The approach of the Court was that because of the drastic inroads committal to prison for failure to satisfy a civil judgment made into the freedom of the individual, the relevant provisions ought to be interpreted restrictively rather than extensively.⁴¹

In sum, at the time when Melunsky J and Froneman J referred the matter in **Matiso and Others**⁴² to the Constitutional Court, our law, through the use of contempt of court, in general sanctioned the criminalisation of non-compliance with an order *ad pecuniam solvendam* at the instance of a judgment creditor.⁴³ While the judgment debtor was ostensibly committed to prison for the criminal offence of contempt of court, it was interesting to note that upon payment of the judgment debt or arrear instalments, the judgment debtor was entitled to be released forthwith from prison;⁴⁴ in other words, payment of the judgment debt or arrear instalments effectively nullified the contempt of court.

Furthermore, as was stated above, it was only the magistrates' courts that had the power to order the imprisonment of a judgment debtor for contempt of court as a sequel to non-compliance with an order *ad pecuniam solvendam*; the Supreme Court was not having a similar power.⁴⁵ As the South African Law Commission pointed out, this anomalous situation entailed that even in cases where judgments of the Supreme Court were involved, action was taken against judgment debtors for contempt of court under the provisions of Section 65M of the **Magistrates' Courts Act** while the Supreme Court which passed the judgment did not necessarily regard non-compliance with an order *ad pecuniam solvendam* as contempt of court.⁴⁶

MATISO AND OTHERS

In **Matiso and Others v The Commanding Officer, Port Elizabeth Prison and Others**⁴⁷ the first applicant was detained under a warrant for her arrest issued in terms of Sections 65F(1) and 65H of the **Magistrates' Courts Act**. Contending that under the new constitutional order a person could be incarcerated or detained only after having been convicted of a criminal offence and after a fair trial, she brought an urgent application for her immediate release on the grounds that the relevant provisions of the **Magistrates' Courts Act** which sanctioned the incarceration of a judgment debtor for contempt of court relating to non-compliance with an order *ad pecuniam solvendam* infringed the rights entrenched in Sections 11(1)⁴⁸ and 25(3)⁴⁹ of the (interim) **Constitution** and were, therefore, invalid. Pending a decision of the Constitutional Court on this question, she also sought an order for the immediate release of all other

judgment debtors in the custody of the first respondent, as well as an interdict prohibiting the first respondent from receiving any other judgment debtors into his custody.⁵⁰

Believing that a decision of the Constitutional Court would be decisive of the matter and that it was in the interests of justice that the matter be referred to that Court,⁵¹ Melunsky J gave an order for the immediate release of the first applicant and referred the matter to that Court.⁵² With regard to the other applicants, Froneman J, after an interesting scholastic exegesis on interpretation of statutes in the new constitutional order, made a similar order and also referred the allegedly offending provisions of the **Magistrates' Courts Act** to the Constitutional Court for its decision.⁵³

ENTER THE CONSTITUTIONAL COURT

Before the Constitutional Court two matters⁵⁴ raising the constitutionality of the imprisonment of judgment debtors for contempt of court under Sections 65A to 65M of the **Magistrates' Courts Act** were heard simultaneously.⁵⁵ The decision of the Court was thus reported as **Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others**.⁵⁶ In the matter, the Court had been called upon to determine whether the relevant provisions of the **Magistrates' Courts Act** which sanctioned the arrest and incarceration of a person for contempt of court deriving from non-compliance with an order *ad pecuniam solvendam* were not invalid due to, and to the extent of, their inconsistency with the (interim) **Constitution**.

As Kriegler J (for the majority⁵⁷) pointed out, while on the face of it the system of imprisonment for debt might have been intended to compel judgment debtors who were unwilling to pay their debts, it unavoidably affected mostly those indigent, illiterate and uninformed persons who did not have the means to pay their debts, who could not afford legal representation and who did not know their rights.⁵⁸ Such persons were in many instances committed to prison for debt without ever having had notice of the original judgment or the notice to appear at the hearing in terms of Section 65A(1) of

the **Magistrates' Courts Act**.⁵⁹ Needless to say, to anyone in such persons' circumstances the provisions of Section 65F(3)⁶⁰ could offer only cold comfort.

For the purpose of determining the constitutionality of the impugned provisions of the **Magistrates' Courts Act**, Kriegler J followed the usual "two-stage approach".⁶¹

THE FIRST STAGE

The first part of the enquiry entailed the determination of whether the disputed provisions⁶² limited any of the Chapter 3 rights. Kriegler J did not hesitate to identify the most fundamental right limited by arrest and incarceration in this regard; for the learned judge of the Constitutional Court such a right was the right to freedom and security of the person, which included *the right not to be detained without trial*.⁶³ He held that:

[c]ertainly to put someone in prison is a limitation of that person's right to freedom. To do so *without any criminal charge being levelled or any trial being held* is manifestly a radical encroachment upon such right.⁶⁴ (my emphasis)

Once he came to the conclusion that the impugned provisions of the **Magistrates' Courts Act** violated this basic right, he then had to proceed to the next stage.

THE SECOND STAGE

The next question for the learned judge to consider was whether the relevant provisions of the **Magistrates' Courts Act** which he had adjudged to be limiting the right to freedom and security of the person were, nonetheless, a justifiable limitation.⁶⁵ Though he accepted that the goal of the relevant provisions of the **Magistrates' Courts Act** was a legitimate and reasonable government objective to enforce judgment debts, Kriegler J found that because the provisions were rather *overbroad* as a means of achieving that goal, they were unreasonable.⁶⁶

SEVERABILITY

After concluding that the limitation entailed in the impugned provisions of the **Magistrates' Courts Act** were overbroad and therefore unreasonable, the Court then had to consider the question of severability.⁶⁷ Though it would not be possible to excise only those provisions which failed to distinguish between those judgment debtors who could but were not willing to pay and those who could not pay their debts at all, Kriegler J found that it would be possible to expunge from the statute those provisions which made up the option of imprisonment.⁶⁸ This, the learned judge held, would not defeat the object of Sections 65A to 65M of the **Magistrates' Courts Act** which is basically "to provide a system to assist in the collection of debts. Removing one of the options available under the system does not render the system that remains contrary to the purpose of the legislative scheme. Accordingly, the infringing provisions can be severed and the balance of the system can usefully remain in force."⁶⁹

Kriegler J was not persuaded of the validity of the argument⁷⁰ presented on behalf of the Association of Law Societies by two *amici curiae*.⁷¹ Instead, he held that the system of imprisonment for contempt of court due to non-compliance with an order *ad pecuniam solvendam* was so manifestly inconsistent with the right to freedom and so indefensible as a limitation that there was no warrant for it to be retained even temporarily.⁷²

Accordingly, the learned judge gave an order which severed those portions which made up the option of civil imprisonment for debt from the provisions of Sections 65A to 65M of the **Magistrates' Courts Act**, thus leaving the debt collection system otherwise intact.⁷³ Therefore, with effect from 22 September 1995, the date of the order, the committal or continuing imprisonment of any judgment debtor in terms of Section 65F or 65G of the Act became invalid.⁷⁴

To the extent that Kriegler J's judgment had a tremendous impact on our debt collection system, the next part will summarise the debt collection system subsequent to the judgment.

THE DEBT COLLECTION SYSTEM TODAY

Having surgically excised from the debt collection system all the offending provisions, Kriegler J stressed that "[a]ll other provisions of sections 65A-65M of the Magistrates' Courts Act remain in force."⁷⁵ Thus, our debt collection system today may be summarised as follows:

- 1) After a court⁷⁶ has given judgment for the payment of a sum of money, *but before the judgment creditor has issued a notice calling upon him or her or it to show cause why he or she or it should not be ordered to pay the judgment debt in instalments or otherwise*,⁷⁷ the judgment debtor may make an offer in writing to the judgment creditor to pay the judgment debt in specified instalments or otherwise. If the judgment creditor or his or her or its attorney accepts the offer, the clerk of court **must**, at the written request of the judgment creditor or his or her or its attorney, order that the debt be paid in specified instalments or otherwise in accordance with the judgment debtor's offer. The order of the clerk of court is *deemed* to be the order of the court referred to in Section 65A(1) of the Act.⁷⁸

- 2) If the judgment for the payment of a sum of money or, as the case may be, the order⁷⁹ that the judgment debt be paid in specified instalments or otherwise, has remained unsatisfied for a period of ten days from the date of the judgment or of the order, the judgment creditor **may** issue a *notice* calling upon the judgment debtor to appear before the court in chambers upon a date specified in the *notice* to show cause why the debt should not be paid in instalments or otherwise.⁸⁰ Such a *notice* shall not be issued in any matter where the judgment debtor was not present in person or represented by any person when the judgment was given, unless there is proof that he or she or it is, or has been made, aware of the judgment.⁸¹ Furthermore, if the court has ordered that the judgment debt shall be paid in instalments, the *notice* shall not be issued unless the judgment creditor has delivered an affidavit or affirmation, or his or her or its attorney has delivered a certificate to the clerk of court in which is mentioned: (i) the outstanding balance of the judgment debt; (ii) in what respects it is alleged that the judgment debtor has failed to comply with the court's order; (iii) to what

extent he or she or it is in arrears with the payment of instalments; and (iv) that the judgment debtor was advised by registered letter of the terms of the judgment and of the consequences of his or her or its failure to satisfy it.⁸²

- 3) Upon the date specified in the said *notice* or, as the case may be, upon any date to which the hearing may have been postponed, the court determines the judgment debtor's financial position.⁸³ In such an enquiry the function of the court is not confined to the determination of the debtor's financial position, however.⁸⁴
- 4) If at such an inquiry the court is satisfied that the judgment debtor has movable or immovable property that may be attached and sold to satisfy the judgment debt or any part thereof, it may authorise the issue of a warrant of execution against such property or any portion thereof as it may deem fit.⁸⁵ The court may, however, also suspend execution against the debtor either *mero motu*⁸⁶ or upon application by the debtor,⁸⁷ if it is satisfied that the debtor cannot pay the debt all at once but may do so in reasonable instalments or consents to either an emoluments order or a garnishee order being made against him or her or it.⁸⁸ For this purpose or reason, the court may postpone the proceedings *sine die*. The authorization of the issue of a warrant of execution as envisaged in this section serves as an interdict restraining the judgment debtor from alienating or disposing of the said property pending execution.⁸⁹

Though nothing prevents a judgment creditor from going for execution immediately in case of failure on the part of the judgment debtor to pay the debt forthwith,⁹⁰ the creditor is, somehow, restrained by the Act from doing so as he or she or it shall generally⁹¹ not get costs in connection with the issue and execution of a warrant of execution where a *nulla bona* return is made.⁹² This, in other words, compels a creditor who has any doubt as to whether the debtor possesses any attachable movable assets to proceed to execution cautiously and *via* the proceedings provided for in the provisions of Section 65A(1) of the Act.⁹³

- 5) The court may also order the attachment of a debt due to the judgment debtor,⁹⁴ or, whether or not the debtor has made an offer in writing to the creditor or the creditor's attorney undertaking to settle the debt in specified instalments or otherwise, authorise the issue of an emoluments order for the payment of the debt and costs by the employer of the judgment debtor,⁹⁵ or order that the debt and costs be paid in specified instalments,⁹⁶ or both such specified instalments and emoluments.⁹⁷
- 6) Where the judgment debtor, whose total debts do not exceed the amount that is determined for this purpose by the Minister of Justice⁹⁸ from time to time, is unable to pay the judgment debt forthwith or to meet his or her financial obligations and does not have sufficient attachable assets, the court may, upon application by him or her, make an order on such conditions as it may deem fit providing for the administration of his or her or its estate and for the payment of his or her debts in instalments or otherwise.⁹⁹ If the debtor has made an application for such an administration order, the Section 65A(1) hearing is postponed *sine die* pending the outcome of the application.¹⁰⁰ Even if the debtor has not lodged such an application, the court may postpone the hearing *mero motu* if it appears that the debtor has other debts as well which should be treated collectively for the purposes of an administration order, to enable the debtor to file a full statement of his or her or its affairs.¹⁰¹

It needs to be stressed that, in the light of the Constitutional Court's judgment and order in **Coetzee, Matiso and Others**,¹⁰² the option to commit a judgment debtor to prison (at the instance of a judgment creditor) for contempt of court for non-compliance with an order *ad pecuniam solvendam*¹⁰³ is no longer available to the courts as part of our debt collection system. Our law today, in other words, does not "hold constitutional a system which ... confers on creditors the power to consign the person of an impecunious debtor to prison at will and *without the interposition of a judicial officer*."¹⁰⁴ (my emphasis) However, as Langa J pointed out, it is extremely important to make a distinction between what was decided and what was not in the matter.¹⁰⁵

THE EFFECT ON "CIVIL CONTEMPT"

While the Constitutional Court, for the right reasons, expunged from our debt collection system civil imprisonment for debt, it did not, in my opinion, do away with committal for non-compliance with an order *ad factum praestandum* in relation to the payment of debts.¹⁰⁶ In other words, as Snyman put it, "*there is nothing to prevent the attorney-general from indicting for criminal contempt in such a case if he thinks the circumstances merit public prosecution.*"¹⁰⁷ (my emphasis) In a proper case, where all the elements of the offence of contempt of court are present, a prosecution should ensue.¹⁰⁸ Otherwise, a real scoundrel, against whom a court has properly given an order *ad pecuniam solvendam*, and who intentionally refuses to comply with it, can take cover behind Kriegler J's judgment in **Coetzee, Matiso and Others** and, from the safety of that judgment, cock a snook and snarl at the court with impunity. It surely was not the intention of Kriegler J to throw the administration of justice into a state of utter chaos and confusion and undermine the public's respect therefor.

Though the question was not dealt with appropriately by the Court, what Kriegler J surely sought to do was to prevent the persecution of judgment debtors solely **for failure to pay** their debts and not their prosecution for contempt of court arising from their **disobedience and wilful refusal to pay**.¹⁰⁹ For this reason, I am prepared to align myself with the reasoning of Didcott J who said that it would not necessarily be totally unconstitutional for a recalcitrant judgment debtor to be committed to prison for a short spell for contempt of court "once certain conditions were met",¹¹⁰ even though the contempt essentially has a close relationship with a court's order *ad pecuniam solvendam*.¹¹¹

The Kriegler judgment, again for the right reasons, left intact the provisions of the **Magistrates' Courts Act** which render certain acts associated with orders *ad pecuniam solvendam* punishable offences.¹¹² For example, in addition to the offences relating to execution,¹¹³ a garnishee who dismisses or terminates the service of a judgment debtor not occupying a position of trust in which he or she handles or has at his or her disposal moneys, is guilty of an offence and, may in certain circumstances, be sentenced to imprisonment for a period not exceeding three months.¹¹⁴ Similarly, failure or neglect on the part of an employer to furnish a written statement containing full particulars of a

judgment debtor in his/her/its employ within a reasonable time after a request by the debtor/employee, or wilful or negligent furnishing of incorrect relevant particulars by such an employer, is a punishable offence.¹¹⁵ It would indeed be absurd to suggest that, while such a garnishee or employer may, in these specific circumstances, be punished for an offence which essentially derives from an order *ad pecuniam solvendam*, the judgment debtor will escape punishment merely because of the Kriegler judgment in **Coetzee, Matiso and Others**.

ENDNOTES - CHAPTER TWELVE

- 1.. 1995 (10) BCLR 1382 (CC).
- 2.. See the South African Law Commission in **Interim Report on Imprisonment for Debt** (August 1994, Annexure B), at 6.
- 3.. *Ibidem*.
- 4.. *Ibidem*. The South African Law Commission, *op cit* 6-18 summarised the legal situation prior to the enactment of the **Magistrates' Courts Act**, 32 of 1944.
- 5.. Hereinafter referred to as the Act.
- 6.. See Jonathan Burchell and John Milton **Principles of Criminal Law** (Juta & Co, Cape Town, 1991) at 627 for a definition of the crime of contempt of court. See also CR Snyman **Criminal Law** (3rd ed, Butterworths, Durban, 1995) at 310.
- 7.. That is, an order for the payment of money.
- 8.. Section 65(1) of the Act prior to the 1976 amendments, for which see the South African Law Commission, *op cit* 21.
- 9.. Section 65(5) of the Act.
- 10.. Section 106 of the Act. It is noteworthy that under the provisions of the current Section 106 of the Act the prescribed maximum period of imprisonment was six months.
- 11.. By Section 15 of the **Magistrates' Courts Amendment Act**, 40 of 1952.
- 12.. Section 65(1) and Section 65(7)(d) of the **Magistrates' Court Act**, as amended.
- 13.. Section 65(5)(a) of the Act, as amended.
- 14.. *Ibidem*, Section 65(5)(a).
- 15.. *Ibidem*, Section 65(5)(b).
- 16.. *Ibidem*, Section 65(9).
- 17.. *Ibidem*, Section 65(9)(b).
- 18.. *Ibidem*, Section 65(9)(c).
- 19.. By the **Magistrates' Courts Amendment Act**, 14 of 1954.
- 20.. See the **General Law Amendment Act**, 70 of 1968. See the South African Law Commission, *op. cit.* 21 for a summary of a discussion of some of the effects of the provisions of the **Magistrates' Courts Amendment Act**, 63 of 1976.
- 21.. This position, as will appear below, never changed.
- 22.. Act No. 2 of 1977.
- 23.. Section 3 of the **Abolition of Civil Imprisonment Act**.

24.. 1994 (3) BCLR 80 (SE).

25.. For which see Sections 65A to 65M of the **Magistrates' Courts Act** (as amended).

26.. In this regard, it is observed that, although in the Supreme Court contempt of court was confined to non-compliance with an order *ad factum praestandum* (ie an order to perform a certain act or refrain from specified action) and could therefore generally not be extended to non-compliance with an order *ad pecuniam solvendam* [cf **Stellenbosch Farmers' Winery (Edms) Bpk v Goldberg**, 1968 (2) SA 728 (T); **Walpamur Company (Pty) Ltd v September**, 1969 (1) SA 643 (EC); and **Hofmeyer v Fourie**, 1975 (2) SA 590 (C)], Section 65M of the **Magistrates' Courts Act** allowed magistrates' courts to deal with judgments given by any division of the Supreme Court for the payment of an amount of money under the provisions of Section 65 of the Act, irrespective of whether such judgments would have exceeded the jurisdiction of the magistrates' courts. Thus, a judgment creditor could utilise the provisions of Section 65M to eventually get the judgment debtor committed to prison for contempt of court deriving from non-compliance with an order *ad pecuniam solvendam*.

27.. Which *notice*, in terms of Section 65B of the **Magistrates' Courts Act**, was to be served at least seven days prior to the date specified therein for the hearing of the proceedings.

28.. *Ibidem*, Section 65A(1).

29.. See Rule 9 of the **Magistrates' Courts Rules**.

30.. Section 65D(1) of the **Magistrates' Courts Act**.

31.. *Ibidem*, Section 65E(1)(c).

32.. *Ibidem*, Section 65E(1).

33.. See **Van den Bergh v John Price Estates**, 1987 (4) SA 58 (SE) at 66 where it was said that, regard being had to the wording of Sections 65A(1) and 65F(1) of the **Magistrates' Courts Act**, the so-called contempt of court was a failure to satisfy a civil judgment, ie to pay a judgment debt sounding in money. See also Van Dijkhorst J in **Quentin's v Komane**, 1983 (2) SA 775 (T) at 778; **Erasmus v Thyssen**, 1994 (3) SA 797 (C); as well as Grosskopf JA in **Tödt v Ipser**, 1993 (3) SA 577 (A) at 588.

34.. *Ibidem*, Section 65F(1). This section, using as did the phrase "the court may ... in its discretion", clearly vested the court with a discretion to commit a judgment debtor to prison for contempt of court, which the courts had to exercise judiciously, and not capriciously. See **Van den Bergh v John Price Estates**, *supra* at 65.

35.. It is observed that the provisions of Section 65F(2) of the **Magistrates' Courts Act** allowed the court to, at any time on good cause shown, either conditionally *suspend* any such order or sentence or any warrant so issued, or *set aside* such order, sentence or warrant upon payment *in full* of the judgment debt and costs.

It is also observed that *not all judgment debtors could, as such, be committed to prison for contempt of court*; the provisions of Section 65F(3) and Section 65F(4) of the Act protected certain categories of judgment debtors from that. See Kriegler J in **Coetsee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison**, *op cit* 1388-1389, paragraph 7, for a succinct summary of the categories that were protected under Section 65F(3) of the Act.

36.. *Ibidem*, Section 65L(a).

37.. *Ibidem*, Section 65L(c).

38.. *Ibidem*, Section 65L(b).

39.. 1983 (2) SA 775 (T).

40.. *Ibidem* at 779-780.

41.. *Ibidem*, at 779. See also **Van den Bergh v John Price Estates**, *supra* at 66.

42.. *Op cit*.

43.. Sections 65A and 65B of the Act. It is noteworthy that this was not done at the instance of the State, in which, in terms of Section 2(1), read with Section 2(2) of the **Criminal Procedure Act**, 51 of 1977, vests *the authority to institute and to conduct a prosecution of any offence*.

44.. Section 65L(b) of the **Magistrates' Courts Act**.

45.. See **Hofmeyer v Fourie**, *op cit* 600 G-H.

46.. *Op cit* 26-27.

47.. 1994 (3) BCLR 80 (SE).

48.. The provisions of which guaranteed the right to freedom and security of the person, including *the right not to be detained without trial*.

49.. The provisions of which guaranteed to every accused person *the right to a fair trial*.

50.. She obviously purported to be acting in terms of Section 7(4)(b)(iv) of the **Constitution** for this purpose. Though the court was not satisfied that the other judgment debtors thus detained constituted a group or class of persons on behalf of which the first applicant could seek relief under this section of the **Constitution**, it granted them leave to seek joinder in her application. It was, however, not prepared to grant the first applicant an interdict restraining the first respondent from receiving future judgment debtors into his custody pending a decision of the Constitutional Court.

51.. **Matiso and Others** *op cit* 84.

52.. *Ibidem* at 85.

53.. *Ibidem* at 85-86 and 91-92.

54.. **Matiso and Others v The Commanding Officer, Port Elizabeth Prison and Others; and Coetzee v Government of the Republic of South Africa**, decided and referred by the South Eastern Cape Local Division and the Cape of Good Hope Provincial Division respectively.

55.. Rule 11(6) of the **Rules of the Constitutional Court** (as published in **Government Gazette** No. 16204 of 6 January 1995) allows the Constitutional Court to order this either on its own motion or upon application by one or more parties.

56.. 1995 (10) BCLR 1382 (CC). For the purposes of this thesis, the decision will hereinafter be referred to as **Coetzee, Matiso and Others**.

57.. See **Coetzee, Matiso and Others**, *op cit* 1383, 1394, 1397 and 1421 for the list of the judges of the Court who concurred in Kriegler J's judgment. The whole Court concurred in the judgment, though some of them decided to give their own separate judgments.

58.. *Ibidem* at 1389, paragraph 8.

59.. As was stated above, it was not necessary for purposes of Section 65A(1) for the *notice* of the hearing to be served upon the judgment debtor personally. See Rule 9 of the **Magistrates' Courts Rules**. However, see **Van den Bergh v John Price Estates**, *supra* at 65 regarding the judicious exercise of the court's discretion to commit a judgment debtor to prison for contempt of court when the Section 65A(1) *notice* has not been served upon the debtor personally.

60.. Which precluded the arrest and/or incarceration for debt of certain categories of judgment debtors.

61.. **Coetzee, Matiso and Others**, *op cit* 1389, paragraph 9.

62.. Which the applicants argued were Section 10 (the right to dignity), Section 11 (the right to freedom and security of the person), and Section 25(3) (the right to a fair trial) of the **Constitution**.

63.. As guaranteed in Section 11(1) of the **Constitution**.

64.. **Coetzee, Matiso and Others**, *op cit* 1389-1390, paragraph 10. See also Langa J, *ibidem* at 1398, paragraph 33, and Sachs J, *ibidem* at 1401, paragraph 43.

65.. In terms of Section 33(1) of the **Constitution**, which required the interpretation of both the fundamental right protected and the evaluation of the statutory limitation. In this regard, Kriegler J said at 1390, paragraph 11, that: "In the case of the right and limitation at issue here such interpretation is perfectly simple. At the very least a law ... limiting the right to freedom must have a reasonable goal and the means for achieving that goal must also be reasonable."

66.. At 1390-1391, paragraphs 12 and 13. At 1391, paragraph 13, in particular, the learned judge said: "The sanction of imprisonment is ostensibly aimed at the debtor **who will not pay**. But it is unreasonable in that it also strikes at those **who cannot pay** and simply fail to prove this at a hearing often due to negative circumstances created by the provisions themselves." (my emphasis) See also 1392, paragraph 14.

See also Didcott J, *ibidem* at 1396, paragraph 25; Langa J, *ibidem* at 1397, paragraphs 31 and 32; and, in particular, Sachs J, *ibidem* at 1416-1417, paragraph 66, who said that "... the object of the system would be to send to gaol those who could not pay in order to get money out of those who could pay. The borderline between ability to pay and refusal to pay would be a shadowy one; *resigned and bewildered debtors, confused by complicated and technical notices, would inevitably get caught up with the truly recalcitrant debt-dodgers who defiantly refused to pay even when they could.*" (my emphasis)

67.. In this regard, the learned judge said at 1392, paragraph 16, that the trite test was: "if the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute. The test has two parts: first, is it possible to sever the invalid provisions and second, if so, is what remains giving effect to the purpose of the legislative scheme?"

Note, in particular, Sachs J's remark, *ibidem* at 1420, paragraph 74, that, for this purpose, due to the fact that it is operating in a new constitutional setting, the Court must, methodologically, "posit a notional contemporary Parliament dealing with the text in issue, paying attention both to the constitutional context and the moment in the country's history when the choice about severance is to be made."

68.. At 1393, paragraph 17. See also Didcott J, *ibidem* at 1396-1397, paragraph 27.

69.. *Ibidem*.

70.. To the effect that the Court should utilise its powers contained in the provisions of Section 98(5) of the **Constitution** and call upon Parliament to cure the defect in the law in order to prevent a total collapse of the debt collection system that might otherwise ensue.

Didcott J, even though concurring in Kriegler J's "incisive" judgment and the order proposed by him (see 1397, paragraph 28), nonetheless thought that it would not necessarily be unconstitutional for judgment debtors to be committed to prison for a limited spell "once certain conditions were met". (see 1394, paragraph 20 *et seq.*)

71.. See Rule 9 of the **Rules of the Constitutional Court**, *op cit* regarding the right of audience granted to *amici curiae* by the Constitutional Court.

72.. **Coetzee, Matiso and Others** *op cit* 1393, paragraph 18. See also Sachs J, *ibidem* at 1420-1421, paragraph 76.

73.. *Ibidem*, 1393-1394, paragraph 19.

74.. *Ibidem*.

75.. *Ibidem*.

76.. For the purposes of the provisions of Section 65A(1), read with Section 65M of the **Magistrates' Courts Act**, "court" also includes a division of the Supreme Court of South Africa, now referred to as a High Court. Section 166 (c) of the (new) **Constitution**.

77.. In other words, before the expiry of ten days from the date of the court's judgment.

78.. Section 65 of the **Magistrates' Courts Act**.

79.. That is, the order given by the clerk of court under Section 65 of the Act.

80.. *Ibidem*, Section 65A(1), read with Sections 48(e) and 65B. As shown above, the courts' power to consider committing the judgment debtor to prison at the instance of the judgment creditor has since been adjudged by the Constitutional Court to be unconstitutional and therefore invalid.

81.. *Ibidem*, Section 65A(2). It is noted that reference to representation by any person means representation by persons allowed to represent others in terms of Section 20 of the Act read with Rule 52, ie advocates and attorneys of the Supreme Court of South Africa.

The clerk of court, and not a magistrate, must determine whether the requisite proof is satisfactory before the Section 65A(1) *notice* is issued. See **Greek Farming Syndicate Ltd v Zevenfontein Ltd**, 1926 CPD 248.

82.. *Ibidem*, Section 65A(4).

83.. *Ibidem*, Section 65D. According to HJ Erasmus **Jones and Buckle: The Civil Practice of the Magistrates' Courts in South Africa** (8th ed, Vol. 1, Juta & Co, Cape Town, 1988) at 255, "This and the following sections make provision for a procedure whereby the judgment debtor's financial position can be determined in order to enable the judgment creditor to obtain from his debtor as much as the latter can really afford to pay, avoiding as far as is possible the expense of issuing a warrant of execution against movable property which may prove abortive."

84.. See **Ferreira v Malherbe**, 1962 (4) SA 523 (E) at 528; and **First Consolidated Holdings (Pty) Ltd v Templeton NO**, 1984 (3) SA 225 (N) at 231.

85.. Section 65E(1)(a)(i) of the **Magistrates' Courts Act**.

86.. *Ibidem*, Section 65E(1)(a)(ii).

87.. *Ibidem*, Section 65E(1)(c).

88.. *Ibidem*, Section 73(1).

89.. *Ibidem*, Section 65E(2).

90.. *Ibidem*, Section 66(1)(a).

91.. Except "on good cause shown". See **Silber v Ozen Wholesalers (Pty) Ltd**, 1954 (2) SA 345 (A) at 352; and **Stuart Nixon Estate Agency (Pty) Ltd v Brigadoon (Pty) Ltd**, 1970 (1) SA 97 (N) at 100 for the meaning of this phrase.

- 92.. *Ibidem*, Section 65E(4).
- 93.. See JM Fourie **The New Debt Collecting Procedures** (2nd ed, Juta & Co, Cape Town, 1981) at 36.
- 94.. *Ibidem*, Section 65E(1)(b), read with Section 72.
- 95.. *Ibidem*, Section 65E(1)(c), read with Section 65J(1).
- 96.. *Ibidem*, Section 65E(1)(c). The judgment debtor's ability to pay the debt and costs in reasonable instalments is an important consideration in this regard. See Mullins AJ (as he then was) in **Standard Bank of SA Ltd v Clemans**, 1982 (4) SA 408 (SE) at 410-411.
- 97.. *Ibidem*, Section 65E(1)(c).
- 98.. *Ibidem*, Section 1.
- 99.. *Ibidem*, Section 74(1).
- 100.. *Ibidem*, Section 65I(1).
- 101.. *Ibidem*, Section 65I(2).
- 102.. *Op. cit.* 1393-1394.
- 103.. The victims of which, as Sachs J, *ibidem* at 1416; paragraph 66, pointed out, were the most vulnerable members of our society, the millions of unemployed persons, who could thus not be subjected to emoluments orders, and those who did not have any property which could be attached to satisfy their judgment debts.
- At 1417, paragraph 67, the learned judge further observed that the operational effect of that procedure could also "to a degree be discriminatory in that the rich who did not pay their debts would in practice be dealt with in the Supreme Court by bankruptcy procedures which respected due process, while the non-paying poor would continue to be faced with summary committal in the Magistrate's Court", a drastic power which, strangely enough, was not available in the Supreme Court.
- 104.. Per Langa J, *ibidem* at 1399, paragraph 35. In this regard, the Kriegler judgment has brought our law into line with international human rights instruments. See, for example, Article XXV of the **American Declaration of the Rights and Duties of Man**; Article 7(7) of the **American Convention on Human Rights**; and Article 11 of the **International Covenant on Civil and Political Rights**.
- 105.. *Ibidem*, at 1397, paragraph 30.
- 106.. Sachs J, *ibidem* at 1419, paragraph 72, in fact pointed out that the Court's judgment did not mean "that there could never be circumstances which could justify the use of the back-up of prison to ensure that court orders for payment of judgment debts were obeyed in the same way as other orders."
- 107.. **Criminal Law**, *op cit* 317. See also **S v Beyers**, 1968 (3) SA 70 (A) at 80-81.
- 108.. Burchell and Milton, **Principles of Criminal Law**, *op cit* 633, said "'Civil' contempt is ... committed by failing to obey an order of court (provided the definition of the crime is satisfied) and it does not matter that the court order which is disobeyed was made in a civil case."
- 109.. In **Coetzee, Matiso and Others**, *op cit* 1393, paragraph 17, the learned judge showed that he was conscious of the need to make a distinction between the two types of judgment debtors. The problem, as he saw it, was that in the particular instance, it would not be possible to sever from the relevant provisions of the **Magistrates' Courts Act** only those portions which failed "to distinguish between the two categories of debtors. In order to do so, this Court would have to engage in the details of lawmaking, a constitutional activity given to the legislature."

Of particular note in this regard was Langa J's remark, *ibidem* at 1397-1398, paragraph 32, namely that, while it was clear that it could never be constitutional to imprison a person who failed to pay a judgment debt because of a lack of means to do so, what the Kriegler judgment did not settle however, was whether, provided certain conditions were fulfilled, it would still be unconstitutional to commit judgment debtors who wilfully refused to settle their debts even though they had the means. The learned judge thought that it was not necessary to address that question *in casu*. See also Sachs J, *ibidem* at 1407, paragraph 52 and at 1419, paragraph 72..

110.. *Ibidem*, 1394, paragraph 20.

111.. In other words, as Sachs J, *ibidem* at 1407, paragraph 52, pointed out, even though imprisonment for debt, like torture and slavery, is internationally one of the prohibited practices in relation to which there is no derogation permissible, the concept or definition thereof can be qualified.

112.. As Sachs J, *ibidem* at 1408, paragraph 54, said, the conclusion he came to after scanning international human rights instruments in this regard, was that such "international instruments repudiate the core element of the institution of civil imprisonment, namely the locking up of people merely because they fail to pay contractual debts, but that *there is a penumbra relating to money payments in which imprisonment can be used in appropriately defined circumstances.*" (my emphasis)

113.. Section 107 of the **Magistrates' Courts Act**.

114.. *Ibidem*, Section 106A.

115.. *Ibidem*, Section 106B.

CHAPTER THIRTEEN

THE PROVINCES TAKE ON THE NATIONAL GOVERNMENT

INTRODUCTION

The (interim) **Constitution of the Republic of South Africa** established a decentralised form of government consisting of a national government and nine provinces¹ which replaced the erstwhile four provincial governments of the old Republic of South Africa² and its four nominally independent³ and six self-governing 'homelands'.⁴ Each of the nine provinces was given power to set up an elected provincial legislature⁵ and a provincial executive council⁶ led by the Premier of the province.⁷ Furthermore, the provinces were entitled to enact their own provincial constitutions⁸ and, subject to the **Constitution**,⁹ exercised legislative powers which were wider than those of the previous provincial councils.¹⁰ As Van Wyk pointed out, the provincial dispensation resembled "the most striking deviation from what used to be the South African Constitution."¹¹

This radical deviation from the previous constitutional order established an order where governmental power was distributed between a national authority¹² and the nine provincial authorities in such a way that each individual in a province would be subject to the laws of two seemingly 'coordinate' authorities,¹³ the national authority and the authority of his or her respective province. The national government, with authority to govern the entire national territory of the Republic and make laws in respect of all matters,¹⁴ was at a higher level, while the authority of each province was restricted to its own provincial territory.¹⁵ However, the relationship between the national government and the provinces was not succinctly defined in the **Constitution**.¹⁶ Moreover, the national government¹⁷ could, subject to the **Constitution**,¹⁸ intervene in the areas of competence assigned to the provinces.¹⁹

It is important to emphasise at this stage that, though under the new constitutional configuration an important and basic tenet of federalism, namely the distribution of legislative and executive powers between two independent and coordinate levels of government, was accepted by the framers of the **Constitution**, the boundaries, the legislative and executive powers of the provinces could, subject to the **Constitution**, be taken away or altered by Parliament.²⁰ This element distinguished our nascent constitutional system from the federal order of Canada, for example.²¹

In this new constitutional system, provision was also made for the power to amend the **Constitution**.²² However, unlike in the past, when we had a flexible constitution and where an ordinary statute passed by the State's central legislative body could amend the constitution, the power-distributing parts of the **Constitution** were specifically protected from change by the unilateral action of Parliament. This made it clear that the amending process included procedures requiring the support not only of Parliament, but, in certain respects, that of an affected province or provinces as well.²³ As will become clearer below, if such procedures were followed, any purported amendment of the **Constitution** would be constitutionally unassailable.

Once the distribution of power between the national government and the provinces was entrenched, it became necessary to establish appropriate mechanisms for settling the perennial disputes as to whether or not a particular legislative or executive body had the power to enact or administer a particular statute or exercise a particular power.²⁴ The framers of the **Constitution** made a conscious decision to give the full power of judicial review to non-elected judges to make decisions of great political significance.

If statutes or executive actions were adjudged to be outside the powers of the enacting or executive body, they were *ultra vires* and therefore invalid. Thus it became clear that our courts were destined to play a new and even more important role in the new dispensation with regard to questions about the extent of governmental power.²⁵

LOCUS STANDI AND THE LOWER LEVELS OF GOVERNMENT

Prior to the Appellate Division decision in **Government of the Republic of South Africa and Another v Government of KwaZulu and Another**,²⁶ it was argued that the lower levels of government, as part of the State, did not have *locus standi* to sue the centre or to have courts adjudicate disputes between themselves and the centre, or *vice versa*. The basis of this argument was that the plaintiff or applicant did not have an independent existence and capacity from that of the defendant or respondent and that it, therefore, had no *locus standi* to bring the challenge to court.

The argument was that the State could not sue itself, in other words.²⁷ Thus, though there were earlier instances²⁸ where disputes between organs of the State were adjudicated upon without the issue of standing being placed in question, in **Natal Provincial Administration v South African Railways and Harbours**,²⁹ for example, the then Natal Provincial Administration was prevented from bringing an action against the South African Railways and Harbours on the same basis.

The Appellate Division did not effectively change that position in the **Government of the Republic of South Africa and Another v Government of KwaZulu and Another** decision, however. The four provinces of the erstwhile Republic of South Africa were thus not granted *locus standi* by this case to sue other organs of the State. Rabie CJ³⁰ pointed out that he took into account that, though KwaZulu, as a self-governing territory, was not an entity that was completely severed from the State, Parliament had in certain respects permitted it to act independently of the State. Unlike the four provinces, it was not regarded as a mere instrument or representative of the State. The Chief Justice was at pains to point out that it was in view of the special status occupied by a self-governing territory in the previous race-based constitutional system that the Government of KwaZulu was entitled to institute legal proceedings against the Government of the Republic of South Africa.³¹

An important feature of the new constitutional order was the recognition of this right in the **Constitution**. In terms of Section 82(1)(d) of the **Constitution** the President of the

Republic had the power "to refer disputes of a constitutional nature ... between organs of state at any level of government to the Constitutional Court or other appropriate institution, commission or body for resolution". Furthermore, the Constitutional Court was granted the jurisdiction to adjudicate "any dispute of a constitutional nature between organs of state at any level of government",³² while the provincial and local divisions of the Supreme Court were accorded jurisdiction with regard to "any dispute of a constitutional nature between local governments or between a local government and a provincial government".³³

THE PROVINCES TAKE THE NATIONAL GOVERNMENT ON

In the very first year of its existence, the Constitutional Court was called upon to intervene in two matters, namely **Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others**,³⁴ and **Premier of KwaZulu-Natal and Others v President of the Republic of South Africa and Others**,³⁵ both of which essentially involved the distribution of competences and powers between the national government and provincial governments. The relevant provinces complained that the conduct of the national government in both matters had infringed their constitutionally guaranteed rights.

In respect of the first matter, a simultaneous challenge on non-constitutional grounds was brought in the Cape Provincial Division on an urgency basis.³⁶

EXECUTIVE COUNCIL OF THE WESTERN CAPE AND OTHERS

In this case, fundamental questions of constitutional law pertaining to the distribution of power between the national government and provinces were raised.

A Summary of the Facts of the Matter

The Origin of the Dispute

The President of the Republic, the first respondent in the matter, purporting to act under the provisions of Section 235(8) of the **Constitution**,³⁷ assigned the executive authority for the administration of the **Local Government Transition Act**³⁸ to provincial administrators to be designated by the Premiers of each of the nine provinces. The Premier of the Western Cape, the second applicant in the matter, designated for that purpose the Western Cape Member of the Executive Council responsible for Local Government,³⁹ the third applicant in the matter, whose duties, as administrator of the **Local Government Transition Act**, included demarcation and delimitation of the province in preparation for the local government elections then scheduled to be held on 1 November 1995 in the whole of the national territory.

In terms of the **Local Government Transition Act**,⁴⁰ the administrator thus designated was required to exercise the powers conferred upon him or her by the Act with the concurrence of a Provincial Committee for Local Government⁴¹ established for each province by the Transitional Executive Authority, failing which the dispute thus arising was to be referred to the Special Electoral Court.⁴² Members of the Provincial Committee would continue to hold office at the pleasure of the provincial executive councils which were entitled to fill vacancies.⁴³

The Executive Council of the Western Cape delegated the authority to fill vacancies and also to dismiss and replace members of the Provincial Committee for Local Government for the province to the administrator of the **Local Government Transition Act**. The administrator, purporting to use this delegated authority, filled a vacancy occasioned by a resignation and also dismissed and replaced a serving member of the Provincial Committee. This was done by way of appointing the fourth and fifth applicants to the Provincial Committee. It was apparent that the member thus dismissed was opposed to the demarcation proposal of the administrator and, had he remained on the Committee, he would have prevented the administrator from obtaining the necessary

two-thirds majority support of the Committee⁴⁴ for his demarcation proposal. Dismissing him made it possible for the administrator to avoid a dispute which would have had to be taken to the Special Electoral Court⁴⁵ for resolution.

The President of the Republic Responds

In the light of, and in effect in response to, the political antics of the administrator,⁴⁶ the President of the Republic, purporting to use the powers conferred upon him by Section 16A of the **Local Government Transition Act**, effected certain amendments to the Act by Proclamation R58⁴⁷ and Proclamation R59.⁴⁸ These two Proclamations, as will appear more fully below, constituted part of the gist of the dispute in this matter.

Proclamation R58 amended Section 3(5) of the Act by transferring the power to appoint and dismiss Committee members⁴⁹ from the provincial Executive Councils to the national government.⁵⁰ In terms of Proclamation R58 the appointments of members of Committees made after 30 April 1995 were terminated,⁵¹ thus effectively nullifying the appointment of the fourth and fifth applicants in the matter.

Proclamation R59 amended Section 10 of the Act. This amendment made the exercise of the administrator's powers relating, *inter alia*, to the demarcation of local government structures and the division of such structures into wards subject to the provisions of a new subsection, namely Section 10(4).⁵² Moreover, Section 2 of Proclamation R59 made the amendment explicitly retroactive,⁵³ thus nullifying the administrator's demarcation proposal that had been handled in the manner stated above.

The combined effect of the two proclamations was to nullify the appointment by the administrator of the Act of the fourth and fifth applicants retrospectively and also to nullify the administrator's controversial demarcation proposal which the reformed Committee had approved. Lastly, the second respondent, the President of the Republic, acting *in consultation with* the third respondent⁵⁴ and *after consultation with* the second applicant,⁵⁵ appointed the fourth and fifth respondents to replace the member of the Committee who had resigned as well as the member thereof who had been dismissed by the administrator of the Act.

The Order Sought by the Applicants

The constitutionality of Section 16A, the two presidential Proclamations, as well as of all action taken thereunder was impugned in the matter. The applicants, having been granted direct access to the Constitutional Court,⁵⁶ sought an order: (1) declaring unconstitutional the amendments to the **Local Government Transition Act** effected by Proclamations R58 and R59; (2) setting aside the Proclamations themselves; (3) setting aside the appointment of the fourth and fifth respondents as members of the Provincial Committee for Local Government for the Western Cape Province; (4) reinstating the fourth and fifth applicants as members of the said Committee; (5) declaring unconstitutional Section 16A of the **Local Government Transition Act**; and (6) costs. The Constitutional Court was, in other words, called upon to adjudicate upon the constitutionality of these laws⁵⁷ and resolve a dispute of a constitutional nature between the central authority and a provincial authority.⁵⁸

The *gravamen* of the complaint of the applicants was that the national government, by means of the impugned Section 16A of the Act and the two controversial proclamations made thereunder, had exercised its powers so as to encroach upon the geographical, functional and institutional integrity of the Western Cape in violation of the **Constitution**. For the purposes of this chapter, an attempt will be made to summarise each of the questions which the Constitutional Court had to grapple with in this regard and how each such question was resolved.⁵⁹

The Issues Raised by the Applicants

1) The Constitutional Principles

The first contention of the applicants was that the impugned Proclamations violated Constitutional Principle XXII which provided that "the National Government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the provinces."⁶⁰ It was argued that the Proclamations constituted a frontal assault by the national government on the *autonomy*

and functional and institutional integrity of the Western Cape. In support of this contention, much reliance was placed upon Section 232(4) of the **Constitution**.⁶¹

Chaskalson P, after a careful analysis of the place and status of the Constitutional Principles in the transitional constitutional configuration, concluded that the argument of the applicants had misconceived their place in the whole scheme. The Court had no doubt that the Constitutional Principles were intended to be of substantive application in the drafting and adoption of a new constitutional text and that, by virtue of the provisions of Section 160(3) of the **Constitution**, they were applicable to any provincial constitution that might be adopted.⁶² The learned President of the Constitutional Court further held that the statement in Section 232(4) of the **Constitution** that the principles, as part of Schedule 4, were to all intents and purposes deemed to be part of the substance of the **Constitution**, related to their status and not to their functions or operation.⁶³

2) Section 61 of the Constitution

The applicants had also argued that the amendments to the Act purportedly made under Proclamation R58 constituted legislation, and that they, as such, violated the "manner and form" requirements of Section 61 of the **Constitution**,⁶⁴ and were, therefore, invalid and of no force or effect. Chaskalson P held that Section 61 applied "only to parliamentary enactments and not to legislative action such as the making of proclamations or regulations in terms of such enactments. Any other construction would not only do violence to the language of the section, but would place a severe impediment in the way of effective government."⁶⁵

3) Section 62(2) of the Constitution

In this regard, the argument was that as Proclamations R58 and R59 amended the powers and executive competences of the provinces within the meaning of Sections 126 and 144 of the **Constitution**, the provisions of Section 62(2) of the **Constitution**⁶⁶ were applicable. Pointing out that the two proclamations, if valid, amended only the Act, and not the **Constitution**,⁶⁷ Chaskalson P rejected that argument as having no

substance as Section 62 dealt with amendments to the **Constitution** and not with amendments to national legislation such as the **Local Government Transition Act**.⁶⁸ The fact that the Act was referred to in Section 245 of the **Constitution** did not make it part of the **Constitution** which would require to be amended in accordance with Section 62, Chaskalson P said.⁶⁹

To the further argument that the two proclamations were inconsistent with the proviso to Section 62(2),⁷⁰ Chaskalson P responded by stating that the whole of Section 62(2) dealt with constitutional amendments, and that, therefore, the proviso thereto ought to be read as qualifying the substantive part of the clause⁷¹ and not as an independent constitutional requirement applicable to any legislation dealing with provincial powers and functions.⁷² He further stated that the powers and functions of provinces could be changed by national legislation without having any regard to the provisions of Section 62 as such changes did not involve constitutional amendments.⁷³

After that, the Court had to grapple with the controversial provisions of Section 16A of the Act.

4) Section 16A of the **Local Government Transition Act**

The issue of the validity of the provisions of Section 16A of the Act⁷⁴ was extremely important for the resolution of the gist of the dispute in this matter. The basic question to be answered in this regard was *whether or not it was competent for Parliament to vest in the President of the Republic the power to amend the Act by proclamation*. The answer to this question, according to Chaskalson P, depended on *whether or not Parliament could, under the **Constitution**, delegate its law-making powers to the executive or other functionaries*, and if so, under what circumstances, or whether such powers must always be exercised by Parliament itself in accordance with the provisions of Sections 59, 60 and 61 of the **Constitution**.⁷⁵

The most basic observation Chaskalson P made was that there was a fundamental distinction between how this question was handled in countries the *grundnorm* of which was parliamentary sovereignty,⁷⁶ and how it was handled in countries the constitutional

systems of which were based on constitutionalism. In the case of the Republic, he pointed out, a break with the past system based on parliamentary supremacy had been made;⁷⁷ the powers of Parliament were clearly defined in Section 37 of the **Constitution**, in terms of which Parliament itself was made subject to the **Constitution** in all respects and could, thus, no longer claim supreme power going beyond the powers vested in it thereunder expressly or by necessary implication.⁷⁸

Secondly, Chaskalson P pointed out that where Parliament was established under (and made subject to) a written constitution, the nature and extent of its power to delegate legislative powers to the executive depended ultimately on the language of the constitution.⁷⁹ In this regard, he observed that, while Parliament may, and should, by necessary implication, have the power under such a constitution to delegate *subordinate legislative powers* to the executive, to delegate to the executive the power to amend or repeal Acts of Parliament was quite different.⁸⁰

After a careful scrutiny of our interim **Constitution**, Chaskalson P concluded that under it Parliament did not have, expressly or by necessary implication, the power to delegate to the executive the authority to amend or repeal Acts of Parliament.⁸¹ To hold that such power existed by necessary implication could be subversive of the "manner and form" requirements prescribed in Sections 59, 60 and 61 of the **Constitution**, the provisions of which were not merely directory.⁸² The only way in which Parliament could arrogate to itself the power to delegate legislative authority to the executive contrary to the **Constitution** was to amend the **Constitution**, which it had not done.⁸³

Though the **Local Government Transition Act** was itself a transient Act of Parliament, Chaskalson P remarked that the authorisation of legislation such as Section 16A allowed control over legislation to pass from Parliament to the executive.⁸⁴ He further warned ominously that: "Later this power could be used to introduce contentious provisions into what was previously uncontentious legislation."⁸⁵

The members of the Constitutional Court unanimously concluded that the provisions of Section 16A of the Act were inconsistent with the **Constitution** and, therefore, invalid.⁸⁶ For the Court, it was extremely important at that early stage of the development of the

post-apartheid constitutional order to establish and nurture the supremacy of the **Constitution**. If what had been done was inconsistent with the **Constitution**, it did not matter that the President and Parliament had acted in good faith, or that there was no objection to the action taken when it was carried out.⁸⁷

5) Section 235(8) of the **Constitution**

The respondents had contended that if the provisions of Section 16A of the Act were indeed adjudged to be inconsistent with the **Constitution**,⁸⁸ the proclamations were nonetheless made within the scope of the President's legislative powers under Section 235(8)(b)(i) of the **Constitution**, which allowed him to "amend and adapt" laws assigned under that section. Chaskalson P scrutinised the overall purpose and scheme of the provisions of Section 235 and concluded that the power to amend or adapt laws thus assigned was given to the President to facilitate the transition from the old constitutional dispensation to the new order. The President was to exercise such discretionary power only to the extent that he or she considered it necessary to amend or adapt a law assigned under Section 235(8) "for the efficient carrying out of the assignment".⁸⁹ This power, as the learned President of the Constitutional Court further elaborated, was to enable the President of the Republic to amend or adapt laws assigned to make them fit the new situation and "to achieve functional efficiency in the administration of the assigned laws."⁹⁰ The provisions of Section 235(8)(b)(i) did not give the President any greater powers than those that were necessary for the achievement of that purpose.⁹¹

The President of the Republic was, therefore, not at liberty to amend or repeal laws merely "because he did not like them, or because he felt that they would be more likely with substantive amendments to achieve what *he* considered to be the objects of the legislation."⁹² The amendments to the Act the President had effected by means of the two proclamations were motivated by a desire on his part to respond to the political antics and manoeuvres of the provincial government of the Western Cape which had helped them avoid referring disputed issues of demarcation to the Special Electoral Court. They were therefore not necessary to make the Act fit the new constitutional order as contemplated in Section 235(8) of the **Constitution**. Noting that the President

had in fact not purported to act under Section 235(8) of the **Constitution** but under Section 16A of the Act, the Court pointed out that if the provisions of Section 16A were invalid, the Section 235(8) powers were not sufficient to provide a source of power which the first respondent, the President of the Republic, could rely on.⁹³

The Court, by a majority of 9 to 2, came to the conclusion, albeit for different reasons, that the two proclamations that were purportedly promulgated under Section 16A of the Act which was declared invalid could not be validated under Section 235 of the **Constitution**.⁹⁴

A VICTORY FOR THE SEPARATION OF GOVERNMENTAL POWERS?

The supremacy of the **Constitution** was asserted in the most vigorous and unprecedented way in this case. Parliament and the executive were told in no uncertain terms that their powers were as prescribed in, and were to be exercised under and subject to, the **Constitution**. The clear message was that that which the **Constitution** did not sanction either expressly or by necessary implication could not be constitutionally valid. The Court gave us a foretaste of what we should expect by way of constitution-making in keeping with the provisions of Constitutional Principle VI.⁹⁵

For the Court, the doctrine of separation of powers, a basic element of constitutionalism, is a fundamental premiss of our new constitutional order. Parliament as the national legislature would be acting in violation of this doctrine if it abdicated or ceded its power to make, amend or repeal its own legislation to the executive. This was the gist of the Court's ruling in this matter.

The provincial government of the Western Cape was victorious; the Constitutional Court had declared the provisions of Section 16A of the Act, and, needless to say, all action taken thereunder and pursuant thereto, including all the proclamations made thereunder, invalid. It was even awarded the overall costs of the action.⁹⁶ Feeling buoyant about this, Senator A van Breda of the National Party declared: "The Western Cape executive won their case in the Constitutional Court. This infamous section 16A of the Local Government Transition Act, in terms of which the even more infamous

Proclamations R58 and R59 were issued, was ruled unconstitutional by the Constitutional Court, also affecting all other proclamations."⁹⁷

However, this was a pyrrhic victory for the Western Cape provincial government. Having thus declared the provisions of Section 16A of the **Local Government Transition Act** to be invalid due to their inconsistency with the **Constitution**, and having ruled that Proclamations R58 and R59 of 1995 purportedly made thereunder could not be salvaged by Section 235 of the **Constitution**, the Court then had to grapple with the serious implications of the declaration of invalidity it had quite correctly made.⁹⁸ The Court, mindful of its responsibility to give meaning to the **Constitution**, wherever possible, in ways which were consistent with its underlying purposes and yet not detrimental to effective government,⁹⁹ had to find a way of ensuring that the declaration that Section 16A was invalid would not jeopardise the holding of the local government elections then scheduled to take place on 1 November 1995 in the whole national territory.

Sections 98(5) and 98(6) of the Constitution

The Court, noting that the **Constitution** itself allowed it to control the consequences of a declaration of invalidity if it should be necessary to do so,¹⁰⁰ then proceeded to look into how it could help avert an otherwise impending constitutional crisis. The provisions of Sections 98(5) and 98(6) of the **Constitution**, which enabled the Court to regulate the impact of a declaration of invalidity and avoid such consequences, were resorted to for this purpose.

The Court used its power under the proviso to Section 98(5) of the **Constitution** to give Parliament, the only institution which could validate the amendments to the **Local Government Transition Act** made in terms of the proclamations issued under Section 16A of the Act, the opportunity, if it so wished,¹⁰¹ to rectify the situation. Parliament was required to correct the defect in Section 16A by not later than 25 October 1995.¹⁰² In the meantime, Section 16A and the proclamations made under it would remain in force pending the correction of the defect or the expiry of the period specified in the Court order.¹⁰³

Though this is not clear from the Court order, the provisions of Section 98(6)(b) of the **Constitution** were used to prevent the retrospective invalidation of all action taken subsequent to 27 April 1994 pursuant to Section 16A of the Act, which would otherwise have ensued after that section was declared invalid.¹⁰⁴

PARLIAMENT RESPONDS

As a result of this decision, Parliament, which had already adjourned for the year, was recalled to address the crisis.¹⁰⁵ The national government placed before the two Houses of Parliament the **Local Government Transition Act Second Amendment Bill**,¹⁰⁶ which was passed within two days, after a not unexpected acrimonious and yet entertaining debate.

The judgment led to a constructive interaction between the judiciary and the national legislature at an early stage in the development of our democracy. The Court interpreted the **Constitution** and its underlying principles fearlessly and without bias, and the legislature deferred to the judgment and responded within its constitutional powers.

In its original form, the Bill had merely sought to repeal the controversial Section 16A of the principal Act and enact the proclamations the Constitutional Court had invalidated. During committee deliberations numerous other issues were raised and debated before the Bill came before Parliament for enactment. The Bill was changed in a few areas prior to this, as Parliament had a choice in the matter.¹⁰⁷

In particular, the controversial Proclamations R58 and R59 were excluded from the final Bill because, according to Deputy Minister Moosa, "having served their purpose, having held the transition together" against the wishes of the Western Cape government, they were no longer required.¹⁰⁸ Proclamation R129,¹⁰⁹ in terms of which the administration of the **Local Government Transition Act** was assigned to the provinces, was repealed.¹¹⁰ Moreover, the provisions of Section 4 of the principal Act were also

amended so that any three members of a provincial committee could refer disputes to the Special Electoral Court even if the provincial government would not cooperate.¹¹¹

PREMIER OF KWAZULU-NATAL AND OTHERS

In this matter, the applicants,¹¹² representing the Executive Council in KwaZulu-Natal, sought to impugn the validity of some of the provisions of the **Constitution of the Republic of South Africa Second Amendment Act**,¹¹³ which amended various sections of the **Constitution**, including Sections 149(10), 182, 184(5) and 245. The applicants, as will become clearer below, objected to the amendments for various reasons. The gist of their objection, however, was that the national government was unconstitutionally encroaching upon the legislative competences of the provinces.

As Mahomed DP did in his judgment, it would be better to deal *seriatim* with each of the impugned sections in order to understand both the bases on which they were attacked and the ruling of the Constitutional Court in respect of each such section.

1) Section 149(10) of the Constitution

Pursuant to Section 149(10) of the **Constitution**,¹¹⁴ the KwaZulu-Natal provincial legislature had enacted the **KwaZulu-Natal Legislature Remuneration Act**,¹¹⁵ which provided, *inter alia*, for the payment of the salaries and allowances of the Premier and members of the executive council of their province. The 1995 constitutional amendment of Section 149(10) effectively removed the power to determine the remuneration and allowances of the Premiers and members of executive councils of provinces from provincial legislatures and placed that in the hands of the President of the Republic, the first respondent in the matter.

As will appear more fully below, the applicants launched a two-pronged attack on the amendment to Section 149(10).

Constitutional Principles

The applicants impugned the amendment on the basis, *inter alia*, that it violated Constitutional Principle XVIII(2) contained in the fourth Schedule to the **Constitution**. In terms of that Constitutional Principle, the powers and functions of the nine provinces, including the competence to adopt their own provincial constitutions, were not to be substantially less than or inferior to those provided for in the **Constitution**.

Reaffirming the position the Constitutional Court took in the **Executive Council of the Western Cape Legislature and Others** case,¹¹⁶ Mahomed DP¹¹⁷ pointed out that the applicants' reliance on the relevant Constitutional Principle appeared to him to have been misconceived. The Constitutional Principle dealt with a future constitutional text which in its entirety ought to conform to the 34 Constitutional Principles contained in Schedule 4 to the **Constitution**. It did not deal with amendments to the (interim) **Constitution**. For this reason, the learned Deputy President of the Court concluded that the impugned amendment to Section 149(10) could not successfully be attacked simply on the ground that it offended Constitutional Principle XVIII(2).¹¹⁸

Section 62(2) of the **Constitution**

The issue of the applicability of Section 62(2) of the **Constitution** arose in this instance as well, albeit from a different angle. The applicants contended that, as the amendment to Section 149(10) had the effect of taking away the competence of the KwaZulu-Natal province to pay to its Premier and to its members of the Executive Council such remuneration and allowances as were prescribed and determined under a law made by its provincial legislature,¹¹⁹ the special procedures prescribed in Section 62(2) had to be followed. In particular, the applicants contended that the amendment was flawed because it took away such competence without the consent of their provincial legislature which was required under the proviso to Section 62(2).

The crucial question the Court had to decide was whether, as the amendment to Section 149(10) did not affect the provisions of Sections 126 and 144 of the **Constitution**,¹²⁰ the proviso to Section 62(2)¹²¹ was an independent and substantive provision which constituted an impediment to the legislative powers of Parliament.

Linked to this was the question relating to the content of the proviso to Section 62(2) and the meaning to be attached thereto.

In **S v Mhlungu and Others**¹²² Mahomed J (as he then was) spelt out the general principle, namely that "a proviso qualifies the substantive part". However, in **Premier of KwaZulu-Natal and Others**, Mahomed DP, after carefully scrutinising various authorities on this question, correctly conceded that this general rule was not invariable, and pointed out that "the context and object of a proviso in a particular statute might justify giving to a particular proviso the meaning of an independent and substantive content."¹²³

In **Executive Council of the Western Cape Legislature and Others**,¹²⁴ the Court specifically held that Section 62(2) dealt with constitutional amendments and that the proviso thereto ought to "be read as qualifying the substantive part of the clause and not as an independent constitutional requirement applicable to any legislation dealing with provincial powers and functions."¹²⁵ Of particular importance in this regard was the Court's ruling that legislative changes not entailing constitutional amendments could be effected by Parliament without complying with the provisions of Section 62 of the **Constitution**.¹²⁶

Whether or not the proviso to Section 62(2) was to be read as a qualification to the substantive part, for Mahomed DP (as he then was) the content thereof was very important. Having analysed the language of the proviso, the learned Deputy President of the Court held that what was contemplated by the proviso was *legislation*¹²⁷ (whether or not diminishing or increasing or qualifying the relevant competencies of the provinces) which was targeted at one or more provinces but not one which was of equal application to all the nine provinces. Accordingly a law applicable to all provinces would fall outside the purview of the proviso.¹²⁸ The Court concluded that, because the amendment to Section 149(10) did not, and did not purport to, target any particular province or provinces, but was applicable to all nine provinces instead, the *consent* of the KwaZulu-Natal provincial legislature or of any other provincial legislature, was not required.¹²⁹

2) Section 182 of the Constitution

Prior to the 1995 constitutional amendment, Section 182 of the **Constitution** provided that traditional leaders of communities observing systems of indigenous law and residing on land within the area of jurisdiction of elected local governments were *ex officio* entitled to be members of their respective local governments, and were as such, eligible to be elected to any office of such local governments. The amendment provided for the identification of eligible traditional leaders in a manner and according to guidelines prescribed by the President of the Republic by proclamation in the **Gazette after consultation with**¹³⁰ the Council of Traditional Leaders,¹³¹ if then in existence, or if not, with the Houses of Traditional Leaders¹³² then established.

In this regard, as will appear more fully below, the amendment was impugned on three grounds.

Violation of Section 126 and Schedule 6 of the **Constitution**

The applicants tentatively challenged the validity of the amendment on the grounds that it offended the division of powers identified in Section 126 as read with Schedule 6 of the **Constitution** in relation to the functional areas of local government and traditional leaders. As Mahomed DP pointed out,¹³³ the underlying assumption of this submission, which was wisely not pressed in argument, was that Section 126 as read with Schedule 6 gave to provinces *exclusive* legislative competence to deal with matters which fell within the functional areas specified in Schedule 6. Though the relevant provisions gave to provincial legislatures the jurisdiction to make laws dealing, *inter alia*, with indigenous law and traditional leaders, the powers were *concurrent*: Subject to Section 126(3) and (4) of the **Constitution**, Parliament also had that jurisdiction.¹³⁴

"Interference" with an Act of a Provincial Legislature

The applicants further contended that the amendment to Section 182 "interfered" with the assignment¹³⁵ of the administration of the **KwaZulu Amakhosi and Iziphakanyiswa Act**¹³⁶ by the President of the Republic, the first respondent, to a competent authority designated by the first applicant, the Premier of the province. Responding to this

argument, Mahomed DP (as he then was) said that, as the amendment dealt with how traditional leaders who were to be *ex officio* members of local governments were to be identified, it did not constitute any "interference" with the legislative or executive competence of the provincial government of KwaZulu-Natal in terms of Section 126 or 144.¹³⁷ Significantly, the Court also held that the mere fact that the administration of a particular Act had previously been assigned by the President of the Republic did not preclude Parliament from making a law dealing with the manner in which such traditional leaders were to be identified.¹³⁸

As it was not an amendment affecting any of these two sections, the Court held that the amendment to Section 182 did not require compliance with Section 62(2) of the **Constitution** at all.¹³⁹

Violation of the Proviso to Section 62(2) of the Constitution

The applicants, as a last resort, contended that the amendment violated the proviso to Section 62(2) of the **Constitution** which operated even in those cases where the provisions of Sections 126 and 144 were not sought to be amended. Mahomed DP¹⁴⁰ said that that argument did not help the applicants because, as he had pointed out before, the proviso to Section 62(2) was not of any application where a particular province or provinces were not targeted. The amendment to Section 182 of the **Constitution** could thus not be attacked on this basis as it was applicable to all the provinces and not to a particular province or provinces.¹⁴¹

3) Section 184(5) of the Constitution

Prior to its amendment, Section 184(5) of the **Constitution** laid down procedural requirements for the passing of any parliamentary Bill affecting or pertaining to traditional authorities or matters having a bearing thereon. Before that "manner and form" procedure was complied with, such a Bill could not be passed by Parliament. This was unfortunately because the relevant structure, namely the Council of Traditional Leaders,¹⁴² to which such Bills were to be referred by the Secretary to Parliament for its comments,¹⁴³ was not established timeously. The amendment to Section 184(5)

provided *an alternative procedure* for the consideration of legislation relating to traditional authorities by obviating the need to refer such legislation to the Council while such Council was not yet in existence.¹⁴⁴

The basic complaint of the applicants in this regard was that the Bill seeking to amend Section 184(5) did not comply with the requirements contained in the section. Mahomed DP¹⁴⁵ correctly pointed out that there was a distinction between a Parliamentary Bill relating to Traditional Authorities, indigenous law, or the traditions and customs of traditional authorities, which would constitute ordinary legislation and not a constitutional amendment, and a Bill seeking to amend Section 184(5) itself. While the procedure prescribed in the section affected the former, the latter required only compliance with Section 62(1) of the **Constitution**.¹⁴⁶ Nothing prevented Parliament from amending or repealing Section 184(5), which was not a self-entrenching provision, so long as the "manner and form" requirements prescribed in Section 62(1) were complied with.¹⁴⁷

Regarding the applicants' argument that the amendment provided for the unconstitutional retrospective recognition of a Bill, Mahomed DP said that there was nothing in the **Constitution** which precluded such an amendment.¹⁴⁸ He further said that he knew of no principle on the basis of which Parliament's power of constitutional amendment could be curtailed because of a Bill's retrospective application.¹⁴⁹

Lastly, the applicants suggested that the intention of the amendment was to validate the Remuneration of Traditional Leaders Bill which Parliament had already passed and which was awaiting assent by the President of the Republic. Mahomed DP said that even if that suggestion was correct, it was irrelevant to, and had no bearing on the amendment to Section 184(5).¹⁵⁰

4) Sections 245(1) and (2) of the Constitution

Prior to the amendment to Section 245 of the **Constitution**, Section 245(1) made provision for local government to be restructured otherwise than in accordance with the **Local Government Transition Act**, 1993 once the first democratic local government elections had been held under the said Act.¹⁵¹ Such restructuring could be done in terms

of legislation enacted by "a competent authority" (which could include a provincial legislature), subsequent to the elections. The amendment made it incompetent for any such "competent authority" to embark upon any restructuring of local government prior to 31 March 1996.

The applicants challenged the amendment to Section 245 on the basis that it extended national legislation within the field of competence of the provincial legislatures. In particular it was argued that the effect of the amendment was to "interfere with a power which the KwaZulu-Natal legislature had in terms of section 126, read with Schedule 6".

The first democratic local government elections could not be held on the same day throughout the country as envisaged in Section 179(1) of the **Constitution**; in KwaZulu-Natal and in parts of the Western Cape this could not be done on 1 November 1995. Mahomed DP (as he then was)¹⁵² held that he thought it was necessary in the circumstances to enact national legislation to obviate the consequences of the proviso to Section 179(1); such legislation could be enacted in keeping with Section 126(3)(b) of the **Constitution**.¹⁵³

Mahomed DP (as he then was) further pointed out that Section 245 was not immune from amendment.¹⁵⁴ Nor would the amendments thereto be subject to the provisions of Section 62(2) of the **Constitution**, as they would not be affecting Sections 126 and 144.¹⁵⁵ All that was required for the amendment to Section 245 to be valid was that it should comply with the procedure for amendment prescribed in the **Constitution**. If that was done properly, the amendment would be constitutionally unassailable.¹⁵⁶

Though the applicants had successfully acquired direct access to the Constitutional Court, the Court dismissed the matter for the aforementioned reasons.¹⁵⁷ The relevant constitutional amendments were thus saved.

CONCLUSION

The **Executive Council of the Western Cape Legislature**¹⁵⁸ case will undoubtedly go down in the annals of our legal history as the case that contained the Constitutional

Court's first major statement on crucial issues that did not concern Chapter 3 of the (interim) **Constitution**, such as the application of the doctrine of separation of powers, the constitutional nature of our new order, the constitutional limits on delegation of parliamentary legislative power, the extent of the authority of the President as Head of State and Government and the propriety of suspending a declaration of invalidity. In that case, Chaskalson P quite correctly noted that *there is a distinction between Parliament appropriately delegating authority to make subordinate legislation and assigning plenary legislative power to another body*, such as had happened *in casu*. The Learned President of the Court further pointed out that the unrestricted power to amend the **Local Government Transition Act** could not be justified on the grounds of necessity nor on the basis of a power granted to the President of the Republic by necessary implication.

The Court ruled that Section 16A of the **Local Government Transition Act** and any executive action taken thereunder, were unconstitutional. The delegation from Parliament to the President of the Republic of the power to amend the Act was struck down for lacking any limitation, with Mahomed DP even saying that the section's provisions went rather too far and effectively constituted "an abdication of Parliament's legislative function".¹⁵⁹ As stated above, this was a victory, not for the government of the Western Cape province controlled by a minority party, but, as Jonathan Klaaren put it, for "constitutional democracy that vanquished parliamentary sovereignty."¹⁶⁰

The debates among the judges themselves, such as had happened in cases such as **Mhlungu** and **De Klerk**, were striking. This tendency not to agree simply in order to preserve the unity of the Court augurs well for our fledgling democracy. The judgment gave us the first tentative foundations for a South African constitutional theory proper.

The **Premier of KwaZulu-Natal**¹⁶¹ case, another example of a case that did not relate to the provisions of Chapter 3 of the (interim) **Constitution**, was interesting because it essentially sought to deal with what allegedly smacked of an abuse of the power to amend a constitution which was reminiscent of what had happened before in the history of our country.¹⁶² In this regard, the reasoning of Mahomed DP, namely that for the proviso to Section 62(2) of the (interim) **Constitution** to be relevant and applicable, the

relevant legislation ought to have been targeted at one or more provinces but not be of equal application to all provinces¹⁶³ is cause for concern. For what could prevent a crafty coterie of national legislators seeking to alter radically the legislative competency of a particular province without referring the amending Bill to the legislature of that province from enacting legislation which is ostensibly applicable to all provinces whilst it in effect is targeted at that one province?

THE NEW CONSTITUTION

The Constitutional Assembly responded to these cases by enacting the provisions of Chapter 3 of the (new) **Constitution**, which seek to promote cooperative government. To achieve this objective, numerous basic principles are outlined in Section 41. The distinctive national, provincial and local spheres of government which, in terms of Section 40(1) of the **Constitution**, together constitute government in the Republic, are each, *inter alia*, required to "respect the constitutional status, institutions, powers and functions of government in the other spheres", "exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere", foster friendly relations, assist and support one another, and refrain from assuming "any power or function except those conferred on them in terms of the Constitution".

It is hoped that these principles will at least help patch political differences and obviate litigation in circumstances similar to the ones depicted in the two cases discussed in this chapter. Thus, it is now a constitutional requirement that

an organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.¹⁶⁴

Courts have been given a discretion to refer matters back to the relevant organs if they are not satisfied that reasonable efforts have been made to settle them and that all other remedies have been exhausted.¹⁶⁵

ENDNOTES - CHAPTER THIRTEEN

- 1.. See Section 124(1) of the **Constitution**. See also Part 1 of Schedule 1 to the **Constitution** for the definitions of these provinces.
- 2.. Which were non-elected bodies appointed by the central government. In the white-dominated former Republic of South Africa which constituted approximately 87% of the national territory executive authority relating to *general affairs* was vested in the State President under Section 19(1)(b) of the **Constitution of the Republic of South Africa Act**, 110 of 1983. It was exercised by the State President himself, and by Ministers, Deputy Ministers, Provincial Administrators and non-elective members of the Executive Councils of the four provinces, all of whom were functionaries of the central government who held their positions at the discretion and pleasure of the State President. For a discussion of provincial government in the new constitutional order, see Mathew Chaskalson and Jonathan Klaaren 'Provincial Government' in Mathew Chaskalson et al **Constitutional Law of South Africa** (1996) at 4-1 to 4-12.
- 3.. That is Transkei, Bophuthatswana, Venda and the Ciskei which in the erstwhile South African constitutional system were sovereign independent states.
- 4.. KwaZulu, Lebowa, Gazankulu, Qwaqwa, KaNgwane and KwaNdebele, which were established and maintained under the now-repealed **Self-governing Territories Act**, No. 21 of 1971, and which had their own flags, anthems and extensive legislative and executive competences, though they remained part of the (old) Republic of South Africa.
- 5.. Section 125(1), read with Section 127(1) of the **Constitution**.
- 6.. Section 149(1) of the **Constitution**.
- 7.. Section 144(1) read with Section 145(1) of the **Constitution**.
- 8.. Under and subject to Section 160 of the **Constitution**.
- 9.. Notably Section 126 read with Schedule 6. It is noteworthy that, though the provinces had overriding powers in respect of the functional areas referred to in Schedule 6, Section 126 provided only for concurrent powers and gave no exclusive powers to them.
- 10.. See Dawid van Wyk, "Introduction to the South African Constitution", in Dawid van Wyk, John Dugard, Bertus de Villiers and Dennis Davis (eds) **Rights and Constitutionalism: The New South African Legal Order** (Juta & Co Ltd, Cape Town, 1994), 131 at 165.
- 11.. *Ibidem*.
- 12.. In which, in terms of Section 37 of the **Constitution**, resided the legislative authority and the power to make laws for the Republic as a whole and in respect of all matters. This section established the national authority as the higher level of government than the provincial level, the power of which was confined to the territory of each of the nine provinces and to matters referred to in Schedule 6 to the **Constitution**. The importance of this section will appear more fully below.
- 13.. That is to say, neither of which was subordinate to the other.
- 14.. By virtue of Section 37 of the **Constitution**.
- 15.. Section 125(2) and (3) of the **Constitution**.
- 16.. Though it could be gleaned from various provisions of the **Constitution** that to some extent, at least, the national and the provincial levels were legally and politically independent of each other. For example, whereas in the past legislation made by a self-governing territory required the assent of the State President, and whereas proclamations made by the Administrator of the province required the approval

of a standing committee of Parliament before they came into force, provincial Bills in the new dispensation only had to be assented to, signed and promulgated by the Premier of the province before they became provincial legislation. See Section 147(1)(a) of the **Constitution**. Furthermore, the national government was not assigned any role in the making of provincial constitutions under Section 160 of the **Constitution**.

17.. The laws of which, in terms of Section 126(4) of the **Constitution** prevailed over provincial legislation if they met the criteria specified in Section 126(3)(a)-(e) and if they were applicable uniformly in all parts of the Republic.

18.. Sections 126(2A), 126(3) and 126(4).

19.. For which see Schedule 6 to the **Constitution**.

20.. See Section 126(3) and (4).

21.. See Peter W Hogg, **Constitutional Law of Canada** (2nd ed, The Carswell Co Ltd, Toronto, 1985), at 80.

22.. Section 62.

23.. Section 62(2) of the **Constitution**, the proviso to which is discussed below.

24.. This question is discussed below.

25.. Note that, according to Hogg **Constitutional Law of Canada**, *supra* at 94, "Neither the Constitution of the United States nor the Constitution of Canada expressly provides a machinery for settling disputes about the distribution of legislative power, and there is controversy as to what the framers of the each constitution intended."

26.. 1983 (1) SA 164 (A).

27.. Rabie CJ, *ibidem* at 205-6, in fact said that he accepted the "general principle of our law" that one organ of the State could not sue another organ of the State, but acknowledged that there was sufficient separation in identity between the Government of the Republic and the Government of KwaZulu to enable the latter to seek redress against the former in the circumstances of their dispute.

28.. For example, **Union Government v Transvaal Provincial Administration**, 1918 TPD 169; and **Germiston Town Council v Union Government**, 1931 TPD 396.

29.. 1936 NPD 643.

30.. At 206.

31.. *Ibidem*, at 206-207.

32.. In terms of Section 98(2)(e) of the **Constitution**.

33.. *Vide* Section 101(3)(d) of the **Constitution**. If the parties to a dispute agreed, Section 101(6) could be utilised to extend the jurisdiction of a provincial or local division of the Supreme Court to the areas otherwise covered exclusively by the Constitutional Court.

34.. 1995 (10) BCLR 1289 (CC).

35.. 1995 (12) BCLR 1561 (CC).

36.. See **Uitvoerende Raad van die Weskaapse Wetgewer en Andere v President van die Republiek van Suid-Afrika en Andere**, 1995 (9) BCLR 1251 (C).

37.. Which empowered the President of the Republic to assign the administration of certain categories of laws to competent provincial authorities designated by each of the nine provincial Premiers. The said provisions further empowered the President, when thus assigning the administration of a law, or at any time thereafter, to amend or adapt such law, to the extent that he or she considered it necessary for the efficient carrying out of the assignment, in order to regulate its application or interpretation.

38.. Act No. 209 of 1993 (hereinafter also referred to as the Act), which, as a transitional law resulting from the World Trade Centre, Kempton Park negotiations, was assented to on 20 January 1994, approximately three months before the **Constitution** came into effect.

39.. A member of the National Party, the majority party in the legislature and in the Executive Council of the province.

40.. Section 4(1).

41.. A body which, in terms of Section 3(2) of the Act, had to be "broadly representative of stakeholders in local government".

42.. *Ibidem*, Section 4(3).

43.. *Ibidem*, Section 3(5).

44.. As was required in terms of Section 3(7)(b) of the Act.

45.. In terms of Section 4(3) of the Act.

46.. The then Deputy Minister for Provincial Affairs and Constitutional Development, MV Moosa, addressing the Senate during the debate on the **Local Government Transition Act Second Amendment Bill** intended to address this issue after the ruling of the Constitutional Court when he alleged that: "What the NP did ... was to subvert the provincial committee, change its composition and pack it with NP members. Then, of course, the provincial committee, which was dominated by the NP, rubber-stamped the apartheid-based demarcation which the NP was proposing for the Western Cape metropolitan area ... the Western Cape government did not want this matter to be taken to the Special Electoral Court for arbitration, because it knew that no court was likely to look sympathetically upon racism as a consideration when boundaries were demarcated." See the **Debates of the Senate**, col 3019, 12 October 1995.

47.. Of 7 June 1995.

48.. Of 8 June 1995.

49.. Which power the Western Cape Executive Council had, as stated above, delegated to its MEC for Local Government in his capacity as the administrator of the Act.

50.. Specifically to the Minister of Provincial Affairs and Constitutional Development, in terms of paragraphs (a) and (b) of the amended version of subsection (5).

51.. Paragraph (c) of the amended subsection (5).

52.. Which effectively invalidated decisions of the provincial committee of the kind in issue taken between 30 April and 7 June 1995.

53.. It is noted that retrospective application was allowed in terms of Section 16A(3) of the Act.

54.. In terms of paragraph (b) of the amended Section 3(5) of the Act.

55.. *Ibidem*.

56.. In terms of Section 100(2) of the **Constitution** read with Rule 17 of the **Rules of the Constitutional Court**. It is also noted that the dispute in the matter had also been referred to the Constitutional Court for resolution by the first respondent, the President of the Republic, who acted in terms of Section 82(1)(d) of the **Constitution**.

57.. In terms of Section 98(2)(c) of the **Constitution**.

58.. In terms of Section 98(2)(e) of the **Constitution**.

59.. For a summary of these issues, see the judgment of Chaskalson P at 1305, paragraph 23.

60.. See Schedule 4 to the **Constitution**.

61.. Which stated that: "In interpreting this Constitution a provision in any schedule ... 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 this Constitution." (my emphasis)

62.. At 1309, paragraph 41. See also Mahomed DP in **Premier of KwaZulu-Natal and Others v President of the Republic of South Africa and Others**, *supra* at 1566, paragraph 12, on this question.

63.. *Ibidem*. See also *ibidem*, at 1307, paragraph 34, where Chaskalson P said that Section 232(4) ensured that the schedules to the interim **Constitution** were regarded not merely as an explanatory adjunct subordinated to the clauses to which they attached.

64.. It is noteworthy that Section 61 referred not to proclamations or subordinate legislation but explicitly to "**Bills affecting the boundaries or the exercise or performance of the powers and functions of the provinces**". (my emphasis)

65.. At 1309, paragraph 43.

66.. Which stipulated the "manner and form" requirements relating to the amendment of Sections 126 and 144.

67.. *Ibidem*, at 1311, paragraph 48.

68.. *Ibidem*, at 1310-1311, paragraph 48.

69.. *Ibidem*.

70.. Which required that amendments to the legislative and executive competences of a province should be effected with the consent of the legislature of the relevant province. See Mahomed DP in **Premier of KwaZulu-Natal and Others v President of the Republic of South Africa and Others**, *op cit* 1570, paragraph 23, on what was contemplated in the proviso to Section 62(2).

71.. See Mahomed J (as he then was) in **S v Mhlungu and Others**, 1995 (3) SA 867 (CC) at 883, paragraph 32, in this regard.

72.. *Op cit* 1311, paragraph 49.

73.. *Ibidem*.

74.. Which empowered the President of the Republic to amend the Act and any schedule thereto by proclamation in the *Gazette* and under which, as stated above, the President purportedly acted when he effected the relevant changes to the Act by means of the impugned Proclamations R58 and R59. As Deputy Minister MV Moosa reminded the National Assembly, the insertion of section 16A into the principal Act had initially enjoyed the support of the National Party and all other parties in the House, except for the Freedom Front. See the **Debates of the National Assembly**, col 4306, 11 October 1995.

75.. *Op Cit* 1310, paragraph 47. See also Mahomed DP, *ibidem*, at 1340, paragraphs 126 to 129.

76.. Such as was the case in the Republic before the **Constitution** came into effect; as Chaskalson P pointed out at 1312, paragraph 52, in the past our courts, due to parliamentary sovereignty, gave effect to Acts of Parliament which vested wide plenary powers in the executive.

77.. *Op cit* 1317, paragraph 62. See also Mahomed DP (as he then was), *ibidem* at 1345-1346, paragraph 137, on the jurisprudential philosophy which informed and underpinned the **Constitution**.

78.. *Ibidem*.

79.. *Ibidem*, at 1316, paragraph 61. See also Mahomed DP, *ibidem* at 1344, paragraph 136.

80.. *Ibidem*, at 1317, paragraph 62.

81.. At 1319, paragraph 65, the learned President of the Court pointed out that the general power envisaged in Section 16A of the Act could not even be inferred from the provisions of Section 245 of the **Constitution**.

However, Mahomed DP, *ibidem* at 1347, paragraphs 141 and 142, concentrated on Section 16A as it stood and concluded that, as it, in that form, went rather too far and effectively constituted an abdication of Parliament's legislative function in terms of Section 37 of the **Constitution**, its provisions were then unconstitutional. He left open the question as to whether any Act of Parliament which purported to delegate to the President of the Republic the power to amend the Act would always be unconstitutional. See paragraph 150 on this question.

82.. *Ibidem*, at 1317-1318, paragraph 62. See also Mahomed DP, *ibidem* at 1345, paragraph 137.

83.. *Ibidem*, at 1318-1319, paragraph 64.

84.. *Ibidem*, at 1318, paragraph 63. See also Mahomed DP, *ibidem* at 1346, paragraph 137.

85.. *Ibidem*.

86.. *Ibidem*, at 1332, paragraph 101. Note that in terms of the Court order (at 1339, paragraph 124), all the proclamations made under Section 16A, including Proclamations R58 and R59, were also declared invalid. Note further the relevance of the substantive portion of the provisions of Section 98(5) of the **Constitution** in this regard.

87.. *Ibidem*, paragraph 100.

88.. And, therefore, in terms of Section 4(1) of the **Constitution**, invalid and of no force and effect to the extent of such inconsistency.

89.. *Op cit* 1327, paragraph 84.

90.. *Ibidem*, at 1331, paragraph 97.

91.. *Ibidem*.

92.. *Ibidem*.

93.. *Ibidem*, paragraph 98.

94.. *Ibidem*, at 1332, paragraph 101.

95.. In terms of which the new constitutional text was required to ensure that there was "a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness." See Section 71(1)(a) and (2) of the **Constitution** for the

significance of the 34 Constitutional Principles enshrined in Schedule 4.

96.. See the order of the Court at 1340, paragraph 124, in this regard.

97.. In the **Debates of the Senate**, col 3024, 12 October 1995.

98.. *Op cit* 1332-1333, paragraph 102, and at 1334-1335, paragraphs 109 and 110.

99.. *Ibidem*, at 1331-1332, paragraph 99, and at 1335, paragraph 110.

100.. *Ibidem*, at 1332. paragraph 100.

101.. At 1336-1337, paragraph 113, Chaskalson P made it clear that Parliament could choose either to correct the defect in the invalidated law within the period specified in the Court order or not to do so, but take any other appropriate legislative steps to address the effect of the declaration of invalidity.

102.. *Ibidem*, at 1339, paragraph 124.

103.. *Ibidem*. Note the remarks of Chaskalson P at 1333-1334, paragraph 106, regarding the effect of the decision of the Court to make use of the proviso to Section 98(5) of the **Constitution** instead of declaring a law or a provision thereof invalid with immediate effect.

104.. See reference to this by Chaskalson P at 1337, paragraph 113. Note also that in terms of the Court order, all the proclamations made under Section 16A, including Proclamations R58 and R59, would remain in force for the duration of the period specified therein.

105.. Addressing the National Assembly in the opening of the debate on this issue, Dr F Ginwala, the Speaker, appropriately remarked that: "This is the first time this Assembly is meeting to rectify constitutional defects in legislation that have been identified by the Constitutional Court. That we are meeting speedily to accept that ruling and comply with it bodes well for our new democracy." See the **Debates of the National Assembly**, col 4361, 11 October 1995.

106.. The objective of which, according to Deputy Minister MV Moosa, was to enable Parliament to validate *in the proper manner* "the whole range of proclamations issued in terms of section 16A" of the **Local Government Transition Act**. See the **Debates of the Senate**, col 3021, 12 October 1995.

107.. As Chaskalson P had pointed out in his judgment in **Executive Council of the Western Cape and Others**, *op cit* 1336-1337, paragraph 113, Parliament could either correct the defect in the invalidated law within the period specified in the order of the Constitutional Court or choose, instead, to "take any other appropriate legislative steps to address the effect of the declaration of invalidity."

108.. See the **Debates of the Senate**, col 3021-3022, 12 October 1995.

109.. Of 15 July 1994.

110.. See the **Debates of the Senate**, *op cit* col 3022.

111.. *Ibidem*.

112.. Who, upon application, were granted direct access to the Constitutional Court in terms of Section 100(2) of the **Constitution** read with Rule 17 of the **Rules of the Constitutional Court**.

113.. Act No. 44 of 1995.

114.. Which, before its amendment, provided that the Premiers and members of executive councils of provinces were to be paid such remuneration and allowances as might have been prescribed by or determined under laws made by provincial legislatures.

It is noted that the provisions of the original Section 149(10) were the same as those of Section 135(4)

of the **Constitution**, which the purported amendment did not allude to. In his judgment, Mahomed DP, at 1565, paragraph 8, dealt with this problem and concluded that Section 135(4) would *pro tanto* be amended or repealed by a properly effected amendment of Section 149(10).

115.. Act No. 2 of 1994.

116.. *Supra*, at 1309, paragraphs 40 and 41.

117.. In **Premier of KwaZulu-Natal and Others**, *op cit* 1566, paragraph 12.

118.. *Ibidem*.

119.. To wit the **KwaZulu-Natal Legislature Remuneration Act** referred to above.

120.. Which related to the legislative competence and the executive authority of provinces and the amendments to which the substantive portion of Section 62(2) specifically sought to regulate.

121.. Which read as follows: "... Priveded that *the boundaries and the legislative and executive competences of a province shall not be amended without the consent of a relevant provincial legislature.*" (my emphasis)

122.. 1995 (3) SA 867 (CC) at 883, paragraph 32.

123.. *Op cit* 1568-1569, paragraph 20.

124.. *Op cit* 1311, paragraph 49, where Chaskalson P dealt specifically with the proviso to Section 62(2).

125.. *Ibidem*.

126.. *Ibidem*. It must be stressed, however, that Chaskalson P was not, thereby, giving a licence to Parliament to ride rough-shod on the powers and competences of the provinces; the requirements prescribed in the provisions of Section 126(3) and (4) of the **Constitution** would still have to be complied with.

It is also noted that, whereas this case dealt with non-constitutional amendments effected by proclamation under the successfully impugned Section 16A of the **Local Government Transition Act**, the **Premier of KwaZulu-Natal and Others** case, on the contrary, dealt with constitutional amendments.

127.. What is not clear is whether Mahomed DP used this word in a generic and all-embracing sense or simply confined its use to constitutional amendments as did Chaskalson P, *ibidem*.

128.. **Premier of KwaZulu-Natal and Others**, *op cit* 1570, paragraph 23.

129.. *Loc cit*.

130.. Which means that, while the public authority (the President of the Republic in this instance) was required to consult, he or she was not obliged to follow the views of those consulted, nor to reach agreement with them. It is noted that in our jurisprudence, where subordinate legislation must be accompanied, in the legislative process, by consultation and deliberation, the absence thereof will affect the validity of the resultant legislation. See **Government of the Republic of South Africa and Another v Government of KwaZulu and Another**, *op cit* 198F-201H.

131.. For which see Section 184 of the **Constitution**.

132.. For which see Section 183 of the **Constitution**.

133.. In **Premier of KwaZulu-Natal and Others**, *op cit* 1571, paragraph 25.

134.. *Loc cit*.

- 135.. In terms of Section 235(8)(a) of the **Constitution**.
- 136.. Act No. 9 of 1990, passed, significantly, by the now defunct KwaZulu Legislative Assembly.
- 137.. **Premier of KwaZulu-Natal and Others**, at 1571, paragraph 27.
- 138.. *Ibidem*.
- 139.. *Ibidem*, paragraph 28.
- 140.. At 1572, paragraph 30.
- 141.. *Ibidem*.
- 142.. Which was to be established in terms of Section 184(1) of the **Constitution**.
- 143.. Section 184(5)(a).
- 144.. See Section 184(5)(aA), which provided that the Bills would be referred by the Secretary to Parliament to those Houses of Traditional Leaders that were contemplated in and established under Section 183 of the **Constitution**.
- 145.. At 1573, paragraph 35.
- 146.. That is, that such a Bill "required to be adopted at a joint sitting of the National Assembly and the Senate by a majority of at least two-thirds of the total number of members of both Houses."
- 147.. At 1573, paragraph 35.
- 148.. *Ibidem*, paragraph 36.
- 149.. *Ibidem*.
- 150.. At 1573-1574, paragraph 37.
- 151.. In terms of the proviso to Section 179(1) of the **Constitution**, such local government elections were supposed to take place on the same day throughout the national territory.
- 152.. At 1575, paragraph 42.
- 153.. Which allowed Parliament to pass legislation dealing with a matter that, to be performed effectively, required to be regulated or co-ordinated by uniform norms or standards that applied generally throughout the country.
- 154.. At 1575, paragraph 44.
- 155.. *Ibidem*.
- 156.. At 1576, paragraph 47.
- 157.. At 1577, paragraph 50.
- 158.. *Op cit*.
- 159.. Paragraph 141 of the case.
- 160.. See 'Case Reports', (1996) 12 **SAJHR** 158 at 161.
- 161.. *Op cit*.

162.. For example, see **Harris v Minister of Interior**, 1952 (2) SA 428; and **Minister of Interior v Harris**, 1952 (4) SA 769 (A), both of which concerned constitutional amendments seeking to exclude the Coloured community from the common voters' roll.

163.. Paragraph 23 of the case.

164.. Section 41(3) of the (new) **Constitution**.

165.. *Ibidem*, Section 41(4).

CHAPTER FOURTEEN

CERTIFICATION OF CONSTITUTIONS

INTRODUCTION

Two constitutions, the Constitution of the Province of KwaZulu-Natal, 1996,¹ and the Constitution of the Republic of South Africa, 1996,² came before the Constitutional Court for certification³ under the (interim) **Constitution**. In the one instance, the basic task of the Court was to determine whether or not the text of the affected provincial Constitution was compatible with the (interim) **Constitution**, including the 34 Constitutional Principles set out in Schedule 4 thereto.⁴ In the other instance, its task was restricted to deciding whether the text adhered to the Constitutional Principles.⁵

In both instances, the decision of the Constitutional Court certifying or refusing to certify that the provisions of the relevant text complied with the (interim) **Constitution** would be final and no court of law could subsequently enquire into the validity of such text or a provision thereof.⁶ In the case of the province of KwaZulu-Natal, the Legislature could choose not to make another constitutional text if the first one failed to gain certification as provinces were under no constitutional constraint to pass their own constitutions. However, the Constitutional Assembly had no choice in the matter; it was required to pass and adopt a "new constitutional text within two years as from the date of the first sitting of the National Assembly ..."⁷ If the initial text failed to gain certification because of its inconsistency with any of the 34 Constitutional Principles, the Constitutional Assembly would still have to do its work; the Republic would otherwise be without a new constitutional text and, therefore, be governed continually under the (interim) **Constitution**, till the provisions of Section 73 of the (interim) **Constitution** were activated for deadlock breaking purposes.

The way the Constitutional Court handled these two cases amply demonstrated that it is not a lackey or a handmaiden of the ruling party, the African National Congress, or of any party or person, for that matter. As will appear below, it acquitted itself in a way that could only enhance its stature in the eyes of the citizenry as a whole and of sceptics⁸ who might have thought that, because of the institution's origins and the previous political leanings of some of its members, it was sympathetic politically to the majority party. In both cases the Court ruled against the decisions of duly elected public representatives and refused to certify the two initial constitutional drafts.

In both cases constitutional issues of great importance arose. It is the objective of this chapter to discuss some of these issues. Where possible, an attempt will be made to relate some of these issues to comparable experiences of other countries.

THE KWAZULU-NATAL CONSTITUTION

The Legislature of the province of KwaZulu-Natal, like the legislatures of the other eight provinces, was allowed in terms of the (interim) **Constitution** to pass its own provincial Constitution if it so chose.⁹ However, the (interim) **Constitution** did not prescribe or proscribe any form or content of a provincial constitution. It was, subject to Section 160 of the (interim) **Constitution**, left to the choice of the provincial Legislature selecting to pass a provincial constitution to decide the form and content of the text of the constitution of the province.

On 15 March 1996, after a lengthy and arduous process of political negotiations among the parties represented in the provincial Legislature, the Legislature of the province of KwaZulu-Natal *unanimously* adopted a Constitution for that province.¹⁰ Despite the unanimity exhibited in the Legislature, the African National Congress¹¹ (for reasons which were not furnished to the Court¹²) and the Government of the Republic objected strenuously to certain aspects of the provincial Constitution when it came before the Constitutional Court for certification.¹³

THE OBJECTIONS OF THE KING'S COUNCIL OF KWAZULU-NATAL

The King's Council of KwaZulu-Natal filed its own written objections to certain provisions of the provincial Constitution.¹⁴ After giving due consideration to the objections, the Constitutional Court ruled in ***In re: Certification of the Constitution of Province of KwaZulu-Natal, 1996***¹⁵ that none of them could be properly considered by it in the exercise of its power of certification under the (interim) **Constitution**.¹⁶

The (interim) **Constitution** provided that, in the case of the province of KwaZulu-Natal, the provincial Constitution must make provision for the institution, role, authority and status of the Zulu Monarch.¹⁷ However, as the Constitutional Court pointed out, the (interim) **Constitution** did not prescribe to the Legislature of KwaZulu-Natal how such provision should be made in the provincial Constitution;¹⁸ in other words, the Legislature was, therefore, at liberty to decide how best to provide for the Zulu Monarch. So long as provision was made in the provincial Constitution for the Zulu Monarch, the Legislature would be in full compliance with the (interim) **Constitution**. Thus, the Court, in my opinion, correctly ruled that the provisions made in the provincial Constitution in this regard, some of which had been objected to by the King's Council of KwaZulu-Natal, could consequently not be said to be inconsistent with any of the provisions of the (interim) **Constitution** or the Constitutional Principles. The objections, submissions and recommendations made by the King's Council raised issues that should more properly be directed to or be dealt with by the KwaZulu-Natal Legislature and did not relate to the certification process.¹⁹

"LEGISLATIVE AND EXECUTIVE STRUCTURES AND PROCEDURES"

The (interim) **Constitution** provided that, while provincial constitutions made thereunder should not be inconsistent with any of its provisions, including the 34 Constitutional Principles, a provincial constitution could "provide for legislative and executive structures and procedures different from those provided for in this Constitution in respect of a province".²⁰ In other words, a province choosing to make and appropriately adopt its own constitution could, if it so chose, deviate from the provisions of the

(interim) **Constitution** and have "legislative and executive structures and procedures" that would distinguish it from the rest of the provinces.²¹

Whatever this²² might have meant or been intended to achieve, the Court pointed out that the reference to "legislative and executive structures and procedures" clearly related to the structures and procedures which may be necessary or appropriate for the proper functioning of the provincial organs of government.²³ It did "not relate to the fundamental nature and substance of the democratic state created by the interim Constitution nor to the substance of the legislative or executive powers of the national Parliament or Government or those of the provinces."²⁴

The Court emphasised that the provisions of the (interim) **Constitution** which allowed the provinces to make and adopt their own constitutions should not be read in isolation; regard ought to be had to all the provisions of the (interim) **Constitution** and the Constitutional Principles.²⁵ If the text of a provincial constitution or any provision thereof was inconsistent with the (interim) **Constitution** or the Constitutional Principles, it would not pass muster and be certified by the Constitutional Court.²⁶ This, needless to say, was a reaffirmation of an old principle of our common law, namely that the words of a statute or of any provision thereof must not only be interpreted according to their ordinary meaning but also in their context.²⁷

With specific reference to the legislative powers of the provinces,²⁸ the Court ruled that a province could "not by means of the bootstraps of its own constitution confer on its legislature greater powers than those granted it by the interim Constitution. The same principle must apply, *mutatis mutandis*, to all other powers, of whatever nature, asserted by a province in the provisions of its constitution."²⁹

THE FATAL FLAWS IN THE KWAZULU-NATAL CONSTITUTION

The Constitutional Court identified a few areas or aspects which prevented it from certifying the provincial Constitution as being consistent with the provisions of the (interim) **Constitution** and the Constitutional Principles. Three of the most important ones were the following:

Usurpation of National Powers

The Constitutional Court identified numerous attempts on the part of the KwaZulu-Natal Legislature to *unanimously* usurp the powers of the national government.³⁰ The provincial Constitution declared in Clause 1(1), for example, that “[the Province of KwaZulu Natal is a self-governing Province within the Republic of South Africa”. The Court held that it was “clearly beyond the capacity of a provincial legislature to pass constitutional provisions concerning the status of a province within the Republic.”³¹

Of great importance was the decision of the Court to characterise our provinces as being fundamentally different from their counterparts in the United States of America, for instance.³² As creatures of the (interim) **Constitution**, our provinces, the Court held, had only those powers that were specifically conferred upon them by and under the (interim) **Constitution**; there was no provision in it which empowered a province to regulate its own status.³³

The Constitution of the province of KwaZulu made provision for a provincial bill of rights. On the face of it, as the Court pointed out, there was nothing wrong with this *per se*.³⁴ However, the Court held that it was imperative for such a bill of rights not to be inconsistent with the (interim) **Constitution** (including the provisions of the Chapter on Fundamental Rights) and the Constitutional Principles.³⁵

From this point of view, it was held to be impermissible for a provincial bill of rights to be utilised to venture into territory that fell outside the legislative or executive competencies of the provinces.³⁶ As far as the Constitutional Court is concerned,

[b]ills of rights, with the exception of provisions which may not always be regarded as capable of direct enforcement (such as, for example, certain types of provisions which have come to be known as “directive principles of state policy”), are conventionally enforced by courts of law striking down or invalidating, for example, legislation and administrative action even when such power of review is not expressly granted in the constitution or bill of rights concerned.³⁷

In other words, they cannot be used for anything else. As examples of what the KwaZulu-Natal Legislature had done in this regard in its proposed bill of rights, the

Court cited reference to the right to a fair trial, labour relations and detailed provisions for states of emergency and their suspension which it said fell "patently outside the domain of competence of provincial legislatures."³⁸

In particular, the Constitutional Court stressed that a province would be precluded from incorporating any provision in its bill of rights which is "inconsistent with" any similar provision in Chapter 3 of the (interim) **Constitution**.³⁹ This was so because, the Court pointed out, the provisions of Chapter 3 were expressly binding upon all legislative and executive organs of state "at all levels of government" and applied to all law, including all provincial law.⁴⁰ It emphasised that:

[a]ny provision in any provincial law, *including a provincial constitution*, which purported to limit the operation of the national bill of rights in any way would be in conflict with ... the interim Constitution and would not meet the section 160(3) inconsistency qualification.⁴¹ (my emphasis)

The KwaZulu-Natal provincial Constitution had done precisely that; in terms of Chapter 3, clause 30(3) thereof, the rights and freedoms recognised in and conferred by the (interim) **Constitution** would be valid in that province only if, and to the extent that, they were not inconsistent with the provincial Constitution. The Court pointed out that that bore "all the hallmarks of a hierarchical inversion."⁴² The provincial Constitution was presented as the supreme law of the province and subordinating the national (interim) **Constitution** to it. As the Court pointed out, the provincial Legislature had no power to do so.⁴³

In Chapter 5 of the provincial Constitution, the provincial Legislature had also attempted to give itself exclusive legislative powers, and, in certain respects, executive powers to its executive council. The Court found it unnecessary to consider whether that was in conflict with any corresponding provision of the (interim) **Constitution** as no province had any authority whatsoever to confer any legislative or executive powers upon itself. All such power emanated exclusively from the (interim) **Constitution**.⁴⁴

The KwaZulu-Natal provincial Constitution further purported to make provision for a provincial constitutional court with powers to declare "a law of the Province" unconstitutional.⁴⁵ The provincial constitutional court would have exclusive jurisdiction

to decide on the constitutional nature of a dispute and disputes in constitutional matters between organs and powers "established or recognised in terms of this Constitution".⁴⁶ Pending the establishment of such a court, its powers would be exercised by the provincial division of the Supreme Court. Obviously being aware that it could not authorise such a court to strike down any law with regard to matters falling outside the competence of a province, the Legislature purported to limit the enforcement of the KwaZulu-Natal bill of rights to the "human rights recognised and protected in this Constitution".⁴⁷

The Constitutional Court pointed out that, as the (interim) **Constitution** nowhere conferred "any power on a province to establish courts of law, whatever their jurisdiction may be",⁴⁸ the KwaZulu-Natal Legislature did not have the power it purported to exercise in this regard. Under the (interim) **Constitution**, provincial and local divisions of the Supreme Court simply did not have the powers the provincial Legislature purported to be giving to the proposed provincial constitutional court, the Court held.⁴⁹

Lastly, as though the province of KwaZulu-Natal was a sovereign state, the provincial Constitution proclaimed that it recognised the exclusive legislative and executive authority or competence of the "national Government" and of Parliament over certain matters.⁵⁰ The Constitutional Court held that, as KwaZulu-Natal was not a sovereign state, such assertions were inconsistent with the (interim) **Constitution**.⁵¹ As such, the provincial Legislature did not have power or authority to grant constitutional "recognition" to what Parliament and the national Government could or could not do.⁵²

The Consistency Clauses

The provincial Constitution, as stated above, provided that, to the extent that it (ie the provincial Constitution) was not inconsistent with the (interim) **Constitution**, it was *the supreme law of the province of KwaZulu-Natal*.⁵³ It (ie the provincial Constitution) further provided that any of its (ie the provincial Constitution's) provisions, other than the provisions of Section 160(3) of the (interim) **Constitution**, which was inconsistent with the latter document would be of no force or effect.⁵⁴

While the Constitutional Court acknowledged that the purpose of these clauses might have been to render any of the clauses of the provincial Constitution inconsistent with the (interim) **Constitution** of no force and effect, they would effectively preclude the Court from testing any provision in the provincial Constitution against the requirements of Section 160(3) of the latter document and immunise the provisions of the provincial Constitution from "the obligatory discipline of constitutional certification process."⁵⁵ The Court would, in other words, be prevented from dealing with the issue of inconsistency in the course of the process of certification of the provincial Constitution.⁵⁶

The Court held that provinces were only given powers to make constitutions which could be objectively tested by it against the (interim) **Constitution** and the 34 Constitutional Principles. They could, therefore, not make constitutions that effectively avoided the process of certification. If any province made any provisions to that effect, it would be acting *ultra vires* its powers in terms of the (interim) **Constitution**.⁵⁷

The Suspensive Conditions

In terms of the provincial Constitution, some substantial portions of it would not come into operation until a later date or until certain conditions were met.⁵⁸ This was yet another device which was palpably designed to avoid the process of constitutional certification and its consequences.

Having seen through this device and using the analogy of our law of contract, the Court held that merely to suspend part of the text of a provincial constitution that was inconsistent with the (interim) **Constitution** could not save the constitution from the consequence of the inconsistency.⁵⁹ As the Court was, in terms of Section 160(4) of the (interim) **Constitution**, required to scrutinise the text of a provincial constitution in its entirety, it held that, in order to glean the meaning of the constitution, it would pierce the veil of the suspensive clauses and evaluate and certify, or refuse to certify, the document as an integrated whole.⁶⁰

Apart from the fact that some of the provisions of the provincial Constitution were in themselves inconsistent with the (interim) **Constitution**, the Constitutional Court held

that the text, due to the suspensive clauses, was inchoate and lacking in finality; *it was not ripe for certification in terms of Section 160(4) of the (interim) Constitution.*⁶¹ As the text left many important provisions for later determination, it was not ready for certification, the Court further held.⁶² The Court was unable, and therefore refused, to certify that the text of the Constitution of the Province of KwaZulu-Natal, 1996, as adopted by the KwaZulu-Natal Legislature on 15 March 1996, was not inconsistent with the provisions of the (interim) **Constitution** and the 34 Constitutional Principles.⁶³ The Court instead described the provincial constitution as being *fatally flawed*, as a result of which it could not be certified under the provisions of Section 160(4) of the (interim) **Constitution.**⁶⁴

THE SOUTH AFRICAN PROVINCES

South Africa is not a federal country; it is a hybrid polity borrowing from, and thus exhibiting features of, both federalism and a unitary state. As stated above, the Constitutional Court stressed that South African provinces, unlike their US counterparts,⁶⁵ were not states; they were created by the (interim) **Constitution** and had only those enumerated powers that were specifically and appropriately conferred upon them. Our constitutional system does not have a provision similar to the most discussed US Tenth Amendment which provides specifically that:

[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.⁶⁶

On the contrary, in terms of the (interim) **Constitution**, Parliament had general plenary power to legislate for the whole of the Republic.⁶⁷ As the Constitutional Court quite correctly pointed out, that plenary power was not confined to specific functional matters.⁶⁸ It was the legislative competence of provincial legislatures that was confined to clearly specified functional areas.⁶⁹ Our provinces could thus not have or exercise any power that they were not specifically and appropriately given under the (interim) **Constitution.**

It is noteworthy that even under the (new) **Constitution**,⁷⁰ though the provinces now have exclusive powers in certain respects,⁷¹ this configuration has not undergone any basic metamorphosis.

THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

From the elections of 27 April 1994 the Republic of South Africa was governed and functioning under the (interim) **Constitution**, which the negotiating parties had correctly characterised as a historic bridge between the old constitutional order and the new.⁷² In the meantime, a popularly mandated Constitutional Assembly⁷³ drafted a new constitutional text⁷⁴ which it had to pass within a period of two years "as from the date of the first sitting of the National Assembly under the" (interim) **Constitution**⁷⁵ by a majority of at least two-thirds of all the members of the Constitutional Assembly.⁷⁶ It was a further requirement of the process of constitution-making that the new constitutional text had to comply with the 34 Constitutional Principles; for this purpose, a special process, namely certification by an independent arbiter, was established. If in any respect the new constitutional text did not comply with any of the Constitutional Principles, the Constitutional Court would not give it the necessary certification.

THE ROLE OF THE CONSTITUTIONAL COURT

In *In re: Certification of the Constitution of the Republic of South Africa, 1996*,⁷⁷ the Constitutional Court was called upon to decide whether or not the new constitutional text adopted by the Constitutional Assembly in May 1996 was not inconsistent with the 34 Constitutional Principles. Its primary responsibility in this regard was, in other words, to determine whether every requirement of the Constitutional Principles had been satisfied by the provisions of the new constitutional text and whether any provision in the new constitutional text conflicted with any of the Constitutional Principles.⁷⁸ Stripped to the marrow of its bones, the test the Court had to apply was whether the provisions of the new text complied with the Constitutional Principles.

It is essential to underscore that the mandate given to the Constitutional Court in this regard was unique and completely unprecedented.⁷⁹ The making of a new constitution does not fit into the category of the constitutional principle of judicial review or the role of the courts to review legislative and executive acts of government. This principle, which defines the power of the courts to “check” the legislative and executive organs of government, is of a more restricted nature than the certification power which was given to the Constitutional Court under the (interim) **Constitution**.

However, it has to be pointed out that the judicial certification must have been a necessary corollary of the Constitutional Principles which were to constitute the basis of the new **Constitution**. Furthermore, this was unavoidable, given the nature of the political transition, the general mistrust and the power relations between the ANC and the National Party, the ruling party of those days, in particular.

The Court emphasised that its role was a judicial, and not a political one. It had no power, no mandate and no right to express any view on the political choices made by the Constitutional Assembly in drafting the new constitutional text, unless such choices were relevant either to compliance or non-compliance with the Constitutional Principles. It had no business to adjudicate upon the wisdom or otherwise of any provision of the text.⁸⁰

Neither was the Court basically concerned with the methodology chosen by the Constitutional Assembly.⁸¹ The Constitutional Assembly was thus at liberty to follow or ignore formulations used in the (interim) **Constitution**, provided that the new constitutional text remained within the boundaries set by the Constitutional Principles.⁸²

The Court further said that “the courts have no power to alter legislation. The power of the judiciary in terms of the NT remains the power to determine whether provisions of legislation are inconsistent with the NT or not, *not to alter them in ways which it may consider desirable*.”⁸³ (my emphasis)

This approach came as no surprise to us: Like most courts often do when confronted with difficult politico-legal questions, the Constitutional Court felt constrained to

pronounce a disclaimer that its role in this regard was purely of a legal nature and not political or even politico-legal. In most democracies courts use these disclaimers and constant reference to their "non-political" role as an ideological device to reinforce the belief in the rule of law and claim impartiality even where their role is clearly semi-political and semi-legal given the nature of the disputes they are confronted with. As Lord Wheatley once remarked,

[w]hen the subject enters the political arena and becomes politically controversial, we assume an *elective silence* on the political issues and confine ourselves, if we intervene at all, to constitutional or legal questions or views on practical matters affecting the law and its administration where our views may naturally be expected and sought.⁸⁴ (my emphasis)

As a result of this, the Constitutional Court bent over backwards and allowed a wide range of conflicting interests to make representations to it, even though this was not required by the Constitutional Principles.⁸⁵ This, despite the fact that the Court recognised that it was its "duty to measure each and every provision of the new constitution, viewed both singly and in conjunction with one another, against the stated Constitutional Principles, *irrespective of the attitude of any interested party.*"⁸⁶ (my emphasis) This, needless to say, was a clear admission on the part of the Court that it was aware of the various vested political and socio-economic interests, the aspirations of which it had to take into account in the certification process.

THE COURT'S APPROACH TO ITS WORK

The Court suggested that there were two essential questions to be answered before deciding whether to certify the new constitutional text. These were, first, whether the basic structures and premises of the new text were compatible with the Constitutional Principles and (if so), second, whether the details of the text complied with the Constitutional Principles.⁸⁷

The Structures and Premises of the New Text

Though the Court eventually refused to certify the new constitutional text as being not inconsistent with the Constitutional Principles, it acknowledged that the text itself

represented "a monumental achievement."⁸⁸ It concluded that the text satisfied the basic structures and premises of the new constitution contemplated in the Constitutional Principles.⁸⁹

It stated categorically that it was not necessary for the Constitutional Assembly to repeat the same structures and protections that were contained in the (interim) **Constitution**. Variations and alternatives, additions and even omissions were legitimate as long as the discipline enjoined by the Constitutional Principles was respected.⁹⁰ This was also the general view at the Constitutional Assembly. In fact, in the initial phases of the constitution-making process some parties and participants openly "avoided" the (interim) **Constitution**.

Compatibility with the Constitutional Principles

For the Court, the question as to whether or not the new text was not inconsistent with the Constitutional Principles was a separate one. It declared that, for this purpose, the test was simply whether the provisions of the new text complied with the Constitutional Principles. That meant that the provisions of the text should not be inconsistent with any of the Constitutional Principles and should give effect to all of them.⁹¹

To determine whether the provisions of the text complied with the Constitutional Principles, each of its provisions and each of the Constitutional Principles had to be interpreted so that a meaning could be given to each of them. However, the Court emphasised that the Constitutional Assembly was at liberty to structure the new constitutional text in any way it chose, as long as it did not transgress the fundamental discipline of the Constitutional Principles. For, as the Court pointed out, the issue as to which of several permissible models should be adopted was not an issue for adjudication by it.⁹² *The wisdom or correctness of that choice was not a matter for decision by the Court, it held. It was concerned exclusively with whether the choices made by the Constitutional Assembly complied with the Constitutional Principles, and not with the merits of the choices.*⁹³

INTERPRETATION OF THE CONSTITUTIONAL PRINCIPLES

The Court held that the purposive and teleological approach to interpretation should be followed in interpreting the Constitutional Principles;⁹⁴ any other interpretation which would avoid the purpose of the constitution-making process should be avoided.⁹⁵ The purpose of the process was as stated in the first paragraph of the preamble to the (interim) **Constitution**, namely "to create a new order" based on "a sovereign and democratic constitutional state" in which "all citizens" are "able to enjoy and exercise their fundamental rights and freedoms".⁹⁶

Of particular note was the Court's emphasis that the Constitutional Principles, as "broad constitutional strokes on the canvas of constitution making", should not be interpreted with technical rigidity.⁹⁷ For this purpose, the Court held that the 34 Constitutional Principles must be read holistically with an integrated approach. None of them should be read in isolation from the rest which would give it meaning and context.⁹⁸ For, at the end of the day, the critical question was not just the meaning, but the purpose and effect of the new constitutional text.

None of the Constitutional Principles should be read in a manner that involved conflict with another, the Court further held. The lawmaker had intended that each of the 34 Constitutional Principles should live together with the others so as to give them life, form and nuance.⁹⁹ The meaning of each one of them could, in other words, be determined by looking at it in its context, namely the Constitutional Principles as a whole.

Lastly in this regard, the Court held that when testing a particular provision of the new constitutional text, it was necessary to give such a provision a meaning.¹⁰⁰ Of particular note was the Court's decision that where more than one permissible meaning could be reasonably supported, it would be proper to adopt the interpretation giving to the new constitutional text "*a construction that would make it consistent with the CPs.*"¹⁰¹ (my emphasis)

That the Court was aware of the importance and implications of this statement was demonstrated by the paragraph following the one in which it was contained. However, in my view, the position, though based on a subjective approach, was a correct one, for, as Barry L. Strayer put it,

courts must often form an opinion as to what they think the constitution *ought* to mean. This should not be the first consideration, but it will often be necessary where the text, as interpreted in the light of its history and context, is still ambiguous or silent and there are no meaningful precedents for guidance. Such decisions involve resort to some *desideratum* which the court perceives to be implicit in the constitution, and thus they may be seen as based on the non-factual element of constitutional policy.¹⁰²

In the final analysis, the new constitutional text must be able to stand the greater test of time. In interpreting it, the Court must, therefore, not be confined to its bare language but should be prepared, where and when necessary, to look at the surrounding factual context in which the text will, and must, operate to see if the essential values of our nascent constitutional system as encapsulated in the 34 Constitutional Principles were being respected.

THE NEW BILL OF RIGHTS

An important component of the new constitutional text was the Bill of Rights that would be constitutionally safeguarded and enforceable by the Courts of the land. The Bill of Rights was intended to be a means to enable *everyone* to enjoy *all universally accepted* fundamental rights, freedoms and civil liberties.¹⁰³ It was an important provision of the (interim) **Constitution** that such a bill of rights should "be drafted after having given due consideration to *inter alia* the fundamental rights contained in Chapter 3 of this Constitution."¹⁰⁴ The Constitutional Court's conclusion, after a careful scrutiny of the Bill of Rights, was that it was in general as extensive as any bill of rights to be found in any national constitution.¹⁰⁵

In the course of analysing the Bill of Rights the Constitutional Court focused on two critical phrases used in Constitutional Principle II. These were "universally accepted" and "fundamental rights, freedoms and civil liberties".

“Universally Accepted”

Though the Court forswore a strict literal interpretation of the word “universal”, it acknowledged that its use established a strict test.¹⁰⁶ From this it concluded that the drafters of the Constitutional Principles clearly intended that only those rights that have gained a wide measure of international acceptance as fundamental human rights must necessarily be included in the new constitutional text.¹⁰⁷ An obvious casualty of this approach was the so-called freedom of economic activity,¹⁰⁸ which was incorporated in the (interim) **Constitution** as a compromise with, and a concession to, the National Party.

The Constitutional Assembly merely had to ensure that such “universally accepted fundamental rights, freedoms and civil liberties” were incorporated in the Bill of Rights. It clearly did not have an obligation to duplicate or match the rights and freedoms contained in Chapter 3 of the (interim) **Constitution**. It merely had to give due consideration to them, among other things. Whatever that vague formulation meant, the Constitutional Assembly did not have to do anything more than show that it had indeed given due consideration to the Chapter 3 rights.¹⁰⁹

The Constitutional Court emphasised that it was certainly not for it, as a Court of law,

but for the CA, the duly mandated agent of the electorate, to determine - within the boundaries of the CPs - which provisions to include in the Bill of Rights and which not.¹¹⁰

“Fundamental Rights, Freedoms and Civil Liberties”

The Court held that this phrase, which encapsulated “those rights and freedoms recognised in open and democratic societies as being the inalienable entitlements of human beings”, should not be read disjunctively.¹¹¹ Understood as such, the phrase referred to “a composite idea that is firmly established in human rights jurisprudence”¹¹² and conveyed nothing new as such.

Under the rubric of “fundamental rights, freedoms and civil liberties”, the Constitutional Assembly could, if it chose to, incorporate a whole range of rights and freedoms as

[t]here is ... no finite list of such rights and freedoms. Even among democratic societies what is recognised as fundamental rights and freedoms varies in both subject and formulation from country to country, from constitution to constitution, and from time to time.¹¹³

As the Court pointed out, the “universally accepted fundamental rights, freedoms and civil liberties” required by the Constitutional Principles to be incorporated in the new constitutional text constituted a narrower group of rights than the group of rights in Chapter 3 of the (interim) **Constitution**.¹¹⁴ The Chapter 3 rights and freedoms, it will be recalled, went beyond the “universally accepted” norm which was prescribed for the new bill of rights. Beyond that prescription the Constitutional Assembly was at liberty to formulate rights more generously and even to establish new rights in the process of constitution-making.

The Constitutional Assembly, as stated above, had no obligation to duplicate or match the Chapter 3 rights and freedoms; the drafters of the (interim) **Constitution** “expressly did not bind it to draft a bill of rights identical to that in the IC.”¹¹⁵ It could thus, by the same token, also reduce the rights and freedoms in the new constitutional text to the bare minimum, namely the “universally accepted”, without offending the Constitutional Principles.

OBJECTIONS TO THE PROPOSED BILL OF RIGHTS

Though the Constitutional Court had come to the conclusion that the Bill of Rights was as extensive as any that could be found in a democracy, and was thus in full compliance with the Constitutional Principles, it nonetheless had to determine whether the provisions of the Bill of Rights were not inconsistent with the Constitutional Principles. This was due to the fact that there were certain objections to its provisions. Some of these were the following:

Horizontal Application

The debate as to whether Chapter 3 of the (interim) **Constitution** was applicable horizontally compelled the drafters of the new constitutional text to incorporate in the new Bill of Rights Clause 8(2) which provided that:

[a] provision of the Bill of Rights binds *natural and juristic persons* if, and to the extent that, it is applicable, taking into account the nature of the right and of any duty imposed by the right.¹¹⁶ (my emphasis)

The basic objection to this Clause of the new constitutional text was that it would impose obligations upon persons other than organs of state. This, it was argued, was not a universally accepted proposition. However, the Constitutional Court held that nothing in Constitutional Principle II *per se* prevented the Constitutional Assembly from including in the new Bill of Rights provisions which are not universally accepted.¹¹⁷ In other words, the Constitutional Assembly was at liberty to go beyond the “universally accepted” norm, so long as it incorporated universally accepted fundamental rights, freedoms and civil liberties in the Bill of Rights.

The second ground of objection was that a clause allowing for horizontal application of the Bill of Rights would violate a basic tenet of our constitutional system, namely *separation of powers*, and thus be inconsistent with Constitutional Principle VI. The gist of this argument was that horizontality would allow the courts to encroach upon the sacred terrain of the legislature by allowing them to “alter” legislation and the common law. Needless to say, the Constitutional Court rejected this spurious argument which “failed to acknowledge that the courts have always been the sole arm of government responsible for the development of the common law”, and suggested that the courts could use the power of judicial review and “alter” legislation in ways they might consider desirable.¹¹⁸

It was further argued that Clause 8(2) of the new constitutional text would impose upon the courts a task to balance competing rights which, it was said, was not a judicial function. This argument too was rejected as our courts will often be required to balance competing rights even where the bill of rights does not bind natural and juristic persons. No Constitutional Principle was violated by the fact that this task might have to be performed in circumstances where a private individual is affected.¹¹⁹

Lastly in this regard, it was argued that this Clause would impose obligations upon individual persons who were entitled to be beneficiaries only of “universally accepted fundamental rights, freedoms and civil liberties”. This, it was suggested, would culminate in a diminution of their rights which was not envisaged in Constitutional

Principle II. The Court rejected this argument and held that Constitutional Principle II would not necessarily be violated with a horizontal application as its provisions implicitly recognised

*that even if only the state is bound, rights conferred upon individuals will justifiably be limited in order to recognise the rights of others in certain circumstances.*¹²⁰ (my emphasis)

Juristic Persons as Opposed to Natural Persons

It was argued that Clause 8(4) of the new constitutional text, which provided that “[j]uristic persons are entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and of the juristic persons”,¹²¹ violated Constitutional Principle II which catered only for natural persons as signified in the utilisation of the word “everyone” therein. The Court quite rightly rejected that argument and demonstrated that many “universally accepted fundamental rights”, such as freedom of speech, applied to natural persons as well as to juristic persons.¹²² As for the Court, the issue thus turned on the nature of the right and the nature of the juristic person concerned.¹²³

Another objection was that giving rights to *powerful and wealthy corporations*, which presumably have enormous resources which can be deployed to assert and defend their rights, would be detrimental to individual rights. Noting that “the same could be said of powerful and wealthy individuals”, the Court rejected this bizarre objection which, it observed, wrongly equated juristic persons with powerful and wealthy corporations.¹²⁴

In a nutshell, Clause 8(4) of the new constitutional text did not violate any of the Constitutional Principles and was, therefore, not invalid.

The Right to Bodily Integrity

Clause 12(2) of the new constitutional text provided that “[e]veryone has the right to bodily and psychological integrity”. As such, everyone has the right, *inter alia*, “to make decisions concerning reproduction”.¹²⁵

This innovation, according to members of the Centre for Applied Legal Studies, is of great importance in the development of our human rights jurisprudence. They argued that the new constitutional text goes beyond a broad and vague guarantee of "freedom and security of the person".¹²⁶ In our situation in particular, they contended,

[i]t is important to have the subset of 'bodily and psychological integrity' in order to make it clear to the interpreting courts that the right to freedom and security of the person encompasses more than due process concerns.¹²⁷

It is my humble submission that this innovation so-called was unnecessary as the international tendency,¹²⁸ in any event, has been to give the widest possible, and therefore most effective, meaning to the concept of "freedom and security of the person". In 1923 the US Supreme Court, for instance, had already said in **Meyer v Nebraska**¹²⁹ that the concept of freedom or liberty includes

not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children [and] to worship God according to the dictates of his own conscience and generally to enjoy those privileges long recognized ... as essential to the orderly pursuit of happiness by free men.

Be that as it may, this clause attracted an objection on the grounds that it would open the way to *abortion*. The Court rightly refused to be drawn into the sterile debate on abortion¹³⁰ as its primary responsibility in this regard was to determine whether the new constitutional text did not violate any of the 34 Constitutional Principles.¹³¹ It once again reiterated its recognition of the right and the wide discretion of the Constitutional Assembly to determine which rights should be included in the new constitutional text and how they should be formulated.¹³²

In response to the suggestion that the Constitutional Assembly had violated Constitutional Principle II by not including the provisions of Section 33(1)(b) of the (interim) **Constitution** which provided that any limitation of a right "may not negate the essential content of the right", the Court reiterated that the Constitutional Assembly had no obligation to repeat the provisions of the (interim) **Constitution**; it merely had to incorporate in the new constitutional text all "universally accepted fundamental rights".¹³³ This requirement, according to the Court, had not been breached.

Labour Relations

In this regard, the Court dealt with two objections to Clause 23 of the new constitutional text, namely that the clause violated Constitutional Principles II¹³⁴ and XXVIII.¹³⁵

The Right to Strike and the Right to Lock Out

The main complaint of the objectors in this regard was that, whereas the employees' right to strike had been provided for expressly in the new constitutional text, the employers' right to lock employees out had not been *expressly* recognised therein. This, it should be pointed out, was a basic departure from the (interim) **Constitution** which recognised and protected the right to strike and simultaneously insulated the employers' right to lock out employees.¹³⁶

To this objection, the Court, while conceding that collective bargaining entails a right on the part of those who engage in it to exercise some economic power against their adversaries, quite correctly pointed out that the Constitutional Principles did not prescribe any particular mechanism for the exercise of economic power by employers and employees. It was sufficient for the purposes of Constitutional Principle XXVIII that the right to bargain collectively was specifically protected.¹³⁷

Another objection was that by including the right to strike in the new constitutional text and omitting the right to lock out, the employers' right to collective bargaining was accorded less status than that of employees to engage in collective bargaining. The Court, needless to say, rejected this argument and correctly pointed out that the employers' right to engage in collective bargaining was expressly guaranteed in the new constitutional text.¹³⁸

Of great importance in this regard is the fact that the Court recognised that, *in reality, workers and their employers are not equal*; whereas workers have only one form of economic power they can resort to by way of collective bargaining, employers have a whole panoply of weapons to choose from. It rejected the notion that the right to lock

out is equivalent to the right to strike and its corollary that in order to treat employers and employees equally, both rights should be included in the new constitutional text.¹³⁹

Our law has thus been brought into line with numerous constitutional systems in which only the right to strike, and not the right to lock out, is entrenched as a fundamental right.¹⁴⁰ The employers' right to lock out employees is, at the same time, appropriately located and protected in Chapter 4 of the **Labour Relations Act, 1995**,¹⁴¹ the provisions of which, as the Court pointed out, will always be subject to constitutional scrutiny to ensure that the rights of workers and employers as entrenched in the new constitutional text are honoured.¹⁴² The inclusion of the right to strike and the (deliberate) omission of the right to lock out does not necessarily imply that legislation protecting and regulating the latter within the framework of the new constitutional text will be (automatically) unconstitutional, the Court pointed out.¹⁴³

With regard to the objection that the omission of the right to lock out violated Constitutional Principle II, the Court held that:

[i]t ... cannot be said that the right of employers to lock out workers is a *universally accepted fundamental right* as contemplated by CP II. *The right to lock out is recognised in only a handful of national constitutions and is not entrenched in any of the major international conventions concerned with labour relations.* It cannot be said, therefore, that the omission from NT 23 of a right to lock out is in conflict with CP II.¹⁴⁴ (my italics)

The Right to Bargain Collectively

It was also argued that Clause 23 of the new constitutional text violated Constitutional Principle XXVIII in that it recognised and entrenched only the right of employers' associations to bargain collectively, and not that of individual employers. This objection succeeded, the Court held, because the Constitutional Assembly had failed to recognise that, unlike workers, "[i]ndividual employers ... can engage in collective bargaining with their workers and often do so."¹⁴⁵

This, in my view, is correct.¹⁴⁶ Moreover, in reality, when workers, for any reason (legitimate or otherwise), resort to industrial action, the response, in the form of negotiations, *normally* comes from one employer, their employer, and not necessarily

from an association or organisation of employers. Thus, it is proper to recognise an individual employer's right to bargain (ie negotiate) collectively with his/her/its employees.

Property

In response to the averment that Clause 25 of the new constitutional text did not expressly entrench the right to acquire, hold and dispose of property as did the (interim) **Constitution**, the Court held that *the right to property is not a universally accepted fundamental right* as required in Constitutional Principle II. It further noted that several recognised democracies, such as Canada and New Zealand, made no constitutional provision for the protection of property. The negative formulation contained in Clause 25 appeared to be widely accepted as an appropriate formulation of the right to property. No universal formulation existed; Constitutional Principle II was thus not violated by the negative formulation in the new constitutional text.¹⁴⁷

With regard to the provisions of the property clause dealing with expropriation and compensation, the Court held that there was no universally accepted approach. Therefore, the approach taken in Clause 25 could not be said to flout any universally accepted approach to the question.¹⁴⁸ The Court's response to the objections that the clause made no provision for mineral rights or intellectual property rights was similar; it held that mention of mineral rights or rights to intellectual property in a property clause could not be said to be a universally accepted fundamental practice,¹⁴⁹ and that, therefore, Clause 25 was not flawed in this regard too.

Socio-economic Rights

The new constitutional text gave recognition to socio-economic rights such as the right to housing, health, food, water, social security and basic education. The Court found nothing wrong with the decision of the Constitutional Assembly "to supplement the universally accepted fundamental rights with other rights not universally accepted",¹⁵⁰ such as these socio-economic rights.

It further held that the inclusion of such rights in the new constitutional text did not necessarily entail a breach of the principle of separation of powers.¹⁵¹ Of particular note was its recognition that *socio-economic rights are not totally non-justiciable*. It declared that it was of the view that:

*these rights are, at least to some extent, justiciable. ... many of the civil and political rights entrenched in the NT will give rise to ... budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.*¹⁵² (my italics)

This approach on the part of the Constitutional Court has laid to rest once and for all the debate that raged for some time on this issue.¹⁵³ Those who, like the South African Law Commission,¹⁵⁴ (the late) AS Mathews¹⁵⁵ and Didcott J,¹⁵⁶ argued that socio-economic rights should not be accorded constitutional recognition on par with civil and political rights as they are not justiciable and impose onerous obligations upon the *fiscus* have obviously lost the battle.

Furthermore, our human rights jurisprudence has effectively been liberated from the time warp which had stopped the development of history at the time of *laissez-faire*. It is now acknowledged at the level of the Constitutional Court¹⁵⁷ that the State, which has over time enlarged its reach and responsibility into the economy and the welfare of the people, has certain obligations "to break those economic, cultural and *de facto* barriers that make the legal system and its rights and guarantees a remote, unfulfilled promise for all those who, because of poverty ... are alienated from the official system, the courts, the administrative agencies, the legislatures, indeed, the schools."¹⁵⁸

THE PROSECUTING AUTHORITY

The new constitutional text introduced a new prosecuting authority for the Republic, thus, subject to the new constitutional text,¹⁵⁹ replacing the offices of attorneys-general.¹⁶⁰ This new prosecuting authority must consist of a National Director of Public Prosecutions, who must be the head of the authority and must be appointed by the President of the Republic.¹⁶¹ It must also consist of Directors of Public Prosecutions¹⁶² and prosecutors as determined by an Act of Parliament.¹⁶³

The Constitutional Court rejected the objection to the introduction of the new prosecuting authority as it was not in breach of any of the 34 Constitutional Principles, in particular Constitutional Principle VI.¹⁶⁴ In rejecting the objection, the Court quite correctly pointed out that:

[t]he prosecuting authority is not part of the judiciary ... in any event, even if it were part of the judiciary, the mere fact that the appointment of the head of the national prosecuting authority is made by the President does not in itself contravene the doctrine of separation of powers.¹⁶⁵ (my emphasis)

The Court recognised the right of the Constitutional Assembly to choose the model to be adopted for the prosecuting authority in the new constitutional text.¹⁶⁶ It held that the choice that was made was not inconsistent with any of the 34 Constitutional Principles.¹⁶⁷

It is worthy of note that, under the new prosecuting system, a decision to prosecute or not to prosecute is reviewable by the National Director of Public Prosecutions.¹⁶⁸ Thus, a Director of Public Prosecutions will, for example, no longer be able simply to issue a certificate *nolle prosequi* and bring a criminal matter to an end; the matter may be reopened by or at the instance of the National Director of Public Prosecutions.

Lastly in this regard, prosecutions have now been centralised. Prosecution policy must be determined at the national level "with the concurrence of the Cabinet member responsible for the administration of justice" and after consultation with the Directors of Public Prosecutions responsible for prosecutions in their respective jurisdictions.¹⁶⁹ The National Director of Public Prosecutions may intervene in any prosecution process if the policy directives he or she issues are not complied with.¹⁷⁰

Moreover, the new constitutional text provides explicitly that

[t]he Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.¹⁷¹ (my italics)

Thus, unlike attorneys-general,¹⁷² unless an Act of Parliament provides otherwise, the new prosecuting authority will not be directly accountable to Parliament. It will be

subject to the control and directions of the Minister of Justice as was theoretically the case before the repeal¹⁷³ of Section 3(5) of the **Criminal Procedure Act**.¹⁷⁴

The Court, after rejecting the objection to the choice made by the Constitutional Assembly, reassured us that there is no cause for concern or fear for

NT 179(4) provides that the national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice. There is accordingly a constitutional guarantee of independence, and any legislation or executive action inconsistent therewith would be subject to constitutional control by the courts.¹⁷⁵

IMMUNISING LEGISLATION FROM CONSTITUTIONAL SCRUTINY

An attempt was made under Clause 241(1) of the new constitutional text to, for example, protect the provisions of the **Labour Relations Act, 1995**¹⁷⁶ from constitutional scrutiny. The clause provided that the provisions of the **Labour Relations Act, 1995**, would remain valid until they were either amended or repealed, despite the new constitutional text.

The Court held that this attempt violated Constitutional Principles IV and VII in particular and flew in the face of the supremacy of the new constitutional text. If allowed, it would impermissibly shield an ordinary statute from constitutional review without making it part of the new constitutional text.¹⁷⁷ This was more or less something which the Province of KwaZulu-Natal had attempted to do by means of the suspended parts of its draft Constitution.

This has established a very important principle: Parliament or any legislative authority is not allowed under our constitutional system to shield any statute from constitutional review. In my view, our system will not allow us even to resort to the Canadian formula¹⁷⁸ which, according to Barry L Strayer,¹⁷⁹ allows to Parliament and the provincial legislatures a legislative override of certain fundamental freedoms (such as speech, belief, press, assembly and association).¹⁸⁰

AMENDING THE CONSTITUTION

The Court also had to decide whether the provisions of Clause 74 of the new constitutional text complied with the requirements of Constitutional Principle XV which prescribed "special procedures involving special majorities" for the amendment of the new constitutional text. It found that, while the requirement of "special majorities" had indeed been met, the requirement of "special procedures" had not.¹⁸¹

The Court pointed out that, for example, only the National Assembly and no other House of Parliament could be involved in the amendment of the ordinary provisions of the new constitutional text; no special period of notice was required; and that constitutional amendments could be introduced as part of other draft legislation.¹⁸² It thus held that the absence of relevant procedures was tantamount to a failure to comply with the requirements of Constitutional Principle XV.¹⁸³

Entrenchment of the Bill of Rights

The Court further found that the Bill of Rights was not sufficiently entrenched as required in terms of Constitutional Principle II. It regarded the notion of entrenchment *in the Constitution* as requiring a more stringent protection than that which was accorded to the ordinary provisions of the new constitutional text. Though it was not ready to prescribe to the Constitutional Assembly what the form and content of the special entrenchment mechanism ought to be, the Court held that "the drafters of CP II required that the provisions of the Bill of Rights, given their vital nature and purpose, be safeguarded by special amendment procedures against easy abridgement."¹⁸⁴ A two-thirds majority of one House of Parliament as was initially proposed in the new constitutional text would not constitute the bulwark envisaged by Constitutional Principle II, it further held.¹⁸⁵

INDEPENDENT INSTITUTIONS

The Court was also called upon to determine whether the independence and impartiality of independent institutions, such as the Public Service Commission, the Reserve Bank, the Auditor-General and the Public Protector, were appropriately provided for and

adequately safeguarded in the new constitutional text as was required in terms of Constitutional Principle XXIX. For this purpose, the Court dealt with each one of such institutions separately, in each case looking at factors such as appointment to, tenure of, and removal from, office.¹⁸⁶

Public Protector

The institution of the Public Protector was introduced to the South African legal system by the (interim) **Constitution**.¹⁸⁷ This was an important innovation in the country's attempt to protect the hard-won fundamental rights and freedoms of persons. Prior to that, the Republic had the office of the Advocate-General¹⁸⁸ which was by no means an *ombudsman* in the classical sense and which, instead, constituted "a kind of special purpose ombudsman possessing many of the forms of an ordinary ombudsman but only a very limited jurisdiction."¹⁸⁹ Moreover, as the South African Law Commission pointed out, the procedure for appointing the Advocate-General was contrary to one of the most basic characteristics of an *ombudsman* since the Advocate-General was appointed by the executive authority and not by the legislature or at least with the prior approval of the majority of the legislature.¹⁹⁰ However, even if this procedure had been followed at the time, given the majority of the National Party in the tri-cameral Parliament and the dominance of the Executive, the outcome of that would have been merely cosmetic.

Under the (interim) **Constitution**¹⁹¹ the Public Protector could be removed from office only by the President on the grounds of misbehaviour, incapacity or incompetence, as determined by a joint committee of Parliament and upon receipt of an address from both the national Assembly and the Senate requesting his or her removal. The relevance of this will soon become apparent as we grapple with the Court's refusal to certify that some of the terms of the provisions of the new constitutional text complied with the requirement of Constitutional Principle XXIX in respect of the Public Protector.

Against this background, the Court was obviously even more watchful when scrutinising the provisions of Clauses 181(2),¹⁹² 183,¹⁹³ 193 and 194¹⁹⁴ of the new constitutional text. In an otherwise strange way, it concluded that the provisions governing the removal of the Public Protector from office did not meet the standard demanded by Constitutional

Principle XXIX.¹⁹⁵ According to the Court, though Constitutional Principle XXIX itself was silent on this question, it thought that, because “[t]he independence and impartiality of the Public Protector will be vital to ensuring effective, accountable and responsible government”,¹⁹⁶ the provision in Clause 194 that the Public Protector could be removed from office by resolution of a simple majority constituted inadequate protection.¹⁹⁷

Auditor-General

This was not a new institution. It had existed even under apartheid. The influence of the (interim) **Constitution**¹⁹⁸ was clear when the Court refused to certify that the provisions of the new constitutional text complied with the requirements of Constitutional Principle XXIX in respect of the Auditor-General.¹⁹⁹ To it, due to the importance of the office in ensuring openness, accountability and propriety in the use of public funds, the dismissal provisions affecting the Auditor-General were not sufficient to meet the requirements of the Constitutional Principle.²⁰⁰ It concluded that more stringent dismissal requirements than were provided for were required.²⁰¹

The Public Service Commission

The Court also had occasion to evaluate the provisions of Clauses 196 and 197²⁰² of the new constitutional text and determine whether Constitutional Principles XX, XXIX and XXX.1 had been complied with. It observed that, while Clause 196 made provision for a public service commission, its powers were not dealt with in the new constitutional text.²⁰³ Though acknowledging that all that was required was an independent and impartial public service commission, the Court concluded that it could not certify that Constitutional Principle XXIX had been complied with. It said that the defect lay in, *inter alia*, the fact that the functions and powers of the public service commission were not provided for in the new constitutional text and that it was not clear from the text what protection the commission would have in order to ensure that it would be able to discharge its constitutional duties independently and impartially.²⁰⁴ Once again, the influence of the (interim) **Constitution** was clear in this regard.²⁰⁵

Furthermore, while it acknowledged that there was no requirement in the Constitutional Principles that there be provincial public service commissions,²⁰⁶ it would appear that, on the face of it, the Court nonetheless thought that the new text should have made provision for such commissions because “the powers of the national sphere of government and of the PSC in respect of provincial administrations are relevant to an evaluation of the autonomy and powers of the provinces.”²⁰⁷ It observed that the notion that there should be only one public service commission was a clear departure from the provisions of the (interim) **Constitution** which empowered the provinces to establish their own provincial public service commissions (ie if they so chose) as the new (single) Public Service Commission was intended to replace both the then existing Public Service Commission and the provincial service commissions.²⁰⁸ It refused to certify that the relevant Constitutional Principles were complied with without knowing what control the provinces would have over appointments to and the staffing of provincial administrations.²⁰⁹

Could it be that the Court saw through, and thus foiled, a veiled attempt on the part of the national government to arrogate to itself the power over appointments to and the staffing of the public service in general? Could it be that, had the Court not done so, it would have allowed the national government to exercise its powers so as to encroach upon the institutional integrity of the provinces in flagrant violation of Constitutional Principle XXII? Could it be that it would also have allowed for a substantial reduction of the powers of the provinces to establish their own public service commissions,²¹⁰ which would have constituted a glaring violation of Constitutional Principle XVIII.2?²¹¹

For the Court, everything in this regard turned on who had the power to make the appointments to the public service in respect of provincial administrations.²¹² It did not matter so much that the provinces would no longer have the power to establish their own public service commissions (if they so chose),²¹³ for

[i]f the PSC has advisory, investigatory and reporting powers which apply equally to the national and provincial governments, and the provinces remain free to take decisions in regard to the appointment of their own employees within the framework of uniform norms and standards, the changes will neither infringe upon their autonomy, nor reduce their powers. But if the provinces are deprived of the ability to take such decisions themselves, that would have a material bearing on these matters.²¹⁴ (my emphasis)

The Court held that the mere fact that the new constitutional text made provision for a single national public service commission did not mean that the legitimate autonomy of the provinces would necessarily be impaired or, for that matter, that their powers would be reduced.²¹⁵ It opined that adequate provision had been made for the provinces to make a contribution to the work of a single national public service commission which would be subject to national legislation made in conjunction with the National Council of Provinces.²¹⁶

LOCAL GOVERNMENT

The Court observed in this regard that the new constitutional text gave more autonomy direct to local government structures than did the (interim) **Constitution**. The Court further observed, however, that the fact that the autonomy of such structures derived directly from the new constitutional text entailed a diminution in provincial powers and functions in so far as they pertained to the role of local government.²¹⁷

Be that as it may, the Court had to determine whether the provisions of the new text which dealt with the issue of local government complied with the requirements of the relevant Constitutional Principles. In terms of Constitutional Principle XXIV, a framework for local government powers, functions and structures was required to be provided for in the new text. The Court held that, at the very least, this requirement necessitated the setting out in the new text of different categories of local government that could be established by the provinces and a framework for their structures. Such a framework also required an indication of how local government executives were to be appointed, how local government decisions were to be taken, as well as an indication of the formal legislative procedures demanded by Constitutional Principle X. Providing only for one local government type and structure, as did the provisions of Clause 151, was inadequate. For its failure to grapple with this properly, the Court would not certify that that clause complied with the requirements of Constitutional Principles X and XXIV.²¹⁸

Furthermore, Constitutional Principle XXV required that the local government framework the Court thought was envisaged in Constitutional Principle XXIV should "make provision for appropriate fiscal powers and functions for different categories of local

government." As no provision was made for such powers and functions in the new text, the Court refused to certify that Clause 229 complied with the requirements of Constitutional Principle XXV.

PROVINCIAL POWERS

As stated earlier on, Constitutional Principle XVIII.2 provided that the powers and functions of the nine provinces as defined in the new text, including the competence of a provincial legislature to adopt a constitution for its province, should not be *substantially less than or substantially inferior* to those provided for in the (interim) **Constitution**. That, according to the Court, was a guarantee that provincial powers and functions would not be substantially reduced by the provisions of the new text.²¹⁹

For this purpose, a comparison between the structures, powers and functions of the provinces provided for under the (interim) **Constitution** and those provided for under the new text was necessary. The Court observed that in the application of Constitutional Principle XVIII.2, there were of necessity two enquiries: Were the powers, functions and status of the provinces in terms of the new text less than or inferior to those provided for in the (interim) **Constitution**? If not, that would be the end of the enquiry in that respect. If, however, they were indeed less or inferior, the second question should be whether they were substantially less or substantially inferior.²²⁰

To achieve the objective of this exercise, the Court looked at a whole range of questions dealt with briefly below, to the extent that it is necessary to do so.

The National Council of Provinces

The starting point for the Court was to determine whether the National Council of Provinces,²²¹ which replaced the Senate,²²² was superior or inferior in status and power to the Senate as an institution. To achieve that objective, it had to distinguish the powers, functions and status of the Senate, through which the provinces expressed their input in the national and political institutions of the Republic under the (interim) **Constitution**, from the corresponding powers, functions and status of the National

Council of Provinces through which that input was to be made under the new constitutional text.

For this purpose, it first contrasted how the Senate was composed²²³ to how the National Council of Provinces would be composed. Due to the fact that Senators were *nominated* by their parties, and not by their provinces, the Court concluded that the representation of the provinces in the Senate was indirect and weak.²²⁴ As an institution, the Senate, the Court held, was more a House in which party political interests were represented than a House in which provincial interests were represented.²²⁵

The next question the Court considered was the role played by the Senate in the making of national legislation as opposed to the role the National Council of Provinces would play in this regard. It noted that, for instance, whereas all parliamentary bills had to be presented to the Senate for consideration, and that whereas the Senate had a veto in certain respects, the new text provided that a dissent in the National Council of Provinces could be overridden by a two-thirds majority in the National Assembly. In certain matters where a joint sitting of the National Assembly and the Senate was required under the (interim) **Constitution** the new text would empower the National Assembly to take decisions on its own. Unlike the Senate,²²⁶ the National Council of Provinces would not participate in the election or impeachment of the President. Neither would the National Council of Provinces have the power to refer bills to the Constitutional Court.²²⁷ As the Court observed, in some respects the Senate had greater power than the National Council of Provinces; in other respects it had less.²²⁸

However, though the Court was satisfied that the structure and functioning of the National Council of Provinces as provided for in the new text were better suited to the representation of provincial interests than the structure and functioning of the Senate, it could not conclude from this that the collective interests of the provinces would necessarily be enhanced by the changes thus effected.²²⁹ As there were rather too many uncertainties and variables in this regard,²³⁰ though the Court was satisfied that there had been no reduction in the collective powers of the provinces, it was unable to conclude that there had been a measurable enhancement of such powers either.²³¹

It is noteworthy that, in this regard, certification was not refused on the basis that the relevant provisions of the new text failed to comply with the requirements of a Constitutional Principle, to wit Constitutional Principle XVIII.2, but purely on the basis that the new text would not effect a measurable enhancement of the collective powers of the provinces. The Court did not suggest that the structure, powers and functions of the provinces were in any way whatever substantially reduced by the changes that the new text sought to effect. To me this smacks of a departure on the part of the Court from its chosen path, namely to enquire whether or not the whole of the new text or portions thereof failed to comply with any of the requirements of the 34 Constitutional Principles.²³² At the same time, of course, the Court's analysis of the differences between the Senate and the National Council of Provinces was a useful and helpful exercise.

The Legislative Powers of the Provinces

The Court compared the legislative powers the provinces had under the (interim) **Constitution** and those the new text sought to confer upon them. In the course of this exercise, it observed that more powers were given to the provinces in the sense that a category of *exclusive legislative powers* was introduced by the new text.²³³ However, with regard to *concurrent legislative powers* the Court pointed out that the new text sought to impose an onerous presumption of necessity in favour of the national government.²³⁴ Furthermore, it noted that an override in favour of national legislation was imposed to ensure uniformity, by establishing "frameworks" or "national policies" for example.²³⁵

Upon comparing the lists of the powers of the provinces under the (interim) **Constitution** and those under the new text, the Court found that there was an increase of the powers of the provinces under the new text "only to a marginal degree."²³⁶ The Court also observed that none of the functional areas set out in Schedule 6 to the (interim) **Constitution** had been excluded.²³⁷ However, after a long survey of the content of the powers and functions of the provinces, it came to the conclusion that the powers and functions of the provinces under the new text were in some instances, albeit

to varying degrees, less than, and inferior to, those which the provinces had and enjoyed under the (interim) **Constitution**.²³⁸

Having come to this conclusion, the Court had to consider whether there was a substantial reduction of the powers and functions of the provinces under the new text. For this purpose, it linked this question to the fact that in the new constitutional text the issues relating to the powers of the provinces in regard to the appointment of their own employees, as well as the powers and functions of the national public service commission, had not been clarified. It also considered that, as matters stood, there was no material difference between the Senate and the National Council of Provinces. It looked at the areas where the powers and functions of the provinces were obviously less than and inferior to those which the provinces had under the (interim) **Constitution**.

In particular, this was the case in respect of police powers, education, local government, traditional leadership, lotteries and sports pools,²³⁹ though the curtailment in these areas would not in itself be sufficient to lead to this conclusion.²⁴⁰ However, the curtailment in these areas, put together with the presumption of necessity favouring national legislation and the alteration in the scope of the override in respect of national intervention in concurrent legislative powers affected the attitude of the Court.²⁴¹

It came to the conclusion that the new constitutional text did not satisfy the requirements of Constitutional Principle XVIII.2.

CONCLUSION AND ORDER

Though the Constitutional Court could not certify the new constitutional text as being consistent with all the 34 Constitutional Principles contained in Schedule 4 to the (interim) **Constitution**, it nonetheless commended the Constitutional Assembly for drafting and adopting a text which complied with the overwhelming number of the requirements of the Constitutional Principles. The Court concluded that, though singly and collectively important, the instances of non-compliance which it had identified

should present no significant obstacle to the formulation of a text that would comply fully with the relevant requirements.

The Court, acting under Section 73A(1) of the (interim) **Constitution**,²⁴² referred the new text back to the Constitutional Assembly for appropriate action. It was then left to the Constitutional Assembly to return to the drawing board to grapple with the shortcomings thus identified.

The Constitutional Assembly reassembled²⁴³ promptly to produce an amended text. The amended text, which not only addressed the grounds for non-certification of the original text but also effected many editorial and minor changes to the text, was passed on 11 October 1996 by more than the required majority in the Constitutional Assembly.

CERTIFICATION OF THE AMENDED CONSTITUTIONAL TEXT

In *In re: Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996*,²⁴⁴ the Constitutional Court was required to consider afresh whether the amended text complied with the Constitutional Principles. Unlike in the **Certification** judgment, the scope of the exercise was considerably narrower and much more focused. The Court acknowledged at the very outset that the Constitutional Assembly had conscientiously addressed the shortcomings the Court had identified in the **Certification** judgment and made a concerted effort to rectify them.²⁴⁵ It further noted that the Constitutional Assembly had also eliminated many of the original grounds for non-certification and thus removed the major areas of contention.²⁴⁶

A summary of some of the issues the Court dealt with in this case, and of the way in which it grappled with them, is provided hereunder.

THE BILL OF RIGHTS

Under this heading, the Court dealt with some of the following questions:

Freedom of Occupational Choice

The basic objection to the amended text in this regard was that Clause 22²⁴⁷ tended to confine the enjoyment of this freedom to *citizens*, whereas it should be extended to everyone, irrespective of citizenship. For one thing, the Court was not persuaded that this right was a “universally accepted fundamental right” as required in terms of Constitutional Principle II.²⁴⁸

It then looked at numerous international instruments of human rights to see if states are obliged to treat citizens and non-nationals equally as far as the choice of occupation is concerned. It concluded in this regard that:

[t]here does not appear to be anything in these instruments which would prohibit States Parties when regulating these matters from imposing suitable conditions, which would not otherwise conflict with the instruments, limiting the rights of non-nationals in respect of freedom of occupational choice.²⁴⁹

I can only agree with the Court in this regard. In countries where the right to pursue a livelihood in the national territory of a state is constitutionally guaranteed, it is generally reserved for citizens and, in some instances, for persons with the status of permanent residents. Each country has a distinctive regime of law governing entry into each industry, trade, profession or occupation.

The issue of the freedom of occupational choice arose in the Canadian case of **Law Society of Upper Canada v Skapinker**,²⁵⁰ for example. Non-citizens are not as a matter of right “entitled to be treated on the same footing as citizens in regard to the freedom of occupational choice.”²⁵¹

Self-determination

The Court was called upon to determine whether the provisions of Clause 31 of the amended text complied with Constitutional Principle XII.²⁵² For the Court, the provisions of Clause 31, viewed in their proper context, complied with the requirements of Constitutional Principle XII.²⁵³

Of particular note in this regard was the Court's observation that Constitutional Principle XII did not indicate how the collective rights of self-determination were to be recognised and protected.²⁵⁴ It held that:

[t]hat was a matter for the CA to decide. Having regard to the CPs as a whole, the "collective rights of self-determination" mentioned in CPII are associational individual rights, namely those rights which cannot be fully or properly exercised by individuals otherwise than in association with others of like disposition. The concept "self-determination" is circumscribed by both what is stated to be the object of self-determination, namely, "forming, joining and maintaining organs of civil society" as well as by CPI which requires the state for which the Constitution has to provide, to be "one sovereign state". In this context "self-determination" does not embody any notion of political independence or separateness. It clearly relates to what may be done by way of the autonomous exercise of these associational individual rights in the civil society of one sovereign state.²⁵⁵ (my emphasis)

I have no doubt that this judicial definition of the right to self-determination within the South African context has put paid to the notion of a *Volkstaat*, a separate territorial entity which, according to one commentator, some of "its proponents would understand to be constitutionally autonomus from government at national and regional level."²⁵⁶

Evidence Obtained in Violation of the Bill of Rights

In the **Certification** judgment the Court had pointed out that, in its opinion, the list of non-derogable rights should have been compiled more rationally and thoughtfully than had been done in the new text. Presumably as a result of this observation, the Constitutional Assembly amended the text and, in the process, included the right to have evidence obtained in violation of the Bill of Rights excluded at a criminal trial *if its admission would render the trial unfair*.²⁵⁷

Thus, under the (new) **Constitution**²⁵⁸ "[e]vidence obtained in a manner that violates any right in the Bill of Rights must be excluded *if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.*"

In this regard, our law goes a little further than the provisions of the (Canadian) Charter of Rights and Freedoms,²⁵⁹ and is now closer to the provisions of the (English) Police and Criminal Evidence Act, 1984,²⁶⁰ as well to the interpretation of the fourth, fifth and fourteenth amendments in the United States, for example. This is a basic shift from the

common law position which was based on the UK decision in **Kuruma v R.**²⁶¹ Thanks to this change, the question of the admissibility of illegally or improperly obtained evidence will no longer turn solely on the utilisation of a discretion by the court.²⁶²

AMENDING THE CONSTITUTION

Special Procedures

According to Constitutional Principle XV

[a]mendments to the Constitution shall require *special procedures* involving *special majorities*. (my emphasis)

As a result of the Court's ruling in the **Certification** judgment that the new constitutional text did not comply with Constitutional Principle XV because of the absence of special, more stringent, procedures for the amendment of the Constitution, the Constitutional Assembly set out the necessary procedures in Section 74(4) to (7) of the amended text. The Court thus declared that "[w]e are satisfied that the procedures prescribed by the AT meet the requirements of CP XV and in the circumstances we hold that the AT complies with CP XV in so far as it requires special procedures to be followed for constitutional amendments."²⁶³

Special Majorities

Under the new constitutional text constitutional amendments affecting the National Council of Provinces, altering provincial boundaries, powers, functions or institutions, or amending a provision dealing specifically with a provincial matter, required the support of two-thirds of the members of the National Assembly and six provinces in the National Council of Provinces. Other constitutional amendments, including amendments to the Bill of Rights, required the support of two-thirds of the members of the National Assembly, but did not have to be passed by the National Council of Provinces.

The Court noted that the 34 Constitutional Principles did not require a bicameral Parliament; nor, if there were to be two Houses of Parliament, did they require all legislation to be passed by each House.²⁶⁴ For this reason, the Court held that:

[t]he CA was entitled to vest the power to effect other amendments to the Constitution in the NA alone, as long as it did so in a manner that complied with CP XV.²⁶⁵

The National Assembly makes its decisions in this regard by a two-thirds majority of its members. This, the Court held, met the *special majorities* requirement of Constitutional Principle XV.²⁶⁶

Although the National Council of Provinces does not vote on other constitutional amendments, it has to be consulted in regard to them. Moreover, thirty days before such an amendment is introduced in the National Assembly, particulars of the bill amending the (new) **Constitution** must be published in the Government Gazette for public comment, submitted to each provincial legislature for their views, and to the National Council of Provinces for public debate.

Amending the Bill of Rights

However, the Court made a distinction between such amendments and amendments of the Bill of Rights. This was most probably because the Bill of Rights was affected by Constitutional Principle II.

As a result of the Court's ruling in the **Certification** judgment that for the purposes of the *entrenchment* requirement of Constitutional Principle II it was not sufficient that only the National Assembly could amend the Bill of Rights, the Constitutional Assembly changed its position. Now the consent of a special majority of the National Council of Provinces²⁶⁷ has been added as a requirement for the amendment of the Bill of Rights. According to the Court, "[t]his consent may not be dispensed with by the NA acting on its own ... In the circumstances, we are of the view that there has been compliance with CP II."²⁶⁸

LOCAL GOVERNMENT

In the **Certification** judgment the Court had held that the chapter dealing with local government failed to comply with Constitutional Principle XXIV in that it did not provide a "framework for the structures" of local government.²⁶⁹ It had further held that the chapter failed to comply with Constitutional Principle XXV in that it did not provide for appropriate fiscal powers and functions in respect of different categories of local government; and with Constitutional Principle X in that it did not provide for formal legislative procedures to be adhered to by local government legislatures.

The Constitutional Assembly amended the new text and specified *three different categories of municipalities* that can be established in the Republic.²⁷⁰ The Court quite correctly pointed out that as Constitutional Principle XXIV contemplated that the (new) **Constitution** would provide no more than a framework and that the details of the local government system would be a matter for legislation,²⁷¹ the requirements of the Constitutional Principle had since been met.²⁷²

Furthermore, the amended text provided for a framework for the fiscal powers and functions of municipalities, revenue allocation to municipalities, the preparation of budgets, treasury control, and the procurement of goods and services. The Constitutional Assembly also made provision in the amended text for how local government executives are to be appointed, how local governments are to take their decisions, and for the formal legislative procedures to be followed. The Court held that all this, in the context of the overall scheme of things, was sufficient to meet the requirements of the relevant Constitutional Principle.²⁷³

TRADITIONAL MONARCH

Constitutional Principle XIII.2 required that the (new) **Constitution** should recognise and protect "[p]rovisions in a provincial constitution relating to the institution, role, authority and status of a traditional monarch". The Court held that Constitutional Principle XIII.2 did "not require the relevant provisions of a provincial constitution to be

given a position of supremacy in the national constitution, allowing them to prevail over all other protected interests.²⁷⁴ What was required, it further held, was that

the institution of the monarchy should be given the recognition and protection that it needs to enable it to carry out its traditional role and to maintain its status and authority, *consistent with the constraints inherent in a republican and wholly democratic constitutional order.*²⁷⁵ (my emphasis)

The Court, after a careful survey and examination of the amended text, came to the conclusion that the recognition and protection required by Constitutional Principle XIII.2 were afforded by the relevant provisions of the amended text and held that, therefore, the amended text complied with the Constitutional Principle.²⁷⁶

COMPLIANCE WITH CONSTITUTIONAL PRINCIPLE XVIII.2

The Presumption of Necessity

In the **Certification** judgment the Court had held that the powers and functions of the provinces defined in the new text were, in certain respects, less than or inferior to the corresponding powers and functions of the provinces that were then contained in the (interim) **Constitution**. In addition, there was a problem with the Clause 146(4) presumption of necessity which favoured national legislation as well as with the alteration in the scope of the override then contained in Clause 146(2)(b) of the new text. The combined weight of these factors had brought the Court to the conclusion that the powers and functions of the provinces were indeed not only less than or inferior to those then contained in the (interim) **Constitution**, but were also substantially less or inferior. For that reason, the provisions of the Constitutional Principle had not been satisfied.

The Constituent Assembly removed the presumption of necessity and completely replaced Clause 146(4). As a result, the Court observed,²⁷⁷

[t]he issue as to whether or not the particular national legislation dealt with a matter which was necessary for the maintenance of national security or economic unity or the protection of the common market or any of the other factors listed in ... 146(2)(c) is now *objectively justiciable in a court* without any presumption in favour of such national legislation. If it is not established that the

legislation is necessary for any of the purposes identified by ... 146(2)(c), the national government will not be entitled to rely on ... 146(2)(c) in order to ensure that such national legislation prevails over any conflicting provincial legislation dealing with the matter. (my italics)

This change satisfied the Court.²⁷⁸

Provincial Police Powers

This was one of the areas where the Court in the **Certification** judgment had held that the powers and functions of the provinces encapsulated in the new text were less than or inferior to those the provinces had under the (interim) **Constitution**. Though the Constitutional Assembly effected some changes,²⁷⁹ the Court held that a comparison between the new text, the amended text and the corresponding provisions of the (interim) **Constitution** in this regard showed that the powers and functions of the provinces in the amended text in respect of the police were still less than or inferior to those contained in the corresponding provisions of the (interim) **Constitution**.²⁸⁰

Be that as it may, the Court noted that the amended text gave the provinces a greater say in the appointment of their provincial police commissioners than had been the case in the new text.²⁸¹ It further observed that the monitoring and overseeing functions of the provinces were "also given more teeth by the power given to the provinces to investigate or to appoint a commission of enquiry into any complaints of police inefficiency or a breakdown in relations between the police and any community."²⁸² Moreover, the amended text gave provincial legislatures "a potentially important power of control ... by the right to require the provincial commissioner to appear before it or any of its committees to answer questions."²⁸³

The Court seems to have been persuaded to think that the provinces were adequately compensated for the diminution of their powers and functions in this regard. A more plausible explanation of its conclusion that "although *the more expansive powers of the provinces in the area of policing provided for in the IC have not been fully restored*, there is nevertheless a significantly greater degree of power and control which vests in the provinces in this area in the AT compared with the corresponding powers of provinces contained in the NT"²⁸⁴ (my emphasis) does not seem to be available.

The National Council of Provinces and Local Government

After an analysis of what the Constitutional Assembly had done to enhance the powers of the National Council of Provinces, the Court still felt that it was unable to discern whether that would result in a substantial increase in the collective powers of the provinces.²⁸⁵ There appeared to the Court to be no differences relevant to the NCOP between the new text and the amended text which could have any influence on the enquiry required by Constitutional Principle XVIII.2.²⁸⁶

In respect of the powers of the provinces in relation to local government, the Court held that the amended text did not effect any major improvement on the corresponding provisions of the new text. The powers and functions of the provinces were effectively the same as the powers they would have enjoyed under the new text and they still remained less than the powers the provinces enjoyed under the (interim) **Constitution**.²⁸⁷

Be that as it may, the Court, as will appear more fully below, certified the amended text as being consistent with the Constitutional Principles.

INDEPENDENT INSTITUTIONS

In the **Certification** judgment the Court had found flaws in the way in which the institutions of the Public Service Commission, the Public Protector and the Auditor-General had been dealt with in the new constitutional text. As a result of the Court's observations in this regard, the provisions dealing with the Public Service Commission, including procedures for the appointment and removal of commissioners, and the provisions dealing with the appointment and removal from office of the Public Protector and the Auditor-General were appropriately amended by the Constitutional Assembly. The Court concluded that the amended text had substantially enhanced the independence of both the Public Protector and the Auditor-General as the incumbents can now be appointed after a resolution of the National Assembly supported by at least sixty per cent of its members and removed after a resolution thereof supported by at least two-thirds of its members.²⁸⁸ It was thus satisfied that the requirements of

Constitutional Principle XXIX had been met in respect of both the Public Protector and the Auditor-General.²⁸⁹

The Public Service Commission

In this regard, the Constitutional Assembly in the amended text persisted in establishing a single Commission for the whole Republic and no provincial service commissions. After a careful analysis of the provisions of the powers of the single Public Service Commission in Clause 196(4), the Court concluded that the role of the single Public Service Commission would be far less significant than it was under the (interim) **Constitution**.²⁹⁰

The Court observed that what the Constitutional Assembly had simply done was to make "it clear that it is the provincial governments that are responsible for the recruitment, appointment, promotion, transfer and dismissal of members of the public service in their administration, all within a framework of uniform norms and standards applying to the public service."²⁹¹ Furthermore, some of the powers the national Public Service Commission and the provincial public service commissions had under the (interim) **Constitution** were given to the single Public Service Commission or to the national government and provincial executives respectively.²⁹² Lastly, the functions of the Public Service Commission were clearly defined in the amended text.²⁹³

Though the Court observed that the shift to a single Public Service Commission represented some diminution of provincial power,²⁹⁴ in the sense that the provinces lost the power to establish provincial public service commissions, it concluded that this bane was in effect a boon! The provinces gained greater powers and functions in respect of the single Public Service Commission, which would consist of fourteen commissioners, five approved by the National Assembly, and one from each of the nine provinces, nominated by each premier. The Court thus held that "[t]his gives the provinces a majority of the commissioners. The single PSC is therefore an important site of collective provincial power."²⁹⁵

However, the Court felt that, though the new Public Service Commission arrangements would compensate the provinces for the loss of the power to establish their own public service commissions by affording them collective power on the single Public Service Commission, there would still remain "a conceptual and residual difference between an autonomous power of a province to create its own commission, on the one hand, and on the other hand the power of such a province to participate in the collective power of the provinces in that they appoint a majority of the members of the PSC."²⁹⁶ After weighing all the necessary factors, it concluded that "there has been a small diminution in the powers of the provinces arising out of the alteration in the functions of the PSC, the change in its composition, and the disestablishment of provincial service commissions."²⁹⁷ But this diminution would not materially affect the balancing process, the Court held.²⁹⁸

CONCLUSION AND ORDER

Though the Court came to the conclusion that, in certain respects, "*the powers and functions of the provinces in terms of the AT are still less than or inferior to those accorded to the provinces in terms of the IC*",²⁹⁹ (my emphasis) it nonetheless certified that all the provisions of the amended text passed by the Constitutional Assembly on 11 October 1996 complied with the 34 Constitutional Principles,³⁰⁰ because the powers and functions of the provinces contained in the amended text were not substantially less or inferior.³⁰¹ Thus was the (new) **Constitution of the Republic of South Africa, 1996**,³⁰² born. Most of the provisions of the (new) **Constitution** came into operation on 4 February 1997.³⁰³ The exceptions were Section 160(1)(b), which would require a municipal council to elect its chairperson and which would come into effect on 30 June 1997, and a number of provisions dealing with financial matters which would only come into effect on 1 January 1998.³⁰⁴

ENDNOTES - CHAPTER FOURTEEN

1.. As was required in terms of Rule 16(1) of the **Rules of the Constitutional Court**, read with Section 160(4) of the (interim) **Constitution**. If the Constitutional Court certified that none of the provisions of a provincial constitution was inconsistent with the (interim) **Constitution** and the 34 Constitutional Principles set out in Schedule 4 thereto, the document would become law; if for any reason it did not grant certification, the document would have to be reconsidered and a new or amended constitution would have to be passed by the Legislature, if it still wished to pass a constitution for its province.

2.. As was required in terms of Rule 15(1) of the **Rules of the Constitutional Court**, read with Section 71(2) of the (interim) **Constitution**.

3.. In **In re: Certification of the Constitution of the Republic of South Africa, 1996**, 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at BCLR 1264, paragraph 1, the Constitutional Court described judicial certification of a constitution as being unprecedented. The (interim) **Constitution** provided for an independent arbiter that would ascertain and declare whether in the one instance the text of the provincial Constitution complied with both the (interim) **Constitution** and the 34 Constitutional Principles and, in the other instance, whether the text of the final Constitution complied with the Constitutional Principles, before each could come into force.

4.. Which the preamble to the (interim) **Constitution** described as a solemn pact. It is noted that the Constitutional Principles were entrenched and protected by Section 74(1) of the (interim) **Constitution** from amendment and repeal. See Section 160(4) of the (interim) **Constitution**. In **In re: Certification of the Constitution of the Republic of South Africa, 1996**, *supra* BCLR at 1351, paragraphs 306 and 307, the Constitutional Court pointed out that, although Constitutional Principle XVIII.2, for example, was introduced later to, *inter alia*, encourage political formations which had refused to participate in the transition process to change their minds and to support the transition to a new political order, its provisions should not be given greater weight than the rest; none of the Constitutional Principles could be characterised as being more important than the others.

5.. See Section 71(2) of the (interim) **Constitution**.

6.. See Sections 71(3) and 160(5) of the (interim) **Constitution**.

7.. Section 73(1) of the (interim) **Constitution**.

8.. Such as Kierin O'Malley who said in his article, 'The 1993 Constitution of the Republic of South Africa - The Constitutional Court', in **Journal of Theoretical Politics** (Vol. 8, Sage Publications, London, April 1996) 177 at 178 that: "... the Constitutional Court could well become an excessively politicized body. South African law, and specifically its constitutional law, and the courts generally will become increasingly politicized and the crucial distinction between law and politics weakened ... The result could be that the doctrine of the separation of powers, which Constitutional Principle VI of Schedule 4 requires the final constitution to comply with, will be weakened. Appointed, unaccountable judges will effectively become legislators in crucial areas of public policy."

9.. Subject to the provisions of Section 160 of the (interim) **Constitution**.

10.. In terms of Section 160(1) of the **Constitution**, a two-thirds majority resolution of all the members of the Legislature would have sufficed.

11.. The second largest political party represented in the Legislature. See the **Report of the Independent Electoral Commission: the South African Elections of April 1994** (Independent Electoral Commission, Johannesburg, October 1994) at 75.

12.. **In re: Certification of the Constitution of the Province of KwaZulu -Natal, 1996**, 1996 (11) BCLR 1419 at 1425, paragraph 12.

13.. Which in **In re: Certification of the Constitution of the Province of KwaZulu-Natal**, *op cit* 1424, paragraph 8 the Court held required a two-step approach. At, paragraph 12, the Court correctly pointed out that the fact that the provincial Constitution had been passed *unanimously* by the Legislature in this instance could not in any way influence the duty imposed upon it by the provisions of Section 160 (4) of the (interim) **Constitution**.

14.. See the decision of the Constitutional Court in **In re: Certification of the Constitution of the Province of KwaZulu-Natal**, *op cit* 1422, paragraph 3 for the specific objections.

15.. *Ibidem*.

16.. The provisions of section 160(4), read with section 160(3)(b) of the (interim) **Constitution** are important to note in this regard.

17.. Section 160(3)(b) of the (interim) **Constitution**.

18.. **In re: Certification of the Constitution of the Province of KwaZulu-Natal**, *op cit* 1422, paragraph 3.

19.. *Ibidem*.

20.. Section 160(3)(a).

21.. **In re: Certification of the Constitution of the Province of KwaZulu-Natal**, *op cit* 1423, paragraph 5.

22.. An element of political asymmetry which, if anything, clearly reflected some of the basic weaknesses of the Kempton Park compromise.

23.. **In re: Certification of the Constitution of the Province of KwaZulu-Natal**, *op cit* 1422-1423, paragraph 4.

24.. *Ibidem* at 1423, paragraph 5.

25.. *Ibidem*, paragraph 6.

26.. See section 160(3) and (4) of the (interim) **Constitution**.

27.. See, for example, Schreiner JA in **Jaga v Dönges NO**, 1950 (4) SA 653 (A) at 662-664. See also Wessels JA in **Stellenbosch Farmers' Winery Ltd v Distillers Corp (SA) Ltd**, 1962 (1) SA 458 (A) at 476.

28.. For which see the provisions of sections 125(2), (3), 126(1), (2), (3), (4) and (5) of the (interim) **Constitution**, as well as Schedule 6 thereto. It is also noteworthy that, unlike the legislative powers of provinces, the plenary legislative powers of Parliament, which were exercised over the whole of the national territory of the Republic in terms of Section 37 of the (interim) **Constitution**, were not restricted to any "matters" of specific functional areas. See **Ex parte Speaker of the National Assembly: In re: Dispute Concerning the Constitutionality of Certain Provisions of the National Education Bill 83 of 1995**, 1996 (3) SA 289 (CC); 1996 (4) BCLR 518 (CC), paragraphs 7 and 13.

29.. **In re: Certification of the Constitution of the Province of KwaZulu-Natal**, *op cit* 1424, paragraph 8.

30.. The provisions of chapter 1 of the provincial Constitution which dealt with "Fundamental Principles", the majority of which the Court suggested would be appropriate in a national constitution, was the main culprit in this regard. *Ibidem* at 1426, paragraph 14. See *Ibidem*, paragraph 16 for examples of this. At, paragraph 15, the Court said that such provisions appeared "to have been passed by the KZN Legislature under a misapprehension that it enjoyed a relationship of co-supremacy with the national Legislature and even the Constitutional Assembly." (my emphasis)

31.. *Ibidem* at 1426, paragraph 14.

32.. *Ibidem*.

33.. *Ibidem*. Chaskalson P had earlier on explained this in **Ex parte Speaker of the National Assembly: In re: Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill, 1995**, 1996 (4) BCLR 518 (CC) at 529, paragraph 23.

34.. **In re: Certification of the Constitution of the Province of KwaZulu-Natal, 1996**, *op cit* 1426-1427, paragraph 17.

35.. *Ibidem* at 1427, paragraph 18.

36.. *Ibidem*, paragraph 19.

37.. *Ibidem*.

38.. *Ibidem* at 1430, paragraph 27.

39.. *Ibidem* at 1428, paragraph 22.

40.. *Ibidem*.

41.. *Ibidem*.

42.. *Ibidem* at 1430, paragraph 27.

43.. *Ibidem*.

44.. *Ibidem* at 1432, paragraph 32. See also **In re: Certification of the Constitution of the Republic of South Africa, 1996**, 1996 (10) BCLR 1253 (CC) at 1341-1342, paragraph 271.

45.. See Chapter 8 of the provincial Constitution.

46.. *Ibidem*, clauses 1(3) and (4)

47.. *Ibidem*.

48.. **In re: Certification of the Constitution of the Province of KwaZulu-Natal, 1996**, *op cit* 1432, paragraph 33.

49.. *Ibidem*.

50.. Chapter 5, clauses 2(1) and (2)

51.. **In re: Certification of the Constitution on the Province of KwaZulu-Natal, 1996**, *op cit* 1433, paragraph 36.

52.. *Ibidem*.

53.. See Chapter 1, clause 1(9) of the provincial Constitution.

54.. Chapter 4, clause 1(1) of the provincial Constitution.

55.. **In re: Certification of the Constitution of the Province of KwaZulu-Natal, 1996**, *op cit* 1433, paragraph 36.

56.. *Ibidem*.

57.. *Ibidem*. At 1434, paragraph 38, the Court, having seen through the scheme, described is as “nothing other than a device to avoid the express requirements of section 160(4)” of the (interim) **Constitution**.

58.. See, for example, Chapter 1, Chapter 3, Chapter 4 clause 1(2), Chapter 5, Chapter 8, certain provisions of Chapters 9, 12, and 13, Chapter 14 clause 2(12) as well as Chapter 15 of the provincial Constitution.

59.. **In re: Certification of the Constitution of the Province of KwaZulu- Natal, 1996**, *op cit* 1435, paragraph 41. In paragraph 42, the Court correctly held that a suspended part of the text of a provincial constitution remained part of the text and did not cease to be contingent upon the happening of a future event.

60.. *Ibidem*, paragraph 42.

61.. *Ibidem* at 1437, paragraph 46.

62.. *Ibidem*.

63.. *Ibidem*, paragraph 48.

64.. *Ibidem*, paragraph 47.

65.. Which, like those of Australia, are known as states. It is noted that the regions in Canada, a federation, are also known as provinces.

66.. It is noteworthy though that the US Supreme Court has given different constructions to these words at different times in the history of the US. For much of the nineteenth and into the early twentieth century, the Court interpreted the amendment as an important statement of states' rights and residual powers. From the 1930s through the 1960s the Court generally backed assertions of national authority and gave the Tenth Amendment little weight. See, for example, **United States v Darby**, 312 U.S. 100 (1941). In the 1970s and the 1980s the Court did not seem to be certain how much weight to attach to the Tenth Amendment any longer. Contrast the case of **National League of Cities v Usery**, 426 U.S. 833 (1976) with that of **Garcia v San Antonio Metropolitan Transit Authority**, (1985), for example.

67.. Section 37 of the (interim) **Constitution**.

68.. **In re: Certification of the Constitution of the Province of KwaZulu-Natal, 1996**, *op cit* 1424-1425, paragraph 9.

69.. *Ibidem*.

70.. **The Constitution of the Republic of South Africa, 1996**.

71.. *Ibidem* Section 104(b)(i), read with Schedule 5 thereto.

72.. See the opening paragraph of the postscript to the (interim) **Constitution**.

73.. In terms of Section 68(1) of the (interim) **Constitution**, the National Assembly and the Senate, sitting jointly for the purpose of making the new constitutional text, would constitute the Constitutional Assembly.

74.. See the third paragraph of the preamble to the (interim) **Constitution**.

75.. Section 73(1) of the (interim) **Constitution**.

76.. Section 73(2) of the (interim) **Constitution**. The proviso to this section was very important as far as the provinces were concerned.

77.. 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC). For the purposes of this work, all references to this case shall be based on the BCLR.

78.. As the Constitutional Court itself stated at 1265, paragraph 2 of the judgment, it saw its primary duty in this regard as being "to measure each and every provision of the new constitution, viewed both singly and in conjunction with one another, against the stated Constitutional Principles."

79.. *Ibidem* at 1264, paragraph 1.

80.. *Ibidem* at 1273, paragraph 27 and at 1275-1276, paragraph 39.

81.. *Ibidem* at 1273-1274, paragraph 28.

82.. *Ibidem* at 1274, paragraph 29.

83.. *Ibidem* at 1280, paragraph 54.

84.. Quoted in JAG Griffith, **The Politics of the Judiciary** (3rd ed, Fontana Press, London, 1985), at 36.

85.. **In re: Certification of the Constitution of the Republic of South Africa, 1996**, *op cit* 1265 and at 1272-1273, paragraphs 2 and 24-26.

86.. *Ibidem* at 1265, paragraph 2.

87.. *Ibidem* at 1276-1277, paragraph 44.

88.. *Ibidem* at 1274-1275, paragraph 31.

89.. *Ibidem* at 1278, paragraph 46.

90.. *Ibidem* at 1276, paragraph 40.

91.. *Ibidem*, paragraph 41.

92.. *Ibidem* at 1275-1276, paragraph 39.

93.. *Ibidem*.

94.. *Ibidem* at 1275, paragraph 34.

95.. *Ibidem*, paragraph 35.

96.. *Ibidem*, paragraph 34.

97.. *Ibidem*, paragraph 36.

98.. *Ibidem*, paragraph 37.

99.. *Ibidem*, paragraph 38.

100.. *Ibidem* at 1276, paragraph 42.

101.. *Ibidem*. In this regard, the provisions of Section 35(2) of the (interim) **Constitution** were, in my view, of great assistance.

102.. In **The Canadian Constitution and the Courts: The Function and Scope of Judicial Review** (3rd ed, Butterworths, Toronto, 1988) at 259-260.

103.. Constitutional Principle II.

104.. *Ibidem*.

105.. **In re: Certification of the Constitution of the Republic of South Africa, 1996**, *op cit* 1279-1280, paragraph 52.

106.. *Ibidem* at 1279, paragraph 51.

107.. *Ibidem*.

108.. Section 26 of the (interim) **Constitution**.

109.. **In re: Certification of the Constitution of the Republic of South Africa, 1996**, *op cit* 1279, paragraph 51.

110.. *Ibidem* at 1297, paragraph 104.

111.. *Ibidem* at 1279, paragraph 50.

112.. *Ibidem*.

113.. *Ibidem*.

114.. *Ibidem* at 1279-1280, paragraph 52.

115.. *Ibidem*.

116.. This directly replaced the provisions of Section 7(1) of the (interim) **Constitution** which were at issue in **Du Plessis and Others v De Klerk and Another**, 1996 (3) SA 850 (CC); 1996(5) BCLR 658 (CC).

117.. **In re: Certification of the Constitution of the Republic of South Africa, 1996**, *op cit* 1280, paragraph 53.

118.. *Ibidem* at 1280-1281, paragraph 54 for the reasoning of the Court.

119.. *Ibidem* at 1281, paragraph 55.

120.. *Ibidem*, paragraph 56.

121.. The comparable provision in the (interim) **Constitution** was Section 7(3) which provided that "[j]uristic persons shall be entitled to the rights contained in this Chapter where, and to the extent that, *the nature of the rights permitted.*" (my italics) The Court, at 1282, paragraph 58, pointed out that the Constitutional Assembly could have retained this provision, presumably because there was no fundamental difference between it and the one in the new constitutional text.

122.. *Ibidem* at 1281-1282, paragraph 57.

123.. *Ibidem*.

124.. *Ibidem* at 1282, paragraph 58.

125.. Pursuant to the philosophy underlying this right, Parliament enacted the provisions of the controversial **Choice on Termination of Pregnancy Act**, 92 of 1996, which (according to its preamble) "promotes reproductive rights and extends freedom of choice by affording every woman the right to choose whether to have an early, safe and legal termination of pregnancy according to her individual beliefs." Section 1(x) of the Act defines "woman" for this purpose as "any female person *of any age.*" (my emphasis)

126.. However, see, in general, the comments of Cachalia et al in **Fundamental Rights in the New Constitution** (1994), at 34-41, on the provisions of Section 11 of the (interim) **Constitution**. See also Lourens du Plessis and JR de Ville, who submitted in 'Personal Rights: Life, Freedom and Security of the Person, Privacy, and Freedom of Movement', in Van Wyk, Dugard, De Villiers and Davis (eds) **Rights and Constitutionalism: The New South African Legal Order**, (1994) at 238, that "freedom and security of the person" denotes the human being's somatic existence and includes both mental and physical integrity.

127.. See DM Davis (ed), **Chapter 2 of the Republic of South Africa Constitution Bill: A Comparison with the Interim Constitution (Occasional Paper 25)**, (Centre for Applied Legal Studies, University of the Witwatersrand, Johannesburg, July 1996), at 16.

128.. Which our Courts, in terms of Section 35(1) of the (interim) **Constitution**, were entitled to have regard to in interpreting the (interim) **Constitution** and promoting its values.

129.. 262 US 390 (1923) at 399.

130.. It is interesting to note that our law on abortion prior to the enactment of the **Choice on Termination of Pregnancy Act**, 1996, would, in Canada for instance, have been regarded as being invalid as it violated the right to security of the person since it forced a woman, upon threat of criminal sanction, to carry the *foetus* to term, unless she met certain criteria completely unrelated to her own priorities and aspirations. See Dickson CJC in **R v Morgentaler**, (1988) 44 D.L.R. (4th) 385, at 402.

131.. **In re: Certification of the Constitution of the Republic of South Africa, 1996** *op cit* 1282-1283, paragraph 60.

132.. *Ibidem*.

133.. *Ibidem* at 1283, paragraph 62.

134.. Already quoted in full above.

135.. Which provided that "Notwithstanding the provisions of Principle XII, the right of employers and employees to join and form employer organisations and trade unions and to engage in collective bargaining shall be recognised and protected. Provision shall be made that every person shall have the right to fair labour practices."

136.. See Section 27(4) and (5) of the (interim) **Constitution**.

137.. **In re: Certification of the Constitution of the Republic of South Africa, 1996** *op cit* 1283-1284, paragraph 64.

138.. *Ibidem* at 1284, paragraph 65.

139.. *Ibidem* at 1284-1285, paragraph 66.

140.. It is noted that the Canadian Charter of Rights and Freedoms does not recognise or protect any of these two rights. This, according to Ken Norman, 'Freedom of Peaceful Assembly and Freedom of Association' in Gerald-A Beaudoin and Ed Ratushny (eds) **The Canadian Charter of Rights and Freedoms** (Carswell, Toronto, 1989) at 242, is "[b]ecause the strike and the lock out have to do with intentionally causing economic harm ..." and would thus be in conflict with the fundamental freedom of association which Kerans JA in **Reference re Public Service Employee Relations Act (Alta.)**, (1985) DLR (4th) 359 (Alta. C.A) at 388 said meant that two or more individuals may, in concert, do that which they are free to do individually, "provided they do not harm others".

141.. Act No. 66 of 1995.

142.. **In re: Certification of the Constitution of the Republic of South Africa, 1996** *op cit* 1285, paragraph 67.

143.. *Ibidem*.

144.. *Ibidem*, paragraph 68.

145.. *Ibidem* at 1285-1286, paragraph 69.

146.. Patrick Hanks and Thomas Hill Long (eds) in the **Collins English Dictionary** (1979) define collective bargaining as "negotiation *between a trade union and an employer or an employers' organization* on the incomes and working conditions of the employees." (my emphasis)

147.. **In re: Certification of the Constitution of the Republic of South Africa, 1996** *op cit* 1287, paragraphs 71 and 72.

148.. *Ibidem* at 1288, paragraph 73.

149.. *Ibidem* at 1288-1289, paragraphs 74 and 75.

150.. *Ibidem* at 1289, paragraph 76.

151.. *Ibidem*, paragraph 77.

152.. *Ibidem* at 1289-1290, paragraph 78.

153.. On which debate see JD van der Vyver, 'Constitutional Options for Post-apartheid South Africa', in (1991) 40 **Emory Law Journal** 745 at 783, for example.

154.. See the South African Law Commission **Interim Report on Group and Human Rights** (1991) at 532-533 and 536. However, while rejecting a full programme of such rights, at 495 (*ibidem*) as well as in **Group and Human Rights: Working Paper 25** at 416-429, the Law Commission conceded that socio-economic rights should be protected in a bill of rights from legislative or executive infringement albeit without imposing positive obligations upon the State. It was even prepared to have imposed a minimum of welfare obligations upon the State, such as the provision of free state education to the end of the primary school phase, state-aided medical care to every indigent child, and payment for necessary subsistence and medical needs of people who are unable to provide such for themselves by reason of physical or mental illness or disability.

155.. See AS Mathews 'The Rule of Law - A Reassessment', in E Kahn (ed) **Fiat Justitia: Essays in Memory of OD Schreiner** (Juta & Co, Cape Town, 1983) at 305 and at 307.

156.. See 'Practical Workings of a Bill of Rights' in JV van der Westhuizen and HP Viljoen (eds) **A Bill of Rights for South Africa: Proceedings of a Symposium Held at the University of Pretoria on 1 and 2 May 1986** (Butterworths, Durban, 1988) 52 at 58.

157.. The decisions of which were, in terms of Section 98(4) of the (interim) **Constitution** made to bind "all persons and all legislative, executive and judicial organs of state."

158.. Mauro Cappelletti 'The Future of Legal Education: A Comparative Perspective', in (1992) 8 **SAJHR** 1 at 9-10.

159.. See paragraph 18 of Schedule 6 to the (new) **Constitution**.

160.. Which all along prosecuted crime on behalf, and in the name, of the State.

161.. Section 179(1)(a) of the new constitutional text.

162.. Who, in terms of Section 179(3)(b) read with Section 179(5) of the new constitutional text, shall be "responsible for prosecutions in specific jurisdictions".

163.. *Ibidem*, Section 179(1)(b). However, pending the enactment of such an Act of Parliament, the old order remains *in esse*, though the appointment of a National Director of Public Prosecutions as envisaged in Section 179(1)(a) is not affected thereby. See paragraph 18 of Schedule 6 to the new constitutional text.

164.. Which required a separation of powers between the legislature, executive and the judiciary, with appropriate checks and balances.

165.. **In re: Certification of the Constitution of the Republic of South Africa, 1996** *op cit* 1307, paragraph 141.

166.. *Ibidem* at 1308, paragraph 145.

167.. *Ibidem*.

168.. Section 179(5)(d) of the new constitutional text.

169.. *Ibidem*, Section 179(5)(a).

170.. *Ibidem*, Section 179(5)(c), read with Section 179(5)(b).

171.. *Ibidem*, Section 179(6).

172.. In terms of Section 5(5) and (6) of the **Attorney-General Act**, No. 92 of 1992, which came into operation on 31 December 1992 under Proc R137 of 1992 (**Government Gazette** 14458 of 11 December 1992), an attorney-general was made accountable to Parliament. Under the previous system the Minister of Justice, whose role was confined to co-ordinating the functions of the attorneys-general, could, at most, only request an attorney-general to furnish information or a report and to give reasons as described in Section 5(5)(a) and (b) of that Act.

173.. By Section 8(1) of the **Attorney-General Act**, 1992, which repealed the entire Section 3 of the **Criminal Procedure Act**, 51 of 1977.

174.. Act No. 51 of 1977.

175.. **In re: Certification of the Constitution of the Republic of South Africa, 1996**, *op cit* 1308, paragraph 146.

176.. Act No. 66 of 1995.

177.. **In re: Certification of the Constitution of the Republic of South Africa, 1996**, *op cit* 1308-1309, paragraph 149.

178.. For which see Section 33(1) of the Canadian Constitution Act, 1982. The whole of Section 33 is important to study for this purpose.

179.. In **The Canadian Constitution and the Courts: The Function and Scope of Judicial Review**, *op cit* 63-64.

180.. To the exclusion of "democratic" rights (such as the right to vote, to candidacy and the requirement of regular legislative sessions and elections), mobility rights and linguistic rights. See Strayer, *ibidem*.

181.. **In re: Certification of the Constitution of the Republic of South Africa, 1996**, *op cit* 1310-1311, paragraph 156.

182.. *Ibidem*.

183.. *Ibidem*.

184.. *Ibidem* at 1311, paragraph 159.

185.. *Ibidem*.

186.. *Ibidem* at 1312, paragraph 160.

187.. Section 110(1) thereof.

188.. Which was established (in the wake of the "Information Scandal") under the **Advocate-General Act**, 118 of 1979. The powers of the Advocate-General were subsequently (ostensibly) extended by the provisions of the **Advocate-General Amendment Act**, 104 of 1991. The office was also rechristened. *Vide* the South African Law Commission, **Report on Constitutional Models** (Vol 3, 1991) at 1263.

189.. Lawrence Baxter, **Administrative Law** (Juta & Co, Cape Town, 1984) at 289.

190.. South African Law Commission, **Interim Report on Group and Human Rights** (1991) at 606.

191.. Section 110(8).

192.. Which asserted the independence and impartiality of the institution.

193.. Which provided for the tenure of seven years, as was the case under Section 110(5) of the (interim) **Constitution**.

194.. Both of which provided for appointment and removal procedures.

195.. **In re: Certification of the Constitution of the Republic of South Africa, 1996** *op cit* 1313, paragraph 163.

196.. *Ibidem*.

197.. *Ibidem*.

198.. Section 191(9).

199.. **In re: Certification of the Constitution of the Republic of South Africa, 1996**, *op cit* 1313, paragraph 165.

200.. *Ibidem*.

201.. *Ibidem*.

202.. Which together made provision for a public service for the Republic and for a single public service commission to which each province could nominate a person to be appointed to serve thereon.

203.. **In re: Certification of the Constitution of the Republic of South Africa, 1996**, *op cit* 1315-1316, paragraphs 172 and 173.

204.. *Ibidem* at 1317, paragraphs 176 and 177.

205.. A fact which the Court admitted. *Ibidem* at 1316, paragraph 174, where it referred to the provisions of Section 210 of the (interim) **Constitution**.

206.. *Ibidem* at 1342, paragraph 275. Section 213(1) of the (interim) **Constitution** merely provided that "[a] provincial legislature may provide by law for a provincial service commission ..." (my emphasis)

207.. *Ibidem*, at 1317, paragraph 177.

208.. *Ibidem* at 1342, paragraph 274.

209.. *Ibidem* at 1317, paragraph 177.

210.. As was the case under Section 213(1) of the (interim) **Constitution**.

211.. Which provided that "[t]he powers and functions of the provinces defined in the Constitution, including the competence of a provincial legislature to adopt a constitution for its province, *shall not be substantially less than or substantially inferior to those provided for in this Constitution.*" (my emphasis) In **In re: Certification of the Constitution of the Republic of South Africa, 1996**, *op cit* 1331, paragraph 229, the Court said that this requirement introduced a dimension to the certification process differing fundamentally from the rest of the Constitutional Principles.

212.. *Ibidem* at 1343, paragraph 276.

213.. After all, as the Court pointed out at 1342, paragraph 275, separate provincial public service commissions were not specifically required by the Constitutional Principles.

214.. *Ibidem* at 1343, paragraph 278.

215.. *Ibidem*, paragraph 277.

216.. *Ibidem*.

217.. *Ibidem* at 1393-1394, paragraph 462.

218.. *Ibidem* at 1349-1350, paragraph 301.

219.. *Ibidem* at 1351, paragraph 308.

220.. *Ibidem* at 1353, paragraph 317.

221.. Which, unlike the Senate, is a council of provinces and not a chamber consisting of elected party political representatives. It is worthy of note that the 34 Constitutional Principles did not prescribe a bicameral Parliament for the Republic.

222.. Which, in terms of Section 36 of the (interim) **Constitution**, was one of the two Houses of Parliament.

223.. In terms of Section 48 of the (interim) **Constitution** the Senate consisted of ninety Senators, with each province being represented by ten Senators nominated by the parties represented in the provincial legislature according to a system of proportional representation.

224.. **In re: Certification of the Constitution of the Republic of South Africa, 1996**, *op cit* 1354, paragraph 319.

225.. *Ibidem* at 1354-1355, paragraph 320. See also 1358, paragraph 330.

226.. Sections 77(1)(b) and 87 of the (interim) **Constitution**.

227.. A power which the (President of the) Senate had under Section 98(9) of the (interim) **Constitution**.

228.. **In re: Certification of the Constitution of the Republic of South Africa, 1996**, *op cit* 1357, paragraph 328.

229.. *Ibidem* at 1358, paragraph 331.

230.. *Ibidem*, paragraph 332.

231.. *Ibidem*, paragraph 333. See also *ibidem* at 1396, paragraph 474.

232.. *Ibidem* at 1273, paragraph 27, at 1274, paragraphs 29 and 30 and at 1275-1276, paragraph 39.

- 233.. *Ibidem* at 1358-1359, paragraph 335.
- 234.. *Ibidem* at 1359, paragraph 336
- 235.. *Ibidem* paragraph 337.
- 236.. *Ibidem* at 1361, paragraph 340.
- 237.. *Ibidem* at 1397, paragraph 477.
- 238.. *Ibidem*, at 1361, paragraph 341 and at 1396, paragraph 471.
- 239.. *Ibidem* at 1397, paragraph 477.
- 240.. *Ibidem* at 1398, paragraph 479.
- 241.. *Ibidem*, paragraphs 480 and 481.
- 242.. In terms of which it had a peremptory obligation to act in a particular manner.
- 243.. In terms of Section 73A(2) and (3) of the (interim) **Constitution**.
- 244.. 1997 (1) BCLR 1 (CC).
- 245.. **In re: Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996**, *op cit* 10, paragraph 15.
- 246.. *Ibidem*.
- 247.. The relevant portion of which provides that: "Every citizen has the right to choose their trade, occupation or profession freely."
- 248.. **In re: Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996**, *op cit* 11, paragraph 17 and at 12-13, paragraph 21.
- 249.. *Ibidem* at 11, paragraph 18.
- 250.. [1984] 1 S.C.R. 357. At issue in this case was a requirement of Ontario's Law Society Act that members of the bar of Ontario must be Canadian citizens. Skapinker, otherwise armed with all the necessary qualifications, was not a citizen but a permanent resident of Canada. On being refused admission to the bar, he sued for a declaration that the citizenship requirement was invalid on the grounds that it violated Section 6(2)(b) of the Charter. In a unanimous judgment written by Estey J, the Supreme Court of Canada rejected this argument and held that Section 6(2)(b) did not confer an unqualified right "to pursue the gaining of a livelihood in the province".
- 251.. **In re: Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996**, *op cit* 12, paragraph 20.
- 252.. This Constitutional Principle was, according to Dawid Wyk, 'Introduction to the South African Constitution' in Van Wyk et al **Rights and Constitutionalism: The South African Legal Order** (Juta & Co, Cape Town, 1994), at 159-160, an "attempt, by and large successful, to involve a part of the electorate with strong nationalist propensities in the first election ...", and for that purpose, "was expanded to include *self-determination* 'in a territorial entity within the Republic or in any other recognised way'." (my emphasis)
- 253.. **In re: Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996**, *op cit* 15, paragraph 27.
- 254.. *Ibidem* at 13-14, paragraph 24.

255.. *Ibidem* .

256.. Heinz Klug, 'Historical Background' in Matthew Chaskalson, Janet Kentridge, Jonathan Klaaren, Gilbert Marcus, Derek Spitz and Stuart Woolman **Constitutional Law of South Africa** (Juta & Co, Cape Town 1996) at 2-14.

257.. **In re: Certification of the Amnded Text of the Constitution of the Republic of South Africa, 1996**, *op cit* 15, paragraph 30.

258.. Section 35(5).

259.. Section 24(2) of Schedule B to the Canada Act 1982 (UK) which provides that: "Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

260.. Section 78 of which provides that a court may refuse to allow evidence, on which the prosecution proposes to rely, if, having regard to all the circumstances - *including the circumstances in which the evidence was obtained* - its reception "would have such an adverse effect on the proceedings that the court ought not to admit it".

261.. [1955] AC 197 at 203; [1955] 1 All ER 236 at 239, where Lord Goddard said: "... the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and *the court is not concerned with how the evidence was obtained.*" (my emphasis) See also Rumpff CJ in **S v Mushimba**, 1977 (2) SA 829 (A) at 840; see further **S v Nel**, 1987 (4) SA 950 (W) at 953E-H.

262.. See Lord Goddard *ibidem* at [1955] AC 204; [1955] 1 All ER 239. See also Rumpff CJ, *ibidem*.

263.. **In re: Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996**, *op cit* 20, paragraph 52.

264.. *Ibidem* at 23, paragraph 66.

265.. *Ibidem*.

266.. *Ibidem* at 23-24, paragraph 67.

267.. Namely six of the nine provinces in the National Council of Provinces in terms of the provisions of Section 74(2)(b) of the (new) **Constitution**.

268.. **In re: Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996**, *op cit* 24-25, paragraph 71.

269.. A phrase which the Court described as vague and imprecise. *Ibidem* at 27, paragraph 82.

270.. *Ibidem* at 26, paragraph 77 for the details.

271.. *Ibidem* at 27, paragraph 80.

272.. *Ibidem* at 27-28, paragraph 82.

273.. *Ibidem*.

274.. *Ibidem* at 32, paragraph 99.

275.. *Ibidem*.

- 276.. *Ibidem* at 34, paragraph 110.
- 277.. *Ibidem* at 46-47, paragraph 155.
- 278.. *Ibidem* at 47, paragraph 157.
- 279.. *Ibidem* at 49, paragraph 166 for what the Court said had been done by the Constitutional Assembly.
- 280.. *Ibidem*, paragraph 164.
- 281.. *Ibidem* at 49-50, paragraph 167.
- 282.. *Ibidem* at 50, paragraph 168.
- 283.. *Ibidem*.
- 284.. *Ibidem*, paragraph 169.
- 285.. *Ibidem* at 53, paragraph 180.
- 286.. *Ibidem*, paragraph 182.
- 287.. *Ibidem* at 52, paragraph 175.
- 288.. *Ibidem* at 39-40, paragraph 134.
- 289.. *Ibidem*.
- 290.. *Ibidem* at 56, paragraph 188.
- 291.. *Ibidem*.
- 292.. *Ibidem*, paragraph 189.
- 293.. *Ibidem* at 40, paragraph 135.
- 294.. *Ibidem* at 58, paragraph 195.
- 295.. *Ibidem* at 56-57, paragraph 190.
- 296.. *Ibidem* at 57, paragraph 191.
- 297.. *Ibidem* at 58, paragraph 198.
- 298.. *Ibidem* at 60, paragraph 204.
- 299.. *Ibidem*.
- 300.. *Ibidem*, paragraph 205.
- 301.. *Ibidem*, paragraph 204.
- 302.. The **Constitution of the Republic of South Africa**, 1996 (for which see **Government Gazette** No. 17678 of 18 December 1996).
- 303.. See Proclamation R6 in **Government Gazette** No. 17737 of 24 January 1997.
- 304.. *Ibidem*.

CHAPTER FIFTEEN

CONCLUSION

In this thesis it was pointed out at the very outset that two years would be too short a period within which we would be able to accurately evaluate the work of the Constitutional Court. Since at the time of writing the Court had dealt with a good number of cases in which a whole range of issues had arisen, it would be premature for anyone to suggest that the Court has not had a tremendous impact and influence upon the development of democracy in our country.¹ However, the work and the influence of the Court must be evaluated, and the question relating to this has to be asked on a continuous basis; if, in the long run, it indeed turns out that we as a polity do not need a special Court which, as the (new) **Constitution**² has reaffirmed, deals solely with constitutional matters,³ future policy makers should be bold enough to take appropriate steps to abolish it.

While at the beginning of our new constitutional system it might have made sense from a political point of view to have established the Constitutional Court, within a short space of time the situation has changed, so much so that "[a] vertically integrated system of constitutional review - where all courts have complete constitutional jurisdiction"⁴ has begun to make far more sense. For one thing, the bifurcated system of review that we had chosen and followed under the (interim) **Constitution** already seemed cumbersome: Trials might be delayed for significant periods of time as cases from the lower courts had to go to local or provincial divisions of the Supreme Court (now called the High Court), then be referred to the Constitutional Court, wait for a ruling from the Constitutional Court, return to the High Court or even the lower court for initial resolution, head up eventually to the Appellate Division (now called the Supreme Court of Appeal), which might then refer them to the Constitutional Court for a final ruling. The system could even prevent many people with legitimate challenges from being heard.

A careful reading of the (new) **Constitution** suggests that this problem has now been addressed. Even the magistrates' courts now have constitutional jurisdiction; they may

not have the jurisdiction to rule on the constitutionality of legislation and of the conduct of the President of the Republic, but for the rest they have the necessary jurisdiction.⁵

The transitional period itself is, however, far from over; the masses of our people, the direct victims of centuries of colonialism and four-and-half decades of apartheid, are still groaning and chafing under the yoke of apartheid's nefarious consequences. Inequality and the iniquitous distribution of resources, wealth, opportunities and income, all of which are characterised by race and gender, are still rampant in our society. In a society where opulence and ostentation are the uncomfortable neighbours of mass unemployment, grinding poverty, squalor, homelessness, disease and ignorance, true freedom and equality are indeed still residing in the realm of noble and yet distant ideals.

Courts *qua* courts, in any event, have a limited role in social transformation. Their role is basically confined to judicial review of what the other organs of state do.⁶ The major responsibility for social transformation belongs primarily to Parliament and the other legislative authorities. It is not the business of the judiciary to make and pronounce policy. In the final analysis the judiciary should and does observe a fastidious regard for limitations of its own power, and this precludes it from giving effect to its own notion of what is wise or politic.

Our appointed judges, who are not accountable to the public to the same extent as politicians,⁷ have not become legislators in crucial areas of public policy,⁸ though they are always confronted with political realities which they have to face up to. As a matter of fundamental judicial policy, they seem to bring a genuine sense of deference to the legislators.⁹

While our Courts, and the Constitutional Court in particular, will no doubt play a crucial role over time in the incremental eradication of apartheid and its consequences, it will be important at all times to bear in mind the wise words of AL Higginbatham Jr, an outstanding personage and a one-time judge of the Supreme Court of the United States, who cautioned that:

constitutional protections are ultimately of limited efficacy ... Thus, while I maintain that constitutional protection of a viable Bill of Rights is significant and important, and that it would improve significantly the human rights situation in South Africa, I also emphasise the necessity of combatting racism in society at large, through individual and governmental action. The Courts can serve as the vanguard for social change and as a beacon in dark times, but used as the sole tool, they cannot eradicate racism.¹⁰

There is, no doubt, a lot of work that still needs to be done by all of us in our variegated social formations to create a truly united, non-racial, non-sexist and democratic South Africa with a society that will be predicated upon liberty and equality. It needs to be acknowledged, however, that, within a short space of time and within the constraints of its role as part of the judiciary, the Constitutional Court has done a lot of good work within the context of social transformation currently under way in our country.

In the majority of cases in the past three years since the advent of the (interim) **Constitution** our Courts have generally taken full advantage of the consequences of our quiet revolution entailed in the move to a system of constitutional supremacy and protection of basic rights and freedoms. I would thus fully agree with Hugh Corder and Dennis Davis that, in so far as the Court's and our judiciary's performance in general is concerned:

[a] general assessment might produce the answer "quite well", especially considering the background. Besides a small group of mainly academic lawyers, knowledge of human rights and constitutional law at the inception of the transitional Constitution was very poor ... Most lawyers ... had to undergo a crash course in constitutional education in order to establish a basic familiarity with the tools of a new discourse of law and government. That many of them have grasped the opportunities created by the transitional Bill of Rights is reflected in the pages of the law reports.¹¹

In some instances its work has indeed had tremendous influence. It has, for example, ruled that the death penalty in general, the sentencing of juveniles to be whipped, and the imprisonment of those who are unable to settle their financial debts, all constitute unconstitutional limitations upon fundamental rights and freedoms guaranteed in the new constitutional system. A few areas will be looked at to show that as a result of the Court's action where it has acted decisively, there have already been interesting developments at the level of our other Courts. Other areas where there has been no decisive action, or no action at all, as yet on the part of the Court will also be highlighted.

DEVELOPMENTS WHERE THE CONSTITUTIONAL COURT HAS ACTED DECISIVELY

DIRECT ACCESS TO THE COURT

Rule 17 of the Rules of the Constitutional Court requires that, for purposes of direct access to the Constitutional Court, a matter must be of such urgency, or otherwise of such public importance, that any delay necessitated by the utilisation of ordinary procedures would prejudice the public interest or the ends of justice and good government. Chaskalson P quite correctly stated in **Minister of Justice v Ntuli**¹² that Rule 17 requires that:

[t]he applicant must first obtain leave from the President of the Court to approach the Court by way of direct access. *If this is granted*, the matter will then be set down by the President of the Court for a date which will be fixed with due regard to the Court roll and the time necessary for the preparation of arguments by the parties to the dispute. (my emphasis)

This Rule no doubt helps prevent abuse of the new Court by vexatious elements in our society.

Moreover, as a result of the Court's stance on direct access to it, our Courts have now been prepared to go into matters and decide whether they should be referred to it for its decision. Our lawyers and judges, who in the majority were schooled in the conservative legal discourse, are thus presented with new opportunities to participate actively and creatively in the development of our nascent constitutional jurisprudence.

Given the fact that the Constitutional Court's docket is too small to accommodate all challenges to legislation, and given that the Court's hands may soon be too full to make the Court an effective institution, it makes sense to take the pressure off the Court and allow constitutional jurisdiction to judges of the High Court.

The decision of the Constitutional Assembly to grant constitutional jurisdiction to the Supreme Court of Appeal ought to be commended. Unlike its predecessor, the

Appellate Division, this Court may intervene in the determination of constitutional matters as it has a role and, as “the highest court of appeal except in constitutional matters”, it “may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President”.¹³ This will further help take the pressure off the Constitutional Court.

However, the provisions of Rule 17 have two apparent shortcomings. On many issues, because of the divergent predilections and idiosyncrasies of our judges, it is now more than ever before possible to get divergent and confusing judgments as long as the Constitutional Court has not intervened.¹⁴

Secondly, access to the Court will, in general, be a privilege enjoyed only by those persons who have the wherewithal to assert and defend their rights. The indigent, who constitute the majority in our polity, will solace themselves with the scarce resources of the Legal Aid Board and *amici curiae* from non-governmental bodies such as the Legal Resources Centre and the (Wits University) Centre for Applied Legal Studies. If anything, decisions of our Courts in this regard have, besides, so far focused on the right to legal assistance as it affects the right to a fair criminal trial.

Moreover, in our jurisdiction the rule which permits the participation of *amici curiae* in constitutional litigation states that an *amicus curiae* will only be permitted if new issues are raised by them. In other words, once a party has raised an issue in the proceedings, whether or not a good job has been done, an *amicus curiae* will not be permitted to participate. We have not come anywhere near the Indian system of access to court which has become known as “epistolary jurisdiction”, for example. According to PN Bhagwati,¹⁵ this has simplified the procedure followed in public interest litigation. It allows any person acting *pro bono publico* simply to address a letter to the Indian Supreme Court to move it in defence of the rights of the disadvantaged. Such a letter is a legitimate and appropriate proceeding within the meaning of Article 32 of the Indian Constitution. The litigant in such cases does not incur personal expenses as he or she does not have to approach lawyers to draw a regular petition to be filed in defence of the rights of the poor and disadvantaged members of the community.

Furthermore, as a result of the Constitutional Court's stance on direct access to it, our Courts have now been prepared to go into matters and decide whether they should indeed be referred to it for its decision. Our lawyers and judges, who in the majority were schooled in the conservative legal discourse, are thus presented with new opportunities to participate actively and creatively in the development of our nascent constitutional jurisprudence. Something drastic needs to be done as a matter of urgency to ensure that all our Courts, and particularly the Constitutional Court, cease being regarded by the socially alienated, the disadvantaged and the vulnerable sections of our society as the collective standard-bearer of the interests and privileges of the tiny, wealthy, and ostentatious minority drawn predominantly from the white component of our society.

The Constitutional Court's numerous orders with regards to costs are an indication that its judges are aware of the problem of money and the indigent. One would hope that, with the extension of constitutional jurisdiction to other courts, the Court's attitude would filter down.

BLANKET DOCKET PRIVILEGE

As a result of the Constitutional Court's decision in **Shabalala and Others v Attorney-General of Transvaal and Another**,¹⁶ Hendler J in **S v Makiti**,¹⁷ held that he saw no reason why the State should refuse to accede to a request by the defence for statements of State witnesses, especially since the case involved a matter that was not trivial and because no prejudice would be suffered by the State.¹⁸ In that case, where the accused was charged with murder, further particulars had been supplied to the accused's instructing attorney, but the Court held that they were inadequate and ordered the Attorney-General to make the statements available to the defence.

THE RIGHT TO A FAIR TRIAL

Thanks to Kentridge AJ who held in **S v Zuma and Others**¹⁹ that the right to a fair trial was broader than was provided for in Section 25(3) of the (interim) **Constitution**,²⁰ and extended beyond procedural fairness to substantive fairness, it was easy for Claassen

J to deal with the problem that arose in **S v Moilwa**.²¹ Thus, according to Claassen J, a duty was imposed upon our Courts to question witnesses on material aspects of a case. Failure to do so constituted a gross irregularity.²²

DEVELOPMENTS WHERE THE CONSTITUTIONAL COURT HAS NOT ACTED DECISIVELY (OR AT ALL)

THE RIGHT TO LEGAL REPRESENTATION AT STATE EXPENSE

In one chapter in this thesis it was pointed out that it was regrettable that the Constitutional Court did not use the first opportunity it had in **S v Vermaas; S v Du Plessis**²³ to address this question adequately.²⁴ It was conceded, however, that it was in our current circumstances perhaps the best possible route that the Court took. As matters stand, the decision as to whether an accused person is to be given legal representation at State expense "is pre-eminently one for the judge trying the case".²⁵

However, given the urgency of the question of legal representation for the indigent and mostly either illiterate or semi-literate accused persons who in the majority come before our lower courts every day, and given the fact that our High Court judges may deal with this question differently and come to different conclusions, it occurs to me that the Court could have done better than it did. It may indeed be necessary for the issue to be revisited by the Court in an appropriate case so that it can enunciate broad principles and guidelines applicable to decisions of this nature.

Didcott J's suggestion that it is Parliament or the executive that should resolve the question of affordability and implement a programme of legal representation for the poor is also worrisome. It may encourage less robust judges who are worried about the public perception that if they promote the enjoyment of this right they will be giving too much to criminals to be even less interventionist in their determination of issues relating to equitable allocation of resources.

I have no doubt that it may well be some time before another opportunity presents itself to the Court to enable it to do what I am suggesting.²⁶ In the meantime, millions of accused persons will continue suffering the consequences of the inadequate action taken by the Court in **S v Vermaas; S v D Plessis**.

THE DEATH PENALTY

Despite the Constitutional Court's epoch-making decision in **S v Makwanyane and Another**,²⁷ it is theoretically still possible for our Courts to sentence people to death under our legal system; skirting around the provisions which allow the State to hang its enemies, as the Court did in **Makwanyane**, has left a lethal weapon in the hands of government. This may become even more apparent when South Africa goes through a crisis and a post-Mandela regime which may be intolerant of dissidence emerges. Or even worse: when public opinion seems so vicious at some stage that some of our politicians are swayed, the symbolic value of **Makwanyane** will be lost.

It is a matter for regret that the Constitutional Court allowed an opportunity to declare the death penalty unconstitutional altogether to slip through its collective fingers. The Constitutional Assembly did not address this issue when it made the (new) **Constitution**; it merely reiterated the provisions of Section 9 of the (interim) **Constitution**.²⁸ Hopefully Parliament will muster sufficient courage and rid our country of the scourge of the death penalty once and for all.²⁹

However, the Court needs to be commended for its decision to *mero motu* extend its declaration of the invalidity of the death penalty to areas it was not called upon to consider in **Makwanyane**. What is regrettable is, as will be shown later on, it did not do this in other cases.

STATUTORY PRESUMPTIONS

In this thesis, it was accepted that the Constitutional Court was right when it ruled in **S v Zuma and Others**³⁰ that its decision was not necessarily doing away with all statutory provisions which create presumptions in criminal cases. Thus, the merits and demerits

of each statutory presumption would have to be evaluated in each case before a declaration of invalidity.

However, it was pointed out that there were instances³¹ where similarly worded presumptions which created a reverse *onus* were not dealt with. In other words, the Court, for some unfathomable reason, would not *mero motu* extend its declaration of invalidation to such presumptions the way it had done in **Makwanyane**. As a result, the issue had to be visited again in **S v Julies**,³² for example.

CORPORAL PUNISHMENT

A point was made in this thesis that the Constitutional Court in **S v Williams and Others**,³³ had, for the right reasons, declared corporal punishment as it affected male juveniles invalid. The Court had refused to *mero motu* extend its declaration of invalidity to the whipping of male adults, notwithstanding the fact that "it was common cause between the applicants and the State that the provisions in our law which authorised corporal punishment for adults are inconsistent with the Constitution."³⁴ Neither was the Court prepared to deal with the constitutionality of corporal punishment in schools as that was not the issue before it.³⁵

The absurdity of unwittingly preserving corporal punishment for adults was pointed out in the thesis. Only Parliament can now intervene and proscribe in our system of criminal justice system and in our polity itself corporal punishment as a mechanism for dealing with crime.³⁶ Doing so would enable us to join many other nations and societies where whipping as a penal option has been abolished.

TAINTED EVIDENCE

In contrast to the decision of Froneman J in **S v Melanie and Others**,³⁷ Claasen J held in **S v Mathebula and Another**³⁸ that our Courts have no discretion whatsoever to admit evidence obtained in violation of an accused person's constitutional rights. The effect of this is that the fundamental rights enshrined in the **Constitution** have to be

treated differently and, upon their breach, they are to be "removed from the parameters of judicial discretion".³⁹

As in the **Melanie** decision, the **Mathebula** case dealt with the issue of the admissibility of evidence obtained as a result of a pointing out where, prior to or at the time of the pointing out, there was a failure on the part of the police to advise the accused of the constitutionally guaranteed rights to legal representation and not to be compelled to make a confession or an admission that could subsequently be used in evidence against him. The Court was satisfied that the police had failed to advise the accused *in casu* of his constitutional rights. It thus concluded that such failure was tantamount to a violation of the accused's rights under the (interim) **Constitution** which, according to the Court, clearly superseded the judge's so-called common law discretion to allow or disallow improperly obtained evidence.

There is obviously a conflict between the positions taken by the two judges. A conflict of this nature can, fortunately, now be resolved by the Supreme Court of Appeal⁴⁰ as this Court does have jurisdiction over matters of a constitutional nature. The Constitutional Court can then confirm an order of the Supreme Court of Appeal in this regard.

The two conflicting positions show that, precisely because of the Constitutional Court's cautious and narrow approach to its work, its decision in **Key v Attorney-General, Cape of Good Hope Provincial Division and Another**⁴¹ has not proved to be a useful guide to some of our judges. They, like the Constitutional Court, tend to confine their judgments to what they have been called upon to decide in each case. Thus, despite the clear rule in **Key**, the issue of the admissibility of evidence obtained as a result of pointing out, *inter alia*, may still have to be addressed by the Constitutional Court.

ACCESS TO INFORMATION

The Constitutional Court has not as yet ruled on the right of access to information; when it had an opportunity to do so in **Shabalala**,⁴² it avoided the issue. As a result, we are saddled with conflicting decisions in this regard.

One such decision was that of Van Dijkhorst J in **Directory Advertising Cost Cutters v The Minister for Posts, Telecommunications and Broadcasting and Others**.⁴³ In that case the learned Judge held that the rights contemplated in Section 23 of the (interim) **Constitution** were confined to the fundamental rights that were set out in Chapter 3; in other words, the Chapter 3 rights did not include other rights against the State such as contractual rights and rights arising from delictual claims. The other case was that of **Van Niekerk v City Council of Pretoria**.⁴⁴ In that case Cameron J distanced himself from the Van Dijkhorst ruling.⁴⁵ According to the Learned Judge the wording of Section 23 of the (interim) **Constitution** was wide and unlimited and the (interim) **Constitution** required a broader approach to the principles which underlay the inclusion of Section 23. The conclusion the Learned Judge came to was that the approach of Van Dijkhorst 'was in consequence unwarrantably narrow.'⁴⁶

In **Van Niekerk** the applicant had requested the respondent to furnish him with the contents of a report it had prepared pursuant to a claim for damages he had lodged with it following a power surge which had destroyed his domestic electrical equipment. Responding to the question whether the information was required for the protection of the applicant's rights, Cameron J noted that the report would assist the applicant in deciding whether to proceed with, or abandon, his claim.⁴⁷ Its disclosure would possibly promote an early settlement of the matter and quickly bring the envisaged action to an end either by settlement or abandonment. In this sense the report was reasonably required by the applicant.⁴⁸

The (new) **Constitution** has not settled or at the very least clarified this issue either. In terms of Schedule 6,⁴⁹ which deals with transitional arrangements, Parliament has till 4 February 2000 before it has to effectively enact appropriate legislation promoting access to information.⁵⁰ Till then, Section 23 of the (interim) **Constitution** remains in force as a transitional measure.⁵¹ In the meantime, it would be better if the Constitutional Court acted and gave direction in this regard. Unfortunately, due its cautious and narrow approach, it may not do so, unless and until it is specifically called upon to do in a particular case.

IMMIGRANTS UNDER THE NEW LEGAL SYSTEM

At the time of writing this thesis, the Constitutional Court had not heard or decided any immigration case under the (interim) **Constitution**. Thus, the validity of some of the provisions of the controversial **Aliens Control Act**⁵² has never been determined. Almost all the cases⁵³ that came before some divisions of the Supreme Court turned on the utility and utilisation of the provisions of Section 24 of the (interim) **Constitution**. The only exception in this regard was the decision in **Baloro v University of Bophuthatswana**.⁵⁴

While it was accepted in all the cases referred to above that the (interim) **Constitution** was applicable to aliens, in the four cases which were decided in favour of the government the decisions were essentially based on the notion that aliens under our legal system did not have any rights, interests or legitimate expectations that could be threatened or harmed by the provisions of the **Aliens Control Act** and that were able to trigger the operation of Section 24 of the (interim) **Constitution**. Thus the applicants could not be given reasons⁵⁵ for the unfavourable decisions made by the Department of Home Affairs.

In other words, aliens, merely because of their national origin, are, as matters stand, not entitled to any protection under our new constitutional system which is putatively based on freedom and *equality*. It is clear that the approach of the relevant judges in these cases was still trapped in the quagmire of the jurisprudence which depended on the rights-privileges distinction.⁵⁶ This question, in my submission, requires the urgent attention of the Constitutional Court;⁵⁷ while the Supreme Court of Appeal, needless to say, can do what the (pre-April 27, 1994) Appellate Division did in respect of the rights of prisoners,⁵⁸ the Constitutional Court will still have to confirm the latter Court's order before it can have legal force.

To complete the "bigger picture", it is imperative for me to comment on a few issues that have characterised the work of the Constitutional Court during the period under review.

METHODS OF CONSTITUTIONAL INTERPRETATION

It is interesting to note that the Constitutional Court has generally described its interpretive method as seeking the “contextualised purpose” of the words used in the **Constitution**. In other words, as was pointed out by Chaskalson P in **Makwanyane**,⁵⁹ the main aim of constitutional interpretation, as opposed to ordinary statutory interpretation,⁶⁰ is to seek the purpose of the provision being interpreted in the context of the rest of the **Constitution** and its underlying values. Mahomed J (as he then was) even suggested that the purposive approach is to be contrasted with a “literalist” one.⁶¹

The Court has tended to identify the purposive with a “a broad or generous ” reading.⁶² It has in many cases⁶³ found the purpose by pursuing a generous reading. However, O'Regan J has quite correctly pointed out that, while on some occasions a purposive approach may require a generous reading, it may, on others, require a narrow one.⁶⁴ In one instance, when two of the Court's judges⁶⁵ pursued a narrow approach, they came to differing conclusions regarding the purpose of Section 241(8) of the (interim) **Constitution**.

While Chaskalson P was prepared to concede that there may “possibly be instances where the ‘generous’ and ‘purposive’ interpretations do not coincide”, he unfortunately did not venture an opinion on, or provide an analysis of, the possible differences for, as he concluded, the problem did not arise *in casu*.⁶⁶ It might arguably be too early to provide a definitive analysis of the Court's approach to constitutional interpretation; the Court itself, whilst presumably knowing how it wants to approach this, has been rather very reticent. The debate among the judges in **Mhlungu**, whilst interesting and illuminating, has not been very helpful in identifying the Court's approach to the subject.

Secondly, in the course of its work, the Constitutional Court has been prepared to entertain arguments on legislative history. For example, the Court solicited such arguments by requesting the parties in **Makwanyane**⁶⁷ to address it on the process of formulating the right to life. Chaskalson P, in the main judgment in the matter, after stating that the context of a constitutional provision “includes the history and background to the adoption of the Constitution”⁶⁸ and reviewing the extent to which our

Courts in the past and foreign courts had dealt with the issues of capital punishment,⁶⁹ said:⁷⁰

[t]he Multi-Party Negotiating Process ... was advised by technical committees, and the reports of these committees on the drafts are the equivalent of *travaux préparatoires* relied upon by the international tribunals. Such background material can provide a context for ... interpretation ... and ... I can see no reason why such evidence should be excluded.

Having counseled caution in this regard,⁷¹ the President of the Court then proceeded to say that:⁷²

[b]ackground evidence may, however, be useful to show why particular provisions were or were not included in the Constitution. [W]here the background material is clear, is not in dispute, and is relevant in showing why particular provisions were or were not included ... it can be taken into account by a Court in interpreting the Constitution.

This approach was then used by the Court to show that the parties that were involved in the Multi-Party Negotiating Process had intended that the Constitutional Court should have the jurisdiction to grapple with and decide the constitutionality of capital punishment.⁷³ The importance of “historical background” was also emphasised in **S v Zuma and Others**,⁷⁴ while in **S v Mhlungu and Others**⁷⁵ the “intention of the framers” was alluded to in determining the meaning of Section 241(8) of the (interim) **Constitution**.

One hopes that the use of “historical background”, for all its shortcomings,⁷⁶ will not increase in prominence with the passage of time. As Laurence Du Plessis and Hugh Corder⁷⁷ have argued, it would appear that its role will be limited to tipping the balance where the relevant legislative history is not controversial or subject to dispute.

Thirdly, the Court has displayed a tentative and inconclusive tendency towards deference to the legislature. For example, in **Makwanyane**⁷⁸ Chaskalson P pithily put it thus:

Can, and should, an unelected court substitute its own opinion of what is reasonable or necessary for that of an elected legislature?

Significantly, while the President of the Court would not provide an answer to his own question, which showed that he was aware of the constant tension and the dichotomy between the counter-majoritarian "problem" of judicial review and the legislative output of an elected legislature, he at least exhibited an acute awareness of the need to strike a fine balance between the two. He observed⁷⁹ that:

[s]ince the judgment in *R v Oakes*, the Canadian Supreme Court has shown that it is sensitive to this tension, which is particularly acute where choices have to be made in respect of matters of policy.

Similarly, Sachs J⁸⁰ set out clearly how he saw the roles of Parliament and the Court. However, the learned Judge did not expressly indicate how the Court would deal with clashes between itself and the legislature. Chaskalson P⁸¹ cited with approval the Canadian decision in *R v Chaulk*⁸² which was essentially to the effect that where differing reasonable policy options are in dispute the Court must defer to the legislature.

As will appear more fully later, the Court has, at the same time, exhibited a strong commitment to constitutional supremacy.⁸³ Thus, it would appear that among the judges of the Court there is, after all, not such a strong commitment to deference to the wisdom of Parliament.⁸⁴ Overall, the Court has handled its relationship with Parliament and the executive with sensitivity and cordiality, and, at the same time, fearlessly and firmly where and when necessary.

Fourthly, while the Court has been prepared to follow comparative case law from other jurisdictions, it is noteworthy that in respect of the interpretation of the general limitation clause it was not prepared to follow the Canadian approach spelt out in *R v Oakes*. In *Zuma*,⁸⁵ Kentridge AJ observed that the *Oakes* test

may well be of assistance to our Courts in cases where a delicate balancing of individual rights against social interests is required. But section 33(1) itself sets out the criteria which we are to apply, and I see no reason, in these cases at least, to attempt to fit our analysis into the Canadian pattern.

The Court's reticence and ambivalence in certain respects may, on the one hand, be indicative of a traditional approach adopted by South African Courts in the past, namely to confine its interpretation and ruling to that which it has been called upon to decide in

a particular case. On the other, it may turn out that it is the best approach to adopt as a freer forum and agent of change.

DIVERSE JUDGMENTS

The large number of separate judgments by all the judges (and even in groups of three or four) in cases such as **Makwanyane**, **Mhlungu** and **Western Cape**, to cite a few examples, have at times technically made it extremely difficult for the reader to distill a *ratio decidendi* in each instance. Each separate judgment has, in other words, resulted in the reader being provided with an array of *rationes decidendi* to choose from.

However, the Court has, in general, in the process exhibited judicial scholarship comparable to the best in the world, which has done South Africa proud. Our judges have thus enriched the constitutional and fundamental rights debate, thus setting a tone which it is hoped will continue.

“UBUNTU”

In the beginning the Constitutional Court extolled the virtues of “*ubuntu*”, “African values and indigenous law”. Mokgoro J even declared that “when our Courts promote the underlying values of an open and democratic society ... when considering the constitutionality of laws, they should recognise that indigenous South African values are not always irrelevant nor unrelated to this task.”⁸⁶ It is, however, a matter for regret that in subsequent cases that came before all our Courts and the Constitutional Court in particular, this does not seem to have been borne in mind. In fact, no mention is made of “indigenous African values” in any of the subsequent cases.

One hopes that the Court was not merely paying lip service to the fundamental value of “*ubuntu*” and the African perspective and context, all of which are important in the development of our jurisprudence.

THE COURT STILL HAS TO BE TESTED

Broadly speaking, the Constitutional Court has brought positive publicity to the new constitutional order and the values underpinning our fledgling democracy. To many it has become an important agent of change and a protector of basic human rights and freedoms.

It is my fervent hope, however, that the Constitutional Court will not exhibit a tendency to shy away from indulging in the complex and delicate balancing role which it must continue to "play if it is to contribute to the restoration of legitimacy to the legal system, while also developing the human rights culture for which so many South Africans have paid so dearly."⁸⁷ Until the judiciary in its entirety has been fully reformed and has become, broadly speaking, more representative than it is currently, we are unlikely to have the kind of expansive constitutional review which we need; the Constitutional Court will, therefore, for some time remain the beacon of hope for those whose fundamental rights are affected or threatened.

As steps begin to be taken by Parliament and government to address the gross historic imbalances in the allocation of resources, opportunities, wealth and income in our apartheid-riven society, I have no doubt that numerous cases and controversies will be brought to our Courts, especially the Constitutional Court. Whilst indeed it will be the responsibility of Parliament and government to develop, promote and carry out programmes that will give effect to our society's desire to ensure the "full and equal enjoyment of all rights and freedoms",⁸⁸ the Constitutional Court will have to be more robust than it has been hitherto in the promotion of substantive equality and the equal enjoyment of socio-economic rights that have since found their way into our new constitutional system.

Thus far, as Corder and Davis⁸⁹ have observed,

the court has chosen to tread warily. In the majority of cases, the judgments have been neither surprising nor constitutionally controversial ... To date ... the challenges which

have been based on the Bill of Rights have not raised the kind of difficulty which would allow for clear commitments or definite divisions to be ascertained.

Despite their awareness of the Court's role in the transformation of our society, its judges have on numerous occasions counseled caution. Cases such as **S v Williams and Others**,⁹⁰ **S v Bhulwana; S v Gwadiso**⁹¹ and **S v Mbatha; S v Prinsloo**,⁹² among others, show that they have been careful to decide only as much as is necessary for the case before them, despite the absurd results the approach sometimes led to. They have also emphasised what their judgement did not mean.⁹³ They have, furthermore, been concerned that their judgments should not cause undue dislocation to the administration of justice.⁹⁴

The greatest test will be when the Court is confronted with the government's efforts to fulfil its electoral promises of the reconstruction and development of our apartheid-ravaged and apartheid-riven society in line with the substantive commitments immanent within the new constitutional system. An appeal⁹⁵ in the controversial judgment of Swart J in **Public Servants' Association of South Africa and Another v Minister of Justice and Others**,⁹⁶ in which the issue of affirmative action in the public service was dealt with, might well turn out to be the beginning of that test.

In a nutshell, a critical question that confronts the Court is: Does it have a role to play in making the Constitution accessible to all, especially the indigent and ignorant in our midst? Or, is it by definition or by its very nature as a court of law, confined to being a sophisticated body, dealing in a sophisticated legal way with sophisticated legal arguments where technicality sometimes tends to vanquish substance?

As for me, this Court, which was established with the view to making a big difference in the development of our jurisprudence, has to do more than what an ordinary court of law does. It has to be more pro-active in recommending (not prescribing!) law reform in problem areas such as the ones that arose in all the matters that came before it. In other words, as a constitutional court, it has to play a role in setting the agenda for thorough-going and fundamental social transformation that will hopefully soon unfold in our country. It has to show much more robustly that it is aware of its important role in the new legal order, namely to use judicial review to protect the rights, interests and

legitimate expectations of all those who cannot protect themselves adequately through the democratic process.⁹⁷

No POLITICAL BIAS!

The Constitutional Court has, however, confounded sceptics and its critics both from the left⁹⁸ and the right⁹⁹. Though it has already dealt with a number of controversial cases and issues, it has hitherto not exhibited any political bias. Instead, as Lourens Ackermann¹⁰⁰ has quite correctly observed,

[a] quick scan of the court's cases to date will show a haphazard pattern for any person trying to establish a trend of political favour.

In **Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others**,¹⁰¹ for example, the Court struck down a presidential proclamation, thus upholding a challenge by the National Party-dominated provincial government to the constitutional validity of (the ANC-dominated) national government action in respect of transitional measures for local government.¹⁰² In the course of his judgment, Chaskalson P, it is noted, rapped the third respondent in the matter, the MEC for Local Government, over his knuckles for the latter's public remark that the Western Cape government had an excellent chance of winning the case in the Constitutional Court if the matter was not a political one.

In **In re: Certification of the Constitution of the Province of KwaZulu-Natal**,¹⁰³ against the wishes of the Inkatha Freedom Party, it sent back the KwaZulu-Natal constitution with a clear message that it was unconstitutional because it sought to usurp some of the powers of the national government and undermine the (interim) **Constitution** by giving the provincial legislature powers which it was not allowed. At the same time, in an earlier judgment,¹⁰⁴ the Court had upheld the Inkatha Freedom Party's contention that the two affected Bills, which sought to, *inter alia*, enable the Province of KwaZulu-Natal to pay the salaries and allowances of its traditional leaders, were not unconstitutional.

No transgressor has been spared the Court's rod. Recently, according to Lourens Ackermann,¹⁰⁵ Abdullah Omar, the Minister of Justice, was rebuked by the Court for a "sorry tale" of bureaucratic bungling and tardiness which saw his Department miss an eighteen-month deadline to amend an unconstitutional law. In **Minister of Justice v Ntuli**,¹⁰⁶ berated the Department of Justice and stated,¹⁰⁷ *inter alia*, that:

[i]f the officials dealing with the matter in the Department of Justice had acted promptly in the period of almost 18 months which have now passed between the decision in *S v Ntuli* and the delivery of this judgment, Parliament could have been asked to bring section 309(4)(a) of the Criminal Procedure Act into line with the Constitution, or provision could have been made for the representation of convicted prisoners in custody who wish to appeal, but do not have the means to secure legal representation. The additional 18 months that the Department of Justice now seeks to enable it to attend to the matter is the result of the neglect of the officials who were dealing with the matter and not the declaration of invalidity. It is said that the courts do not have the resources to handle the additional appeals which will result from the declaration of invalidity coming into force. If this is so, it is a consequence of the rights conferred by the Constitution and departmental neglect, and not the order made by this Court.

The President of the Court¹⁰⁸ then warned that:

[t]his Court has the responsibility of ensuring that the provisions of the Constitution are upheld and enforced. It should not be assumed that it will lightly grant the suspension of an order made by it declaring a statutory provision to be invalid and of no force and effect, or if it does so, that it will allow more time than is necessary for the defect in the legislation to be cured.

The Court has so far behaved like the Supreme Court of the United States, the judges of which have tended not necessarily to follow the wishes of the Presidents, such as Lyndon Johnson and Ronald Reagan, who appointed some of its judges during their reign, hoping that they would follow their politics.

For these reasons, Ackermann concluded his article by praising the Constitutional Court profusely and declaring that

[w]e are lucky enough to have landed up with an independent Constitutional Court. A court which has made it clear that the Constitution and its values are not the property of politicians or their parties but the property of the people - and sacred property at that.¹⁰⁹

PARLIAMENT MUST ACT

As a result of numerous decisions of the Constitutional Court, already many of our statutes, particularly those that were enacted in the previous constitutional era, have been mutilated. An obvious casualty has been the **Criminal Procedure Act**,¹¹⁰ which, as Langa J¹¹¹ quite correctly observed, "was drafted and enacted in a different constitutional era in which the legal validity of its provisions could not be questioned." Many of its provisions have already been adjudged to be in conflict with the **Constitution** and therefore invalid; in appropriate proceedings, many of its remaining provisions will soon suffer the same fate. Parliament has to act as a matter of urgency to bring this Act, among others, into line with our nascent democracy and the core values of freedom and equality inherent in the new constitutional system, which must now hold sway.

We cannot afford to wait until appropriate cases arise before we can address piecemeal the crudities of some of our old legislation. A way has to be found to systematically comb through the statute book and weed them out. It behoves me to emphasise Langa J's further observation that:

[t]he problem is that provisions of old legislation, and in particular the Act, are being struck down because they are inconsistent with the Constitution, leaving gaps in the law which only the legislature can fill. It is primarily the task of the legislature, and not the courts, to bring old legislation into line with the Constitution. Although understandable because of the transitional stage we are in, the continued operation of, and reliance by prosecutors on provisions which do not reflect the new constitutional order is an unsatisfactory state of affairs. Hopefully, it will not be long before a revised Criminal Procedure Act, consistent with the Constitution, is put in place.¹¹² (my emphasis)

A possibly quicker solution might be that an injunction should be issued to all organs of state to scrutinise the laws they are responsible for and prepare Bills seeking to expunge all presumably unconstitutional provisions within a given time frame. I may even suggest that the South African Law Commission should also be involved in an exercise of that nature, magnitude and complexity.

ENDNOTES - CONCLUSION

1. One thing I am certain about is that the prediction of Kierin O'Malley 'The 1993 Constitution of the Republic of South Africa - The Constitutional Court', in (1996) 8 **Journal of Theoretical Politics** 177 at 178 that the Constitutional Court and the courts generally could well become excessively politicized and the crucial distinction between law and politics weakened has not materialised.
2. Section 167(3)(b).
3. In the decision of which the Supreme Court of Appeal, which is headed by the Chief Justice of the Republic, is entitled to participate. See Section 168(3), read with Sections 167(5) and 172(2)(a), of the (new) **Constitution**.
4. Stuart Woolman, Case Reports in (1996) 12 **SAJHR** 151 at 156.
5. See Section 170 of the (new) **Constitution**.
6. See Mokgoro J in **Case and Another v Minister of Safety and Security; Curtis v Minister of Safety and Security**, 1996 (5) BCLR 609 (CC) at 640, paragraph 73.
7. Mahomed J (as he then was) in **S v Makwanyane and Another**, 1995 (3) SA 391 (CC) at 489C-D, paragraph 266.
8. O'Malley, *op cit*.
9. See Chaskalson P in **S v Makwanyane and Another**, *supra* at 437G-438A, paragraph 107. See also Chaskalson P in **Ferreira v Levin; Vryenhoek v Powell**, 1996 (1) BCLR 1 (CC) paragraph 183. However, as was pointed out in this thesis, the distinction between these two organs of state must not be exaggerated.
10. 'Racism in American and South African Courts: Similarities and Differences' in (1990) 65 **New York University Law Review** 479 at 485.
11. 'A Ringing and Decisive Break with the Past?' in (1996) 3 **Review of Constitutional Studies** (Alberta Law Review and Centre for Constitutional Studies) 141 at 142.
12. Paragraph 5 of the unreported decision of the Court reported as CCT 15/97 handed down on 5 June 1997.
13. Section 172(2)(a) of the (new) **Constitution**. It is noteworthy that, as Section 172(2)(d) shows, in so far as orders of constitutional validity are concerned, decisions of the Supreme Court of Appeal are "appealable".
14. The provisions of Section 172(2)(a) are clear: An order of constitutional validity made by a High Court or a court of similar status, and even by the Supreme Court of Appeal, "has no force unless it is confirmed by the Constitutional Court."
15. A former Chief Justice of India, referred to this in his address delivered at the Columbia Law School in October 1984.
16. 1995 (12) BCLR 1593 (CC), where the Court held that a "blanket docket privilege" was inconsistent with the right to a fair trial then as guaranteed in Section 25(3) of the (interim) **Constitution**.
17. [1997] 1 All SA 291 (B).
18. *Ibidem*, at 294E-F.

19. 1995 (2) SA 642 (CC).
20. *Ibidem*, at paragraph 16.
21. [1997] 1 All SA 351 (NC).
22. *Ibidem*, at 357C-D. See also **S v David**, 1991 (1) SACR 375 (Nm) for the position under Namibian law.
23. 1995 (7) BCLR 851 (CC).
24. Judges like Chaskalson P, Didcott and Sachs, who were known advocates of the right of the indigent to legal representation at state expense, agreed with the rest presumably because to them unanimity among the Court's judges is a priority, especially when it comes to controversial issues demanding the making of unpopular decisions.
25. *Ibidem*, at paragraph 15.
26. Didcott J merely referred to this issue in passing in **S v Ntuli**, 1996 (1) BCLR 141 (CC) at 153, paragraph 29.
27. 1995 (3) SA 391 (CC).
28. Section 11 of the (new) **Constitution**.
29. As pointed out in Chapter 10 of this thesis, the matter is now before Parliament, where the ANC, the chief protagonist of the abolition of the death penalty, has a majority of 62.5%, more than the requisite simple majority it would take for the institution to pass the necessary legislation.
30. 1995 (4) BCLR 401 (CC).
31. Such as in **S v Bhulwana; S v Gwadiso**, 1995 (12) BCLR 1579 (CC).
32. 1996 (7) BCLR 899 (CC).
33. 1995 (7) BCLR 861 (CC).
34. Per Langa J at 866, paragraph 10.
35. *Ibidem* at 878, paragraph 49.
36. As stated in Chapter 11, a Bill seeking to abolish corporal punishment as a penal option in our legal system is now before Parliament.
37. 1996 (1) SACR 335 (E), where it was held that unconstitutionally obtained evidence could be admissible, unless it was shown that its admissibility would bring the administration of justice into disrepute.
38. 1997 (1) BCLR 123 (W).
39. *Ibidem*, at 134H-I.
40. Formerly called the Appellate Division of the Supreme Court.
41. 1996 (6) BCLR 788 (CC), where it was held per Kriegler J, with whom all the other members of the Court concurred, that unconstitutionally obtained evidence - in this instance evidence obtained directly or derivatively as a result of an unconstitutional search and seizure - does not become inadmissible *per se* at criminal proceedings against the person from whom the material containing or pointing to the evidence was seized; depending on the circumstances, fairness may in certain circumstances require that such evidence be excluded or, as the case may be, allow that it be admitted. Such questions as may

relate to the admissibility of such evidence are to be determined by the trial court in the light of the circumstances of each case.

42. *Op cit*.

43. 1996 (3) SA 800 (T).

44. [1997] 1 All SA 305 (T).

45. *Ibidem*, at 309C.

46. *Ibidem*, at 309H-I.

47. *Ibidem*, at 313G-H.

48. *Ibidem*, at 313I.

49. Section 23(1), read with Section 32(2) of the main body or text of the (new) **Constitution**.

50. As envisaged in Section 32(1)(a) and (b) of the (new) **Constitution**.

51. See **In re: Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996, 1997 (1) BCLR 1 (CC)**.

52. Act No. 96 of 1991 as amended.

53. Such as **Xu v Minister van Binnelandse Sake**, 1995 (1) BCLR 62 (T); **Naidenov v Minister of Home Affairs**, 1995 (7) BCLR 891 (T); **Parekh v Minister of Home Affairs**, 1996 (2) SA 710 (DCLD); and **Foulds v Minister of Home Affairs**, WLD July 1996 Case No. 96/8037, per Streicher J.

54. 1995 (4) SA 197 (BSC), which was decided in favour of an alien on the basis that discrimination against aliens on the ground of national origin was a violation of Section 8 of the (interim) **Constitution**.

55. Which every person was basically entitled to under Section 24(c) of the (interim) **Constitution**.

56. It is useful to recall that in an analogous context, namely the issue of prisoners and their rights or privileges, the question as to whether prisoners had rights or only the privileges they were granted was settled in 1993 by the Appellate Division in **Minister of Justice v Hofmeyer**, 1993 (3) SA 131 (A), where it was held that prisoners indeed have rights.

57. Which appropriately pointed out in **S v Makwanyane and Another**, *op cit* 431E-F, paragraph 88, that: "[t]he very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process."

58. Section 167(5), read with Section 163(3), of the (new) **Constitution**.

59. *Op cit* paragraphs 9 and 10.

60. See **S v Zuma and Others**, 1995 (2) SA 642 (CC) at paragraph 14. See also **S v Mhlungu and Others**, 1995 (3) SA 867 (CC) at paragraph 99.

61. In **Mhlungu**, *supra*, at paragraphs 8, 23, 26 and 46.

62. See **Zuma**, *supra*, at paragraph 15.

63. See, for example, **Zuma**, *supra* at paragraphs 14, 15 and 18; **S v Williams and Others**, *supra* at paragraph 51 and **Executive Council, Western Cape Legislature v President of the Republic of South Africa**, 1995 (4) SA 877(CC) at paragraph 198.

64. In **Makwanyane**, *op cit* paragraph 325.
65. Kentridge AJ and Kriegler J in **Mhlungu**, *supra* at paragraphs 63, 64 and 69, and 97 respectively.
66. In **Makwanyane**, *supra* at paragraph 9.
67. *Op cit*.
68. *Ibidem* at paragraph 10.
69. *Ibidem* at paragraphs 13-16.
70. *Ibidem* at paragraph 17.
71. *Ibidem* at paragraph 18.
72. *Ibidem* at paragraph 19.
73. *Ibidem* at paragraphs 20-25.
74. *Op cit* paragraphs 15, 33, 36 and 37.
75. *Op cit* paragraphs 112 and 142.
76. In constitutional democracies such as Canada it appears that "originalism" has never enjoyed much support. See Peter H Hogg **Constitutional Law of Canada** (3rd ed, Carswell, Toronto, 1992) at 1289. See also Lamer J in **Re: Section 94(2) of the BC Motor Vehicles Act**, [1985] 2 S.C.R. 486 at 509.
77. **Understanding South Africa's Transitional Bill of Rights** (Juta & Co, Cape Town, 1994) at 83-85.
78. *Op cit* paragraph 107.
79. *Ibidem*.
80. *Ibidem* at paragraph 370.
81. *Ibidem* at paragraph 104.
82. [1990] 3 S.C.R. 1303; (1991) 1 C.R.R. (2nd ed) 1 at 30.
83. See, for example, Chaskalson P in **Executive Council, Western Cape Legislature v President of the Republic of South Africa**, 1995 (4) SA 877 (CC) at paragraph 100. See also Didcott J in **S v Vermaas; S v Du Plessis**, 1995 (3) SA 292 (CC), at paragraph 16.
84. Though the views of Madala J and Ngoepe AJ expressed in their dissenting judgment in **Executive Council, Western Cape Legislature v President of the Republic of South Africa**, *supra* at paragraphs 211ff may be read in that light.
85. *Op cit*, paragraph 35.
86. **S v Makwanyane and Another**, *op cit* 498C-D, paragraph 300.
87. Jeremy Sarkin 'The Constitutional Court's Decision on Legal Representation' in (1996) 12 **SAJHR** 55 at 61.
88. Section 9(2) of the (new) **Constitution**.
89. *Op cit* 164 - 165

90. *Op cit.*
91. 1995 (12) BCLR 1579 (CC).
92. 1996 (3) BCLR 293 (CC).
93. **S v Zuma and Others**, *op cit* paragraphs 41 and 42.
94. *Ibidem*, paragraph 43. See also **S v Mhlungu and Others**, *op cit*, paragraphs 35, 39-42 and 93.
95. According to **The Star**, 4 July 1997, Swart J has given leave to appeal in this matter.
96. 1997 (5) BCLR 577 (T).
97. See **Makwanyane**, *op cit* 431E-F, paragraph 88.
98. Who might have been unhappy about the number of "conservative white judges" serving in the Court. However, Corder and Davis, *op cit* 163, correctly noted that some of the Court's judgments "do reveal a division between those judges who are more comfortable with traditional legal analysis and those who are prepared to seek meaning way beyond the literal formulations in order to promote the underlying values of the Constitution. Whether this division is but temporary will be tested when the Court is confronted with more controversial cases dealing with the Bill of Rights."
99. Who might have predicted that the Court was ANC-dominated and would be an instrument of government policy.
100. 'SA's Constitutional Court Proves Its Integrity by Its Actions', in **The Star**, 26 June 1997.
101. *Op cit.*
102. It is noteworthy that Chaskalson P, demonstrating a strong commitment to constitutional supremacy, declared in this case at paragraph 100, that: "Constitutional cases cannot be decided on the basis that Parliament or the President acted in good faith or on the basis that there was not objection to action taken at the time that it was carried out. It is of crucial importance at this early stage of the development of our constitutional order, to establish respect for the principle that *the Constitution is supreme.*" (my emphasis)
103. 1996 (11) BCLR 1419 (CC).
104. **In re: KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995; In re: Payment of Salaries, Allowances and Other Privileges to the Ingonyama Bill of 1995**, 1996 (7) BCLR 903 (CC).
105. *Op cit.*
106. *Op cit*, paragraphs 37-42. This was the decision of the Constitutional Ackermann was commenting on.
107. At paragraph 39.
108. At paragraph 42.
109. *Ibidem.*
110. Act No. 51 of 1977.
111. In **S v Coetzee and Others**, 1997 (4) BCLR 437 (CC) at 442 - 443, paragraph 1.
112. *Ibidem.*

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