THE SOUTH AFRICAN POLICE SERVICE FROM PARLIAMENTARY SOVEREIGNTY TO CONSTITUTIONAL SUPREMACY AND LAW ENFORCEMENT CHALLENGES UNDER THE 1996 CONSTITUTION

by

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PROMOTER: PROF AMB MANGU

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DECLARATION

I, student number 07661673, Pitso Petrus Ramatsoele, declare that

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is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

I also declare that I submitted the thesis to originality checking software and that it falls within the accepted requirements for originality.

I further declare that I have not previously submitted this work, or part of it, for examination for another qualification to UNISA or any other higher education institution.

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All mistakes and omissions are not intentional and mine.

PP RAMATSOELE

DEDICATION

This study is dedicated to my late mother, Moselantja Roseline Ramatsoele. Her passion for education made me persevere and never give up, even in very difficult times. She taught me to be patient and never give up on anything in which I believe. I thank you, Mom.

ABSTRACT

This thesis is centered on a major research question: What has been the path of the South African Police (SAP) from parliamentary sovereignty to constitutional supremacy? How can constitutionalism, the rule of law, and democracy assist in transforming legislation and the police to eliminate law enforcement challenges under the 1996 Constitution? The significance of the problem and its implications impact on the lives of all South Africans. This thesis explores the degree to which constitutionalism, the rule of law, and democracy are adapting unjust laws. The assumption is that all legislation must comply with the Constitution. The thesis is based on legal methodology and includes theoretical, conceptual, and philosophical analysis. It is analytical and resorts to both desktop and library research. This includes a comprehensive literature review and a review of the 1996 Constitution, selected pieces of legislation, case law, and comparative law. The thesis consists of five chapters. Chapter 1 is the general introduction that introduces the reader to the research study. Chapter 2 examines the theories that are important and relevant to the study. Chapter 3 investigates the transition of the SAPS from the previous system of parliementary sovrreignty to the current legal order based on constitutional sovereignty. Chapter 4 reflects on law and enforcement challenges under the 1996 Constitution. Chapter 5 concludes with findings and recommendations. The thesis makes a valuable contribution to knowledge on South African constitutional law by examining constitutionalism, democracy and the rule of law and its impact on the transformation of the SAPS under the 1996 Constitution.

KEY WORDS

Constitution; Constitutional Supremacy; Constitutionalism; Democracy; Human Rights; Judiciary; Parliamentary Sovereignty; Rule of Law; South African Police Service

LIST OF ABBREVIATIONS AND ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights, 1981
AHRLJ	African Human Rights Law Journal
AJCJS	African Journal of Criminology and Justice Studies
AJOL	African Journals Online
ANC	African National Congress
Afr. Soc. Sci. Rev.	African Social Science Review
AR	Africa Review
AYIHL	African Yearbook on International Humanitarian Law
Banjul Charter	African Charter on Human and Peoples' Rights, 1981
CESCR	Committee on Economic, Social and Cultural Rights
CIDT	Cruel, Inhuman and Degrading Treatment
CILJ	Cornell International Law Journal
CJLJ	Canadian Journal of Law and Jurisprudence
CPA	Criminal Procedure Act 51 of 1977
CSPS	Civilian Secretariat for Police Service Annual Report
CSVR	Centre for the Study of Violence and Reconciliation
DPCI	Directorate for Priority Crime Investigation
GTULC	Georgetown University Law Centre
HCPA	High Court of Parliament Act 35 of 1952
ICC Act	International Criminal Court Act 27 of 2002
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights, 1966
IPID	Independent Police Investigative Directorate
ISESCR	International Covenant on Economic, Social and Cultural Rights, 1966
JGRJ	Journal of Gender, Race and Justice

JMLR	John Marshall Law Review
JOEPP	Journal of European Public Policy
MJSS	Mediterranean Journal of Social Sciences
MLJ	Macquarie Law Journal
MLR	Milan Law Review
NA	National Assembly
NCA	Natives (Urban Areas) Consolidation Act 25 of 1945
NDPP	National Director of Public Prosecutions
NLA	Natives Land Act 27 of 1913
NPA	National Prosecuting Authority
NTLA	Native Trust and Land Act 18 of 1936
PELJ	Potchefstroom Electronic Journal
RSA	Republic of South Africa
SACJ	South African Computer Journal
SACQ	South African Crime Quarterly
SADC	Southern African Development Community
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SANNC	South African Native National Congress
SAP	South African Police
SAPF	South African Police Force
SAPL	South African Public Law
SAPS Act	South African Police Service Act 68 of 1995
SAPS	South African Police Service
SCLR	Southern California Law Review
SJICL	Singapore Journal of International and Comparative Law
TILJS	Texas International Law Journal

TSAR	Tydskrif vir die Suid-Afrikaanse Reg
TSJOL	The Student Journal of Law
TYLJ	The Yale Law Journal
UDHR	Universal Declaration of Human Rights, 1948
UK	United Kingdom
UN	United Nations
UNOHCHR	United Nations Office of the High Commissioner for Human Rights
US	United States
USA	United States of America

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Chapter 1: General introduction

1.1 Context and background of the study

This study investigated material differences in the application of the constitution and law enforcement in South Africa before and after 1994, considering our recent history, when many citizens' fundamental rights were violated during the apartheid era. This study was conducted in the context of this history in order to find solutions to challenges in law enforcement caused by the impact of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution).[1]

1.2 Aims and objectives of the study

Aims and objectives of the study South Africa moved from a system of parliamentary sovereignty in which legislation passed by Parliament was supreme under the apartheid regime to that of constitutional supremacy under the 1994 (interim) Constitution. The interim Constitution was superseded by the 1996 Constitution, which is the supreme law of the Republic and currently governs the country.

It is worth noting that the South African Police Service (SAPS) was known as the South African Police Force (SAPF) during the apartheid era, primarily due to the police acting in a semi-military manner. The police force is now known as the SAPS under the new constitutional supremacy regime because the Police Department evolved from a "force" to a public "service". This thesis looks into how the SAPS evolved from the previous to the current regime; how apartheid's policies influenced its activities during parliamentary sovereignty; and how constitutional supremacy changed the post-apartheid dispensation.

This research seeks to comprehend the role of the police "force" in the previous administration and how this force affected society and policing. It also investigates the current (police) approach to "service" in the new (post-apartheid) regime.

During the apartheid era, the police had a very narrow and politically oriented mandate. The SAPF was mandated to uphold apartheid and protect the political order (parliament was sovereign under the apartheid system). This mandate was

1 Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution).

considered a top priority of the SAPF. The day-to-day fight against crime received less attention.[2]

The police mandate changed in the new dispensation. The broad mandate of the SAPS under the system of constitutional supremacy is as follows: (1) crime prevention; (2) investigating domestic crime; (3) investigating international crimes; (4) maintaining public order; (5) protecting and securing human rights; and (6) upholding and enforcing the law. This mandate is authorised by the 1996 Constitution.[3] The change which is currently observed is that the mandate of the police moved from focussing on politics to focussing on normal crime-fighting.

The new regime did not come without its own set of policing challenges. The 1996 Constitution had an impact on legislation in some ways. This, in turn, complicates smooth policing. This thesis investigates the pre-1994 legislation that has a negative impact on police operations as a result of the 1996 Constitution's impact. This thesis then investigates how to address this legislation as well as other factors impeding effective post-apartheid policing.

This thesis intends to contribute to the consistency of the law on the police in the country. The goal is to encourage law enforcement to comply with the requirements of the Constitution, the United Nations (UN) Charter, as well as international standards. It is meant to deter human rights abuses during the exercise of law enforcement.

In general, the goal of this thesis is to contribute to the development of solutions to legislation that makes it difficult for the police to provide quick and efficient services to the community. This will not be possible if there are legislative and other barriers. As a result, the study seeks to contribute by addressing identified policy and legislative gaps, which date back to the creation of the 1996 Constitution and the Bill of Rights.

In view of the above, the following aims focus on the purpose of the thesis:

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2 Pruitt WR "The progress of democratic policing in post-apartheid South Africa" 2010 *AJCJS* 116 – 140 119.

3 Section 205(3) of the Constitution.

1. Reflecting on the South African Police Service (SAPS) from apartheid to the democratic era;
2. Examining the mandate of the SAPS from apartheid to the new dispensation;
3. Investigating the challenges confronting the SAPS as a law enforcement agency under the current legal order.

The following objectives indicate what the thesis intends to accomplish:

1. To illustrate the effects of apartheid on humanity and policing;
2. To demonstrate the effects of the 1996 Constitution on legislation and policing;
3. To find solutions to the challenges; and
4. To contribute to existing knowledge.

1.3 Problem statement

What has been the path of the South African Police (SAP) from parliamentary sovereignty to constitutional supremacy? How can constitutionalism, the rule of law, and democracy help transform previous (pre-democratic) legislation and the police, and address law enforcement challenges under the 1996 Constitution?

The pre-democratic Police Department operated in a more force-oriented manner, as opposed to a service-oriented manner. It was enforcing the government's laws, even if they were unjust. They did not have a choice but to comply. This was influenced by the fact that parliament was superior, and its laws could not be challenged. This method of working with force became the police culture for more than 80 years. The use of force was the norm.

The problem is that the present democratic police is now struggling to abandon the use of force as it has been the dominant culture for many years in the police organisation. Even today, 27 years into the democratic dispensation, the public still complains about and fears police brutality.

Apartheid left several issues, which the new democratic order inherited. This includes a society that was separated into black, white, coloured, and Indians. According to their races, the groupings were further separated into distinct

residential neighbourhoods. As a result of the unequal treatment of citizens, there was resistance, prompting the police to act.

The use of force by the police to suppress the people caused society to distance itself from the police as their defenders. For example, police could shoot and kill a person fleeing from arrest due to the commission of a crime under schedule 1 of the Criminal Procedure Act 51 of 1977, regardless of the seriousness of the crime.[4] This resulted in the problem of bad relations between the police and the community. The police force was separated into separate police agencies, each situated in a distinct homeland. This resulted in the problem of skills for some of the police because they did not receive the same training. The democratic dispensation thus inherited the problem—the police do not have the same standard of expertise.

Because parliament was supreme, it could pass any legislation. Because the political order, at the time, adopted an apartheid policy, most of the legislation attempted to comply with the government's apartheid policies. As a result, the majority of the legislation was unjust to the country's non-white population because it meant to comply with the government's apartheid policies. The current issue in the new regime is that some of the legislation is in conflict with the 1996 Constitution and complicates policing work. This aspect is explained in detal below.

The 1996 Constitution (and not the legislature) is supreme in the new (democratic) order. The supremacy of the Constitution has prompted courts to declare some public laws (e.g. statute law, criminal procedure and law of evidence) or their provisions unconstitutional because they did not meet the constitutional muster. This impacted some policing activities. It implies that the police now experience difficulty in enforcing the law due to gaps in the laws, which were declared unconstitutional. This thesis contributes to identifying such laws and recommends their amendment to comply with the 1996 Constitution.

Currently, section 35 of the 1996 Constitution is vague concerning the rights of an offender not taken into custody. It does not indicate whether this person (offender not taken into custody) is entitled to the rights contained in section 35 of the

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4 Section 49 of the Criminal Procedure Act 51 of 1977 before amendment (hereinafter referred to as the CPA).

Constitution. The Constitution only highlights the rights of the arrested, detained, and accused persons.[5] When a person, suspected of having committed a crime, has not yet been arrested, but the police wish to interview the person, it is not clear from the Constitution whether or not the person must be informed of his rights as set out in section 35. On the contrary, the Judges' Rules of 1931 required a suspected person to be warned of his rights before being interviewed by the police. This creates confusion for the police when carrying out their duties. Section 35 of the 1996 Constitution needs to be simple and unambiguous so people and police officers can grasp it and comply with the rule of law.

The following paragraphs provide examples of other problems. The constitutional right to human dignity[6] and the right to life relating to fugitives is a challenge.[7] Wanted persons or foreign fugitives often flee to South Africa to avoid justice in their own countries. If the fugitive's state demands South Africa to deport or extradite the fugitive to stand trial, South Africa may refuse to do so even though an extradition arrangement exists between the countries. This occurs if the applicant country fails to offer a promise or assurance to South Africa that the fugitive will not be sentenced to death (if found guilty in the applicant country).[8]

The problem, at present, is that South Africa does not have the authority to put a defendant in a South African court for crimes committed by such a defendant in his own country unless the offence falls within the scope of the Rome Statute of the International Criminal Court Act.[9] This deficiency presents a risk to the safety of all citizens, although the right to life of fugitives has to be respected. It also contravenes the Constitution, protecting and securing inhabitants of the Republic, and upholding

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5 Sections 35(1) – (3) of the Constitution.

6 Section 10 of the Constitution; Bradley AW and Ewing KD *Constitutional and administrative law* (Pearson Education Harlow 2003) 4.

7 Section 11 of the Constitution; *S v Makwanyane* 1995 6 BCLR 665 (CC) (hereinafter the *Makwanyane* case) [328]; Rautenbach IM and Malherbe EFJ *Constitutional law* 2nd ed (Butterworths Durban 1996) 322.

8 *Mohamed and another v President of the Republic of South Africa and others* 2001 7 BCLR (CC); *Minister of Home Affairs and others v Tsebe and others, Minister of Justice and Constitutional Development and another v Tsebe and others* 2012 5 SA 467 (CC).

9 27 of 2002 (hereinafter referred to as the ICC Act).

and enforcing the law.[10] The challenge complicates the police functions of preventing crime.

There are some limitations on police functions relating to the Criminal Procedure Act.[11] The right to privacy[12] and the right to freedom and security of the person experience some challenges.[13] Sections 19 to 37 of the CPA are silent on the searching and seizing of a device or mobile phone for the purpose of allowing police officers to access information from it, for investigative purposes. Furthermore, the CPA is silent relating to extraction of real evidence (exhibits), such as a bullet point or drugs from the physique of the person who is alleged to have committed a crime, been apprehended, is in custody, or has been indicted.[14] It deals only with the search and seizure of property referred to in section 20, where there is no intrusive activity relating to the body of the person.

The CPA does not include a provision that authorises police officers to retrieve an exhibit that is stuck in the body of a suspected offender—if the person is not willing to consent to the removal of the exhibit.[15] If the police remove the exhibit from the body of the person without his consent, it may be regarded as a violation of the constitutional rights of the person (i.e. the right to privacy, human dignity, bodily integrity, and the right to freedom and security of the person).[16]

Currie and de Waal indicate that privacy is what can reasonably be considered to be private.[17] For the sake of completeness, it must be clarified that the action or intervention of a medical practitioner to extract an object (bullet point) from the body of a non-consenting person is not protected by the CPA or any other statute. Surgery or other medical procedures are invasive and can be viewed as breaching or

10 Section 205(3) of the Constitution.
11 51 of 1977.
12 Section 14 of the Constitution.
13 Section 12 of the Constitution.
14 *Minister of Safety and Security and another v Gaqa* 2002 1 SACR (C) (hereinafter the *Gaqa* case); *Minister of Safety and Security v Xaba* 2004 1 SACR (D) (hereinafter the *Xaba* case).
15 *Gaqa* 10 – 11; *Xaba* 1 – 3.
16 Rautenbach and Malherbe *Constitutional law* 323.
17 Section 12(2)(c) of the Constitution; Currie I and de Waal J *The Bill of Rights handbook* (Juta Cape Town 2009) 318.

violating the rights of the individual, such as the right not to be subjected to medical or scientific experiments without informed consent.[18]

Currie and de Waal further clarify the significance of the CPA by noting that there are various laws allowing search and seizure, the most important of which is the CPA. These laws limit the right to privacy and must be justified in compliance with the limitation clause. In order to comply with section 36 of the Constitution, enabling legislation must clearly describe the scope of the search and seize powers. Prior authorisation is required from an independent authority. The Act requires the independent authority to be persuaded, through an oath, that the search has reasonable grounds.[19]

The scope of the CPA excludes the use of surgery as a form of search. This is a legislative gap and needs to be closed and regulated by the legislature as it has a negative impact on the investigation of crime.

The right to land and the right of access to adequate housing is still a problem in South Africa. The Constitution orders the state to ensure that all citizens have land on an equal basis.[20] Furthermore, the Constitution guarantees the right of access to housing.[21]

The question of land management and access to adequate housing remains a challenge, contributing to social- and economic problems. These social issues contribute to confrontation in the form of public violence and the police must intervene to neutralise the confrontation. Thus, the Natives Land Act 27 of 1913 (NLA) is one piece of legislation that does not support the values of the Constitution and contributes to unemployment, shortage of houses, and public unrest. This Act creates hostile relations between the police and the community during the combatting of public unrest.

Corruption also contributes to social problems. It is a concern both at home and abroad. South Africa's corruption is growing at a rapid pace. As a result, the confidence of society in the government is eroding. The police must devise novel

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18 Section 12(2)(c) of the Constitution.
19 Currie and de Waal *The Bill of Rights handbook* 325.
20 Sections 25(5) and (9) of the Constitution.
21 Sections 26(1) – (2) of the Constitution.

approaches to combat corruption. When funds—meant for the people—are diverted to those in power for their own or personal gain, corruption invariably results in human rights violations. In South Africa, this issue exists at all levels, from local to national levels. To fight corruption you need "whistleblowers". The South African Police Service is tasked with protecting citizens from injustice, and solutions must be found to strengthen this.[22]

In 2013, when the SAPS celebrated the 100 years of its existence, the former Minister of Police, NE Mthethwa, MP, made the following remarks in his speech:

> As Government we remain committed and will continue to instill various principles which underpin a new approach to security in a democratic[23] South Africa. Firstly, that both national security and personal security must be advanced through efforts to meet the social, economic, and cultural[24] needs of society. To give impetus to such undertakings, we have consistently emphasised that police must be seen and see themselves, as the guardian of human rights[25] generally in line with the Constitutional ethos. On this occasion we charge all patriots of the SAPS that: 1. The police must respect human dignity, uphold and protect human rights; 2. The police service must be established on the ethics of public service and not view themselves as the 'masters' of the public.[26]

There is a clear need to delve deeply into the structure of the police, its mandate, and the Constitution, as well as previous dispensation's public laws (which have a negative impact on policing after 1994) in order to find solutions to the challenges that policing faces in our democratic society. This may help or contribute to the development of the law, improve relations between the police and the community, and bring forward new law enforcement ideas.

1.4 Research questions

The following research questions relating to public law are addressed in this study:

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22 Section 205(3) of the Constitution; section 13 South African Police Service Act 68 of 1995.

23 Section 1 of the Constitution.

24 These are usually referred to as third generation rights. This means that the minister confirms that the police have an obligation to contribute to the protection of socio-economic and cultural rights.

25 See Chapter 2 of the Constitution.

26 SAPS "Remarks by the Minister of Police NE Mthethwa, MP at the commemoration of the SAPS centenary on 22 November 2013" http://www.saps.gov.za/about/min-mthethwa-saps100-speech.php (Date of use: 15 January 2015).

1. Are the police under constitutional supremacy expected to enforce the law in the same way they used to enforce it during the era of parliamentary sovereignty?

2. Does the legislation on the police pass constitutional muster?

3. What kind of change happened in legislation?

4. Are there still gaps in public law ?

5. How does one reconcile the protection of values in the Constitution and the need to fight crime?

6. Did the legislature try to solve public law enforcement challenges?

7. Are the police able to serve the community efficiently and effectively with the current public law enforcement challenges?

1.5 Hypothesis

This thesis revolves around the theory that the 1996 Constitution is the supreme law of the Republic,[27] with a Bill of Rights that protects the rights of all the people in the country.[28] While the state is a modern democracy, the Constitution and the Bill of Rights have had some effect on some aspects of the law, raising new legal issues that need to be changed. It is believed that certain provisions of the law, at present, do not grant the police adequate power to protect the public against the perpetrators of crime. As a result, the police are not making an adequate contribution to the greater community to ensure the safety and security of the citizens.

The authority of the SAPS is a constitutional mandate that must be complied with by the police to avoid breaching the Constitution.[29] As a result, a way of reconciling "protection of values" in the Constitution and "the need to fight crime" must be found. The principle of the protection of rights and the promotion of values were confirmed in the case of *S v Makwanyane.*[30]

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27 Section 2 of the Constitution; Rautenbach and Malherbe *Constitutional law* 22.
28 Sections 7(1) – (3) of the Constitution.
29 Section 205(3) of the Constitituion.
30 *Makwanyane* 171 [308].

Conte supports the above assertion and points out that the essence of international human rights law is that the protection of rights and freedoms includes a degree of flexibility rather than a small number of absolute rights.[31] This helps states to bring these rights and freedoms into effect whilst, at the same time, implementing vital policy goals aimed at protecting communities, including national security, and ensuring a balance between competing rights.[32]

1.6 Justification and significance of the study

This research contributes to a better understanding for the development of inadequate legislation. Certain laws are no longer applicable and others have loopholes. It is well recognised that every statute that was in effect before the 1996 Constitution came into force remains in force until it has been amended or repealed to the degree that it conforms with the Constitution.[33] Several laws have been amended owing to intervention by the courts and this is discussed in more detail in Chapters 3 and 4 below. However, there are pieces of legislation that are still not consistent with the Constitution as only some have been amended.[34]

The intervention by the courts is confirmed by Moseneke. He indicates that the Constitution allows parliament (in the exercise of its legislative power) to act in compliance with and within the limits of the Constitution.[35] Cabinet members are collectively and separately responsible to parliament for the exercise of their powers and the execution of their duties.[36] All members of the executive are obliged to act in line with the Constitution.[37] The courts are autonomous and are dependent only on the Constitution and must enforce the law. Moreover, the Constitution orders the courts to proclaim any law or conduct that is incompatible with the Constitution worthless to the extent of the inconsistency.[38]

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31 Conte A *Human rights in the prevention and punishment of terrorism commonwealth approaches: the United Kingdom, Canada, Australia and New Zealand* (Springer Heidelberg Dordrecht London New York 2010) 11 14.

32 Conte *Human rights in the prevention and punishment of terrorism commonwealth approaches: the United Kingdom, Canada, Australia and New Zealand* 283.

33 Rautenbach and Malherbe *Constitutional law* 285.

34 *Makwanyane* [328].

35 Moseneke D "Striking a balance between the will of the people and the supremacy of the Constitution" 2012 *SALJ* 13.

36 Moseneke 2012 *SALJ* 13; section 92(2) of the Constitution.

37 Section 93(2)(a) of the Constitution.

38 Section 172(1)(a) of the Constitution.

Moseneke's statement referred to above justifies why existing law must be checked and updated to comply with the Constitution and why the police, as a state agency, must be able to execute or implement laws that follow the Constitution in the interests of the public.

The provision in section 36(1) of the Constitution (rights may be restricted only in terms of the law of general application) means that only the legislation may grant the administrative authorities the power to restrict rights. Without such discretion, successful governance is unlikely. However, the Constitution imposes certain limitations on the scope of the power the legislation can grant. The law will be invalid if it involves a complete transfer of power to the executive body to restrict some or all of the rights in the Constitution. The reason that rights can be restricted only by statute is that the legislature, as the representative of the people, and no one else, will make the initial decision to restrict rights.[39]

Where rights are limited using laws or actions that violate the Constitution, individuals that are affected by the action of the organs of the state will pursue the route of judicial review.[40] Carroll points out that any person who is grieved by the alleged abuse of power by a public body and who feels that the body has acted *ultra vires* or in violation of the rules of natural justice may petition for a judicial review of the action or decision in question.[41] Carroll points out that a public body acts *ultra vires* if it has no legal authority either in statute or in the common law.[42] Illegality, irrationality, and procedural impropriety are grounds for judicial review.[43] The statement of Caroll indicates that legislation must be clear and relevant to the current dispensation.

Some amendments ought to be made regarding the nature of those laws that are incompatible with the Constitution. This is the appropriate justification for this thesis. The rationale for this thesis is that it intends to contribute to the existing knowledge and public interest. The researcher relies on the presumption that reforms that have taken place since the transition of South Africa from parliamentary sovereignty to

39 Rautenbach and Malherbe *Constitutional law* 201.
40 Section 38 of the Constitution.
41 Carroll A *Constitutional and administrative law* (Pearson Education Limited Harlow England 2003) 22.
42 Carroll *Constitutional and administrative law* 273.
43 Carroll *Constitutional and administrative law* 280. Also see section 33(1) of the Constitution.

constitutional supremacy have had a significant effect on certain pieces of legislation. This means that some pieces of legislation do not pass the constitutional muster,[44] and have to be reviewed and redrafted in order to align with the 1996 Constitution and ensure smooth law enforcement processes.[45]

Law enforcement issues inevitably affect a safe and secure community, which is what victims of crime and law-abiding citizens want and need. Economic growth is inhibited by high crime rates and this discourages the trust of investors. A high crime rate also means that victims of crime lose trust in the police because they see the police as incapable of protecting them. This ultimately leads to communities taking the law into their own hands, which in turn promotes vigilantism and mob justice.

Makiwane considers a victim of a crime as a person who has suffered unjust or undeserved loss or a substantial decrease in well-being if he has been powerless in preventing loss.[46] The loss must have an established cause and the legal or moral meaning of the loss entitles the loss sufferer to some form of social concern. The victim must have been innocent or blameless—he must not be guilty of having intentionally or negligently contributed to the loss.[47]

The deficiencies in some pieces of legislation are highlighted in detail in Chapter 4 below. An example is found in some sections of pre-trial criminal procedure, especially the sections dealing with the rights of suspected, arrested, detained, and accused persons. Some of the sections are not compatible with the Constitution and frustrate law enforcement. These sections are discussed in detail in this thesis.

The UN is committed to improving the protection of human rights in the judicial process. It means that when citizens are investigated, arrested, detained, charged, or punished by state authorities, it is important to ensure that the law is enforced with due regard to the protection of human rights.[48]

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44 *Pillay and others v S* 2004 2 BCLR 159 (SCA).

45 Bradley and Ewing *Constitutional and administrative law* 4.

46 Makiwane PN *Rights and constitutionalism – A bias towards offenders* (LLD thesis University of South Africa 2008) 157.

47 Makiwane *Rights and constitutionalism – A bias towards offenders* 157.

48 *Basic Facts about the United Nations* (UN Department of Public Information New York 2011) 229.

The dispensation of parliamentary supremacy in former South Africa was a strategy in which human rights abuses were not a matter of concern. Little effort was made to secure human rights.[49] Positivism was a leading approach and the legislation was enforced as it was, regardless of how unjust or unreasonable it was. The approach to parliamentary supremacy was rather simple—parliament was sovereign. The laws passed by parliament had to be complied with by the police. The courts had to adjudicate the laws as they were. The high courts were unable to review the laws and they were only allowed to develop the common law. In 1931, some judges took action intending to defend the civil rights of arrested, imprisoned, and suspected persons and implemented the "Judges' Rules". That was the common-law way of ensuring the protection of the rights of perpetrators of crime and maintaining some checks and balances on police action.

In contrast, the 1996 Constitution omitted what the "Judges' Rules" intended to protect. The protection of the rights of a suspected person was excluded from the protection scheme of the previous 1931 Judges' Rules. Section 35 of the Constitution provides for the protection of the rights of the perpetrators of crime who have been taken into custody. However, this provision does not guarantee the rights of a person who has allegedly committed a crime when the essence of the event does not warrant the immediate taking into custody of the person. This poses practical challenges during day-to-day police inquiries, as the Constitution authorises police officers to question only persons who have been arrested, detained, or prosecuted—not offenders who have not been arrested.

Furthermore, the pre-trial procedure referred to in sections 36A–E and section 37 of the CPA is not properly consistent with the Constitution.[50] These sections do not comply with the right of the individual to privacy and the right of the individual to freedom and security. The shortcomings apply, in particular, to the powers of search and seizure of real facts or evidence trapped in the bodies of persons under investigation. Such sections are particularly essential for the orderly execution of

49 An example of this is found in *Harris and others v Minister of Interior* 1952 4 SA 769 (A) 27. Here, the Supreme Court struck down legislation that was aimed at protecting parliamentary sovereignty through passing legislation to create the "High Court of Parliament" that was aimed at reviewing all judgments of the Supreme Court that declared legislative provisions invalid.

50 See *Gaqa* 10 – 11; *Xaba* 1 – 3.

police activities or pre-trial criminal proceedings. The inconsistencies in these sections contravene constitutionalism,[51] which dictates that state action must be in line with the Constitution as well as the rule of law.[52]

Although perpetrators of crime have rights that need to be protected,[53] the victims of crime also have rights, which need to be protected by the state through the police,[54] and the courts.[55] Mangu rightly points out that the protection of human rights at the national level requires not only an enforceable Bill of Rights but also compliance mechanisms or structures to prosecute abuses and provide sufficient relief.[56] These rights include the right to life,[57] which is the right not to be murdered without justification, such as self-defence. This right protects the physical-biological existence of human beings.[58] The right to own property,[59] and others, also fall in this category.

The importance of the statistics below is to indicate the unacceptable crime rate in South Africa and therefore the need to develop laws that positively contribute to the promotion and protection of public and human rights.

Figures of reported crime for the financial year 2013/2014: 17 068 murders; 17 110 attempted murders; 183 173 assaults with intent to do grievous bodily harm; 46 253 cases of rape; 119 351 robberies with aggravating circumstances; 19 284 robberies at residential premises; and 145 robberies of cash in transit.[60]

Officers of the SAPS are also killed in crime-fighting operations. The total number of members of the SAPS killed during April 2014 to March 2015 financial year is 63.

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51 Currie and de Waal *The Bill of Rights handbook* 9 [1.3]; Barnett H *Constitutional and administrative law* 8th ed (Routledge UK 2011) 5.

52 Mangu AMB "Separation of powers, independence of the judiciary, and good governance in African Union member states" 2009 *Paper* 8; Bradley and Ewing *Constitutional and administrative law* 93.

53 Section 35 of the Constitution.

54 Section 205(3) of the Constitution.

55 Sections 165, 167 – 169 of the Constitution.

56 Mangu AMB *The road to constitutionalism and democracy in post-colonial Africa: The case of the Democratic Republic of Congo* (LLD thesis University of South Africa 2002) 149; section 172(1) of the Constitution.

57 Section 11 of the Constitution.

58 Rautenbach and Malherbe *Constitutional law* 322.

59 Section 25 of the Constitution.

60 SAPS "Analysis of the National Crime Statistics" Addendum to the Annual Report 2013/2014 13 – 31.

On 7 September 2015, President Jacob Zuma spoke at the SAPS National Day of Commemoration at the Pretoria Union Building. In his address, he said that as of 27 September 2015, 58 police officers had already been killed. A total of 27 police officers were killed on duty and 31 were killed off duty. The President said that the country's violent history of apartheid and colonialism has created a fertile ground for violent crime and disrespect for human life by some elements in our society.[61]

It is against this backdrop that the researcher assumes that there is ample justification for this analysis. The objective is to identify the statutory deficiencies and contribute to the development or alteration of legislation. This also leads to the defence of the interests of both offenders and victims of crimes, as well as social justice. A balance of interests is required.

The thesis is critical because it is unique. It is appropriate to investigate the topic as there currently exists no research on the topic of law enforcement and compliance issues emerging from the transformation of the SAP from parliamentary hegemony to constitutional dominance. Although some research exists regarding the SAP, there exists no research relating specifically to the challenges faced by the police under the 1996 Constitution.

The goal of this thesis is to contribute to improving the rule of law in South Africa. Its importance is that it explores the obstacles faced by police in their attempts to protect the public through law enforcement in a constitutional democracy, whilst at the same time maintaining respect for individual human rights.

The selection of this topic was influenced by the transition of the SAP from an apartheid regime to a democratic order, as well as the aftereffects of the previous regime (which influenced legislative changes in the new order due to its non-compliance with the 1996 supreme Constitution). These changes complicate the delivery of police services to the public. It is for this reason that this research is conducted.

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61 Nicholson G "Police killings: Zuma tells cops to fight back" 7 September 2015 *Daily Maverick* 2.2 https://www.dailymaverick.co.za/article/2015-09-07-police-killings-zuma-tells-cops-to-fight-back/ (Date of use: 15 December 2015).

1.7 Scope of the study

The scope of this thesis is limited to the area of concern. This thesis concentrates on the police as the government's law enforcement agencies for the study but excludes other members of the criminal justice system, such as the courts and correctional services. The scope is limited to the transition of the police force from the old to the new order.

In terms of political order and governance, the scope is limited to the impact of the old order's policies on police activities; the transition from the old to the new order; the impact of the previous order on the new order; apartheid's influence on the laws of the old order; the effect of the new order's Constitution on the laws of the old order; the impact of the 1996 Constitution on police operations; and legislation, which is causing the police to be ineffective.

In terms of policing and democracy, the focus is on civil and political rights. Little attention will be given to social and economic rights. The rights of both the criminal and the victim are considered. The main goal is to figure out how law enforcement and civil rights protection may coexist without endangering civil liberties.

The scope of the legislation is restricted to certain provisions of the Universal Declaration of Human Rights, 1948 (UDHR), international law, international covenants,[62] the NLA, the Prevention and Combating of Corrupt Activities Act 12 of 2004 (PRECCA), the South African Police Service Act 68 of 1995 (SAPS Act), the CPA, and the Constitution.

1.8 Literature review

The following are the main themes or central issues addressed in this review: (1) parliamentary sovereignty; (2) constitutional supremacy and constitutionalism; (3) apartheid, society, and policing; and (4) law enforcement challenges under the 1996 Constitution.

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62 International Covenant on Civil and Political Rights, 1966 (hereinafter referred to as the ICCPR); International Covenant on Economic, Social and Cultural Rights, 1966 (hereinafter referred to as the ISESCR).

This review critically explore the above themes and does not explore the challenges of the entire criminal justice system, such as the courts and correctional services.

1.8.1 Parliamentary sovereignty

The unconstitutional laws of South Africa are founded on this principle and its policy of apartheid. As a starting point for discussing sovereignty, Dicey states that,

> [t]he principle of parliamentary sovereignty means neither more nor less than this: namely, that Parliament thus defined has, under the British constitution, the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.[63]

Dicey continues:

> A law may, for present purpose, be defined as any rule which will be enforced by the courts. The principle, then, of parliamentary sovereignty may, looked at from its positive side, be thus described: any Act of Parliament, or any part of an Act of Parliament, which makes a new law, or repeals or modifies an existing law, will be obeyed by the court. The same principle looked at from its negative side, may be thus stated: there is no person or body who can, under the English constitution, make rules which override or derogate from an Act of Parliament, or which (to express the same thing in other words) will be enforced by the courts in contravention of an Act of Parliament.[64]

South Africa was a colony of Britain. Britain was a sovereign parliament and the law of Britain was applied in South Africa.[65] South Africa was ultimately converted into the Union of South Africa in 1910.[66] This means that parliamentary sovereignty in South Africa was born long before 1910—if not during the annexation of the colonies. To protect legislation passed through the principle of parliamentary sovereignty and to sustain it, in 1952 the Union of South Africa passed the Enabling Act.[67] Section 2 of this Act provided that,

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63 Dicey AV *Introduction to the study of the law of the Constitution* (Liberty Classics 1982) 36 – 37.

64 Dicey *Introduction to the study of the law of the Constitution* 151 – 152; Barnett *Constitutional and administrative law* 164.

65 Dicey *Introduction to the study of the law of the Constitution* 42 – 44.

66 South Africa Act, 1909. This Act was passed through both houses of the Imperial Parliament exactly as it was forwarded after the South African Convention was held. It was assented to by King Edward VII on 20 September 1909, and a Royal Proclamation on 2 December 1909 declared the date of the establishment of the Union to be 31 May 1910.

67 High Court of Parliament Act 35 of 1952 (hereinafter referred to as the HCPA). The English text was signed by the Governor-General and was assented to on 3 June 1952.

> notwithstanding anything to the contrary in any law contained, any judgment or order of the Appellate Division of the Supreme Court of South Africa, whether given or made before or after the commencement of this Act, whereby the said Appellate Division declared or declares invalid any provision of any Act of Parliament referred to in section one or whereby it declared or declares that any such Act is not an Act of the Parliament of the Union, or whereby it refused or refuses to give effect to any provision of such an Act or prohibited or prohibits any person from giving effect to any such provision or in any other manner rendered or renders such a provision inoperative or denied or denies that it has the force of law, shall, subject to the provisions of this Act, be subject to review by the High Court of Parliament.

The above clause of the High Court of Parliament Act 35 of 1952 (HCPA) suggests that parliament was conscious that there were particular unjust laws the courts might refuse to enforce. Indeed the Appellate Division in *Harris*[68] ruled that the Separate Representation of Voters Act, 46 of 1951 was unconstitutional as it disqualified voters on ground of race or colour. Surprisingly, parliament passed the HCPA which allowed the High Court of Parliament to set aside decisions in which the Appellate Division declared legislation invalid.[69]

Some pre-democratic laws were and continue to be unconstitutional, complicating police law enforcement. Makiwane critically shows that judges were conditioned by the dominance of parliament and government policies in decision-making during parliamentary sovereignty.[70]

The view of Makiwane is supported by Eleftheriadis who critically analyses parliamentary sovereignty.[71] He points out that the distinction between the Westminster Parliament and the United States (US) Congress or the German Bundestag, whose powers are strictly restricted in their respective constitutions, appears to be that the Westminster Parliament has absolute authority.[72]

Saunders and Dziedzic carried out a critical study of parliamentary sovereignty in the former British colonies.[73] They point out that many of the former colonies of the

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68 *Harris and others v Minister of Interior and another* 1952 2 SA 428 (A) (hereinafter the *Harris* case).

69 *Harris* 59.

70 Makiwane *Rights and constitutionalism – A bias towards offenders* 26.

71 Eleftheriadis P "Parliamentary sovereignty and the constitution" 2009 *CJLJ* 1.

72 Eleftheriadis 2009 *CJLJ* 1.

73 Saunders C and Dziedzic A "Parliamentary sovereignty and written constitutions in comparative perspective" 2012 *CPA* 477

British Empire have retained both the tradition and the definition of parliamentary supremacy.[74] South Africa was one of those former colonies.

Motshekga agrees with Saunders and Driedzic and indicates that the first state to settle in South Africa was Holland in 1652. In January 1806, the Dutch armies at the Cape gave the British expeditionary force jurisdiction over the colony.[75] By implication, the view of Motshega is that the British brought parliamentary superemacy to the colony.

Mangu clarifies sovereignty by pointing out that "sovereignty" is symbolic of the people's government—for the people.[76] This means that "sovereignty" refers to the "supreme power" of the people not parliament.[77]

Fenwick and Phillipson confirm the above view of Mangu.[78] They reason that in most cases, a liberal state should have a Constitution and a Bill of Rights to ensure that the rights of people are adequately respected and not unreasonably violated.[79]

Ali[80] conducted a critical analysis of parliamentary sovereignty in the UK. The goal of his work was to establish well-informed proposals to transform the foundation of the current Constitution of the UK from parliamentary hegemony to a more democratic concept of constitutional supremacy.[81]

Constitutional dominance is a concept that needs to be used more broadly. The concept grants supremacy to the Constitution and guarantees that all bodies behave in compliance with the Constitution.[82] This is what was lacking in South Africa.

74 Saunders and Dziedzic 2012 *CPA* 477.
75 Motshekga MS *Concepts of law and justice and the rule of law in the African context* (LLD thesis University of South Africa 1994) 167.
76 Mangu *The road to constitutionalism and democracy in post-colonial Africa: The case of the Democratic Republic of Congo* 189.
77 Mangu *The road to constitutionalism and democracy in post-colonial Africa: The case of the Democratic Republic of Congo* 189.
78 Fenwick F and Phillipson G *Text, cases and material on public law and human rights* (Cavendish Publishing Limited Portland USA 2003) 839.
79 Fenwick and Phillipson *Text, cases and material on public law and human rights* 839.
80 Ali T "The demise of parliamentary sovereignty and the uprise of constitutional supremacy" 2014 *TSJOL* 1.
81 Ali 2014 *TSJOL* 1.
82 Ali 2014 *TSJOL* 10 – 11.

Kuan also researched the British Constitution.[83] He points out that the Constitution of the UK is mostly unwritten.[84] It originates from a variety of formal and informal sources, such as statutory law, judges' laws, constitutional conventions, and majestic prerogatives.[85] Parliamentary sovereignty is the fundamental governing principle of the Constitution of the UK. The courts are not allowed to neglect to apply primary legislation—even if it violates civil liberties.[86] That was the South African position pre-democracy.

1.8.2 Apartheid, society and policing

This section reviews and explores apartheid and its effects on society and policing. It defines apartheid, explains the impact of apartheid on society, its impact on the SAPF before 1994, and the situation of the SAPS after 1994.

1.8.2.1 The meaning of apartheid

Landis defines apartheid as "segregation".[87] She claims that the Nationalists devised the term "apartheid" after Prime Minister Smuts in 1944 admitted that the traditional policy of "segregation" had failed. Apartheid is essentially the development of races in geographically defined areas, each according to its own genius or inherent characteristics. Apartheid promotes white supremacy and white dominance.[88]

1.8.2.2 The impact of apartheid on society and police

The apartheid system was so well planned and executed that it can be equated to a legal institution. It has two main areas as parts of its structure. The function of the first part was to physically separate the citizens of the country according to race. The second part regulated the citizens that have already been physically separated by the first part. It used legislation to achieve its objectives.

Physical separation was carefully done. For instance, blacks or Africans were confined to the areas called "reserves". This was facilitated by the Natives Land Act

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83 Kuan YK "The ultimate ruling principle of the British Constitution" 2013 *TSJOL* 1 – 12.
84 Kuan 2013 *TSJOL* 1.
85 Kuan 2013 *TSJOL* 9.
86 Kuan 2013 *TSJOL* 9.
87 Landis ES "South African apartheid legislation: Fundamental structure" 1961 *TYLJ* 1 – 2.
88 Landis 1961 *TYLJ* 1 – 2.

27 of 1913 (NLA) that served as authority to place the blacks into reserves. African rural land ownership was limited to reserves.[89]

The above statement is supported by Ngcukaitobi who points out that the NLA was the most visible manifestation of colonial conquest as this Act formalised dispossession.[90] He notes that already on 13 May 1908, Percy Alden warned that "without the land, the natives were forced to starve".[91] This statement is based on the fact that the struggle for land for the Africans was a struggle for life.[92] He also posits that "the land is ours" referring to marginalised Africans, and he points out how the land was lost to the colonialists.[93] He articulates how colonialists have trained Africans in South Africa to be industrial workers, who will contribute to the advancement of capitalism for British imperialism.[94] It is this issue of land that is currently causing unlawful land occupation in South Africa, resulting conflict between the police and the society.

Ngcukaitobi's assertion is supported by De Vos who states that in 1894 the Glen Gray Act 25 of 1894 was passed in the Cape Colony only to remove the majority of Africans from the Cape Parliament. The Act weakened the authority of the Chiefs and replaced it with government district councilors. The Act created separate areas called "reserves", which were considered to be the place of residence for Africans. It has reserved geographical areas to be used by blacks and certain areas to be used by whites. This Act is the forerunner of ethnic nationalism and apartheid. The Tribal Chiefs were said to have transferred their sovereign rights over land and political authority to the Crown through a peaceful annexation process.[95]

Segregation also affected Indians. As early as 1885, the South African Boer Republic stated that persons of any Asian native race were not permitted to own

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89 Native Trust and Land Act 18 of 1936 (hereinafter referred to as the NTLA).
90 Ngcukaitobi T *The land is ours* (Penguin Books Cape Town South Africa 2018) 272.
91 Ngcukaitobi *The land is ours* 272
92 Ngcukaitobi *The land is ours* 237.
93 Ngcukaitobi *The land is ours* 11 – 22.
94 Ngcukaitobi *The land is ours* 22 – 27.
95 De Vos P *et al South African constitutional law in context* (Oxford University Press Cape Town South Africa 2019) 8 – 9.

fixed property in the Republic. Non-Asians were not permitted to transfer property (land) to Asians.[96]

The Group Areas Act physically separated different races in urban and peri-urban areas. The Act established separate areas in each region of the Union for each race to live in and conduct their business.[97] As a result, people engaged in passive resistance campaigns, which resulted in numerous arrests and, eventually, the threat of severe penalties, which put an end to overt resistance.[98]

Apartheid did not end with the separation of people. It further regulated them in the places where they stayed. The Africans in the "reserves" were legally restricted to two locations in the countryside, being the "reserves" and the white farmers' land.[99] To implement its philosophy of modern Bantustans, the government has provided for tribal (rather than individual) land ownership. Africans could not acquire land from non-Africans anywhere outside of a designated area if such land was surrounded by non-African land.[100]

Africans who found themselves in urban areas were also subject to regulation. The Act that governed them was known as the Natives (Urban Areas) Consolidation Act.[101] The overarching goal of this Act was to control the inflows of Africans into urban areas and to regulate their behavior there.[102] When an African male arrived in a city (urban area), he was required to register at the labour bureau. The goal was to obtain a certificate of authorisation (to be in the city). On-demand, he was required to produce this certificate. Any African male in such an area who could not find work (or who left his job) had to report to the authorities and was forced to leave if he was unable to find work.[103] The people who were responsible for ensuring that the person left the area were the police. This regulation of people did not end with the African males only. African women were also affected by this Act.

96 Asiatic (Transvaal Land and Trading) Act 28 of 1939; Landis 1961 *TYLJ* 20.
97 Group Areas Act 41 of 1950; Landis 1961 *TYLJ* 21.
98 Landis 1961 *TYLJ* 28.
99 NLA ; Landis 1961 *TYLJ* 17.
100 Section 12(1)(b) of the NTLA; Landis 1961 *TYLJ* 18.
101 Natives (Urban Areas) Consolidation Act 25 of 1945 (hereinafter referred to as the NCA).
102 *R v Kotane* 1957 1 So. Afr. L.R. 630 (1956); Landis 1961 *TYLJ* 43.
103 Section 23(1)(b) of the NCA.

Without a certificate of approval, African women were not permitted to live or work in urban areas.[104] No African could stay in a city for more than 72 hours unless he was born there and had lived there continuously since birth,[105] or he had continued to work for one employer consistently for ten years, or he had been there lawfully and continuously for fifteen years.[106]

Indians were also regulated. For instance, Indians who have resisted all attempts to persuade them to abandon their prosperous farms and return to their ancestral homeland have also suffered. Legislation restricting Indian land rights primarily reflects the fear of continued white penetration. In South Africa, Indian segregation has always been closely linked to restrictions on land ownership or occupation. In 1885, the South African Republic (commonly known as the Boer Republic, later Transvaal) declared that persons of any Asian native race were not permitted to own fixed property in the Republic.[107] At a later stage, the Group Areas Act 77 of 1957 controlled all Indian land ownership and occupation. Irrespective of how unjust these apartheid laws were, the police did not have a choice but to enforce them.

The police were not exempt from apartheid. It also separated the police force. For example, the SAPF enforced the law in urban areas, white-owned farms, and townships (where Africans lived closer to towns and cities where they worked). On the other hand, there were homeland police. Each Police Department was dedicated to its own tribe. In the former Western Transvaal, the Batswana tribe was served by the Bophuthatswana police (now the North West Province). Ciskei police were in charge of the Xhosa tribe in Ciskei (now the Eastern Cape). The Gazankulu Police Department served the Tsonga tribe in the former Northern Transvaal (now the Limpopo Province) and the Eastern Transvaal (now Mpumalanga).

Kangwane police were responsible for policing the Swazi tribe in the former Eastern Transvaal (now the Mpumalanga Province). Kwandebele police was a police force that served the Ndebele tribe in the former Eastern Transvaal (now the Mpumalanga Province). In the former Natal province, KwaZulu police were serving the Zulu tribe

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104 Section 23(1)(d) of the NCA; Landis 1961 *TYLJ* 44.

105 *Mathebula v Ermelo Municipality* 1955 So. Afr. L.R 443 (1955); section 10(1) of the NCA; Landis 1961 *TYLJ* 45.

106 *R v Ndingane* 1956 4 So. Afr. L.R. 39 (1955).

107 See Law 3 of 1885; Landis 1961 *TYLJ* 19 – 20.

(now the Kwazulu-Natal Province). In the former Northern Transvaal, Lebowa police served the Northern Sotho tribe (Mapedi) (now the Limpopo Province). In the former Orange Free State, Qwaqwa police served the South Sotho tribe (Basotho) (now the Free State Province). Transkei police were providing services to the Xhosa tribe in Transkei (now the Eastern Cape Province).

Although it was not internationally recognised as a Republic, Venda police served the Venda tribe in the former Venda Republic. It was situated in the former Northern Transvaal (now the Limpopo Province). When their homelands were incorporated into the Republic of South Africa in 1994, all of the homeland police were absorbed into the SAPS. This includes what was commonly referred to as "kitskonstables" in Afrikaans. This name translates to "instant constable" in English. They were all black cops. Their training period was only six weeks long. Their mission was to patrol townships. Because some of them could not read or write, the majority of them were illiterate, and they were thus trained orally. Their primary responsibility was to put a stop to revolutionary activities.[108] Pruitt's statement is accurate because some of those members are still working in the police today. The police tried to develop their skills by giving them some training (and driver's licences).

Randall reports on the work done by "The Legal Commission of the Study Project on Christianity in Apartheid Society."[109] This Commission aimed to inquire about apartheid in general. The Commission also looked at "the police in apartheid society", concluding that as long as a large portion of our population is regarded as second-class citizens, they will not be afforded the same level of security as white people, resulting in hardship and resentment.[110]

Following a review of the literature, it is clear that apartheid had a devastating impact on society and the police. What is unknown is how to deal with apartheid's aftereffects on society to restore the dignity of the people.

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108 Pruitt 2010 *AJCJS* 117 – 118.

109 Randall P *Law, justice and society report on the Legal Commission of the study project on Christianity in apartheid society* (SPRO-CAS Publication No 9 Johannesburg 1972).

110 Randall *Law, justice and society* 62 – 63.

1.8.2.3 Apartheid and the South African Police Force

Under apartheid, the SAPF was in existence from April 1913 up to April 1994. The SAPS was formed following the democratic elections of 1994. When apartheid was in effect, the police were mostly used as a power mechanism rather than a crime-fighting force.[111]

Regarding the mandate, the SAPF's main function was to uphold apartheid. In respect of personnel strength, in 1994, the total number of police employees was 130 000. When it comes to policing, normal policing was handled by the Criminal Investigation Department, Crime Scene Police, and Uniformed Police.

Some landmark incidents indicate that the "force" was usually applied by the SAPF when dealing with the public. For instance, the Sharpeville massacre of 21 March 1960, in which 69 demonstrators were killed and 180 others were injured, is the defining incident of this mandate of upholding apartheid. There were specific units set up to carry out the mandate. For example, "Koevoet" was a counter-insurgency unit (COIN), suppressing all activities that posed a challenge to government authority. The "Special Task Force" was in charge of defending the Republic's borders. The "Divison: Internal Stability" was in charge of dealing with violence in the Republic. The "Security Branch" was responsible for investigating political activists and political crimes. This discussion demonstrates the extent to which apartheid enforced unjust laws and separated people.

The Police Force was the arm of the state that was responsible for policing in the Union until 1961, then the Union of South Africa became a Republic. After 1961, the Police Force continued with its responsibility of policing in the Republic until 1994 when South Africa became a democratic order. From 1913 until 1994, the Police Force was functioning under parliamentary sovereignty. This is the system of government in which parliament is sovereign and legislation passed by parliament is supreme.

From the name SAPF, one can deduce that the police was a semi-military institution because it was a "force" and not a "service". Its main objective was to maintain law

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111 Pruitt 2010 *AJCJS* 119.

and order by enforcing legislation passed by parliament. This mandate was found in the South Africa Act.[112] The Act indicates that parliament has the complete authority to legislate laws that will ensure peace, order, and good governance within the Union.[113] The executive arm of government that was responsible to enforce these laws was the SAPF.

The South African Native National Congress (SANNC) was founded on 8 January 1912 at Bloemfontein by John Langalibalele Dube. Its main mission was to bring all Africans together as one to defend their rights and freedoms. For a better understanding, it is important to determine the meaning of the word "native".

The term "Native" has more than one definition. For instance, "Native" refers to any member of any aboriginal race or tribe of Africa, other than a race, tribe, or ethnic group in the Union representing the remnants of a race or tribe of South Africa that has ceased to exist as a race or tribe.[114] A "native" is a person who is or is widely accepted to be a member of any African aboriginal or tribe.[115]

Since its establishment on 1 April 1913, the SAPF deviated from its function of focussing on policing and fighting crime. Instead, the Police Force focussed on policing and fighting political activism by concentrating on what the SANNC was trying to achieve. The former SANNC is currently the African National Congress (ANC).

Steinberg argues that during the late apartheid period, the challenge of suppressing an uprising stimulated the structure and ethos of the SAP.[116] Conversely, in the democratic era, policing has become increasingly energised by the task of resolving conflict within the ruling party.[117]

The first statement of Steinberg is accurate (suppressing uprisings during the apartheid era), although the same cannot be said for the second statement (the resolving of conflict amongst the ruling party during the democratic order). This is

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112 South Africa Act, 1909.
113 Section 59 of the South Africa Act, 1909.
114 Section 49 of the NTLA; Landis 1961 *TYLJ* 8.
115 Section 1 of the Population Registration Act 30 of 1950.
116 Steinberg J "Policing, state power, and the transition from apartheid to democracy: a new perspective" 2014 *OUP* 173 – 175.
117 Steinberg 2014 *OUP* 173 – 175

because, for the first time since the democratic era, the SAPS can now focus on fighting normal crime rather than fighting political activism. Oversight bodies like the Public Protector, South African Human Rights Commission, and a police oversight body called Civilian Secretariat (falling under the Minister of Police) never indicated their concern that police are involved in politics. Political parties, in general, also never indicated or complained that the police are involved in politics.

The previous dispensation applied two styles of policing. Steinberg describes them as “high policing” and “low policing”. High policing entails policing to preserve the political order. Low policing refers to everyday policing by uniformed agents and detectives. High policing safeguards the state against those who wish to destabilise it. In contrast, low policing is concerned with combating crime.[118]

It is known that high policing was enforced by the Security Branch of the Police Force and other Specialised Units. The police’s Security Branch, which was instrumental in investigating political crimes and protecting the political order, was disbanded in 1991. This was the start of the downfall of apartheid’s systems that enforced apartheid laws.[119]

Hornberger supports the arguments of Steinberg and Landis relating to the impact of apartheid.[120] She claims that political policing existed before 1994 and that it still exists today. She defines “political policing” as the overt defence of government by the use of intelligence and extralegal force against those who challenge government from the outside or inside.[121]

1.8.3 Constitutional supremacy and constitutionalism

The review of this theory is aimed at investigating how it was applied in the past and how it is currently applied and what the main differences are in its application. De Vos argues that the constitutions of South Africa did not begin in 1910 when South Africa became a Union. Before 1910, constitutions had been established in the various territories of the country. For example, there were two Republics in the North

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118 Steinberg 2014 *OUP* 175.
119 Steinberg 2014 *OUP* 180.
120 Hornberger J "We need complicit police! Political policing then and now" 2014 *SACQ* 17 – 18.
121 Hornberger 2014 *SACQ* 17 – 18.

of the country, namely the Boer Republic of the Orange Free State and the Transvaal Republic.

Both Republics followed the idea of the separation of powers, and the Orange Free State had a Bill of Rights and its Constitution of 1854. The Constitution of the Orange Free State acknowledged the right of the courts to review the legislation. The downside of the Constitution is that it only covered white males. The Transvaal Constitution of 1858 promoted racial discrimination. It suggested that there was no equality between races.[122] This indicates the beginning of racial separation and disregard of civil liberties in both Republics—regardless of constitutions that could have protected the citizens.

Mangu points out that the Constitution is the fundamental law of the land. It identifies and describes the different organs of the state authority, their powers, and how they must be carried out, the relationship between the different holders of authority, the relationship between them and the people, and the rights to which they are entitled and the duties to which they are subject.[123] He further indicates that constitutionalism is a prerequisite for democratic survival.[124] Constitutionalism protects people from the abuse of power by the state and at the same time protects the exploitation of state resources by those in power through the enforcement of the rule of law, the division of powers, and checks and balances.[125]

Mangu indicates that separation of powers, human rights, and the Constitution (embodying the rule of law) are the main elements of constitutionalism.[126] Mangu's statement implies that the police must respect human liberties and act under the law, rather than suppressing freedoms (as under apartheid).

Hence, constitutionalism is a necessary condition for democratic survival. The reason for this is that in a democratic regime, there are checks and balances on the

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122 De Vos *et al South African constitutional law in context* 6 – 7.

123 Mangu *The road to constitutionalism and democracy in post-colonial Africa: The case of the Democratic Republic of Congo* 165.

124 Mangu *The road to constitutionalism and democracy in post-colonial Africa: The case of the Democratic Republic of Congo* 202.

125 See *Economic Freedom Fighters v Speaker of the National Assembly and others; Democratic Alliance v Speaker of the National Assembly and others* 2016 ZACC 11 4 (hereinafter the *EFF* case) [1].

126 Mangu *The road to constitutionalism and democracy in post-colonial Africa: The case of the Democratic Republic of Congo* 118.

power of the state organs and the state itself. This means that the state cannot abuse its power in the same way that the apartheid regime used its power to abuse the police by using the police to protect the political order and uphold apartheid, as discussed above.

De Vos supports Mangu and points out that the authority of the state comes from the Constitution. It creates and authorises policy institutions and regulates the exercise of power by the elected branches of government and the judiciary. It imposes limits on the exercise of power and lays down the fundamental rules regulating the regime.[127]

Motshekga argues that the Anglo-American and South African approaches to the rule of law, which forms part of constitutionalism, can be divided into three groups: (a) law and order; (b) procedural justice; and (c) basic rights.[128]

Barnett defines "constitutional supremacy" as a paradigm under which the Constitution is sovereign, not the law. According to Barnett, the Constitution overrides the law. He points out that Professor KC Wheare describes the Constitution of the state as:

> […] the whole system of government of a country, the collection of rules which establish and regulate or govern the government.[129]

In Mangu's words, constitutionalism is simply about restricting government power, and perhaps the most important reason why power should be restricted is the preservation of human rights. He points out that human rights are both a means and an end to constitutionalism.[130]

Fombad describes "constitutionalism" as the principle of limiting government-inherent arbitrariness to ensure that governmental powers are used for the good of society.[131]

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127 De Vos *et al South African constitutional law in context* 3.

128 Motshekga *Concepts of law and justice and the rule of law in the African context* 14.

129 Barnett *Constitutional and administrative law* 7.

130 Mangu *The road to constitutionalism and democracy in post-colonial Africa: The case of the Democratic Republic of Congo* 144.

131 Fombad CM *Constitutional law in Cameroon* (Kluwer Law International Netherlands 2012) 33.

The Constitution of South Africa states that in the current constitutional democratic dispensation, the Constitution is the Republic's supreme law.[132] It also points out that the Bill of Rights is the foundation of South Africa's democracy.[133] The Constitutional Court (CC), contrary to the era of parliamentary sovereignty, is now the country's highest court. Barnett points out that the doctrine governing the legitimacy of government action is constitutionalism.[134]

Alder indicates that the Constitution protects people from violations committed by those to whom citizens entrust authority. It is a sad aspect of human nature that those who want authority might not be there to practice it correctly.[135] This phenomenon was seen in the case of the "state of capture" in South Africa.[136]

Du Plessis argues that constitutionalism exists in three forms, the first being transitional constitutionalism.[137] He describes "transitional constitutionalism" as portraying the Constitution as a bridge to a culture of justification in the new South Africa from a culture of authority in apartheid South Africa.[138] He describes the second form as "transformative constitutionalism"; in the words of Klare, it connotes:

> An enterprise of inducing large scale social change through non-violent political process grounded in law […] a transformation vast enough to be inadequately captured by the phrase "reform", but something short of or different from a "revolution" in any traditional sense of the word.[139]

He defines the third as "memorial constitutionalism", and this recognises the South African Constitution as both memories, coming to terms with the notorious past, and offering a changed future along the road to fulfillment.[140] The observation of Du

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132 Section 2 of the Constitution.

133 Section 7(1) of the Constitution.

134 Barnett *Constitutional and administrative law* 5.

135 Alder *General principles of constitutional and administrative law* 3; see also *EFF* [1]; *Democratic Alliance and others v Acting National Director of Public Prosecutions and others* 2012 3 SA 486 (SCA) 486 [22], [27], [31], [33], [37], [44] – [45].

136 *EFF* [4].

137 Du Plessis L "Affirmation and celebration of the 'religious other' in South Africa's constitutional jurisprudence on religious and related rights: Memorial constitutionalism in action?" 2008 *AHRLJ* 378; Barnett *Constitutional and administrative law* 5.

138 Du Plessis 2008 *AHRLJ* 378; Barnett *Constitutional and administrative law* 5.

139 Klare K "Legal culture and transformative constitutionalism" 1998 *SAJHR* 150; Du Plessis 2008 *AHRLJ* 378.

140 Du Plessis 2008 *AHRLJ* 378 – 379.

Plessis is correct because the SAPS moved from a period of apartheid governance and transformed to a period of democratic governance.

Rapatsa confirms the importance of the Constitution and a need for legal reform.[141] He believes that social issues can be overcome by applying the Constitution as the overarching law and as the basis for social reform. He explains the transformation of South Africa from parliamentary sovereignty to constitutional democracy as "transformative constitutionalism".[142]

The statement of Rapatsa above confirms the relevance of this study, as his argument is similar to the current study that examines law enforcement challenges after the transformation of South Africa into a constitutional democracy.

The Constitution requires the executive and all other organs of state[143] to respect its values.[144] These values oblige all to adapt to the new drastic changes that have been brought about by the Constitution.[145] Makiwane indicates that the Constitution, constitutionalism, and the rule of law are all concepts that seek to regulate the exercise of power by the state.[146]

Makiwane's observation is relevant to democratic police. In a democratic society, police actions must be carried out in a way that does not violate people's rights and freedoms. The Constitution Act of 1961 transformed the Union of South Africa into the Republic of South Africa.[147] The only downside of the Constitution Act is that it was meant to uphold unjust and oppressive laws in an unequal society and that it was enforced in an undemocratic state.

This is confirmed by Rapatsa when he says that the 1996 Constitution of South Africa is regarded as a revolutionary text, primarily because it is based on the

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141 Rapatsa M "Transformative constitutionalism in South Africa: 20 years of democracy" 2014 *MJSS* 887.
142 Rapatsa 2014 *MJSS* 887.
143 Section 8(1) of the Constitution.
144 Sections 1(a) – (c) of the Constitution.
145 Makiwane *Rights and constitutionalism – A bias towards offenders* 400.
146 Makiwane *Rights and constitutionalism – A bias towards offenders* 79.
147 Republic of South Africa Constitution Act, 1961.

historical values of non-racialism, non-sexuality, the Bill of Rights, and the rule of law.[148]

For the purposes of comparing similarities and best practices, I also considered the constitutions of Canada, US and UK. Canada has a Constitution[149] and a Bill of Rights called the Canadian Charter of Rights and Freedoms.[150] Its purpose is similar to that of Chapter 2 of the Constitution of the Republic of South Africa.[151] The Canadian Charter of Rights and Freedoms[152] also declares a law invalid if it violates the Charter. There are some similarities in some of the sections. For example, sections 24(1) and (2) of the Canadian Charter of Rights and Freedoms have a similar objective to section 35(5) of the South African Constitution. These sections deal with the admissibility of unconstitutionally obtained evidence in a constitutional democracy. Canada, like South Africa, was at some stage a colony of the UK, which has a sovereign parliament.

The USA has a Constitution[153] and Bill of Rights called the Amendments. The Fifth Amendment of the US Constitution falls within the first ten Amendments, which are regarded as the Bill of Rights for the US.[154]

Vick conducted a detailed review of the UK Constitution.[155] He states that in the UK, there is no written Constitution.[156] The UK has a Bill of Rights called the Human Rights Act of 1998. The British Bill of Rights appears rather toothless, particularly if it is judged against the standards of US constitutionalism.[157]

De Vos argues that Constitutionalism describes a framework in which elected representatives, judicial officers, and government officials must act in compliance with the law that derives its validity from the Constitution, its power, and its control.[158]

148 Rapatsa 2014 *MJSS* 894.
149 Canada Constitution Act, 1982.
150 Canadian Charter of Rights and Freedoms, 1982.
151 The Bill of Rights.
152 Canadian Charter of Rights and Freedoms, 1982 6.
153 Constitution of the United States, 1787.
154 United States Bill of Rights, 1791.
155 Vick DW "The Human Rights Act and the British Constitution" 2002 *TILJS* 330 – 331.
156 Vick 2002 *TILJS* 330 – 331.
157 Vick 2002 *TILJS* 330 – 331.
158 De Vos *et al South African constitutional law in context* 38.

The police, as government officials, must act in compliance with the law. If the law that the police apply does not comply with the Constitution, the police will find it difficult to apply that law. That is the reason why this study aims to identify such laws so that they can be amended.

The argument above is supported by Mubangizi.[159] He believes that human rights are those rights that one holds as a human being. One must have no other requirement to enjoy human rights other than the fact that he or she is a human being. Therefore, human rights should be enjoyed by all people, irrespective of their social status or their geographical or regional location.[160]

Politics cannot be used to violate human rights as done during apartheid in South Africa. The reason is that, if that happens the result will be resistance from those who are affected.

Makiwane argues that rights are biased toward criminals and do not adequately endorse the protection of victims.[161] His opinion is that the South African Constitution, which is regarded as among the best in the world, does not enjoy complete legitimacy on the part of the subjects because of its alleged bias in favour of offenders regarding criminal justice.[162] Makiwane's opinion may be criticised as the challenge lies in legislation that is not constitutional rather than the denial of freedoms.

Barnett defines constitutionalism as the ideology that regulates government actions validity.[163] The doctrine implies, at the very least, that the exercise of power should be within the legal limits imposed on those appointed by the parliament and that those exercising power should be accountable to the law.[164] The police must be held accountable and must not abuse their power.

Following a review of the above literature, it is known that the Constitution is the supreme law of the country in South Africa post-1994. It is also known that

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159 Mubangizi JC "Towards a new approach to the classification of human rights with specific reference to the African context" 2004 *AHRLJ* 94.
160 Mubangizi 2004 *AHRLJ* 94.
161 Makiwane *Rights and constitutionalism – A bias towards offenders* 72.
162 Makiwane *Rights and constitutionalism – A bias towards offenders* 72.
163 Barnett *Constitutional and administrative law* 5.
164 Barnett *Constitutional and administrative law* 5.

constitutionalism is in place. What is unknown is how constitutionalism will remove legal obstacles that violate the Constitution in order to empower the SAPS to be effective and efficient in enforcing the law post-apartheid era.

1.8.4 The South African Police Service in a democracy

Pallotii and Engel indicate that South Africa has come a long way in overcoming the legacy of apartheid and colonial oppression 20 years after the end of apartheid. After 1994, there was widespread praise for the peaceful transition and the establishment of strong democratic institutions.[165] This statement confirms the preceding discussion by indicating that apartheid existed prior to constitutionalism.

The SAPF was the official name for the police during apartheid's rule. At the beginning of the democratic era, the Police Force was renamed SAPS. This move was made to emphasise that the police are present to serve the public rather than to act as a force against them.[166]

The SAPS Act was passed in 1995 by the South African legislature. Community policing was established as a new goal for the reorganised SAPS under this Act.[167] The key goal of the community policing strategy was to bring the community closer to the police through community police forums; to promote contact between the police and the community; to promote cooperation between the police and the community; to improve the delivery of police services; to improve accountability, and to make problem-solving easier for the police and the community.[168]

Pruitt, claims that South Africa has been forced to democratise since the end of apartheid. The new police organisation established after apartheid is an important part of that democratisation. To assist the SAP in becoming a democratic organisation, significant changes are required. According to him, by enacting new legislation, these changes can be implemented quickly.[169] This is a critical stament that supports the need to change some legislation as proposed by this study.

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165 Pallotii A and Engel U (eds) *South Africa after apartheid policies and challenges of the democratic transition* (Brill Leiden 2016) 24.
166 Pruitt 2010 *AJCJS* 121.
167 Section 19(1) of the SAPS Act.
168 Section 18(1) of the SAPS Act; Pruitt 2010 *AJCJS* 119.
169 Pruitt 2010 *AJCJS* 116.

Some pieces of legislation must be enacted to empower the police to operate without violating rights and the Constitution. In other words, there are legislation gaps that need to be closed. In the new era, the powers, duties, and functions of the SAPS officials are indicated in sections 11 to 15 of the SAPS Act. According to the structure, there are three levels of command, namely (1) National Commissioner, (2) Provincial Commissioner, and (3) Station Commissioner. The National Commissioner is responsible for running the country and can delegate his or her powers to the Provincial Commissioners.[170]

Provincial Commissioners are responsible for running provinces and can delegate their powers to Station Commissioners.[171] Station Commissioners are responsible for policing at a local level (stations). They can delegate their powers to members who serve under their command.[172] Police can also be employed to preserve life, health, and property.[173] The constitutional mandate of the police as contained in section 205(3) of the Constitution includes preventing, combating, and investigating crime; maintaining public order; protecting and securing inhabitants of the Republic and their property, and unholding and enforcing the law.

According to Pruitt, post-apartheid South Africa is emerging as a new country after years of rules based on skin colour. The transformed SAPS is an important component of the new South Africa. The new police system attempts to transition from a history of brutal and indiscriminate violence into a respectable democratic police organisation.[174]

The statement of Pruitt indicates that the police successfully moved to democracy. What needs to be assessed is whether they have any challenges in the new dispensation.

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170 Sections 11 and 15 of the SAPS Act.
171 Sections 12 and 15 of the SAPS Act.
172 Sections 13 and 15 of the SAPS Act.
173 Section 14 of the SAPS Act.
174 Pruitt 2010 *AJCJS* 116.

1.8.5 The 1996 Constitution and policing challenges

In this part of the review, the researcher investigates legislation and other factors that have a negative impact on law enforcement relating to the mandate of the police.

1.8.5.1 Legislation

Rautenbach and Malherbe indicate that there is a strong likelihood at the start of the implementation of the Bill of Rights that several legal provisions will be inconsistent with the Bill of Rights.[175] If the void is not rectified through legislation, it can have profound and serious implications for law enforcement, as all organs of the state are bound by the Constitution[176] and the Declaration of Rights.[177]

Snyman reasons that the criminal justice system of South Africa (police, prosecuting authority, and the courts) is failing the citizens.[178] To support his statement, he highlights statistics of the high crime rate in South Africa. He also indicates that one of the contributing factors to these challenges is the abolition of the death penalty after the decision in *Makwanyane*. According to him, this decision did not achieve the desired results for the following reasons: (1) it did not contribute to respect for human dignity and life; and (2) the situation of violating human rights through murders and other serious crimes is becoming worse.[179]

Snyman's observation may be criticised on the following grounds: although the transition to democracy presents legislative challenges due to the new constitutional influence, the death penalty is not a solution to ensure law enforcement. Numerous other penalties can be imposed that do not violate the right to life. Killing someone solely for deterrence or prevention is neither morally correct nor legally justifiable.

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175 Rautenbach and Malherbe *Constitutional law* 285; also see *S v Makwanyane* 1995 6 BCLR 665 (CC) [328].
176 Section 7(2) of the Constitution.
177 Rautenbach and Malherbe *Constitutional law* 298.
178 Snyman CR *Criminal law* 6th ed (Lexis Nexis Durban South Africa 2017) 20 – 26.
179 Snyman *Criminal law* 20 – 26.

Pruitt agrees that, as the country has changed, the police have had to adjust to several new laws and legislation aimed at improving democratic policing.[180] The researcher shares the same views.

The statement of Pruitt is confirmed by Rautenbach.[181] Rautenbach confirms that there are laws that need to be changed to fulfill the constitutional muster's requirements.[182]

Abioye covered the challenges faced by the country's law enforcement. The goal of the thesis is to create a connection between the rule of law of the state and the challenges faced by the institutionalisation of law within countries.[183] This study does not deal with policing challenges in South Africa.

Robins explores some of the problems facing law enforcement in Sierra Leone, Tanzania, and Zambia.[184] Despite the fact that the focus is the same, this study may not be useful because it does not address law enforcement challenges similar to those faced by the South African Police Service.

Thompson highlights the budget and resources as challenges to law enforcement in South Carolina (in the United States of America (USA)).[185] Wardlaw describes technology as the key contributor to law enforcement problems in Australia especially computers.[186] This computer generated crime complicates the

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180 Pruitt 2010 *AJCJS* 121.

181 Rautenbach C "The Constitutionality of police road blocks in South Africa" 1996 *SACJ* 297 – 300.

182 Rautenbach 1996 *SACJ* 297 – 300.

183 Abioye *Rule of law in English speaking and African countries: The case of Nigeria and South Africa* 16.

184 Robins S "Addressing the challenges of law enforcement in Africa" (Institute for Security Studies Policy Brief NR 16 October 2009) 1 – 3.

185 Thompson A "Challenges facing law enforcement in the 21st century" 2017 https://www.hsdl.org/?view&did=806767 (Date of use: 16 August 2021) at 2 – 4. Alonzo Thompson is Chief of Police City of Spantanburg, South Carolina. He addressed the House Committee on the Judiciary's Subcommittee on Crime, Terrorism, Homeland Security, and Investigations, on 17 May 2017 at Washington DC.

186 Wardlaw G "The future and crime: Challenges for law enforcement" (Paper presented at the Third National Outlook Symposium on Crime in Australia, Mapping the Boundaries of Australia's Criminal Justice System, convened by the Australian Institute of Criminology, Canberra, Australia on 22–23 March 1999) 2 – 3. This paper maps the boundaries of australia's criminal justice system.

identification of offenders in crime.[187] This study focuses on legislation challenges under the 1996 Constitution not technology.

Makiwane explored the degree to which the Bill of Rights strikes a balance between, on the one hand, the interests of the perpetrator of a crime and, on the other, the victims of crime.[188] Makiwane's objective relating to victims of crime is similar to the objective of this thesis but the outcome will be different.

Bradley and Ewing point out that protection from arbitrary state interference is a basic human right. It is, therefore, necessary to ensure that the police have adequate measures to protect the public, without at the same time conferring powers that undermine the very freedom that the police must defend.[189] Bradley and Ewing's warning is important. They warn against too much power in the hands of the police.

The common law crime of bribery was not effective to deal with corruption. To deal with corruption effectively and to comply with the UN Convention Against Corruption, South Africa has implemented a new law to deter and counter corruption.[190] Although this Act has been in place for more than 10 years, it can be criticized in the sense that corruption remains a serious challenge in South Africa. [191]

Nelson Mandela highlighted the dangers of corruption, and Snider and Kidane quote him:

> Little did we know that our people, when they get that chance, would be as corrupt as the Apartheid Regime. That is one thing that has really hurt us.[192]

Mr Adama Dieng, Secretary-General of the Organisation of African Unity (OAU), stated that "corruption and impunity" are antithetical to the enjoyment of economic, social, and cultural rights and are the enemy of the concept of good governance.[193]

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187 Wardlaw "The future and crime: Challenges for law enforcement" 2 – 3.
188 Makiwane *Rights and constitutionalism – A bias towards offenders* 2 [3].
189 Bradley and Ewing *Constitutional and administrative law* 456.
190 Prevention and Combating of Corrupt Activities Act 12 of 2004 (hereinafter the PRECCA).
191 *Shaik v The State* 1 2006 SCA 134 (RSA) (hereinafter the *Shaik* case) [50].
192 Snider TR and Kidane W "Combating corruption through international law in Africa: A comparative analysis" 2007 *CILJ* 692.
193 Snider and Kidane 2007 *CILJ* 693.

Pallottii and Engel confirm the above argument and state that a high level of corruption has been identified as the country's core challenge.[194] Snider and Kidane, as well as Pallottii and Engel's observations, are well-grounded for the following reasons; corruption in South Africa has reached such a high degree that the government has created a commission of inquiry to investigate it. With their current capabilities, the police are having difficulty dealing with the situation.

Unconstitutional legislation is still a big challenge. An example is sections 20 to 37 of the CPA on search and seizure. The sections are silent on how the police will search and seize objects that are stuck in the body of a non-consensual individual during the investigation of a crime. The Cape High Court through Judge Desai tried to resolve this challenge in the case of *Gaqa*[195] but a contrary view was held by the Durban High Court in the case of *Xaba*.[196] These two cases can be critisezed in the sense that they contradict each other, thus requiring the Legislature or Supreme Court of Appeal intervention to clarify the differences. The law must be clear so that police can comply with the rule of law.

Dicey explains the meaning of the rule of law in this manner:

> It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of government …; a man may with us be punished for a breach of law, but he can be punished for nothing else.[197]

Dicey defines the rule of law as:

> Equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law of the courts.[198]

The above definition of Dicey indicates that the police cannot use discretion or prerogative or act arbitrarily in the execution of their duties. They must be guided by

194 Pallotii and Engel *South Africa after apartheid policies and challenges of the democratic transition* 24.
195 *Gaqa* 10 – 11.
196 *Xaba* 1 – 3.
197 Dicey *Introduction to the study of the law of the Constitution* 55; Bradley and Ewing *Constitutional and administrative law* 93.
198 Dicey *Introduction to the study of the law of the Constitution* 55, 110 and 258; Bradley and Ewing *Constitutional and administrative law* 93.

the rule of law and the Constitution. Ally confirms that there are issues relating to the application of general law.[199] He conducted a critical analysis relating to unconstitutionally obtained evidence.[200] He indicates that section 35(5) allows the courts to protect the legitimacy of the criminal justice system in the event of a dispute under section 35(5).[201] Section 35(5) of the Constitution protects offenders from unjust police action. It replaces the apartheid-era policy of giving police unlimited powers.

Mujuzi also identified the existing challenge in the enforcement of the law of general application.[202] Citing *Mthembu,* he submits that evidence obtained by coercion is of course excluded from the trial.[203] He maintains that the evidence of "cruel, inhuman, and degrading treatment" (CIDT) is not excluded by the South African courts. He cites the case of *Mukoko v Attorney-General*[204] in support of his contention.[205]

Further Mujuzi[206] critically discusses evidence obtained through violations of human rights in Namibia. He points out that, unlike the situation in other jurisdictions, such as South Africa, Kenya, and Zimbabwe, the Namibian Constitution does not allow the courts to exclude evidence obtained through human rights violations. Mujuzi suggests that the Namibian Constitution's Bill of Rights needs to be amended to provide specifically for the rights of suspects, convicted individuals, imprisoned persons, and accused persons.[207]

The researcher agrees with Mujuzi's argument for the following reasons: he confirms the gap that is argued in the current study when it comes to the rights of suspects. The rights of suspects are not covered by the Constitution of South Africa.[208] The Constitution covers the rights of the arrested, detained, and the

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199 Ally D "Determining the effect (the social costs) of exclusion under the South African exclusionary rule: Should factual guilt tilt the scales in favour of the admission of unconstitutionally obtained evidence" 2012 *PELJ* 477.

200 Ally 2012 *PELJ* 477.

201 Ally 2012 *PELJ* 504 – 505.

202 Mujuzi JD "Evidence obtained through violating the rights to freedom from torture and other cruel, inhuman or degrading treatment in South Africa" 2015 *AHRLJ* 91.

203 *S v Mthembu* 2008 2 SA 407 (SCA).

204 *Mukoko v Attorney-General* 2012 JOL 29664 (ZS).

205 Mujuzi 2015 *AHRLJ* 91.

206 Mujuzi JD "The admissibility in Namibia of evidence obtained through human rights violations" 2016 *AHRLJ* 407 – 434.

207 Muzuji 2016 *AHRLJ* 433.

208 Section 35 of the Constitution.

accused person only. According to the literature that has been reviewed, Mujuzi is the only researcher to have found that the rights of a suspect who is not under arrest are not protected by the Namibian Bill of Rights.[209] The situation in Namibia concerning the rights of a suspect is similar to that of South Africa.

De Vos confirms the existence of challenges in the application of the law by law enforcement agencies.[210] He analysed illegally or unconstitutionally obtained evidence. He concludes by stating that the rules governing the admissibility of evidence obtained incorrectly, unlawfully, or unconstitutionally are intended to protect the rights of the accused in criminal proceedings and to uphold the integrity of the administration of justice.[211]

Nanima[212] analyses the issue of evidence obtained through human rights violations in Uganda. The author maintains that the Constitution of the Republic of Uganda of 1995 is silent on the matter of dealing with evidence obtained through violations of human rights. Only the 2012 Prohibition and Prevention of Torture Act makes the evidence obtained through torture and CIDT inadmissible. [213]

Naude[214] argues the right of a suspect to be informed of his or her constitutional rights. He opines that police must inform those arrested and detained of their fundamental rights. If this information is not released, the facts gathered as a result of this omission will be rejected by the court.[215]

The researcher concurs with Naude's observation for the following reason: indeed, the rights of the un-arrested suspected offender are not protected by the 1996 Constitution. This jeopardises these people's rights during police operations.

The point of Naude above is backed by De Rover when he states that a right is an entitlement.[216] De Rover's point of view holds merit as "offenders" who are not yet

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209 Muzuji 2016 *AHRLJ* 433.
210 De Vos WLR "Illegally or unconstitutionally obtained evidence: A South African perspective" 2011 *TSAR* 268 – 282.
211 De Vos 2011 *TSAR* 282.
212 Nanima RD "The legal status of evidence obtained through human rights violations in Uganda" 2016 *PELJ* 1.
213 Nanima 2016 *PELJ* 2.
214 Naude BC "A suspect's right to be informed" 2009 *SAPL* 506 – 527.
215 Naude 2009 *SAPL* 506 – 527.
216 De Rover C *To serve and to protect: Human rights and humanitarian law for police and security forces* (Geneva Switzerland 1998) 68.

arrested but are suspected of having committed a crime are human beings. As a result, they are entitled to have rights that must be safeguarded by the Constitution. This implies that they must be covered by section 35 of the 1996 Constitution, which is currently not the situation.

In the case of *R v Grant*,[217] "detention" was referred to as suspending the freedom of an individual through significant physical or psychological restraint. Psychological detention shall be established where the victim has a legal obligation to comply with a coercive order or requirement, or a reasonable person may believe that he has no choice but to comply because of the conduct of the state.[218]

Hence, if an offender is called by the police to come and explain an alleged offence, the offender is psychologically detained for that time of the interview though not physically detained.

Joubert confirms the above argument.[219] He defines a suspect as someone other than an arrested, detained, or accused person.[220] Mujuzi discusses the prosecution of international offences committed abroad.[221] He discusses some important Acts relating to extraterritorial jurisdiction. He recommends amending the relevant legislation to eliminate ambiguities.[222] Mujuzi's argument confirms that there are laws in South Africa that need to be amended and aligned with the Constitution and the new order.

The implementation of the Geneva Convention Act provides that any court in the Republic may bring a person to trial for any offence under this Act in the same manner as if the offence had been committed within the jurisdiction of that court, regardless of whether the act or omission to which the charge relates had been committed outside the Republic.[223] It is aimed at ensuring the smooth application of

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217 *R v Grant* 2009 SCC 32 (2009) 2 S.C.R (hereinafter the *Grant* case) [353].
218 *Grant* [353].
219 Joubert CD *Applied law for police officials* (Juta Cape Town 2013) 240.
220 Joubert *Applied law for police officials* 240.
221 Mujuzi J "The prosecution in South Africa of international offences committed abroad: The need to harmonise jurisdictional requirements and clarify some issues" 2015 *AYIHL* 96.
222 Mujuzi 2015 *AHRLJ* 107.
223 Section 7(1) of the Implementation of the Geneva Convention Act 8 of 2012.

law enforcement. The researcher believes that domestic legislation should also facilitate the smooth application of applied law.

South Africa implemented the Prevention and Combating of Trafficking in Persons Act[224] to comply with Geneva Convention. This Act provides that a court of the Republic shall have jurisdiction, in respect of an act committed outside the Republic, which would have constituted an offence if it had been committed in the Republic, regardless of whether or not the act constitutes an offence at the place of its commission.

Law enforcement challenges happen even internationally. For example, Novak discusses the difficulties faced by the ICC during the arrest of suspects for crimes, such as genocide, crimes against humanity, and war crimes.[225] He points out that North American Treaty Organisation soldiers or members of the Stabilisation Force used to make arrests for the Yugoslavia Tribunal. However, such powers did not exist, for example, in the situation in Uganda or the Democratic Republic of the Congo.[226] This indicates that other countries also had challenges relating to the enforcement of the law. However, in this thesis, the focus is on the law enforcement challenges in South Africa to limit the scope of the study.

1.8.5.2 Relationship of police with the public

The relationship between the police and African citizens in South Africa remains strained. This is supported by several public protests and mob justice incidents that continue to occur in some South African informal settlements.

The above statement is confirmed by Pruitt.[227] He indicates that in South Africa each police station is divided into sectors to reach out to the community and close the void left by apartheid. A police officer is assigned to each sector, and his or her job is to consult with the community to identify challenges and solutions. This shows that there is a disconnect between the public and the police.[228] Thus, sector policing

224 7 of 2013.
225 Novak A *The International Criminal Court: An introduction* (Springer International Publishing Switzerland 2015) 64.
226 Novak *The International Criminal Court: An introduction* 64.
227 Pruitt 2010 *AJCJS* 123.
228 Pruitt 2010 *AJCJS* 123.

is the current policing model, and it is aimed at bringing police closer to the community.

1.8.5.3 Training and experience of the police

Apartheid also created problems for the democratic dispensation relating to expertise and policing operations. For example, the amalgamation of eleven independent police forces with varying levels of training and experience resulted in unequal skills and practical experience. Kitskonstabels, for example, were undertrained and cannot deliver the same quality of service as the other police officials. Due to community dissatisfaction over police service delivery, mob justice and vigilantism started to emerge. The majority of white police officers left the force to join private security firms. This also contributed to the loss of skills as they received better training at their colleges during the pre-democracy era.[229]

1.8.5.4 Policing challenges identified by other researchers

Different researchers identified different challenges that unfortunately do not close the gap identified by the researcher. Van Der Merwe[230] considers why, despite a legislative and policy framework promoting improved service delivery, the South African Police Service fails to provide efficient service delivery. He believes that the SAPS requires leaders who can devise strategies, identify weaknesses, and correct policy failures. [231]

Mengistu[232] examines the concept of community policing in the context of the new South African disposition in his analysis. The purpose of this article is to examine the qualitative and quantitative nature of crime in South Africa in order to determine the feasibility and potential effectiveness of community policing. He concludes that the South African context has too many detractors that must be addressed before community policing can be implemented successfully. [233]

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229 Pruitt 2010 *AJCJS* 124 – 125.

230 Van Der Merwe J, Van Graan J, and Ukpere WI "Effective service delivery: A leadership challenge for policing" 2013 *MJSS* 627 – 633.

231 Van Der Merwe *et al* 2013 *MJSS* 632.

232 Mengistu B, Pindur W, and Leibold M, "Crime and community policing in South Africa" 2000 *Afr. Soc. Sci. Rev.* 15 – 29.

233 Mengistu *et al* 2000 *Afr. Soc. Sci. Rev.* 26.

Phillips[234] contends that three major challenges to South Africa's ongoing police reform process are police culture, an emphasis on community policing, and the government's failure to maintain a commitment to the reform process. She concludes by stating that the framework of community policing, as well as the government's departure from the original vision of police reform, all pose significant challenges to police reform in South Africa.[235]

This study is adding value to existing literature by indicating where the police come from and the challenges they experienced in the past and in the present. It contributes to existing knowledge by adding value relating to new ways that should be put in place to police in a democratic and constitutional order.

1.9 Methodology

The research approach used in this study consists of desktop (computer) and library research. The research is non-imperical (theory driven) and employs a critical literature review to "come to a proper understanding of a specific domain of scholarship"[236] (Chapter 1). This includes a comparative review of previous and current literature to arrive at rational conclusions. Conceptual analysis is employed to determine the meaning of concepts and clarifying conceptual linkages through classification and categorisation. Philosophical analysis is employed to analyse arguments in favour of or against a particular position (Chapters 2 to 4). Analysis intensively assesses the adequacy of current legislation and proposes changes to any legislation considered to be inadequate.

This thesis requires a study of the Constitution, selected pieces of legislation, decided cases, journal articles, legal textbooks, chapters, and international law. The thesis commences by explaining constitutionalism, the rule of law, and democracy from apartheid to post-apartheid South Africa. This is followed by discussing the SAPS from apartheid to the democratic order. The next discussion looks at the

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234 Phillips N "Challenges to police reform in post-apartheid South Africa" 2011 *On Politics* 53 – 68.

235 Phillips 2011 *On Politics* 64.

236 Mouton J *How to succeed in your master's and doctoral studies: A South African guide and resource book* (Van Schaik Publishers Pretoria 2008) 179.

SAPS and law enforcement challenges under the 1996 Constitution. The thesis is concluded in the final chapter, which indicates the findings and recommendations.

The thesis compares relevant and best practices in international and domestic law. In their historical and legal contexts, the evidence about the areas of study is systematically and critically examined. The study areas' facts are systematically and critically evaluated in their historical and legal contexts. A comparative approach is used to analyse parliamentary sovereignty, constitutional supremacy, and law enforcement challenges from various sources and jurisdictions to reach the desired theoretical and realistic conclusions.

The thesis makes extensive use of the Constitution, the Bill of Rights, and international law. It also examines the contributions of the United Nations (UN), the African Union (AU), and the Southern African Development Community (SADC) to the international protection of human rights, as well as in Africa as a continent and in Southern Africa as a region, with a focus on South Africa. The reasoning is that South Africa is still a young country that needs to catch up to the rest of the world in terms of liberal democracy and democratic policing.

Canada, the USA, and the UK are some of the countries considered in this thesis. The explanation is that the South African courts have, on many occasions, applied foreign law of Canada and the USA. The UK has been used, as the law of evidence in South Africa is a product of English law.

As the analysis focuses primarily on constitutional supremacy and law enforcement issues following the transition from parliamentary hegemony to constitutional dominance, the most important constitutions considered are those of Canada and the USA. The viewpoints of constitutional and human rights authors are valuable tools for recognising the problems resulting from the transition into a modern democracy.

The main topics are constitutional dominance, the rule of law, democracy, law reform, and compliance issues in South Africa. There is also a comparative law study that is useful in facilitating law enforcement through policing, with a particular focus on the situation in South Africa. The goal is to identify best practices for recommendation purposes at the end of the research. For referencing purposes,

short citations are used in footnotes for books and journal articles. Detailed citations, as well as short citations, are reflected in the bibliography.

1.10 Structure of the study

The following is the structure of the thesis.

Chapter 1 General introduction

The reader is introduced to the research in this chapter. It specifies the aim of the thesis, the problem statement, the research questions, the hypothesis, the justification and significance of the study, the scope of the thesis, the literature review, the methodology, and the structure of the thesis. The outcomes of the research questions are reflected in the general conclusion (chapter 5).

Chapter 2 Constitutionalism, the rule of law and democracy from apartheid to post post-Apartheid South Africa

This chapter examines the theory of constitutionalism, the rule of law, and democracy in South Africa from pre-apartheid to post-apartheid. It focuses on constitutionalism and the rule of law as well as democracy and human rights. These are theories that explain governance that is limited by the Constitution and the law, as well as governance that provides people with rights and freedoms.

It examines the two approaches of constitutionalism and democracy in South Africa, namely (1) apartheid South Africa's constitutionalism; and (2) democracy and post-apartheid South Africa's constitutionalism. Parliamentary sovereignty is investigated under apartheid South Africa, and constitutional supremacy under post-apartheid South Africa. The chapter examines how the two different political regimes applied the Constitution, the rule of law, and democracy. It investigates how the previous regime impacted human rights, with a particular emphasis on the role of apartheid.

Finally, this chapter looks at how the new regime protects human rights through the Bill of Rights. This chapter lays the groundwork for Chapter 3, which examines how the police functioned under apartheid and democracy.

Chapter 3 The South African Police Service from apartheid to the democratic order

This chapter is critical because it addresses the research's core. The researcher discusses the following topics in this chapter: the origins of the SAPS and its evolution from apartheid to democratic South Africa; the SAPS under the 1996 Constitution; the limits and control of the SAPS's action; and the conclusion.

The chapter describes, in detail, the origins of the SAPS and its evolution to its current status. It explains where it came from, how it functioned under apartheid, and how it functions under the 1996 Constitution. The chapter explores how the new democratic dispensation limits and controls the actions of the SAPS to ensure respect for constitutionalism, the rule of law, and democracy. The next chapter looks at the challenges faced by the police under the 1996 Constitution.

Chapter 4 The South African Police Service and law enforcement challenges under the 1996 Constitution

This chapter examines the SAPS and challenges related to respect for constitutionalism, the rule of law, and human rights; the SAPS and legal challenges in combating crime; and the SAPS and law enforcement challenges. In other words, the chapter investigates the impediments to smooth policing in the constitutional regime. It is critical in assisting in identifying legislative gaps for law reform to improve police service delivery. The following chapter is the general conclusion to the research study.

Chapter 5 Conclusion

This chapter serves as a summary and recap of the thesis, with a specific focus on the research questions. This chapter also provides general recommendations and avenues for further research as part of the conclusion.

Chapter 2: Constitutionalism, the rule of law and democracy from apartheid to post post-apartheid South Africa

2.1 Introduction

The key concepts used in this thesis are defined in this chapter. It discusses key concepts, such as constitutionalism, the rule of law, and democracy. The research looks at these theories from apartheid to post-apartheid South Africa. During the discussion, the researcher demonstrates how the concepts were applied by the previous political regime and how the concepts are applied by the current regime.

2.2 Constitutionalism democracy and the rule of law

Constitutionalism implies that the government is constrained by the Constitution. The rule of law requires that government actions be carried out in accordance with predetermined and clear laws that are known in advance to the public.

2.2.1 Constitutionalism and constitutions

The researcher examines constitutionalism and constitutions in-depth in this section.

2.2.1.1 Constitutionalism

In a constitutional democracy, the police must carry out their duties in accordance with the constitution and the rule of law. If they fail to do so, their actions will be declared invalid.[237] The constitution binds the police.[238] The different authors' perspectives on constitutionalism are discussed below.

According to Brooks, Rawls describes constitutionalism as the idea that even the highest political power in a country is subject to legal limits and requirements. He points out that the Constitution is an established law or statute, the highest ranking of a country, which no other regulation, judgment, or decision can infringe.[239]

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237 Section 2 of the Constitution.
238 Section 8(1) of the Constitution.
239 Brooks T (ed) *Rawls and law* (Ashgate Publishing Limited Farnham England 2012) 3.

Bazezew states that constitutionalism is a belief in the state of the Constitution.[240] The ideology that regulates the legality of government action can be described as constitutionalism.[241]

The following as the features or characteristics of constitutionalism: popular sovereignty;[242] separation of powers and checks and balances; responsible and accountable governance; rule of law; independence of the judiciary; respect for human rights; respect for self-determination; civil-military and police command governed by law; and judicial oversight.[243]

Tsagourias reasons that constitutionalism is about the theoretical and structural beliefs of the constitutional authorities.[244] Constitutionalism is the philosophy behind the constitutionalising process and the resultant philosophy behind the Constitution.[245]

Motala and Ramaphosa point out that constitutionalism stands for restricted government.[246] This aims to enforce the substantive and institutional constraints to restrict the scope of government power.[247] Constitutionalism means accountability by the state.[248]

De Vos supports Motala and Ramaphosa and points out that power is in the hands of the government and that this power must be kept under control.[249] The Constitution sets out exceptionally detailed directives for the execution of legislative and executive powers.[250] However, the protection of rights and freedoms can be limited. In the matter of *Kaunda*,[251] the CC clearly indicated to the applicants that the Constitution could not protect their rights in a foreign country. The HC clarified the degree to which citizens' freedoms can and cannot be protected by the

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240 Bazezew M "Constitutionalism" 2009 *MLR* 358 – 369.
241 Bazezew 2009 *MLR* 358.
242 Bazezew 2009 *MLR* 359.
243 Bazezew 2009 *MLR* 358 – 359.
244 Tsagourias N (ed) *Transitional constitutionalism* (Cambridge University Press UK 2007) 1.
245 Tsagourias *Transitional constitutionalism* 1.
246 Motala Z and Ramaphosa C *Constitutional law analysis and cases* (Oxford University Press Cape Town 2002) 176.
247 Motala and Ramaphosa *Constitutional law analysis and cases* 176.
248 Motala and Ramaphosa *Constitutional law analysis and cases* 176.
249 De Vos *et al South African constitutional law in context* 38 – 40.
250 De Vos *et al South African constitutional law in context* 38 – 40.
251 *Kaunda and others v President of the Republic of South Africa and others* 2005 4 SA 235 (CC) 240.

constitutional principle. This is because each state is an independent sovereign state.[252]

According to Fombad, the legitimacy, feasibility, and usefulness of every new constitutional order depend on the essence of the Constitution of the state.[253] The fundamental purpose of a Constitution is to limit the use of government powers.[254]

Mbazira reiterates the idea of restricting the power of government.[255] He claims that the fact that the government was elected by a majority does not mean that it can exercise its powers without restrictions.[256]

The above assertion by Mbazira was supported in the judgment in the *EFF* case. In this case, the CC, by its order, restricted the powers of parliament. Parliament was compelled to accept and comply with the findings of the Public Protector.[257] What happened in the *EFF* case is close to what happened in the *Collins* case. In the *Collins* case, parliament failed to comply with the decision of the SCA. Instead of complying, it increased the number of parliament members to achieve a two-thirds majority by passing a statute, namely the Senate Act 58 of 1955.

This Act was aimed at validating the Separate Representation of Voters Act 46 of 1951 that was set aside by the Appeal Court in the *Harris* case (in 1952). The goal was to enforce the Separate Representation of Voters Act to remove coloureds from the common voters' roll, which constituted protection of unjust laws.[258] This shows that there was a Constitution in 1957, but there was no constitutionalism in South Africa. Parliament was paramount.

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252 *Kaunda and others v President of the Republic of South Africa and others* 2005 4 SA 235 (CC) 240.

253 Fombad CM "Strengthening constitutional order and upholding the rule of law in Central Africa: Reversing the descent towards symbolic constitutionalism" 2014 *AHRLJ* 412 – 448.

254 Fombad 2014 *AHRLJ* 414.

255 Mbazira C *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice* (Pretoria University Law Press Pretoria 2009) 34.

256 Mbazira *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice* 34.

257 *EFF* [105].

258 *Collins v Minister of the Interior and another* 1957 1 SA 552 (A).

Mangu indicates that constitutionalism limits the government to what it can do. It tends to create a state of minimalism. This is a state that leaves more space for the freedom and activities of the individual.[259]

Rapatsa also calls for constitutionalism.[260] This concept governs the validity of government action. He insists that it is based on the notion of freedom of the people.[261] It requires those who rule to recognise that they are mandated to conduct government business in compliance with publicly expressed and forward-looking principles, which allow people to determine the integrity and interests of public policy.[262]

Barnett describes constitutionalism as the theory that determines the legitimacy of government action.[263] The author claims that constitutionalism implies something much more important than the definition of legitimacy, which requires official actions to comply with the pre-established rules of law.[264]

Academics indicate that there are different forms of constitutionalism. There is transitional constitutionalism, transformative constitutionalism, memorial constitutionalism, democratic constitutionalism, political constitutionalism, and legal constitutionalism. Du Plessis believes that the first kind of constitutionalism would be the constitutionalism of transition.[265] He describes transitional constitutionalism as a link between the culture of "authority" in apartheid South Africa and the culture of "justification" in a new South Africa.[266] He defines the second as constitutionalism that is transforming.[267] The third is the constitutionalism of memory. Memorial constitutionalism, he says, accepts the Constitution of South Africa.[268] It sees the Constitution as both memories and a commitment to a changed future along the way.[269]

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259 Mangu *The road to constitutionalism and democracy in post-colonial Africa: The case of the Democratic Republic of Congo* 108.
260 Rapatsa 2014 *MJSS* 887 – 895.
261 Rapatsa 2014 *MJSS* 887 – 895.
262 Rapatsa 2014 *MJSS* 890.
263 Barnett *Constitutional and administrative law* 5.
264 Barnett *Constitutional and administrative law* 5.
265 Du Plessis 2008 *AHRLJ* 378 – 379.
266 Du Plessis 2008 *AHRLJ* 378 – 379.
267 Du Plessis 2008 *AHRLJ* 378 – 379.
268 Du Plessis 2008 *AHRLJ* 378 – 379.
269 Du Plessis 2008 *AHRLJ* 378 – 379.

It is the view of the researcher that the words "from a culture of authority to a culture of justification" (as used by Du Plessis 2008 *AHRLJ* 378 note 9 citing Mureinik 1994 *SAJOHR* 31-32) are equivalent to the words "from a culture of parliamentary sovereignty to a culture of constitutional supremacy", which is the theme of this thesis.

Christiansen confirms the argument of Du Plessis.[270] He argues that the constitutional form in South Africa is transformative constitutionalism.[271] The express objective is to enhance the quality of life of all citizens and to liberate the ability of each person.[272]

Endoh defends democratic constitutionalism.[273] He points out that the post-apartheid period of South Africa saw the emergence of a new Constitution whose ideals were founded on the basic standards of democracy, respect for human rights, and fundamental freedom.[274]

The above argument of Endoh is confirmed in the *EFF* matter. In this case, the Court emphasised that one of the key elements of our constitutional vision is to make a decisive break from the unchecked abuse of state power and resources through constitutionalism, accountability, and the rule of law.[275] This case confirms that the features of constitutionalism are accountability, the rule of law, and democracy, as already indicated above by Bazezew.[276]

Kibet and Fombad contend that transformative constitutionalism gives hope that basic rights and freedoms will be better secured.[277] Constitutionalism is the notion of a government bound by a statute that involves elements, such as the protection of human rights and freedoms, the concept of the separation of powers, the

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270 Christiansen EC "Transformative constitutionalism in South Africa: Creative uses of Constitutional Court authority to advance substantive justice" 2010 *JGRJ* 575 – 614.
271 Christiansen 2010 *JGRJ* 575 – 614.
272 Christiansen 2010 *JGRJ* 576. Also see Rapatsa 2014 *MJSS* 886 – 887.
273 Endoh FT "Democratic constitutionalism in post-apartheid South Africa: The interim constitution revisted" 2015 *AR* 67 – 79.
274 Endoh 2015 *AR* 67 – 79.
275 *EFF* [1].
276 Bazezew 2009 *MLR* 359.
277 Kibet E and Fombad C "Transformative constitutionalism and the adjudication of constitutional rights in Africa" 2017 *AHRLJ* 340 – 366.

independence of the courts, the examination of constitutional laws, and the oversight of constitutional amendments.[278]

Kawadza maintains that avoiding authoritarian rule is the key goal of constitutionalism.[279] This is accomplished by complex processes that determine who should govern, determine a plan and decide on a goal.[280] He also points out that two contrasting constitutional models have surfaced, namely legal and political constitutionalism.[281]

Political constitutional theory is founded on the notion that political processes should be the structures to which those exercising political power should be subjected.[282] The fear is that the inclusion of the judiciary could lead to political decisions being taken by non-politicians.[283]

2.2.1.2 Constitutions

According to Costa and Zolo,[284] Aretin argued that the Constitution is the law of all laws, the precepts of which bind both the government and the legislative assembly.[285] Carl von Rotteck says the Constitution is the national representation that has to express the people's interests and rights against the government.[286]

According to Bahr, in his discussion of the doctrine of the *Rechtsstaat*, the Constitution is a fundamental law.[287] The goal is to establish the rights and responsibilities with which the state presents itself to individuals.[288]

Rautenbach and Malherbe indicate that the German concept of the constitutional state represents everything that is good in state and public law.[289] The concept includes power separation, enforceable individual rights, constitutional supremacy,

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278 Kibet and Fombad 2017 *AHRLJ* 340 – 344.
279 Kawadza H "Attacks on the judiciary: Undercurrents of a political versus legal constitutionalism dilemma?" 2018 *PELJ* 1 – 23.
280 Kawadza 2018 *PELJ* 1 – 3.
281 Kawadza 2018 *PELJ* 3.
282 Kawadza 2018 *PELJ* 4.
283 Kawadza 2018 *PELJ* 4.
284 Costa P and Zolo D (eds) *The rule of law: History, theory and criticism* (Springer Dordrecht Netherlands 2007) 243 – 244.
285 Costa and Zolo *The rule of law: History, theory and criticism* 243 – 244.
286 Costa and Zolo *The rule of law: History, theory and criticism* 243 – 244.
287 Costa and Zolo *The rule of law: History, theory and criticism* 243 – 244.
288 Costa and Zolo *The rule of law: History, theory and criticism* 243 – 246.
289 Rautenbach and Malherbe *Constitutional law* 281.

the legality principle, legal certainty, access to independent courts, and multi-party democracy.[290]

From the point of view of the social contract, Abioye discusses the legal system of the government.[291] He argues that the democratic government system means that, in a particular society, the people have decided to give up their individual rights and to be bound by the law for the collective good of existing together in harmony.[292] The laws embody the fundamental law of society and are referred to as the Constitution of the state.[293]

According to Barnett, a Constitution is a set of rules which govern an organisation.[294] Bradley and Ewing define the Constitution, in its limited meaning, as a document with a special legal sanctity that sets out the structure and main functions of government bodies within the state and sets out the principles under which those bodies are to work.[295] Bogdanor describes the Constitution as a code of rules that seeks to regulate the distribution of roles, powers, and duties between the various agencies and government officials, and defines the relationships among them and the public.[296]

Kuan points out that the Constitution is commonly understood as a collection of rules and principles that are considered to be authoritative, specifying the role of public power and regulating how that power is to be exercised.[297]

Makiwane maintains that the Constitution in every way defines the degree to which people of the country are entitled to fundamental rights.[298] He points out that, at best, the Constitution provides rights to all those who live within the state and, at worst, is a simple paper in the hands of rulers who may change it at will.[299]

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290 Rautenbach and Malherbe *Constitutional law* 281.
291 Abioye *Rule of law in English speaking and African countries: The case of Nigeria and South Africa* 87 – 88.
292 Abioye *Rule of law in English speaking and African countries: The case of Nigeria and South Africa* 87 – 88.
293 Abioye *Rule of law in English speaking and African countries: The case of Nigeria and South Africa* 87 – 88.
294 Barnett *Constitutional and administrative law* 6.
295 Bradley and Ewing *Constitutional and administrative law* 4.
296 Loveland I *Constitutional law: A critical introduction* (Butterworths London 1996) 2 – 3.
297 Kuan 2013 *TSJOL* 1.
298 Makiwane *Rights and constitutionalism – A bias towards offenders* 67.
299 Makiwane *Rights and constitutionalism – A bias towards offenders* 67.

The case of *Mark*[300] clearly indicates the application of the principle of constitutionalism. In South Africa, the Constitution is supported by monitoring mechanisms, such as the Human Rights Commission, the independent judiciary, an independent Auditor General, an independent Public Protector, an independent Electoral Commission, and strong and independent media, as well as civil society with freedom of speech.

Any statute or conduct which, for procedural or substantive purposes, does not comply with the Constitution will not have the force of law. The judiciary must have the power to enforce a supreme Constitution to be effective.[301]

A court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency when deciding a constitutional matter within its jurisdiction.[302] A court may make any order that is just and equitable.[303] The SCA, HC, or a court of similar status may make an order regarding the constitutional validity of an Act of parliament, a provincial Act, or any behaviour of the President.[304] If not authenticated by the CC, an order of constitutional validity shall have no effect.[305] This is indicated by the case of *Dodo*.[306] In this case, the CC was approached to uphold the HC's decision. This was after the HC ruled that section 51(1) of the 1977 Criminal Law Amendment Act is incompatible with the offender's rights. The CC, after careful consideration of all the facts, declined to confirm the HC's order in which section 51(1) of the Act was declared unconstitutional and invalid.[307]

Mangu defends a supreme Constitution.[308] He reasons that human rights cannot flourish in a country without a supreme Constitution, which institutionalises the rights of all people and guarantees that independent bodies, in particular courts, enforce

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300 *S v Mark and another* 2001 1 SACR 572 (C) (hereinafter the *Mark* case).
301 Currie I *et al The new constitutional and administrative law* 1st ed (Juta Claremont 2010) 74.
302 Section 172(1)(a) of the Constitution.
303 Section 172(1)(b) of the Constitution.
304 *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 4 SA 877 (CC) [62].
305 Section 172(2)(a) of the Constitution.
306 *S v Dodo* 2001 1 SACR 594 (CC) (hereinafter the *Dodo* case) [51] – [52].
307 *Dodo* [51] – [52].
308 Mangu Mbata B "The conflict in the Democratic Republic of Congo and the protection of rights under the African Charter" 2003 *AHRLJ* 235 – 264.

them.[309] He points out that an effective state is essential to protect human rights and the freedoms of individuals.[310]

Moseneke maintains that the Constitution requires Parliament to act in compliance with and within the boundaries of the Constitution in the exercise of its legislative authority.[311]

Supremacy and the values of the Constitution were emphasised in the *EFF* case. In this case, the Court noted that one of the main elements of South Africa's constitutional dream is to make a big break from the unregulated misuse of power by the state.[312]

The following cases indicate the supremacy of the Constitution: *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and another*,[313] as well as the case of *J*.[314] In both cases, the supreme Constitution protected the rights of children.

2.2.1.3 Relationship between constitutionalism and constitutions

The view of the author is that, constitutionalism operationalise the constitution. It is the constitution in action. The government's power is limited by the Constitution. Constitutionalism entails a degree of restraint in government. Because they both deal with the control of government power, constitutionalism, and constitutions are strongly intertwined.

2.2.2 Limitation of separation of powers and independence of the judiciary

Separation of powers is essential for avoiding any misuse of power within the government structure. An independent judiciary must enforce the principle of separation of powers. The roots of power separation can be traced back to 1689.

309 Mangu 2003 *AHRLJ* 262.
310 Mangu 2003 *AHRLJ* 235.
311 Moseneke 2012 *SALJ* 13.
312 *EFF* [1].
313 2014 2 SA 168 (CC).
314 *J v National Director of Public Prosecutions and another* 2014 ZACC 13.

Montesquieu (1689 – 1755) established one of the most important and complicated power-separation safeguards to ensure that the executive's power was managed.[315]

The separation of the judiciary from the executive was important for Montesquieu, as it clarified the points of contention between government, law, and individuals, and would therefore constitute an effective barrier against the government's breach of the law.[316] Montesquieu states that "freedom" is not existing if the right of judgment is not autonomous from powers held by the legislature and the executive.[317]

Locke concludes that the division of powers dates back to the Middle Ages.[318] He describes his division of powers in a manner that is not quite clear, even though he maintains that the powers are separated.[319] His opinion is based on two primary factors.[320] First, he appears to believe that there can be only one supreme power, the legislature, to which the others are and must be subordinate.[321] The second explanation is that he frequently viewed the judiciary as part of the executive branch and that his triple division of legislative, executive and federal powers did not conform to the constitutional model that Montesquieu admired and embraced in modern constitutions.[322]

In defence of the separation of powers, Locke argues that political society is formed when any number of men join the society, in the "state of nature", under one supreme government, to make "one people", "one political body".[323] This puts "men out of state of nature" into that of the Commonwealth, by setting up a "judge on earth" with jurisdiction to decide all disputes and rectify the injuries that may arise to any member of the Commonwealth; the judge is the legislative or magistrate appointed by the Commonwealth.[324]

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315 Montesquieu B *The spirit of the laws* Translated by T Nugent (The Colonial Press New York 1899) 151 – 152.

316 Montesquieu *The spirit of the laws* 151 – 152; Neate F (ed) *The rule of law: Perspectives from around the globe* (Lexis Nexis Publishers UK 2009) 2.

317 Montesquieu *The spirit of the laws* 151 – 152; Brooks BR *Plato and modern law* (Ashgate Publishing Limited Hampshire England 2007) 461.

318 Brooks T (ed) *Locke and law* (Ashgate Publishing Limited Hampshire England 2007) 243.

319 Brooks *Locke and law* 243.

320 Brooks *Locke and law* 243.

321 Brooks *Locke and law* 243.

322 Brooks *Locke and law* 243.

323 Brooks *Locke and law* 260 – 262.

324 Brooks *Locke and law* 260 – 262.

Through this, Locke refers specifically to the legislature as the primary source of all authority and the representation of the state's composite power.[325] According to Locke, for the sake of life, liberty, and estate, men give up their individual powers to society.[326] More precisely, they do so to resolve a situation that threatens life, freedoms, and properties, namely the non-differentiation of law, adjudication, and execution.[327]

Costa and Zolo explain the view of Bahr. They indicate that, in the discussion of the theory of *Rechtsstaat*, Bahr cautioned that law and justice could find their true sense and legitimate power only if they found a judicial authority equipped for their realisation. He expanded his theory on the *Rechtsstaat*, on the concept of representation, and the need for a separation of powers. He points out that there was also the executive power, in addition to legislation and judicial authority, which reflected the existence of the state organism.[328]

The judicial power and the executive power were both subject to law but in different ways.[329] The judge served the legal system, and his rulings were impartial, while the executive power did not intervene from the objective legal system's point of view, but rather focused on the subjective interests it served in any particular instance.[330] He suggests that the adjudication and administration had to be separate roles and that priority was to be given to safeguarding the legal system carried out by the judiciary.[331]

Similarly, Ngang agrees with Montesquieu's theory.[332] He points out that the theoretical idea of the division of powers conveys the principle of the sharing of powers between the executive, the legislature, and the judiciary to ensure the requisite checks and balances to curb the misuse of power by each of these bodies.[333]

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325 Brooks *Locke and law* 260 – 262.
326 Brooks *Locke and law* 260 – 262.
327 Brooks *Locke and law* 260 – 262.
328 Costa and Zolo *The rule of law: History, theory and criticism* 246 – 247.
329 Costa and Zolo *The rule of law: History, theory and criticism* 246 – 247.
330 Costa and Zolo *The rule of law: History, theory and criticism* 246 – 247.
331 Costa and Zolo *The rule of law: History, theory and criticism* 246 – 247.
332 Ngang CC "Judicial enforcement of socio-economic rights in South Africa and the separation of powers objection: The obligation to take other measures" 2014 *AHRLJ* 655 – 680 662.
333 Ngang 2014 *AHRLJ* 655 – 680.

Constitutional principle VI of the Constitutional Principles adopted during the South African multi-party talks in the early 1990s (and attached to the interim Constitution)[334] provided for the separation of powers between the legislature, the executive, and the judiciary, with sufficient controls and balances to ensure responsibility, responsiveness, and transparency.[335] Writing in the mid-18th century, Montesquieu made a momentous statement about the significance of a democracy's separation of powers. He said when the legislative and executive powers are merged in the same individual, or the same body of magistrates, there can be no freedom.[336]

This is because tyrannical laws will be enforced by the same king or senate who made them. If the judiciary is not segregated from the legislature and the executive, there is no liberty. If it is preceded by the judiciary, the subject's life and independence would be subject to the arbitrary influence, as the judge would then be the legislature. A judge may act with violence and oppression if combined with the executive power.[337]

Rautenbach views the division of powers as quite important.[338] According to Rautenbach, the separation of powers doctrine is one of the most respected fundamental values the world has ever encountered.[339] Kuan points out that the separation of powers doctrine is the avoidance of the accumulation of governmental powers in a single entity to prevent the misuse of governmental power and protect individual life and freedom.[340]

Mangu points out that the separation of powers doctrine implies that power corrupts, and the separation of powers is fundamental to freedom and democracy.[341] The underlying idea of Montesquieu's thinking was that man, though a reasoning being,

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334 Constitution of the Republic of South Africa, 1993.

335 Montesquieu *The spirit of the laws* 151 – 152; O'Regan K "Checks and balances: Reflections on the development of the doctrine of separation of powers under the South African Constitution" 2005 *PELJ* 120.

336 Montesquieu *The spirit of the laws* 151 – 152.

337 Montesquieu *The spirit of the laws* 151 – 152; O'Regan 2005 *PELJ* 122; Barnett *Constitutional and administrative law* 94.

338 Rautenbach IM "Policy and judicial review-political questions, margins of appreciation and the Constitution" 2012 *TSAR* 20 – 34.

339 Rautenbach 2012 *TSAR* 20.

340 Kuan 2013 *TSJOL* 2.

341 Mangu 2009 *Paper* 2.

is guided into immoderate acts by his impulses and constant experience shows that every man invested with power is capable of abusing it and taking his authority as far as it goes. The end result of all powers being centralised or combined is despotic government, tyranny, or repression of all modes of democracy.[342]

Hulme and Pete regard checks and balances as the guardian of the Constitution. It is part of our system of monitoring and balancing.[343] In South Africa, this statement was confirmed by the case of *Glenister.*[344]

Hulme and Pete say that in modern democracies, the concept of the separation of powers is in most cases questioned by the confrontation between the executive and the judiciary.[345] In support of this view, Hulme and Pete point to the situation in England during the 17th century, when the doctrine of the division of powers was in its infancy.[346] That was when King James I of England and his chief justice, Edward Coke, disagreed on the principle of separation of powers.[347]

King James I was a strong believer in the doctrine of the "divine right of kings".[348] He argued that royal absolutism had divine authority.[349] He believed that only his orders were right; nobody else was right.[350] He believed he could not be judged and that he could only be judged by God.[351] His conduct eventually led to the Civil War in England and the execution of his successor, Charles I.[352]

The proper application of the doctrine of separation of powers is still a challenge in some countries. This is confirmed by the famous South African case of *Dalinyebo.*[353] This case shows that while South Africa is a constitutional democracy that accepts the concept of power separation, there is still a void in understanding the principle

342 Mangu 2009 *Paper* 2.
343 Hulme D and Pete S "Rising tension between the South African executive and judiciary considered in historical context – Part One" 2012 *PELJ* 15 – 43 16.
344 *Glenister v President of the Republic of South Africa and others (Helen Suzman Foundation, Amicus Curiae)* 2011 3 SA 347 (CC) (hereinafter the *Glenister II* case).
345 Hulme and Pete 2012 *PELJ* Part One.
346 Hulme and Pete 2012 *PELJ* Part One 29 – 31.
347 Hulme and Pete 2012 *PELJ* Part One 29 – 31.
348 Hulme and Pete 2012 *PELJ* Part One 33 – 34.
349 Hulme and Pete 2012 *PELJ* Part One 33 – 34.
350 Hulme and Pete 2012 *PELJ* Part One 33 – 34.
351 Hulme and Pete 2012 *PELJ* Part One 33 – 34.
352 Hulme and Pete 2012 *PELJ* Part One 33 – 34.
353 *Dalinyebo v S* 2015 ZASCA 144 (hereinafter the *Dalinyebo* case).

of power separation between different state institutions and individuals. This includes the role played by traditional leaders.

The case of *Proclamations*[354] from the 17th century in England is an example of conflicting interests in the separation of powers. The case involved King James I. By way of proclamation, he wanted to prohibit the construction of new buildings in and around London.[355] The argument was whether statutory prohibitions can be produced in this manner, by the King. Although the King had supposedly made law by way of proclamation in the time before this matter came up for consideration, the practice was questioned.

Chief Justice Edward Coke pointed out that the indictments applied to the statute in such cases, rather than any royal proclamation.[356] Similar to Montesquieu, Coke supported the principle of separation of powers. Similarly, the case of *Dalinyebo* above supports the principle—the King cannot create his own laws and punish his subjects while there are courts to execute that function.[357] In this case, the Supreme Court's decision sends a message to the community and the executive that, in a constitutional democracy, there is a separation of powers, checks and balances, and respect for the rule of law.[358]

According to the observation of Hulme and Pete, the problems faced by England in the 17th century and currently in South Africa are not completely different. South Africa is in the early stages of its democratic growth, like England in the 17th century. Democratic institutions are weak and not yet deeply embedded in democratic processes. When different power centres press for space, conflict seems unavoidable.[359]

When one observes the tension that existed between the Public Protector and some members of the executive in South Africa during the Nkandla investigations (regarding the alleged misappropriation of public funds in the Nkandla building

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354 Hulme and Pete 2012 *PELJ* Part Two 51. *Prohibitions Del Roy* 1607 *EWHC* KB J23 77 ER 1342, 12. Co. Rep.64 1 November 1607.
355 Hulme and Pete 2012 *PELJ* Part Two 51 – 52.
356 Hulme and Pete 2012 *PELJ* Part Two 52 – 53.
357 *Dalinyebo* [1].
358 *Dalinyebo* [59].
359 Hulme and Pete 2012 *PELJ* Part Two 54.

project), the statement of Hulme and Pete seem to be correct. The same can be said about the tension between the judges of South Africa and the executive, which led to Chief Justice Mogoeng Mogoeng requesting the President to intervene, as the courts were unjustifiably criticised by some members of the executive for decisions they had taken. The meeting took place on 27 August 2015. The notice for the meeting read as follows,

> President Jacob Zuma will today chair the meeting of the Executive and Judiciary to discuss working relations between the two arms of the state, at the Union Buildings in Pretoria. It is expected that the meeting would strengthen cooperation between the two arms of the state, deepen democracy and stress the rule of law as a fundamental principle of the constitutional order of the nation.[360]

In 1897, Paul Kruger, the President of the Zuid-Afrikaanse Republic (now the Provinces of Gauteng, Limpopo, Mpumalanga, and North West in South Africa) also clashed with his Chief Justice, Kotze.[361] The clash was over the separation of powers between the executive and the judiciary. The main issue was the "testing rights of the court".[362] The view and approach of President Kruger in dealing with the doctrine of the separation of powers did not differ from the view and approach of King James I of England regarding the "divine right of kings". It is clear that both felt that the King or parliament was supreme. They related the supremacy of parliament and the divine right of kings to God because God is regarded as a "supreme being" by Christians.

It is the view of the researcher that in a democratic society, where there is a rule of law and separation of powers, there is no space for absolutism and dictatorship, as this will lead to chaos and instability—causing innocent people to suffer.

Labuschagne states that the doctrine of the separation of powers means that the rights of the citizen of a state can only be assured by a division of centralised

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360 The Presidency "President Zuma convenes meeting of executive and judiciary" http://www.thepresidency.gov.za/content/president-zuma-convenes-meeting-executive-and-judiciary (Date of use: 21 December 2015) 1.

361 Hulme and Pete 2012 *PELJ* Part One 24 – 25; De Vos *et al South African constitutional law in context* 7; Bergh JS "A perspective on State President SJP Kruger: Chief Justice JG Kotze's *bibliographic memoirs and reminiscencenees*" 2013 *Historia* 106 – 121 115 – 117.

362 Hulme and Pete 2012 *PELJ* Part One 24 – 25; De Vos *et al South African constitutional law in context* 7; Bergh JS "A perspective on State President SJP Kruger: Chief Justice JG Kotze's *bibliographic memoirs and reminiscencenees*" 2013 *Historia* 106 – 121 115 – 117.

institutionalised power because centralised power can potentially lead to oppression.[363] This statement of Labuschagne supports the above statement of Mangu. The separation of powers concept means that the liberty of a state's people can only be assured if the consolidation of power (which can lead to abuse) is avoided by the division of government authority into a legislative, executive, and judicial authority, and it is exercised by various government bodies. Legislative authority is the authority to make, change, and revoke laws. Executive authority is the control of law enforcement and compliance. In disagreements, judicial authority is the power to decide what the rule is and how it should be enforced in specific situations.[364]

An important mechanism to prevent government tyranny is the principle of separation of powers. This principle seeks to distribute power among the three branches of government (i.e. the legislature, executive, and judiciary).[365] For instance, the NPA cannot usurp the function of the police. The South African National Defence Force cannot usurp the function of the police. The judiciary cannot usurp the function of the Prosecuting Authority.

Checks and balances are intended to ensure that the various branches of government control each other internally (checks) and act as counterweights to the influence of the other branches (balances). In most democracies, the most conspicuous example of a check is the judiciary's power to review executive behaviour and laws for constitutional (and Bill of Rights) compliance.[366] The three legs of government apply checks and balance processes to one another.

The executive oversees the legislature by creating and enforcing policies, designing and introducing legislation, and approving statutory Bills adopted by the legislature. The legislature oversees the executive by requiring executive members to provide full and frequent reports on matters under their jurisdiction, replaces or recalls national executive members, and selects the President. The judiciary checks the legislature by dismissing laws passed by the legislature that does not conform with

363 Labuschagne P "The doctrine of separation of powers and its application in South Africa" 2004 *Politeia* 84 – 102 85.
364 Rautenbach and Malherbe *Constitutional law* 68.
365 Motala and Ramaphosa *Constitutional law analysis and cases* 175.
366 Currie and de Waal *The Bill of Rights handbook* 21.

the Constitution and verifying that the legislature conforms with constitutional procedural requirements.[367]

A practical example of checking and balancing in the policing environment is that a magistrate will not issue a search warrant to a police official if he is not satisfied that there are reasonable grounds to authorise the issuing of a search warrant. In this way, the magistrate checks an act or conduct of a police official that could have been unlawful or invalid. In that way, the magistrate balances the act or conduct of the police official by ensuring that the police official provides reasonable or sufficient evidence before the search warrant is authorised. Similarly, the magistrate will not issue a warrant of arrest to a police official if there is not enough evidence justifying the arrest of a person who is mentioned in an application for the issuing of a warrant of arrest.

The Department of Correctional Services will not detain a person if the police officer who wants a person to be detained does not provide the Department of Correctional Services with a "detention warrant".[368] The NPA will not place a police case docket on the court roll if there is insufficient evidence justifying the prosecution of the arrested person, as that might lead to malicious prosecution and result in civil claims against the state.[369]

An example of a case in which the separation of powers and checks and balances was applied is *National Director of Public Prosecutions and others v Freedom under the Law*.[370] In this matter, the Court agreed with the appellants that the mandatory prohibitions were inappropriate transgressions of the separation of powers doctrine. The case indicates the power of the separation of powers doctrine.

In the case of *Dodo*, the Court indicated that checking and balancing constitute a vital part of the separation of powers principle.[371] It prevents state organs from becoming too effective in exercising their delegated authority. The existing Bill of Rights is a most critical check on the legislature. An autonomous judiciary enforces

367 De Vos *et al South African constitutional law in context* 71.
368 Section 50(1)(a) of the Criminal Procedure Act 51 of 1977.
369 *Carmichele v Minister of Safety and Security and another (Centre for Applied legal Studies Intervening)* 2001 4 SA 938 (CC).
370 2014 JOL 32248 (SCA).
371 *Dodo* [41].

this Bill of Rights. By limiting the power of the government, it preserves individual rights.[372]

For the proper checks and balances of government power, there is a need for an independent judiciary. The independent judiciary is the sole arbiter of legal disputes. Montesquieu confirms this by indicating that, there is no liberty if judicial power is not separated from the legislature and executive.[373]

Similarly, McCorquodale argues that the fundamental question to be answered by the rule of law is: who guards the guardians? Who ensures that they use the powers we have given them to protect us, in a manner that is appropriate, rational, and fair?[374] This is the task of the judiciary, as indicated by Govender below.

Govender argues that reasonable checks and balances on the exercise of public authority require an effective, efficient, and autonomous judiciary, and independent institutions that support democracy, free, impartial, and competent media, and a vibrant and alert civil society.[375] All of these are necessary if powers, checks, and balances are to be segregated. The required balance envisaged in the Constitution can only be accomplished if these institutions function properly.[376]

Similarly, De Vos *et al* confirms the power of the independent judiciary. He indicates that with its non-elected but appointed judges, the judiciary has the power to override legislation passed by majority democratically elected representatives. This signifies how powerful and autonomous the judiciary is in a non-authoritative country.[377] In the case of *De Lange*,[378] the Court highlighted the requirement of independence and non-interference with the judiciary. It indicated that the CC on two occasions cited with approval the words of Chief Justice Dickson, the previous Chief Justice of Canada when he said; historically, the commonly accepted

372 *Dodo* [41].
373 Montesquieu *The spirit of the laws* 152.
374 McCorquodale R (ed) *The rule of law in international and comparative content* (British Institute of International and Comparative Law London 2010) 109.
375 Govender K "Power and constraints in the Constitution of the Republic of South Africa 1996" 2013 *AHRLJ* 82 – 102 84.
376 Govender 2013 *AHRLJ* 82 – 102 84.
377 De Vos *et al South African constitutional law in context* 72 – 73.
378 *De Lange NO v Smith and others* 1998 3 SA 785 (CC).

fundamental principle of judicial independence, has been the complete liberty of individual judges to hear and decide cases that come before them.

No person, be it government, interest groups, individuals, or even another judge, may intervene or attempt to intervene with the way a judge handles his case and makes his decision.[379] In the case of *South African Association of Personal Injury Lawyers,* the Court stated that the judiciary has a delicate role to play in monitoring the exercise of power and upholding the Bill of Rights. It is important that the judiciary is sovereign and that it is viewed as autonomous.[380]

Rawls believes that judges need to be autonomous, and justice is fair.[381] He finds the idea of legitimacy to be a principle of justice.[382] Rawls points out that judges are to enforce the rules laid down by the legislature on the simple positivist account in so far as these rules are extremely clear or can be made indisputable by consulting legislative history and other standard sources of legislative intent.[383]

Similar to Rawls, Neate argues that judicial independence is fundamental to any democracy and essential to the separation of powers, the rule of law, and human rights.[384] Judicial independence ensures procedural fairness and democracy, and its principles are preserved. The foundations of judicial independence are the individual judge's independence and the judicial branch's independence.[385]

Mangu reasons that an independent judiciary plays a critical role in ensuring checks and balances[386] through judicial review, and is a fundamental element of democracy.[387] This is confirmed by the African Charter, which provides that state parties to this Charter shall have the obligation to guarantee the independence of the courts and shall allow the establishment and development of the relevant

379 *De Lange NO v Smith and others* 1998 3 SA 785 (CC); *Van Rooyen and others v S and others (General Council of the Bar of South Africa Intervening)* 2002 5 SA 246 (CC).
380 *South African Association of Personal Injury Lawyers v Heath and others* 2001 1 BCLR 77 (CC) 34 [46].
381 Brooks *Rawls and law* 40 – 41.
382 Brooks *Rawls and law* 40 – 41.
383 Brooks *Rawls and law* 40 – 41.
384 Neate *The rule of law: Perspectives from around the globe* 62 – 65.
385 Neate *The rule of law: Perspectives from around the globe* 62 – 63.
386 Mangu AMB *Separation of powers and federalism in African constitutionalism: The South African case* (LLM dissertation University of South Africa 1998) 15.
387 Mangu *The road to constitutionalism and democracy in post-colonial Africa: The case of the Democratic Republic of Congo* 124; Fombad *Constitutional law in Cameroon* 166.

national institutions charged with promoting and protecting the rights and freedoms guaranteed by this Charter.[388]

"Independence" is divided into two parts, (1) independence of the individual, and (2) independence of the organisation. Institutional independence relates to the existence of structures, and safeguards and protects courts and judicial officers from intrusion from other government branches. Individual independence refers to judicial officers acting independently and impartially.[389]

Egbewole indicates that for the judiciary to be truly independent as an institution, the functionaries must possess some qualities in terms of professional skills acquired by training, personal satisfaction, self-confidence, financial discipline, and a limited level of socialisation.[390] The judiciary must be self-sustaining financially by way of autonomy; the appointment of judicial officers and other personnel must be determined solely on merit, without any interference of politics or any form of pollution.[391]

The UN Basic Principles on the Independence of the Judiciary 1985 guarantee the independence of the judiciary. It indicates that the state guarantees the independence of the judiciary, and this is enshrined in the country's Constitution or statute. All governmental and other institutions must respect and maintain judicial independence.[392] The independent judiciary plays a supporting role in political stability. The AU orders state parties to institutionalise good political governance through an independent judiciary.[393]

Bazezew supports judicial independence.[394] He insists that the supremacy of the Constitution is protected by an autonomous judiciary. When the legislature has a

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388 Article 26 African Charter on Human and People's Rights, 1981 (or Banjul Charter).

389 Gordon A and Bruce D "Transformation and the independence of the judiciary in South Africa" 2007 *CSVR* 7.

390 Egbewole W (ed) *Judicial independence in Africa* (Wildy, Simmonds & Hill Publishing London England 2018) 2.

391 Egbewole *Judicial independence in Africa* 2.

392 OHCHR "Basic principles on the independence of the judiciary" https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx#:~:text=The%20judiciary%20shall%20decide%20matters,quarter%20or%20for%20any%20reason. (Date of use: 3 Novermber 2016) 2.

393 Article 32 African Charter on Democracy, Elections and Governance, 2007 (adopted by 8th Ordinary Session of the Assembly, held in Addis Ababa, Ethiopia, 30 January 2007).

394 Bazezew 2009 *MLR* 365 – 366.

law that is contrary to the Constitution, an autonomous judiciary has the right, by virtue of the principle of judicial or constitutional review, to declare it null and void.[395]

The argument alluded to above indicates that the UN believes in an independent judiciary. The majority of scholars also agree that the judiciary will be autonomous if the independence of individual judges and their institutions is acknowledged or valued. Therefore, the independence of the judiciary requires both the individual judge and the organisation that he/she represents to be autonomous.

2.2.3 The rule of law

This is one of the key pillars of constitutionalism. Dicey explains the rule of law as meaning, absolute supremacy, or predominance of regular law as opposed to the influence of arbitrary power.[396] This entails the exclusion of the existence of arbitrariness, prerogative, or wide discretionary power on the part of government and equality before the law or equal subjection of all people to the ordinary law of the land.[397] Dicey's rule of law theory originated in the common law legal tradition. He indicates that the Constitution is the result of ordinary law.[398]

McCorquodale argues that the fundamental question to be answered by the rule of law is: who guards the guardians? Who ensures that they use the powers we have given them to protect us, in a manner that is appropriate, rational, and fair?[399] Costa and Zolo point out that according to Austin, Dicey opposed the notion that the English Constitution was founded on the principle of the division of powers.[400] He opposed the notion that parliament would be subject to constitutional rule. He argued that the rule of law was based on the principle of legality. Compared to the German rule of law (*Rechtsstaat*), the rule of law was specifically designed to regulate the discretionary control of the executive.[401]

Brooks analysed the work of Plato. He points out that Plato states that, the state is on its way to collapse unless the laws are supreme, and the rulers see themselves

395 Bazezew 2009 *MLR* 365 – 366.
396 Dicey *Introduction to the study of the law of the Constitution* 120.
397 Dicey *Introduction to the study of the law of the Constitution* 120.
398 Dicey *Introduction to the study of the law of the Constitution* 121.
399 McCorquodale *The rule of law in international and comparative content* 109.
400 Costa and Zolo *The rule of law: History, theory and criticism* 187 – 188.
401 Costa and Zolo *The rule of law: History, theory and criticism* 187 – 188.

as servants of the rules.[402] He claims that obedience to the laws is the greatest of all democratic values and the highest qualification of the office. Therefore, as a judge or a police officer, every judge and every officer must be responsible for what they do.[403] Here, Plato points out that public officials must be held responsible and accountable. The rule of law for Plato is the highest standard.

Stalley indicates that Plato argues that any state in which the government is recognised must recognise the power of law.[404] There has to be a rule that says who is in charge. An absolute monarchy, for example, may be governed according to one simple rule, "obey the King". In a state of this nature, one could not say that the king was a subordinate or a slave to the law because the law gives him unlimited power. The state may be said to be governed by the law if the government recognises the rule of law, that is, the government behaves in compliance with the general laws. Such laws apply equally to all and, in some ways are made public; disputes are settled by a non-arbitrary process. Observance of the rule of law, interpreted in this context, undoubtedly limits governments and can avoid some of the worst injustices. However, if the government can change the law at will, it can hardly be said to be the servant of the laws.[405]

Brooks describes how Plato reveals how much Socrates was concerned with the rule of law.[406] He points out that an opportunity to escape is given to Socrates lying in jail awaiting execution. Instead, Socrates wants to go to his death because his execution is mandated by statute, and a breach of the statute would be unjust. Socrates goes to his death because he believes that by deciding to live as a resident, he has put himself under the competence of the lawful power and that an action in breach of that authority is a violation of the law.

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402 Brooks *Plato and modern law* 445.
403 Brooks *Plato and modern law* 445.
404 Stalley RF *An introduction to Plato's laws* (Basil Blackwell Publisher Limited Oxford England 1983) 81.
405 Stalley *An introduction to Plato's laws* 81.
406 Brooks *Plato and modern law* 186 – 195.

The Plato Criteria retain the following proposals: (i) positive law imposes a moral obligation on citizens to the obedience of the law; and (ii) a citizen may be morally obliged to do what he is morally obliged to do.[407]

Citizenship in South Africa is guaranteed by the Constitution and gives the citizen rights, benefits, privileges, duties, and responsibilities. The Constitution indicates that there is collective citizenship of South Africa, and all people are equally entitled to citizenship rights, privileges, and benefits. They are also equally subject to citizenship duties and responsibilities.[408] One of those responsibilities is to obey the law, as demonstrated by Socrates.

Mackinnon points out how Hume shows the value of the law. He points out that all natural laws regulating property as well as all civil laws are common.[409] Hume claims that the following are standards of the common law and are also viewed as fundamental to the rule of law: (a) they apply to all, including the judges themselves; (b) they are stringent in their execution, stipulate uniform treatment of offences and ensure that officials conduct their functions in a prescribed manner; (c) they are clear and determined in their application; and (d) they are known in advance to the public.[410]

Costa and Zolo indicate how Locke and Montesquieu view law. According to Locke and Montesquieu, the essential medium of freedom was law (natural law and civil law).[411] Individuals are free to the extent that they act in compliance with the law. This is their only protection against arbitrary actions.[412]

In France, the rule of law is called *Etat de droit.* The idea of *Etat de droit* has two connotations in modern French public law doctrine. This means, first of all, that the state operates exclusively in a lawful manner. The government acts by means of a law. Secondly, the government is governed by the rule of law. The power of the state is limited by means of law. Political power is framed using the following guarantees:

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407 Brooks *Plato and modern law* 186 – 195.
408 Section 3 of the Constitution.
409 Mackinnon K (ed) *Hume and law* (Ashgate Publishing Limited Farnham England 2012) 38 – 43.
410 Mackinnon *Hume and law* 43.
411 Costa and Zolo *The rule of law: History, theory and criticism* 78.
412 Costa and Zolo *The rule of law: History, theory and criticism* 78.

separation of powers, declaration of rights and liberties, judicial review, administrative acts, and independence of the judiciary.[413]

Neate asserts that, as early as 1215, with the signing of the Magna Carta, the British moved to principles that are part of the modern interpretation of the rule of law.[414] The Magna Carta, by extending the rule of law to the monarch and all his subjects, questioned the King's unrestrained powers in principle. Some of the goals of the Magna Carta were to establish a fairer, more reliable form of justice. John Locke (1632 – 1704) argued that men have absolute freedom and equality in the state of nature but are bound by natural law by the rule of reason. They then authorise the executive authority to the government on the principle that the government is governed by natural laws. To Locke, the law has triumphed over the will of both individuals and the government.[415]

Neate highlights the perspective of Montesquieu (1689 – 1755) who also equated individual liberty with life under the overarching guidance of the law.[416] The origins of the rule of law have been evident in religion as far back as 384 – 322 BC. In addition, Neate points out that the idea of a rule of law to which everybody, even the most influential, is subject, has existed for many years. Moses took down the Ten Commandments from Mount Sinai. The Torah (laws found in the first books of the Old Testament) was binding upon all, including the kings, and acted as a restraint on their control. The kings did not make or enforce such rules. The Old Testament explains how the laws were enforced by judges who were autonomous from the King. Eventually, the evolution of Sharia under Islam was not significantly different. Two fundamental principles of the rule of law have been in existence from earlier times—those in power should not make the laws (the separation of powers), and all people (including those in power) should be bound by the laws.[417]

Neate also looked at Aristotle. In "The Politics" Aristotle also said that the rule of law is preferable to the rule of any individual. The search for goodness or justice under the law has been a recurring theme since the time of Socrates, Plato (427 – 347

413 Costa and Zolo *The rule of law: History, theory and criticism* 261.
414 Neate *The rule of law: Perspectives from around the globe* 1.
415 Neate *The rule of law: Perspectives from around the globe* 1.
416 Neate *The rule of law: Perspectives from around the globe* 2.
417 Neate *The rule of law: Perspectives from around the globe* 2.

BC), and Aristotle (384 – 322 BC).[418] During the 19th century, Dicey already described three key aspects of the rule of law in his study of the rule of law, namely (i) the supremacy of the law over arbitrary power; (ii) the equality of all before the law and the rule of law; (iii) the rights of individuals as higher law.[419] The three principles outlined by Dicey are seen as basic procedural standards for the enforcement of human rights. The German meaning of the rule of law *(Rechtsstaat)* has the same function as the rule of law, as it often limits the power of government. This concept emerged in Germany during World War II. However, the German interpretation of the rule of law focuses on the prohibition of unregulated state power rather than on the protection of individual rights.[420]

Through his study, Neate discusses why academics argue that the idea of the rule of law arose through two schools of thought.[421] There is a school of thought that advocates a "thick" view of the rule of law, arguing that it must be reflective of democratic values and the defence of the rights of individuals and minorities. Ronald Dworkin proposes that the rule of law be thickly established. The other school of thinking advocates the "thin" view of the rule of law. The "thin" definition of the rule of law focuses on restricting the exercise of governmental or individual executive powers and making the acts of government and individuals transparent and predictable. Joseph Raz's thin concept, for example, holds that the rule of law simply means what is stated, the rule of law. Utilising this in its widest possible sense, people will abide by and be governed by the law.[422]

May's argument is both the thin and the thick interpretation of the rule of law. He points out that the narrow view of the rule of law is aimed primarily at describing the practice and process rather than the content, whereas the wider view of the rule of law includes a broader collection of legal concepts, such as equality and justice.[423]

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418 Neate *The rule of law: Perspectives from around the globe* 1.

419 Dicey *Introduction to the study of the law of the Constitution* 120; Neate *The rule of law: Perspectives from around the globe* 2 – 3.

420 Neate *The rule of law: Perspectives from around the globe* 5.

421 Neate *The rule of law: Perspectives from around the globe* 6.

422 Neate *The rule of law: Perspectives from around the globe* 6.

423 May C *The rule of law: The common sense of global politics* (Edward Elgar Northampton 2014) 36 – 38.

In addition, May points out that the "thin" interpretation of the rule of law sees it as a standardised (mostly non-political) measure of social organisation. Thus, when Stefan Voigt recently attempted to establish a formula for calculating the achievement of the rule of law, the list of these elements included a division of powers, judicial oversight, independence of the judiciary, judicial transparency, autonomy of the prosecutor, fair trials and fundamental human rights. He points out that, for many observers, these thin definitions reduce the law to its positive legal features, leaving the question of how to hold the government or the state to account.[424]

The thick view of the rule of law implies a wide conception of justice, both political and economic, in the rule of law. It includes values, such as democracy, welfare, freedom of religion, right to education, right to privacy, freedom of the press, and economic rights.[425]

In addition, May claims that according to Bingham, the following issues constitute the rule of law; the law must be accessible, simple, and straightforward, and legal rights and liability issues should normally be resolved through law enforcement and not through discretionary exercise.[426] The judiciary and legal profession must be independent of the state; and the rule of law allows the state to meet its responsibilities under international law, as is the case under national law.[427]

In the case of *The Minister of Justice and Constitutional Development*, the SCA ruled that the respondents (the state) did not fulfil their international obligations under section 10 of the Rome Statute by refusing to detain, arrest and surrender the President of Sudan, Omar Hassan Ahmad Al Bashir, to the ICC. This is an indication of the effective application of the rule of law by the courts in South Africa.[428]

Bellamy claims that the term "rule of law" means nothing more and nothing less than the presence and operation of a judicial system.[429] He points out that, in the

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424 May *The rule of law: The common sense of global politics* 42 – 43.
425 May *The rule of law: The common sense of global politics* 43.
426 May *The rule of law: The common sense of global politics* 50 – 52.
427 May *The rule of law: The common sense of global politics* 50 – 52.
428 *The Minister of Justice and Constitutional Development v Southern African Litigation Centre* (867/15) 2016 ZASCA 17 (15 March 2016).
429 Bellamy R *The rule of law and the separation of powers* 2nd ed (Ashgate Publishing Company Burlington USA 2005) 3.

congratulatory formulation of Lon Feller, the rule of law is the subjection of human conduct to the control of moral standards by means of the operation of the legal system with the following principles; (1) working according to general standards and participating in all or most of the following properties; (2) offering guidelines to individuals who are expected to comply with them; (3) being prospective rather than retrospective; (4) being understandable rather than hopelessly incomprehensible; (5) not mutually incompatible and without overlapping duties; (6) they do not impose requirements that cannot possibly be met; (7) they proceed for a significant period of time instead of being changed at a disorienting pace; and (8) they are usually enforced in accordance with their terms, such that the standards as formulated and the standards as implemented are compatible. "The rule of law" is the fulfilment of these precepts.[430] This understanding of norms is confirmed by Costa and Zolo.[431]

Costa and Zolo claim that political authority, law, and individuals tend to be the basic elements of the rule of law.[432] Those three elements are the pillars of the life and sense of the rule of law. The rule of law is an extraordinary relationship between "government" and "justice". Individuals profit from the rule of law and follow a common goal. This informs society on how to act on "control" through the law to strengthen the position of individuals. The debate on citizenship can include the rule of law since it focuses on the relationship between the citizen and the political system.[433]

Trebilcock and Daniels contend that there is a sequence of characteristics that the rule of law will provide. The first is the values of the system. This means that a legislatively based interpretation of the rule of law would, in part, concentrate on the features of the legal system. This will provide clarification in the legislative and adjudicative functions.[434] In other words, the systems need to be clear. The second is the values of institutions. Such ideals must possess qualities, such as autonomy

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430 Bellamy *The rule of law and the separation of powers* 3.
431 Costa and Zolo *The rule of law: History, theory and criticism* 7.
432 Costa and Zolo *The rule of law: History, theory and criticism* 8.
433 Costa and Zolo *The rule of law: History, theory and criticism* 74.
434 Trebilcock MJ and Daniels RJ *Rule of law reform and development: charting the fragile path of progress* (Edward Elgar Publishing Inc Northampton 2008) 29.

and transparency.[435] For example, judicial decisions must be independent. The last is the legitimacy of values. This means the justification of the exercise of authority.[436]

The above arguments flow from the idea of the English legal scholar, Albert Venn Dicey. He defined the rule of law as follows:

> [It] means the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power. It excludes the existence of arbitrariness, prerogative, or even of wide discretionary authority on the part of the government. It means equality before the law or equal subjection of all classes to the ordinary law of the land administered by ordinary courts. The Constitution is the result of the ordinary law of the land.[437]

Principe argues that the rule of law is a noble set of principles by which the government treats its individuals equally and fairly, irrespective of race, gender, education, or economic differences.[438] He points out that the rule of law encourages trust among people if the government follows it.[439]

In the *EFF* case, the CC instructed parliament to comply with the proposals of the Public Protector. This is an excellent demonstration of the rule of law, which indicates constitutionalism and constitutional supremacy in action.[440]

Motshekga indicates that the rule of law requires the state to be regulated by law.[441] Unlike its counterpart as described by Dicey, the complex idea of the rule of law has not been derived from the culture or customs of any nation. This comes mainly from the philosophy of morality (ubuntu) which argues that the universal ideals of justice and freedom and the fundamental principle of justice and the right to democratic governance are inherent in the meaning and integrity of human consciousness.[442]

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435 Trebilcock and Daniels *Rule of law reform and development: charting the fragile path of progress* 30 – 31.

436 Trebilcock and Daniels *Rule of law reform and development: charting the fragile path of progress* 33.

437 Dicey *Introduction to the study of the law of the Constitution* 120 – 121; Bradley and Ewing *Constitutional and administrative law* 93; Principe ML "Albert Venn Dicey and the principles of the rule of law: Is justice blind? A comparative analysis of the United States and Great Britain" 2000 *Loy. L.A. Int'l & Comp.L.Rev* 359; Motshekga *Concepts of law and justice and the rule of law in the African context* 4.

438 Principe 2000 *Loy. L.A. Int'l & Comp.L.Rev* 357 – 373.

439 Principe 2000 *Loy. L.A. Int'l & Comp.L.Rev* 371 – 372.

440 *EFF* [4].

441 Motshekga *Concepts of law and justice and the rule of law in the African context* 5.

442 Motshekga *Concepts of law and justice and the rule of law in the African context* 529 – 530.

De Vos stresses the concept of Dicey. He points out that the rule of law is absolute, and that public control can only be exercised in terms of statutory authority. No one may exercise public power arbitrarily, and everybody is equal before the law. Ordinary courts are responsible for the execution of the common laws of the land.[443]

The rule of law is an essential concept in liberal democracy. In the case of *Economic Freedom Fighters*, the Court noted as follows regarding the rule of law: the rule of law demands that no power be employed unless it is permitted by law and that no decision or action permitted by law can be ignored based on the adverse opinion we hold.[444]

According to Rosenfeld, the rule of law requires, in its broadest terms, that the government only submits publicly promulgated laws to citizens and that the legislative role of the state is distinct from the function of adjudication and that no one is above the law of the system.[445] Without the rule of law, modern liberal democracy will be unlikely.[446]

According to Barnett, the rule of law is the supremacy of the law over the human being.[447] Today, the concept of the rule of law is enshrined in the Charter of the UN.[448] For the UN, the Secretary-General defines the rule of law as a principle of governance in which both public and private individuals, organisations, and institutions, including the state itself, are accountable to both laws that are adopted, enforced reasonably, and independently adjudicated.[449]

Hoexter and Lyster argue that the law is placed above politics in the principle of the rule of law and that judges are independent and impartial arbitrators protecting the rights of people and guarding against tyranny and arbitrariness in government.[450]

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443 De Vos *et al South African constitutional law in context* 78.

444 *EFF* [75].

445 Rosenfeld M "The rule of law and the legitimacy of constitutional democracy" 2001 *SCLR* 1307.

446 Rosenfeld 2001 *SCLR* 1307.

447 Barnett *Constitutional and administrative law* 52.

448 UNROL "Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies 2004. What is the rule of law?" http://www.unrol.org/article.aspx?articleid=3 (date of use 2015-07-27).

449 UNROL http://www.unrol.org/article.aspx?articleid=3 (date of use 2015-07-27); see also generally *Glenister II*.

450 Hoexter C and Lyster R *The constitutional and administrative law* 3rd ed (Juta Landsdowne 2002) 69.

The case of *Masethla*[451] is an example where the rule of law has been tested and the state has been forced to demonstrate accountability. During the judgment Ngcobo J placed his point in the minority judgment; he said, the rule of law requires lawfulness. Public authority must be exercised in compliance with the statute. This must be achieved within the limits of the statute. In the rule of law, non-arbitrariness refers to a broader concept and a deeper principle, which is fundamental fairness. As a basic concept, the rule of law is related to the founding principles of honesty, openness, and accountability.[452]

Currie and De Waal confirm the judgment of *Masethla*. They reason that South Africa is a rule of law-based constitutional democracy.[453] The rule of law's aim is to protect fundamental human and individual rights. This is achieved by demanding that the government must act based on pre-announced, transparent, and general rules and according to rational practices. The rules must be executed by neutral courts. State institutions are required to act in accordance with the law. Secondly, unless the law allows it to do so, the government cannot exercise power over anyone. If the state acts without legal authority, it acts unlawfully.[454]

Fombad strengthens the definition of Dicey. He points out that despite different opinions on its exact definition and nature, there is now rational consensus on what the core elements of the rule of law might be.[455] These consist of: (a) the principle of legality, including the provision for an open, accountable, and democratic legislative process; (b) the principle of non-discrimination and equality before the law, which means that, under the law, the government and its officials and agents, as well as individuals and private entities, are responsible; (c) legal certainty and prohibition of arbitrariness, requiring laws to be clear, publicised and fair, to be applied equally and to safeguard fundamental rights, including the security of individuals and property; (d) the law enacting, administering and enforcing process is accessible, fair and efficient; and (e) prompt delivery of justice by trained, legitimate, autonomous and impartial representatives. These must be sufficient in

451 *Masethla v President of the Republic of South Africa* 2008 1 BCLR 1 (CC).
452 *Masethla v President of the Republic of South Africa* 2008 1 BCLR 1 (CC); also see Kruger R "The South African Constitutional Court and the rule of law: The Masethla judgment, a cause for concern?" 2010 *PELJ* 468 – 508.
453 Currie and de Waal *The Bill of Rights handbook* 10.
454 Currie and de Waal *The Bill of Rights handbook* 10.
455 Fombad CM "An overview of the crisis of the rule of law in Africa" 2018 *AHRLJ* 213 – 243.

number, have sufficient resources, and reflect the composition of the community they serve; respect for human rights.[456]

From the above description of the rule of law by Dicey and the clarification provided by different writers, it is noted that the concept of the rule of law makes it clear that the law is supreme and cannot be overridden by arbitrary authority, privilege, or discretion. Everyone is equal before the law; the state cannot exercise its power without the authorisation of the statute and the officials of the state, such as the police are not excluded from the application of the law.

2.3 Democracy and human rights

Democracy and human rights are elements of constitutionalism that are required in a democratic regime.

2.3.1 Democracy

In a true democracy, people have rights and freedoms, government power is limited and the rule of law is applied. Bellamy and Castiglione indicate that democracy involves two main tasks; (i) the positive task of promoting the fair participation of people in the development of the public interest; and (ii) the negative task of protecting the interests of those governed from being controlled and exploited by their rulers through their control of the state machinery.[457]

De Vos perfectly explains the four different forms of democracy. The first is "direct democracy". This means a democratic structure that includes direct involvement by the citizenry, rather than elected representatives, in their political community's rule and decision-making. A referendum is just one example.[458] For example, on 3 August 1960, the Government of the National Party announced that a referendum would take place in October of that year so that citizens could decide whether the Union of South Africa would become a republic. Voting was limited to white South

456 Fombad 2018 *AHRLJ* 217.
457 Bellamy R and Castiglione D "Three models of democracy, political community and representation in the EU" 2013 *Journal of European Public Policy* 206 – 223 209.
458 De Vos *et al South African constitutional law in context* 87.

Africans. The referendum was attended by more than 90% of registered voters. The Republic was voted for by 52.3%.[459]

The second is "representative democracy". This concept involves a governance structure in which constituents of a political community engage indirectly in the governance of their society, using elected representatives.[460] The National Assembly that represents and governs on behalf of the people is an example of this.[461] The third is "participatory democracy". This form of democracy guarantees that people are given the chance to engage in choice-making on matters affecting their lives. It strives to ensure that people are given a real opportunity for sensibly engaging in outcome-making that concerns them. An example of this is written submissions by the public and public hearings.[462] The fourth is "constitutional democracy". This model defines a governance structure in which decisions are taken in terms of a Constitution within a specific political class.[463]

Zafirovski describes different forms of democracy as "formal-procedural democracy" and "substantive-effective democracy".[464] According to him, the conditions, elements, and indicators or dimensions of formal-procedural democracy are classified and specified. The first condition, component, and indicator of "formal-procedural democracy" involves free, fair, regular, inclusive, and non-discriminatory political elections. These elections are premised on and decided by legal-constitutional majority rule as the democratic decision principle for determining electoral and other public outcomes, such as elected and non-elected individual and collective political agents, candidates, and parties, winners and losers.[465]

The conditions, elements, and indicators of "substantive-effective democracy" comprise actual, realised political and civil liberties, choices, and rights in reality, as distinct from nominal and potential ones on the legal "paper" of constitutions and laws defining its formal-procedural type. When effective political and civil liberties

459 Background to Republic of South Africa Constitution Act, 1961.
460 De Vos *et al South African constitutional law in context* 89.
461 Section 42(3) of the Constitution.
462 De Vos *et al South African constitutional law in context* 94.
463 De Vos *et al South African constitutional law in context* 95.
464 Zafirovski M *Identifying a free society conditions and indicators* (Print force Netherlands 2017) 45.
465 Zafirovski *Identifying a free society conditions and indicators* 45.

and rights completely or reasonably correspond and implement their formal statements, this indicates complete, consistent, genuine democracy, thus a free polity. The following classifies the conditions, elements, and indicators of "substantive-effective democracy": effective, realised, universal and equal political and civil liberties and rights; democratic, egalitarian and just rule or governance of elected rulers or representatives; effective, realised freedom of opinion, speech, and dissent; collective association and opposition; effective universalism, equality, and justice in government; positive and negative sanctions; a degree of effective pacifism or peace, non-militarism, non-imperialism, and no wars.[466]

Hessebon describes democracy as the system of governance in which all adult citizens are constitutionally free to take part in the process of electing and affecting those who hold significant public offices and making binding collective decisions in any capacity of their choice.[467] He points out that not all democracies are democratic. In addition to meeting institutional criteria, the electoral structure must show these characteristics to be considered a liberal democracy. Such external elements are not only components of democracy, but requirements of liberalism.[468]

Liberalism is characterised as an attempt to restrict the state's power in the interests of individual freedom.[469] Liberalism values individuals' rights and freedoms. It strengthens and makes democracy possible. It defines and restricts the laws in a democracy. The liberal democratic model requires the rule of the majority to have certain limits.[470] Therefore, liberalism can also be seen as reinforcing constitutionalism, as constitutionalism is restricted governance.[471]

Rawls indicates that a democratic society is one whose members respect each other and see each other as free and equal. A democratic culture is committed to basic terms of social co-operation that are fair, given that the co-operation is among

466 Zafirovski *Identifying a free society conditions and indicators* 52 – 53.
467 Hessebon GT *Contextualizing constitutionalism multiparty democracy in the African political matrix* (Eleven International Publishing Netherlands 2017) 39.
468 Hessebon *Contextualizing constitutionalism multiparty democracy in the African political matrix* 39.
469 Hessebon *Contextualizing Constitutionalism: Multiparty Democracy in the African Political Matrix* 39 – 40.
470 Hessebon *Contextualizing Constitutionalism: Multiparty Democracy in the African Political Matrix* 41.
471 Also see Fombad *Constitutional law in Cameroon* 33.

persons who reciprocally recognise each other as free and equal lifetime associates.[472]

During the 18th century, Rousseau defended "democracy" and "principles of political right".[473] In Rousseau's thinking, democracy must have a general will and social interdependence. This is in line with the notion of the government of the people by the people for the people. Rousseau highlights the following as the principles of democracy: (i) Basic rights. He indicates that arguments of principle are intended to support basic rights and the institutional consequences that follow from those rights. In a society in which there is a general will, there are certain interests that ought to be respected and that people recognise that they ought to respect. Consequently, building rights based on interests that should be protected implies the existence of a general will. (ii) The creation of a general will. Maintaining this will require the ability of people to consider common interests and to be inspired to advance those interests. (iii) Prevention of individuals and groups from being in positions where they can design or advance policies that have predictable benefits to themselves or are particularly burdensome to others, and thus reconcile what right permits with what interests prescribe, so that justice and utility are not at variance. (iv) The "common good" to be promoted. The institutional problem is to increase the likelihood of achieving the common good if collective decisions are made by people who share their different views on what is going to achieve common interests.[474]

Bellamy and Castiglione argue three forms of "representative democracy". They point out that "representative democracy" promotes closer union among peoples as it ensures equal opportunities and respect.[475] The thick form of democracy, for example, is concerned with the inherent advancement of a perceived common good, and the thin form of democracy is geared towards the instrumental defence of individual rights and interests. The third form of democracy is a mixture of the thick

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472 Brooks *Rawls and law* 7 – 8.

473 Brooks T (ed) *Rousseau and law* (Ashgate Publishing Limited Aldershot England 2005) 86 – 88; Rousseau JJ *The social contract or principles of political rights* Translated by RM Harrington (GP Putnam's sons 1893) 51 – 76.

474 Brooks *Rousseau and law* 102 – 105.

475 Bellamy and Castiglione 2013 *Journal of European Public Policy* 206.

and thin form of democracy, with the features of most liberal democracies in the third form of democracy.[476]

Representation entails someone taking someone else's position through a process that involves both the representative's endorsement by the represented and includes the representative's responsibility to the represented. Authorisation relates to processes, and people transfer their authority to either act or make decisions to other political or legal entities or organisations. Accountability deals with how and to what degree electors will monitor what their members are doing in their name. Those two phases embody both the initial and final stages of the representative relationship and are fundamental to the credibility of democratic representation.[477]

Mangu indicates that true peace is impossible without democracy, respect for human and people's rights, and the rule of law.[478] He strongly argues for democracy, elections, and good governance.[479] He points out the AU's position in an effort to promote democracy in Africa. The AU found democracy to be essential for stability and development and therefore adopted the "African Charter on Democracy, Elections, and Governance".[480]

The African Democratic Charter aims to promote democracy, elections, and good governance. Mangu says the Democratic Constitution legally leads to improving the African structure of human rights, as it supplements the African Charter on Human and People's Rights.[481] He argues that states do not support the African Democracy Charter sufficiently and recommends that states should use civil society to promote democracy through awareness campaigns.[482]

Govender indicates that when sufficient power is given to elected representatives on the condition that power is applied in compliance with constitutional checks and balances, constitutional democracy works optimally.[483] Constitutional democracy

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476 Bellamy and Castiglione 2013 *Journal of European Public Policy* 208.
477 Bellamy and Castiglione 2013 *Journal of European Public Policy* 208.
478 Mangu 2003 *AHRLJ* 263.
479 Mangu AMB "African civil society and the promotion of the African Charter on Democracy, Elections and Governance" 2012 *AHRLJ* 348 – 372 348.
480 The Democracy Charter was adopted on 30 January 2007 in Addis Ababa Ethiopia and came into operation on 15 February 2012.
481 Mangu 2012 *AHRLJ* 349 – 350.
482 Mangu 2012 *AHRLJ* 367.
483 Govender 2013 *AHRLJ* 82.

gives elected and accountable rulers power, but at the same time imposes a system of checks and balances to minimise the abuse of power.[484]

Schultz's point is that the people's right to govern is the foundation of democracy. Under direct democracy, it would be the right to govern directly and make legislation or policy choices. In the case of representative democracy, it will be the responsibility of the people to choose their representatives. The principle of democracy requires or suggests the right of the people to vote.[485]

Osiaty'nski argues that democracy ensures participation, while freedoms preserve equality. However, without participation dignity can hardly exist, and true democracy is not possible without individual rights being acknowledged and secured. Democracy and human rights are mutually dependent, and the cornerstone of modern democracy is rights.[486]

Abioye describes democracy as a system that gives people a voice in their affairs. This offers a process in which everyone has the power to speak and can contribute to decision-making.[487] Democracy is currently understood in the Western notion as the presence of country-wide structures and institutions that guarantee free and fair elections as well as accountability on the part of officeholders.[488]

According to Mangu, democracy is a "citizen's affair", there cannot be democracy without the sovereignty of the people and citizens. He indicates that sovereignty is the "supreme power" of the people.[489] This statement of Mangu is correct because

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484 Govender 2013 *AHRLJ* 82.

485 Schultz D (ed) *Election law and democratic theory* (Ashgate Publishing Company Burlington 2014) 85.

486 Osiaty'nski W *Human rights and their limits* (Cambridge University Press New York 2009) 72; Chapter 9 Institutions are also contributing to protecting democracy and ensuring accountability. These are "(1) Public Protector; (2) South African Human Rights Commission; (3) Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; (4) Commission for Gender Equality; (5) Auditor General; (6) Electoral Commission; and (7) Independent Authority to Regulate Broadcasting". Overall is the CC through judicial review of constitutional matters.

487 Abioye *Rule of law in English speaking and African countries: The case of Nigeria and South Africa* 109.

488 Abioye *Rule of law in English speaking and African countries: The case of Nigeria and South Africa* 109.

489 Mangu *The Road to Constitutionalism and Democracy in Post-Colonial Africa: The case of the Democratic Republic of Congo* 189.

it is the people who vote for the government and put it into power.[490] It is also the people who put the government out of power through their right to vote.[491] This is reflected in the slogan of the African National Congress that says, "all power to the people".

Alder defines the meaning of democracy as government by the people as a whole or government with the consent of the people. He further indicates that democracy cannot easily be justified as the most efficient form of government but rests on ideas of human equality and dignity.[492]

Currie and de Wall argue that government can only be valid to the degree that it is based on the consent of the governed and democracy must be based on the people's will.[493] In a democratic government structure, the government-people relationship is not simply based on authority; it is based on the people's consent.[494]

Abioye confirms the above statement when he says that when there is popular involvement or support in the legislative process, it is said that there is democratic legitimacy or constitutional governance. He asserts that legitimate democratic government has the elements of constitutionality, as well as values, laws, and conventions. The second element is transparency. Engagement is the third element.[495]

Murray points out that historically, democracy and human rights have been seen as distinct phenomena that inhabit distinct areas of the political sphere.[496] The first is a matter of government organisation, and the other is a matter of individual rights. These two phenomena might be distinct but are interrelated and interdependent.[497]

Murray[498] further indicates that the AU considers a democratic state as a state that complies with the following features or elements that are important in a formal

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490 *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) and others* 2005 3 SA 280 (CC) relating to right to vote.
491 Section 1(d) of the Constitution.
492 Alder *General principles of constitutional and administrative law* 10.
493 Currie and de Waal *The Bill of Rights handbook* 12 – 14.
494 Currie and de Waal *The Bill of Rights handbook* 13.
495 Abioye *Rule of law in English speaking and African countries: The case of Nigeria and South Africa* 67.
496 Murray R *Human rights in Africa* (Cambridge University Press Cape Town 2004) 70 – 73.
497 Murray *Human rights in Africa* 73.
498 Murray *Human rights in Africa* 97.

democratic structure and the rule of law: (1) a Constitution,[499] (2) separation of powers, rule of law and independence of the judiciary,[500] (3) support for civil society, opposition parties and popular participation, (4) protection of human rights,[501] (5) democratic institutions,[502] (6) good governance and combating corruption,[503] (7) sustainable development,[504] and (8) the election process.[505]

There must be full voting rights and free and fair elections that meet the following requirements; (1) there have to be multi-party elections,[506] (2) the fairness of elections is to be measured by the international community and population of the state,[507] (3) elections should be peaceful,[508] (4) there must be impartial institutions,[509] (5) wider protection of rights should occur,[510] (5) fraud must be prevented,[511] and (6) elections must be transparent.[512]

It is common knowledge that democracy must be jealously preserved, and the AU confirms this too. The AU directs state parties to promote a tradition of stability and democracy. That is important for any country's stability and economic growth.[513]

The Republic of South Africa did take steps to protect its democracy by putting into place a national legal instrument called the Protection of Constitutional Democracy against Terrorist and Related Activities Act. The Act is an extremely useful legal instrument to combat acts of terrorism and related activities.[514] The first case in which the Act was applied to protect constitutional democracy in South Africa was the case of *S v Okah*.[515]

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499 Murray *Human rights in Africa* 99.
500 Murray *Human rights in Africa* 100.
501 Murray *Human rights in Africa* 103.
502 Murray *Human rights in Africa* 106.
503 Murray *Human rights in Africa* 107.
504 Murray *Human rights in Africa* 108.
505 Murray *Human rights in Africa* 83.
506 Murray *Human rights in Africa* 85.
507 Murray *Human rights in Africa* 86.
508 Murray *Human rights in Africa* 88.
509 Murray *Human rights in Africa* 89.
510 Murray *Human rights in Africa* 90.
511 Murray *Human rights in Africa* 90.
512 Murray *Human rights in Africa* 91.
513 Article 11 of the African Charter on Democracy, Elections and Governance, 2007.
514 Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004.
515 2018 1 SACR 492 (CC).

2.3.2 Human rights

Human beings are natural beings, born free with equal status and dignity. That is their natural right. Rights and liberties are integral aspects of constitutionalism. The AU upholds this declaration and directs state parties to support human rights.[516]

As a starting point, it is important to understand the meaning of the word "humanity". Trindade indicates that humanity is associated with the universal principle of respect for the dignity of the human person, or the sense of humaneness.[517] According to Trindale, humankind is not a synonym of humanity; humankind encompasses all the members of the human species as a whole, including in a temporal dimension present as well as future generations.[518]

Human rights are the cornerstones of every democratic society. According to Togni, both the word "human rights" and the fundamental concepts behind it originated from two significant historical events.[519] The first was the American Declaration of Independence in 1776, and the second was the French Revolution in 1789. The founding text of the French Revolution was the Declaration of the Rights of Man and the Citizen. Human rights were enshrined in the US Constitution and were expanded by the 16th amendment in 1913.[520]

One of the documents relating to human rights was the Declaration of Human Rights and Duties of 1929. This was the result of work done by the New York Institute of International law for submission to the Inter-American Legal Committee. It stated, *inter alia*, that it was the duty of every state to recognise equal rights of an individual to life, freedom, and property and to fully grant and protect these rights on its entire territory regardless of nationality, sex, race, language, or religion. Article II of the Declaration called for the state to guarantee or recognise the equal rights of the individual to practice his or her religion, faith, and worship, on condition such

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516 Article 4 of the African Charter on Democracy, Elections and Governance, 2007.

517 Trindade AC *International law for humankind* 2nd ed (Martinus Nijhoff Publishers Leiden Boston 2012) 280.

518 Trindade *International law for humankind* 281.

519 Togni LS *The struggle for human rights: An international and South African perspective* (Juta Kenwyn 1994) 45.

520 Togni *The struggle for human rights: An international and South African perspective* 45.

activities did not violate public order and accepted norms of the society concerned.[521] This is similar to the limitation clause of the Constitution.[522]

According to the Universal Declaration of Human Rights,[523] in the exercise of their rights and freedoms, everyone shall be subject only to the limitations laid down by law. This is solely to ensure proper consideration and respect for the rights and freedoms of others and satisfy in a democratic society the just requirements of justice, public order, and general welfare.[524]

The provisions of the AU Constitutive Act[525] suggest that human rights will play an important role in the work of the Union.[526] For example, the Preamble talks about states being determined to promote and secure the rights of human beings and cultures, preserve democratic institutions and culture, and ensure good governance and the rule of law.[527] Member States are therefore expected to promote gender equality and respect the principles of democracy, human rights, the rule of law, good governance, and the sanctity of life.[528]

Since South Africa is a member of both the UN and the AU, both promoting, respecting, and protecting human rights, the country must also promote and respect human rights. Section 7(2) of the Constitution actually places an obligation on the state.[529] It directs that the state must "respect, protect, promote and fulfil the rights in the Bill of Rights".[530]

Most democratic countries recognise religion as a human right. Mangu argues that religion as a human right is closely related to law. Religion is an agent of both peace and violence. He points out that the state and legislation should not only ensure that the right to religious freedom is granted and respected, but also that cultures,

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521 Togni *The struggle for human rights: An international and South African perspective* 45.
522 Section 36 of the Constitution.
523 1948 (hereinafter the UDHR).
524 Article 29(2) of the UDHR (adopted and proclaimed by General Assembly Resolution 217 A(III) of 10 December 1948).
525 African Union Constitutive Act, 2000 (Adopted at the 36th ordinary session of the Assembly of Heads of States and Government of the OAU on 11 July 2000, in Lome, Togo).
526 Dugard *International law: A South African perspective* (Juta Cape Town 2014) 552 – 553.
527 Article 3(e) and (h) of the Constitutive Act of the AU, 2000.
528 Article 4(m) and (o) of the Constitutive Act of the AU, 2000.
529 Constitution of the Republic of South Africa, 1996.
530 Constitution; also see *EFF* [103] – [104].

religious organisations, their leaders, and members contribute to sustainable peace and growth.[531]

Grimheden and Ring contend that the police must value human rights in the exercise of their powers.[532] Human rights are protected by law; international law and state law have come into being as a result of the propensity of people with powers to misuse their powers.[533]

Mubangizi argues that "basic or fundamental freedoms" are those rights that are not to be deprived by any legislation or conduct of the state and which are also laid down in the country's fundamental law, such as the constitutional Bill of Rights.[534]

According to Mubangizi, Civil and political rights are the first generation of rights in the world. They limit the control of the state over actions that affect the individual. Second-generation rights concern economic, social and cultural freedoms.[535]

In Prince's case, cultural freedoms were claimed. The minority judgment argued in this matter that it was necessary to protect the rights of vulnerable groups and minorities.[536] Social, economic, and cultural rights require more positive intervention on the part of the state to provide, or at least establish, conditions for access to certain services that are deemed essential to life.[537] Positive action, which is required from the state, was enforced in the case of *Joseph.*[538]

The privileges of the third generation belong to a very recent class. These rights are mutual and for their achievement, they rely on international cooperation. Their achievement is also based on a collective effort between government and people. These are the right to peace, growth, and a clean environment. These freedoms are also referred to as the "rights of unification".[539]

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531 Mangu AMB "Law, religion and human rights in the Democratic Republic of Congo" 2008 *AHRLJ* 505 – 525 524 – 525.

532 Grimheden J and Ring R (eds) *Human rights law: From dissemination to application: essays in honour of Goran Melander* (Martinus Nijhoff Publishers Leiden 2006) 33.

533 Grimheden and Ring *Human rights law: From dissemination to application: essays in honour of Goran Melander* 33.

534 Mubangizi 2004 *AHRLJ* 94.

535 Mubangizi 2004 *AHRLJ* 95.

536 *Prince v President, Cape Law Society* 2002 2 SA 794 (CC).

537 Mubangizi 2004 *AHRLJ* 96.

538 *Joseph v City of Johannesburg* 2010 3 BCLR 212 (CC).

539 Mubangizi 2004 *AHRLJ* 96.

Edwards and Ferstman argue that as a citizen, the individual is regarded as a full member of the state, with the overriding right to enjoy the full equality and non-discrimination of membership of the state with all its related rights and obligations.[540] This gives rise not only to state protection but also to protection from the state. Therefore, the statement suggests that nationality or citizenship are regarded as the sole right or right to have freedom.[541] Protection of people by the state in South Africa is confirmed by different landmark CC decisions.[542]

Boerefijn claims that human rights are far more than the basic rules of international law in modern international affairs.[543] These are intended to advance a wide variety of goals and to form the foundation of a wider collection of values, norms, and practices. Human rights are intended to restrict and regulate the powers of authoritarian control and violence within and between states.[544]

Charnovitz, Steger, and van den Bossche argue that fundamental recognition of inalienable human rights derived from "human dignity" requires the interpretation of national and international law as a hierarchical unit to promote equality and diversity, both individual and democratic.[545] The French Declaration specified freedom in terms of complete equality of rights.[546] To protect human rights, international human rights also recognise protection against the removal of non-citizens from a country where people find themselves. This protection is afforded by the ICCPR.[547]

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540 Edwards A and Ferstman C (eds) *Human security and non-citizens* (Cambridge University Press Cambridge 2010) 5.

541 Edwards and Ferstman *Human security and non-citizens* 5.

542 *Makwanyane* — protection of right to life; *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) — Freedom of religion, prohibition of corporal punishment in schools; and *Carmichele v Minister of Safety and Security and another (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) — protection of right to dignity, right to freedom and security of the person and duty to protect women from sexual violence.

543 Boerefijn I, Henderson L, Janse R and Weaver R (eds) *Human rights and conflict: essays in honour of Bas de Gaay Fortman* (Intersentia Publishing Cambridge United Kingdom 2012) 13.

544 Boerefijn, Henderson, Janse and Weaver *Human rights and conflict: essays in honour of Bas de Gaay Fortman* 13.

545 Charnovitz S, Steger DP and van den Bossche P (eds) *Law in the service of human dignity: Essays in honour of Florence Feliciano* (Cambridge University Press New York 2005) 47.

546 Charnovitz, Steger and van den Bossche *Law in the service of human dignity: Essays in honour of Florence Feliciano* 47.

547 International Covenant on Civil and Political Rights, 1966 (adopted and opened for signature, ratification, and accession by General Assembly Resolution 2200 A(XII) on 16 December 1966, entry into force on 23 March 1976, in accordance with article 49).

According to Edwards and Ferstman, there is no general obligation, as a matter of international law, to compel a state to enable non-citizens to access its territory, nor is there any general obligation not to expel or deport non-citizens or to deny extradition.[548]

South Africa is doing its best to comply with international human rights instruments by respecting the rights of human beings. Edwards and Ferstman indicate that, under human rights law, the protections against removal where an individual faces a risk of violation of his or her fundamental rights in the country of destination are of much wider scope than the protection afforded under branches of international law.[549] This was confirmed by the Court in the decision of *Mohamed*.[550]

Most states that apply multi-party democracy as their system of government also recognise human rights for the protection of the rights of their citizens.[551]

The UN is the international driving force or a leading player in human rights regulation and wants member states to uphold human rights as well. The UN's position in the protection of human rights is evident in the judgment of Sudan's President Al Bashir. In this matter, the UN Security Council played a huge role throughout, defending gross violations of the human rights of Sudanese civilians by referring President Al Bashir's case to the ICC by passing a resolution.[552]

In the defence and regulation of human rights, the AU also plays a major role. The OAU took a step in the early 1980s to accept the implementation of the 1981 African Charter on Human and Peoples' Rights, also known as the Banjul Charter. The African Commission on Human and Peoples' Rights (African Commission) was left with the key means of ensuring compliance with the African Charter. This Commission is a quasi-judicial enforcement mechanism set up under article 30 of

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548 Edwards and Ferstman *Human security and non-citizens* 497 – 498.
549 Edwards and Ferstman *Human security and non-citizens* 499.
550 *Mohamed and another v President of the Republic of South Africa and others* 2001 7 BCLR (CC).
551 Kibet and Fombad 2017 *AHRLJ* 355.
552 UN Security Council Resolution 1593 of 2005. The Resolution was adopted by the Security Council at its 5158th meeting on 31 March 2005; see Tladi D "Interpretation and international law in South African courts: The Supreme Court of Appeal and the Al Bashir saga" 2016 *AHRLJ* 310 – 338 312.

the African Charter with a clear mandate to "promote and protect the rights of human beings and peoples in Africa".[553]

In 2000 the OAU transformed to become the AU. The AU was established by the Constitutive Act[554] after a decision had been taken by the OAU in Lome.[555] The African Commission is responsible for the application and compliance of the African Charter rights provisions. Its drawback is that its decisions are not binding on state parties. These are merely recommendations to be submitted for ratification to the AU Assembly.[556]

As regards the protection of human rights, Mubangizi argues that some states, especially the US and the UK, took a different view during the drafting of the UDHR.[557] They believe that while civil and political rights were immediately enforceable, socio-economic rights depended on positive programmatic compliance. They were best protected through a structured monitoring system.[558] In contrast, the CC has given judgments in South Africa stating that socio-economic freedoms are enforceable.[559] This is supported by the researcher.

Similarly, Ngang advocates the immediate application of social and economic freedoms.[560] She states that under provision 7(2) of the Constitution, the state is obliged, as a matter of obligation, to "respect, protect, promote and fulfil" the spectrum of socio-economic rights.[561] Enforcement of socio-economic rights (section 27 of the Constitution) the right to water, was confirmed by the CC in the case of *Mazibuko*.[562] The Court stated that the rights do not require the state to provide each person with sufficient water straight away, but rather that the state

553 Du Plessis M "A court not found" 2007 *AHRLJ* 523.
554 This Act was adopted at the 36th ordinary session of the Assembly of Heads of State and Government of the OAU on 11 July 2000 in Lome, Togo.
555 Decision on the establishment of the African Union, OAU Doc AHG/Dec 143(XXXVI). Constitutive Act of the African Union CAB/LEG/23 15, adopted in Lome, Togo on 11 July 2000, entered into force on 26 May 2001.
556 Du Plessis 2007 *AHRLJ* 533.
557 Mubangizi 2004 *AHRLJ* 99.
558 Mubangizi 2004 *AHRLJ* 99.
559 *Government of the Republic of South Africa v Grootboom and others* 2001 1 SA 46 (CC); *Minister of Health and others v Treatment Action Campaign and others* 2002 5 703 (CC).
560 Ngang 2014 *AHRLJ* 662.
561 Ngang 2014 *AHRLJ* 662.
562 *Mazibuko and others v City of Johannesburg and others* 2010 4 SA 1 (CC) (hereinafter the *Mazibuko* case) [49].

needs to take appropriate legislative and other steps gradually to achieve the right of access to adequate water within the available resources.[563]

In contrast to *Mazibuko*, the Court took a different approach in the matter of *Modderklip*[564] when it came to the interpretation of section 26(2), which is similar to section 27(2) of the Constitution. The High Court of North Gauteng held that Modderklip's property rights under section 25(1) had been infringed by the illegal occupation of their property and that the state had thus violated its obligations under section 26(1) and section 26(2), read with section 25(5), to take appropriate measures within its available resources to recognise the rights of the inhabitants to have access to adequate housing and land.[565]

In Dada's case, which also dealt with social and economic rights, the South Gauteng HC took positive action to force the state to enforce "progressive recognition" of social and economic rights. Upon appeal, the HC ruling was set aside by the SCA. The SCA argued that the judge's approach was beyond the scope of the Court's jurisdiction. The order against the municipality was obviously not "fair relief", that is, to buy property for illegal inhabitants.[566]

Constitutional Principle II of the Constitution states that: everybody shall possess all fundamental rights, freedoms, and civil liberties universally accepted which are provided for and secured in the Constitution by engraved and just provisions.[567]

The African Commission also contributes to the protection of rights and freedoms. In 2004, the Zimbabwe Human Rights Non-Governmental Organisation (NGO) filed correspondence 295/04 on behalf of four claimants.[568] The lawsuit included claims of unlawful killings. The African Commission found that Zimbabwe's "accountability mechanism", for law enforcement officers regarding excessive use of force was

563 *Mazibuko* [50].

564 *President of the Republic of South Africa and another v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC); see also *Government of the Republic of South Africa v Grootboom and others* 2001 1 SA 46 (CC).

565 *President of the Republic of South Africa and another v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) [15].

566 *Ekurhuleni Municipality v Dada* NO (280/2008) [2009] ZASCA 21 (27 March 2009) 8 – 9 [14].

567 *Certification of the Constitution of the Republic of South Africa* 1996 10 BCLR 1253 (CC) [48].

568 *Kazingachire and others v Zimbabwe*, Merits, Communication No 295/04, IHRL 3831 (ACHPR 2012) (hereinafter the *Kazingachire* case) [145].

inadequate and breached the African Charter. The Commission also found that Zimbabwe had not succeeded in providing redress and had thus infringed the Charter's articles 1 and 4.[569] The Commission ordered Zimbabwe to pay the next of kin of the four deceased and their legal heir's compensation for damages.[570]

Ethiopia was also taken to the African Commission. The *Gabrie-Selassie Communication* 301/05 was sent on behalf of the Mengistu (Dergue) regime's former officials. The former officials said they had been detained illegally since 1991. It was found that Ethiopia had violated the right to a fair hearing, a trial within a reasonable period of time, and the presumption of innocence. Consequently, the Commission ordered Ethiopia to pay the victims adequate compensation.[571]

South Africa was not an exception. It was also taken to the African Commission. The *Dabalorivhuwa Communication* 335/06 involved alleged discrimination and violation of the labour rights of the Vhavenda people. The Commission held that the distinction between the beneficiaries was not discriminatory and was based on fair and rational principles aimed at achieving a valid goal. The rights had therefore not been violated.[572]

The above discussion clearly indicates that the African Commission mainly deals with violations of human rights to restore human dignity through compensation. The Commission, unfortunately, does not deal with violations of an international criminal nature, such as war crimes, genocide, and crimes against humanity. It would have been good if the mandate of the Commission covered the aspect of international criminal matters.

The researcher is of the view that there is a need for an African Court that can deal effectively with international criminal offences that emanate from gross human rights violations, such as genocide, war crimes, and crimes against humanity. The African Court can serve as the court of the first instance to which the African continent's

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569 African Charter on Human and Peoples Rights, 1981 (also known as the Banjul Charter).

570 *Kazingachire* [145]; also see Killander M and Nkrumah B "Human rights development in the African Union during 2012 and 2013" 2014 *AHRLJ* 275 – 296 284.

571 *Gebre-Sellaise v Ethiopia*, Decision, Communication No 301/2005 (ACHPR 2011) 3 and 56; Killander and Nkrumah 2014 *AHRLJ* 285.

572 *Dabalorivhuwa Patriotic Front v the Republic of South Africa*, Communication No 335/2006 (ACHPR 2013) [134] – [135]; also see Killander and Nkrumah 2014 *AHRLJ* 287.

international criminal matters can be referred to before approaching the ICC in The Hague.

Tladi indicates that the South African Constitution is reputed to be one of the most international law and human rights friendly constitutions in the world.[573] This observation of Tladi was confirmed by the court through its decision in the case of *Tsebe*,[574] who was a non-citizen of South Africa. In this matter, Botswana requested South Africa to extradite Tsebe to Botswana in order to stand trial on a charge of murder, which is punishable by death sentence in Botswana. South Africa refused to extradite Tsebe because of its obligations to respect the right to life and the right not to give a punishment that is inhuman or degrading.[575]

The UDHR is the cornerstone of a wide-ranging body of human rights law, created over decades since the end of World War II.[576] Articles 1 and 2 states that all human beings are born equal in dignity and privileges and are entitled to all the rights and liberties set out in the Declaration without classification of any kind, such as colour, sex, language, faith, political or other opinions, national or social origin, assets, birth or another status. Articles 3 to 21 of the UDHR set forth civil and political rights to which all human beings are entitled.

Articles 22 to 27 lay down the social, economic, and cultural rights that are granted to all human beings. Articles 28 to 30 state that all have the right to a social and international order in which the human rights laid down in the Declaration can be fully realised.[577]

Articles 55 and 56 of the Charter lay down the fundamental human rights obligations of all the member states of the UN.[578] Article 55 indicates that: The United Nations shall promote, to create the conditions of security and well-being necessary for peaceful and friendly relations between nations, based on respect for the principle

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573 Tladi 2016 *AHRLJ* 311.

574 *Minister of Home Affairs and others v Tsebe and others, Minister of Justice and Constitutional Development and another v Tsebe and others* 2012 5 SA 467 (CC) (hereinafter the *Tsebe* case).

575 See generally *Tsebe* and *Makwanyane*.

576 UDHR; *Basic facts about the UN* 209.

577 UDHR; *Basic facts about the UN* 209.

578 Charter of the United Nations and Statute of the International Court of Justice, 1945 (agreed on at San Francisco on 26 June 1945).

of equal rights and people's self-determination: equal dignity and respect for human rights and fundamental freedoms for all, regardless of race, sex, language or religion.[579]

Article 56 says: All members promise to pursue joint and independent action in conjunction with the Organisation to achieve the goals set out in article 55.[580] The court in South Africa contributed in the protection of Human Rights in Sudan by issuing a relevant order relating to the President of Sudan when he was in South Africa in 2015.[581]

Mangu indicates that human rights also called "fundamental rights", are those rights without which there can be no human dignity. They are to be recognised by every man or woman solely because of being human. They are moral and individual rights, but they can also be collective rights.[582]

According to Motshekga, human rights derive from the idea of worth as well as the self-respect of a human being. This was initially advocated by the Hermetic and Stoic philosophers. Humanist philosophers, such as Samuel Pufendorf and Hugo Grotius also supported the idea.[583]

Swanepoel points out that in a general sense, human rights are known as rights belonging to a person because they are human and for no other reason.[584] Chamberlain[585] argues that there are rights that are enabling rights. In this regard, she refers to the "right to protest"[586] and the "right to access to information".[587] She indicates that access to information and protest rights are examples of "enabling"

579 Charter of the United Nations and Statute of the International Court of Justice, 1945 12.
580 Charter of the United Nations and Statute of the International Court of Justice, 1945 12.
581 *Southern African Litigation Centre v Minister of Justice and Constitutional Development and others* 2015 9 BCLR 1108 (GP).
582 Mangu *The Road to Constitutionalism and Democracy in Post-Colonial Africa: The case of the Democratic Republic of Congo* 145.
583 Motshekga *Concepts of law and justice and the rule of law in the African context* 109.
584 Swanepoel M *Law, psychiatry and psychology: A selection of constitutional medico-legal and liability issues* (LLD Thesis University of South Africa 2009) 211.
585 Chamberlain L "Assessing enabling rights: Striking similarities in troubling implementation of the rights to protest and acess to information in South Africa" 2016 *AHRLJ* 365 – 384.
586 Section 17 of the Constitution.
587 Section 34 of the Constitution.

rights that are important not only for their own sake but also because they help to recognise other rights.[588]

Murray claims that in Africa when the Organisation of African Unity was founded in 1963, the Organisation's emphasis was not on human rights, but on Africa's "dominant issues" at the time, namely the liberation of those colonised African peoples.[589]

Murray[590] points out that since the late 1970s, a number of important events have characterised the OAU/AU's step towards greater human rights focus. The UN also recommended that at the regional level there should be human rights. The OAU then adopted in 1981 the African Charter on Human and People's Rights (ACHPR or Banjul Charter). However, the Charter's compliance mechanism, the African Commission on Human and Peoples Rights, was weak.[591] A protocol establishing an African Court was adopted in 1998.[592]

Murray's statement relating to the creation of the African Court is confirmed by Naldi. He points out that the African Court of Human and People's Rights, together with the African Commission on Human and People's Rights, were formed in compliance with article 30 of the African Charter and were intended to form an integrated system of continental supervision. The mandate was to investigate whether contracting parties were meeting their obligations and to decide on allegations of violations of human rights committed by states.[593]

According to Osiaty'nski's claim, human rights are universal moral rights of fundamental precept.[594] Human rights consist of at least six basic ideas, (1) the authority of a king, a dictator, or a state is not unlimited; (2) people have a sphere of autonomy that no power may violate, and certain rights and freedoms must be

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588 Chamberlain 2016 *AHRLJ* 366.

589 Murray *Human rights in Africa* 7.

590 Murray *Human rights in Africa* 22.

591 The Charter was adopted on 27 June 1981 and came into force in 1986.

592 Murray *Human rights in Africa* 24. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, OAU/LEG/AFCHPR/PROT (III), adopted by the Assembly of Heads of State and Government, 34th session, Burkina Faso, 8 to 10 June 1998.

593 Naldi "Observations on the rules of the African Court on Human and Peoples' Rights" 2014 *AHRLJ* 366 – 392 367.

594 Osiaty'nski *Human rights and their limits* 1.

protected by a ruler; (3) procedural structures exist to restrict the arbitrariness of a dictator and to protect the rights and freedoms of those ruled who can make valid state claims for such protection; (4) those ruled have the right to participate in the decision-making process; (5) the authority does not have only powers but also certain responsibilities, which may be asserted by the citizens; (6) all such rights and freedoms must be granted equally to all.[595]

Osiaty'nski's idea of human right number 5 states: the authority has not only powers but also certain responsibilities that the people may assert.[596] This idea is supported by the *Treatment Action Campaign* case in which the defendant claimed the right to medical care. In judgment, the Court held that the policy of the government did not meet constitutional requirements because it omitted those who could fairly be included where such care was medically recommended to combat mother-to-child HIV transmission.[597]

Mbazira points out that South Africa's democracy is based on human rights and social justice. The incorporation of civil, social, and cultural rights in the Constitution of 1996 aims to promote the social and economic needs of the people.[598]

The UDHR states that everyone is equal before the law and entitled to equal protection of the law without discrimination.[599] This means that, like all other rights, social and economic rights must be progressively given equal attention and the courts must oversee compliance where the rights are violated, whether directly or indirectly.

The debate alluded to above suggests that numerous academics and scholars believe that rights and freedoms must be protected. They point out that these rights restrict the power of the government to protect the people. The defence of rights and freedoms is a matter of fundamental concern. It is assumed that all states will protect the rights of their people.

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595 Osiaty'nski *Human rights and their limits* 1.

596 Osiaty'nski *Human rights and their limits* 1 – 3.

597 *Minister of Health and others v Treatment Action Campaign and others* 2002 5 SA 721 (CC).

598 Mbazira *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice* 1 – 3.

599 Article 7 of the UDHR.

2.3.3 Relationship between democracy and human rights

Human Rights defend the populace against government authority under a democratic setting in which rights and freedoms are respected. This is because people in a democracy are free and equal. The use of government power against the people is limited by human rights.

2.3.4 Relationship between constitutionalism and democracy

Constitutionalism gives government power, structure, functions, and responsibilities while also ensuring that power is not abused by establishing clear limits on government power. It establishes limits on where the government's power can be exercised. People's rights and liberties are granted by democracy, but they are not absolute and can be limited. Thus, democracy and constitutionalism are intricately connected.

2.4 Constitutionalism, democracy, and the rule of law in apartheid South Africa

There was a Constitution in apartheid South Africa, but it was not supreme. Parliament was supreme. Fombad argues that constitutionalism is the belief that a written Constitution should provide the state with its powers. It is an idea that powers of government be limited by a written Constitution.[600]

2.4.1 Constitutionalism

Mangu indicates that lasting peace will not be possible without a state build on democracy, constitutionalism, and human rights. He indicates that democracy promotes and ensures popular participation in political and public affairs, development, and peace.[601]

The statement of Mangu is true. Constitutionalism and democracy did not exist during apartheid South Africa. There was no lasting peace. As a result, there was resistance and incidents, such as the Soweto uprisings on 16 June 1976, the Sharpeville massacre on 21 March 1960, and a march by women against the implementation of apartheid laws on 9 March 1956. The source of all these was that

600 Fombad *Constitutional law in Cameroon* 33; Currie and de Waal *The Bill of Rights handbook* 8; Alder *General principles of constitutional and administrative law* 92.
601 Mangu 2003 *AHRLJ* 235 – 236.

South Africa’s statehood was based on the sovereignty of parliament, with no Bill of Rights. Parliament was supreme, and laws passed by it could not be challenged.

To grasp the wider concept of parliamentary sovereignty, one must first grasp what "sovereignty" entails. Rousseau argues that sovereignty is absolute power over the people.[602] The sovereign is the sole judge of what is important. However, the life and liberty of private persons are independent of the sovereign. The rights of the citizens must be distinguished from the rights of the sovereign. Further, one must distinguish between the duties the citizens have to fulfil and the rights they have to enjoy.[603] The "sovereign" is the citizenry that is united by the general will. Sovereign power is something that is not in a position to be alienated.[604]

Rousseau distinguishes between governments and sovereignty. He indicates that the "sovereign" is the result of the social contract and exists only through the expression of the general will. The general will can only decide matters that affect citizens in the same way. Public policy and government allow people to assemble and vote to express their general will.[605] A person was born free, yet everywhere he is in chains he said. The social order is a sacred right that is the basis of all rights.[606]

The researcher, therefore, argues that there was no respect for the general will, rights, and liberties in South Africa before 1994. This is based on the fact that some citizens were excluded from the political activities of the country. Rousseau argues that the inflexibility of laws that prevents people from adapting to situations can, in certain cases, make them catastrophic and, at a time of crisis, lead to the destruction of the state.[607]

This is what happened in South Africa. The general will existed only within a specific race group. Other racial groups were nonparticipants and were barred. As a result, one could argue that the general will did not treat people equally because it was intended for a specific group only. As a direct consequence, the apartheid laws were

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602 Rousseau *The social contract or principles of political rights* 21 – 22.
603 Rousseau *The social contract or principles of political rights* 21 – 22.
604 Rousseau *The social contract or principles of political rights* 18; Stone R "Rousseau’s general will totalitaian perception of a virtuous ideal" 2013 *Ephemeris* 82 – 105 82.
605 Rousseau *The social contract or principles of political rights* 18 79 and 84; Stone 2013 *Ephemeris* 92.
606 Rousseau *The social contract or principles of political rights* 2 – 3.
607 Rousseau *The social contract or principles of political rights* 98.

disastrous, and the apartheid state was destroyed. There was no constitutionalism to restrict the power of the legislature.

2.4.2 Rule of law

The rule of law requires that government actions be carried out in accordance with the law. Unfortunately, apartheid South Africa enacted laws that were not fair enough to be considered an acceptable rule of law. As a result, no acceptable form of rule of law existed. Passive and active resistance was used by black people to oppose the laws.

Rosenfeld clarifies the rule of law in this manner; the rule of law is often opposed to "men's rule".[608] In some cases, "men's rule" (or, as we may say today, "the rule of the individual") typically connotes unregulated and perhaps arbitrary personal rule by an uncontrolled and maybe unpredictable ruler. Rule of law becomes "the rule of man" if the law may be modified unilaterally and arbitrarily, if it is generally ignored, or if the king and his supporters are continuously beyond the rules. In it, there is a strong separation of the legislature from the adjudicative function, and general adherence to the rule that no one is above the law is a prerequisite. In line with this, any legal structure that meets such minimum standards would be considered in the "narrow sense" to comply with the provisions of the rule of law.[609] The rule of law seems to need democratic accountability, procedural fairness, and perhaps practical context to become valid.[610]

The rule of law was not followed pre-1994. The government was not held accountable for its actions. There was no justice. For instance; blacks were prohibited from appearing in court to defend themselves against forced removals.[611] In labour disputes, blacks were prohibited from being involved in strike action.[612] There was no free political activity. Some political activities were banned.[613] Blacks were by law compelled to be citizens of homelands and their South African

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608 Rosenfeld 2001 *SCLR* 1313.
609 Rosenfeld 2001 *SCLR* 1313.
610 Rosenfeld 2001 *SCLR* 1314.
611 Native (Prohibition of Interdicts) Act 64 of 1956.
612 Native Labour (Settlement of Disputes) Act 48 of 1953.
613 Suppression of Communism Act 44 of 1950.

citizenship was taken away.[614] To suppress political activities, certain organisations could be declared unlawful organisations.[615]

The purpose of the rule of law is to limit the power of the government. The preceding discussion indicates that government power was not restrained by the rule of law.

2.4.3 Democracy and human rights

The goal of democracy is to allow citizens to freely participate in government activities. Human rights are freedoms and liberties that protect citizens from the power of the government. Van der Westhuizen indicates that 1970 and beyond are the years in which the regime of apartheid was strongly felt in South Africa.[616] It was strengthened by extremely strict security laws. The police, as the organ of the state, commanded enormous power. The rights of people were not observed.[617] People could be detained in prison without trial to prevent the commission of political crimes.[618] They could be detained in police cells without trial for purposes of interrogation.[619] Many arrested have been held without being charged. They were kept there until their interrogators had been pleased with the details they had received. To suppress the others, those detained for interrogation were expected to testify against those who were accused of terrorism during trials. Torture is currently prohibited by statute in South Africa, for example, the Prevention of Combating and Torture of Persons Act 13 of 2013. It is the view of the researcher that this Act's heading is completely inaccurate and must be corrected by parliament. According to the researcher, it should at the very least read "Prevention and Combating of Torture Act".

The matter of *Collins* indicates the absence of human rights. In this case, the person was fighting for his voting rights. Parliament failed to comply with the decision of the SCA in which the rights were protected. Instead of complying, it increased the

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614 Sections 3 and 4 of the Bantu Homelands Citizenship Act 26 of 1970; see *Tshwete v Minister of Home Affairs of the Government of the Republic of South Africa* 1988 2 All SA 140 (A) [10] – [11].

615 Section 4(1) of the Internal Security Act 74 of 1982.

616 Van der Westhuizen J "A few refelections on the role of courts, government, the legal profession, universities, the media and civil society in a constitutional democracy" 2008 *AHRLJ* 252; section 6(1) – (5) of the Terrorism Act 83 of 1967.

617 Section 6(1) – (7) of the Terrorism Act 83 of 1967.

618 Section 28(1) of the Internal Security Act 74 of 1982.

619 Section 29(1) of the Internal Security Act 74 of 1982.

number of Members of Parliament in order to achieve a two-thirds majority by passing a statute, namely Senate Act 58 of 1955. This Act was aimed at validating the Separate Representation of Voters Act that was set aside by the Appeal Court in the case of *Harris* in 1952. The goal was to enforce the Separate Representation of Voters Act to remove coloureds from the common voters' roll.[620]

Following the Collins case in 1957, came the *Mandela* case in 1963. On August 5, 1962, Nelson Mandela was arrested for alleged sabotage. This was the time when the liberation movement was fighting for freedom. The other leaders were arrested at Rivonia on July 11, 1963. These leaders were Walter Sisulu, Ahmed Kathrada, Govan Mbeki, Dennis Goldberg, Raymond Mhlaba, Lionel Bernstein, Elias Motsoaledi, and Andrew Mlangeni. The trial began in October 1963 and ended in June 1964. This trial became known as the Rivonia trial. Eight of the accused, including Nelson Mandela, were sentenced to life in prison. Two were released, and one was turned into a state witness. When he was allowed to make a statement in Court, Mandela ended his statement with the following words:

> I have cherished the ideal of a democratic and free society in which all persons live together in harmony and equal opportunities. It is an ideal which I hope to live for and achieve. But if needs be, it is an ideal for which I am prepared to die.[621]

After this trial, the United Nations declared apartheid a crime against humanity.

The above discussion shows that there was a Constitution in South Africa, but there was no democracy that allows people to participate in government affairs. There was no Bill of Rights that enforce respect for human rights.

2.4.4 Independence of the judiciary and judicial review

De Vos *et al* indicates that with its non-elected but appointed judges, the judiciary has the power to override legislation passed by majority democratically elected representatives. This signifies how powerful and autonomous the judiciary is in a non-authoritative country.[622]

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620 *Collins v Minister of the Interior and another* 1957 1 SA 552 (A).

621 Memory of the World Register Criminal Court Case No. 253/1963 (*S v Mandela and Others)* Ref No 2006-25 at 4.

622 De Vos *et al South African constitutional law in context* 72 – 73.

What *De Vos et al* is indicating was not the position in the previous authoritative dispensation. During that time, the judiciary lacked independence. This is based on the fact that its decisions could be overturned by the High Court of Parliament. Its judicial review was ineffective because it could not declare laws unconstitutional.

In the case of *De Lange*,[623] the court highlighted the requirement of independence and non-interference with the judiciary. It indicated that the CC on two occasions cited with approval the words of Chief Justice Dickson, the previous Chief Justice of Canada when he said; historically, the commonly accepted fundamental principle of judicial independence, has been the complete liberty of individual judges to hear and decide cases that come before them. No person, be it government, interest groups, individuals, or even another judge, may intervene or attempt to intervene with the way a judge handles his or her case and makes his or her decision.[624]

What is highlighted by the case of *De Lange* was not happening in the previous dispensation. Judges did not have complete liberty. There was interference with their decisions.

2.5 Constitutionalism, democracy, and the rule of law in post-apartheid South Africa

Mr. Justice Pius Langa, Deputy Chief Justice, during the National Judges Symposium in 2003 indicated that the constitutional vision envisages that the transformed society will be open and democratic. He highlighted that the Constitution refers to the values of "accountability, responsiveness, and openness". Those who question the justification of public or private actions should be able to do so (for instance President Zuma challenged the judgment of the CC on his conviction of contempt of court).[625]

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623 *De Lange NO v Smith and others* 1998 3 SA 785 (CC).

624 *De Lange NO v Smith and others* 1998 3 SA 785 (CC); *Van Rooyen and others v S and others (General Council of the Bar of South Africa Intervening)* 2002 5 SA 246 (CC).

625 Langa PL "The vision of the Constitution" 2003 *SALJ* 670 – 673; *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021) (herinafter the *Zuma* case) [2]; also see *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 426 (CC); *Merafong Dermacation Forum and Others v President of the Republic of South Africa and Others* 2008 (5) SA 171 (CC).

The above statement by Chief Justice Pius Langa indicates that the situation in post-apartheid South Africa has changed. There is currently constitutionalism and democracy. People now have the right to question and demand justification for public and private actions.

2.5.1 Constitutionalism

Waldron indicates that constitutionalism is not simply a normative philosophy of government styles and practices. It is about regulating, restricting, and curbing state power.[626]

This is the current situation. People have the right to participate in public affairs. Citizens have the right to vote. They have the right to join political parties of their choice. They have the right to challenge government authority in court. For example, the SCA, HC, or a court of comparable standing may issue an order regarding the constitutional validity of a Parliament Act, a Provincial Act, or the President's behaviour.[627]

In the case of *EFF,* the authority of the government was challenged in court, and the CC, by its order, restricted the powers of parliament. Parliament was compelled to accept and comply with the findings of the Public Protector.[628]

The above discussion indicates that there is constitutionalism in the new order.

2.5.2 Rule of law

Meyerson said the rule of law is the opposite of the rule of force. It represents the dominance of the law over the supremacy of the will of the person. The exercise of power should be regulated by specific legal rules as set out by Dicey. Public officials must always comply with the laws adopted by the parliament.[629]

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626 Waldron J "Constitutionalism: A skeptical view" 2010 *GTULC* 1 – 45 12.
627 *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 4 SA 877 (CC) [62].
628 *EFF* [4].
629 Meyerson D "The rule of law and the separation of powers" 2004 *MLJD* 1 – 2; *Zuma* [2-6].

For instance, in the new regime, things are different. Sections 35(1) to 35(5) of the Constitution govern police authority during investigations. The powers of the police are clearly limited.

Desai J held in the case of *Aimes* that admitting accused number one's bail evidence obtained in violation of his right to be advised to remain silent would be a violation of his right to a fair trial.[630] According to the preceding case law, state organs must carry out their duties in accordance with the law. As a result, there is the rule of law.

2.5.3 Democracy and human rights

People have choices, rights, and freedoms in a democracy. During the transformation of South Africa to a democratic state, former President Nelson Mandela outlined what would become the future foreign policy of South Africa. He said future foreign relations in South Africa will be based on our conviction that human rights should be the central issue of international relations, and we are prepared to play a role in promoting peace and prosperity in the world which we share with the community of nations. The time has come for South Africa to take up its rightful and responsible place in the community of nations. Although the delays in this process, imposed upon us by apartheid, make it even more difficult for us, we believe we have the capacity and determination to begin making our own positive contribution to the world's stability, prosperity, and goodwill in the near future.[631]

This statement by the late President indicates that the President considered human rights to be fundamental in a democratic regime. The judiciary heeded the President's call because the CC of South Africa's landmark decisions protects fundamental rights and freedoms in the country.[632]

Nel and Bezuidenhout indicate that the adoption of both the Constitutions of 1993 and 1996, in particular the Bill of Rights, has laid the firm foundation for human rights enforcement in South Africa. Not only can people now contest legislation that

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630 *S v Aimes* 1998 1 SACR 343 (C).

631 *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and another* 2014 ZACC 30 [1].

632 *National Coalition for Gay and Lesbians Equality and another v Minister of Justice and Constitutional Development and others* 1999 1 SA 6 (CC) — striking down laws criminalising sex between consenting males; *Makwanyane* — striking down the death penalty.

infringes individual rights unreasonably, but they can also petition the courts for a remedy.[633]

The observation of Nel and Bezuidenhout is confirmed by Langa. Langa points out that the Bill of Rights points to a new "culture of justification" and openness, and that it is a set of values that allows citizens affected by laws or acts to pursue justification.[634]

To enforce international human rights, and to comply with international standards, South Africa implemented the Act called Implementation of the Rome Statute of the International Criminal Court.[635] The Act was applied in a case involving violations of the human rights of Zimbabwean citizens by the Republic of Zimbabwe. South Africa was ordered by the court to intervene in this matter and complied.[636] The rights of innocent people were thus protected. The court also implemented the Rome Statute in the case of the *Southern African Litigation Centre.*[637]

There is the protection of human rights in the new order. This is confirmed by the above case law.

2.5.4 Independence of the judiciary and judicial review

In *Church of Scientology v Woodward*,[638] Brenman J spoke about the role of judicial review in the defence of the rule of law. He said the judicial review is neither more nor less than the enforcement of the rule of law on executive action.[639]

Judicial review relating to the violation of "human rights" was displayed by the Court in the case of *Walters*.[640] In this matter, the HC declared section 49(2) of the Criminal Procedure Act 51 of 1977 (CPA) unconstitutional. The Court held that the section was legally sanctioning the use of force in preventing the flight of a suspected

633 Nel F and Bezuidenhout J *Policing and human rights* (Juta Landsdowne 2002) 55.
634 Langa 2003 *SALJ* 673.
635 Act 27 of 2002 (hereinafter referred to as the ICC Act).
636 *National Commissioner, South African Police Service and another v Southern African Human Rights Litigation Centre and another* 2014 ZACC 30 [84].
637 *Southern African Litigation Centre v Minister of Justice and Constitutional Development and others* 2015 9 BCLR 1108 (GP).
638 *Church of Scientology v Woodward* (1982) 154 CLR 25, 70.
639 *Church of Scientology v Woodward* (1982) 154 CLR 25, 70.
640 *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another* 2002 2 SACR 105 (CC).

person. The CC found that this section violated the suspect's "right to life" and right to "human dignity" and declared the section unconstitutional.[641] In this way, the court developed statute law and protected the right to life and dignity of all persons.

There is thus the independence of the judiciary and judicial review in the new order.

2.6 Conclusion

From the above discussion, the researcher concludes that constitutionalism regulates government by limiting government power. The rule of law restrains government power by requiring the government and its organs to carry out their mandate in accordance with the law. People have the right to participate in government activities under democracy. Human rights protect the people from unjust government power. Apartheid South Africa had no constitutionalism or democracy, whereas post-apartheid South Africa has both. As a result, apartheid legislation and policies will have to change.

Chapter three below investigates the transition of the South African Police from apartheid to a democratic dispensation.

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641 *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another* 2002 2 SACR 105 (CC) 10 [9] and 71 [77].

Chapter 3: The South African Police Service from apartheid to the democratic order

3.1 Introduction

In this chapter, the researcher investigates the evolution of the SAPS from apartheid to the democratic order. The goal of this chapter is to convey a message about how the police functioned during apartheid and how it now functions under the 1996 Constitution. This is significant because it shows how constitutionalism, the rule of law, democracy, and human rights transformed the police department into democratic policing.

3.2 Origins of the SAPS and its evolution from apartheid to democratic South Africa

The following discussion will focus on the SAPS's beginnings and evolution.

3.2.1 Origins of the SAPS and the Natives Land Act 27 of 1913

It is necessary to give a brief history of the roots of the SAPS, for the sake of completeness when exploring policing and law enforcement. The origins of the South African Police are described in a magazine produced when the South African Police Force turned 70 years old in 1983. In this magazine there is a message from the Honourable Louis le Grange, DMS Minister of Law and Order of that time, which reads as follow:

> With this resume of the history and actions of the SA Police of the past 70 years, we wish to cultivate a better understanding of the police and their many responsibilities. Ours has never been an easy task, but today the Force is widely accepted as the most scientifically orientated and professional law-enforcement body on the African continent, which commands the respect of everyone.[642]

There is also a message of the Police Commissioner of that time, General PJ Coetzee which reads as follow:

> Since its inception on 1 April 1913, the police of South Africa as the national police force has developed into one of the first and most vital

642 South African Police Magazine 1913 to 1983 at 3 (publisher and date of publishing unknown). The Magazine was accessed by the author at the National Library of the South African Police Service (Aloe Park Building, 1 Rebecca Street, Pretoria West, 0183).

> bulwarks in South Africa's defence system against crime. We trust this review of the Force's history and growth to professional status will afford the public, on whose support and loyalty we are ever dependent, a greater insight into the life and duties of all its members.[643]

When the Union was established on 31 May 1910 there was no single police force in South Africa, but several provincial, town, and rural forces that continued functioning independently. Each of these independent police forces had been established under and functioned in terms of a different act or proclamation. When the Union was established, this inevitably led to an almost intolerable situation and the merger of the various forces became an urgent necessity. The possibility of the unification of the police forces was investigated. An agreement was soon reached and since the Transvaal Police was already a well-organised and disciplined force, a Bill, which was based on the Transvaal Police Act,[644] and accompanying regulations were drawn up. The Police Act draft and regulations were only approved in principle on 15 October 1912. A Cabinet decision of 1910 placed the task of centralising the different police forces squarely on the capable shoulders of the magistrate of Standerton, TG Truter.[645]

Although Colonel Truter was officially appointed Chief Commissioner and Accounting Officer, it was only in the latter capacity that he was able to exercise any true authority over various police forces. Without an Act of Parliament to make unification a reality, the various police groups sustained their function autonomously under the command of the various commissioners and in terms of the old acts. To put it mildly, the newly appointed Chief Commissioner was faced with a formidable task. Two high-ranking officers were appointed to assist Colonel Truter as Deputy Commissioners. They were Lieutenant-Colonel HC Bredell for the Uniformed Branch and Lieutenant-Colonel TE Mavrogordato for the Detective Branch.[646]

The year 1911 was a busy and important one in the early development of the police. The staff records of the various police forces were drawn, and each individual record was checked to determine the earnings and position of employees of the upcoming national police force. This task was complicated by the fact that each police force

643 South African Police Magazine 1913 to 1983 at 5.
644 Transvaal Police Act 5 of 1908.
645 Later appointed colonel and made a British knight in 1924.
646 South African Police Magazine 1913 to 1983 at 8.

had its own system of records and, to make matters worse, its own conditions of service. Similarly, the administrative duties of the Chief Commissioner's staff corps increased by the day as the Department of Justice gradually transferred the administration of those matters that were to be the responsibility of the police. The most important development was, however, the consideration of the draft Police Act and regulations and the events concerning the second reading of this Act. After a protracted debate in the House of Assembly, it was decided to hold the Bill over until 1912 because certain matters regarding the proposed police force were closely related to certain provisions of the Defence Act, which could not be implemented at that stage.[647]

During 1912 the Chief Commissioner gradually took over direct command of the different autonomous police forces in the Union of South Africa. The various commissioners retained only administrative control over their forces and were required to report on this administration to the Chief Commissioner, who was stationed in Pretoria. By proclamation, 1 April 1913 was determined as the date on which the new national police force, with the title of South African Police, would be established in practice.[648]

The ideal of having only one national police force had, however, not yet been realised. Two forces were established, namely the South African Police and the South African Mounted Riflemen. The latter unit, which was a military institution, fell under the Department of Defence but performed police duty in the larger black areas, especially in Natal. It was reasoned that an armed military unit would be able to enforce law and order more effectively in those areas.

The important facts to remember are, however, that the South African Police Force was officially established only on 1 April 1913 and that Colonel TG Truter, with the designation of Commissioner of the South African Police, was permanently appointed to lead this young organisation in its early, difficult days.

The origins of the Natives Land Act 27 of 1913 (NLA) created a lot of policing challenges for this new Police Force. This Act primarily impacted blacks because it

647 South African Police Magazine 1913 to 1983 at 8 – 9.
648 Proclamation 18 of 1913.

directed them to specific areas. As a result, Africans were evicted from their land and were barred from owning land. With the use of police in forced removals, Africans were moved and placed in poor areas far from areas of economic activity and development and were completely side-lined and ignored. Except for being used as hard laborers, they were non-participants in the country's economic development. Naturally, this caused dissatisfaction among Africans, leading to resistance against the government. The people and the police were at odds as a result of this resistance. The current challenges of homelessness, poverty, and housing shortage in South Africa stemmed from the implementation of the Land Act in 1913 and were exacerbated by the government policy of apartheid, which was implemented in 1948.

This is confirmed by Liebenberg when she argues that apartheid represented not only the disenfranchisement of the black population of South Africa but also an institutionalised system that maintained white domination.[649] She further indicates that whites were privileged in terms of politics, culture, and social spheres. Blacks were excluded from these domains. This white domination was attained at the cost of the African population that was deprived of access to land. Blacks were ultimately subjected to economically underdeveloped reserves and homelands. The blacks were systematically discriminated against and could not access social services and other resources.[650]

The land is the foundation of a proper livelihood because, without it, an individual cannot own a home or engage in economic and social activities that are necessary for survival. If an individual is not self-sufficient, he or she becomes a burden on the state, exacerbating the state's socio-economic challenges. The 1996 Constitution in its section 25 intends to address the inequalities caused by the NLA.

Unfortunately, so far, the implementation of the 1996 Constitution has not been successful in addressing the Land Act's ramifications. As a result, even 100 years later, there is still ongoing conflict between the police and the public, because people illegally occupy land, prompting the police to intervene. People have died as a result

649 Liebenberg S *Socio-economic rights adjudication under a transformative Constitution* (Juta Claremont 2010) 2.
650 Liebenberg *Socio-economic rights adjudication under a transformative Constitution* 2.

of police action during this stabilisation process, straining relations between the public and the police. The preceding discussion indicates that the Land Act of 1913 created significant policing challenges, which are still present and unresolved.

3.2.2 The SAPS under apartheid

The SAPS under apartheid was called the South African Police Force. This is mainly because their culture was a semi-military style of policing and the application of force was a policing method. Their ranks were military ranks like those of the Defence Force. Section 7(1) of the Police Act 14 of 1912 determined the duties and powers of police officials as follows in vaguely worded legalese:

> Every member of the force shall exercise such powers and perform such duties as are by law conferred or imposed on a police officer or constable but subject to the terms of such law and shall obey all lawful directions in respect of the execution of his office which he may from time to time receive from his superiors in the force.

The police's broad mandate at the time was to preserve law and order in accordance with apartheid policies and laws. At the time, the Minister of Police was known as the Minister of Law and Order. The style of policing mentioned above is confirmed by Muntingh *et al*[651] and refer to it as "regime policing". Regime policing protects the government rather than the citizens. It reports to the government rather than the citizens. It controls rather than protects populations. It favours a ruling class. It remains separate from the community members. It borrows characteristics from postcolonial African police forces. For example, tighter central control and accountability to the President rather than the law; militarised policing that is distanced from the civilian population and protects the regime; and segmentation of state policing.[652]

The above statement is supported by the judgment of *Raduvha.*[653] In this matter, the CC stated that arrest and incarceration played a critical role in the government's decision to perpetuate the much-maligned apartheid regime at the time. The police played a crucial part in the regime's survival. In order to facilitate this, the police

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651 Muntingh L, Faull A, Redpath J and Petersen K "Democratic policing: A conceptual framework" 2021 *Law, Democracy & Development* 121 – 147 123.

652 Muntingh *et al* 2021 *Law, Democracy & Development* 123.

653 *Raduvha v Minister of Safety and Security and Another* 2016 2 SACR 540 (CC) (hereinafter the *Raduvha* case) [6].

used "brute force" to arrest and detain suspects. This was "a prevailing culture" within the police force. This is the culture that our Constitution seeks to replace with a culture of human rights that pervades all aspects of our lives.[654]

The "South African Police Magazine" gives a clear picture of the evolution of the SAPS.[655] It indicates that in order to provide the necessary law and order and security, the Union of South Africa was for purposes of control and administration separated geographically into five parts, known as divisions, namely Transvaal, Kimberley, Orange Free State, Eastern Cape, and Western Cape. Each police division was in turn subdivided into police districts. There was a total of 45 districts, with each district falling under a district commandant. The lowest in the chain of command was the station areas, a few of which constituted a district. The station areas were run by station commanders.

From the outset, Colonel Truter introduced a programme that was aimed at eliminating certain shortcomings in the force. Three matters required urgent attention, namely training, manpower, and the image of the South African police. There was no uniform training for police officials. Prior to the amalgamation of the different police forces, only the Transvaal, Natal, and Free State Police Forces had training depots where recruits could be trained. In the Cape Province, a recruit merely had to take the oath and he was posted out for duty without further ado. To Colonel Truter, this state of affairs constituted a violation of everything that a national police force stood for.

To remedy the shortcomings in the system, it was therefore decided to establish a central training centre and the logical choice was the training depot of the former Transvaal Police in Pretoria West.[656] It soon became clear that Colonel Truter viewed his role as "father of the Police Force" very seriously. From that time onwards no constable was to leave the depot before he had been personally tested by the Police Commissioner. Attention then had to be paid to manpower for the Force, especially since the Transvaal clearly had less than its allocated numerical strength.

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654 *Raduvha* [6].

655 South African Police Magazine 1913 to 1983 3 – 11. Produced and published when the South African Police turned 70 years in 1983.

656 Major, later Colonel W Manning was appointed the first Commanding Officer of the South African Police Training depot on 1 April 1913.

The educational and physical requirements for admission to the police were so strict that many applicants had to be turned away at the outset. In time, however, the Defence Force proved to be a fertile source of manpower, and the ex-servicemen who joined the Force provided the police with a large number of disciplined and competent members.

A high-ranking officer from Pretoria was sent to the Cape to recruit candidates and even magistrates and ministers of religion were approached to recruit young men for the Police Force. The first recruiting campaign was so successful that the Commissioner was in a position to announce in his annual report for 1913 that 723 candidates had been recruited during that year and that the quality of the recruits was markedly higher than before.[657]

There were no female police officers, either black or white, at the time. Only male employees were employed. Members' uniforms were also not the same at all. Africans had their own uniform, while whites had their own. The training facilities were also not the same. Whites were trained in Pretoria, while Africans were trained in Hammankraal. Indians were trained in Durban, while coloreds were trained in Cape Town. Only whites were permitted to carry firearms, while blacks were permitted to carry batons. Separate doors were provided at police stations where members of the public came to report. There was a door for whites and another for non-whites. Whites and blacks were separated in detention cells at the police station.

The apartheid government's implementation of the homeland system exacerbated the police situation even more. The united police force that was established in 1913 was divided once more. Taking it back to the pre-1913 scenario. Each tribe or ethnic group had its own police force. The police forces were divided as follows: the South African Police Force enforced the law in traditionally known South Africa.

The Homeland Police Force was formed. Each police department was devoted to a specific tribe. The Bophuthatswana Police were in charge of the Batswana tribe. The Xhosa tribe in Ciskei was overseen by Ciskei Police. The Tsonga tribe was

657 South African Police Magazine 1913 to 1983 3 – 11. Produced and published when the South African Police turned 70 years in 1983.

served by Gazankulu Police Department. The Swazi tribe was policed by Kangwane Police. Kwandebele Police was the Ndebele tribe's police force. The Zulu tribe was being served by the KwaZulu Police Department. The Northern Sotho tribe was served by Lebowa Police. The South Sotho tribe was served by Qwaqwa Police. The Xhosa tribe in Transkei was served by Transkei Police, and the Venda Police was the Venda tribe's law enforcement agency.

When the homelands were absorbed into the Republic of South Africa in 1994, all of the homeland police was absorbed into the South African Police Service, reuniting the different forces into one police service.[658]

In the case of *Raduvha*, the court as per Bosielo AJ remarked about this transition and a new beginning as follows:

> Over two decades ago, we adopted our Constitution. In doing so we signalled a decisive break with our past - a ringing rejection of a history of denial of human rights to our people. We started an ambitious and laudable project to develop, nurture and induce a culture of respect for human rights in all aspects of our lives. We all committed ourselves to a new and egalitarian society founded on values of human dignity, equality, and freedom for all.[659]

The discussion above indicates how the SAPS evolved under apartheid until it reached a new beginning after 1994. This new and beautiful beginning of the South African Police Service's transition from apartheid to democratic order is discussed further below.

3.3 The SAPS under the 1996 Constitution

South Africa underwent radical transformations following the adoption of the 1996 Constitution. These changes took place more than 80 years after the SA Police Force was established. This demonstrates that the SA Police Force's culture of force was deeply embedded at the time. As a result of this development, the SAPS began to operate in a democratic order under the 1996 Constitution. This implies that the police must adhere to democratic principles, giving rise to democratic policing.

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658 See Bruce D and Neild R *The police that we want: A handbook for oversight of police in South Africa* (Centre for the Study of Violence and Reconciliation Johannesburg 2005) 5.

659 *Raduvha* [55].

While the Constitution legally declared eleven police agencies to be one South African Police Service, Bruce and Neild point out that much work remained to be done to integrate rank structure and administrative procedures.[660] Improving police-community relations; improving policing facilities in communities that suffered discrimination under apartheid; increasing the representation of historically disadvantaged groups in police ranks; changing policing symbols, such as uniforms and rank insignia; tackling the selection process and basic training curriculum; introducing human rights training and a code of conduct for the SAPS; enhancing the public order policing system; stopping the torture of people in police custody; and bringing the police labour relations blueprint in line with democratic standards, are among the other measures that have been implemented in South Africa as part of the police transformation process.[661]

Muntingh *et al* indicate that democratic policing must meet at least three requirements: democratic accountability of and for the police; the police adhering to the rule of law; and the police behaving in a procedurally fair manner in the service of the public.[662] The authors also state that the following nine dimensions are required in democratic policing: knowledge; effectiveness and efficiency; ethics and accountability; rights-based policing; police being treated as citizens; objectivity; responsivity; and empathy and trust.[663]

To put these dimensions into action, police officers must understand what works to improve community safety and satisfaction, what works to reduce crime and the fear of crime, how to successfully maintain a safe environment that demonstrates the police's effectiveness, how to ensure cost-effective resource allocation, and how to be efficient. High ethical and accountability standards must be observed, and policing should be based on respect for and preservation of human rights. When it comes to the public, police officers must be seen as citizens as well. The police must carry out their duty neutrally and objectively. Officers must perform their duties to

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660 Bruce and Neild *The police that we want: A handbook for oversight of police in South Africa* 5.

661 Bruce and Neild *The police that we want: A handbook for oversight of police in South Africa* 5.

662 Muntingh *et al* 2021 *Law, Democracy & Development* 121.

663 Muntingh *et al* 2021 *Law, Democracy & Development* 125 – 126.

the best of their ability. If all of these things happen, the public will benefit, and faith in the police will grow.[664]

In the previous order, the public lost trust in the police due to conflict between the police and the community. In the democratic order, this level of trust must be increased. According to Muntingh *et al,* levels of trust in the police are driven by the police's ability and performance record in three areas: objectivity, empathy, and responsivity. The latter three outputs are the result of five input variables: knowledge of what works in creating a safer society from a policing perspective; rights-based policing; accountability of policing; efficiency and effectiveness of resource utilisation; and the police as citizens having rights and protections.[665]

This thesis is supported by the observation made by Muntingh *et al* above. The police must develop positive relationships with the community because this will help to motivate the public to support the police in their fight against crime. Policing is a fight against crime that requires everyone's participation, including the general public. Police officers who practice democratic policing are perceived as legitimate authorities. This necessitates that the public has faith in the police to act in the best interests of the community as a whole.

3.3.1 Main features of the SAPS

The SAPS is a national police service. It is currently operating at three levels, as authorised by the Constitution (i.e. national, provincial, and local levels).[666] Regarding the command structure, the main members of police leadership are as follows: a National Commissioner at the national level, nine Provincial Commissioners at the provincial level, and over a thousand Station Commissioners at the local level. The National Commissioner delegated his authority to Provincial Commissioners, who in turn delegated authority to Station Commissioners.[667]

The National Commissioner's powers, duties, and functions are outlined in section 11 of the SAPS Act, while the Provincial Commissioners are outlined in section 12,

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664 Muntingh *et al* 2021 *Law, Democracy & Development* 133 – 146.
665 Muntingh *et al* 2021 *Law, Democracy & Development* 122.
666 Section 205(1) of the Constitution.
667 Section 15 of the SAPS Act.

and the rest of the members' powers, duties, and functions are outlined in section 13 of the SAPS Act.

3.3.2 Mandate of the SAPS

The SAPS is mandated by the Constitution.[668] This means that the police must carry out their duties to the best of their abilities while not violating the Constitution. They are a law enforcement agency, and it is reasonable to expect them to enforce the law in accordance with the rule of law and democratic principles.

Police, according to Bayley, are the most visible manifestation of a government authority. They betray the democratic promise of governance for the people when they utilise that authority just to suit the interests of the government. The most significant contribution police officers can make to democracy is to become more receptive to individual citizens' needs.[669]

The CC confirmed the police mandate in the case of *Raduvha*, "noting that the Constitution mandated the police to prevent, combat, and investigate crime, maintain public order, protect and secure the inhabitants of the Republic and their property, and uphold and enforce the law. In short, the Court stated that the police are there to ensure that we live, go about our daily lives, and sleep peacefully at night in our homes".

The Court emphasised that this is a constitutional mandate. To assist the police in carrying out these onerous constitutional responsibilities for our people's safety, the law grants the police a variety of powers, including the authority to arrest and detain suspects, as well as enter and search premises and people under certain conditions.[670]

The vision of the police in South Africa is to strive for creating an environment that is providing safety and security for everybody. The mission is to see to it that crime that is threatening the community is prevented, combated, and investigated. Making

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668 Section 205(3) of the Constitution.
669 Bayley DH *Democratizing the police abroad: What to do and how to do it* (National Institute of Justice, Office of Justice Programs Washington DC 2001) 13.
670 Section 205(3) of the Constitution; also see *Raduvha* [3].

sure that those who commit crimes are brought before the courts for justice to take place and finally rooting out generators of crime.[671]

The values of the SAPS are protecting everyone's rights and being impartial, respectful, open, and accountable to the community; using powers given responsibly; providing a responsible, effective, and high-quality service with honesty and integrity.[672] The mandate is discussed in greater depth below.

3.3.2.1 Crime prevention

In most states, crime prevention is done by uniformed police officers. Addressing generators of crime leads to crime prevention. For example, removing or reducing factors that contribute to the commission of crimes, such as unlicensed liquor outlets and unlicensed firearms, prevents and reduces crime. This theory was confirmed in *Van der Burg's* case.[673] The judgment confirms the prevention of crime through the removal of generators of crime. The judgment addresses the issue of an illegal liquor outlet and defends the rights of the children that were affected by the illegal liquor outlet. In other words, the judgment prevents social crime, such as child abuse or child neglect, and thus protects the rights of the vulnerable, such as children.

In South Africa, the Uniform Branch of the SAPS is also in charge of crime prevention. This function is performed by various sub-units of this unit. For example, a social crime prevention unit, a mounted unit, a flying squad unit, a K9 unit (commonly known as a dog unit), and others. This unit assists in the stabilisation and normalisation of crime.

The country's prosperity relies heavily on stability. Investor trust in a nation relies heavily on crime prevention. The AU orders state parties to ensure peace and crime prevention in order to maintain stability and development.[674]

Winterdyk indicates that crime prevention refers to the implementation of preventative strategies by different concerned role players, public and private, to

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671 Section 205(3) of the Constitution.
672 SAPS Annual Report 2016/2017 21.
673 *Van der Burg and another v National Director of Public Prosecutions* 2012 8 BCLR 881 (CC).
674 Article 33(11) of the African Charter on Democracy, Elections and Governance, 2007.

target social and other factors that contribute to crime and victimisation.[675] The following are different forms of crime prevention methods: (1) Situation crime prevention concentrates on the social setting for crime. Its ideologies are to reduce the chances for offenders to commit a crime. It adapts to the environment so that it is problematic, dangerous, and less gratifying to engage in crime. (2) Crime prevention through social development is designed to fight the original social and economic causes of crime.[676] (3) Developmental crime prevention focuses on the way crime occurs, or the way victimisation happens and remedies the situation. (4) Community development crime prevention is intended to change the physical or social arrangement of communities. The purpose is to affect the behaviour or quality of life of people positively.[677] (5) Social crime prevention is intended to solve social problems, such as inequality, poverty, unemployment, discrimination, and social exclusion.[678]

The levels of crime in South Africa currently do not indicate that these crime prevention strategies or methods are successful. The incidence of crime at homes, at schools, and in public places is unacceptably high. The state and private sectors have to join hands to make these strategies work. Co-operative governance principles enjoin state departments to work together in preserving peace and securing the well-being of the people.[679] All relevant government departments must thus work together to improve social justice. To improve social justice, the state has to invest heavily in social crime prevention programmes. Social ills contribute to inequality and poverty. Addressing social inequalities will improve equal access to water, electricity, health, education, and land to all. This in turn will discourage individuals from being involved in criminal activities, as everybody will be enjoying equal privileges and benefits.

The current situation in South Africa indicates that some or most of the crimes that are committed are encouraged by inequality and poor social and economic conditions in the country. Many people are still living under serious social and

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675 Winterdyk JA *Crime prevention, international perspectives, issues and trends* (CRC Press Boca Raton London New York 2017) xli.

676 Winterdyk *Crime prevention, international perspectives, issues and trends* xlii.

677 Winterdyk *Crime prevention, international perspectives, issues and trends* xliii.

678 Winterdyk *Crime prevention, international perspectives, issues and trends* 210.

679 Section 41 of the Constitution.

economic challenges. These challenges are a product of the previous political situation and its laws. The laws encouraged unequal distribution of land and the wealth of the country.

The situation needs to be corrected by the government and this will to a great extent reduce community public protests actions that are related to access to land, housing, education, and health. This will also allow the police to concentrate on normal criminal activities instead of on public protest actions.

If law enforcement agencies like the police and local government fail to protect and serve the communities, they will be failing in their constitutional mandate, as highlighted in the case of *Carmichele*.[680]

3.3.2.2 Fighting and investigating crime

The investigation of crime is broad and occurs across national and international borders. In instances where crime prevention units are not successful in preventing crime, investigation of crime kicks in. During the investigation process, the purpose is to identify perpetrators of crime and to bring perpetrators of crime to justice. This function is usually undertaken by detectives. In other words, the detectives contribute to preventing crime by ensuring that perpetrators of crime are traced and brought before the court to stand trial and account for their unlawful actions. In this manner, they protect the rights of the victims of crime.

Failure to protect the rights of victims of crime through investigation of crime is viewed in a profoundly serious light. For example, the SAPS detectives who were investigating a case of rape and assault in the case of *Carmichele* failed to defend the victim's rights by ensuring that the perpetrator of the crime was held in jail and bail was rejected. The victim filed a claim for damages in a civil court. Due to their failure to safeguard the victim from further abuse by the perpetrator, the police and the National Prosecuting Authority were held accountable for damages in the *Carmichele* case.

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680 *Carmichele v Minister of Safety and Security and another (Centre for Applied legal Studies Intervening)* 2001 4 SA 938 (CC) (hereinafter the *Carmichele* case).

Grimheden and Ring argue that investigation by police includes a duty to investigate human rights violations. For instance, violations like the right to life and torture are intensely serious wrongdoings. That is why instruments dealing with human rights abuse require that alleged or suspected violations of human rights be investigated. Effective investigation of human rights violations guarantees respect and protection of human rights.[681] Legislation must thus support or enable effective investigation.

In South Africa, there are two groups of detectives, those that fall under the DPCI and those that fall under the Detective Service. Both have a constitutional obligation to ensure effective investigation[682] and detection of crime. The effective uncovering of crime centers entirely on the successful collection of evidence concerning a specific crime that has been committed. Significant evidence can be found at the crime scene. It is thus vital that the crime scene be investigated properly by crime scene experts and evidence be gathered by investigating detectives. The investigation must be conducted legally and constitutionally, otherwise, police action will be declared invalid and unconstitutional.[683]

Domestic crimes

In a case where prevention of crime has not had the desired results, the Constitution[684] obliges police to investigate the crime that has been committed. This implies more focus on the perpetrator of the crime, namely the suspect. What is fundamental in the investigation of crime is that police must respect the rights of the people. In this case, the rights of the suspect, arrested, or detained person must be balanced with the rights of the victim, meaning that the victim's protection by the state must be ensured.

The rule of law instructs that government or state action must be applied within the framework of the law. According to Meyerson,[685] the rule of law is not the same as the rule of power. It means that the supremacy of the law is above the will of the individual. There must be clear legal rules that authorise the use of power. Officials

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681 Grimheden and Ring *Human rights law: From dissemination to application: essays in honour of Goran Melander* 34.

682 Section 205(3) of the Constitution.

683 Section 2 of the Constitution.

684 Section 205(3) of the Constitution.

685 Meyerson 2004 *MLJD* 1.

of the state, in this case, the police must observe the rules enacted by parliament. The courts must have jurisdiction to enforce the appropriate use of executive power.[686] In other words, the courts must ensure that executive power by police is not abused.

The investigation of domestic crimes encompasses both traditional common law crimes and statute crimes. These crimes are normally investigated by the Detective Service of the South African Police Service and include murder, assault, robbery, housebreaking, fraud, extortion, rape, and many other crimes. The most common issue in the investigation of these crimes is when extradition is required, and the perpetrator of the crime is hiding in a country that does not have an extradition treaty with South Africa.

International crimes

The SAPS also investigates international crimes. These crimes are however investigated by the independent police body called the DPCI, commonly known as the "HAWKS".[687] This is because international crimes are regarded as priority crimes. The functions of the HAWKS are to prevent, combat, and investigate national priority offences, offences under chapter 2 and section 34 of the Prevention of Corrupt Activities Act, 2004 (Act 12 of 2004), and any other offence referred to it by the National Commissioner of the South African Police Service. Priority offences are regarded as; organised crime, crime that requires national prevention or investigation, or crime that requires specialised skills in the prevention and investigation thereof.[688] As the investigation of these cases is complex, the investigation is conducted in a multidisciplinary manner in which other government departments are included to make a success of the investigation.

An example is the case of *Mohamed*. In this case, the investigation was conducted by the police, Department of Home Affairs, and the Federal Bureau of Investigations (FBI) of the USA. In this matter, Mohamed reportedly bombed the US embassies within Kenya Nairobi and Dar Es Salaam Tanzania. Article IV, section 2, of the Constitution of the US, 1787 specifies that "a person charged in any State with

686 Meyerson 2004 *MLJD* 2.
687 Established under section 17D of the SAPS Act.
688 Section 17A of the SAPS Act.

treason, felony or other crime who flees from justice and is found in another State shall, at the request of the executive authority of the State from which he fled, be released and transferred to the State with jurisdiction over the crime".[689] Looking at the facts in *Mohamed*'s case, it appears that the US was relying on Article IV, Section 2 of the United States Constitution of 1787 to deport Mohamed to the US so that he could be tried for acts of terrorism committed in Kenya and Tanzania. South Africa deported Mohamed to the USA to stand trial.[690]

3.3.2.3 Maintaining public order

Public order in the country is maintained by the uniform unit called "Public Order Policing".[691] The law governing public disorder is called the Prevention of Public Violence and Intimidation Act.[692] The purpose of the Act is to provide for the prevention and control of public violence and intimidation. The Act also established a body known as the Commission of Inquiry regarding the Prevention of Public Violence and Intimidation.[693] The purpose of the Commission is to strive for a community free from public violence and intimidation.[694]

The Commission's functions include inquiring into the phenomenon of public violence and intimidation in the Republic, inquiring into the nature and causes of public violence, and making recommendations to the State President regarding[695] (i) the policy which ought to be followed for the prevention of public violence and intimidation; (ii) steps that need to be taken to prevent public violence or intimidation; (iii) any other steps it may deem necessary or expedient, including proposals for the passing of legislation, in order to prevent a repetition or continuation of any act or omission relating to public violence or intimidation; (iv) the generation of income by the state to prevent public violence and intimidation as well as the compensation of

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689 Article IV, section 2, of the US Constitution, 1787.
690 *Mohamed and another v President of the Republic of South Africa and others* 2001 7 BCLR (CC).
691 Sections 16 – 17 of the SAPS Act.
692 Act 139 of 1991.
693 Section 2(1) of Act 139 of 1991.
694 Section 2(2) of Act 139 of 1991.
695 Section 10(1)(a) of Act 139 of 1991.

persons who were prejudiced and suffered patrimonial loss; and (v) any other matter which may contribute to preventing public violence and intimidation.[696]

The rate at which public violence and protest action are happening in South Africa indicates that this Act is not having an impact and is not a solution to the challenge. For example, the picture of the state of public disorder in South Africa reveals that in the financial year 2016/2017 a total number of 14 693 crowd-related incidents were responded to and successfully stabilised by Public Order Policing Units of the police. These included 10 978 peaceful incidents, such as assemblies, gatherings, and meetings, as well as 3 715 unrest-related incidents, such as #FeesMustFall gatherings, labour disputes, and events arising from dissatisfaction with service delivery by local municipalities and in the transport and education sectors. The number of peaceful incidents decreased by 173 incidents, while unrest-related incidents increased by 173 incidents compared to 2015/2016.[697]

The above statistics indicate that the Prevention of Public Violence and Intimidation Act 139 of 1991 can never be a solution to addressing dissatisfaction arising from landlessness, homelessness, and poverty. It is understandable because this Act is just a remedy trying to stabilise a volatile situation and is not aimed at addressing the root cause of the challenge, namely unequal distribution of land.

If land can be made available, several challenges can be addressed. For instance, those provided with land can farm, thus finding employment and reducing the high rate of unemployment. The farming sector will be more productive, which will improve the economy of the country. The challenge of homelessness will also be addressed, as those without housing can stay on the farm where they are working. This will also encourage people to study in the field of agriculture, as they will be aware of making a meaningful contribution to agriculture and the growth of the economy.

The above discussion indicates that public unrest is mostly caused by dissatisfaction emanating from deficiencies displayed by the government. These include failure to progressively address "second generation rights", such as municipal or local

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696 Section 10(1)(d) of Act 139 of 1991.

697 SAPS Annual Report 2016/2017 141 – 142; also see Chapter 3 [3.6.3].

government services, for example, lack of electricity, lack of housing, lack of distribution of land, poor service delivery in health facilities, and education. This indicates that the police are involved in policing human rights issues.

The above mandate of the police is confirmed by Grimheden and Ring when they highlight that both police and human rights are intended to protect the mental and physical integrity of the individual in specific situations.[698] Both are designed to uphold the rule of law and democratic principles. When the principle of security is discussed, it can be seen that the role of the police involves two complementary sets of benefits for humanity, namely the preservation of peace, order, and prosperity and the protection of human rights. Police maintain peace, order, and stability in the society by responding to threats to order or instances of social disorder, by preventing and detecting crime, and by assisting people who need immediate aid in times of emergency.[699]

De Rover agrees with Grimheden and Ring and states that a safe, prosperous and secure nation relies primarily on law enforcement agencies.[700] Maintaining order in society is accomplished by the implementation of national legislation. Knowledge of the law and the skills necessary to deal with major cases and events are needed. Members and key players in public protests and public gatherings need to know and understand how to deal with such events, working hand in hand with the police. Awareness of the rights and freedoms of those who do not take part in meetings and protests is important. This is important in order to preserve the rights and freedoms of others. Participants must exercise their right to protests and assemblies without violating the rights of others. The police are responsible for ensuring that this happens. On the other hand, the duty of the police to carry out their duties becomes more complicated when protests and demonstrations get out of control

698 Grimheden and Ring *Human rights law: From dissemination to application: essays in honour of Goran Melander* 33 – 34.

699 Grimheden and Ring *Human rights law: From dissemination to application: essays in honour of Goran Melander* 33 – 34.

700 De Rover *To serve and to protect: Human rights and humanitarian law for police and security forces* 197.

and become violent. In these instances, the police are expected to use their knowledge and skills to deal with the situation to maintain public order.[701]

The Act that is mentioned above is aimed at policing public disorder in order to ensure a safe and secure environment as well as public peace. However, enforcing the Act is not enough to ensure public peace. The reason is that the Act does not deal with the root causes of public disorder, but with symptoms. Intervention by the police is not a permanent solution.

The researcher thus concludes that the Prevention of Public Violence and Intimidation Act 139 of 1991 is not a solution that will stop continuous public violence or disorder, since the root cause of this public violence is social and economic inequalities emanating from the unequal distribution of land. To reduce public violence, social and economic inequalities must be addressed.

3.3.2.4 Protecting and securing human rights

It is the responsibility of the police to protect and secure the rights and freedoms of the people. This is because the Police Department is the executive arm of the state in charge of policing.

Kamber agrees with the preceding statement because he believes that the contemporary philosophy of international human rights law recognises that almost every human right implies a positive action. The action is intended to put in place effective procedures for ensuring the enforcement of a right.[702] This means that the state in the form of police is expected to act positively in order to achieve the rights of the people. The SAPS, as part of the executive of the government, has an obligation to protect and secure citizens and their property. This is confirmed by the Constitution[703] and the SAPS Act.[704]

Police officers cannot look away when a crime is committed; they have the duty of acting, protecting, and securing inhabitants against those that violate their rights. In

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701 De Rover *To serve and to protect: Human rights and humanitarian law for police and security forces* 197.

702 Kamber K *Prosecuting human rights offences: Rethinking the sword function of human rights law* (Brill Leiden Boston 2017) 29.

703 Section 205(3) of the Constitution.

704 Section 13 of the SAPS Act.

that way, they protect the rights of citizens. This was confirmed in the case of *Scheepers* in the Eastern Cape High Court, Grahamstown.[705] In this matter, the issue was legality of arrest without warrant under section 40(1)(a) of the CPA, which indicates that "a peace officer may without warrant arrest any person who commits or attempt to commit any offence in his presence". The court held that "to place higher standard on peace officer would unneccesarily discourage peace officers from arresting offenders who were in act of committing offence". The case indicates that the courts will uphold the legal acts of the police in order to protect public interests and rights. This case supports the security and safety of the people. The case in question shows constitutionalism, the rule of law, and democracy in action. The case also shows that while people have rights, their rights can be restricted by the law if these infringe the individual rights of others.

Human rights are routinely violated, and the police must protect the innocent. For example, during incidents of public violence, innocent residents who are not part of the group that causes the violence are negatively impacted. Some people are killed by stray bullets. Some people have lost their property as a result of looting and arson. Some are displaced because they are afraid of being killed or injured. Some children are unable to attend school in certain areas. Parents in some communities are unable to go to work because residential areas have been completely shut down. Unfortunately, all of these are social issues that have a negative impact on the country's economy, growth, and development, and thus necessitate police intervention.

Dealing with the issue requires the state to focus on the causes of the dissatisfaction of the people. Symptoms, such as violent actions are just indicators to the state that there is a challenge that needs to be addressed. Protecting and securing citizens cannot be sustained by police action only. It needs the main generators, such as poverty, unemployment, and inequality, to be addressed. As long as there is gross inequality, there will be social and economic problems. This means that social justice is absent. To bring about social justice, the state needs a more inclusive and

705 *Scheepers v Minister of Safety and Security* 2015 1 SACR 284 (ECG).

integrated approach, not only police action. Police action is just an interim solution until the challenge is addressed.

3.3.2.5 Upholding and enforcing the law

The function of upholding and enforcing the law is placed squarely on the shoulders of the police by the SAPS Act[706] and by the Constitution.[707] The rule of law commands the police to execute their functions only based on the law that is predetermined and unambiguous so that the public can understand what is expected of them. Police are protectors of the rights of the people through upholding and enforcing the law. Upholding and enforcing the law is key to the police for the protection of those whose rights have been violated. The public relies heavily on the police for the protection of their rights and in some instances, if the police fail to protect the rights by upholding and enforcing the law, the public takes over and protects their rights, resulting in self-help, which sometimes leads to serious chaos.

The law is upheld and enforced by preventing and investigating crime in a way that makes the community safe and feel safe. Dealing with perpetrators of crime through upholding the law entails protecting the human rights of affected victims. The principle of separation of powers also kicks in during the upholding of the law by the police because the independent judiciary oversees police action by declaring their acts unlawful or unconstitutional where police go beyond their scope of power. In a democratic state, the people must enjoy their freedom without their rights being infringed.

Although the police uphold and enforce the law for the benefit of society, daily they experience serious challenges during the execution of their functions. This in turn affects the confidence of the public in the police as the levels of trust drop. The public wants to see the police being effective and efficient, meaning that laws must capacitate the police to protect the populace.

706 Section 13 of the SAPS Act.
707 Section 205(3) of the Constitution.

3.4 Limits and control of the action of the SAPS

Previously, police powers were overly broad and were not limited by the Constitution or the law. The court stated in Raduvha's decision as follows: section 7(2) commands the state, including the judiciary, to respect, promote, and fulfil the rights enshrined in the Bill of Rights, subject to the limitations enshrined in section 36 of the Constitution or elsewhere in the Bill. This responsibility, however, is not limited to the courts. Section 7(2) addresses the state. The Executive must also fulfil the obligation. This is critical because the police are involved in incidents that have the potential to affect people's rights to dignity, equality, and freedom, which are fundamental to our democracy, in the course of their daily duties.

Our citizens deserve a police service that is rooted in a culture of human rights respect. This requires them to be guided by respect for human rights and strict observance of the rights to human dignity, equality, and freedom in all their dealings with society while carrying out their constitutional duties.[708] The above court decision indicates that the powers of the SAPS are limited by the Constitution and legislation. The police can no longer operate with unlimited powers.

The police's powers are being restricted by more than just legislation. The country's supreme law, the Constitution, contains principles and ideals. These principles also prevent the police and other governmental institutions from abusing their power. These constitutional principles that constrain police behaviours are examined in greater depth further down.

3.4.1 Constitutional principles limiting the SAPS and its actions: Respect for constitutionalism, the rule of law, democracy, and human rights

According to Bayley, democracy necessitates not only that police, as part of the executive branch of the government, be bound by the law, but also that they make a special effort to protect activities that are critical to democratic participation. These activities include freedom of expression, association, and mobility, as well as

708 *Raduvha* [55] – [56].

freedom from arbitrary arrest and detention and impartiality in the administration of justice.[709]

The statement of Bayley[710] above confirms that in the new regime, the SAPS's actions are not without limitations. These acts are constrained by constitutional principles as well as the law. This was not done during the previous dispensation. If the police violate the Constitution or the law, the court will issue an appropriate court order to bring the police back into line.

Bayley[711] points out that under a democracy, government activities are limited by law. Decisions are taken after consultation and published after appropriate consideration by a representative body. In a democracy, police actions must be guided by the rule of law, not by directives issued arbitrarily by certain regimes and their members. Democratic police do not write laws; they enforce them, and even then, their decisions must be upheld by the courts.[712]

The case of *Raduvha*[713] contains evidence to confirm the argument of Bayley. In Raduvha's matter, her rights as a child under section 28 of the Constitution were violated by the police. She was 15 years old at the time of the incident of her arrest. She brought an action against the police and claimed damages. The facts were as follows: on 6 April 2008, two SAPS officers were dispatched to the home of Mrs. Raduvha, Ms. Raduvha's mother, to investigate a complaint of a protection order issued against her mother.

When the police arrived at the house, they found her with her family. When the police attempted to arrest her mother, she intervened and placed herself between her mother and the officers to prevent them from arresting her mother. The police officers arrested her for obstructing them in the performance of their lawful duties, citing section 40(1)(j) of the Criminal Procedure Act (CPA). After arrest, she and her

709 Bayley *Democratizing the police abroad: What to do and how to do it* 14.
710 Bayley *Democratizing the police abroad: What to do and how to do it* 14.
711 Bayley *Democratizing the police abroad: What to do and how to do it* 14.
712 Bayley *Democratizing the police abroad: What to do and how to do it* 14.
713 *Raduvha* [76].

mother were both detained in police cells and released the next day. The public prosecutor declined to charge them both.[714]

The CC ruled that the police violated section 28 of the Constitution by arresting the minor, which can only be done as a last resort, and in this case, the arrest and detention were not the last resort. The minor could have been released into the custody of her father, who was present at the time. The detention, according to the Court, was illegal because it violated section 28(1)(g) of the Constitution. The Court's decision was based on the fact that the arrest and detention were not carried out as a last resort and were not in the best interests of the child, as required by section 28(2) of the Constitution.[715] This case indicates that constitutional principles that limit police action were properly applied by the Court in this matter.

According to Bruce and Neild, the government must support democratic policing to make it a reality.[716] They argue that democratic policing is unlikely to bring about political democracy on its own, however democratic police changes are an important part of larger democratic political reforms. Democratic policing can most likely only be fully appreciated if political democracy has been established and democratic constraints on the state's exercise of power have been put in place. In the absence of democracy, police may attempt to uphold democratic policing principles, but this is likely to be difficult and may bring them into conflict with the government or their superiors. To fully establish democratic policing, the government, to whose authority the police are subject, must be committed to democracy and see the police as an instrument for protecting the safety and democratic rights of the people. This democratic political will is required for the establishment and practice of democratic policing.[717]

Grimheden and Ring support the argument of democratic policing. They note that the relationship between civil rights and policing has four components. These are police powers and respect for civil rights and liberties; police functions and

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714 *Raduvha* [7].
715 *Raduvha* [70] – [71].
716 Bruce and Neild *The police that we want: A handbook for oversight of police in South Africa* 23.
717 Bruce and Neild *The police that we want: A handbook for oversight of police in South Africa* 23.

protection of civil rights and liberties; the requirement to investigate a violation of civil rights and liberties; and the entitlement of police to civil rights and liberties.[718]

Neate supports the above statement and indicates that, in some countries, civil rights are not respected. He emphasises that a democratic society built on the rule of law does not allow lawlessness. It should uphold people's rights and resolve the conflict between the power of the government and the rights of citizens.[719]

To achieve the above goals, the United Nations High Commissioner for Human Rights came up with "Human Rights Standards and Practice for the Police". According to the guide, it is expected that in a constitutional and democratic state where the rule of law is applied, police will respect and protect human dignity, as well as maintain and uphold the human rights of all people. They will be held accountable to the community as a whole. Effective mechanisms for ensuring internal discipline and external control of police officials must be put in place. Investigations into violations of human rights and freedoms must be prompt, competent, thorough, and impartial. Obedience to superior powers is not a defence for police violations.[720]

In the case of *Ex Parte Minister of Safety and Security and Others*,[721] constitutionalism and human rights were successful in limiting the power of the police and the general public. This case is dealing with the constitutionality of section 49(2) of the CPA, the law that authorised the killing of a human being. The provisions of this Act before amendment were as follows:

> (1) If any person authorised under this Act to arrest or to assist in arresting another, attempts to arrest such person and such person-
>
> (a) resists the attempt and cannot be arrested without the use of force; or

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718 Grimheden and Ring *Human rights law: From dissemination to application: essays in honour of Goran Melander* 32.

719 Neate *The rule of law: Perspectives from around the globe* 80.

720 UNHCR *Human rights standards and practice for the police, expanded pocket book on human rights for the police, professional training series* no. 5/Add.3 (UN New York and Geneva 2004) 59 – 60.

721 *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another* 2002 2 SACR 105 (CC) (hereinafter the *Walters* case).

(b) flees when it is clear that an attempt to arrest him is being made, or resists such attempt and flees, the person so authorised may, in order to effect the arrest, use such force as may in the circumstances be reasonably necessary to overcome the resistance or to prevent the person concerned from fleeing.

(2) Where the person concerned is to be arrested for an offence referred to in schedule 1 or is to be arrested on the ground that he is reasonably suspected of having committed such offence, and the person authorised under this Act to arrest or to assist in arresting him cannot arrest him or prevent him from fleeing by other means than by killing him, the killing shall be deemed to be justifiable homicide.[722]

During the arrest of fleeing suspects, the police relied on this Act. The previous administration saw nothing wrong with the provisions of this Act. This was due to a lack of regard for human rights. The CC reversed the previous approach during the new regime. The court ruled that the Act was unconstitutional and thus invalid.[723] The court's decision is based on the fact that the Act violates the following rights: human dignity (section 10 of the Constitution), life (section 11 of the Constitution), and freedom and security of the person (section 12 of the Constitution).[724]

Alleweldt and Fickenscher confirm the above judgment and argue that the state is indebted for respecting and protecting human rights. This should be done by taking all relevant measures. If correct measures are taken persons will enjoy their rights. Protection of rights includes managing the relationships between private individuals and the state. The positive obligation of the state arises in the context of crime. Attacking crime is a common method of protecting against human rights violations.[725]

This is confirmed by the case of *Ngqukumba.*[726] The court in this matter held that in combating and preventing crime, the SAPS must observe the law too. This judgment protected the constitutional right of the possessor of the vehicle (victim), namely the

722 Section 2 of the CPA (before amendment).
723 *Walters* [77].
724 *Walters* [2].
725 Alleweldt R and Fickenscher G (eds) *The police and international human rights law* (Springer International Publishing Cham Switzerland 2018) 189.
726 *Ngqukumba v Minister of Safety and Security and others* 2014 2 SACR 325 (CC) 14.

right to privacy,[727] and thus compels the police to respect the rights of victims[728] during the prevention and investigation of crime.

All police officers in a democratic dispensation have limited power and are expected to maintain their impartiality and independence at all times. They are expected to carry out their tasks without regard for race, colour, sex, language, religion, or politics. They must maintain social order in order for constitutional and legal democratic procedures to take place. Commanders must guarantee that police policies and strategies respect the democratic government. Through fair and non-discriminatory recruitment and management rules and practices, the police force must be representative of the entire community. Recruitment and training methods must be structured to attract and retain police officers who are willing and able to satisfy the demands of democratic policing under democratic rule. The cops must be well-versed in the area they patrol. In the community and at the police station, they must speak out against ethnic or racial stereotyping or discrimination.[729]

In the case of *Gumede*,[730] the SCA limited the police's powers through the application of human rights principles. This is a case in which the police used illegal methods to solve the crime, and the accused was convicted and sentenced to life in prison plus 15 years on a charge of murder and robbery. As a result, the accused appealed the conviction and sentence. The significance of this case is that it demonstrates the power of human rights in limiting unlawful and unconstitutional police action.

The issue, in this case, was a violation of the right to privacy as guaranteed by section 14 of the Constitution and the right against self-incrimination as guaranteed by section 35(1) of the Constitution. The accused and others were arrested following a robbery in which someone was killed during the robbery. Investigators from the police department received information that the accused was involved in the robbery and murder. Police, without a search warrant as required by section 21 of the CPA, forced open the door of the accused's house in the middle of the night and searched

727 Section 14(c) of the Constitution.
728 Section 7(1) of the Constitution.
729 UNHCR *Expanded pocket book* 5 – 8.
730 *Gumede v S* 2017 1 SACR 253 (SCA) (hereinafter the *Gumede* case) [1].

it. A firearm was discovered in the room where the accused was sleeping, and he was arrested.

The firearm was confiscated. He was not properly informed of his constitutional right to silence, so he remarked and confessed to things. He was convicted and sentenced as a result of the firearm that was found in his room and the confession, he made to the investigator including pointing out of the crime scene. The accused was found not guilty and discharged on appeal after the appeal court ruled that the evidence obtained during the search was inadmissible because it was conducted without a search warrant. In addition, the court ruled that the pointing out and confession were inadmissible evidence because they were not obtained freely and voluntarily as prescribed by section 217 of the CPA. The appeal was successful, and the conviction and sentence were overturned by the court.[731] This is a clear indication of the power of constitutional principles in protecting rights and freedoms through limiting the power of the state and its organs, in this case, the police.

Victims of crime regard prevention of crime by police as their constitutional and democratic right,[732] for example, the right to freedom and security of a person and the right to life.[733] That is why they rely on the state to ensure that the environment in which they live is safe and secure. In every country, there is a need to protect the citizens against incidents of crime. This duty rests squarely on the shoulders of the police. The police contribute to safety and security by conducting activities that will prevent crime from being committed, for example by being visible in areas where crime is commonly committed, by conducting awareness campaigns, by making the community aware of crime hot spots; how perpetrators commit crimes; and how they can make themselves less vulnerable to crime. They also allow the community to participate in the fight against crime by allowing the community to give their views relating to improved methods of fighting crime. This is done at the meetings called Community-Police Forum. In this manner policing becomes democratic as the views of the community are considered.

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731 *Gumede* [42].
732 Section 205(3) of the Constitution.
733 Sections 11 and 12 of the Constitution.

Respect for the rights of victims of crime is paramount in a democratic and constitutional state with the rule of law. Winterdyk indicates that the notion of a perfect victim is founded on an innocent defenceless victim. This victim is not involved in crime or affected by any influences relating to crime or criminals.[734]

Kamber points out that the Fundamental Standards of Justice for Victims have been implemented in the belief that victims of crime deserve compassion and dignity, which gives them the right to timely relief of their suffering, by giving them access to the mechanisms of the criminal justice system, reparations and adequate resources tailored to assist their rehabilitation.[735] The principles are essentially recommendations for appropriate action to be taken at the international, regional and national level to safeguard victims' rights, such as improving their access to justice.[736]

Alleweldt and Fickenscher indicate that the police are the main players in the defence of human rights. Government authorities, as well as the police, are formed to provide security and protect citizens' rights. Police officers often have to act quickly and authoritatively to ensure that individual rights and the rule of law are respected.[737] Defence from crime is considered to be a human right in legally binding terms. That is because the state and its law enforcement institutions, such as the police, have substantive responsibilities to properly protect and uphold human rights.[738] The researcher believes that this argument is accurate since people who are victims of crime do have specifically expressed rights like arrested persons whose rights are specifically expressed in section 35 of the Constitution.

Similarly, Olugbuo and Wachira contend that the criminal justice system has long neglected the voices of human rights abuses and their concerns. While international and national legal frameworks, as well as the Bill of Rights of domestic constitutions, contain express provisions for the preservation of the rights of accused persons and

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734 Winterdyk *Crime prevention, international perspectives, issues and trends* 407.

735 Kamber *Prosecuting human rights offences: Rethinking the sword function of human rights law* 93.

736 Kamber *Prosecuting human rights offences: Rethinking the sword function of human rights law* 93.

737 Alleweldt and Fickenscher *The police and international human rights law* 1.

738 Alleweldt and Fickenscher *The police and international human rights law* 187.

perpetrators of crimes, there is nothing expressly in place for victims of those atrocities.[739]

In support of the above, Gaur argues that the degree to which human rights are respected and protected in criminal proceedings is a significant measure of society's civilisation.[740] Few people will dispute this proposition. To what degree will the human rights of convicted and accused individuals be secured when significant interests of society are under threat? There is a constant tension between the interests of the accused and the basic interests of society. Too much focus on the security of one interest is likely to have a detrimental effect on the other. A balance has to be struck between the two interests. This function is entrusted to the judiciary in a democracy governed by the rule of law. The judiciary must find a dividing line in order to harmonise the two interests, without overemphasising one to the detriment of the other.[741]

It is the view of the researcher that the rights of perpetrators of crime should be balanced with the rights of victims of crime. This will give victims of crime satisfaction, as there is a perception that victims of crime do not have rights.

Webster's point is that South Africa's democracy has changed the role of government in society.[742] From the oppressor to the liberator, the government has made tremendous gains in improving the lives of people. Dedication to service delivery is at the heart and core of the modern position of the government. From the Reconstruction and Development Programme to Batho Pele,[743] the government has defined a comprehensive policy and legislative framework for meeting the needs of the citizens. However, one of the big obstacles that threaten South Africa's democratic and constitutional euphoria is the application of policy and legislation.[744]

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739 Olugbuo BC and Wachira GM "Enhancing the protection of the rights of victims of international crimes: A model for East Africa" 2011 *AHRLJ* 608 – 609.

740 Gaur KD (ed) *Criminal law and criminology* (Deep & Deep Publications New Delhi 2003) 302.

741 Gaur *Criminal law and criminology* 302.

742 Webster N "Rights and Responsibilities in our Democracy – A case study of the Victims Charter" 2007 https://www.justice.gov.za/VC/docs/articles/2007%20VC%20Case%20Study.pdf (Date of use: 26 July 2021) 1.

743 The meaning of "*Batho Pele*" is "people first".

744 Webster https://www.justice.gov.za/VC/docs/articles/2007%20VC%20Case%20Study.pdf (Date of use: 26 July 2021) 1.

Victims of crime believe that they have the right to be protected by the state, as they have a social contract with the state, having elected government to power through their votes to represent them. Olugbuo and Wachira indicate that the Rome Statute does not define victims, however, rule 85 of the ICC Rules of Procedure and Evidence defines victims as natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the ICC.[745]

Webster indicates that as crime victims or citizens that are concerned, we comprehend that the criminal justice system is custodians of our legal rights.[746] Furthermore, we appreciate that we are entitled to protection from violence. We comprehend that the government is in authority for reduction of crime, investigation of crime, prosecution, and rehabilitation of offenders. For victims of crime, the disturbing impact of crime is strengthened by the negative response from the criminal justice system, in this case, the police. This causes secondary victimisation as the crime itself is primary victimisation. Victims of crime find satisfaction through the positive support of police,[747] prosecutors,[748] or court officials.[749] These officials have a legal obligation of caring for victims of crime.[750]

In the international arena, victim's rights are protected. Police in South Africa must thus also contribute to the protection of victims' rights during the execution of their functions. Olugbuo and Wachira reason that the adoption of the UDHR demonstrates an optimistic normative response to respect the fundamental human rights and freedoms of persons.[751] Although the Universal Declaration does not contain explicit provisions relating to the rights of victims, the instrument remains the foundation of human rights protection. Furthermore, the adoption of the ICCPR, which codified the civil and political rights of the Universal Declaration in a legally

745 See Olugbuo and Wachira 2011 *AHRLJ* 608 – 613.
746 Webster https://www.justice.gov.za/VC/docs/articles/2007%20VC%20Case%20Study.pdf (Date of use: 26 July 2021).
747 Section 205(3) of the Constitution.
748 Section 179(4) of the Constitution.
749 Webster https://www.justice.gov.za/VC/docs/articles/2007%20VC%20Case%20Study.pdf (Date of use: 26 July 2021) 1.
750 *Carmichele* [62] and [73].
751 Olugbuo and Wachira 2011 *AHRLJ* 614.

binding instrument, is seen as encouraging progress in the protection of the rights of victims.[752]

The following international instruments are in place for the protection of rights of victims of crime, although in some instances protection is not clearly expressed: Convention on the Prevention and Punishment of the Crime of Genocide, 1948.[753] In this Convention, the "right to life" for victims of crime is protected, although not expressly. The Convention stipulates that individuals committing genocide or any other acts enumerated in article III shall be punished, irrespective of the fact that they are constitutionally responsible rulers, public officials, or private individuals. This means that even heads of state can be punished.[754] For the purpose of extradition, acts enumerated in article III together with genocide are not regarded as crimes relating to politics.[755]

The purpose of this article is clearly to ensure that perpetrators of genocide are extradited and prosecuted to protect the rights of victims of crime. The Universal Declaration confirms this right, as it provides that everyone has the right to life, liberty, and security of the person.[756] The word "everyone" in the article includes victims of crime. This means that "equal rights" for crime victims are protected internationally. The Universal Declaration states that all are equal before the law, and are entitled to equal protection of the law without discrimination. Everyone has the right to equal protection from any discrimination in violation of this Declaration and from any incitement to such discrimination.[757] The word "all" in the article by implication means that victims of crime are also included and have rights and freedoms. The state is responsible for the protection of the rights of victims of crime.[758] The state is obliged to respect the rights of perpetrators of crime.[759]

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752 Olugbuo and Wachira 2011 *AHRLJ* 614.

753 Adopted by UN General Assembly Resolution 96(1) dated 11 December 1946; Ghandhi PR *Blackstone's international human rights documents* 3rd ed (Oxford University Press New York 2002) 19.

754 Article IV of the Convention on the Prevention and Punishment of Crime of Genocide, 1948.

755 Article VII of the Convention on the Prevention and Punishment of Crime of Genocide, 1948.

756 Article 3 of the UDHR; Ghandhi *Blackstone's international human rights documents* 22.

757 Article 7 of the UDHR.

758 Section 205(3) of the Constitution.

759 Sections 35(1) – (4) of the Constitution.

Moreover, the Universal Declaration protects the "right to ownership of property" thus protecting the victim. It provides as follows: "everyone has the right to own property alone as well as in association with others".[760] This right is also protected by the Constitution of South Africa.[761] This means that victims of crime are entitled to enjoy ownership of their property. Nobody should arbitrarily deprive them of their property. If that happens, the state is expected to protect them.

The Universal Declaration protects the right to "freedom and dignity". It provides as follows: "all human beings are born free and equal in dignity and rights".[762] These international and regional instruments are legal remedies for respecting the rights of victims of crime. Chirwa reasons that legal remedies have coercive power, which non-legal mechanisms do not have, to compel compliance and foster respect for the rights of victims. Essentially, legal remedies reinforce the obligatory character of human rights.[763] In the matter of *Hoffman*,[764] the CC emphasised that an effective remedy must strike efficiently at the cause of the violation and entail *restitution in integrum.* This confirms the principle that the victim must be placed in the position he or she would have been before the violation. The above discussion indicates that victims have rights, and these rights must be respected by limiting the powers of violators of rights.

The USA has legislation to protect victims.[765] The objective of the legislation is to ensure that innocent victims of all crimes have their rights upheld, have their dignity and privacy respected, and are treated with fairness.[766]

Cassell, Mitchell, and Edwards point out that the Crime Victims' Rights Act of 2004 protects the interests of victims in the USA.[767] This Act grants victims the right to take part in court proceedings. Some entitlements include the right to fair treatment,

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760 Article 17 of the UDHR.
761 Section 25 of the Constitution.
762 Article 1 of the UDHR.
763 Chirwa DM *Human rights under the Malawian Constitution* (Juta & Co Ltd Claremont Cape Town South Africa 2011) 57.
764 *Hoffman v South African Airways* 2001 1 SA 1 (CC) [50]; Chirwa *Human rights under the Malawian Constitution* 78.
765 Federal Victims and Witness Protection Act of 1982 (18USC).
766 Olugbuo and Wachira 2011 *AHRLJ* 628.
767 Cassell PG, Mitchell LJ and Edwards BJ "Crime victims' rights during criminal investigations? Applying Crime Victims' Rights Act before criminal charges are filed" 2014 *J Crim L & Criminology* 59 – 104.

the right to care of a dignified nature and to privacy, and the right to communicate with the lawyer of the government who is handling the case. The Department of Justice is the lead agency for the protection of victims' rights. All other departments, particularly those in the criminal justice system, must also uphold these rights. The law has mechanisms for the protection of freedoms. The right can be asserted by the victim, the legal representative of the victim, or the counsel of the government. For example, the victim has the right to be aware of progress in the prosecution of the case, the right to be informed at the court of the date of the trial of the case, the right to be told about the outcome of the case, and the right to be free from secondary victimisation. Police and the courts are meant to handle the defence of freedoms. The concern is that victims suffer when they are excluded from the criminal justice process.[768]

Inman and Magadju reason that victims have the right to an effective remedy and participation in criminal processes.[769] This is because the involvement of victims is recognised as a way of making criminal trials more relevant to specifically affected groups by cultivating a sense of accountability and ownership, by enabling their pain to be widely accepted, and by encouraging the discovery of reality.[770] Finding ways of reconciling the interests of society, the accused and the victim has always been a difficult endeavour. Human rights law, on its part, has tried to resolve this issue by emphasising that adherence to the rule of law and the right to fair remedies require the right of victims to take part in criminal proceedings, in particular in the prosecution of gross human rights violations.[771]

In South Africa, the rights of victims are protected by different Acts. For example, the Child Justice Act[772] protects the rights of children in conflict with the law. The Protection from Harassment Act 17 of 2011 protects victims from harassment by perpetrators of crime. The Children's Act 38 of 2005 promotes the protection, development, and well-being of children. The Domestic Violence Act 116 of 1998

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768 Cassell, Mitchell and Edwards 2014 *J Crim L & Criminology* 66 – 67.

769 Inman D and Magadju PM "Prosecuting international crimes in the Democratic Republic of the Congo: Using victim participation as a tool to enhance the rule of law and to tackle impunity" 2018 *AHRLJ* 293 – 318.

770 Inman and Magadju 2018 *AHRLJ* 299.

771 Inman and Magadju 2018 *AHRLJ* 316.

772 Child Justice Act 75 of 2008.

protects victims of domestic violence. The Older Persons Act 13 of 2006 protects the rights of older persons; it protects older persons against harm and distress.

This discussion indicates that there is a need in South Africa to put the "United Nations High Commissioner's Human Rights Standards and Practice for Police" in action.[773]

These guidelines need to be adopted. After adoption, commanders and supervisory officials are expected to issue clear standing orders and provide regular training on the protection of human rights, the rule of law, respect for constitutionalism, and respect for democracy. Remove from service any official who has been implicated in a human rights violation, pending the outcome of an investigation. All officials should receive entry-level and ongoing in-service training that focuses on human rights, the rule of law, and democracy.[774]

It is expected that the SAPS will implement the guidelines in order to meet the requirements of constitutionalism, the rule of law, democracy, and human rights. Constitutionalism, the rule of law, human rights, and democracy are all principles that limit police power.

The guidelines support constitutional principles by restricting the actions of all police agencies. Thus, the SAPS is expected to adopt and follow these guidelines as well.

3.4.2 Control of the SAPS

Unlike in the previous order, in the new order, the SAPS is subject to supervision and control that is in line with democratic principles. In every organisation, accountability is a concept that ensures adequate monitoring and management. This does not exclude the South African Police Service.

Muntingh *et al* indicate that democratic elections do not guarantee clean administration, and emerging democracies are nonetheless plagued by human rights violations, nepotism, and corruption.[775] Accountability is divided into two dimensions: horizontal accountability and vertical accountability. This means that

773 UNHCR *Expanded pocket book* 2 – 64.
774 UNHCR *Expanded pocket book* 60 – 62.
775 Muntingh *et al* 2021 *Law, Democracy & Development* 121 – 147.

the government must be willing to restrain itself by establishing and maintaining independent public institutions to oversee its actions, demand explanations, and, when necessary, impose penalties on the government for improper and illegal behaviour. Horizontal accountability refers to the accountability that the state imposes on itself and the government. Vertical accountability refers to the authority that external institutions have over the government.[776]

According to Muntingh *et al*, in order to prove that their decisions and acts are logical, rational, and within their mandate, decision-makers must be able to publicly justify their judgments and actions.[777] Accountability and transparency will be meaningless unless there are mechanisms in place to sanction actions and decisions that violate the mandate. Accountability institutions must be able to exert control over the police. Impunity grows when the government and individuals are not held accountable.[778]

The following discussion exemplifies accountability in the South African Police Service following the establishment of democracy. This accountability is required to ensure transparency, accountability, and controllability.

3.4.2.1 Internal control

The National Commissioner is in charge of and manages the police service in accordance with national policing policy and the directives of the Cabinet member responsible for policing.[779]

The National Commissioner, with the endorsement of the Provincial Executive, appoints a man or woman as the Provincial Commissioner for the province; however, if the National Commissioner and the Provincial Executive are unable to agree on the appointment, the Cabinet member taking responsibility for policing must mediate between the parties.[780]

The Provincial Commissioners are in charge of policing in the provinces. They must annually report to the provincial legislature on policing in the province and must

776 Muntingh *et al* 2021 *Law, Democracy & Development* 138.
777 Muntingh *et al* 2021 *Law, Democracy & Development* 139.
778 Muntingh *et al* 2021 *Law, Democracy & Development* 139.
779 Section 207(2) of the Constitution.
780 Section 207(3) of the Constitution.

submit a copy of the report to the National Commissioner. Provincial Commissioners appoint Station Commissioners and Station Commissioners appoint Unit Commanders.[781]

According to Muntingh *et al*, the first and most important aspect of police accountability is holding individual officers accountable for their actions while performing their policing duties, particularly regarding their use of force, arrest practices, stop and search, interrogations, and treatment of people in custody.[782] Holding police organisations accountable for services given is the second aim of police accountability. Police management must guarantee that proper training, operational guidance, supervision, equipment, and infrastructure are in place in this respect. Institutional accountability encompasses external actors' scrutiny of police policy and operations and is thus inextricably tied to transparency and operations.[783]

3.4.2.2 Judicial control

The judiciary is also constitutionally and legally authorised to exercise control over the police to keep them within the requirements of the Constitution and the law. Individual police personnel can be held accountable by the courts. The following are some examples of how the judiciary can exert control over the police through legislation. The CPA, for example, requires that an article that can be confiscated by police be seized under a search warrant.

This is done to limit the police's ability to conduct illegal searches and seizures. According to the Act, an article referred to in section 20 of the CPA may only be seized by a search warrant issued by a magistrate or justice if it appears to such magistrate or justice from information obtained under oath that there are reasonable grounds for believing that any such article is in the possession or under the control of or upon any person or upon or at any premises within his jurisdiction.[784] If it appears to the magistrate or judicial officer presiding over criminal proceedings that any such article in the custody or under the control of any person or on or at any

781 Sections 207(4) – (5) of the Constitution.
782 Muntingh *et al* 2021 *Law, Democracy & Development* 121 – 147.
783 Muntingh *et al* 2021 *Law, Democracy & Development* 139.
784 Section 21(1)(a) of the CPA.

place is required in evidence during such proceedings, the judge or judicial officer may issue a search warrant.[785]

In this manner, the courts are protecting the rights and freedoms of the people. The applicants in the case of *Minister of Police and Others* challenged the constitutionality of section 13(7) of the South African Police Service Act 68 of 1995 (SAPS Act), which allows for the search and seizure of persons and items without a search warrant. The court ruled that section 13(7)(c) of the SAPS Act was unconstitutional and invalid because it violated the right to privacy. The court ruled that without a search warrant, the police are not permitted to search a private home or a person in a private home.[786]

The above case law indicates that control of the police by the judiciary is accomplished through criminal as well as civil law processes. Criminal courts accomplish this through sentencing and civil courts through holding police liable for civil damages.[787] For example, if the police arrest a person without a warrant in a charge that requires the police to get a search warrant before the arrest, they may be held accountable for damages.

According to the CPA, any magistrate or justice may issue a warrant for the arrest of any individual upon the written application of the attorney general, a public prosecutor, or a commissioned officer of the police, which specifies the suspected crime; which alleges that the person in respect of whom the application is made is known or is reasonably suspected to be within the area of jurisdiction of the magistrate within whose district or area an application to the justice for such warrant is made, or that the offence was not committed within such jurisdiction, but that the person in respect of whom the application is made is known or is reasonably suspected to be within such area of jurisdiction.[788]

In *Saliu*, the court decided that section 43 of the CPA (issue of warrants of arrest) applies to the issuing of warrants to arrest people accused of offences that are justiciable in South African courts. The arrest of people accused of committing

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785 Section 21(1)(b) of the CPA.
786 *Minister of Police and Others v Kunjana* 2016 2 SACR 473 (CC) [119(d)].
787 Sections 165(1) – (2) of the Constitution.
788 Sections 43(1)(a) – (c) of the CPA.

crimes in other jurisdictions is not covered by section 43 of the CPA.[789] This judgment restricts the police's power to use the warrant of arrest indiscriminately.

Muntingh *et al* note that the courts normally serve as a reactive institutional watchdog, judging on financial culpability and misbehaviour by police officers. Police actions are also subject to international accountability in two areas: state reporting to treaty monitoring organisations and communications submitted by aggrieved individuals to international monitoring mechanisms.[790]

3.4.2.3 Political control: the government, parliament, and institutions supporting democracy (Chapter 9 Institutions)

Democratic control over police is broad and includes politicians, government, parliament, institutions supporting democracy and civil society. Bruce and Neild[791] note that while democratic principles necessitate that governments have jurisdiction over the police, democratic policing also requires that police officers be shielded from undue political intrusion.[792]

According to Bruce and Neildt, one source of concern is the possibility of political meddling in individual cases, such as attempts to sway police decisions on investigations or arrests, as well as whether or not to bring charges against certain persons.[793] Political power should not be used to ensure the impunity of political allies by discouraging police investigations into them. This is not to suggest that political authorities should not scrutinise police operations; rather, they should do so after the fact, in order to assess policy execution and procedural accuracy, rather than to try to influence specific investigation and other operations outcomes.[794]

789 *Saliu v S* (2014/A262) 2015 179 (25 August 2015) 2 & 8 – 10.
790 Muntingh *et al* 2021 *Law, Democracy & Development* 140.
791 Bruce and Neild *The police that we want: A handbook for oversight of police in South Africa* 24.
792 Bruce and Neild *The police that we want: A handbook for oversight of police in South Africa* 24.
793 Bruce and Neild *The police that we want: A handbook for oversight of police in South Africa* 24.
794 Bruce and Neild *The police that we want: A handbook for oversight of police in South Africa* 24.

To control and manage the police service, the President, as head of the national executive, appoints a woman or a man as National Commissioner of the Police Service.[795]

At the national level, a civilian secretariat for the police service is in place, reporting to the Minister of Police. This secretariat assists the Minister of Police in overseeing police functions, drafting police policy, and other matters.[796]

The Minister of Police General BH Cele, MP stated in the foreword to the Civilian Secretariat for Police Service Annual Report (CSPS) that the CSPS is mandated to, among other things, exercise civilian oversight over the police service and provide strategic advice on legislation, policy, and strategy development. This is consistent with the vision of ensuring a transformed and accountable police service that reflects the democratic values enshrined in the Republic of South Africa's Constitution.[797]

The vision of the CSPS is to ensure:

> A transformed and accountable Police Service that reflects the democratic values and principles of the Constitution of the Republic of South Africa.[798]

The mission is:

> To provide efficient and effective civilian oversight over the South African Police Service for safer and more secure communities through community participation, legislation, and policy development.[799]

The Minister of Police is responsible for overseeing the police, as well as formulating and enforcing police policies and regulations.[800] For example, the South African Police Service is required to report to parliament's Portfolio Committee on Police[801] on the state of crime in the country and the results of the police annual plan. These accounting sessions are frequently attended by both the National Commissioner of Police and the Minister of Police.

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795 Section 207(1) of the Constitution.
796 Section 208 of the Constitution.
797 Civilian Secretariat for Police Service Annual Report 2019/2020 8.
798 Civilian Secretariat for Police Service Annual Report 2019/2020 17.
799 Civilian Secretariat for Police Service Annual Report 2019/2020 17.
800 Section 206(1) of the Constitution.
801 Section 206(8) of the Constitution.

In terms of political responsibility, each province has the authority to monitor police conduct; oversee the effectiveness and efficiency of the police service, including receiving police service reports; promote good relations between the police and the community; evaluate the effectiveness of visible policing, and consult with the Cabinet member responsible for policing.[802]

A province, as a political body, may investigate or appoint a commission of inquiry into any complaints of police inefficiency or a breakdown in relations between the police and any community. It may also make recommendations to the Cabinet member responsible for policing, in this case, the Minister of Police.[803]

An impartial police complaints body created by national statute shall investigate any alleged misconduct or infraction committed by a member of the police service in the province after receiving a complaint from the provincial administration.[804] This body is called the Independent Police Investigative Directorate (IPID).[805] The vision of the IPID is to ensure:

> An effective independent investigative oversight body that ensures policing that is committed to promoting respect for the rule of law and human dignity.[806]

The mission of the IPID reads as follow:

> To conduct independent, impartial, and quality investigations of identified criminal offences allegedly committed by members of the South African Police Service (SAPS) and Municipal Police Services (MPS) and to make appropriate recommendations in line with the IPID Act, whilst maintaining the highest standard of integrity and excellence.[807]

The IPID Act empowers the IPID to investigate the following: any death in police custody; any death as a result of police actions; complaints relating to the discharge of an official firearm by any police officer; rape by a police officer, whether on or off duty; rape of any person in police custody; complaints of torture by police; and

802 Section 206(3) of the Constitution.
803 Section 206(5) of the Constitution.
804 Section 206(6) of the Constitution.
805 See Independent Police Investigative Directorate Act 1 of 2011.
806 Independent Police Investigative Directorate Annual Report 2019/2020 17.
807 Independent Police Investigative Directorate Annual Report 2019/2020 17.

complaints of assault by police.[808] It is also authorised to investigate systemic corruption where members of the SAPS are involved.[809]

During the fiscal year 2019/2020, the IPID conducted the following investigations as part of its oversight duties: the number of cases relating to death in police custody: 174; the number of cases relating to death as a result of police actions: 141; the number of rape cases by a police officer: 90; the number of rape cases while a person was in police custody: 8; the number of cases relating to the torture of persons: 62.[810]

Muntingh *et al*, correctly notes that individual police officers can be held accountable through internal and external oversight systems.[811] Aggrieved individuals should be allowed to file complaints against police officers, which should lead to internal or external inquiries or investigations by authorities who are empowered and resourced to do so. Individual accountability systems outside of the organisation should be able to make recommendations for internal disciplinary action or criminal prosecution against the police. Public participation, including the media, must be able to help hold police officers accountable at both individual and institutional levels.[812]

According to Bruce and Neild, oversight groups dedicated to long-term police reform and the establishment of high-quality policing can promote and maintain police commitment to reaching the democratic norms that are expected of them.[813] Supporting police leadership in recognising and resolving the difficulties they encounter is at the heart of effective monitoring and accountability. In order to do so, oversight groups will need to develop relevant methods for assessing police performance. They must be aware of the key concerns to be investigated as well as the information required to assess police and policing.[814]

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808 Section 28(1) of the Independent Police Investigative Directorate Act 1 of 2011.

809 Section 28(2) of the Independent Police Investigative Directorate Act 1 of 2011.

810 Independent Police Investigative Directorate Annual Report 2019/2020 29.

811 Muntingh *et al* 2021 *Law, Democracy & Development* 121 – 147.

812 Muntingh *et al* 2021 *Law, Democracy & Development* 139 – 140.

813 Bruce and Neild *The police that we want: A handbook for oversight of police in South Africa* 8.

814 Bruce and Neild *The police that we want: A handbook for oversight of police in South Africa* 8.

The Constitution also creates several state institutions supporting constitutional democracy. These are institutions, such as the South African Human Rights Commission (SAHRC),[815] the Public Protector,[816] the Commission for Gender Equality,[817] and the Commission for Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.[818]

The vision of the SAHRC is to "transform society, secure rights, and restore dignity".[819] The mission is:

> To support constitutional democracy through promoting, protecting, and monitoring the attainment of everyone's human rights in South Africa without fear, favour, or prejudice.[820]

In its overview of institutional performance for the fiscal year 2019/2020, the SAHRC stated that ongoing violations of human rights in the country remain an endemic challenge in society. During the 2019/2020 fiscal year, the Commission had to deal with 11 000 cases. Based on the top five complaints filed with the Commission, the key human rights concerns include equality rights: section 27 (health care, food, water, and social security); just administration action; labor relations; and human dignity. In terms of equality rights, most complaints were received on the issue of racism. Aside from the top five complaints, other issues raised by complainants have included the right to education, arrested, detained, and accused persons, as well as housing and children.[821]

The Commission received the greatest number of complaints relating to violations of "the right to equality", which were reported as follows: Quarter 1 of the year received 501; Quarter 2 of the year received 619; Quarter 3 of the year received 744, and Quarter 4 of the year received 827; total received for the year is 2 691.[822] The rights of those who have been arrested, detained, or accused have been violated as a result of police action.

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815 Section 184(1)(a) of the Constitution.
816 Section 182(1)(a) of the Constitution.
817 Section 187(1)(a) of the Constitution.
818 Section 185(1)(a) of the Constitution.
819 South African Human Rights Commission Annual Report 2019/2020 (hereinafter SAHRC Annual Report 2019/2020) 5.
820 SAHRC Annual Report 2019/2020 5.
821 SAHRC Annual Report 2019/2020 11.
822 SAHRC Annual Report 2019/2020 27.

The purpose of the above-mentioned commissions is to prevent the state from abusing control over its subjects. They serve as a watchdog for government action and maintain respect for constitutional democracy, the rule of law, and the separation of powers, by ensuring that the state recognises, safeguards, supports, and fulfils the rights inherent in the Bill of Rights. They support constitutional democracy. This is a checking and balancing exercise.

3.5 Conclusion

According to the discussion above, the South African Police Force has transformed to function in a democratic order. Its power is properly limited to make sure that it operates according to democratic principles. What must be done is to put all democratic policing principles into action. Management systems in the police will rectify and modify bad behaviour if the police are sufficiently trained and equipped, motivated, and unbiased, have democratic influence, and are subjected to enough community outcry to do their job.

The following chapter looks into the South African Police Service in the new regime and the law enforcement challenges that the police face under the 1996 Constitution. The goal is to find solutions to improve democratic policing to promote rights and freedoms in a constitutional democracy.

Chapter 4: The South African Police Service and law enforcement challenges under the 1996 Constitution

4.1 Introduction

The SAPS was transformed from a force to service in 1994. As a result of this transformation, police officers are now required to act democratically, in accordance with the Constitution, the rule of law, and human rights. Parliament is no longer supreme; instead, the Constitution is. The police cannot simply enforce the law passed by parliament without considering the consequences of doing so. This chapter investigates the unique challenges that the police face under the 1996 Constitution.

4.2 The SAPS and challenges related to respect for constitutionalism, the rule of law, and human rights

The Constitution requires the state and all of its organs to adhere to the principles of constitutionalism, the rule of law, and human rights. In support of this approach, the United Nations Office of the High Commissioner for Human Rights (UNOHCHR) developed guidelines that all police forces around the world must follow to successfully respect rights and freedoms.[823] According to the High Commission, because international human rights law is binding on all states and agents, including law enforcement officials, police officials are required to know and apply international human rights standards.[824]

For the reasons stated above, the SAPS must adapt quickly to implement approaches that respect the Constitution, the rule of law, and human rights. It is for the same reason that legislation that is impeding police operations must be addressed as soon as possible. This is discussed further below.

4.2.1 Respect for constitutionalism and the rule of law

In the previous era, there were constitutions but no constitutionalism. As a result, there was no constitutionalism in place for police to follow. Because there was no

823 UNHCR *Expanded pocket book* 1 – 62.
824 UNHCR *Expanded pocket book* 1.

equality, the rule of law did not treat the population equally. Because they had no choice, the police enforced the unjust rule of law.

There is constitutionalism and the rule of law in the new administration. Because the police are part of the executive branch of government, constitutionalism implies that they are also bound by the Constitution and must uphold the rule of law. Police failure to respect the rule of law is equivalent to a violation of human rights. The classic example in this regard is the case of *Raduvha.*[825] This case indicates the absence of respect for human rights by police through unlawfully arresting and detaining a minor with her mother without complying with the provisions of section 28 of the Constitution.[826]

The rule of law requires that government organs, such as the police carry out their duties in accordance with the law. Every action taken by the police must be authorised by law. The conduct of police can be declared illegal if it does not comply with the law. This is yet another challenge for the police. In order to combat crime, they sometimes break the law and fail to follow the rules of the law. In the case of *De Klerk*, for example, a police official who was investigating a case of assault with intent to do grievous bodily harm arrested and detained De Klerk.

The Court found that the charge was actually common assault and a warrant of arrest, as required by section 43 of the Criminal Procedure Act (CPA) was required to do the arrest. The police were ordered by the court to pay damages for De Klerk's unlawful arrest and detention as this resulted in the violation of the right to freedom of De Klerk.[827] This suggests that there is still a long way to go before the police fully comprehend the steps that must be taken to avoid human rights violations and respect for the rule of law.

4.2.2 Respect for democracy

Democracy is a form of governance in which people have rights and freedoms and are free to participate in government activities. In this system, the police are expected to understand that members of the public have specific rights and

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825 *Raduvha* [55].
826 *Raduvha* [55].
827 *De Klerk v Minister of Police* 2020 1 SACR 1 (CC) [1] – [3] & [117].

freedoms that they are free to exercise. The police are not permitted to infringe on these rights and liberties. They are not permitted to limit those entitlements unless authorised by law.

Police officers must conduct themselves in such a way that the public respects and accepts them as their law enforcement agency. The public's acceptance of the police reflects their legitimacy. The relationship between the public and the police improves when the public accepts the police as their legitimate law enforcement agency. This improvement in the relationship makes it easier for the public and the police to work together, and the public provides the police with the necessary support in the fight against crime.

During the previous administration, the police did not respect democracy. This is because democracy did not exist in any form. This assertion is supported by the case that resulted in the conviction and sentence of the late President Nelson Mandela and his co-accused for alleged sabotage. They were apprehended by the police, put on trial, and sentenced. Former President Nelson Mandela was imprisoned for 27 years. The reason for their arrest was that they were attempting to be recognised as citizens of the country, who should be permitted to participate freely in democratic activities of the government.[828] This case indicates that, during those years, there was no democracy at all. Only whites were freely participating in government activities through their votes.

In the current regime, the Constitution, through its Bill of Rights, obligates the police to respect democracy. This is taken from the Preamble to the Constitution, which states:

> We, therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to heal the divisions of the past and establish a society based on democratic values, social justice, and fundamental human rights.[829]

When one examines the language in the Preamble, it becomes clear that the police must also participate in "healing the divisions of the past". This can be accomplished

828 Memory of the World Register Criminal Court Case No. 253/1963 (*S v Mandela and Others)* Ref No 2006-25 at 4.

829 Preamble of the Constitution.

by treating everyone equally and without discrimination. They can do this by operating outside of political influence. This can be accomplished by responding quickly to community needs. This can be accomplished by treating all racial and ethnic groups, including minorities, in a non-discriminatory manner. They will be upholding and supporting democratic values if they succeed in this. They must make sure that social justice is upheld. Human rights must be respected by them.

The following demonstrates that police in the current regime respect democracy: when people have been permitted to march in order to present a memorandum of their grievances to the authorities, police do not prevent them from doing so. Police permit the marching of people and ensure that the rights of those who are not marching are not violated.

When elections are held, police make sure that those who want to participate can do so in a peaceful environment without being intimidated by those who do not want to participate. When members of one political party destroy the posters of another political party in order to prevent it from campaigning during the elections, the matter is investigated, and the wrongdoers are identified and arrested for prosecution purposes. This is done to ensure that everyone can freely vote in the elections.

According to the United Nations High Commission Standards, police officers must respect and protect human dignity, as well as maintain and uphold the human rights of all people.[830] When the police comply with respect for human rights, they promote and respect democracy.

4.2.3 Respect for human rights of suspected, investigated, accused, arrested, and detained persons

All people who are facing criminal charges have the right to be protected by the Constitution. Police must respect these rights. The challenge is that, currently, there is no provision in the Constitution to protect the rights of someone who is a suspect but has not yet been arrested. A person's rights are protected under section 35 of

830 UNHCR *Expanded pocket book* 2.

the Constitution.[831] In the previous dispensation, some of these rights were protected by the Judges' Rules and common law as there was no Bill of Rights.

The law of general application that will be discussed in this section is the pre-trial criminal procedure, more specifically the sections that deal with the rights of the suspect, arrested, and detained person. This will include search and seizure, focussing on sections 20, 21, 36A, and 37 of the CPA.

4.2.3.1 Intrusive search and seizure on non-consenting persons

In practice, it happens that during incidents when serious crimes, such as robbery are committed, police are called upon to respond to a robbery that is taking place or is in progress. In most cases when the police arrive at the crime scene, the perpetrator of the crime or suspect shoots at the police. The police then respond by returning fire. It might happen that during cross-firing between the suspect and the police, the suspect is shot by the police but manages to flee.

At a later stage, information may be received from sources, clearly indicating who the suspect is. The source may also inform the police that the spent bullet is trapped in the flesh of the person, but the source may not be prepared to give an affidavit to support the allegations. In other words, the source may want to remain anonymous.

The spent bullet that is trapped in the flesh of the person then becomes part of the evidence that needs to be seized by the police for investigation. This means comparing the spent bullet with the firearms of the police that were involved in the cross-firing with the suspect. In plain language, the body of the suspect is a crime scene, since the evidence, a spent bullet, is trapped in the body of the suspect. This type of evidence is called expert or scientific evidence. The Criminal Procedure Act authorises that this type of evidence may be seized by the police.[832]

Although the evidence meets the criteria of articles that may be seized by the state or police as evidential material to prove a case, the following is the challenge: Which law authorises the police to seize the spent bullet that is trapped in the body of the suspected person for investigation purposes? The CPA is silent about this aspect.

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831 Sections 1 – 3 of the Constitution.
832 Section 20 of the CPA.

Therefore, no law authorises the spent bullet that is trapped in the body of the suspect or arrested person to be taken out of the body of the person through surgery by a medical practitioner if the person does not give consent. The challenge is, how will the police seize the exhibit or evidential material for investigation purposes? The possibility is that if the police instruct a medical practitioner to remove the article without the consent of the suspect, the police will be violating the constitutional right of the suspect, namely the right to freedom and security of the person[833] and the right to privacy.[834] There is also no law that authorises the police to approach the court and request that authority is granted for the performance of surgery to remove the exhibit. The only ground that can be used is the common law principle of "reasonable suspicion" and this does not empower the police sufficiently.

The term "comparative search" that is defined in section 36A(1)(f) of the CPA does not include conducting surgery on a person. A medical procedure or surgery does not fall within the meaning of search or ascertainment of bodily features as understood in the CPA. The cases discussed below confirm this challenge and unfortunately, they contradict each other in their ruling.

In the case of *Gaqa,* the applicants applied for an order compelling the respondent to submit himself to an operation for the removal of a spent bullet from his leg. The respondent opposed the application, but the court granted the application.[835]

The facts in the case of *Gaqa* above were similar to the case of *Xaba,* but the court rejected the application in the case of *Xaba*. In the case of *Xaba*, the court found that the case of *Gaqa* was wrongly decided. The court indicated that this decision should not be followed. The reason is that the court did not agree with the reasons that informed the decision in the case of *Gaqa*. In other words, the Court was of the opinion that the police cannot use section 27 and section 37(1) of the CPA as authority to request the court to authorise a medical practitioner to take out an exhibit, in this case, a spent bullet, from the flesh of a non-consenting perpetrator of crime through surgery.[836] The challenge is determining which legislation the police

833 Section 12(2)(c) of the Constitution.
834 Section 14 of the Constitution.
835 *Gaqa* 10 – 11.
836 *Xaba* 1 – 3.

must use in the execution of their duties. This challenge has not yet been settled by the legislature, the SCA, or the CC.

Police powers in section 37(1)(c) or 37(3) of the CPA do not empower the police to deal with this challenge. Such legal uncertainty and conflicting decisions have a negative impact on effective policing and need to be corrected by the legislature or settled by the CC.

The challenge discussed in the case of *Gaqa* and *Xaba* above was also experienced by the US Court in the case of *Lee.*[837] In the case of *Lee,* the Court highlighted consideration of factors, such as medical risk during the surgery, compelling factors, and whether there was other evidence that could be used to prove the case. According to the Court, if there were no compelling reasons to take out the exhibit it would be unreasonable to continue with surgery. The position of the exhibit in the body of the person is also a particularly important factor; for instance, the Court highlighted that it would be risky to take out the exhibit, as it was situated in the chest. This indicates that in the USA, circumstances and all other relevant factors will give direction as to which steps should be taken.[838]

This judgment indicates that the court weighs the interests of the accused against the interests of the community, considering the rights of the accused. The court also weighs the risk involved in the removal of the exhibit (real evidence). The constitutionality of removal of real evidence from the body of the arrested or accused person is currently unclear in South Africa. The researcher's view is that the approach of the *Xaba* case is in line with the Constitution and should be followed. The gap in the legislation should be bridged by the legislature. The word "search" must be clearly defined in the CPA and must include surgery or another procedure by a medical practitioner.

4.2.3.2 Respect of rights and freedoms

This part investigates the right to innocence, the right to freedom of expression, the right to freedom of association, and the right to freedom of assembly.

837 *Winston v Lee* 470 US 753 (1985).
838 *Winston v Lee* 470 US 753 (1985).

The right to "innocence" is guaranteed by the Constitution. The Constitution specifically provides these rights to anybody arrested, incarcerated, or facing charges in a court of law. This person has the right to be presumed innocent until a court of law finds him or her guilty and the police must respect that.[839]

When conducting an investigation, the police must always interview a person who has been involved in the commission of a crime while keeping in mind the person's right to silence and the right to be presumed innocent. This right must be respected at all times by the police. Respect for the right to innocence includes police respecting the individual's right to remain silent. This means that the police cannot impose any kind of pressure on a person to talk, no matter how minor that pressure is and regardless of the method used by the police to coerce the person into speaking. Coercing a person to speak is violating the person's right to silence, thus violating the right to innocence.

In the case of *Matlou*,[840] the evidence presented by the state during the accused's trial was rejected by the court because it was obtained through police assault on the accused. The court's decision is based on the fact that this evidence violates the accused's right to silence, making it unconstitutional and invalid. To show that the court does not approve the conduct of the police (assault on the accused to make him speak and confess) the sentence on the accused was set aside.[841]

The right to "freedom of expression" is guaranteed by the Constitution. Sometimes the public express their right to freedom of expression violently, and sometimes in a peaceful manner. At any moment when police are dealing with the public, whether it is during the investigation of an alleged crime or policing of protest actions, they must remember that the public has the "right to freedom of expression".[842]

The public has the right to express their dissatisfaction with specific government actions. However, when exercising their rights, members of the public must also respect the rights of other members of the public who are not members of the concerned group. They also have the right to express whether or not they want to

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839 Sections 35(1)(a) and 35(3)(h) of the Constitution.
840 *S v Matlou and Another* 2010 2 SACR 342 (SCA) (hereinafter the *Matlou* case).
841 *Matlou* 1 – 11.
842 Section 16(1) of the Constitution.

talk when the police question them as part of an investigation into a criminal offence. This is because South Africa is a democratic country in which citizens can participate in government activities. People voted for the government, and they expect their representatives in parliament, provincial government, and local government to hear their concerns and meet their demands.

During criminal investigations, the people have the right to express whether they want to explain anything or not. In other words, police officers must respect the right to free expression, whether expressly or silently. Freedom of expression does not include propaganda for war, incitement of imminent violence, or advocacy of hatred based on race, ethnicity, gender, or religion, which constitutes incitement to cause harm.[843]

Freedom of expression can be interpreted in a variety of ways. For example, if a person is dissatisfied with the way government services are delivered, he or she can express his or her displeasure by protesting or marching and delivering a petition to government representatives. This is a way of communicating with the government. A person who is being detained, on the other hand, may express himself by refusing to answer questions from a police officer. This is his way of saying he does not want to answer the police question relating to the alleged offence. The other person may choose to expressly respond to the question posed to him. Freedom of expression requires that this choice be done freely, with no undue police pressure or coercion.[844] The Constitution orders the police to respect these choices.[845]

The Constitution protects the right to freedom of association,[846] and the right to freedom of assembly.[847] The police are ordered by the Constitution to respect these rights.[848] The former regime did not permit freedom of association. Africans were not permitted to affiliate with political parties of their choosing. People were not allowed to gather and express their displeasure with the government's illegal activities. That is legal under the present situation.

843 Section 16(2) of the Constitution.
844 *Matlou* 1.
845 Section 7(1) – (2) of the Constitution.
846 Section 18 of the Constitution.
847 Section 17 of the Constitution.
848 Section 7(1) – (2) of the Constitution.

The right to freedom of association was confirmed by the court in the case of *Mlungwana.*[849] In this matter, the applicants argued that section 12(1)(a) of the Regulation of Gatherings Act 205 of 1993 is unconstitutional because it criminalises the act of anyone who fails to give notice or gives inadequate notice when convening a gathering. The HC ruled that this section was unconstitutional because it violated section 17 of the Constitution's guarantee of the right to assemble.[850] The declaration of invalidity issued by the HC was confirmed by the CC.[851] In this manner, the CC confirmed the need to respect human rights.

The SAPS Annual Report for 2019/2020 details the scope of crowd-related protest incidents across the country. The Police Department's Public Order Policing is in charge of managing this. For example, 12 244 crowd-related situations were effectively stabilised in the fiscal year 2019/2020. There were 8 608 peaceful incidences out of the total of 12 244. There were 3 636 unrest-related instances out of the total of 12 244.

Peaceful crowd-related incidents were reduced by 2 823 instances over the previous fiscal year. The number of instances involving civil unrest has reduced by 890.[852] These figures show that the police are respecting the right to assemble and the right to freedom of association as they police these incidents to recognise people's rights to protest, demonstrate, and picket. However, in some cases where the crowd gets out of hand, police are forced to respond and sometimes people are seriously injured and some, unfortunately, get fatally wounded.

The United Nations High Commission for Human Rights (UNHCR) provides guidance on how police should restore order when the public expresses itself through disorderly behaviour. It states that all measures to restore order must respect human rights. The restoration of the order must be accomplished without discrimination. Any restrictions on rights shall be limited to those imposed by law. Any action taken and any restrictions on rights must be solely to ensure respect for

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849 *Mlungwana and Others v The State and Another* 2019 1 SACR 429 (CC) (hereinafter the *Mlungwana* case) 2 – 4.
850 *Mlungwana* 43 – 44 [104].
851 *Mlungwana* 47 [112].
852 South African Police Service Annual Report (hereinafter SAPS Annual Report) 2019/2020 153 – 154.

the rights and freedoms of others, as well as meet the just requirements of morality, public order, and the general welfare.[853]

4.2.4 Social, economic and cultural rights

It will be a huge mistake to overlook the fact that failure by the government to protect and promote social and economic rights can contribute to crime. These rights are based on a person's role as a member of society.[854] If the government, including the police as the executive branch, does not respect and promote these rights, the negative consequences of non-governmental action spill over into the community, resulting in criminal acts and, as a result, police intervention and involvement. For example, if the country's economy does not develop sufficiently to accommodate all of its citizens, some people will be unemployed. Unemployment leads to hunger and starvation. Hunger and starvation drive some other people who lack the initiative to seek alternative means of subsistence to turn to crime.

The indicators in this regard are "foreigners" who have been attacked and their property been destroyed by citizens who claim that the foreigners are stealing their jobs. This is something that the government must avoid at all costs. These rights require positive action through the enforcement of substantive responsibilities on the government. The granting of social rights provides someone with goods and services he would otherwise not enjoy.[855] These rights should be applied based on democratic values and principles of responsiveness, transparency, and open government.[856]

Liebenberg points out that incorporating social and economic rights as justiciable rights into the Constitution was the result of a period of struggle to acknowledge the social and economic aspects of human dignity, liberty, and equality.[857] Social and economic rights were seen as crucial to an integrated, inclusive Bill of Rights that would represent the interests and desires of everyone. It was hoped that these rights would improve participatory democracy, and that oppressed citizens would be able

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853 UNHCR *Expanded pocket book* 28 – 29.
854 Mubangizi 2004 *AHRLJ* 95.
855 Bossuyt M *International human rights protection balanced, critical, realistic* (Intersentia Ltd Cambridge 2016) 20.
856 Garcia HA, Klare K and Williams LA *Social and Economic Rights in Theory and Practice: Critical Inquiries* (Routledge New York 2015) 179.
857 Liebenberg *Socio-economic rights adjudication under a transformative Constitution* 20 – 21.

to question pronouncements that adversely affect their social and economic well-being. These rights would give the state a direct mandate to implement legislation and programmes that are aimed at achieving equitable distribution of social and economic resources to marginalised communities.[858]

This has not yet occurred to the satisfaction of the people of South Africa, which is why you still find people sitting on street corners looking for work. That is why the South African government continues to provide survival grants to unemployed citizens.

The SAPS Annual Report for 2019/2021 shows an alarming number of theft and robbery cases. The following are the statistics for the financial year 2019/2020: robbery at residential premises is 21 142 cases; robbery at non-residential premises 20 661 cases; theft 284 131 cases.[859] These crime statistics indicate a society that is faced with serious social and economic problems. The root causes of this must be addressed and one of those root causes is unemployment and poverty. This is not something that can be addressed through policing but has an impact on the increase of crime.

The above argument is based on the fact that people who are employed are less likely to engage in criminal activity, such as theft because they have a means of subsistence. People who are employed will not easily resort to a crime, such as a robbery because they are aware of the high risk of being killed in the robbery.

A Constitution guaranteeing social and economic rights will take seriously the concept of citizenship. This is based upon the idea that each citizen should enjoy the necessary material entitlements and non-material provisioning. This is to enable a person both to flourish and participate as an active citizen in the shaping of his or her society.[860] This includes participating in the social and economic development of the country like government granting farmers loans to farm, small business loans to start a business, and free education for training people in business and farming.

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858 Liebenberg *Socio-economic rights adjudication under a transformative Constitution* 21.

859 SAHRC Annual Report 2019/2020 130.

860 Garcia HA Klare K and Williams LA *Social and economic rights in theory and practice critical inquiries* (Routledge New York 2015) 212.

These will alleviate a lot of unemployment and poverty challenges, thus contributing to the reduction in crime.

The police contribute to the respect for social and economic rights by ensuring that farmers' stock is not stolen and that farmers are not attacked on their farms, by making certain that people are not robbed in their homes, by ensuring that business owners are not attacked at their places of business, and by ensuring that no one steals from others' businesses in the name of poverty or unemployment.

King[861] argues that the word "social rights" can be used as follows in at least five separate ways: (1) Social human rights are human rights about which philosophers talk, rights people possess as a matter of political ethics, and the essence of which does not depend on any legal recognition. (2) Social citizen rights are universal rights created by some concept of distributive justice, but which may be limited to specific populations and therefore usually go beyond the minimalist or social human rights. (3) International social rights are the global civil rights that are specifically designed to reflect people's social human rights. (4) Legislative social rights are rights embedded in law and enforced before the courts and tribunals in ordinary public law. (5) Constitutional social rights are written in constitutions and can be considered legitimate or unjustifiable.[862] According to King, constitutional social rights are an institutional means of protecting social human rights and social citizenship rights that a community can include among its commitments.[863]

These rights are protected by the Covenant in the international arena.[864] The Covenant indicates that there is a right for all people to self-determination. They determine their political status freely by virtue of that right and pursue their economic, social and cultural development freely.[865] Each state party to the Covenant undertakes to take the best possible steps, independently and through global support and cooperation, in particular economic and technical, to gradually

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861 King J *Judging social rights* (Cambridge University Press New York 2012) 18.
862 King *Judging social rights* 18 – 19.
863 King *Judging social rights* 20.
864 ISESCR. Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200 A (XXI) of 16 December 1966, entry into force on 3 January 1976, in accordance with Article 27. The Republic of South Africa signed the Covenant on 3 October 1994 and ratified it on 12 January 2015. Date of entry into force in South Africa 12 April 2015.
865 Article 1 of the ISESCR.

achieve the full realisation of the rights recognised in this Covenant by all appropriate means, including, in particular, the adoption of legislative measures.[866]

The Committee on Economic, Social, and Cultural Rights (CESCR)[867] developed a "minimum core" as a measure of ensuring that state parties comply with the enforcement of rights. This "basic core" demands that each state party fulfil the minimum core duty by ensuring that a certain necessary standard of social and economic rights is met. Each state has a minimum core obligation, to ensure the satisfaction of at least the minimum essential levels of each of the rights. For a "minimum core" compliance, the Committee stated that, in the following circumstances, a state party will fail to fulfil its obligations where a substantial number of people are (1) deprived of essential food; (2) deprived of vital primary health care; (3) deprived of basic necessities as well as housing; and (4) deprived of basic education. The four circumstances mentioned above are, *prima facie*, the state party's failure to fulfil its obligations under the Covenant.[868]

In summary, the Committee regards essential foodstuffs, health care, housing, and education as a "minimum core" that every state must provide to its citizens. However, the Committee accepted that any evaluation of whether a state has fulfilled its minimum core obligation shall also take account of the resource constraints in that state.

Article 2(1) requires each state party to take steps that are necessary and also use its resources up to the maximum. In circumstances where a state party wants to be able to correlate its inability to meet its minimum core obligations with a lack of available resources, it must demonstrate that every attempt has been made to use all available resources to satisfy certain minimum obligations as a priority.[869] Within the four elements of the minimum core, the main challenges facing South Africa are health, housing, and education.

866 Article 2(1) of the ISESCR.
867 CESCR *General Comment No 3: The Nature of States Parties' Obligations (Art 2 Para1, of the Covenant)* adopted at the Fifth Session of the CESCR on 14 December 1990 (hereinafter the CESCR *General Comment No 3*).
868 CESCR *General Comment No 3* [10].
869 CESCR *General Comment No 3* [10].

The Committee emphasises that even though the available resources are insufficient, state parties still have a duty to strive to ensure that the applicable rights are exercised as widely as possible under the prevailing conditions. However, resource constraints do not negate the responsibilities to check the degree of realisation of rights and to formulate strategies and programs for their promotion.[870] This indicates that resource constraints cannot always be raised by the state as reasons for non-compliance when it comes to the promotion of these rights.

Furthermore, the Commission submits that concerning justiciable rights, amongst the interventions that could be considered acceptable except legislation to protect and promote the rights, we need judicial remedies. Even in periods of extreme resource constraints, whether caused by an economic recession adjustment process or by other causes, vulnerable members of the social order can and must be covered by the implementation of relatively low-cost services.[871]

This indicates that protection and enforcement of economic, social, and cultural rights cannot be postponed or suspended until the state has sufficient funds; progressive realisation of resources must continue. Of importance is that the Committee indicates that the phrase "to the maximum of its available resources" was used by the Convention’s drafters to mean "resources that are present within the state including those of the international community which can be obtained through international cooperation and assistance".[872]

This indicates that during the assessment of obligations by the courts, the courts have to establish whether the state has taken appropriate legislation steps and other initiatives to enforce the rights, including the use of resources that might be of assistance from the global community. The courts have to play a crucial role in assessing whether state parties comply with the convention.[873]

Relating to the promotion of the rights in the country, the courts will have to consider sections 25(5), 26(2), and 27(2) of the Constitution to assess reasonable legislative and other actions engaged in by the government in achieving the rights. When

870 CESCR *General Comment No 3* [11].
871 CESCR *General Comment No 3* [12].
872 CESCR *General Comment No 3* [13].
873 Article 2(1) of the ISESCR.

looking at the recommendations of the Committee,[874] one is tempted to say that the courts in South Africa should assess the degree to which government bodies responsible for promoting economic and social rights use external resources to promote people's rights. The recommendations of the Committee indicate that it is aware that state parties cannot rely on only their own resources. This will also serve as a mechanism to ensure that external donations are not used carelessly and for incorrect reasons.

King refers to the "minimum core" as "the social minimum".[875] He indicates the following as "core human interests" for the protection of social rights: (1) "well-being", that is the lack of physical pain, the pillar of humanity; (2) "autonomy", which is a dream of individuals directing their own destiny to some extent and shaping it through succeeding decisions throughout their lives; and (3) "social participation", which is a significant opportunity for social and community engagement. According to him, if these interests are for social human rights claims and obligations, then they must enable claims for resources for a minimally decent life.[876]

Minimal respect for the values of autonomy, well-being, and social participation will call for delivery of a package of resources satisfying the following: (1) a strong survival threshold that meets basic physical necessities for food, childhood development, nutrition, and mental integrity; (2) a social participation threshold that would ensure adequate education for necessary economic and social engagement, economic shock coverage and the resources required for minimal social interaction with family and peers; and (3) an agency threshold requiring the education and economic stability required to engage in basic life planning in a particular society. The capacity to frame and achieve long-term goals.[877] The "social minimum theory" of King confirms the "minimum core" of the UN.[878]

When it comes to basic duties in respect of a "social minimum", King argues that the duties of the state will be to respect, meaning showing restrain; to protect, meaning regulating third-party invasion and to fulfil, meaning to provide social rights

874 CESCR *General Comment No 3* [13].
875 King *Judging social rights* 29.
876 King *Judging social rights* 29.
877 King *Judging social rights* 29 – 30.
878 CESCR *General Comment No 3*.

directly.[879] In the case of the police, respect for social and economic rights is exemplified by the protection of people's property, such as businesses, farms, and homes, as well as moveable property, from being looted and invaded by others.

South Africa protects socio-economic and cultural rights under sections 26, 27, 30, and 31 of the Constitution. These rights are addressed progressively[880] by the state. Currently, socio-economic rights need a lot of attention because of different challenges, such as unemployment, poverty, housing, health, education, safety, and security. Without employment, people remain poor, and poverty increases from bad to worse. Due to unemployment and poverty, people are unable to obtain houses if the government is not in a position to provide free housing.

People cannot pay for their medical expenses if the government is not in a position to provide quality health care, and people cannot pay their own fees for education if the government cannot provide free education. Investors' confidence drops if the country is not safe and secure. These rights are interrelated and affect one another. Unfortunately, the government is exceedingly slow in progressively achieving these rights.

The Human Rights Commission of South Africa confirms this situation in its Annual International Report.[881] In this report, the Commission indicates that several high-profile cases involving the right to housing took place during 2012. This situation highlights the weaknesses of the existing housing stock in South Africa, especially in cities where rapid and ongoing urbanisation puts pressure on the already strained resources. The Committee stated that at least 10 percent of the 50 million people living in urban informal settlements in South Africa in 2012 amounted to more than 1.2 million households. Often, these informal settlements do not have basic services, such as electricity and sanitation. Their inhabitants are vulnerable to factors, such as disease and shack fires. Women are vulnerable to abuse, as the streets and houses where they live do not have lights, thus inadequate safety is a serious threat. Most of the dwellings in these informal settlements do not meet a

879 King *Judging social rights* 35 – 36.
880 In this regard see sections 26(2) and 27(2) of the Constitution; *Soobramoney v Minister of Health (KwaZulu-Natal)* 1997 12 BCLR 1696 (CC).
881 SAHRC Annual International Report 2012.

minimum housing standard in accordance with the right to live safely, peacefully, and with dignity.[882]

The Committee points out that the lack of sufficient government housing, the high incidence of informal settlements and squatting, coupled with development and urban regeneration means that informal communities are often on a collision course with local authorities whereby forced evictions remain a prominent problem.[883] The Committee illustrated cases in support of the social and economic challenge of housing, such as *Schubart Park Resident Association and others*.[884] The Court in *Schubart* ruled that the 5 000 tenants who had been summarily evicted from a block of flats that had been deemed unsafe and unfit for housing when there was no court order had to be temporarily re-housed at the expense of the municipality during the reconstruction of the building.

In the lawsuit of *Moonlight*,[885] the Court concluded that the City was compelled to provide reasonable alternative accommodation for expelled citizens. The Court also found that the city violated its obligation to provide adequate housing progressively. The Court found the City's housing policy unconstitutional. Furthermore, the Court found that the City had to put contingency policies and procedures in place in case people were expelled from their own or private buildings.

The Commission concluded its report by making the following recommendations: government should develop schemes to address the high unemployment rate;[886] government should explore how to gradually develop a housing policy to shift to a place where as many people as possible are housed in permanent structures properly and safely;[887] the Department of Human Settlement needs to develop a minimum standard for adequate housing and implement policies that resolve all informal settlements, whether from pre-or post-1994.[888]

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882 SAHRC Annual International Report 2012 31.
883 SAHRC Annual International Report 2012 32.
884 *Schubart Park Residents Association and others v City of Tshwane Metropolitan Municipality and another* 2013 1 BCLR 68 (CC) (hereinafter the *Schubart* case).
885 *City of Johannesburg Metropolitan Municipality v Moonlight Properties (Pty) Ltd and another* 2012 2 SA 104 (CC) (hereinafter the *Moonlight* case).
886 SAHRC Annual International Report 2012 at 37 [3.4.3].
887 SAHRC Annual International Report 2012 at 36 [3.4.6].
888 SAHRC Annual International Report 2012 at 36 [3.4.7].

The above report of the Human Rights Commission of South Africa clearly indicates that the government is currently not paying sufficient attention to social and economic rights. On the other hand, the courts are doing their utmost to enforce these rights. Failure to address these rights forces citizens to move away from peaceful protests and resort to violent protests as a way of forcing the government to pay attention to their plight. This invites police intervention to control the protest actions. This is a capacity that the police can use in dealing with more serious crimes and not public protests.

In the judgment of *Grootboom*, the court indicated that unless the communities' suffering is alleviated, citizens may be forced to do things themselves to get out of the intolerable conditions under which they are living.[889] This will include committing actions that increase crime.

The current situation in South Africa suggests that failure to implement social and economic rights is aggravated by maladministration and corruption. These are the main factors that contribute to scarce resources and thus affect the progressive realisation of social and economic rights. The above argument of maladministration is based on the current inquiry that is conducted by the "State of Capture" Commission in South Africa. The police can protect and respect social and economic rights by effectively fighting corruption.

The implementation of social and economic rights is a continuing and serious challenge in South Africa. This is confirmed by Jacoob J in the case of *Grootboom* when he indicates that this judgment demonstrates the suffering of many people throughout the country who are still living in terrible conditions.[890]

The researcher's view is that the above statement of Jacoob J calls on the courts to do their utmost to ensure enforcement or compliance with the implementation of social and economic rights including the police.

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889 *Government of the Republic of South Africa v Grootboom and others* 2001 1 SA 46 (CC) (hereinafter the *Grootboom* case) [2].

890 *Grootboom* 65 [93].

In the case of *Moiloa*,[891] a member of the public who was protesting for service delivery was shot and killed by the police during a service delivery protest. This type of protest is an example of a protest that relates to social and economic rights and indicates that social and economic rights are still a serious challenge in South Africa. The challenge is that police action will never solve social and economic rights. Addressing social and economic rights is a matter that falls within the jurisdiction of politicians by implementing programmes that will progressively address social and economic rights challenges.[892] Public protests are sometimes peaceful, but there are instances where protesters are very violent.[893]

Some citizens that are not satisfied with the situation relating to social and economic rights resort to court as a last resort. The other residents express their unhappiness by looting government property and the property of innocent citizens. For instance, in the case of *Mazibuko,* the applicant resorted to court for a remedy. In this matter, *Mazibuko* took the City of Johannesburg to court, because the City was not providing water as required by section 27 of the Constitution. Because of social and economic challenges, some citizens had no access to water because they had no means to pay. O'Regan J highlighted inequality caused by social and economic challenges as the main cause.[894] She indicated that the achievement of equality, one of the founding values of our Constitution, will not be accomplished while water is plentifully available to the wealthy but not the poor.[895]

The above is just one example of many socio-economic challenges in South Africa. Unfortunately, these challenges spark community action that ultimately leads to public unrest, inviting the police to intervene.

The core of the challenge is that the cause emanates from poor governance and lack of service delivery. Thus, the solution cannot be suppression of protest action through policing and the Defence Force. It is the state or the government that must

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891 *Moiloa and others v State* (A 139/11) 2011 ZAFSHC 115 (7 July 2011) (hereinafter the *Moiloa* case) 3 – 4.
892 *Moiloa* 3 – 4.
893 SAPS Annual Report 2016/2017 141 – 142.
894 *Mazibuko* [1] – [3].
895 *Mazibuko* [2].

take reasonable steps to achieve the social and economic rights of the people by delivering the necessary services.[896]

For instance, the government can contribute by building state-owned companies and employing unemployed people, and giving the people land so that those who can afford it can build their own houses. In that way they will be addressing the challenge of housing and unemployment, thus reducing the risk of crime being committed. The researcher argues that there will be less crime as the people will be working and having no time to be involved in crime.

4.3 The SAPS and legal challenges in combating crimes

Although South Africa is a constitutional democracy, some legislative challenges still need attention to make police effective in combating crime. According to Muntingh *et al*, police are required to be objective, treat individuals fairly and without bias, and make logical and rational decisions or conclusions. These aspirational conceptions, or values, exist because, at their core, citizens in democracies want fair treatment and do not want to be disadvantaged by police officers' personal and subjective opinions.[897] The accountability of police officers is an essential component of democratic policing. As a result, police must be responsive to public expressions of opinion. This contributes to bringing the public closer to the police.[898] Legislation must empower police to do their job without violating rights and freedoms.

4.3.1 Domestic crimes

The primary function of the police is dealing with domestic crimes. These are crimes that are committed within the country. Currently, drugs and drug trafficking are challenges globally. South Africa is experiencing the same challenge. For this reason, the South African parliament passed the Drugs and Drug Trafficking Act[899] to deal with the scourge of drugs and to combat its trafficking.

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896 Sections 26(2) and 27(2) of the Constitution.
897 Muntingh *et al* 2021 *Law, Democracy & Development* 128.
898 Muntingh *et al* 2021 *Law, Democracy & Development* 130.
899 Act 140 of 1992.

The *modus operandi* that is explained below indicates some of these legal challenges happen regularly in South Africa. As an example, drug smugglers swallow drugs in a particular country. They then move to South Africa, either as a transit destination or often to supply drugs. Knowledge or information is often obtained before they arrive at the airport. When they arrive at the airport, their baggage and bodies are searched based on the applicable legislation and the common law concept of "reasonable suspicion".

The suspicion is founded on intelligence or information that was received before the landing at the airport. This type of police action is authorised by the Drugs Act,[900] the SAPS Act,[901] and the CPA.[902] All these Acts only authorise a search in a non-invasive manner, which involves searching the body of the person, but only its surface, the container, the premises, and the building. The Acts are unclear on how to search and retrieve an exhibit (drug) that was swallowed by the perpetrator to keep the police from capturing the exhibit to prove a crime.

The question that needs to be answered is, should the person be given a substance to drink to flush the exhibit out of the body? What can be done if the person refuses to drink such a substance? Is the act of forcing the person to drink the substance to flush the exhibit out of the body not invasive? Is this act not violating the person's right to privacy?[903] The legislation does not answer these questions. The question is how must the police in a constitutional democracy deal with such challenges? Foreign law in the case of *Montoya* below attempts to answer the above questions.[904]

In the US case of *Montoya de Hernandez*,[905] the suspected drug trafficker who was confronted and detained by police at the airport refused to be subjected to flushing of drugs out of her body. She declined to go to the bathroom and refused to drink water. She preferred the choice of being deported to her country instead of being subjected to the removal of drugs from inside her body. The police sought a court

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900 Sections 11(1)(a) – (b) and (g) of the Drugs and Drug Trafficking Act 140 of 1992.
901 Section 13(6) of the SAPS Act.
902 Section 20 of the CPA.
903 Section 14 of the Constitution.
904 See *United States v Montoya de Hernandez*, 473 U.S. 531 (1985) 1 – 5.
905 *United States v Montoya de Hernandez*, 473 U.S. 531 (1985) (hereinafter the *Montoya de Hernandez* case).

order to gain authority to seize the substances that were eventually identified in her body. After she was convicted and sentenced, the US SCA reversed the conviction because the search and seizure were violating her right in the fourth amendment of the US Constitution (unreasonable search and seizure). The reason is that the search was intrusive.[906]

Currently, there is no law of general application in South Africa that authorises the police to conduct intrusive search and seizure on a perpetrator of a crime. The Constitution indicates that rights can only be limited by the law of general application, and we do not have such law. South African law needs to be improved to have laws that authorise police to approach the court in such instances. This will avoid violation of the right to privacy[907] and obstruction of enforcement of the law.

4.3.2 International and modern-day crimes

Crime perpetrated on a worldwide scale is known as international crime. As a result, to tackle international crime, all governments must cooperate. Human trafficking, for example, is emerging as a modern-day crime.

4.3.2.1 Trafficking of persons

Human trafficking is a relatively new crime that has spread around the globe. It is a violation of human rights. It is a betrayal of human dignity. It infringes on people's privacy. It restricts one's freedom of movement. It is considered a form of slavery since people are treated as slaves. It is a form of confinement that is done indirectly. It exacerbates social problems. It has a negative impact on families.

The task of combating this crime is enormous. This is due to the difficulty in identifying victims of human trafficking. Currently, the public does not report human trafficking incidents to the police promptly because it is a new type of crime in South Africa and is not well known to the general public. South Africa has enacted legislation to combat this crime to carry out the Republic's international treaty obligations regarding human trafficking.[908] This means that the Act must be properly

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906 *Montoya de Hernandez* 1 – 16; also see Fernandez L "*United States v Montoya de Hernandez*: The Supreme Court let nature take its course" 1986 *John Marshall Law Review* 759 – 772 761 – 765.

907 Section 14 of the Constitution.

908 Prevention and Combating of Trafficking in Persons Act 7 of 2013.

marketed to the public for the public to understand their role in assisting in the fight against human trafficking. In most instances this crime is committed through cyber, using technology.

4.3.2.2 Corruption

Corruption is the worst enemy, and it is a global issue. Domestically and internationally, it must be addressed. It is a country's worst enemy when it comes to good governance and development. The UN instructs states to take steps to remove development impediments.[909]

To deal with corruption, South Africa came up with domestic legislation relating to corruption (i.e. PRECCA). This is a form of complying with the UN intentions of dealing with corruption.[910] The purpose of PRECCA is to prevent and combat corruption. Corruption is broadly defined in the Act and the definition will not be repeated here.[911] The Act covers different forms of corruption. For instance, a general offence of corruption has been defined.[912]

The definition of corruption indicates that the general offence of corruption prohibits giving or offering to give someone in a position of power "gratification" to act in a certain way. The focus of corruption is on preventing the giving of "gratification". Gratification is broadly defined, and its definition will not be repeated here. It covers receiving money, whether in cash or otherwise, any donation, gift, loan, fee, reward, valuable security, property or interest in property of any description, whether movable or immovable, or any similar advantage.[913]

In the case of *Scholtz,* corruption was committed by a public official and members of private companies. The court convicted the public official and some private company members and further clarified the interpretation of sections 3(a) and (b) of the PRECCA. The court indicated that corruption is committed when a person either accepts or gives gratification or when such person agrees or offers to accept or give the gratification. Thus the offence is committed on an agreement to give or even on

909 Article 6 (3) United Nations Declaration on the Right to Development, 1986.
910 United Nations Convention Against Corruption, 2003.
911 Section 3 of the PRECCA.
912 Part I of the PRECCA.
913 Section 1 of the PRECCA.

merely offering to give the gratification. The sections, in their usual connotation, therefore envisage that an individual who undertakes to behave in a manner that constitutes corruption would commit the crime, even if the pledge of gratification is provided only after the incident.[914]

In the case of *Shaik,* the court emphasised the severity of the offence of corruption. The court highlighted that corruption harms the rule of law. It damages the values of good governance. It topples the moral quality of a nation. In the end, it harmfully disrupts the development and advancement of human rights. Corruption threatens a constitutional order.[915]

In 2001, in the case of *Heath,* the CC condemned corruption. The Court indicated that corruption does not support the rule of law. It is against the values of our Constitution. It does not promote human dignity. It is working against the commitments of the Constitution, and it does not recognise human rights and freedoms. The Court warned that if corruption is not checked and the perpetrators of it are not punished, it will be a serious threat to democracy.[916]

The PRECCA Act creates different offences in respect of corrupt activities relating to specific persons,[917] for example, offences in respect of corrupt activities relating to public officers.[918] Public officers include an employee of a public body, any person in the public service, any person receiving any remuneration from public funds, a judicial officer, and a member of the prosecuting authority.[919] The UN Convention defines "public official" as; (1) any person holding a legislative, executive, administrative or judicial office of a state party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that persons' seniority; (2) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the state party and as applied in the pertinent area of law of that state party; and (3) any other person defined as a "public official" in the domestic

914 *Scholtz and Others v S* 2018 2 SACR 526 (SCA) 58 – 59 [129].
915 *Shaik v The State* 1 2006 SCA 134 (RSA) 90 [223].
916 *South African Association of Personal Injury Lawyers v Heath and others* 2001 1 BCLR 77 (CC) 2 [4].
917 Part 2 of the PRECCA.
918 Section 4 of the PRECCA; *Scholtz and Others v S* 2018 2 SACR 526 (SCA) 1 – 2.
919 Section 1(1) of the PRECCA.

law of state party.[920] The definition of the UN Convention Against Corruption attempted to close all the loopholes when it comes to the definition of a public official.

Interpreting the definition literally, one concludes that even a person who is in the service of the state as a volunteer, not paid and not serving in a permanent capacity, may be charged for corruption. This will include a person who is in the service of the state as a consultant or student, for instance in the case of the police. This is derived from the words "whether permanent or temporary".

The AU Convention forbids the acceptance, directly or indirectly, by a public official or any other person, of any goods of monetary value, or other benefits, such as a gift, favour, promise, or advantage for himself or herself or another person or entity, in exchange for any act or omission in the performance of his or her public functions.[921] That happened in the case of *Selebi.*[922] In this case, the accused who was a Commissioner of Police for the country was charged for corruption and sentenced to 15 years. The court indicated the elements of corruption as (a) acceptance; (b) of a gratification (payment or some other benefit); (c) in order to act in a certain way (inducement); (d) unlawfulness; and (e) intention.[923]

Other persons and offences in respect of combating and preventing corrupt activities relate to the following: foreign public officials;[924] agents;[925] members of legislative authority,[926] judicial officers,[927] prosecuting authority,[928] receiving or offering of unauthorised gratification,[929] witnesses,[930] contracts,[931] procuring and withdrawal of tenders,[932] auctions,[933] sporting events,[934] gambling games and games of

920 Article 2(a) United Nations Convention Against Corruption, 2003.
921 Article 4(1)(a) of the African Union Convention on Preventing and Combating Corruption, 2004.
922 *Selebi v S* 2012 1 SACR 209 (SCA) (hereinafter the *Selebi* case).
923 *Selebi* 6 [8].
924 Section 5 of the PRECCA.
925 Section 6 of the PRECCA.
926 Section 7 of the PRECCA.
927 Section 8 of the PRECCA.
928 Section 9 of the PRECCA.
929 Part 3, section 10 of the PRECCA.
930 Section 11 of the PRECCA.
931 Section 12 of the PRECCA; see *Shaik v The State* 1 2006 SCA 134 (RSA).
932 Section 13 of the PRECCA.
933 Section 14 of the PRECCA.
934 Section 15 of the PRECCA.

chance,[935] acquisition of a private interest in a contract, agreement or investment of public body,[936] unacceptable conduct relating to witnesses,[937] intentional interference or hindering an investigation,[938] accessory after the fact,[939] and attempt and conspiracy to commit an offence.[940]

From the above list of offences of corruption, it is clear that the legislature intended to make sure that it closed all the loopholes relating to possible corruption. The Act is also extremely broad and covers almost every form of improper conduct that can be a source of corruption. The challenge then lies in application and implementation. For example, if the general public is not aware of this list of offences, it is doubtful whether the public will be able to pick up if corruption is committed in order to report this to the police. If that is the situation, then the Act will not be as effective as intended by the legislature and the desired outcomes of combating corruption will not be achieved.

In the case of *Shaik,* the court said, "We must do everything in our power to stop corruption and its effects". Courts through their judgments must display a clear message that corruption cannot be allowed to exist. Sentencing by the courts must be suitable and severe.[941]

When one looks at how the Act is implemented in practice, one picks up that the section of the Act that deals with "strengthening of measures to prevent corruption and corrupt activities" appears to be lacking in implementation from the government. Government measures to proactively combat corruption are insufficient. For instance, one does not see advertisements discouraging corruption on TV or in the print media, although the country has a serious challenge of corruption. One does not see educational programmes in the print media or on TV educating the public about corruption, its negative impact on the country, and how to report it, except for

935 Section 16 of the PRECCA.
936 Section 17 of the PRECCA.
937 Section 18 of the PRECCA.
938 Section 19 of the PRECCA.
939 Section 20 of the PRECCA.
940 Section 21 of the PRECCA.
941 *Shaik v The State* 1 2006 SCA 134 (RSA) 90 [223].

the existing corruption hotline. One does not see government posters or billboards in the streets discouraging corruption or educating the public about corruption.

The view of the researcher is that the government is not complying with the UN Convention that instructs state parties to the Convention to involve society in the fight against corruption. This should be done in the form of awareness campaigns and public education programmes.[942] The above is confirmed by Udombana. He argues that corruption must be battled aggressively.[943]

The war must be aggressive and inclusive. The focus must be on the prevention, enforcement, and prosecution of corruption. In order to be successful, corruption policies must encourage people's participation and must represent the rule of law and the efficient management of public affairs. State action must be clear and responsive.[944] Civil society must activate citizens to claim more transparency. Persons assigned power must be held accountable. Corruption must be destroyed before it causes huge damage in Africa.[945]

The researcher's view is that corruption can only be arrested successfully if the citizens are educated on corruption through awareness campaigns, using all forms of communication. Only then will the majority of the people understand the dangers of corruption and its anti-development impact.

The obvious gap is that the PRECCA does not have any clause that compels the government to ensure that the society or public in the form of individuals, groupings, civil society, community-based organisations, and NGOs actively participate in the prevention and combating of corruption through awareness campaigns and public education programmes relating to the existence of corruption, the threats of corruption and the damage caused by corruption.[946]

This might be the reason why the general public is not actively participating in the prevention of corruption, as they are not fully aware of its repercussions. The

942 Article 13 United Nations Convention Against Corruption, 2003.
943 Udombana NJ "Fighting corruption seriously? Africa's Anti-Corruption Convention" 2003 *SJICL* 447 – 488.
944 Udombana 2003 *SJICL* 478.
945 Udombana 2003 *SJICL* 484 – 485.
946 Article 13 United Nations Convention Against Corruption, 2003.

PRECCA is more reactive in its application and concentrates mostly on reporting corruption and reacting to it; it does not pay much attention to proactive prevention measures. Proactive measures will add more value, as more corruption will be exposed and prevented before it happens.

The Prevention of Corrupt Activities Act places a duty on certain persons holding a position of authority to report certain corrupt transactions.[947] It is not clear why section 34 of the Act excludes the general public from reporting suspicious corruption activities, as that would have contributed to more people reporting corruption, thus having a greater impact on the reduction of corruption. The section only refers to the person holding the position of authority. If the general public is included in the section, this would contribute to an increased number of whistle-blowers.

4.3.2.3 Genocide, war crimes, and crimes against humanity

South Africa is affected by international crime. It has an Act for policing crimes against humanity. This Act is called Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. Although this Act authorises the investigation of genocide, crimes against humanity, and war crimes, there is a challenge when it comes to the investigation of these crimes in the following circumstances: (i) if the country where the violations of human rights are taking place is unable or not willing to investigate them; and (ii) where other countries that are aware of violations of human rights are also unable or unwilling to investigate them. This means that the state leader, organ of state, or person violating human rights will never be brought to book, even if the state is a member of the UN and the ICC. This will not address the combating of crimes against humanity properly, as perpetrators of these crimes will remain untouched.

The Security Council of the UN has primary responsibility under the UN Charter. This responsibility is to maintain international peace and security.[948] All the UN

947 Section 34 of the PRECCA.
948 "Role of the Security Council: United Nations Peacekeeping" http://www.un.org/en/peacekeeping/operations/rolesc.shtml (Date of use: 10 November 2015) 1.

participants agree to accept and enforce Security Council resolutions.[949] Certain UN bodies make recommendations to member states. The Council is the only body that has the power to take decisions. All decisions must be adopted and put into action by member states. Through adopting a Security Council Resolution, the Security Council defines a peacekeeping operation. The resolution sets out the purpose and scale of that mission. The Security Council periodically oversees the role of UN peacekeeping operations. This involves reviewing the Secretary General's periodic reports. Dedicated sessions of the Security Council are held to discuss the operation's work.[950]

The researcher believes that there is no reason why the UN Security Council cannot adopt or approve a UN resolution to launch investigations into human rights abuse in a member state that is not prepared to investigate abuse. The explanation is that stabilising the conflict by peacekeeping forces alone is not enough to maintain peace, as human rights abusers remain unchanged unless they are brought to justice by judicial investigation and prosecution.

The above statement is supported by Meron when he says that the problem of implementation and supervision of the Rome Statutes of the ICC plagues international law as a whole because of the absence of a permanent international police force and an international court with universal compulsory jurisdiction.[951] He further states that the problem is particularly acute where violations of human rights are concerned since the relations between an individual victim of such violations and the state are characterised by enormous inequality.[952]

The statement of Meron is true when one observes the violation of human rights in most of the African countries that are still developing. Where there is clear economic and social inequality and misuse of power, there is a likelihood of gross human rights

949 Article 25 of the Charter of the United Nations and Statute of the International Court of Justice, 1945.

950 "Role of the Security Council: United Nations Peacekeeping" http://www.un.org/en/peacekeeping/operations/rolesc.shtml (Date of use: 10 November 2015) 1.

951 Meron T (ed) *Human Rights in International Law Legal Policy and Issues* (Oxford University Press New York 1992) 356.

952 Meron *Human rights in international law legal policy and issues* 356; also see Article 1 Protocol to the African Charter on Human and People' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted on 9 June 1998 in Burkina Faso and came into operation on 25 January 2004).

violations. The result of this is social disorder and lawlessness, as some people end up taking the law into their own hands in an attempt to force or introduce regime change.

The OAU did its part to protect human rights. The African Charter on Human and People's Rights (Banjul Charter) provides that an African Commission on Human and People's Rights shall be established within the Organisation of African Unity to promote human and people's rights and ensure their protection in Africa.[953]

The OAU (now AU) went further to protect human rights through the protocol. The protocol provides as follows: "There shall be within the Organisation of African Unity an African Court on Human and Peoples' Rights".[954]

Relating to the jurisdiction of the African Court on Human and Peoples' Rights, the protocol provides as follow:

> Article 3 Jurisdiction
>
> (1) The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
>
> (2) In the event of a dispute as to whether the Court has jurisdiction, the court shall decide.[955]

This is a clear indication that human rights violations will not be tolerated. The gap that still exists is the absence of an African police force that will be able to investigate violations of human rights.

It is the view of the researcher that there is a need for an African police force to investigate human rights violations that in turn should be heard by the African Court

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953 Section 30 African Charter on Human and People's Rights, 1981 (Banjul Charter); Niyizurugero J (ed) *Human rights protection in Africa: A compilation of texts* (APT, Geneva, Switzerland 2006) 245.

954 Niyizurugero *Human rights protection in Africa: A compilation of texts* 271.

955 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, OAU/LEG/AFCHPR/PROT (III), adopted by the Assembly of Heads of State and Government, 34th session, Burkina Faso, 8 to 10 June 1998.

for Human and People's Rights. In other words, there is a need for an African solution for African problems. This is confirmed by Novak.[956]

It is, therefore, necessary for the AU to authorise the establishment of an investigative police force that will be able to investigate atrocities in member states that are not willing to investigate the atrocities. This Court can serve as the Regional Court for Africa before cases are referred to the ICC. Cases should be referred to the ICC only by the African Court. There should be no direct referral of cases to the ICC. This will avoid countries withdrawing from the ICC, as the matters will first be heard on the African continent by the African Court before being dealt with globally.

4.3.2.4 Cyber-criminality

The law that empowers police to combat cybercrime is insufficient. Sections 19 to 37 of the CPA, for example, make no mention of searching and seizing a device, such as a computer or mobile phone, in order to allow police officers to access information from it for investigative purposes.

Cybercrime is defined as criminal activity that targets or uses a computer, a computer network, or a networked device. "Cybercrimes are those crimes which are committed in the online or electronic environment".[957] It is a rapidly growing criminal offence in South Africa, and it is committed in a highly sophisticated manner. Cybercriminals are primarily motivated by a desire to make money. It is committed by perpetrators who operate as individuals or as organised groups. It is mostly committed in the form of internet fraud, identity fraud, financial or card fraud, theft and sale of corporate data, cyberextortion (demanding money), and cyber espionage (in which hackers gain access to private, government or company systems). [958]

After 1994, the police's ability to investigate this crime was limited to a great extent by the 1996 Constitution, owing to the police's obligation to respect the right to privacy.[959] There is no law of general application that is authorising the police to limit

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956 Novak *The International Criminal Court: An introduction* 64.

957 Mshana JA "Cybercrime: An empirical study of its impact in the society – A case study of Tanzania" 2015 *Institution of Judicial Administration Lushoto* 72 – 87 72.

958 Mshana 2015 *IJAL* 76.

959 Section 14 of the Constitution; also see Nortje JGJ and Myburgh DC "The search and seizure of digital evidence by forensic investigators in South Africa" 2019 *PELJ* 5.

this right, as required by section 36 of the Constitution. This leads to the question of the constitutionality of search and seizure of evidence relating to gadgets of non-consenting persons.

It often happens in practice that someone is in possession of material information that is required for court purposes. This information might be contained in cell phone records, computer records, or on other devices in the possession of the person of interest. The information needs to be gathered by police with the assistance of the Prosecuting Authority, as it may assist in proving or disproving an allegation.

Different pieces of legislation regulate the obtaining of information for investigation purposes. For instance, the Criminal Procedure Act,[960] as well as Regulation of Interception of Communications and Provision of Communication-related Information Act.[961]

According to section 205 of the CPA,[962] obtaining information can only be authorised by a judge, regional court magistrate, or magistrate of a district court. This can only be done with the assistance of the director responsible for public prosecutions or the authorised Public Prosecutor. This means that the investigating police official must submit the request for information that is required for the investigation to the Public Prosecutor or Director of Public Prosecutions who in turn submit the request to the magistrate or judge.

The Regulation of Interception of Communications and Provision of Communication-related Information Act prescribes that only a designated judge can authorise the acquisition of required information.[963] This information can be requested by an appointed commissioned police officer of the SAPS;[964] a Defence Force officer; a member as defined in section 1 of Intelligence Services Act; the

960 Section 205(1) of the CPA.
961 Act 70 of 2002.
962 51 of 197.
963 See sections 16, 17 and 18 of the Regulation of Interception of Communications and Provision of Communication-related information Act 70 of 2002.
964 Section 33 of the SAPS Act.

Head of the Directorate or an Investigating Director; and a member of the Independent Police Investigative Directorate.[965]

However, downloading information from a person's equipment, whether a computer or a cell phone, is not included in a request for information. No legislation addresses this issue. This means that police officers do not have the legal right to do so.

The reality is that, in practice, during the investigation of crime the police seize the cell phones and computers of arrested persons and extract or download information from those devices. The purpose of extracting the information is to analyse the information extracted from the above-mentioned devices for investigation purposes. It is accepted that section 205(3) of the Constitution authorises the police to investigate crime and section 20 of the CPA authorises the police to seize any article that is involved in the commission of crime or suspected commission of the crime. Section 21 of the CPA authorise the police to search for an article with a search warrant. Section 13 of the SAPS Act authorises the police to investigate crime and cordon and search a specified place for purposes of combating crime.

Although these powers are granted to the police, there is still a gap in pre-trial criminal procedure. There is no legislation that gives the police powers to "extract information" from a cell phone or computer of an arrested or detained person. This approach of the police might violate the right to privacy of the arrested person.[966]

Extracting personal information from cell phones and computers through downloading, which is currently a practise, is not covered anywhere by the law. Police action of extracting stored information from cell phones and computers without the enabling Act[967] might be violating the right to privacy.[968] This evidence might be ruled inadmissible by the court during the trial.[969] This also exposes the state to potential civil claims flowing from unlawful search and seizure.

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965 Sections 1 and 19 of the Regulation of Interception of Communications and Provision of Communication-related information Act 70 of 2002.
966 Section 14 of the Constitution.
967 Section 36(1) of the Constitution.
968 Section 14 of the Constitution.
969 Section 35(5) of the Constitution; also see Currie and de Waal *The Bill of Rights handbook* 329 – 330.

When the police act in a way that is not in accordance with the law, the public can file a civil suit against the state. As a result, the police must conduct their operations in accordance with the rule of law and with regard for human rights. On March 31, 2020, for example, there were 49 040 pending civil claims against the police. The total amount of money involved in pending claims was R 6 716 929 845. Unlawful search and seizure, as well as unlawful arrest and detention by police officers, are some of the causes of these claims.[970]

As long as there are gaps in legislation that facilitates policing, there will be wrongful conduct by the police as they use discretion. This gap should be rectified by the parliament[971] through legislation or by the courts[972] through the judgments (case law). Loopholes in legislation complicate enforcement of the law and create serious challenges in law enforcement.

The Protection of Personal Information Act 14 of 2013 (POPIA) came into effect on 1 July 2020 and has become enforceable on 1 July 2021. The Act's goal is to protect the right to privacy. The Act promotes the protection of personal information. Sections 100 to 106 of the Act define offences for improperly obtaining personal information. Unfortunately, this legislation does not address the loophole that is discussed above. It does not authorise the police to download information from devices for investigation purposes.

However, with the passage of the Cybercrime Act 19 of 2020 on 1 June 2021, the challenge that the police are facing will be resolved once that legislation goes into effect. The purpose of the Cybercrimes Act[973] is to create offences related to cybercrime, make the disclosure of harmful data messages a crime, make interim protection orders available, regulate investigating powers, regulate mutual assistance in cybercrime investigations, and strengthen obligations to report cybercrime.[974]

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970 SAPS Annual Report 2019/2020 98.
971 Section 44(1)(a)(ii) of the Constitution.
972 Section 39(2) of the Constitution.
973 Act 19 of 2020.
974 Preface of the Cybercrimes Act 19 of 2020.

The legislation gives police officers the power to investigate, search, access, or seize an article that is required in the investigation of cybercrimes.[975] This means that the police can now lawfully access stored data in a cell phone and computer. By applying for a search warrant from a magistrate or a judge, the investigating police official is now authorised to search, access, or seize any exhibit involved in the commission of cybercrime within the Republic.[976] This is a great development to fighting cybercrime.

4.4 The SAPS and challenges related to law enforcement

This section deals with law enforcement challenges emanating from the matters listed below.

4.4.1 Training

The SAPS Act empowers the National Commissioner of Police to determine the training that members must receive.[977] Managing illegal gatherings and violent community protests is currently the most difficult challenge in policing. Another challenge is reducing crimes against women and children, which are vulnerable groups. As a result, it is critical that police training emphasises the protection of these vulnerable groups. Because of the country's current high level of community protest actions, members of Public Order Policing must be equipped with human rights training. It is also necessary to provide training to detectives who are investigating crimes against women and children in order for them to be gender-sensitive and understand the dynamics of these types of crimes.

Considering international human rights standards, the police, through community policing forums, must educate the community on how to contribute to reducing crimes against women and children and how to resolve community dissatisfaction without resorting to violent protests. This will help to increase community participation in the fight against crime.[978]

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975 Sections 25 – 45 of the Cybercrimes Act 19 of 2020.
976 Sections 28 – 29 of the Cybercrimes Act 19 of 2020.
977 Section 32 of the SAPS Act.
978 UNHCR *Expanded pocket book* 58 – 59.

According to UNHCR, the[979] police must adopt a human rights policy and institutionalise it. Police Standing Orders or National Instructions must have human rights standards that will make members observe human rights.

4.4.2 Corruption

Corruption is an emerging threat to democracy in South Africa. Sewpersadh and Mubangizi confirm that since 1994 corruption has been an issue in South Africa. While there have been reports of corruption at high levels of government, it has been exceedingly difficult to find and deal with it. Corruption exists both in the public and private sectors, and the emergence of corruption in the private sector has not gained as much attention as in the public sector.[980]

In the case of *Heath,* the court referred to the remark that was contained in the affidavit of the Minister of Justice. The remark indicated that the levels of crime in South Africa are exceedingly high and that is a shame. The crime of corruption was highlighted as one aspect that needs special attention in an investigation. It was indicated that in most instances' corruption is committed by public servants. Further, it was indicated that this type of crime needs covert investigation methods.[981] The Directorate tasked with investigating corruption (DPCI) should be given adequate manpower and resources to combat corruption. Its autonomy must also be respected.

There is a need for extremely powerful "whistleblowers" to help police officials investigate corruption. The problem is that no law protects "whistleblowers" who help police fight crime. The Witness Protection Act 112 of 1998 that is in place in South Africa only protects state witnesses in criminal cases but not "whistleblowers."

The Witness Protection Act includes specific provisions to protect state witnesses in criminal matters, but nothing exists to protect "whistleblowers" who are not state witnesses. This has a negative impact on crime investigation because ''whistleblowers'' are reluctant to assist police for safety reasons.

979 UNHCR *Expanded pocket book* 1.
980 Sewpersadh P and Mubangizi JC "Using the law to combat public procurement corruption in South Africa: Lessons from Hong Kong" 2017 *PELJ* 2.
981 *South African Association of Personal Injury Lawyers v Heath and others* 2001 1 BCLR 77 (CC) 2 [3].

The preceding discussion suggests that there is a greater need for public awareness about the crime of corruption so that it can be reported to the greatest extent possible. The courts handling these cases must also expedite their proceedings so that the message of deterrence reaches the public as soon as possible.

4.4.3 De-politicisation

Depoliticisation is regarded as a solution to both public policy and constitutional challenges.[982] Flinders and Buller define depoliticisation as "the range of tools, mechanisms, and institutions through which politicians can attempt to move to an indirect governing relationship and or seek to persuade the demos that they can no longer be reasonably held responsible for a certain issue, policy field or specific decision".[983]

According to Flinders and Buller, there are three types of depoliticisation: institutional depoliticisation, rule-based depoliticisation, and preference-shaping depoliticisation. In the case of institutional depoliticisation, the minister and the independent agency have a principal-agent relationship. In the case of rule-based depoliticisation, explicit rules are incorporated into the decision-making process. In the case of preference-shaping depoliticisation, a rhetorical position is taken that seeks to portray certain issues as beyond the control of national politicians.[984]

Looking at the situation in South Africa, one could argue that the relationship between the Minister of Police and the DPCI, also known as the HAWKS, is one of institutional depoliticisation. This is based on the fact that the HAWKS is independent.

One could argue that the Minister of Police's relationship with the IPID is one of institutional depoliticisation. This is because the IPID operates independently as well.

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982 Flinders M and Buller J "Depoliticisation: Principles, tactics and tools" 2006 *British Politics* 293 – 318 293.
983 Flinders and Buller 2006 *British Politics* 296.
984 Flinders and Buller 2006 *British Politics* 299.

One could argue that the Minister of Police's relationship with the SAPS is one of rule-based depoliticisation. This is because the SAPS Act requires the National Commissioner of Police to run the police service.

Based on the evidence presented thus far, I conclude that the South African Police Service has been depoliticised.

4.4.4 Equipment, budget, and resources

The South African Police Service faces a massive policing task. The SAPS served 59,62 million inhabitants as of 2020. The population was 58,775 in 2019. This is approximately 850, 000 more inhabitants than the previous year.[985]

For the financial year 2019/2020, the community reported a total of 1 635 896 serious crimes to the police. Irrespective of the increase in the number of inhabitants in the country, the police managed to reduce crime by 2.7% compared to the previous year.[986] The total budget spent by the SAPS for the same financial year is R 96, 073, 217.[987]

For the financial year 2019/2020, the total number of SAPS employees was 187 358.[988] The total employees are divided according to their mandate as follows:

- Administration: 35 781
- Visible Policing: 97 598
- Detective Service: 38 821
- Crime Intelligence: 8 590
- Protection and Security Services: 6 568[989]

985 See Stats SA "Mid-year population estimates 2020" http://www.statssa.gov.za/publications/P0302/P03022020.pdf (Date of use: 16 August 2021)
986 SAPS Annual Report 2019/2020 130.
987 SAPS Annual Report 2019/2020 319.
988 SAPS Annual Report 2019/2020 319.
989 SAPS Annual Report 2019/2020 319.

The above figures of employees indicate that 151 577 police officials were responsible for operational crime-fighting duties.

Based on the number of inhabitants served by the police and the number of serious cases reported by the community to the police, the researcher believes that there is a need to increase the number of detectives who are investigating these cases in order to reduce the investigation workload.

There is also a requirement to increase the number of intelligence operatives who assist detectives in gathering intelligence in order to solve these cases. This is due to the fact that enforcing applicable legislation by police requires both human and physical resources in order to be successful in crime-fighting. Successfully combating crime contributes to democracy, the rule of law, and respect for human rights. Community satisfaction is at the heart of democratic policing.

4.5 Conclusion

According to the discussion in this chapter, the implementation of the 1996 Constitution has created law enforcement challenges. According to the findings of the study, the police must adhere to the principles of constitutionalism, the rule of law, and human rights. It is also clear that there are social and economic issues that, if not addressed, contribute to the difficulty of law enforcement. Legislative issues must be addressed for the police to effectively combat crime. Operational issues are stemming from resources that must be addressed for police to be more efficient in their enforcement of the law.

Chapter 5: Conclusion

5.1 A short overview of the research

The purpose of this research was to compare policing in pre-democratic South Africa to policing in a democratic and constitutional South Africa after 1994. [990] This includes finding solutions to law enforcement challenges that police officers face after South Africa transitioned from apartheid to the new constitutional and democratic dispensation. [991]

This thesis began by explaining constitutionalism, the rule of law, and democracy in South Africa during and after apartheid. It examines the SAPS from apartheid to democratic order, with a focus on law enforcement challenges under the 1996 Constitution.

It also focused on the culture of "force" (rather than service) in pre-democratic policing, the effects of apartheid on the democratic order, and the impact of parliamentary sovereignty on legislation. The study's findings are as follows.

The research reveals in Chapter 2 that constitutionalism limits the government's authority. This implies that constitutionalism has the potential to limit police power.

The study also comes to the conclusion that the rule of law restricts the authority of the government by requiring it and its branches to execute their mandate in compliance with the law. This implies that police power may be restrained by the rule of law.

Based on the above, I recommend that police management promote a culture of respect for the constitution and the rule of law.

In Chapter 3, the study concludes that the South African Police Force has transitioned to a democratic system. Its powers are appropriately limited to ensure that democratic norms are upheld.

990 Chapter 2 and 3.
991 Chapter 4.

I recommend that police management ensure that all members fully understand how the constitution and human rights affect police functions and responsibilities.

Chapter 4 concludes that the implementation of the 1996 Constitution has posed law enforcement challenges.

To avoid violating the constitution and the rule of law, I recommend that the police follow constitutional, legal, and human rights principles. Furthermore, the legislative issues that have a negative impact on police work should be addressed by the Legislature.

This thesis concludes with the following responses to the research questions.

5.2 What are the implications of transformation?

The transformation resulted in South Africa transitioning from parliamentary sovereignty to constitutional supremacy. South Africa transitioned from apartheid to democracy. The SAPS was transformed from a "force" to a "service". The SAPS adopted a democratic policing style in which the public is given the opportunity to express their needs. This enables the public to participate in policing through community policing. This transformation resulted in some pieces of legislation being declared unconstitutional and invalid based on inconsistency with the Constitution.[992] It is evident from this research (Chapter 3) that the shortage of police has always been a challenge. Even today, 100 years after 1913, there is still a shortage of police when compared with the population it serves.[993] The tension that flows from these apartheid laws is still visible in the country when one looks at the inequalities in society and the challenge of social justice.

The police's approach changed with the 1996 Constitution, and they adopted democratic policing, which required them to police while respecting human rights, the rule of law, the Constitution, and democracy. Their authority is now constrained by the Constitution, the rule of law, the Bill of Rights, and an independent judiciary. The police have adopted and implemented community policing, which aims to bring communities closer to the police. This is accomplished through the use of a

992 See Chapter 2 [2.2], [2.3], [2.4] and [2.5].
993 Chapter 3 [3.2.1] – [3.2.2]; also see Chapter 4 [4.4].

consultative policing method that involves the community in policing. Internal, judicial, and political oversight of the police has been established to ensure compliance with a democratic order.[994]

5.3 Are the police under constitutional supremacy expected to enforce the law in the same way they used to enforce it during the era of parliamentary sovereignty?

Under the 1996 Constitution, the police can no longer police in the same way they used to. They are currently required to uphold the Constitution, the rule of law, human rights, and democracy. Their powers are now limited by the Constitution and the rule of law, and their approach is limited to the respect and protection of human rights.[995]

5.4 Does the legislation pass constitutional muster?

Some of the legislation does not pass constitutional muster and must be amended to comply with the 1996 Constitution. For example, section 21 of the CPA has some shortcomings. It does not enable the police to conduct an intrusive search and seizure in the body of a suspected criminal during criminal investigations.[996]

5.5 What kind of change happened in legislation?

There are some legislative amendments. For instance, there was no legislation to authorise search and seizure in the investigation of cyber criminality. However, new legislation has recently been developed (i.e. the Cybercrimes Act 19 of 2020) to close this gap. This legislation was not yet in operation at the time of writing this thesis.[997] Despite this small victory, there still exists some gaps in legislation.

5.6 Are there still a gaps in public law?

There is still a gap in the following pieces of legislation and each are shortly discussed.

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994 Chapter 3 [3.3] – [3.4].
995 See Chapter 3 [3.2], [3.3] and [3.4].
996 See Chapter 4 [4.2] – [4.2.3].
997 See Chapter 4 [4.3.2.4].

5.6.1 Prevention and Combating of Corrupt Activities Act 12 of 2004 (PRECCA)

Constitutional democracy and constitutional rights must be protected at all costs. Corruption undermines constitutional democracy and individual rights. It depletes the resources that must benefit the people. It disrupts the smooth operation of the government. It impedes and undermines the efficiency and effectiveness of law enforcement officers by corrupting and paralyzing them. Corruption should be eliminated at all levels because it impedes the police's ability to carry out their constitutional mandate. I recommend the following solutions.

Section 34 of the PRECCA needs to be improved to include members of the public in whistle-blowing against corruption. The legislation must make it mandatory that a member of the public who knows that corruption is being committed report it to the authorities. Failure to report corruption by a member of the public while he/she knows that it is being committed should be criminalised.[998]

The current Witness Protection Act 112 of 1988, which only protects State witnesses in criminal cases, should be amended to include protection for "whistleblowers" who are not State witnesses. The Act should be renamed the Whistleblower and Witness Protection Act.[999]

The reason for the solution is that the general public requires public order, peace, security, and protection. However, PRECCA falls short of meeting these requirements. For example, the PRECCA is applied in a more reactive rather than proactive manner. Section 34 of the Act, for example, requires certain people in positions of authority to report specific corrupt activities.[1000] This obligation is not imposed on the general public. If the general public is included in the section, the number of whistle-blowers will increase. This will contribute to a reduction in corruption.[1001]

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998 See Chapter 4 [4.3.2.2].
999 See Chapter 4 [4.4.2].
1000 Section 34 of the PRECCA.
1001 See Chapter 4 [4.3.2.2].

5.6.2 Section 13 South African Police Service Act 68 of 1995

Human dignity and privacy are essential components of our democratic system. Section 13 of the SAPS Act is incomplete and deficient. It only permits static roadblocks, checkpoints, and cordon-and-search operations in specific areas.[1002] It does not empower the police to conduct roving search and seizure (stop and search crime prevention operations) in high crime areas to prevent crime. Police are currently using the common-law principle of "reasonable suspicion" to conduct roving search and seizure operations. This type of search is not covered by Section 13 of the SAPS Act. This may lead to an infringement on one's right to privacy where reasonable suspicion cannot be justified.[1003] This is not empowering enough in a country with a high crime rate, such as South Africa, and a Bill of Rights that protects people's rights. Inadequate law to empower police may result in civil claims against the state. I recommend the following solution.

Section 13 of the SAPS Act should be amended to include roving road blocks, as the use of "reasonable suspicion" may be difficult to justify police action in some cases.

5.6.3 Section 21 Criminal Procedure Act 51 of 1977

People's rights are important in a constitutional system and must be respected and protected. Section 21 of the CPA has flaws that can be challenged in terms of protecting rights and freedoms. For instance, it does not empower the police to conduct intrusive search and seizure for investigation purposes. There is a need to improve this section to enable police to conduct their work efficiently and effectively. According to the Constitution, limitation of rights and freedoms can only be authorised by the law of general application (enabling legislation). The identified gap is that the CPA and SAPS Acts do not include such enabling provisions. This makes it difficult for the police to fulfill their constitutional mandate.[1004] I therefore recommend the solution listed below.

1002 Sections 13(7) and 13(8) of the SAPS Act.

1003 Rautenbach 1996 *SACJ* 296 – 309.

1004 See Chapter 4 [4.2.3] and [4.3.1]; see *United States v Montoya de Hernandez*, 473 U.S. 531 (1985) 1 – 16; also see *Minister of Safety and Security and another v Gaqa* 2002 1 SACR (C) 10 – 11; *Minister of Safety and Security v Xaba* 2004 1 SACR (D) 1 – 3.

The SAPS must develop legislation that allows police officers to approach the court and request permission for registered medical practitioners to perform surgery on the person of interest who is being detained in order to extract any exhibits that are stuck in that person's body (for example, in a leg or arm), depending on the risk of the surgery and the gravity of the crime.

5.7 How does one reconcile the protection of values in the Constitution and the need to fight crime?

The Constitution contains clear values that must be protected and upheld by all state organs. The police, as a state institution, are not exempt from upholding constitutional values. I propose the following solution.

The police must promote a culture of respect for human rights and constitutional values through basic training, specialised training, advanced training, national instructions, standing orders, and operational guidelines, as well as conducting human rights workshops in areas identified as emerging human rights challenges.[1005]

5.8 Did the legislature try to solve public law enforcement challenges?

Unconstitutional public law makes it difficult for officers to enforce the law. The legislature attempted to address the issue of legislation that is impeding the performance of police duties. For example, the promulgation of Cybercrime Act 19 of 2020 has resulted in a positive development in the fight against cybercrime. [1006]

Furthermore, the legislature attempted to address public law enforcement by issuing orders declaring legislation to be unconstitutional and unenforceable in certain cases.[1007] Chapter 2 illustrates that there is a need for apartheid legislation and policies to be revised to meet the requirements of the new regime.[1008]

1005 See Chapter 4 [4.4.1].
1006 See Chapter 4 [4.3.2.4].
1007 See Chapter 3 [3.4.2.2]; *Minister of Police and Others v Kunjana* 2016 2 SACR 473 (CC) at 44 [119(d)].
1008 Chapter 2 [2.2], [2.3], [2.4] and [2.5].

5.9 Are the police able to serve the community efficiently and effectively with the current public law enforcement challenges?

The implementation of the 1996 Constitution has resulted in law enforcement challenges. With the current legislative challenges, the police are unable to serve the community efficiently and effectively. These difficulties are a stumbling block to effective policing. Some of the difficulties are not directly linked to police responsibilities as they are of a social and economic nature.[1009] Following the implementation of the 1996 Constitution, certain provisions of the legislation do not provide the police with sufficient authority to safeguard the public from criminals. As a result, the police are failing to make a meaningful contribution to the larger community to protect the residents' safety and security, as required by the Constitution.[1010]

5.10 The role of international courts

South Africa is a member of the African Union and should help combat international crime. According to Article 3 of the Protocol establishing the African Court, the African Court on Human and People's Rights does not have jurisdiction to hear cases of genocide, war crimes, or crimes against humanity. An African solution to African problems is necessary. As a result, I recommend the following options.

The African Court's jurisdiction should be expanded to include cases of genocide, war crimes, and crimes against humanity.

The African Union must authorize the establishment of an investigative police force capable of investigating atrocities in member states that refuse to do so.

Before matters are referred to the ICC, the African Court must serve as the Regional Court for Africa.

Only the African Court should refer cases to the International Criminal Court (ICC).

Direct referrals to the ICC should only be made in exceptional circumstances.[1011]

1009 See Chapter 3 [3.2.1] and Chapter 4 [4.2.3.1].
1010 Chapter 1 [1.4].
1011 See Chapter 4 [4.3.2.3].

5.11 Other developments

In terms of combating cyber criminality, there has been a positive development as a result of the promulgation of the Cybercrime Act 19 of 2020, though the legislation is not yet in effect. The legislation empowers police officers to investigate, search, access, or seize any article necessary for the investigation of cybercrime.[1012] This means that the police can now legally access data stored on a cellphone or computer. The investigating police official is now authorised to search, access, or seize any exhibit involved in the commission of cybercrime within the Republic by applying for a search warrant from a magistrate or a judge.[1013]

This is a significant step forward in the fight against cybercrime. The police now have legislation that will justify their actions in accordance with the requirements of Section 36 of the Constitution.[1014] Relating to operational law enforcement, this thesis concludes that the implementation of the 1996 Constitution resulted in freedom of movement and a high influx of people into the country in search of better opportunities. This has created law enforcement challenges due to an increase in the number of the population.[1015] There are thus operational issues stemming from resources that must be addressed for police to be more efficient in their enforcement of the law. For instance, a population of 9.6 million is served by 151 577 police officials. This seems to be insufficient looking at the figures of the population.[1016]

5.12 Suggestions for further research

The development of a learning program is necessitated, which must be institutionalised in the SAPS to increase human rights awareness and transform the SAPS from that of a "force" to a "service". To be efficient and effective in managing public disorder with minimal loss of life, research must be conducted to determine how many Public Order Policing Officials are required to serve a population of 59.62 million, and what type of skills they must possess.

1012 Sections 25 – 45 of the Cybercrimes Act 19 of 2020.
1013 Sections 28 – 29 of the Cybercrimes Act 19 of 2020.
1014 See Chapter 4 [4.3.2.4].
1015 See Chapter 4 [4.4.4].
1016 See Chapter 4 [4.4.4].

To be efficient and effective in investigating and referring reported crimes for successful prosecution, it is necessary to research to determine how many Police Detectives are required to serve a population of 59.62 million and what type of skills they must have. To be effective in gathering proactive information that can be used to prevent and detect crime, and ensure state security, research should be conducted to determine how many Police Crime Intelligence Operatives are required to serve a population of 59.62 million and what type of skills they must have.

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