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ARTICLES

"Law and Transformative Justice in Post-Apartheid South Africa": A Conference to Celebrate the 90th Anniversary of the University of Fort Hare

Professor Patrick C Osode
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This conference issue of *Speculum Juris* contains a special collection of papers presented at a three-day conference on the broad theme of "Law and Transformative Justice in Post-Apartheid South Africa" hosted in East London by the Nelson R Mandela School of Law in October 2006. Organised as part of the 90th anniversary celebration of the University of Fort Hare, the conference brought together leading members of the judiciary, legal academia, law enforcement and human-rights institutions in a rigorous interrogation of South Africa's post-apartheid Constitution and its impact on society, with particular focus on the numerous landmark changes it has spawned in the corpus of South African law since 1994. Inevitably, the conference created an opportunity for progressive legal intelligentsia to reflect on the progress made by the South African constitutional state in the last 12 years and to explore the challenges that remain in order for South Africa to fully realise its dreams of becoming a society in which all citizens live in freedom, dignity, equality and security. More specifically, the conference presentations, including the special keynote address delivered by Deputy Chief Justice Dikgang Moseneke, addressed, *inter alia*, the following questions:

- To what extent have the Constitution and the law healed or facilitated the healing of the divisions of the past and established a society based on democratic values, social justice and fundamental human rights?
- Have the Constitution and the law laid a sufficiently strong foundation for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law?
- To what extent have the Constitution and the law improved the quality of life, or laid down the machinery for the improvement of the quality of life, of all citizens and thereby freed the potential of each citizen?
- To what extent have the Constitution and the law built a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations?

On behalf of the Editorial Board, I hope this special conference issue will make a distinctly enlightening and stimulating read.

Transformative Adjudication in Post-Apartheid South Africa – Taking Stock after a Decade

Dikgang Moseneke
Deputy Chief Justice of the Republic of South Africa

1 SALUTATIONS AND INTRODUCTION

At the outset, I must first thank the University of Fort Hare, and in particular Nelson R Mandela School of Law, and even more pointedly, Professor Patrick C Osode, the Executive Dean, Faculty of Law, for the kind invitation to speak at this auspicious conference. I bring you greetings from our Chief Justice, Pius Langa, and also from all my colleagues at the Constitutional Court. I pause to thank Judge President Somyalo, not only for his kind introductory remarks about me, but also in keeping with the good tradition of yesteryear which compels a visitor to commence a visit by paying respects to the resident chief or ruler. I also wish to extend my warm greetings to many colleagues on the bench here present, from the bar, in academia and other fields in pursuit of justice in our land. Many of you have been in tireless pursuit of a just society and it is heartening to see you here present as part of a critical stock-take of what we have set for ourselves to do, what we have done, and what is open to us to achieve in the future.

It is a matter of very special significance that the University of Fort Hare hosts this conference. Although we are now in East London, I know that in effect I am at Fort Hare University. That means that I have to take my shoes off because I stand on holy ground. I stand on the shrine of the struggle for a free, open and just and caring society. I do not exaggerate when I say that, of all places of higher learning that come to mind in this country, Fort Hare University is historically the ultimate gestation site of the high notions of a just society so amply enunciated and entrenched in our Constitution.

It is ironic that around the cut and thrust of the First World War, a tiny black elite and a few white liberals brought into being the first tertiary education facility to train and educate Africans, who then were, in effect, in bondage. Another paradox was that the facility was open to students from across the African continent. In this way, bonds with liberation movements on the rest of the continent were made possible. Parents and relatives of many of its new charges had to go to war for the British Empire to stall the advance of fascism and to protect democratic rights and freedoms which they did not enjoy in their native lands.

The unintended but invaluable aftermath of the First and Second World Wars was growing opposition to colonial tutelage, racial segregation and land dispossession. By the end of the Second World War, the young but restless activists at Fort Hare were well set to challenge, and declare intellectually bankrupt, morally depraved notions of racial superiority and exclusion. Scholar after scholar (if not activist after activist) from Fort Hare University re-asserted the innate and equal

worth of all human beings. They argued that there is only one race – the human race – and that all within a common polity were entitled to equal and unqualified franchise, self-determination and a just social order.

It is therefore not inappropriate to acknowledge at a conference such as the present the towering contribution of some of the graduates of Fort Hare University to our protracted struggle for freedom, renewal and a good social order. Many of its graduates have enjoyed prominent careers in fields as diverse as politics, medicine, literature and art. A remarkable collection of names from the 1940s to the 1950s comes to mind. A few names make the point: Dr WF Nkomo, Anton Mziwakhe Limbede, Godfrey Pitje, AP Mda, Nthato Motlana, Oliver Tambo, Robert Sobukwe, Govan Mbeki, Selby Ngendane, Mangosutho Buthelezi, Robert Mugabe, Ntsu Mokhele, Dennis Brutus, ZK Matthews, Can Themba, Seretse Khama, Joe Matthews, Chris Hani, and last, but certainly not least, Nelson Rolihlahla Mandela, whose name your law faculty proudly bears.[1] As I conclude my modest tribute to this great institution, it would be less than gracious not to recognise the crop of the 1970s to the 1990s who have inherited and honoured a proud tradition of struggle and selfless dedication to advancing the birth of a just society.

2 SCOPE OF THE ADDRESS

It is thus a singular honour to have been asked to deliver the keynote address at this conference. Rightly so, the repertoire of conference papers is most impressive. It boasts several very specific papers by distinguished jurists. Their contributions are bound to drill deeper into their areas of focus than I would hope to do in a wide-ranging paper. I recognise that I have limited time and space. What I have chosen to do is to restate, by way of background, the promise of our Constitution. Thereafter, I shall examine, albeit briefly, the overarching challenge of the judiciary in a shifting paradigm necessitated by our constitutional transition. Immediately thereafter, I shall seek to take stock of selected areas of judicial intervention since the inception of constitutional democracy. I shall do so with a view to making the broader thesis that what the courts have pronounced on over the past twelve years is admirable and often breaks new ground. However, it is perhaps what the courts have not decided that may very well pose the difficult questions on how well our courts have advanced the transformative enterprise commanded by the Constitution.

It seems therefore that the brief stock-take I hope to accomplish will be less to do with counting beans already in the calabash, and more to do with raising questions about why other beans are not in the container. There appears to be a crescendo of social-justice claims, be they claims for redistributive fairness, or around crime and the protection of life and limb, that appear to have not enjoyed adequate or any judicial attention over the past twelve years. Significant claims of the marginalised, poor and powerless appear muffled as far as courts are concerned. What are the implications of this apparent jurisprudential gap?

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1 Marrow and Gxabashe *History in Africa* (2000) 481–497; Williams *A History of the University of Fort Hare, South Africa. The 1950s: The Waiting Years* (2001). For an instructive case study, see Osode "Transforming teaching and research at law schools of historically Black Universities: A case study of the Fort Hare Law Faculty" 2000 *THRHR* 649.

3 THE PROMISE OF THE CONSTITUTION

Our Constitution holds a promise of a new beginning. It represents our collective quest for renewal. It is a product of the joint effort and will of our people who are deeply conscious of our unjust, unequal and divided past but opt for truth, reconciliation and reconstruction. The Constitution set for itself the object of healing these divisions by establishing a common citizenship in an undivided country which must strive to be united in its diversity. It reaffirms our common conviction that South Africa belongs to all who live in it, that the choice we make is of a democratic and open society in which every citizen is equally protected by the law. In the final analysis the renewal our Constitution promises is to improve the quality of life of all citizens and to free the potential of each person. In other words, embedded in the inner recesses of our transformative project is not only the meticulous observance of fundamental human rights but also the quest to ameliorate material deprivation and, so to speak, to bring the goal of a better life for all within reach.

To achieve this broader purpose, the Constitution lays down foundational norms. Foremost of these is that the Constitution itself ousts rule by a sovereign parliament and declares itself as supreme law; it commands that any law inconsistent with it is invalid and that the obligations imposed by the Constitution must be fulfilled. Equally important is that the Constitution spells out its specific normative value system or the juridical ideology. In this way, it displaces subjective ethical or intellectual preferences with a transparent and justiciable set of values.

The first and most crucial of these norms (and indeed an entrenched right) is that human dignity is inviolable. Human beings carry inherent worth for no reason other than that they are human. To make this primordial truth, the Zulus in their well-known greeting say "Sawubona" – I see you, I recognise your humanity, I know and accept that you are human. In the Sotho languages the same point is made by the idiomatic expression "Motho ke motho ka batho" – I am because you are. The fullness of our very being is expressed in terms that are tied up to the equal and inalienable respect which inheres in every one of us. Trite as this proposition is, past and present human condition shows that breach of human dignity, exclusion and dispossession still abound. Wars still rage. Forcible removal of democratic governments and regime changes are not a thing of the past. Genocide and physical brutality are not uncommon. Poverty, homelessness and pandemic ill-health are all on the rise. Lastly, in our domestic context, perhaps poverty, ill-health and violent crime may be the severest affronts to human dignity.

For this, and other important reasons, in our new jurisprudence equal worth and dignity are not only ethereal, but justiciable, standards. Every rule of law and every exercise of public power must not diminish or undermine the inherent worth of people, save if it is convincingly justifiable and reasonable. Equally important is that notions of dignity are not limited to so-called first-generation rights. Properly understood, the requirement of dignity is central to, but also part of, mutually reinforcing fundamental rights such as the rights to life, equality and non-discrimination, freedom and the security of the person. In turn, human dignity and equal worth gain true meaning only when there is redistributive justice and social equity.

The Constitution points to other values. It places a premium on the rule of law. Separation of powers is a cardinal feature of our democracy which, in turn, is

based on universal adult suffrage, a common voters' roll, and regular elections. Public institutions must afford citizens governance that is accountable, responsive and open. The exercise of all public power is subject to constitutional control, inasmuch as everyone has the right to lawful, reasonable and procedurally fair administrative action reviewable by an independent judiciary. In the end we will do well to remember that democracy is not much more than the means by which the citizenry keeps the ruling elite accountable and responsive so as to advance the vital interests of a good society.

In order to buttress its transformative project, the Constitution does not leave the fundamental rights it seeks to entrench to chance. It prescribes, in remarkable detail, a Bill of Rights that is a cornerstone of our democracy. It is said to affirm the democratic values of human equality and freedom. Our Bill of Rights applies to all law. It binds the legislature, the executive, the judiciary and all organs of state, and, in appropriate circumstances, it applies to natural and juristic persons. In effect, the Bill of Rights reinforces the supremacy of the Constitution and demands that all law and conduct must be consistent with its provisions.

More than any other part of the Constitution, the Bill of Rights entrenches the ubiquitous sway of the constitutional scheme and creates one as opposed to two or more systems of law. This it does by requiring all courts, when interpreting any legislation and when developing the common law or customary law, to promote the spirit, purport and objects of the Bill of Rights.[2] Of course, it is by now trite that rights conferred by the Bill of Rights are not limitless. When it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, rights may be limited by a law of general application or by a provision of the Constitution.[3]

4 THE CENTRALITY OF JUDICIAL FUNCTION

The Constitution contemplates that its goals shall be best achieved by separating powers to be exercised by the legislative, the executive and the judiciary and by specified organs of state. However, the overall scheme vests legislative authority in the legislature. Judicial authority vests in the courts, and the president and the executive wield executive power conferred by the Constitution and by law. Thus,

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2 See s 39(2) of the Constitution. See related cases *Steenkamp NO v The Provincial Tender Board of the Eastern Cape* 2007 3 BCLR 300 (CC); *Phumelela Gaming and Leisure Ltd v Gründlingh* 2006 8 BCLR 883 (CC); *K v Minister of Safety and Security* 2005 9 BCLR 835 (CC), 2005 6 SA 419 (CC); *Khumalo v Holomisa* 2002 8 BCLR 771 (CC), 2002 5 SA 401 (CC); *Carmichele v Minister of Safety and Security and the Minister of Justice and Constitutional Development* 2001 10 BCLR 995 (CC), 2001 4 SA 938 (CC); *Gardener v Whitaker* 1996 6 BCLR 775 (CC), 1996 4 SA 337 (CC), ; *Du Plessis v De Klerk* 1996 5 BCLR 658 (CC), 1996 3 SA 850 (CC); *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President* of RSA 2005 1 BCLR 1 (CC), 2005 1 SA 580 (CC), .

3 See s 36(1) and (2) of the Constitution. Cases relevant to the limitation analysis are: *Magajane v Chairperson, North West Gambling Board* 2006 10 BCLR 1133 (CC); *Zondi v MEC for Traditional and Local Government Affairs* 2005 3 SA 589 (CC); *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)* 2004 5 BCLR 445 (CC); *Phillips v Director of Public Prosecutions (Witwatersrand Local Division)* 2003 4 BCLR 357 (CC); *Prince v President of the Law Society of the Cape of Good Hope* 2002 3 BCLR 231 (CC); *S v Manamela* 2000 5 BCLR 491 (CC); *S v Makwanyane* 1995 6 BCLR 665 (CC).

separation of power is an over-arching organising principle in the exercise of public power. It not only identifies the functionary and delineates public power, but also serves and reinforces democratic practice and good governance. It implies that power shall be used in a lawful and accountable manner, and in furtherance of a legitimate public end. Because separation of power has the effect of dispersing and apportioning public power, it creates checks and balances appropriate in a democracy. It subjects all exercise of public power to forensic review by an independent judiciary, and yet it does not permit unwarranted judicial incursion into the domain of parliament or the executive. In its essence separation of powers is an antidote for tyranny and abuse of power. Therefore, when the separation of power principle operates optimally, there should be no trespass by the judiciary into the domain of the legislature, or by the legislature into the areas set aside for judicial function. Equally, it is not permissible for the executive to exercise powers other than those conferred on it by the Constitution.[4] What is, however, clear is that the task to fulfil the transformative design of the Constitution is a collective one, and falls to be obeyed by all state functionaries and organs and, when appropriate, by individuals and corporate citizens alike.

However, for purposes of this paper, I look inward. I limit my concern to the judicial function and the obligation of the judges, when deciding matters, to advance, when so required, the transformative design of the Constitution. I have, on another occasion,[5] tried to spell out what transformative adjudication implies. This is not the place to repeat that discussion. Let the following suffice. First, the judiciary, like all sectors of society, should acknowledge and recognise that the Constitution was developed within a particular historical and social context, and that the Constitution is set to redress this legacy. It was a context of social exclusion, unequal power relations and material dispossession. Second, the judicial power is not inherent but derives from the Constitution. The power to test legislation and other law for constitutional consistency, and the authority to review executive decision, are deliberate choices. They all, however, mean that those who grace our judicial office must embrace the fundamental transition the Constitution envisions and the resultant jurisprudential sea-change envisioned by the Constitution.

One might ask what transformation means in an adjudicatory context. In my view, it means decision-making that is faithful to what the Constitution and the law requires, in the context of each case and its peculiar factual matrix. One can articulate a similar point in terms, perhaps more robust, used by writers Albertyn and Goldblatt, who say:

> "We understand transformation to require a complete reconstruction of the state and society, including redistribution of power and resources along egalitarian lines. The challenge of achieving equality within this transformation project involves the eradication of systemic forms of domination and material disadvantages based on race, gender, class and other grounds of inequality. It also entails the development of opportunities which allow people to realise their full human potential within positive social relationships".[6]

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4 Compare *Van Rooyen v The State* 2002 5 SA 246 (CC).

5 Moseneke "The Fourth Braam Fischer Memorial Lecture: Transformative Adjudication" 2002 *SAJHR* 309–319.

6 Albertyn & Goldblatt "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" 1998 *SAJHR* 248–249.

In other words, as Mohamed DP suggested in *Makwanyane*, we judges ought to turn our backs firmly against the bad of the past legal order and to uphold the good required by the new legal order. What is good and permissible is determined in the light of the injunctions of the Constitution and its holistic, value-based framework[7] that carries the common conviction of our society. As it is often said, it is a repository of "the values which bind its people".[8] This means that the rich heritage of the common law is worth preserving only to the extent of its constitutional compliance. Equally, many values and rules of indigenous law are worthy of preservation, but only if they sit well in our new-found jurisprudence.

Third, whilst judges are bound to give effect to the provisions of the Constitution and the values it espouses, this is not an invitation to impose political objectives, or subjective or parochial norms. This adjudicative style readily recognises that judges are engaged in a judicial function, not a legislative one. Their function is to interpret and give effect to the law within the context permitted by the Constitution. This exercise should not be merely positivistic, but should rather be value-drenched and sensitive to the broader social context and the peculiarities presented by each case at hand. As I have said in another context:

> "Judicial interpretation under the Constitution has placed different imperatives upon the adjudicator. Austere legalism more suited to interpretation of statutes is not commendable to constitutional interpretation. The intention of the drafter is of little avail in constitutional interpretation as intimated earlier, the salutary approach to constitutional interpretation, is one which provides the most adequate response to the countermajoritarian dilemma by giving effect to the underlying values of the Constitution.[9] It seems to me that our constitutional design of conferring vast powers of judicial review to the courts becomes optimal only if the courts are true to the constitutional mandate. It is argued that, in their work, courts should search for substantive justice, which is to be inferred from the foundational values of the constitution. After all, that is the injunction of the Constitution – transformation."[10]

Fourth, judges should be astute to recognise that the Constitution requires us to be intolerant towards systemic forms of exclusion and domination within society; that fundamental rights are indivisible and interrelated; that fundamental rights which gird social justice are just as important, if not more important, than so-called first generation rights.

This is so because, in part, our Constitution is animated, less by neo-liberal notions of personal autonomy and protection of individual property, but more by the achievement of collective good and redistributive justice. The judicial function should recognise and give effect to the value of a society that is open and that holds accountable the ruling bureaucrats to the constitutional design of securing socio-economic rights and thus entrenching social equity. Put more simply, our polity is duty bound to improve the quality of life for all citizens, and in that way to free the potential within each of us.

Before I turn my attention to a brief scorecard on judicial function and transformative adjudication over the last dozen years, I must emphasise that the transformative enterprise is a judicial enterprise, and therefore must occur within the

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7 See *Coetzee v Government of the RSA* 1995 4 SA 631 (CC) para 46 (per Sachs J).
8 *S v Makwanyane* 1995 3 SA 391 (CC) para 262 (per Mahomed DP).
9 For a discussion of the counter-majoritarian dilemma, and an analysis of theories of constitutional interpretation see Kentridge & Spitz "Interpretation" in Chaskalson *et al Constitutional Law of South Africa* 11-1ff.
10 Moseneke 2002 *SAJHR* 316.

context of the law. Judges are required to, and should, at all times, stay faithful to the facts before them. They are required to dispense justice consistent with their judicial oath, which requires of them to uphold and protect the Constitution and the human rights entrenched in it. The oath further requires that they must administer justice to all persons alike, without fear, favour or prejudice, in accordance with the Constitution and the law.[11]

5 THE SCORECARD

A survey of decided cases of the constitutional court over twelve years evinces three broad categories. These involve jurisprudence on: rights in the Bill of Rights; on jurisdiction; and on the exercise of power by other courts or branches of government. It is, however, fair to say that rights jurisprudence has dominated much of constitutional adjudication to this point. This is to be expected, because litigants often seek to anchor their constitutional claim in a demonstrable invasion of an interest entrenched in the Bill of Rights.

In the court in which I serve, claims concerning equality and dignity dominate our rights jurisprudence. In turn, these challenges tend to fall in three categories: sexual orientation; family power relations; and, to a lesser degree, affirmative action. The most prominent of our equality cases relate to employment discrimination against an HIV positive person,[12] discrimination arising from criminal prohibition of sodomy between consenting adult males,[13] legislative discrimination against same sex life partners on rights related to immigration issues,[14] unfair exclusion of same sex partners from state remuneration benefits,[15] and unjustified exclusion of same sex partners from adoption of children.[16]

In the category of gender inequality we have struck down legislation or rules of the common law or customary law which favour patriarchy within the family or home.[17] Surprisingly, we have had occasion to consider only one affirmative action challenge relating to parliamentary pension fund rules.[18] Another claim based on a breach of affirmative action provisions of the Employment Equity Act[19] was raised, but not decided, and was remitted to the court *a quo* in *Dudley v The City of Cape Town.*[20] In *City Council of Pretoria v Walker*,[21] the discrimination claim emanated from white residents against electricity billing practice preferential to black residential areas. Lastly, in *Larbi-Odam*,[22] we struck down

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11 See Schedule 2 of the Constitution, para 6.1: Oaths and Solemn Affirmations.
12 *Hoffman v SAA* 2000 11 BCLR 1211 (CC).
13 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC).
14 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 2000 1 BCLR 39 (CC).
15 *Satchwell v The President* 2002 9 BCLR 986 (CC).
16 *Du Toit v The Minister of Welfare and Population Development* 2002 10 BCLR 1006 (CC).
17 *Brink v Kitshof* 1996 6 BCLR 752 (CC); *Bhe v Magistrate Khayelitsha* 2005 1 SA 580 (CC); *Van der Merwe v RAF* 2006 4 SA 230 (CC); *S v Baloyi* 2000 1 BCLR 86 (CC); *Daniels v Campbell NO* 2004 2 BCLR 735 (CC).
18 *Minister of Finance v van Heerden* 2004 6 SA 121 (CC).
19 Employment Equity Act 55 of 1998.
20 2004 8 BCLR 805 (CC).
21 *City Council of Pretoria v Walker* 1998 3 BCLR 257 (CC).
22 *Larbi-Odam v MEC for Education* 1997 12 BCLR 1655 (CC).

as unjust discrimination a legislative instrument that sought to prevent permanent residents from holding permanent posts in the Department of Education.

The court has also had occasion to consider a variety of constitutional claims for procedural and substantive justice in the context of criminal hearings. The most prominent of these cases examined the constitutional validity of the death penalty,[23] reverse onus in criminal proceedings,[24] the appealability of adverse factual findings,[25] issues of judicial bias and discretion in a criminal trial,[26] common purpose as a criminal justice standard,[27] bail proceedings and the right to freedom,[28] corporal punishment for juvenile offenders,[29] the use of fatal force in the course of lawful arrest,[30] criminal prohibition of prostitution[31] and of possession of child pornography,[32] as well as the constitutional appropriateness of civil forfeiture of private property used as an instrumentality of crime.[33]

In the past decade it has not been uncommon for the Constitutional Court to be invited to advance the constitutional injunction that in interpreting legislation and when developing the common law or customary law, every court must promote the spirit, purport and object of the Bill of Rights. We have heard several times that the duty to bring in line all law with the Constitution and its values is a mandatory one. Whereas, under the Interim Constitution, there may have been some procedural doubt whether s 35(3) of the Interim Constitution made the development of the common law and customary law mandatory,[34] it is now clear that under the present Constitution, courts are obliged to do so.[35]

6 SOCIO-ECONOMIC AND PROPERTY RIGHTS

I have just given you a broad survey of the kind of issues that our courts in general and in particular the Constitutional Court have had to confront in the last twelve years. I turn now to examine, albeit briefly, socio-economic and property rights claims that had to be resolved. Before I do so, I restate briefly the duty of the state to advance social justice. The state and the judiciary must protect socio-economic rights. The state first carries the duty to protect socio-economic rights by regulating such rights through legislation and administrative conduct. Courts also play an important role in protecting these rights through the interpretation of legislation and the development of common law rules, in order to promote the spirit purport and object of the Bill of Rights.[36] Under our Constitution it is

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23 *S v Makwanyane* 1995 3 SA 391 (CC); 1995 6 BCLR 665 (CC).
24 S v *Bhulwana; S v Gwadiso* 1995 12 BCLR 1579 (CC); 1996 1 SA 388 (CC).
25 *Boesak v The State* 2001 1 BCLR 36 (CC).
26 *S v Basson* 2004 6 BCLR 620 (CC).
27 *Thebus v S* 2003 10 BCLR 1100 (CC).
28 *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat* 1999 7 BCLR 771 (CC).
29 *Christian Education South Africa v Minister of Eduction of RSA* 2000 10 BCLR 1051 (CC); *S v Williams* 1995 7 BCLR 861 (CC).
30 *S v Walters* 2001 10 BCLR 1088 (Tk).
31 *Jordan v S* 2002 11 BCLR 1117 (CC).
32 *De Reuck v DPP* 2003 12 BCLR 1333 (CC).
33 *Prophet v National Director of Public Prosecutions* 2007 2 BCLR 140 (CC).
34 *Du Plessis v de Klerk* 1996 BCLR 658 and also see *Gardener v Whitake*r 1996 6 BCLR 775 (CC).
35 *Carmichele v Minister of Safety and Security* 2001 10 BCLR 995 (CC); *K v Minister of Safety and Security* 2005 9 BCLR 835 (CC).
36 Brand and Heyns *Socio-Economic Rights in South Africa* (2005).

convenient to examine these rights under the rubrics of health care, food, water, social security, education, housing, land and the environment.

The language of our Constitution makes it plain that each of the socio-economic rights, in the first instance, must be protected. In *Treatment Action Campaign*[37] we held that government was better placed than the courts to formulate and implement policy on HIV, but held that it had failed to adopt a reasonable measure to achieve the progressive realisation of the right of access to health care services in accordance with s 27(2) read with s 27(1). In this case, the court emphasised that the needs of children "were most urgent".

We then said:

> "Where a breach of any right has taken place, including a socio-economic right, a Court is under a duty to ensure that effective relief is granted. The nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in a particular case. Where necessary this may include both the issuing of a mandamus and the exercise of supervisory jurisdiction."[38]

The challenge however, lies in the internal limitations found in the formulation of socio-economic rights. The state is indeed obliged to take legislative and other measures, but it is obliged to take only reasonable steps, and within available resources. The Constitution readily realises that the achievement of socio-economic rights would be subject to progressive realisation. In *Grootboom* the court explained:

> "The term 'progressive realisation' shows that it was contemplated that the right could not be realised immediately. But the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the state must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time."[39]

What intrigues me is the paucity of cases on socio-economic protections. In fact it is not unkind to say that beyond *Treatment Action Campaign*, *Grootboom* and perhaps *Modderklip Boerdery*,[40] *PE Municipality*,[41] and *Jaftha*,[42] our jurisprudence on enforcement of socio-economic rights has had a stunted growth. We are yet to confront and define what the right to "basic education" and "further education" entails. We are yet to give content to most of the social rights. The same may properly be said of the right to have access to "sufficient food, water and the right to an environment that is not harmful to health or wellbeing". Equally surprising is the low level of judicial output in relation to issues associated with access to adequate housing and protection against arbitrary evictions. In a similar vein, or perhaps on the other end of the spectrum, there has been a remarkable lack of forensic analysis around the protection against arbitrary deprivation of property. This is so in the face of intractable issues around landlessness and land restoration claims.

The points I make here must been seen within the context of a plethora of research on the mushrooming of social movements to articulate and contest social

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37 *Minister of Health v Treatment Action Campaign* 2002 10 BCLR 1033 (CC).
38 Para 106.
39 *Government of the RSA v Grootboom* 2001 1 SA 46 (CC) para 45.
40 *President of RSA v Modderklip Boerdery* 2005 8 BCLR 786 (CC).
41 *PE Municipality v Various Occupiers* 2004 12 BCLR 1268 (CC).
42 *Jaftha v Schoeman* 2005 1 BCLR 78 (CC).

justice claims akin, or not dissimilar to, socio-economic guarantees. Editors and social researchers Ballard, Habib and Valodia, writing in collaboration with several social scientists in *Voices of Protest – Social Movements in Post-Apartheid South Africa* observe that:

> "Contemporary social movements are by no means unitary and uniform. A quick scan of the issues they represent indicates a massive diversity of concerns: land equity, gender, sexuality, racism, environment, education, formal labour, informal labour, access to infrastructure, housing, evictions, HIV/Aids treatment, crime and safety and geo-politics. Many movements suggest that they draw from class-based ideologies with notable self-descriptions as: anti-neo-liberal, anti-capital, anti-GEAR, anti-globalisation, anti-market, and pro-poor, pro-human rights, socialist and Trotskyist. However, while the material improvement of poor people's lives is at the core of many of these movements, they are by no means limited to demands for delivery or indeed to the concerns of the poor. Some also speak to legal rights, social and environmental justice, and stigmas and discrimination of certain categories of people rooted in everyday society and culture. Furthermore, the acknowledgement of second generation rights in the Constitution allows for material gains to be constructed as rights, and there is increasing blurring between class-based and rights based struggles."[43]

7 CONCLUSION

In conclusion, may I observe that the transitional project commanded by our Constitution is well underway. A very impressive body of jurisprudence is emerging, well steeped in the value system and imperatives of our Constitution. Although sometimes many courts go about their tasks as if there was no lawful revolution ignited by the interim Constitution of 1994, a significant body of jurisprudence suggests that a growing number of judicial officers have indeed grasped the nettle and do justice within the freer and aspirational context of the Constitution, which seeks to recreate our society into one that values democracy, freedom and social justice and which promises a better life for all. This injunction we may ignore, but only at our peril.

By all this I am not arguing that courts are principal agents of our constitutional revolution. They are indispensable partners and co-guardians of the transformation enterprise. This does not, however, mean that all rights mandated by the Constitution, in practice, enjoy effective and constant protection.

An immediate example is the intolerable wave of violent crime that perforce invades and diminishes much-cherished personal peace and bodily integrity of law-abiding citizens, who rightly deserve more from all of us who wield public power. It might perhaps be appropriate to conclude by observing that one of the most effective antidotes of crime (although certainly not the only antidote) must surely be a more socially just society. If we are to advance a more socially just society we, as jurists of a wide variety, need to understand why the particular causes have enjoyed more judicial attention than others? Why do redistibutive claims to social justice by the poor, marginalised, dispossessed, landless and sick not reach the courts? Are public interest entities doing enough in advancing access to justice on critical matters of social justice? Do social movements knowingly choose terrains of struggle other than courts? By all accounts, public

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43 Ballard, Habib and Valodia *Voices of Protest – Social Movements in Post-Apartheid South Africa* (2006).

protest and demonstrations against questionable service delivery may be on the increase. Do the street protests have more allurement than a battle in the courts?

Crime undermines fundamental human rights of all, especially the poor, and in time, it threatens the fabric of our much-idealised open democracy. Is this a legitimate judicial concern? Should courts be moved on this basis?

It seems to me there are more questions than answers in a vital area of our constitutional revolution. This conference may seek to find some answers to these intractable questions.

The Horizontal Application of Human Rights Norms

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1 INTRODUCTION

The so-called "horizontal" application of human rights is a metaphor used to distinguish the application of human rights between private individuals and entities from the application of those rights between the state (or organs of state) and private individuals or entities, which is also metaphorically called the "vertical" application of those rights or norms. The aim of my address is to chip away at the power of these metaphors, or better still, to convince you to discard them.[1] We did not rely on those metaphors before the advent of our constitutional democracy, and I will attempt to convince you that neither do we need them today. My suggestion is that their use is, or has become, part of the problem and not really helpful in finding an answer to the question when, and the extent to which, human rights norms apply to legal relationships, either between private parties themselves or between private parties and state or public organs.

The answer to that question, I suggest, is not to be found in purely "legal" or conceptual analysis,[2] although I do not say that these kinds of analyses cannot contribute to making the right kind of choice. The final answers, however, lie at a deeper level. They are to be constructed by making evaluative choices about, first, our past – to what extent it was bad, and to what extent it nevertheless contained some good;[3] and, second, our future – to what extent the bad of our past must be transformed into good, and of what that good must consist. Our Constitution requires the judiciary (and, by implication, all of the legal profession) to take part in this transformative process.[4] We are thus not shielded or absolved

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1 See Botha "Metaphoric Reasoning and Transformative Constitutionalism" 2002 *TSAR* 612 and 2003 *TSAR* 20 for an illuminating discussion on the importance and pitfalls of the use of metaphors in legal reasoning.

2 There is a considerable body of literature on the issue. A fairly comprehensive summary and discussion of the different approaches appears in the chapter on "Application" by Woolman in Woolman & Roux (eds) *Constitutional Law of South Africa* 2 ed Ch 31.

3 In "The Constitution is Natural Justice Writ Large" Corder & McLennan (eds) *Controlling Public Power: Administrative Justice Through Law* (1995) 51, Albie Sachs states: "It is no accident that constitutions come into being as a result of bad rather than good experiences. Their text, or sub-text, is almost invariably: 'never again'." In *S v Makwanyane* 1995 3 SA 391 (CC) para 262 Mahomed J characterised the South African Constitution as a decisive break and rejection of the past, retaining from the past only "what is defensible" and what is in keeping with the Constitution's "commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos". These quotes are taken from Plasket *Administrative Law* (forthcoming) ch 1 6–8.

4 See ss 1(c), 2, 7, 8, 38, 39, 165 and 173 of the Constitution of the Republic of South Africa, 1996.

from making those evaluative choices. What seems to be required from the judiciary in the transformative process is not only to assess (and in a sense rewrite) our legal history, but also to shape the law for the future course of history. That is a formidable task and responsibility, which carries within it the danger of falsifying history: portray the past as worse than it was and the needs of transformation are exaggerated; portray the past as better than it was, then it can be argued that there is nothing to fix.

2 CONVENTIONAL WISDOM

But what if our tradition – the conventional wisdom of our law, our politics, our economics, our social life – tells us that that it is not the function of law to make those choices, or that, even if we are capable of making such rational evaluative choices in law, the effect of making those choices will at best not amount to much and, at worst, will probably be harmful to the well-being of our society? We might overcome that by simply rejecting the conventional wisdom of the past and by attempting to replace it with a new conventional wisdom that allows the kind of rational evaluative choices that the Constitution requires of us. It will, however, be easier for us to fashion such a new conventional wisdom which not only allows, but also demands, the making of those evaluative choices in adjudication, if there are traces of good in our past which may be reconciled with the new conventional wisdom we seek.

What about the world at large, the global world from which there is no escape any more? Again, it will be easier to fashion the new conventional wisdom if current trends in the world at large acknowledge the real and effective possibility of evaluative social choice, also in law. But what if an examination of the present state of knowledge in law, social life, politics and economics confirms the conventional wisdom that those evaluative social choices are at best illusions, and at worst positively harmful? In that event I think the Constitution tells us to go it alone regardless, but is the news really so grim?

I think not. There is good news and there is bad news.

The bad news is that the conventional wisdom of the past, and the present, indeed seems to say that evaluative social choice should be avoided because it is inevitably arbitrary, and even if it cannot be avoided it should be minimised so as not to cause too much harm.

The good news is that there are traces in our past tradition, as well as in present learning, to challenge this conventional wisdom *on its own terms*.

3 A NEW, OR ADAPTED, CONVENTIONAL WISDOM

What I mean by challenging accepted conventional wisdom on its own terms is to challenge it, not by outright rejection, but by viewing its terms from a different perspective, or adding new insights to it, so that adherents to that conventional wisdom may recognise the value of the new perspective or insights, and come round to accepting the merits of the proposed new, or adapted, conventional wisdom. The approach is a pragmatic one.[5]

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5 The alternative is to reject the underlying premises of the conventional wisdom altogether, but that usually results in a "dialogue of the deaf", where neither side listens to the other.

Let me give a brief sketch of the conventional wisdom that the constitutional demand of transformative adjudication in law – making evaluative social choices in public and private legal relations – is up against.

Philosophically, it is buttressed by Isaiah Berlin's now celebrated distinction between negative freedom and positive freedom.[6] Negative freedom – the freedom from interference, especially from interference from the state – is a freedom worthy of legal protection because it enhances political freedom. Positive freedom – having the means to exercise real personal autonomy – should not be so protected because to do so would confuse political freedom with economic freedom, and because the notion of positive freedom could be abused by dictators to prescribe what is necessary and good for us to enable us to be truly free.[7] Economically, its foundations are found in "the invisible hand" of Adam Smith – the self-sufficient free market of supply and demand – which by itself finds the most effective way to produce wealth.[8] On an economic level, the security of property rights is of paramount importance for an efficient market, but the efficiency of the market is said not to be dependent on the distribution of property rights.[9] Similarly, the distribution of income produced by the market is not an economic concern, but a political one. Any attempt to ascertain by cogent aggregative judgments, that is, by social choice, what is good for society is doomed to failure.[10] Since the collapse of communism, the apparently deterministic logic of the free market has been extended to virtually every country in the world by the international integration of economic activities through markets, that is, by global capitalism.[11]

The conventional wisdom of the law accepts the implications of these philosophical and economic imperatives. It makes a distinction between public and

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6 Berlin "Two Concepts of Liberty" in *The Proper Study of Mankind: An Anthology of Essays* (1997).

7 Berlin *The Power of Ideas* (2001) 16–17.

8 "'[T]he invisible hand' . . . whereby 'the private interests and passions of men' are led in the direction 'which is most agreeable to the interest of the whole society'." Smith *The Wealth of Nations*, quoted in Heilbroner *The Worldly Philosophers* 6 ed (1983) 54.

9 A series of economic theorems appears to rule out any effort to bring equitable considerations into mainstream economic thought. The First Welfare Theorem, or Fundamental Theorem of Welfare Economics, holds that any competitive equilibrium leads to an efficient allocation of resources. A competitive equilibrium assumes the existence of a competitive market for all goods with negligible transaction costs. Efficiency means Pareto efficiency, that is, a result that can make at least one individual better off without making anyone else worse off (see eg Mercuro & Medema *Economics and the Law* 2 ed (2006) 21 and 25). The Pareto criterion takes no interest in distributional issues "which cannot be addressed without considering conflicts of interest and of preferences" (see Amartya Sen "The Possibility of Social Choice" http://nobelprize.org/nobel prizes/economics/laureates/1998 178 183 (also published in *American Economic Review* (July 1999) 89)). Arrow's Impossibility Theorem established that relating social preference to a set of individual preferences could not satisfy some mild conditions (Pareto efficiency, non-dictatorship, independence and unrestricted domain) simultaneously (Sen *ibid*). This impossibility seems to rule out social choice as a legitimate factor in measuring and evaluating economic efficiency. The simplest version of the Coase Theorem states that in a world where there are no transaction costs an efficient outcome will occur regardless of the initial allocation of property rights (see Mercuro & Medema *Economics and the Law* 107–113).

10 Arrow's Impossibility Theorem, discussed by Sen "The Possibility of Social Choice" 183–184.

11 Wolf *Why Globalization Works* (2004) 14 and 19.

private law. Public law is the legitimate domain of political considerations, but only to the limited extent that the courts may defend the negative political freedom from interference of the individual from encroachment by the state. The assumption is that only in public law legal relationships do unequal power relationships exist.[12] The combination of acceptably protected negative political freedoms and the unequal power relationship inherent in public law legal relations justifies the different nature of adjudication in this "vertical" situation in at least two ways: (1) judges make "political" choices, and they do so by (2) the application of human rights relating to the negative political freedoms.

Private legal relationships are different though. They are relationships between equals. Adjudication in private law is not, as in public law, the control by the courts of the possible abuse of power in an unequal power relationship. When judges adjudicate private law disputes they do not make social or political choices to correct the possible abuse of the unequal exercise of power; they are merely neutral value-free arbiters who make the necessary (purely legal) decision by applying legal reasoning in the form of deductive or inductive logic from established legal concepts and previous case law. That positive law stands autonomous from social or political choices about human rights. Adjudication in these "horizontal" situations thus does not (1) involve social or political choice, nor (2) does it involve the application of human-rights norms in any political sense.

The conventional wisdom thus holds that the nature of adjudication in public law or so-called "vertical" relationships is different to that of private law or so-called "horizontal" relationships, in that in the former some limited form of social or political choice based on human rights of a political nature is required, but that neither social choice nor human rights are implicated in the latter.[13]

When it comes to economic empowerment, the conventional legal wisdom mimics conventional economic wisdom. The law of property protects established property rights to the fullest extent without concerning itself about the distribution of those property rights, or in ordinary language, with who holds those property rights.[14] The law of contract gives precedence to the freedom to contract and the sanctity of contract in order to let the market run its course.

If this is indeed the conventional wisdom of the past, and of the present, is its application likely to enable the South African judiciary to fulfil the constitutional mandate to play its part in the transformation of our society? The answer to that depends on what we understand by the constitutional demand of the transformation of our society.

If transformation merely means the transfer of political, social and economic power from one ruling elite (whites) to another ruling elite (blacks), this past and current conventional wisdom may well serve that purpose quite well, but in a rather perverse way, namely by requiring the judiciary *not* to take part actively in the transformative process. Under this version of transformation the transfer of

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12 Cockrell "'Can You Paradigm?' – Another Perspective on the Public Law/Private Law Divide" 1993 *Acta Juridica* 227 228.

13 Cockrell *ibid*.

14 Anything less than full, or absolute, ownership is either not recognised as a property right, or, even when it is, will always lose "in any straight contest of power" against the right of ownership. See Van der Walt "Tradition on Trial: A Critical Analysis of the Civil-Law Tradition in South African Property Law" 1995 *SAJHR* 169 179.

political power takes place through the ballot box. Once this is done the further transfer of economic power is effected by legislative measures, for example by empowerment schemes warranting transfer of the productive means of wealth to the new black elite. The courts do not interfere with this *political* redistribution of the means to produce wealth because the conventional wisdom says it should not. The positive freedoms, of access to housing, education, health, water, social welfare, and the like, are similarly to be effected primarily by the legislature, and the courts should be loathe to interfere in that process as well, because once again it is primarily a *political* issue where the courts should defer to the wishes of the democratically elected legislature. With regard to the negative political freedoms the courts may, however, play an active role by strengthening the democratic process to prevent too much interference with the individual's freedom to be left alone, as they are supposed to do in classic liberal societies.

4 POLITICAL FREEDOM AND SOCIO-ECONOMIC JUSTICE

In addition to what has been said above, it seems quite clear that the Constitution asks for a deeper transformation of our society than merely the changing of elites.[15] It recognises that political freedom and socio-economic justice are mutually reinforcing; that people need to have the necessary social resources if they are to be truly free. When it speaks of equality, it means substantive equality, not mere formal equality.[16] It places affirmative duties on the state to combat poverty and promote social welfare, and it recognises quite explicitly that its vision of realising the means to dignified freedom and equality also extends to the private spheres of the market, the workplace, and the family. The Constitution is "historically self-conscious", and the democracy it seeks to promote is deeper than mere voting in elections. It seeks to establish a "culture of democracy" which embraces accountable and responsive government, and it recognises cultural diversity.[17]

If this is the transformation the Constitution demands the courts to play an active part in, however, then conventional wisdom will not do. The deepening of democracy it requires goes far beyond the protection of individual liberties. The rule of law it embraces in the public sphere is one of accountable, open and responsive government, and of judicial oversight of the government's obligation to fight poverty and provide social welfare. Even in the public sphere, it pulls the courts into much deeper social and political choice-making than the conventional wisdom ever countenanced. In the private sphere it requires the courts to do their bit in eradicating distorting patterns of interpersonal, social and economic domination. The conventional wisdom pretends that courts may not do that. So both in the so-called "vertical" (public) and "horizontal" (private) spheres, the conventional wisdom does not provide us with the means or tools to perform our constitutional duty. Something more, and different, is required.

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15 The pathbreaking article about transformative constitutionalism was that of Klare "Legal Culture and Transformative Constitutionalism" 1998 *SAJHR* 146. See also, for example, Lang, "The Vision of the Constitution" 2003 *SALJ* 670; Moseneke, "The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication" 2002 *SAJHR* 309; Pieterse "What do we mean when we talk of Transformative Constitutionalism?" 2005 *SA Public Law* 155.

16 See Albertyn & Goldblatt, "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" 1998 *SAJHR* 248.

17 See Klare 1998 *SAJHR* 153–158.

5 A NEW READING OF OUR LEGAL-HISTORICAL LEGACY

In what follows, I want to propagate some good news. The first part of the good news is that our legal history, looked at with the benefit of a different perspective borne of hindsight, contains within it the potential to be read differently to the present conventional wisdom. The second part is that such a reading of our legal history finds comfort in the deeper and broader understanding of legal, philosophical and economic issues that is emerging in current thought.

I will use the pre-constitutional case of *Bank of Lisbon v De Ornelas*[18] and its post-constitutional counterparts, *Brisley v Drotsky*[19] and *Afrox Health Care Bpk v Strydom*,[20] to help make my case about the re-interpretation of our legal history.

What had to be decided in the *Bank of Lisbon* case was whether the *exceptio doli generalis* still formed part of our pre-constitutional common law of contract. The *exceptio doli* as a substantive defence would imply that in appropriate circumstances a court could grant relief in contractual cases where the strict law would have an inequitable effect. The majority (per Joubert JA) held that it did not. The minority of one (Jansen JA) held that it did.

In the *Brisley* and *Afrox Health Care* cases, the Supreme Court of Appeal had to decide whether constitutional values justified the incorporation of good faith as an independent norm of our post-constitutional common law of contract. The court held that they do not justify such an incorporation of independent good faith into our law of contract.

At the heart of both the *exceptio doli* issue in *Bank of Lisbon* and the good faith issue in *Brisley* and *Afrox* was whether evaluative "open-ended" norms could be used to override or ameliorate established contractual rules of law. In the former case, the basis for such a norm was sought in equitable considerations, in the latter case, in constitutional considerations of equality and dignity. The first point I would like you to note is that in substance the issue is the same, or at least similar, although these issues are respectively articulated in the legal language of their own time. The second point I wish to point out is the difference in the form of reasoning used by Joubert JA and Jansen JA in the *Bank of Lisbon* case. For Joubert JA the issue was primarily, if not exclusively, one of formal legal authority: was the *exceptio* ever received into the law of the province of Holland to form part of the Roman-Dutch law and thus part of our common law?[21] To answer this, he wrote a learned history of Roman and Roman-Dutch law, but what is conspicuously absent from his reasoning is any serious attempt to ascertain whether the *exceptio* had a substantive purpose to fulfil in South African law at the time when the appeal was heard. Jansen JA also had regard to the old authorities, but with this substantive purpose in mind, namely whether it had a role to play "in our modern law".[22]

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18 1988 3 SA 580 (A).
19 2002 4 SA 1 (SCA).
20 2002 6 SA 21 (SCA).
21 604F–I.
22 611G and 613–618.

The judgment of Joubert JA, relying on authority-based reasoning,[23] fits almost perfectly the conventional wisdom of our legal tradition. The judgment of Jansen JA, with its reliance on evaluative reasoning, does not. But although not reflecting the dominant tradition of the conventional wisdom, Jansen JA's approach is not totally out of line with that legal tradition. That approach is in accordance with another respectable strand of our legal tradition, namely that Roman-Dutch law was a principled and equitable system of law, flexible and adaptable in its application so as to conform to changing circumstances.[24] The conventional wisdom seems to have ignored or forgotten this part of our legal tradition.

There is much further evidence in our pre-constitutional case law that undermines the conventional wisdom that private law does not involve evaluative judicial choice based on human-rights norms. Examples are easy to find if one rewrites our judicial history from a different perspective. Freedom was protected in delict (unlawful imprisonment), in contract (freedom of contract, *pacta sunt servanda*, restraint of trade), in enrichment (no general rule of liability for enrichment) and in succession (freedom of testation). The law of things protected property rights. All these protections were also, however, counterbalanced by interests based on what today we might call the human-rights norms of equality and dignity. In contract, that showed in the requirements that only persons deemed to have legal capacity may validly conclude contracts, that contracts on behalf of minors were only enforced if to their benefit, and that contracts tainted by fraud, misrepresentation or undue influence were not given effect to. It showed in the doctrine of estoppel in whatever field of law that doctrine applied. It showed in allowing compensation for enrichment where the law considered that enrichment to be unjustified. And it showed in delict in instances of absolute liability, vicarious liability and the determination of wrongfulness or unlawfulness. These are random examples: I suspect that a thorough examination of the entire field of pre-constitutional common law will show a consistent and, over time, ever-expanding reliance on underlying norms, by evaluative reasoning of the courts, that we will recognise as deriving from what we now call human rights.

Adjudication in private law was thus not, as the conventional wisdom seeks to tell us, different in nature to adjudication in public law. It also involved evaluative social choices based on human rights. It was not neutral and self-executing adjudication.

But private law, too, was never as private as the conventional wisdom wants us to believe. Private law – contract, delict, enrichment, family law (the list is not exhaustive) – does not exist of its own, independent accord. The rules of contract, delict, enrichment and family law are enforced in the courts only because of state sanction. But the state always exacts some price for that public sanction in the form of some pre-condition before private-law rules are enforced.

Contracts are not deemed to have been lawfully entered into unless done so by persons having legal capacity. The rules for legal capacity are not determined by

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23 Atiyah & Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (1987) distinguish between formal and substantive legal reasoning in their study. These forms roughly correspond to what I refer to as "authority based reasoning" as opposed to "evaluative reasoning" in this article.

24 See eg Corbett "Aspects of the Role of Public Policy in the Evolution of our Common Law" 1987 *SALJ* 52.

the parties themselves, but exist only with the approval by legislation or tolerance of common law rules by the state. Contracts affected by fraud, representation, duress or non-compliance with certain formalities in their formation are not regarded as binding. Certain terms contrary to public policy or good morals will not be enforced. For many types of contracts, terms are implied by law and are not dependent on the will of the parties to the contract. And, even if the formation, terms and execution of the contract is above board, remedies for breach may be refused, in the discretion of the judge in the case of specific performance, and absolutely if it is held to be exceptionally against public policy to do so.

The necessary intervention of state regulation and sanction is even more obvious in the case of delict or enrichment, where the rules of law are in no way determined by the will of the parties themselves. In family law, marriage is only recognised if certain state-imposed requirements are met. And so I can go on and on. There is, in the end, no total privacy left in private law, contrary to the conventional wisdom. To the extent that private relations are recognized as law the rules of private law are really only "doctrinal artefacts by which the state regulates and coerces all civil society and might [thus] . . . be categorized as public law".[25]

I do not want to push the argument too far: as a descriptive statement of what actors are involved in law and the interests served in these different relationships the distinction between public and private law may still be useful. But as the determining concept for deducing a supposedly distinct nature of adjudication in relation to the two spheres, the use of the public/private distinction cannot serve the transformative demands of the Constitution any longer. Its assumptions of unequal power relations in the public sphere and equal power relations in the private sphere do not fit the facts on the ground. The obvious reality is that in many instances unequal power relationships existed, and exist, in private-law relationships as well, and recognition of this explains many of the evaluative choices made daily in private-law adjudication. To the extent that this reality is ignored in adjudication, it creates the danger that patterns of domination in the market, the workplace and the family may be ignored and hidden. The obverse side of this is that by privatising its functions in relation to public goods, the state will attempt to escape the democratic scrutiny of those functions by claiming that what it does now falls within the private sphere and needs to be adjudicated upon in the supposedly neutral mode of private-law adjudication.[26]

I think I have made a reasonable case for the proposition that our pre-constitutional common law, if looked at with the benefit of constitutional hindsight, presents no serious legal or juristic obstacle to stating that the nature of adjudicating public and private law disputes is not different in *nature*, but only in *degree.* Both kinds of dispute often, if not always, involved the making of evaluative social choices based on norms deriving from the articulation of certain interests which nowadays we identify as human rights. Where required the courts developed the common law, public and private, to give expression to evolving

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25 Cockrell 1993 *Acta Juridica* 229.

26 Cockrell 1993 *Acta Juridica* 231. Compare *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC* 2001 3 SA 1013 (SCA), subsequently explained as an instance of equal bargaining power not amounting to an exercise of public power, in *Logbro Properties CC v Bedderson NO* 2003 2 SA 460 (SCA) para 10.

social realities. Viewed in this light the pre-constitutional common law (public and private) fits seamlessly into the constitutional vision of one system of law which in both its public and private application is subject to the Bill of Rights. The nature of that application is the same, but the degree of application depends on the context and the kind of interests at stake in each individual case.[27]

The conventional wisdom that this was not, and still cannot be the case, is thus wrong. It needs to be changed or replaced. How? By what?

6 THE RULE OF LAW

My suggestion is something along these lines: The rule of law's main concern is to subject the exercise of all power to judicial control. The law's concern is not primarily in who exercises the power, but what the power is, whom it affects[28] and what interests are affected by the exercise of that power. The courts control that power on the basis of legal norms often deriving their articulation from what we have come to call human rights. They do so by various means: by articulating general free-standing norms in different fields of the law; by formulating specific duties to respect, protect and fulfil specific human rights; by developing existing rights to give fuller expression to current understandings of human rights; and, where necessary, by constructing new rights where no existing rights give proper expression to current understandings of what human rights are needed in society.

There is a rich diversity of choice in our common law tradition on how to apply the underlying principles and values of our law to different situations that arise in court every day. Why impoverish (and confuse) this abundant casuistry with strange sounding concepts – "direct and indirect application", finding different "axes" for law and conduct to operate in, and norms being "irradiated" – rather than the tried and tested practical application of law in court?

That the rule of law embraces the control by the courts of the exercise of private and public power, in all its diverse forms, in accordance with constitutional values is, I suggest, the kind of conventional wisdom that we must work toward, in order to allow for the fullest consideration of all possibilities on how the common law may be developed to assist in our common constitutional project to transform this country into a better place for all who live here. If we make conceptual or other kind of restraining pre-conditions part of the conventional wisdom – as in the version of the conventional wisdom which I relied upon today in order to criticise it – we deprive ourselves of realising the full participation the law can give to the transformation process.

Note that the minimalist approach to the transformative role of the courts is not excluded by such an approach: its defenders will only be forced to be honest in its defence.

But I am not a defender of the minimalist approach. I think it will tend to assist only a transfer of power between elites, not the substantive transformation of

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27 Not all the rights in the Bill of Rights bind natural and juristic persons in the same manner. The coercive might of the state is the guarantor for the enforcement of all law, including the Bill of Rights (s 7(2) of the Constitution), but the manner of application when legal persons (state organs, individuals and corporate entities) are parties to litigation surely depends, even when the state is a party to the litigation, on the particular right or rights implicated by the factual context of the dispute (s 8 of the Constitution).

28 Compare Sedley *Freedom, Law and Justice* (1999) 38.

the character of our society that the best reading of the Constitution requires. It seems to me that thus far the courts have been reasonably open to control the exercise of private power relating to social and family relations and the workplace (and to develop the common and customary law in that regard) in order to correct the societal and personal patterns of domination that have arisen because of racial and gender discrimination in the past.[29] They have been more hesitant to do that in the economic sphere of property and contract law. It is to this aspect that I turn, briefly, in conclusion.

7 CONCLUSION

The assumption that I proceed from is that South Africa is a middle-income developing country whose best chance of overcoming generalised poverty is by accelerated economic growth. Because of our past, both the possession of property rights and the distribution of the income produced by the keepers of property[30] are greatly unequal. Conventional economic wisdom holds that the former (that is, who possesses the property) is not important from an efficiency perspective in a free market whilst the latter is economically irrelevant, that is, it is politics that determines how the income should be distributed, not economics.[31] The double bind of this economics "hands-off" approach however, is that it nevertheless sends out the underlying message that, in order to have an efficient economy, existing property rights must be protected and the egalitarian redistribution of income will undermine further capital accumulation and investment and thus the incentive to create growth. Both the redistribution of property rights and the redistribution of income will thus inhibit the efficient working of the economy.

If this is indeed the inexorable truth of the market, any attempt by judges to fiddle with what I will call "market rights" (protection of existing property and freedom of contract), on the basis of countervailing "needs rights" (access to housing, water, food, education), "democracy rights" (free speech, assembly, association), or "dignity rights" (dignity, equality), will not only be ineffectual, but worse still, probably harmful for the long term well-being of our society. The implication, however, is actually much deeper: The wider constitutional project of transformation of our society, insofar as it seeks to make it a more egalitarian and just *economic* society, is also doomed to failure, if it seeks to do so by attempting to incorporate notions of fairness and justice into the supposedly rigid and deterministic logic of the free market.

I do not have the time and expertise to refute that part of the conventional wisdom here, but the little bit of reading that I have done suggests to me that it can be done, again not by outright rejection, but by taking it on in its own terms. As I understand the economics, much of that potential challenge has to do with the

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29 Examples are the invalidation of succession and marriage legislation on the basis of gender discrimination in the face of strong historic cultural and social traditions: *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC); *Daniels v Campbell NO* 2004 5 SA 331 (CC), and in refusing to countenance workplace discrimination: *Hoffman v SA Airways* 2001 1 SA 1 (CC).

30 The traditional emphasis is on negative claims against interference with existing property – *keeping*, not *having*, property, see Michelman "Possession vs Distribution in the Constitutional Idea of Property" 1987 *Iowa LR* 1319.

31 See notes 9 and 10 above.

informational deficit, or problem of "asymmetrical information", that underlies most of the real economic world – in contrast to the assumed ideal, rational and informationally symmetric economic world upon which the efficiency of the free market model is based.[32] The so-called "impossibility" of social choice, in economic terms, rested on the acceptance of the view that interpersonal comparisons could not be properly measured in economic terms. However, in his 1998 Nobel Prize acceptance lecture, entitled "The Possibility of Social Choice"[33] Amartya Sen reported, happily I think, that it could be done, albeit only by way of partial comparability studies. The implication of this and other informational broadening studies makes it possible, it appears, to measure more things relevant to the functioning of the economy and thus also to measure and assess its efficiency differently. These insights have had different results in economic theory. Some have used it to complement mainstream conventional wisdom;[34] others have used it to propagate the importance of its effect on distributional issues;[35] and others consider it to have undermined conventional wisdom to such an extent that an alternative economics based on these insights is not only possible, but also necessary.[36]

I do not need to go any further. Free market theory is not as inexorable or deterministic as its extreme adherents would like it to be. More sober mainstream defenders of global capitalism acknowledge that its success also depends on practical realities of fairness and justice.[37] Our courts have taken the first steps on the road to balance property "market rights" against both "democracy rights"[38] and "needs and dignity rights".[39] In so doing they are, I suggest, creating a new conventional wisdom – complemented by emerging thought in economic theory – that political and economic freedom are complementary and indispensable to each other, and that the fair distribution of the means to produce economic wealth may well contribute more to economic efficiency than to

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32 Relatively non-technical explanations of this can be found in the acceptance lectures of the Nobel Laureates who pioneered the insights into the effect of asymmetric information on economic models, to be found at http://nobelprize.org/nobel prizes/economics/laureates/2001: Akerlof "Behavioral Macroeconomics and Macroeconomic Behaviour" 365; Spence "Signalling in Retrospect and the Informational Structure of Markets" 407; Stiglitz "Information and the Change in the Paradigm in Economics" 472. See also Sen "The Possibility of Social Choice" cited above.

33 Sen "The Possibility of Social Choice" http://nobelprize.org/nobel prizes/economics/laureates/1998 188.

34 In the study of "New Institutional Economics". See, for example, Du Plessis "New Tools for the Constitutional Bench" in Van der Walt (ed) *Theories of Social and Economic Justice* (2005) 37.

35 Sen "The Possibility of Social Choice and compare Loots "The Fiscal Implications of Social and Economic Justice: An Overview of the Changing Theoretical Framework" in *Theories of Social and Economic Justice* 168.

36 Stiglitz "Information and the Change in Paradigm in Economics" note 32 above.

37 Wolf *Why Globalization Works* accepts that some of the points of critics of global capitalism "need to be taken into account", including, for example, the capture of global institutions by special interests "as was the case for the agreement on trade-related intellectual property in the Uruguay Round", and "adequate investment in education, health and infrastructure" (at 318).

38 See *Laugh It Off Promotions CC v SA Breweries International (Finance) BV* 2006 1 SA 144 (CC); *Petro Props (Pty) Ltd v Barlow* 2006 5 SA 161 (W).

39 See *Japhta v Schoeman* 2005 2 SA 140 (CC) and *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC).

undermine it. It is ironic and disappointing that the failure in *Brisley v Drotsky,*[40] *Afrox Health Care*[41] and *South African Forestry Co Ltd v York Timbers Ltd* [42] to make good faith part of the normative fabric of our contract law is not only discordant with this trend, but also in conflict with what is accepted in many capitalist economies.[43]

I started off by saying that I hoped to chip away at the metaphors of "horizontal" and "vertical" application of human rights. It took us quite a while to realise that our "public" common law of review formed part of a single legal system based on the Constitution. So does "private" common law. Let me end by using a more powerful, and in my view more appropriate, metaphor to express what I want to bring across. Under the rule of law everyone is equal before the law: government, business corporations and ordinary individual alike. The application of law in all its forms is always "horizontal". And so it should be.

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40 2002 4 SA 1 (SCA).

41 2002 6 SA 21 (SCA).

42 2005 3 SA 323 (SCA).

43 In America (see s 1-203 of the Uniform Commercial Code, section 205 of the Restatement Second and three seminal and important articles about good faith in contract: Farnsworth "Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code" 1963 *U Chicago LR* 666; Summers "'Good Faith' in General Contract Law and the Sales Provisions of the Uniform Commercial Code" 1968 *Virginia LR* 232; Burton "Breach of Contract and the Common Law Duty to Perform in Good Faith" 1980 *Harvard LR* 369); much of Europe (Zimmerman & Whittaker (eds) *Good Faith in European Contract Law* (2000)); and New South Wales in Australia (McDougall "The Implied Duty of Good Faith in Australian Contract Law" http://www.lawlink.nsw.gov.au/lawlink/SupremeCourt/ll_sc.nsf/pages/SCO_mcdougall210206).

Post-1994 Administrative Law in South Africa: The Constitution, the Promotion of Administrative Justice Act 3 of 2000 and the Common Law

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1 INTRODUCTION

In 1986, in an insightful and now oft-cited article entitled "Our Administrative Law: A Dismal Science?",[1] Professor Barry Dean identified a number of fundamental weaknesses in South African administrative law. These weaknesses included procedural weaknesses, such as the inadequacy of rule 53 of the Uniform Rules as the vehicle to take matters on review,[2] substantive weaknesses, such as the failure to develop effective judicial controls over broad discretionary powers,[3] structural weaknesses, such as its "lack of system and principle",[4] and its ideological weaknesses, which he described as follows:

> "Notwithstanding a blossoming of interest in the subject amongst lawyers, administrative law remains a somewhat depressing area of South African law. It has developed within a system of government which concentrates enormous powers in the hands of the executive and the state administration and in which law has been used not to check or structure these powers, but rather to facilitate their exercise by giving those in whom they are vested as much freedom as possible to exercise them in the way they see best. In this process the South African courts have at times appeared to be all too willing partners displaying what virtually amounts to a phobia of any judicial intervention in the exercise of powers by administrative agencies."[5]

This unflattering analysis should come as no surprise, because the state system at the time was based on four pillars that together militated against an open and accountable public administration. These pillars were (a) the doctrine of parliamentary sovereignty, (b) the repudiation of its counter-balance (the universal franchise), (c) race classification and a racially based system of according rights and privileges, and (d) limited scope for judicial review of the exercise of public power.[6] South African administrative law was underdeveloped and functioned in

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1 1986 *SAJHR* 164.
2 1986 *SAJHR* 165–167.
3 1986 *SAJHR* 167–168.
4 1986 *SAJHR* 164.
5 1986 *SAJHR* 164.
6 Mahomed "The Impact of the Bill of Rights on Law and Practice in South Africa" June 1993 *De Rebus* 460. See too O'Regan "A Fresh Start for Administrative Law" Unpublished paper delivered at a conference on Controlling Public Power, University of Cape

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an undemocratic setting that was antagonistic to fundamental rights, was secretive and unaccountable.

All of that has changed. We now live in a functioning democracy that has as its supreme law a Constitution containing an extensive set of justiciable fundamental rights and broad-based standing provisions. The courts – guaranteed to be independent by the Constitution – and the power of judicial review of all forms of public power, including the exercise of legislative power by Parliament, are central to the Constitution's scheme. The Constitution is based on a set of founding values that are the antithesis of the values that animated the apartheid state: they include the values of the rule of law and constitutional supremacy, and those of democratic governance aimed at ensuring accountability, responsiveness and openness. To give effect to these democratic values, the Constitution guarantees to everyone fundamental rights, inter alia, of access to information, of access to court and to just administrative action.

The right to just administrative action had its genesis in the negotiations that preceded the acceptance and passing of the interim Constitution of 1993. Section 24 of that Constitution gave to everyone rights to administrative action that was lawful, procedurally fair and justifiable in relation to the reasons given for it, as well as the right to reasons for adverse administrative action.[7] In the process leading up to the passing of the final Constitution of 1996, there was talk of omitting the right to just administrative action from the Bill of Rights completely and instead promulgating a statutory code of administrative justice, but that plan was abandoned after meeting strenuous resistance from opposition parties and organs of civil society. Instead, it was decided to maintain a fundamental right to just administrative action in the Bill of Rights but to provide that it should be given effect to by means of legislation.[8] The result was s 33 of the Constitution, which reads:

> "(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

Town, March 1996 8; Corder "Administrative Law: A Corner-stone of South Africa's Democracy" 1998 *SAJHR* 38 40–41.

7 See *Sasol Oil (Pty) Ltd v Metcalfe NO* 2004 5 SA 161 (W) para 7 in which Willis J held, with reference to the fundamental right to just administrative action: "It is widely recognised that the Bill of Rights was incorporated in our Constitution with the unanimous approval of all political parties represented in Parliament because we, the citizenry, believed that there were potent lessons to be learnt not only from our apartheid past but also from the experience of other countries around the world, especially in the past century. We were resolved, almost unanimously, that never again must such injustices as had been experienced under apartheid and in other parts of the world prevail in our own country. Over the past 100 years, most of the terrible suffering which humankind has actually experienced, whether it arose from war, genocide, religious persecution, racial classification, racial segregation, forced removals, arrest under the pass laws, detention without trial, confiscation of property, denial of access to health, or the application of fatally flawed economic policies, derives from the exercise of administrative power. The limitation of administrative power, according to law reflecting internationally respected human rights, lies at the heart of a modern constitutional democracy."

8 Corder "Reviewing Review: Much Achieved, Much More to Do" in Corder and Van Der Vijver (eds) *Realising Administrative Justice* Siber Ink (2002) 1 8.

(3) National legislation must be enacted to give effect to these rights, and must–
   (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
   (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
   (c) promote an efficient administration."

The legislation referred to in s 33(3) was eventually passed by Parliament, and later brought into force.[9] It is the Promotion of Administrative Justice Act 3 of 2000 (the PAJA), a flawed piece of legislation that shows all the signs of the rushed job that it was, and which also displays a lack of coherence and principle.[10]

The PAJA is intended to cover the field, as it were.[11] Its major flaw lies in the fact that it falls short in this respect because of the complicated, qualified, illogical and incomplete definition of administrative action in s 1. It is, as Nugent JA held in *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works*,[12] a cumbersome definition which "serves not so much as to attribute meaning to the term as to limit its meaning by surrounding it within a palisade of qualifications". Hoexter describes the definition as being both "extremely narrow and highly convoluted", with the former quality being achieved by means of the exclusions from the definition and also "by piling one on top of another a number of separate requirements".[13] The second quality is attained by using terms in the definition that are "*themselves* defined, and then in fairly complicated terms".[14] She adds that the definition is also "a strange and unlikely cocktail of South African, Australian and German ingredients" and that those that have to use the PAJA "may well find themselves becoming impatient with some of these rather whimsical and seemingly gratuitous borrowings".[15] Whether the under-inclusiveness of the definition will survive a constitutional challenge remains to be seen.

The heart of the PAJA is s 6. Section 6(1) provides that "[a]ny person may institute proceedings in a court or a tribunal for the judicial review of an administrative action", and s 6(2) proceeds to set out a list of grounds of review, thereby seeking to give effect to the fundamental right to administrative action that is lawful, reasonable and procedurally fair. Section 6(2) is intended to be a codification of the grounds of review,[16] although, once again, certain well-known

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9 In terms of item 23(2)(b) of Schedule 6 of the Constitution, a provision that was essentially similar to s 24 of the interim Constitution would operate until the legislation was passed. Item 23(1) provided that the legislation envisaged by s 33(3), as well as s 9(4) – concerning the right to equality – and s 32(2) – concerning the right of access to information – was to be "enacted within three years of the date on which the new Constitution took effect".

10 For a history of the drafting of the PAJA see Corder in Corder and Van der Vijver (eds) *Realising Administrative Justice* 9–12.

11 *Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and another as* Amici Curiae*)* 2006 1 BCLR 1 (CC), 2006 2 SA 311 (CC) para 95. Chaskalson CJ held: "PAJA is the national legislation that was passed to give effect to the rights contained in s 33. It was clearly intended to be, and in substance is, a codification of these rights. It was required to cover the field and purports to do so."

12 2005 6 SA 313 (SCA) para 21.

13 *The New Constitutional and Administrative Law – Vol 2: Administrative Law* (2002) 100 (hereafter referred to as Hoexter).

14 Hoexter 101.

15 Hoexter 101.

16 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 7 BCLR 687 (CC), 2004 4 SA 490 (CC) para 25.

grounds of review have been omitted. That defect is, however, curable because s 6(2)(i) constitutes a catch-all and also allows for the development of new grounds of review. It provides that a court can set aside on review administrative action that is "otherwise unconstitutional or unlawful".[17]

2 JUDICIAL REVIEW BEFORE AND AFTER 1994

2 1 Common law and Constitutional review

While the source of common law review is the inherent jurisdiction of the superior courts, the interim and final Constitutions have created a similar but broader constitutional review jurisdiction that allows for the review of legislative as well as executive and administrative acts.[18] The final Constitution does so principally through Chapter 8 (which creates and defines the judicial authority of the South African state)[19] read with s 1 (which entrenches founding values such as constitutional supremacy and the rule of law), s 2 (which proclaims the Constitution to be the supreme law of the land), s 7(2) (which places an obligation on the State to "respect, protect, promote and fulfil the rights in the Bill of Rights") and s 8(1) (which states that the "Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state"). The Constitutional Court summarised the position in *President of the Republic of South Africa v South African Rugby Football Union*,[20] where it stated that the "exercise of public power is regulated by the Constitution in different ways. There is a separation of powers between the legislature, the executive and the judiciary which determines who may exercise power in particular spheres. An overarching bill of rights regulates and controls the exercise of public power, and specific provisions of the Constitution regulate and control the exercise of particular powers".

Unlike common law review, constitutional review is not, in its original form at least, a judge-made jurisdiction.[21] It is created by, and given a great deal of its

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17 One of the most noteworthy omissions is that of vagueness as a ground of review. In *Minister of Health v New Clicks South Africa (Pty) Ltd* para 246, Chaskalson CJ held that even though vagueness "is not specifically mentioned in PAJA as a ground of review, it is within the purview of s 6(2)(i) which includes, as a ground for review, administrative action that is otherwise 'unconstitutional or unlawful'. This Court has held that the doctrine of vagueness is based on the rule of law which is a foundational value of our Constitution".

18 See Davis "Constitutionalism, Interpretation and Judicial Review" in Davis, Cheadle and Haysom (eds) *Fundamental Rights in the Constitution* (1997) 3: "The Constitution of the Republic of South Africa (Act 200 of 1993), with its move towards a federal structure and its Chapter on Fundamental Rights made a decisive break with the Westminster tradition and gave the Constitutional Court and the Supreme Court a heavy responsibility to ensure that the fledgling democratic order keeps to the lofty ideals and the messy compromises of the interim constitutional arrangement. Decisive as this break was, the concept of judicial review was not foreign to South African lawyers. Whenever a judge is asked to review an administrative act or subordinate legislation, he or she is in effect invited by one of the parties to intervene in a matter which has been entrusted to another arm of government. In this decision the judge is guided by the principles which flow from the kind of justice promoted by a legal system predicated on the rule of law. But within the context of a constitutional system based upon the sovereignty of parliament, the scope for a judiciary to supervise the decisions of the legislature, and to a lesser extent the executive, is limited."

19 See s 165 in particular.

20 1999 10 BCLR 1059 (CC), 2000 1 SA 1 (CC) para 132.

21 For a discussion of the historical development of the supervisory powers of the courts in England and South Africa, see Baxter *Administrative Law* (1984) 19–22, 30–34.

content by, the Constitution and draws on the values of the Constitution. It nonetheless has a great deal in common with common law review, as the similarities between, for instance, the idea of lawful administrative action in its common law and constitutional contexts will attest. But it extends beyond the common law in respect of other aspects of just administrative action such as procedural fairness, the duty to give reasons, and review for unreasonableness and irrationality. The main difference, from a foundational perspective, has been identified by Froneman J in *Matiso v Commanding Officer, Port Elizabeth Prison*.[22] He held that under the previous constitutional dispensation, the process of judicial review had as its starting point a search for the intention of the legislature, whereas since 27 April 1994, judicial review was aimed instead at testing exercises of public power against "the values and principles imposed by the Constitution" and is thus concerned with the "recognition and application of constitutional values and not with a search to find the literal meaning of statutes". In *Fedsure Life Assurance Limited v Greater Johannesburg Transitional Metropolitan Council*,[23] Chaskalson P, Goldstone J and O'Regan J observed that the interim Constitution had "radically changed the setting within which administrative law operates in South Africa. Parliament is no longer supreme. Its legislation, and the legislation of all organs of State, is now subject to constitutional control".[24]

2 2 The cases

In the pre-PAJA case of *Commissioner for Customs and Excise v Container Logistics (Pty) Ltd*; *Commissioner for Customs and Excise v Rennies Group Ltd t/a Renfreight*,[25] Hefer JA held that the constitutional review jurisdiction of the courts existed alongside the equivalent common law review jurisdiction, the latter not having been abolished by the interim Constitution,[26] and that there is "no indication in the interim Constitution of an intention to bring about a situation in which, once a court finds that administrative action was not in accordance with the empowering legislation or the requirements of natural justice, interference is only permissible on constitutional grounds".[27]

In *President of the Republic of South Africa v South African Rugby Football Union*,[28] the Constitutional Court held that the right to just administrative action "was entrenched in our Constitution in recognition of the importance of the common law governing administrative review" but that it was not correct to view s 33 of the final Constitution "as a mere codification of common-law principles".[29] Its principal function is to "regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common-law principles developed over decades".[30]

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22 1994 4 SA 592 (SE) 597F–H.
23 1998 12 BCLR 1458 (CC), 1999 1 SA 374 (CC).
24 Para 32. See too Henderson "The Curative Powers of the Constitution: Constitutionality and the New Ultra Vires Doctrine in the Justification and Explanation of the Judicial Review of Administrative Action 1998 *SALJ* 346 359.
25 1999 3 SA 771 (SCA).
26 786D–E.
27 786F–G.
28 1999 10 BCLR 1059 (CC), 2000 1 SA 1 (CC).
29 Para 135.
30 Para 136.

Hefer JA's analysis, in *Container Logistics*, of the relationship between judicial review in terms of the Constitution and the common law has now been held to be incorrect in *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa*.[31] Chaskalson P held that the "control of public power by the courts through judicial review is and always has been a constitutional matter" and that the common law principles that had been applied to control powers prior to 1994 "had been subsumed under the Constitution, and insofar as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts".[32] He also held that there is "only one system of law. It is shaped by the Constitution which is the supreme law and all law, including the common law, derives its force from the Constitution and is subject to constitutional control".[33]

The main difference between the pre- and post-1994 constitutional arrangements was in the relationship between the Constitution and the common law in respect of the control of public power. Prior to 1994, the Constitution was largely silent on the control of public power. Common law principles such as the rule of law, the sovereignty of Parliament and the rules relating to the exercise of prerogative powers filled the gap. After 1994, the opposite was true. The Constitution now devotes much more attention to controlling power by abolishing reliance on parliamentary sovereignty but incorporating other common law principles such as the rule of law.[34] Chaskalson P stressed that although the interim Constitution "shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written Constitution which is the supreme law", the common law retains relevance for the development of the new public law.[35] So, for instance, he held that the constitutional doctrine of legality and the common law doctrine of *ultra vires* are identical when a functionary exceeds a statutory power, and the rights to just administrative action "cannot mean one thing under the Constitution, and another thing under the common law".[36]

In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*[37] the Constitutional Court discussed both the relationship between the common law, the Constitution and the PAJA, and the scope of review in terms of the PAJA. On the first issue, O'Regan J held that, as administrative action is regulated by "only one system of law grounded in the Constitution", it follows that the power to review administrative action "no longer flows directly from the common law but from PAJA and the Constitution itself. The groundnorm of administrative law is now to be found in the first place not in the doctrine of *ultra vires*, nor in the doctrine of parliamentary sovereignty, nor in the common law itself, but in the principles of our Constitution". The common law remains relevant to the extent that it "informs the provisions of PAJA and the Constitution, and derives its force from the latter". The extent of the common law's relevance, she held,

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31 2000 3 BCLR 241 (CC), 2000 2 SA 674 (CC).
32 Para 33.
33 Para 44.
34 Paras 34–41.
35 Para 45.
36 Para 50.
37 2004 7 BCLR 687 (CC), 2004 4 SA 490 (CC).

would become clearer over time "as the Courts interpret and apply the provisions of PAJA and the Constitution".[38] On the second issue, she held that s 6 of the PAJA codified the grounds of review of administrative action (as that term is defined in the PAJA), that the cause of action when administrative action is taken on review "now ordinarily arises from PAJA, not from the common law as in the past", that the "authority of PAJA to ground such causes of action rests squarely on the Constitution" and that, because the PAJA gives effect to s 33 of the Constitution, "matters relating to the interpretation and application of PAJA will of course be constitutional matters".[39]

3 THE ROLES OF SECTION 33 OF THE CONSTITUTION, THE PAJA AND THE COMMON LAW

3 1 Section 33 of the Constitution

When legislation or conduct is challenged because it is alleged to infringe or threaten the fundamental right to just administrative action, the role of the PAJA is limited because, as has been seen, its primary role in giving effect to s 33 is to codify the grounds of review. In *Zondi v MEC for Traditional and Local Government Affairs*[40] this interaction was discussed more broadly because in the court below provisions of the Pound Ordinance 32 of 1947 (Natal) were held to be invalid because of their conflict with the provisions of the PAJA.[41] In the Constitutional Court, however, Ngcobo J held that when legislation is challenged on the basis of it being in conflict with the right to just administrative action, that legislation must be evaluated against s 33 of the Constitution, and not against the PAJA.[42] The reason for this is not hard to find: the PAJA is intended to give legislative effect to – to flesh out – the fundamental right to just administrative action, while s 33 of the Constitution acts as a shield against laws, policies and practices that undermine administrative justice.[43]

Section 33 performs a second function: it informs the PAJA and keeps it within constitutional bounds. The PAJA is intended to give effect to s 33. In order to do so properly, s 33 must be the foundation for the interpretation of the PAJA. In other words, the PAJA must be interpreted consistently with s 33

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38 Para 22.

39 Para 25. See too *Schoonbee v MEC for Education, Mpumalanga* 2002 4 SA 877 (T) 882G, in which Moseneke J observed that the PAJA "contains in great part what one may regard as partial codification of administrative law with specific reference to administrative actions". See further *Sasol Oil (Pty) Ltd v Metcalfe NO* para 7 in which the pedigree of the PAJA was discussed. Willis J held that "PAJA cannot be regarded as ordinary legislation" because it seeks to give effect to fundamental rights contained in the Bill of Rights, describing it as "triumphal legislation".

40 2005 4 BCLR 347 (CC), 2005 3 SA 589 (CC). See too *South African National Defence Union v Minister of Defence* 2004 4 SA 10 (T).

41 *Zondi v Member of the Executive Council for Traditional and Local Government Affairs* 2004 5 BCLR 547 (N), especially at 553F–554B.

42 Para 99.

43 See for further examples of laws or conduct being challenged against s 33 of the Constitution, *Janse Van Rensburg NO v Minister of Trade and Industry* 2000 11 BCLR 1235 (CC), 2001 1 SA 29 (CC); *Winckler v Minister of Correctional Services* 2001 2 SA 747 (C); *Carlson Investments Share Block (Pty) Ltd v Commissioner, South African Revenue Service* 2001 3 SA 210 (W).

wherever possible. This point is well illustrated by the *Minister of Health and another NO v New Clicks South Africa (Pty) Ltd*.[44] Chaskalson CJ, in dealing with the argument that the making of regulations did not fall within the definitions of administrative action and a decision in the PAJA held that these definitions must be "construed consistently with s 33 of the Constitution. The starting point of the enquiry, therefore, is what constitutes administrative action for the purposes of s 33".[45] Later in his judgment, in giving effect to this approach, he stated:

> "It would no doubt be possible to give a narrow construction to "administrative action" in s 33 and to have two systems of review, one under the common law for delegated legislation, and the other under the Constitution for administrative action construed narrowly. But that would not be consistent with the purpose of s 33, which is to establish a coherent and overarching system for the review of all administrative action; nor would it be consistent with the values of the Constitution itself. Properly construed, therefore, "administrative action" in s 33(1) of the Constitution, includes legislative administrative action."[46]

If the PAJA cannot be interpreted consistently with s 33, then the fundamental rights entrenched in s 33 will have been infringed or threatened by the offending provision of the PAJA, and its constitutionality will have to be determined.

3 2 The relationship when administrative action is reviewed

3 2 1 The scope of review

Because the PAJA applies to the review of administrative action in general, statutes that create administrative powers must be read with the PAJA.[47] This point will be discussed in the context of two cases, one that harmonises the PAJA with a special, wide, statutory review, and one that uses the PAJA to trump a narrower than usual statutory review.

Nel NO v The Master of the High Court[48] concerned the review, in terms of s 151 of the Insolvency Act 24 of 1936, of the Master's decision to reduce the fees claimed by the liquidators of an insolvent estate. Section 151 has been interpreted to create a review power that encompasses, at its outer margins, correctness as the standard of review.[49] Courts thus have far greater powers of review than those vested in them by s 6(2) of the PAJA, and may in fact second guess the Master's decisions. Froneman J considered where this type of review – the third type of review referred to by Innes CJ in *Johannesburg Consolidated*

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44 2006 1 BCLR 1 (CC), 2006 2 SA 311 (CC). This case will be referred to in what follows as the *New Clicks* case.

45 Para 100. See too *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* para 22. At para 23, Nugent JA held, in applying this principle: "While PAJA's definition purports to restrict administrative action to decisions that, as a fact, 'adversely affect the rights of any person', I do not think that literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on s 33 of the Constitution."

46 Para 118.

47 *Zondi v MEC for Traditional and Local Government Affairs* paras 101–102.

48 ECD undated judgment (case no 1633/01) unreported.

49 See *Gore and another NNO v The Master* 2002 2 SA 283 (E); *Nel v The Master (ABSA Bank and others intervening)* 2005 1 SA 276 (SCA).

Investment Co v Johannesburg Town Council[50] – fitted into the scheme created by the PAJA. He held that even though this type of review was wider than the usual, a court's powers of intervention were nonetheless not unlimited and the extent of those powers also depended to an important extent on the "nature of the function entrusted to the person making the decision under review".[51] He then stated, in the same paragraph:

> "The AJA seeks to give effect to the fundamental right to lawful, reasonable and procedurally fair administrative action and the right to be given written reasons, entrenched in s 33 of the Constitution. It is, in a certain sense, a codification of the principles relating to the second kind of review referred to by Innes CJ in the *JCI* case . . . Previously those principles derived their authority from the constitutionally allowed inherent common law jurisdiction or competence of the superior courts. They now find their authority in the written Constitution . . . The third kind of review, however, derives its existence from specific statutory enactments that provide for powers of review far wider than the powers of the first two kinds of review (compare the remarks of Innes CJ at 116–117 of the *JCI* case). This kind of review thus incorporates constitutional review (based previously on the common law and now on the written Constitution), but also extends it beyond constitutional review grounds. The extension does not offend the constitutional separation of powers, because it is the legislature that expressly authorises the courts to go further than the constitutional review founded upon that separation of powers.
>
> To the extent that a review under s 151 of the Insolvency Act (applicable to companies by virtue of s 339 of the Companies Act) is based on constitutional review it must fall within the codified categories of review under the AJA. To the extent that it goes beyond constitutional review (something that, by definition, implies no conflict with the grounds of constitutional review) it falls outside the ambit of the AJA or, perhaps, it resorts under the catch-all category of "*action . . . otherwise . . . unlawful*" in s 6(2)(i) of the AJA."

What this amounts to is this. When a statute creates a broader than usual review power, the PAJA applies in two ways. To the extent that the applicant seeks to challenge the decision on one or more of the conventional grounds of review, his or her cause of action must be based upon those grounds of review as codified in s 6(2) of the PAJA; to the extent that the ground of review relied upon goes beyond the usual grounds, it must be brought within the terms of the PAJA through the catch-all provision, s 6(2)(i). This approach provides a principled way of harmonising the PAJA, which applies generally to all administrative action as defined by it, with wider than usual statutory reviews.

Bulk Deals Six CC v Chairperson, Western Cape Liquor Board[52] dealt with the relationship between the general provisions of the PAJA, on the one hand, and the narrower statutory review provisions of the Liquor Act 27 of 1989. The nub of the issue was that the grounds of review that were relied upon by the applicant – a mistake of law, that irrelevant considerations were taken into account and that the decision in question had been taken in a procedurally unfair manner – were contained in s 6(2) of the PAJA but not in s 131(a) of the Liquor Act. Cleaver J held that the matter was to be dealt with in terms of the PAJA because s 6(1) created a right to review all administrative action in terms of the Act. It may be argued that *Carephone (Pty) Ltd v Marcus NO*[53] is authority for

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50 1911 TS 111 116.
51 Para 8.
52 2002 2 SA 99 (C).
53 1999 3 SA 304 (LAC).

this approach. That case widened the ambit of review in terms of the Labour Relations Act 66 of 1995 by interpreting s 145 of the Act in such a way that it was consistent with the provisions of the transitional administrative justice rights, item 23(2)(b) of Schedule 6 of the Constitution. In *Bulk Deals Six CC*, however, Cleaver J did not purport to read down the provisions of s 131(a) of the Liquor Act. In effect, he held that the general terms of s 6(2) of the PAJA replaced, impliedly repealed or supplemented that section. Taken to its logical conclusion, the result of this interpretation is that the PAJA has rendered redundant all statutory reviews where the grounds of review are narrower than those codified in the PAJA. It is unlikely that the legislature, when passing the PAJA, intended such far-reaching consequences and intended to tie its own hands in this way for the future creation of administrative bodies and their control. The proper approach would be to challenge the constitutionality of s 131(a) of the Liquor Act against s 33 of the Constitution and, if it is found to limit the right to just administrative action unreasonably and unjustifiably, to strike down s 131(a), to read in grounds of review contemplated by s 33(1) of the Constitution or grant some other form of appropriate relief.[54]

3 2 2 The review of administrative action

Chaskalson CJ and Ngcobo J were required to deal with the relationship between the Constitution, the PAJA and the common law in the *New Clicks* case because in both the court of first instance and in the Supreme Court of Appeal there were suggestions that the regulations under challenge could be reviewed against the common law, the constitutional principle of legality (derived from s 1(c)) and s 33 of the Constitution. Ngcobo J stated:

> "Where, as here, the Constitution requires Parliament to enact legislation to give effect to constitutional rights guaranteed in the Constitution, and Parliament enacts such legislation, it will ordinarily be impermissible for a litigant to found a cause of action directly on the Constitution without alleging that the statute in question is deficient in the remedies that it provides. Legislation enacted by Parliament to give effect to a constitutional right ought not to be ignored".[55]

In similar vein, Chaskalson CJ stated that the PAJA was "intended to be, and in substance is, a codification of" the rights envisaged by s 33 of the Constitution. It was "required to cover the field and purports to do so".[56] Flowing from this, he held (quoting with approval the views of Professor Cora Hoexter expressed in an article entitled "'Administrative Action' in the Courts"[57]) that the PAJA could not simply be by-passed by way of direct reliance on s 33 or by way of reliance on the common law because it has displaced the common law.[58]

Both prior to and since the Constitutional Court's judgment in *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa*[59] some confusion is evident in the courts as to the relationship between the Constitution, the PAJA and the common law in cases involving the review of administrative action. That confusion may be ascribed in part at least

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54 See in this regard *Maharaj v Chairman, Liquor Board* 1997 1 SA 273 (N).
55 Para 437.
56 Para 95.
57 Then unpublished, now available in 2006 *Acta Juridica* 203–325.
58 Para 97.
59 2000 3 BCLR 241 (CC), 2000 2 SA 674 (CC).

to two things: first, in terms of the interim Constitution, the erstwhile Appellate Division was precluded from exercising any constitutional jurisdiction, so administrative law cases in that court were dealt with on the basis of the common law. This appeared to confirm the idea that there were indeed two systems of law in operation, the common law and, when the common law did not provide the answer, the Constitution;[60] and secondly, the "constitutional issue last" doctrine that the Constitutional Court developed in cases such as S *v Mhlungu*[61] and *Zantsi v Council of State, Ciskei*[62] encouraged courts to engage with the Constitution only as a last resort, and seemed to be authority for the idea that the common law still had a direct role to play in the judicial review of administrative action. On a theoretical level, the problem was resolved by *Pharmaceutical Manufacturers* which, as has been seen, held that the judicial review of every public power is a constitutional issue and the common law has been subsumed under the Constitution, which provides the rationale and framework for the review of all public power. In this scheme, the PAJA "fleshes out" the fundamental right to just administrative action contained in s 33 of the Constitution.[63] The cases discussed below are indicative of this confusion as to the relationship between the Constitution, the PAJA and the common law, despite the theoretical simplicity of the issue.

In *National Educare Forum v Commissioner, South African Revenue Service*[64] the court appeared to approach the issue before it on the basis that the common law was still central to the judicial review of administrative action and that the Constitution merely bolstered it. Van Zyl J held that when the respondent implemented s 47 of the Value-Added Tax Act 89 of 1991, he acted administratively and his action was "subject to review under the common law and falls within the administrative justice clause of the Constitution"; and that there was nothing in the section to suggest that the "inherent jurisdiction of the High Court to grant appropriate, other or ancillary relief is excluded".[65]

In *Mafongosi v United Democratic Movement*[66] Jafta AJP held that disciplinary decisions of a political party were reviewable in terms of s 33 of the Constitution directly:

> "It is perhaps necessary at this stage to set out, in general terms, the legal principles on the basis of which the applicants impugn the decisions taken by the UDM. However, I must hasten to mention that in the light of disputes of fact and the view I take of the matter, it is unnecessary for me to express any opinion on whether the provisions of s 3 of the PAJA apply to the present case. When the issue was raised with counsel during the hearing of the matter they were not fully prepared to argue it. In my view, the matter can be disposed of sufficiently by having recourse to the

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60 This problem was not restricted to administrative law. In the field of criminal law and procedure, see for example *Hlantlalala and others v Dyantyi NO and another* 1999 2 SACR 541 (SCA).

61 1995 7 BCLR 793 (CC), 1995 3 SA 867 (CC).

62 1995 10 BCLR 1424 (CC), 1995 4 SA 615 (CC).

63 See *Metcash Trading Ltd v Commissioner, South African Revenue Service* 2001 1 BCLR 1 (CC), 2001 1 SA 1109 (CC) para 33; *Pennington v Friedgood* 2002 1 SA 251 (C) paras 10–18; *Ampofo v MEC for Education, Arts, Culture, Sports and Recreation, Northern Province* 2002 2 SA 215 (T) para 55.

64 2002 3 SA 111 (Tk).

65 128H–129A.

66 2002 5 SA 567 (Tk).

> provisions of s 33 of the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution) which gives certain rights to the applicants. The applicants contend that such constitutional rights of theirs were violated and in addition thereto they were not given a hearing before the decisions were taken."[67]

This case may be criticised on two bases. In the first place, as has been shown, it is simply not permissible to decide to ignore the PAJA and to apply s 33 directly because the former gives effect to the latter. Secondly, (and this is not directly relevant to the issues discussed here), whether a political party in its relationship with its members exercises public power is a tricky and complex issue that the court did not enquire into, simply assuming this to be the case.

In *Johannesburg Municipal Pension Fund v City of Johannesburg*,[68] Malan J raised the possibility of the review of administrative action otherwise than through the PAJA. He found that decisions taken by the applicants to terminate two pension funds and to cease contributing to them were administrative actions as defined in the PAJA, but proceeded to hold that even if he was wrong in this respect, "direct recourse to s 33 of the Constitution appears to be possible" and that it may be so that the PAJA "is not and cannot be exhaustive of the right to administrative justice" because to hold otherwise "would be subversive of the principle of constitutional supremacy".[69]

The difficulty with which Malan J was grappling was the under-inclusiveness of the definition of administrative action in the PAJA. On the basis of Chaskalson CJ's view in the *New Clicks* case that the PAJA is "required to cover the field and purports to do so" resort to the common law or to s 33 directly is not an option open to a court. If the PAJA falls short of its intended purpose of giving effect to s 33 of the Constitution, it would be susceptible to constitutional challenge and its shortcoming would, in order to survive scrutiny, have to meet the standards for justification of all infringements of fundamental rights set out in s 36 of the Constitution. If found wanting, the PAJA's omissions would have to be rectified, either by means of reading in, or by the striking down of an exclusion from the definition of administrative action, or by means of an order directing the legislature to remedy the defect. If the omission was justified, the administrative action not recognised by the PAJA would nonetheless be reviewable in terms of s 1(c) of the Constitution. In the light of the above, it is doubtful that Malan J's tentative views are correct. But he has highlighted a glaring weakness in the PAJA – the ostensible lack of fit between s 33 of the Constitution and s 1 of the PAJA. The courts have held, however, that it is necessary to interpret the PAJA consistently, wherever possible, with s 33 of the Constitution and with the Constitution as a whole.[70] This, to an extent at least, tends to limit the damage caused by the legislature's shoddy work.

3 2 3 The role of the common law

The Constitutional Court has made it plain that the common law remains relevant to the review of administrative action, but that it now plays a different role

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67 Para 12.
68 2005 6 SA 273 (W).
69 Para 15. This issue was left undecided in *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* para 19 fn 3.
70 See for instance, *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* para 22. See too the *New Clicks* case paras 99, 118, 126 and 128.

to the central role it played prior to 1994. It is no longer the source of the power to review administrative action and it no longer supplies the grounds of review, as it previously did: they are now codified in s 6(2) of the PAJA.[71] Despite this downgrading of the common law, it remains important for the reasons that follow.

First, it remains important for purposes of interpreting both s 33 of the Constitution and the PAJA. In *Pharmaceutical Manufacturers Association of South Africa: In Re Ex Parte President of the Republic of South Africa*[72] Chaskalson P held that despite the interim Constitution having "shifted constitutionalism" from its previous common law base to that of a written, supreme Constitution, the common law remained important as its "well established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development". In similar vein, in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*[73] O'Regan J held that the common law "informs the provisions of PAJA and the Constitution, and derives its force from the latter", while in *Manong and Associates v Director-General: Department of Public Works*[74] Davis J stated that "[e]ven a cursory examination of the provisions of PAJA reveals that the body of common law which had been developed prior to the introduction of PAJA remains relevant to the interpretation and development of PAJA" and that many of the concepts used in the Act "require recourse to common law jurisprudence" in order to give them meaning.

The role of the common law in giving meaning to the PAJA is perhaps most important in relation to the interpretation of s 6(2), the grounds of review. The reason for this is obvious: most of the grounds of review are drawn directly from the common law and codified in the section. So, if one is required to interpret s 6(2)(d), which provides for the review of administrative action on the basis of an error of law, it would be impossible to do so without reference to *Hira v Booysen*,[75] because s 6(2)(d) simply borrowed the formulation for this ground of review from that judgment. So, too, if one wanted to know what was meant by s 6(2)(a)(iii) – review on the basis of bias or reasonably suspected bias – one need look no further than *BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers' Union*,[76] because this case decided that the test for disqualifying bias was the "reasonable suspicion" test rather than the "real likelihood of bias" test. The former test, as formulated by the Appellate Division, has now been codified in the PAJA. The content of the rules of procedural fairness in s 3 of the PAJA are yet another example of the central importance of the common law.

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71 *Pharmaceutical Manufacturers Association of South Africa: In Re Ex Parte President of the Republic of South Africa* para 45; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* para 22.

72 Para 45.

73 Para 22.

74 2005 10 BCLR 1017 (C) 1026H–1027A.

75 1992 4 SA 69 (A). See for examples of the application of this judgment, *Governing Body, Mikro Primary School v Minister of Education, Western Cape* 2005 3 SA 504 (C), upheld on appeal in *Minister of Education, Western Cape v Governing Body, Mikro Primary School* 2006 1 SA 1 (SCA); *Liberty Life Association of Africa Ltd v Kachelhoffer NO* 2005 3 SA 69 (C); *South African Jewish Board of Deputies v Sutherland NO* 2004 4 SA 368 (W); *Boesak v Chairman, Legal Aid Board* 2003 6 SA 382 (T).

76 1992 3 SA 673 (A).

This section, to a large extent, simply converts the common law rules developed by the courts over the years into legislative form.[77] By much the same token, the threshold for the operation of the right to procedurally fair administrative action in the PAJA – material and adverse effect on rights or legitimate expectations – is similar to, but perhaps more limited than, the common law threshold (which arguably also includes adverse impact on some sufficiently important interests).[78] Once again, in this respect, if one wanted to know what was meant by the term legitimate expectation – one of the most abused and misused terms in administrative law – one would only have to look at *Administrator, Transvaal v Traub*[79] (and the foreign cases relied upon in that judgment) to find out.

The common law also plays a part in ameliorating the harshness of some of the provisions of the PAJA which appear on their face to be less in step with the Constitution and its values than the common law. So, for instance, the time-limit of 180 days for the institution of judicial review proceedings provided for in s 7(1) read with s 9(1) of the PAJA is more rigid than the common law delay rule, but there are indications that it may be applied in much the same way.[80] The same may be said of s 7(2), which places a particularly onerous obligation on an applicant for judicial review to exhaust any domestic remedy that may have been created by statute before approaching a court. This is far more hostile to the right of access to court than the more nuanced common law rule, and courts have tended to read the section down to bring it into conformity with the common law.[81] Thirdly, in respect of remedies, the common law is still particularly relevant because most of the remedies contemplated by s 8 of the PAJA are remedies that are derived from the common law. As with the time-limit and the duty to exhaust internal remedies, one remedy, that of substitution for the decision of the administrative decision-maker (as an alternative to remittal), has been codified in what appears to be more stringent terms than the equivalent common law rule.[82] Here too the courts have tended to interpret the section as meaning the same thing as the common law rule.[83] It may be said that these interpretative

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77 On the content of the rules of procedural fairness at common law, see Corder "The Content of the *Audi Alteram Partem* Rule in South African Administrative Law" 1980 *THRHR* 156.

78 See Plasket *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* (PhD thesis, Rhodes University, 2002) 402–414.

79 1989 4 SA 731 (A). See too *South African Veterinary Council v Szymanski* 2003 4 SA 42 (SCA); *National Director of Public Prosecutions v Phillips* 2002 4 SA 60 (W).

80 See for example, *Scenematic Fourteen (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 BCLR 430 (C). (The non-compliance with the time limit was not an issue in the appeal from this decision. See *Minister of Environmental Affairs and Tourism v Scenematic Fourteen (Pty) Ltd* 2005 6 SA 182 (SCA), in which the decision of the court of first instance was set aside on the merits.)

81 See for instance, *Governing Body, Mikro Primary School v Minister of Education, Western Cape* 2005 3 SA 504 (C); *Minister of Education, Western Cape v Governing Body, Mikro Primary School* 2006 1 SA 1 (SCA); *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism* 2005 3 SA 156 (C).

82 Section 8(1)(c)(ii)(aa) of the PAJA provides that in "exceptional circumstances" a court that has found administrative action to be invalid may substitute or vary the administrative action or "correct a defect resulting from an administrative action".

83 See for instance, *Gauteng Gambling Board v Silverstar Development Ltd* 2005 4 SA 67 (SCA); *Ruyobeza v Minister of Home Affairs* 2003 5 SA 51 (C); *Stanfield v Minister of*

continued on next page

techniques are designed to interpret the PAJA in conformity with s 33 of the Constitution, and they use the common law to do so.

The common law is not dead, despite it having been relegated in importance. It may still be developed. Those developments can be fed into the PAJA in at least two ways. First, new grounds of review can be encapsulated in the PAJA via s 6(2)(i), the catch-all ground that allows for administrative action to be set aside on review if it is "otherwise unconstitutional or unlawful". It has been seen that this section has been used to fit wide statutory reviews and the doctrine of vagueness into the new South African administrative law. It will also be necessary to use this section to found a cause of action based on the fettering of discretion by means of a rigid adherence to a fixed policy, as this well-known ground too has been omitted inexplicably from the PAJA.[84]

Furthermore – and to an extent this relates to the interpretation of the PAJA – when grounds of review which were not part of the pre-1994 common law or had not then been fully developed, but are now part of the PAJA, are interpreted and developed, this will more often than not need to be done within a common law context. Review for unreasonableness is a good example. Prior to 1994, the common law did not recognise unreasonableness in itself to be a ground of review: it served merely as an indication that some other ground of review must have been present and allowed a court to draw this inference, provided the unreasonableness was gross.[85] In 1976, the accepted position was questioned by Jansen JA in *Theron v Ring van Wellington van die NG Sendingkerk in Suid Afrika*,[86] but despite academic enthusiasm for the idea that administrative action should be capable of being reviewed for unreasonableness on its own, the courts failed to grasp the nettle. In 1995, however, in *Standard Bank of Bophuthatswana Ltd v Reynolds NO*[87] Friedman JP held that the symptomatic unreasonableness test was incompatible with the new constitutional order and that the time had come to recognise unreasonableness on its own and unqualified as a ground of review. More recently, in discussing s 6(2)(h) of the PAJA (which provides for the review of administrative action when the impugned decision is "so unreasonable that no reasonable person could have so exercised the power or performed the function") O'Regan J looked, in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* to English common law for guidance on what this section meant. She held that the section should not be interpreted literally as that would set a standard so high that a decision would only very rarely be capable of being found to be unreasonable. Construed consistently with the Constitution and with s 33, the section, in line with Lord Cooke of Thorndon's views on unreasonableness in *R v Chief Constable of Sussex, Ex Parte International*

Correctional Services 2003 12 BCLR 1384 (C); *RHI Joint Venture v Minister of Roads and Public Works* 2003 5 BCLR 544 (Ck).

84 See *Kemp NO v Van Wyk* 2005 6 SA 519 (SCA) para 1, in which it was affirmed that this form of abuse of discretion is still a ground of review and in which the correctness of the leading on the issue, *Britten v Pope* 1916 AD 150 was also affirmed. No mention was made of the PAJA in the judgment.

85 See *Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Ltd* 1928 AD 220 236–237. This form of unreasonableness is often referred to as symptomatic unreasonableness.

86 1976 2 SA 1 (A).

87 1995 3 SA 74 (B).

Trader's Ferry Ltd[88] meant that "an administrator's decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision maker could not reach".[89]

Finally, the common law remains in place as a "long stop" in the event that things may go wrong and either s 33 of the Constitution and the PAJA are repealed, or worse, that the Constitution is either emasculated or changed fundamentally. In either of these events – unlikely as they appear to be – the common law will fill the void created by the constitutional amendment. Similarly, in less dramatic fashion, if the legislature decided to repeal s 7(1) of the PAJA, which provides for the 180-day time limit, the common law rule that judicial review proceedings must be initiated within a reasonable time, would fill the void left by the repeal.

4 CONCLUSION

It has been shown above that whereas s 33 of the Constitution serves as the shield to protect individuals from laws and practices that infringe or threaten their right to hold the administration to account for its exercise of the public power vested in it, the PAJA serves as the sword, providing individuals with the equipment to hold the administration to account – to enforce the fundamental right to lawful, reasonable and procedurally fair administrative action, and to reasons for adverse administrative decisions. In this scheme, there are not two systems of law at work: a statutory system with the Constitution at its apex, and a parallel common law system separated from it by an impenetrable firewall. Instead, the statutory and common law regimes are part of an integrated whole and both are subservient to and informed by the supreme Constitution. The role of the common law, once the engine room of administrative law, has changed, but it remains as important as ever for purposes of giving content to the grounds of review and other fundamental concepts of the new administrative law. It is the golden thread that runs through South African administrative law, even after 1994. Administrative law simply cannot be practiced competently, either in the courts or in academia, and s 33 of the Constitution and the PAJA cannot properly be understood, without an understanding of the common law. The challenge for administrative lawyers committed to the democratic values enshrined in the Constitution is to ensure that the new integrated administrative law is properly developed, using the best of the common law, comparative law and South Africa's emerging constitutional jurisprudence to enforce the rule of law and ensure accountability, responsiveness and openness on the part of those to whom administrative power has been entrusted.

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88 [1999] 1 All ER 129 (HL) 157.
89 Para 44.

Towards a Transformative Adjudication of Socio-Economic Rights*

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1 INTRODUCTION

Ten years since the adoption of South Africa's 1996 Constitution, there is a burgeoning body of jurisprudence on the socio-economic rights provisions in the Bill of Rights. Of the seven or eight major decisions of the Constitutional Court on socio-economic rights, only one case has not been decided in favour of the applicants, namely *Soobramoney v Minister of Health, Kwa-Zulu-Natal*.[1] Moreover, the Court has developed a model of reviewing socio-economic rights claims which has been praised for achieving a delicate balance between respecting the roles and competencies of the legislative and executive branches of government, whilst not abdicating its judicial role of enforcing these rights.[2]

This article examines whether the courts' predominant paradigm for reviewing socio-economic rights claims – the model of "reasonableness review" – constitutes a transformative mode of adjudicating socio-economic rights claims. It considers three approaches that could enhance the transformative potential of reasonableness review: contextual interpretation; an approach that takes the intersection between rights seriously; and a substantive approach to the separation of powers doctrine. It proceeds to consider the implications of these approaches for the model of review and standard of scrutiny applied to socio-economic rights claims. The final part considers the implications for transformative adjudication of the different model of review adopted by the courts for the negative and positive duties imposed by socio-economic rights.

2 REASONABLENESS REVIEW

The Constitutional Court's rejection of the notion of minimum core obligations and its embrace of the reasonableness review standard for the positive duties imposed by socio-economic rights has attracted academic criticism.[3] Nevertheless,

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1 1998 1 SA 756 (CC).

2 See, for example, Sunstein "Social and economic rights? Lessons from South Africa" 2001 *Const Forum* 123.

3 See, for example Bilchitz "Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence" 2003 *SAJHR* 1; Liebenberg "South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty" 2002 *Law, Democracy and Development* 159.

it has also attracted praise for being an appropriate, democracy-enhancing review standard for the positive duties imposed by socio-economic rights.[4] The Constitutional Court has emphasised that reasonableness review is not intended to prescribe any particular policy choice to the State, but rather to assess whether the State's conduct or omissions fall within the range of a reasonable response to the socio-economic commitments in the Constitution.[5]

The Court has indicated that it will assess the reasonableness of the State's conduct in the light of the social, economic and historical context, and consideration will be given to the capacity of institutions responsible for implementing the programme.[6] Initially, it appeared that the Court would adopt a thin standard of rationality review in socio-economic rights cases.[7] However, in its subsequent jurisprudence the Court has clarified that its standard of scrutiny in socio-economic rights cases is more substantive than simply enquiring whether the policy was rationally conceived and applied in good faith.[8] In the *Grootboom* and the *TAC* cases, the Court established a number of criteria for assessing the reasonableness of government programmes impacting on socio-economic rights. Thus a reasonable programme must be: comprehensive, coherent, co-ordinated;[9] balanced and flexible and make appropriate provision for short, medium and long-term needs;[10] reasonably conceived and implemented;[11] transparent and its contents must be made known effectively to the public;[12] appropriate financial and human resources must be made available for its implementation;[13] and it must provide relatively short-term measures of relief to those whose needs are urgent.

The latter criterion represents the element of the reasonableness test that comes closest to laying down a general requirement that socio-economic rights claims must be responsive to the basic socio-economic needs of those who are experiencing severe forms of deprivation. Thus the Court has held:

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4 See, for example, Steinberg "Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence" 1006 *SALJ* 264; Pillay "Reviewing reasonableness: An appropriate standard for evaluating state action and inaction?" 2005 *SALJ* 419; Kende "The South African Constitutional Court's embrace of socio-economic rights: A comparative perspective" 2003 *Chap LR* 137.

5 Thus in *Government of Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC), the Court held at para 41: "A Court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met."

6 *Soobramoney* para 16; *Grootboom* para 43; *Khosa v Minister of Social Development* 2004 6 BCLR 569 (CC) para 49.

7 See *Soobramoney* and the discussion by Pieterse "Coming to terms with judicial enforcement of socio-economic rights" 2004 *SAJHR* 383 401.

8 *Bel Porto School Governing Body v Premier, Western Cape* 2002 9 BCLR 891 (CC) para 46; *Khosa* para 67.

9 *Grootboom* paras 39 and 40.

10 *Grootboom* para 43.

11 *Grootboom* paras 40–43.

12 *Minister of Health v Treatment Action Campaign* 2002 10 BCLR 1033 (CC) para 123.

13 *Grootboom* para 39.

> "To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are most urgent and whose ability to enjoy all rights is therefore most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test."[14]

This requirement of the reasonableness test is justified particularly in terms of the value of human dignity.[15]

The key strength of reasonableness review is its potential to be a flexible, context-sensitive tool for assessing the State's compliance with its socio-economic rights obligations.[16] By not fully specifying the core components of the various socio-economic rights, the Court leaves space for democratic deliberation on the concrete programmes needed to realise socio-economic rights by the executive and legislative branches of government as well as the general public. A too detailed and rigid definition of the "core" content of a socio-economic right could result in the closing down of opportunities for broader democratic deliberation on what the rights should mean in a range of different contexts.[17] This approach does not resonate well with the Constitutional Court's emphasis on participatory democracy as a key component of transformative constitutionalism in South Africa.[18] As Justice Ngcobo observes in *Doctors for Life International v The Speaker of the National Assembly*:

> "It [participatory democracy] enhances the dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist."[19]

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14 *Grootboom* para 44.

15 Thus in *Grootboom* (para 83) the Court held: "It is fundamental to an evaluation of the reasonableness of State action that account be taken of the inherent dignity of human beings . . . In short, I emphasise that human beings are required to be treated as human beings."

16 See in this regard: Liebenberg "Enforcing positive socio-economic rights claims: The South African model of reasonableness review" in Squires, Langford and Thiele (eds) *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (2005) 73–88.

17 See Mark Tushnet's arguments in favour of weak-form review, and his characterisation of the *Grootboom* decision as a form of "democratic experimentalism". See Tushnet "New Forms of Judicial Review and the Persistence of Rights- and Democracy-based Worries" 2003 *Wake Forest LR* 813.

18 *Doctors for Life International v The Speaker of the National Assembly* 2006 6 SA 416 (CC) paras 108, 112–117. See further Cohen "The economic basis of deliberative democracy" 1989 *Social Philosophy & Policy* 25.

19 *Doctors for Life International v The Speaker of the National Assembly* 2006 6 SA 416 (CC) para 115.

Although this case concerned participation in the legislative process, the values and principles underlying participatory democracy are also relevant in an adjudicative context. This suggests that the test for reasonableness review should be developed so as to promote maximum participation by marginalised communities in decisions that have an impact on their socio-economic well-being.

However, an open-textured form of review in which the content of the government's obligations are not specified can also undermine participation by disadvantaged groups in the political, economic, social and cultural life of our young democracy. It can make it more difficult for groups to claim access to the concrete socio-economic resources and services from the State that they need to function effectively in society.[20] Moreover, reasonableness review has the potential of degenerating into an extremely deferential standard, approximating mere rationality review. This is particularly likely to occur in socio-economic rights cases in which the courts are reluctant, for a range of reasons, to disrupt the State's social policy and budgetary choices.[21] It can become a formalistic device to avoid an active, responsible role for the courts in socio-economic transformation.

Given the Court's express preference for the model of reasonableness review, it becomes important to examine how it can be developed to give effect to the transformative ethos of the Constitution. Can it contribute to the transformation of our prevailing legal tradition and culture and facilitate reforms that advance broader political and socio-economic transformation?[22] I argue that it is possible to develop a substantive and transformative model of reasonableness review, and sketch the outlines of how this might be accomplished. Finally, I consider some of the implications of the approach I develop for the model of review and standard of scrutiny applied in socio-economic rights cases.

3 THE ROLE OF SOCIO-ECONOMIC RIGHTS UNDER A TRANSFORMATIVE CONSTITUTION

The development of the substantive content of reasonableness review must be informed by an understanding of the broader transformative commitments of the Constitution, and the particular role of socio-economic rights. In other words, it is impossible to evaluate the reasonableness of the conduct or omissions of the State or private entities without some background conception of the role of socio-economic rights in advancing transformation in South Africa.[23] This does

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20 Sen and Nussbaum have argued that human rights norms, including socio-economic rights, can play an important role in enhancing people's capabilities to function in society: Sen "Human rights and development" in Andreassen and Marks (eds) *Development as a Human Right: Legal, Political, and Economic Dimensions* (2006) 1; Sen "Elements of a theory of human rights" 2004 *Philosophy & Public Affairs* 315; Nussbaum "Capabilities, human rights and the Universal Declaration" in Weston & Marks (eds) *The Future of International Human Rights* (1999) 25.

21 See Davis "Socio-economic rights in South Africa: The record of the Constitutional Court after ten years" 2004 *ESR Review* 3.

22 Klare "Legal culture and transformative constitutionalism" 1998 *SAJHR* 146 argues that transformation of South Africa's legal culture "is a necessary condition for the long-term success of transformative constitutionalism" (at 170).

23 Thus Klare "Legal theory and democratic reconstruction: Reflections on 1989" 1991 *Univ of British Columbia LR* 69 101 argues that it is necessary "to step outside of" rights discourse in order to fill rights with legal and institutional meaning: "One must appeal to more

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not (nor should it) imply developing a master-narrative on what transformation is or should be.[24] However, it does require an analysis of the complex historical, political and social forces that have created and continue to perpetuate patterns of marginalisation and subordination in our society.[25] Second, we cannot begin to debate what transformation entails without a minimum pre-commitment to full and equal participation by all in deliberation about the type of post-apartheid society we wish to construct, and the processes for realising this vision.

There are entrenched structural obstacles that impede participation by many groups in the political, economic, social and cultural institutions of our society. One barrier to participation is the systemic patterns of discrimination on grounds such as race, sex, sexual orientation, disability and HIV-status. A second major barrier is the deep levels of poverty and unequal access to social services and economic resources that exist in South Africa.[26] These two forms of disadvantage intersect with each other to create new and invidious forms of marginalisation. Thus, for example, a black woman living with HIV/AIDS in an impoverished rural community without access to basic services such as potable water, health and childcare facilities experiences multiple forms of overlapping and mutually-reinforcing disadvantage. These include the gendered burden of care work, the racialised legacy of socio-economic deprivation, social stigma and geographic isolation.[27]

In this context, I suggest that socio-economic rights have four important functions to perform in advancing the transformative commitments of our Constitution. Firstly, socio-economic rights read in combination with other rights in the Bill of Rights, such as the right to equality, create a more holistic and realistic picture of multiple, overlapping sources of disadvantage. As Judge Dikgang Moseneke observed in the Fourth Bram Fischer Memorial Lecture:

> "a creative jurisprudence of equality coupled with a substantive interpretation of the content of 'socio-economic' rights should restore social justice as a premier

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concrete and therefore more controversial analyses of the relevant social and institutional contexts than rights discourse offers; and one must develop and elaborate conceptions and institutions about human freedom and self-determination by reference to which one seeks to assess rights claims and resolve rights conflicts."

24 On dangers of the use of history as a master-narrative in constitutional interpretation, see De Vos "A Bridge Too Far? History as Context in the Interpretation of the South African Constitution" 2001 *SAJHR* 1. See also Langa "Transformative constitutionalism" 2006 *Stell LR* 351.

25 See, for example, O'Regan J's account of the intersecting patterns of race and gender discrimination in *Brink v Kitshoff NO* 1996 6 BCLR 752 (CC) para 44. For an excellent account of the history and current socio-economic consequences of race, class and inequality in South Africa, see Seekings and Nattrass *Class, Race and Inequality in South Africa* (2006).

26 See Seekings and Nattrass *Class, Race and Inequality in South Africa*. These obstacles to participatory parity are prevalent to a greater or lesser degree in contemporary, capitalist societies. The philosopher and political theorist, Nancy Fraser, describes these obstacles to participatory parity which are present to a greater or lesser degree in contemporary, capitalist societies as misrecognition and misdistribution respectively. See Fraser and Honneth *Redistribution or Recognition? A Political-Philosophical* Exchange (2003). For a discussion of the implications of her theories for social rights adjudication in South Africa, see Liebenberg "Needs, rights and transformation: Adjudicating social rights" 2006 *Stell LR* 1.

27 On the impact and implications of the intersection between gender, race and poverty, see Goldblatt "Citizenship and the right to child care" in Gouws *(Un)thinking Citizenship: Feminist Debates in Contemporary South Africa* (2005) 117.

> foundational value of our constitutional democracy side by side, if not interactively with, human dignity, equality, freedom, accountability, responsiveness and openness."[28]

Secondly, enforceable socio-economic rights in the Bill of Rights assist in challenging the conventional wisdom that the meeting of socio-economic needs is not a question of public responsibility, but are a private matter for familial and market institutions.[29] Their status as constitutionally entrenched rights allows powerful institutions of state and civil society to be marshalled to challenge these patterns of disadvantage and create opportunities for greater participation in transformative politics. Thus, the courts are constitutionally obliged to enforce the duties imposed by socio-economic rights.[30] In addition, the state institutions supporting constitutional democracy, such as the South African Human Rights Commission and the Commission for Gender Equality, have important roles to play in monitoring and investigating socio-economic rights.[31] Thirdly, the inclusion of socio-economic rights in the Bill of Rights creates opportunities for the voices of those who are marginalised by poverty to be heard in judicial processes when political processes are indifferent or hostile to their claims.[32]

Finally, socio-economic rights create opportunities for the transformation of common law rights and duties which structure access to economic resources and opportunities. The notion that a social need could create a positive entitlement to public assistance is absent in our common law tradition.[33] Socio-economic rights can assist in restructuring common law rules in spheres such as contract and

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28 2002 *SAJHR* 309 314.

29 For a discussion of the "privatisation" discourses at play in relation to the meeting of socio-economic needs, see Brand "The 'politics of need interpretation' and the adjudication of socio-economic rights claims in South Africa" in Van der Walt (ed) *Theories of Social and Economic Justice* (2005) 17 19–20.

30 Section 38 read with s 172(1) of the Constitution.

31 See, for example, the express monitoring role given to the Human Rights Commission in relation to socio-economic rights by s 184(3) of the Constitution. For a discussion of this role, see Newman "Institutional monitoring of socio-economic rights: A South African case study and a new research agenda" 2003 *SAJHR* 189.

32 See Dugard and Roux "The record of the South African Constitutional Court in providing an institutional voice for the poor: 1995–2004" in Gargarella, Domingo and Roux (eds) *Courts and Social Transformation in New Democracies* (2006) 107.

33 On the implications of the concept of a welfare entitlement for private law in the United States, see Williams "Welfare and legal entitlements: The social roots of poverty" in Kairys (ed) *The Politics of Law: A Progressive Critique* (1998) 575; For an exploration by Williams of similar themes in the SA context, see "Issues and challenges in addressing poverty and legal rights: A comparative United States/South African analysis" 2005 *SAJHR* 436. The Supreme Court of Appeal has already signalled its awareness of the potential impact of socio-economic rights on common law rights, see *Ndlovu v Ngcobo; Bekker v Jika* 2003 1 SA 113 (SCA) para 16. However, in practice the SCA has remained reticent in drawing on the interests protected by socio-economic rights to develop the common law: see *Brisley v Drotsky* 2002 4 SA 1 (SCA); *Afrox Health Care Bpk v Strydom* 2002 6 SA 21 (SCA). For a critique of the SCA's stance in *Brisley*, see Roux "Continuity and change in a transforming legal order: The impact of section 26(3) of the Constitution on South African law" 2004 *SALJ* 466 484–492. For a critique of the *Afrox* decision, see Tladi "One step forward, two steps back for constitutionalising the common law: *Afrox Health Care v Strydom*" 2002 *SA Public Law* 473; Naude and Lubbe "Exemption clauses – A rethink occasioned by *Afrox Healthcare Bpk v Strydom* 2005 *SALJ* 441. See also Van der Walt *Constitutional Property Law* (2005) 422–424 and 438–440.

property law so that they are more responsive to power imbalances in social relations. André van der Walt has demonstrated how the stripping of Black people of their land rights, together with the strong status of private property rights within Roman-Dutch law, facilitated the forced removals and evictions of the apartheid era which led to the impoverishment of the Black majority.[34] The strong recognition of private property rights, the strict private/public law conceptual divide and the absence of any recognition of social rights in our legal tradition have arguably facilitated the deep inequalities and the creation of a large economic underclass in South Africa. The influence of s 26(3) of the Constitution and legislation giving effect to this right such as the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[35] (PIE) has already had a profound impact on the common law of property.[36]

If reasonableness review is to avoid amounting to a formalist, procedural standard of review,[37] its application must be informed by a broader moral and political vision of the transformative commitments and values of our Constitution. I have argued that this must entail a commitment to eliminating not only the political obstacles to participation in our democracy, but also the social and economic obstacles.[38]

4 DEVELOPING A TRANSFORMATIVE INTERPRETATION OF REASONABLENESS

This part considers how the basic features of reasonableness review can be developed so as to promote the transformative potential of socio-economic rights. Three interrelated aspects are identified as being central to developing reasonableness review in a transformative direction: contextual evaluation, intersectionality and substantive reasoning. Thereafter the implications of these features for the model of review and standard of scrutiny applied by the courts in particular socio-economic rights cases are considered.

4 1 Reasonableness in context

In *Grootboom*, the Constitutional Court emphasised that reasonableness must be understood not only in the context of the Bill of Rights as a whole, but also by considering the broader historical, social and economic context in which deprivations of socio-economic rights occur.[39] If the adjudication of socio-economic rights claims is to transcend the legacy of abstract, conceptualist legal reasoning

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34 See Van der Walt "Legal history, legal culture and transformation in a constitutional democracy" 2006 *Fundamina* 1 13–15 (see particularly the sources cited at note 30).

35 Act 18 of 1998.

36 See Roux 2004 *SALJ* 466.

37 For an argument that the Court is developing a proceduralist standard of review in socio-economic rights cases, see Brand "The proceduralisation of South African Socio-Economic Rights Jurisprudence, or "What are Socio-Economic Rights For?" in Botha, A van der Walt and J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2004) 33.

38 In a prescient early article, Nicolas Haysom argued in favour of the inclusion of a basic platform of socio-economic rights in the Constitution on the basis of the role in facilitating democratic participation. See Haysom "Constitutionalism, majoritarian democracy and socio-economic rights" 1992 *SAJHR* 451.

39 *Grootboom* para 43.

in our legal tradition,[40] it must be responsive not only to the legal context of a particular case, but also the broader historical, social and economic context in which the claim arises. This requires an examination of the historical forces and institutional power relations that marginalise certain groups. Moreover, courts should be receptive to as broad a range of arguments and perspectives as possible, to enable the broader contextual factors surrounding a case to be aired fully. This is facilitated by the courts' receptiveness to public interest standing[41] as well as the admission of NGOs and others as *amici curiae* in socio-economic cases. In addition, broader reforms to the system of legal aid in South Africa must be pursued with vigour so as to expand access to legal representation by disadvantaged groups.[42]

The judgment of the Constitutional Court in *Port-Elizabeth Municipality v Various Occupiers*[43] is a good illustration of the use of contextual factors to interpret legislation enacted to give effect to a socio-economic right. Sachs J undertakes a detailed analysis of the role of forced evictions sanctioned by a range of apartheid-era legislation (such as the Prevention of Illegal Squatting Act 52 of 1951) in giving effect to apartheid land and housing programmes. He also analysed how the principles of ownership in the Roman-Dutch common law "then gave legitimation in an apparently neutral and impartial way to the consequences of manifestly racist and partial laws and policies".[44] Having painted a rich and nuanced picture of the interaction between apartheid policy, statutes and the common law he proceeds to analyse the transformative purposes of s 26(3) of the Constitution and one of the key statutes enacted to give effect to this right, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE).[45] The former "depersonalised processes that took no account of the life circumstances of those being expelled were replaced by humanised procedures that focused on fairness to all".[46] People "once regarded as anonymous squatters

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40 See Van der Walt 2006 *Fundamina* 1; Van der Walt "Tradition on Trial: A Critical Analysis of the Civil-Law Tradition in South African Property Law" 1995 *SAJHR* 169. On the broader significance of substantive legal reasoning for transformative constitutionalism in South Africa, see Klare 1998 *SAJHR* 146, particularly at 170–171.

41 Section 38(d) of the Constitution permits human rights cases to be brought by "anyone acting in the public interest". The Constitutional Court laid down the requirements for public interest standing in *Lawyers for Human Rights v Minister of Home Affairs* 2004 4 SA 125 (CC) paras 17–18.

42 On the institutional factors relevant to determining whether the courts are able to become an effective institutional forum for enabling the claims of disadvantaged groups to be heard, see Gloppen "Social rights litigation as transformation: South African perspectives" in Jones and Stokke (eds) *Democratising Development*: *The Politics of Socio-Economic Rights in South Africa* (2005) 153; Gloppen "Courts and social transformation: An analytical framework" in Gargarella, Domingo and Roux (eds) *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (2006) 35.

43 2004 12 BCLR 1268 (CC).

44 *Port Elizabeth Municipality v Various Occupiers* paras 8–10. Van der Walt's analysis of the interaction between common law ownership principles and evictions statutes in facilitating "the separation of land holdings along race lines" is referred to. See "Exclusivity of Ownership, Security of Tenure, and Eviction Orders: A Model to Evaluate South African Land-reform Legislation" 2002 *TSAR* 254 258.

45 Act 19 of 1998. See *Port Elizabeth Municipality v Various Occupiers* paras 12–13.

46 *Port Elizabeth Municipality v Various Occupiers* para 13.

now became entitled to dignified and individualised treatment with special consideration for the most vulnerable".[47]

The Court then develops a set of context-sensitive criteria for evaluating when an eviction would be "just and equitable" as required by PIE. This includes a consideration of the history and circumstances of the occupation,[48] the impact of a possible eviction on the occupier, the availability of suitable alternative accommodation, the hardship experienced by the landowner, and attempts at mediation in finding creative alternatives.[49] As the Court noted, there are a multiplicity of different circumstances and relationships at play in each case where an eviction application is brought. The courts' role under PIE and the Constitution is not automatically to privilege "in an abstract and mechanical way" the rights of ownership.[50] Rather it is to examine closely these contextual factors and attempt to balance and reconcile the various interests at stake, guided by constitutional values such as human dignity and *ubuntu*.[51] The parties involved in an eviction application are encouraged to seek creative solutions that avoid a damaging sacrifice of constitutionally protected interests and values. The nature of the judicial function in balancing ownership and housing rights in the context of an eviction application is described as follows:

> "In sum, the Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law. It counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home. The expectations that ordinarily go with title could clash head-on with the genuine despair of people in dire need of accommodation. The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be possessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case."[52]

The *PE Municipality* case concerned the State depriving people of their existing access to a socio-economic right. In *Jaftha v Schoeman*,[53] the Constitutional Court characterised this type of State action as a negative violation of socio-economic rights. It proceeded to evaluate the justifiability of such a deprivation in terms of the heightened purpose and proportionality requirements of the general limitations clause. In the course of its s 36 analysis, the Court also sanctions a contextual, balancing approach to evaluating the role of judicial oversight in controlling over execution against immovable property where this will result in the loss of a person's home.[54]

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47 *Ibid*.

48 The Court noted that "persons occupying land with at least a plausible belief that they have permission to be there can be looked at with far greater sympathy than those who deliberately invade land with a view to disrupting the organised housing programme and placing themselves at the front of the queue". *Port Elizabeth Municipality v Various Occupiers* para 26.

49 *Port Elizabeth Municipality v Various Occupiers* para 41.

50 *Port Elizabeth Municipality v Various Occupiers* para 23.

51 *Port Elizabeth Municipality v Various Occupiers* para 37.

52 *Port Elizabeth Municipality v Various Occupiers* para 23.

53 *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 34.

54 *Jaftha v Schoeman* paras 25–30, 35–51. The Court explains at para 51 that a "blanket prohibition" on execution against people's homes below a certain value would not be

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A similar approach is also apposite to an application of the reasonableness test in the case of an alleged omission by the State to fulfil the positive duties imposed by socio-economic rights.[55] As noted above, the reasonableness test incorporates a number of factors such as whether the programme is comprehensive, co-ordinated, transparent, reasonably implemented, and makes provision for those in urgent need.[56] While all these criteria are capable of yielding important contextual insights, they should be supplemented by a more detailed consideration of the impact on the complainants and the group they represent of the deprivation in question. Such a consideration should include an understanding of how the lack of access to the particular socio-economic right affects the complainant's life chances,[57] human dignity,[58] and ability to participate in political as well as socio-economic activities. Building a more detailed consideration of the impact of socio-economic deprivations reinforces participatory democracy, which I argue is an essential component of transformative constitutionalism in South Africa. As the Constitutional Court noted in the *TAC* decision,[59] only a concerted and co-operative national effort involving both government and civil society is required to confront the magnitude of the HIV/AIDS challenge facing our country. This in turn requires proper communication by government to all spheres of the public, particularly the most marginalised, of its socio-economic programmes and plans.[60]

4 2 Intersectionality

As noted above, poverty and various forms of systemic discrimination on the grounds of race, gender, disability and HIV-status overlap to produce new and invidious forms of disadvantage in our society. Furthermore, research has illustrated that there is a close correlation between poverty and decreased levels of participation in civil and political activity.[61] The existence of both civil and political and socio-economic rights in our Bill of Rights reflects a commitment to the principle of the interdependency of all human rights. Craig Scott writes

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appropriate as it could lead to a poverty trap, and does not sufficiently accommodate the interests of creditors.

55 For an account and a critique of the positive and negative duties imposed by socio-economic rights, see Liebenberg "The Interpretation of Socio-economic Rights" in Chaskalson *et al Constitutional Law of South Africa* 2 ed (2004) ch 33 at 17-47; Craven "Assessment of the progress on adjudication of economic, social and cultural rights" in Squires, Langford and Thiele (eds) *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (2005) 27; Liebenberg "Needs, rights and transformation: Adjudicating social rights" 2006 *Stell LR* 5 29.

56 See notes 9–13 above and accompanying text.

57 The *TAC* decision illustrates the impact on children's actual survival of the denial of certain social benefits such as antiretroviral medication. See paras 78–79 of that judgment.

58 The Court has held that human dignity is a central value in the reasonableness test, particularly in relation to the need for short-term measures to protect those whose socio-economic situations are urgent. See *Grootboom* paras 44 and 83. For a discussion of the value of human dignity in socio-economic rights adjudication, see Liebenberg "The value of human dignity in interpreting socio-economic rights" 2005 *SAJHR* 1.

59 *Minister of Health v Treatment Action Campaign* 2002 10 BCLR 1033 (CC).

60 *TAC* para 123.

61 Jackman "Constitutional contact with the disparities in the world: Poverty as prohibited ground of discrimination under the Canadian *Charter* and human rights law" 1994 *Review of Constitutional Studies* 76.

that "[t]he term *interdependence* attempts to capture the idea that values seen as directly related to the full development of personhood cannot be protected and nurtured in isolation".[62]

The initial approach of the court in the *Soobramoney* case (concerning a patient's claim for state provided kidney dialysis treatment) created some concern as to whether the Court would appreciate and endorse an interdependent reading of the Bill of Rights.[63] In this case, the Court held that aspects of health rights could not be inferred from the right to life in s 11 of the Constitution as these were expressly protected in s 27 of the Constitution.[64] The Court interpreted the right to life (s 11) as excluding those elements falling within the scope of the right to emergency medical treatment (s 27(3)). This suggested that a restrictive approach would be adopted to the interrelationship between rights in the Bill of Rights. Craig Scott and Phillip Alston refer to this type of interpretative approach as "negative inferentialism".[65] It views the various rights in the Bill of Rights as protecting mutually exclusive or discrete interests, and narrows the scope of certain rights where the interests at stake in litigation are more explicitly protected in other provisions.

However, in its subsequent decision in *Grootboom*, the Constitutional Court explicitly endorsed the interdependence and indivisibility of rights in the following terms:

> "All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, equality and freedom, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential . . . Socio-economic rights must all be read together in the setting of the Constitution as a whole. The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and in particular, in determining whether the state has met its obligations in terms of them."[66]

This approach to interdependence is a form of substantive reasoning that resonates with the transformative ethos of the Constitution. Conversely, an approach premised on a strict compartmentalised approach to the Bill of Rights would undermine the transformative potential of our jurisprudence. It would entrench a formalist approach to the interpretation of human rights, which fails to take account of the ways in which systemic disadvantage is constructed in real life from multiple, intersecting sources of discrimination and marginalisation. The consequence would be a narrowing of the range of possibilities available to the

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62 Scott "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights" 1989 *Osgoode Hall LJ* 769 786.

63 *Soobramoney* 1998 1 SA 756 (CC).

64 *Soobramoney* paras 15–19.

65 Scott and Alston "Adjudicating constitutional priorities in a transnational context: A comment on *Soobramoney's* legacy and *Grootboom's* promise" 2000 *SAJHR* 206.

66 *Grootboom* 2000 11 BCLR 1169 (CC) paras 23–24.

courts for redressing the complex intertwinement of inequality and poverty in our society.[67]

This intersection between rights in particular socio-economic rights cases also has practical consequences in adjudication for the standard of review adopted by the courts in particular cases.[68]

4 3 Substantive reasoning and the separation of powers doctrine

One of the major obstacles to the judicial enforcement of socio-economic rights is formalistic conceptions of the separation of powers doctrine, particularly in relation to decisions with substantial resource implications. During the Certification process, the objectors argued that the inclusion of socio-economic rights in the Bill of Rights would oblige the courts to dictate budgetary policy to the legislative and executive branches of government, thereby breaching the doctrine of separation of powers.[69] The Court held that the fact that the enforcement of rights has budgetary implications does not imply a breach of the separation of powers doctrine. It pointed out that the enforcement of many civil and political rights such as equality, freedom of speech and the right to a fair trial also have budgetary implications.[70] Nevertheless, given that resource constraints are frequently raised by the State in litigation as a reason for not extending access to socio-economic rights,[71] it is vital that the courts undertake a substantive evaluation of this defence. Substantive legal reasoning is a key feature of a transformative approach to adjudication. As Johan Froneman observes:

> "The Constitution gives the courts no choice other than to make these substantive choices, choices that are of the kind that a formal vision of law would not countenance as 'real' law. The Constitution appears to exclude the possibility that anything other than a substantive vision of the law still remains open to us."[72]

The value of substantive legal reasoning lies in articulating the policy or value-based reasons which inform a judge's interpretation of the law or facts in a particular case. This increases the transparency of judicial decision-making, and enables adjudication to be exposed to public scrutiny and debate thus enriching democratic deliberation. Karl Klare observes that formalist legal reasoning, which entails a reliance on the formal authority of a rule or doctrine without examining its underlying substantive justification, operates to mystify the choices that judges make in their interpretative work. In addition to reducing the transparency of the legal process, Klare argues that this mode of adjudication "may induce a kind of intellectual caution that discourages appropriate constitutional innovation and leads to less generous or innovative interpretations and applications of the Constitution than are permitted by the text and drafting history".[73] The result may be that even "progressive judges comfortable with an activist role

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67 See also De Vos "*Grootboom,* the Right of Access to Housing and Substantive Equality as Contextual Fairness" 2001 *SAJHR* 258.

68 See further Part 5 below.

69 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* 1996 4 SA 744 (CC) paras 76–78.

70 Para 77.

71 See, for example, the *TAC* case; *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 BCLR 569 (CC).

72 Froneman "Legal reasoning and legal culture: Our 'vision' of law" 2005 *Stell LR* 3 17.

73 Klare 1998 *SAJHR* 146 170–171.

may take for granted limitations on their interpretative scope that owe more to tradition than to the responsibilities and obligations of their role under *this* Constitution".[74]

Sections 26(2) and 27(2) expressly qualify the position regarding the duty on the State to achieve the progressive realisation of the various socio-economic rights by reference to the State's "available resources". The Court noted in *Grootboom* that "both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources".[75] The Court also indicated that one of the factors it will consider in evaluating the reasonableness of the State's conduct or omissions is "the capacity of institutions responsible for implementing the program".[76]

The separation of powers doctrine is particularly liable to be invoked as a rigid device in socio-economic rights adjudication, allowing courts to avoid making decisions which are perceived to challenge the authority of the executive and legislative branches of government. This is particularly the case when the doctrine assumes an idealised form of separate terrains with a strict demarcation between the roles of each branch instead of a functional and pragmatic device to facilitate responsive, accountable governance.[77]

This model is also particularly ill-suited to a transformative constitution such as South Africa's, in which co-operation between the three branches of government is essential for empowering government to take the necessary developmental and redistributive measures envisaged by the Constitution, particularly in relation to socio-economic rights.[78] The Constitutional Court has generally emphasised that the Constitution does not envisage brightline boundaries or a competitive model of relations between the three spheres of government.[79] Instead, it

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74 *Ibid*.

75 *Grootboom* para 46.

76 *Grootboom* para 43.

77 See De Waal & Currie *The Bill of Rights Handbook* (2005) 82–85. See also the discussion by Pieterse 2004 *SAJHR* 385–399 of the separation of powers doctrine and related reasons, such as institutional legitimacy and competence, for denying the courts a meaningful role in the enforcement of socio-economic rights claims. Constitutional Principle VI to the "interim" Constitution, 1993, required the 1996 Constitution to establish a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness."

78 The Constitutional Court has held that a balance must be developed between "the need, on the one hand, to control government by separating powers and enforcing checks and balances, and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest". *De Lange v Smuts NO* 1998 3 SA 785 (CC) para 60.

79 Thus in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996* (*First Certification* judgment) 1996 4 SA 744 (CC) para 111, the Constitutional Court held that the doctrine of separation of powers is not "a fixed or rigid constitutional doctrine" and that "it is given expression in many different forms and made subject to checks and balances of many kinds". Although, on occasion, the Court has tended to revert to the more traditional metaphor of the separation of powers doctrine as constituting separate "terrains", whose functions may overlap but which "are in the main separate, and should be kept separate". (per Chaskalson P in *Ferreira v Levin NO* 1996 1 SA 984 (CC) para 183. See, generally, Botha "Freedom and constraint in constitutional adjudication" 2004 *SAJHR* 249 277–278.

values a flexible and co-operative model of relations between the three branches of government, as well as between the three spheres of national, provincial and local government.[80] The three spheres of government as well as the branches of government within each sphere are constituted as distinctive, but also inter-dependent and interrelated.[81] A mutual relationship of "accountability, responsiveness and openness" is envisaged.[82]

This is more akin to a flexible, dialogic model of the separation of powers doctrine which entails, in Martha Minow's words, "a continual process of mutual action and interaction" in which context plays a crucial role.[83] This is consistent with the central purpose of the doctrine of separation of powers, which is to prevent a concentration of power in any one branch of government. In other words, no one branch should monopolise all the power and dominate the process of transformation. Craig Scott and Jennifer Nedelsky characterise this process of mutual interaction as a "constitutional dialogue" between the different branches of government.[84] This relationship will certainly not always be harmonious or free from conflict and mutual resistance to an over-assertion of power by one branch.[85] What is important is that while the limits of each branch's institutional power are being continually defined and redefined, they remain engaged with each other in a manner which is open and respectful of the institutional strengths and weaknesses of each. This "constitutional dialogue" should also not be confined to the three branches of government, but should include the State institutions supporting constitutional democracy (such as the Human Rights Commission and the Commission for Gender Equality) as well as civil society. This is compatible with a concept of transformative constitutionalism in which all institutions of our constitutional democracy and civil society are joint participants in the processes of transformation.

This model is more accommodating to the judicial enforcement of socio-economic rights. In adjudicating on socio-economic rights claims, the role of the judiciary is to make the executive and legislative branches of government aware of the impact of their actions and omissions on the lives of those marginalised by poverty and unable to find a voice in the formal political process. Adjudication aims at prodding government to be more responsive to the needs of the poor in order to fulfil their constitutional rights to have access to economic and social resources and services. Taking this role seriously will require, in appropriate cases, decisions which have extensive policy and budgetary implications. However, in

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80 See chapter 3 of the South African Constitution.

81 See ss 40 and 41

82 See s 1(d). Constitutional Principle VI to the interim Constitution, 1993 required the 1996 Constitution to have "a separation of power between the legislature, the executive and the judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness".

83 Minow *Making all the difference: Inclusion, exclusion and American law* (1990) 361.

84 Scott & Nedelsky "Constitutional dialogue" in Bakan and Schneiderman (eds) *Social Justice and the Constitution: Perspectives on a Social Union for Canada* (1992) 59. For a detailed account of "the dialogic turn" in human rights adjudicatory practice, see Roach "Constitutional, remedial and international dialogues about rights: The Canadian experience" 2005 *Texas International LJ* 537.

85 Scott & Maklem "Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution" 1992 *Univ of Penn LR* 1 42.

other cases, it may require judicial restraint and deference to the institutional strengths and skills of the other branches. What is required is not a ritual invocation of the separation of powers doctrine to deny relief in socio-economic rights litigation, but a careful and transparent analysis of the most effective mechanisms and processes for realising these rights in the particular context of the case. Separation of powers concerns can also be met by crafting remedies which allow for participation by the other branches of government and civil society organisations in designing policy solutions that meet constitutional requirements. [86]

This in turn suggests that the courts provide substantive reasons in socio-economic rights cases for its decisions to defer to the other branches as well as the conditions under which it is prepared to defer. Thus the Court might decide, as it did in *Soobramoney*, that the social policy and economic resource ramifications of a decision are too vast and unforeseeable for it to order the provision of a particular service to the claimants.[87] However, even in the circumstances where the State has neglected over a significant period to expand access to a particular constitutionally guaranteed service or resource, a court may order the State to adopt a transparent and participatory plan of action for the progressive expansion of the services in question.[88] Such an order could also be combined with a supervisory order to enable both the retention of jurisdiction over the implementation of the order by the Court, as well as civil society participation in the monitoring of implementation. This is another form of remedy which has the potential to enhance participatory democracy.

Alternatively, a court may decide that the claimants represent the voices of only a section of the community that may potentially be affected by a decision, and that justice demands that other voices be heard before arriving at a decision. In these circumstances, a court may decide, for example, to make an order of suspended invalidity to give parliament an opportunity to correct the constitutional defect after having solicited views from a broad spectrum of the public.

Finally, a court may decide, as it did in the *TAC* case, that the impact on the complainants of the denial of the service in question is particularly severe, that the State's policy and budgetary justifications for refusing to provide the service are unpersuasive, and that it would not be unjust to other groups to make a positive order. In these circumstances, the courts are obliged to make the only constitutionally responsible decision in the circumstances, namely, to order government to provide the particular service to the complainants (and by implication to others in their position).[89]

Engaging in substantive reasoning in socio-economic rights cases also requires courts to require detailed, high quality evidence and arguments from the State on

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86 See Trengove "Judicial Remedies for Violations of Socio-Economic Rights' 1999 *ESR Review* 8; Roach "Crafting remedies for violations of economic, social and cultural rights' in Squires, Langford and Thiele (eds) *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (2005) 111.

87 *Soobramoney* paras 19 and 28.

88 For a discussion of this issue in the context of social security rights, see Liebenberg "The right to social assistance: The implications of *Grootboom* for policy reform in South Africa" 2001 *SAJHR* 232. See also UN Committee on Economic, Social and Cultural Rights, General Comment No 14, para 43(f); General Comment No. 15, para 37(f).

89 See the mandatory orders made by the Court in the *TAC* case para 135.

its social policy and resource justifications. While genuine resource constraints may be a valid reason for the Court to decline to make a positive order in favour of complaints, as O'Regan J reminds us in the *Metrorail* case:

> "This last criterion will require careful consideration when raised. In particular, an organ of State will not be held to have reasonably performed a duty simply on the bald assertion of resource constraints. Details of the precise character of the resource constraints, whether human and financial, in the context of the overall resources of the organ of State will need to be provided."[90]

A good illustration of substantive legal reasoning in the context of a resource constraints defence is the Court's judgment in the *Khosa* case.[91] The case entailed a challenge to the provisions of the Social Assistance Act[92] for failing to extend access to social grants to permanent residents.[93] The respondents sought to deny the benefit to permanent residents "on the grounds that this would impose an impermissibly high financial burden on the State".[94] The Court undertook a detailed scrutiny of the State's calculations of the costs of extending social grants to permanent residents.[95] It found that the costs in fact represented "an increase of less than 2% on the present cost of social grants (currently R26.2 billion)" and concluded that "the cost of including permanent residents in the system will be only a small proportion of the total cost".[96]

In conclusion, it is appropriate for the courts to grant the State a degree of latitude in the light of the socio-economic backlogs generated by apartheid and the realities of resource and capacity constraints. However, the courts' analyses of claims based on socio-economic rights must also include a substantive consideration of the impact of poverty on disadvantaged communities, the implications of social deprivation for building a just society as envisaged by the Constitution, as well as the justifiability of the State's distributional priorities in the light of constitutional values and commitments.

5 THE MODEL OF REVIEW AND STANDARD OF SCRUTINY

A key issue in developing a transformative jurisprudence on socio-economic rights is the standard of scrutiny which the Court should apply to the policy and budgetary justifications of the State for failing to ensure that the complainant group has access to the relevant services.

All the factors discussed in the preceding section – a contextual evaluation of the claim, a consideration of the intersection between rights, and a substantive approach to the doctrine of separation of powers – should inform the standard of scrutiny applied in particular cases. Thus, where a disadvantaged group seeks access to a basic service or resource which is essential to their survival, development and participation as equals in society, the courts should apply a strict

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90 *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 4 BCLR 301 (CC) para 88.
91 *Khosa & Mahlaule v Minister of Social Development* 2004 6 BCLR 569 (CC).
92 Act 59 of 1992.
93 The challenge was based both on s 9 (equality) and s 27(1)(c) read with s 27(2) (the right of everyone to have access to social assistance) of the Constitution.
94 *Khosa* para 60.
95 *Khosa* paras 60–62.
96 *Khosa* para 62.

standard of scrutiny, incorporating a proportionality analysis. This would include a consideration of lesser forms of provisioning where it is not possible within current resource constraints to provide a comprehensive social programme. This stricter standard of scrutiny was illustrated in the *Khosa* case.[97] The "hard look" review of the State's policy and budgetary justifications for denying permanent residents access to social grants was triggered by the fact that a particularly vulnerable group (non-nationals) were denied access to a social grant with the effect that they were forced into destitution and relations of dependence on their community.[98] The intersection between equality rights and socio-economic rights also triggered a strict standard of review in the *Khosa* case, amounting to a proportionality analysis.[99] Where the group in question is less disadvantaged and the service of a tertiary nature, the standard of review can be progressively relaxed.[100]

The advantage of this graduated review standard is that it does not rest on a rigid distinction between "core" and "non-core" interests in terms of the form of review or the standard of scrutiny applied. Instead it allows for a contextual appraisal of the nature of the affected group as well as the interests at stake in the particular case. Where rights such as the right to life, equality rights, or other civil and political rights, are implicated in the exclusion of vulnerable groups from a social benefits programme, this explicit overlap should trigger a correspondingly stricter standard of scrutiny. Even in cases where a direct violation of the other rights cannot be established, the values underpinning these rights should nonetheless inform the standard of scrutiny applied for assessing the State's compliance with its positive duties under ss 26 and 27.

This approach to the review of the State's socio-economic duties establishes minimum core obligations and reasonableness as complementary, not disjunctive. It invites the courts to take particularly seriously situations where vulnerable groups are denied access to a vital social service or economic resource. In this regard, it is worth recalling that in both the *Grootboom* and *TAC* decisions, the Court expressly held that the minimum core of a particular service could be taken into account in determining whether the measures adopted by the State are reasonable.[101]

6 TOWARDS A UNIFIED MODEL OF REVIEW FOR NEGATIVE AND POSITIVE DUTIES

A final aspect worth considering is the implications for the evolution of a transformative jurisprudence on socio-economic rights of the conceptual division

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97 2004 6 BCLR 569 (CC).

98 The fact that the disadvantage experienced by the vulnerable group of non-citizens was exacerbated by the denial of basic subsistence benefits was a key factor informing the Court's evaluation of the reasonableness of the programme in terms of s 27(1)(c) read with (2). Conversely, as argued above, the critical role of social assistance benefits in alleviating the disadvantage experienced by this group informed the Court's inquiry into the "fairness' of the discriminatory legislation. See *Khosa* paras 48–85.

99 *Khosa* para 49.

100 Contrast, for example, the standard of review applied by the Court in the *Soobramoney* and *TAC* cases respectively.

101 *Grootboom* para 33; *TAC* para 34.

made by the Court between negative and positive duties and the differing model of review it applies to each.

Where there is a breach of the positive duty to provide or extend access to socio-economic rights, the Court applies the model of reasonableness review guided by the internal qualifications in ss 26(2) and 27(2): "reasonable measures", "progressive realisation" and "within the state's available resources". However, a breach of the negative duty not to deprive people of their existing access to socio-economic rights constitutes a *prima facie* violation of the right, and the burden of justification falls on the State in terms of the stringent criteria of the general limitations clause.[102]

Thus, existing access to socio-economic rights receives strong constitutional protection while the claims of those who lack access to socio-economic rights (and who are according in a more vulnerable position) are subjected to the less stringent form of reasonableness review. Furthermore, the conceptual distinction between negative and positive duties is in itself problematic and arbitrary. As Matthew Craven points out, the reliance upon the typology of negative and positive obligations "appears to be only coherent in the context of a static temporal frame in which pre-existent entitlements are naturalised and claims to particular resources are radicalised".[103] He goes on to observe:

> "It is often pointed out that the belief that the right to a fair trial merely involves state restraint – absence of interference – is only credible if one presumes the existing of a developed judicial system and its correlative institutional matrix of courts, judges, interpreters and legal advisors. By the same token, the belief that the fact of homelessness or poverty invokes an obligation to provide housing or food, and is therefore subject only to progressive achievement, obscures the possibility of any responsibility for the structures and processes that were themselves productive of these conditions."[104]

The distinction becomes arbitrary when one considers that an obligation can be classified as either a negative or a positive duty (with consequences for the model of review applied) depending on the stage at which the particular case is heard and how far down the chain of causality and responsibility one is prepared to travel. Thus, if the *Grootboom* case had been heard at an earlier stage when the community was facing eviction from the land they were occupying it would have been decided in terms of the negative duty not to deprive people of their access to housing,[105] instead of the positive duty of claiming access to housing.

While the strong and immediate protection afforded in cases where the State or private parties deprive people of their existing access to socio-economic rights is welcome, a rigid distinction between negative and positive duties may impede the development of a context-sensitive, substantive model of review in socio-

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102 See *Jaftha v Schoeman* 2005 2 SA 140 (CC) and accompanying text to note 53. For an examination of the implications of the Court's reasonableness model of review for the burden of proof in socio-economic rights cases, see Liebenberg "South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty" 2002 *Law, Democracy & Development* 159.

103 Craven "Assessment of the progress on the adjudication of economic, social and cultural rights" in Squires *et al* (eds) *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (2005) 27 34.

104 *Ibid*.

105 See the discussion in *Grootboom* paras 88–90.

economic rights cases. Perhaps the time is ripe to start thinking in terms of a single model of reasonableness review in which the nature of the harm done and the justifiability of the relevant acts or omission should form the overarching criteria for review. The standard of scrutiny would then be tightened or loosened based, not on a conceptual divide between negative and positive duties, but on a variety of contextual factors.[106] These factors would include: the position of the complainants and the group to which they belong in society, the nature of the service or resource to which access is sought, the historical and current economic and social context relevant to the claim, and the nature of the justifications put forward for not providing the resource or service in question.

7 CONCLUSION

The Court's rejection of the notion of minimum core obligations could be regarded as a setback for the development of a transformative jurisprudence on socio-economic rights. However, implicit in what I have argued is that this does not necessarily have to be so. If the courts embrace a sufficiently substantive approach to reasonableness review, the adjudication of socio-economic rights claims can become an important forum for courts to nudge both government and private actors to be more responsive to the voices and needs of the poor and marginalised. In this way, the adjudication of socio-economic rights claims can become an important forum for enhancing democratic transformation in South Africa.

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106 For an example of a similar approach in which the standard of scrutiny is varied depending on a variety of contextual relationships and factors, see the approach developed by Ackermann J to the review of the "arbitrariness" criterion for deprivations of property in s 25(1) of the Constitution in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC), particularly at para 100. For an analysis of this approach in the context of s 25(1), see Roux "Property" in Chaskalson *et al Constitutional Review of South Africa* Ch 46, particularly at 21–25.

Judges, Politics and the Separation of Powers

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1 INTRODUCTION

During the celebration of the first half-century of the existence of the German Federal Constitutional Court (the *Bundesverfassungsgericht*), the President of the Court, Jutta Limbach, said (freely translated):[1]

> "The history of the Court is a history of success. This is true despite the fact that it repeatedly caused critical crossfire with its decisions. This however never led to a lasting loss of trust by the people in the Court. It may be said without exaggeration that the *Bundesverfassungsgericht* had become a citizens' court *par excellence*. Such popularity is however not to be had without some doubt . . . Does such unmitigated immense trust in constitutional justiciability perhaps indicate a political distrust of democracy?"

Might there be substance in such a rhetorical question? Some clarity regarding this question may be found in an assessment of the manner in which courts deal with matters of a political nature.

According to some judicial voices from the past, politics and courts have little to do with one another. In 1930, for example, the American Judge Jerome Frank described the "conventional view" (to which he did not subscribe) on the function of judges thus:[2]

> "Judges are simply 'living oracles' of law. They are merely 'the speaking law'. Their function is purely passive. They are 'but the mouth which pronounces the law'. They no more make or invent new law than Columbus made or invented America. Judicial opinions are evidence of what the law is; the best evidence, but no more than that."

What, however, one might also have to ask, are "matters of a political nature". Judicial definitions of "politics" or "political" are hard to find. Most dictionary definitions of these terms refer to

- government and the state;
- opinions or attitudes regarding choices to be made concerning government; and
- association with a group or party promoting a particular approach to government.

Let us then assume that "politics" refers to the opinions, preferences or attitudes regarding the manner in which the country should be governed, and by whom.

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1 The statement was chosen for the closing remarks of Schlaich's standard work on the *Bundesverfassungsgericht*: *Schlaich Das Bundesverfassungsgericht – Stellung, Verfahren, Entscheidungen* 5 ed by Stefan Korioth (2001) 368–369.

2 Frank *Law and the Modern Mind* (1970).

2 JUDICIAL ENCOUNTERS WITH POLITICIANS, OFFICIALS AND POLICIES

In the case of *Treatment Action Campaign v Government of the Republic of South Africa*, Nicholson J made the following statement when it was suggested that the government had given an instruction not to comply with an order of court:[3]

> "If the Government of the Republic of South Africa has given such an instruction then we face a grave constitutional crisis involving a serious threat to the doctrine of the separation of powers. Should that continue the members of the judiciary will have to consider whether their oath of office requires them to continue on the bench."

Did Nicholson J in this case cross the boundary between politics and adjudication?

The oath of office prescribed by the Constitution of the Republic of South Africa, 1996[4] requires members of the judiciary to make the following oath or solemn affirmation:

> "I will be faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law."

By stating that refusal by the Government or the public administration to comply with a lawful judicial order made against it puts the judiciary under moral pressure, is no more than an incontestable interpretation and application of the Constitution. This is undoubtedly the function of the courts under the Constitution which provides in s 165(2) that: "The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice."

The Court's concern with the separation of powers is also fully justified, since s 165(5) of the Constitution provides that "[a]n order or decision issued by a court binds all persons to whom and organs of state to which it applies". Failure on the part of the executive to comply with an order of court would therefore not only be unconstitutional, but would amount to a rejection of the role of the judiciary as a balancing check within the meaning of the doctrine of the separation of powers.

In another case heard almost simultaneously in the Free State on a request for postponement, Hattingh J was quoted in the media as saying in a ruling: "Must we now close our courts, sit and count our fingers and do everything in Africa time to accommodate a national police commissioner who is not doing his job?" and "When Marike de Klerk was murdered the [DNA] tests were done in two days. Are you now discriminating against the dead?"[5]

Do such angry remarks from the bench represent a crossing of the boundary between politics and adjudication, or do they represent an incursion into the domain of the executive? What they are not, is typical of the dispassionate and

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3 *Treatment Action Campaign v Government of the Republic of South Africa* (unreported) Case No 4576/06 28th August 2006 (D&CLD) para 33. It would appear that had Nicholson J been made aware of the judgment in *MEC, Department of Welfare v Kate* 2006 2 All SA 455 (SCA), he might not have been given to feel so exposed. Nevertheless, given the information that he had, he was justified in making the point.

4 Item 6(1) of Schedule 2.

5 Report by Julian Rademeyer in *Sunday Times*, 3 September 2006.

reasoned style usually associated with jurisprudence. If quoted correctly, the disparaging reference by the judge to "Africa time" and the statement of malperformance on the part of the Commissioner of Police can be described as unfortunate. This is so because of the potential that these comments may be understood as belligerent criticism of the manner in which government is managing the organs of state under its control, rather than pointing out the unlawfulness of government conduct. The style of such remarks is typical of political debate and not of objective adjudication, however justified such comments may be in the public discourse. In legitimate political debate, contentious and critical statements are normal, and governments in a democracy must be criticised (and even denigrated) for their failures. This, however, is not the proper function of a court of law, even if its criticism is objectively warranted. As stated above, opinions or attitudes regarding choices to be made concerning government do fall within the domain of politics.

Judicial frustration with questionable actions on the part of politicians, and the appropriate response for courts were also demonstrated in the eventual outcome of a matter before the Free State High Court which led to an appeal to the Constitutional Court in the case of *Swartbooi v Brink*. The matter concerned political wrangling between members of the Nala Local Municipality during the process of its transition from the Bothaville Town Council. The respondents were wronged by certain decisions taken by the Council, and the High Court set them aside and made a special costs order against the appellants to bear the costs personally. The following *dictum* in the judgment of the Constitutional Court simultaneously reflects the High Court's aversion to the irregular conduct of the appellants, and the judicial moderation prescribed by the Constitutional Court:[6]

> "The High Court was also motivated by the perception that the costs order against the appellants might serve to ensure that members of the council would consider their decisions more carefully in the future. This reasoning evinces an intention to teach municipal councillors a lesson. It says to them: 'You must be punished appropriately for your wrongdoing so that you may learn a lesson and not do it again.' This is an improper approach and reflects an improper purpose. It trenches upon the separation of powers because it is judicial conduct aimed at influencing the conduct of the legislative and executive branch of government. Courts have the power to set aside executive and legislative decisions that are inconsistent with the Constitution. They cannot attempt, by their orders, to punish municipal councillors and, in so doing, influence what members of these bodies might or might not do. This motive of the High Court constitutes a dangerous intrusion into the legislative and executive domain."

These tempered tones of the Court may justifiably be understood to indicate to the judiciary not to adjudicate political occurrences in such a manner that the ensuing judgments in effect become extensions of the partisan struggles among politicians.

Given our constitutional history and social circumstances, South African courts are frequently called upon to deal with highly contentious and sensitive matters of policy. The Constitution provides specific mandates to do so. The interpretation of these mandates is frequently carried out with reference to pre-constitutional history. In its reference to history, courts are not reticent in their denunciation of the politics of the past and in the construction of the Constitution

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6 2006 1 SA 203 (CC) (*Swartbooi*) para 25, per Yacoob J.

as an instrument of restitution for past wrongs. There are many examples of this, especially in the areas of equality[7] and the ownership of land.[8] In matters of this nature, the Constitutional court invariably chooses to adopt the stance of the current political majority by, for example, giving an interpretation to the constitutional provisions on equality an extensive ideological meaning which is unique in the world. This kind of judicial choice should be distinguished from "executive mindedness" – a charge which can hardly be brought against the South African judiciary. It is however, more profound, in that similar choices made by the political school of thought of the contemporary government regarding the interpretation of the Constitution and its translation into legislation, are made by the Court. It is naturally the function of especially the Constitutional Court to make operational the values and principles underlying the Constitution, but an argument that there is only one legitimate method of interpretation of those values and principles would undermine the justification for reserving the final interpretative jurisdiction for the Court. There is even the danger that (justified) emphasis on the supremacy of the Constitution can become a sub-conscious strategem behind which the unexpressed political and moral presuppositions of a judge are concealed.

In the context of the universal and unqualified condemnation of apartheid and the general understanding of the Constitution as a milestone in the conversion of

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7 For example, Moseneke J in *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 30: "[O]ur constitutional understanding of equality includes what Ackermann J in *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1999 1 SA 6 (CC)] calls 'remedial or restitutionary equality'. Such measures are not in themselves a deviation from, or invasive of, the right to equality guaranteed by the Constitution. They are not 'reverse discrimination' or 'positive discrimination' as argued by the claimant in this case. They are integral to the reach of our equality protection. In other words, the provisions of s 9(1) and s 9(2) are complementary; both contribute to the constitutional goal of achieving equality to ensure 'full and equal enjoyment of all rights'. A disjunctive or oppositional reading of the two subsections would frustrate the foundational equality objective of the Constitution and its broader social justice imperatives." And further at para 31: "[W]hat is clear is that our Constitution and in particular section 9 thereof, read as a whole, embraces for good reason a substantive conception of equality inclusive of measures to redress existing inequality. Absent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow."
Despite Justice Moseneke's finding that the Court's interpretation of section 9 does not allow reverse discrimination, it really does not amount to anything other than authorising measures which discriminate against individuals falling in the category of "previously advantaged" groups. The Court has in effect made the constitutional expression "achievement of equality" a euphemism for reverse discrimination. This is a dogmatic choice, because a different and equally effective interpretation allowing for transformation is possible. It really is a matter of social perspective, which is determined by an emphasis on either individual interests, or on social restructuring.

8 *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) para 81: "There can be no doubt that the calculation of compensation for expropriation raises a constitutional issue. Indeed, the precise formulation of the property clause in our Constitution was a matter of great sensitivity at the constitutional negotiations and for good reason. Three and a half centuries of colonial deprivation and apartheid together resulted in a deeply racist pattern of land ownership in our country, which our Constitution seeks to alter. The provisions of the property clause were carefully formulated to ensure that while protecting property on the one hand, the constitutional protection of property, important as it is, should not impede the important social and political purpose of land reform."

the legal system from one which legalised racism to one which provides for the restoration of justice, the judicial vilification of pre-constitutional politics is legitimate. There is however a danger that, taken too far, the denunciation out-of-hand of pre-constitutional policies may tip the balance in the direction of judicial politicking.[9]

A very topical example of a confrontation of the interests of politicians, officials and policies on the one hand, and the judiciary on the other, is the draft legislation that has been canvassed in recent years, culminating in the *Constitution of the Republic of South Africa Fourteenth Amendment Bill* published in December 2005.[10] The reserve with which serving judges reacted publicly to the obvious attempts of the executive and public administration to acquire closer control over the judiciary, serves as a tribute to the long-standing judicial dignity and ethos of avoiding the dusty arena of politics. No doubt however can exist about the judiciary's opposition to the attacks on its independence. At a conference organized by the Human Rights Committee of the General Council of the Bar, held in Johannesburg on 17 February 2006, Chief Justice Langa said:[11]

> "We are an evolving society and really the question is how, as a judiciary involved in the court system, how do we evolve in the context of the notion of the doctrine of separation of powers? Do we evolve backwards or forwards? Do we entrench those aspects which make for a good, stable and exemplary democracy, or do we want to give the narrowest of meanings to the concepts of the independence of the judiciary and the separation of powers? On my travels abroad, I meet judges in other jurisdictions. I would say there is no jurisdiction that I know of which is moving backwards. All the jurisdictions that I interact with – and these are jurisdictions we admire – are moving towards giving a wider meaning to the concept of independence than that which I think these Bills seek to achieve."

Former Chief Justice Chaskalson expressed himself slightly more strongly in the following terms:[12]

> "Administration by the department without the heads of court having any control over what is done can work if there's goodwill on both sides. It can work if the department exercises its powers so as to meet the needs of the judiciary. My concern is really that a structure is to be put in place, which says actually: we are in control, you have no say. That's what it's telling us. Why these changes? Why must the Minister make the rules where previously the Chief Justice made rules for the Constitutional Court and the Rules Board made them for the other courts? What is the need for a constitutional amendment to vest this power in the Minister? Is it to enable her to ignore the wishes of the judiciary? What is the purpose of those changes? What is the reason for it? I just don't understand it. I can't answer your question as to what would be the best structure, but I do think that a structure which

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9 Regardless of the context and even of the truth of their content, verbose *dicta* in the following style can hardly be characterized as non-political: "The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution." (Per Mahomed J in *S v Makwanyane* 1995 3 SA 391 (CC) para 262.)

10 For a list of the controversial draft legislation, see Albertyn "Judicial Independence and the Constitution Fourteenth Amendment Bill" 2006 *SAJHR* 126 fn 2.

11 Transcript of the conference distributed by the GCB 65.

12 Transcript 44.

> in fact says that the Executive controls all aspects of the functioning of courts other than the way they decide their cases, is not consistent with judicial independence."

It would appear that it is in the nature of politics that governments and administrations would strive for limitations on judicial independence in order to maximise the extent of their own powers. The South African history of the past thirty years shows that this inclination is never far below the surface, regardless of where on the political spectrum a particular government positions itself. This apparent fact of constitutional life is clearly more destructive of judicial objectivity where the bench is populated by people sharing the political opinions and attitudes of the incumbent government.

3 THE POLITICAL DIMENSIONS OF ADJUDICATION

Judges, especially those adjudicating constitutional issues, are more often than not participating in, and practising, politics. This is not to say that judges in so doing are necessarily venturing beyond their judicial mandate. It merely means that it cannot be avoided and should not be denied, despite the unique, studiously abstract language and mode of argumentation employed by the judiciary.[13]

The Constitutional Court considers it unavoidable that its judgments will in certain "crucial political areas" within its jurisdiction have "political consequences".[14] In the recently decided case of *Doctors for Life International v Speaker of the National Assembly*,[15] both the Supreme Court of Appeal and the Constitutional Court described the jurisdiction of the latter in terms of s 167(4)(e) to "decide that Parliament or the President has failed to fulfil a constitutional obligation", as "pre-eminently a 'crucial political' question". This "political" role of the Constitutional Court is described by Ngcobo J (with reliance on *SARFU 1*[16]) as being reserved only for its own jurisdiction:[17]

> "The purpose of giving this Court exclusive jurisdiction to decide issues that have important political consequences is 'to preserve the comity between the judicial

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13 Lenta "Democracy, Rights Disagreements and Judicial Review" 2004 *SAJHR* 1 aptly argues (at 29–30) that judges tend to be anxious about the choices they make between various arguments, and continues: "This anxiety frequently causes judges to write in a register intended to convey that their decisions are compelled by the facts of the dispute to be resolved. Judges most often write in a monological voice that effaces the appearance of freedom of choice, and presents the verdict as forced by the logic of the situation itself . . . In their judgments, judges often fail to acknowledge and argue against positions and arguments contrary to their own."

14 *President of the Republic of South Africa v South African Rugby Football Union* 1999 4 SA 147 (CC) ("the SARFU recusal judgment") paras 72 and 73: "Section 167(4) thus confers exclusive jurisdiction to this Court in a number of crucial political areas which include the power to decide disputes between organs of state in the national and provincial sphere, to decide on the constitutionality of any parliamentary or provincial Bill, to decide on the constitutionality of any amendment to the Constitution and to decide whether Parliament or the President has failed to fulfil a constitutional obligation. And, in terms of s 167(4), this Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional. It follows that the drafters of the Constitution necessarily envisaged that this Court would be called upon to adjudicate finally in respect of issues which would inevitably have important political consequences."

15 2006 6 SA 416 (CC) paras 21 to 26.

16 *President of the Republic of South Africa v South African Rugby Football Union* 1999 2 SA 14 (CC).

17 Para 23 of the judgment.

> branch of government' and the other branches of government 'by ensuring that only the highest court in constitutional matters intrudes into the domain' of the other branches of government. And thus while vesting in the judiciary the power to declare statutes and the conduct of the highest organs of state inconsistent with the Constitution and thus invalid, the Constitution 'entrusts to this Court the duty of supervising the exercise of this power and requires it to consider every case in which an order of invalidity has been made, to decide whether or not this has been correctly done.'"

It should be noted that these *dicta* cannot mean that only the Constitutional Court is required to venture into areas fraught with political considerations. After all, probably most of the "crucial political questions" over which the Constitutional Court has the final word would reach the Court through the judgments of other courts. No judge can therefore, at least not in the adjudication of the constutionally defined issues, be innocent of politics.

South African jurisprudence is not without its history regarding the affirmation of the capacity of judges to perform their functions appropriately in the face of polticial pressures. In the *Van Rooyen* case[18] (in which the constitutionality of the legislation and regulations pertaining to the magistrates' courts had to be adjudicated) the Constitutional Court found it necessary to quote the following passage from the famous judgment of the Appellate Division in *Minister of the Interior v Harris*,[19] where Schreiner JA stated:

> "The Superior Courts of South Africa have at least for many generations had characteristics which, rooted in the world's experience, are calculated to ensure, within the limits of human frailty, the efficient and honest administration of justice according to law. Our Courts are manned by full-time Judges trained in the law, who are outside party politics and have no personal interest in the cases which come before them, whose tenure of office and emoluments are protected by law and whose independence is a major source of the security and well-being of the state."

Chaskalson CJ followed this quotation with the following:[20]

> "Under our new constitutional order much has changed since then and more changes are foreshadowed in the bill presently before Parliament.[21] As was previously mentioned, judges are now appointed by the President on the recommendation of the Judicial Service Commission.[22] Their salaries and benefits cannot be reduced,[23] and a decision of the Judicial Service Commission supported by a resolution of two thirds of the members of the National Assembly is required for impeachment.[24] Salaries and conditions of service are still fixed by regulation, but the Bill makes provision for an independent commission to make recommendations to government on the remuneration of judges."

Over time, the attitude of the South African bench toward matters of politics and policy has received much attention. A useful historical mirror in which one can judge the current state of affairs is to be found in Professor John Dugard's inaugural lecture of 1971,[25] in which he endeavoured to expose the endemic

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18 *Van Rooyen v The State* 2002 5 SA 246 (CC) para 82.
19 1952 4 SA 769 (A) 789.
20 *Van Rooyen* para 83.
21 Judicial Officers Amendment Bill 72 of 2001.
22 Section 174(6) of the Constitution.
23 Section 176(3) of the Constitution.
24 Section 177 of the Constitution.
25 Dugard "The Judicial Process, Positivism and Civil Liberty" 1971 *SALJ* 181.

positivism in the judicial thinking of the time and the judges' refusal to recognise their own presuppositions. As a solution he offered two "antidotes":[26]

> "First, a frank recognition on the part of the judiciary that their role is *not* purely mechanical; . . . and that in disputes between individual and State subconscious personal preferences are an ever-present hazard. Secondly, what is needed is a conscious determination by judges to be guided by accepted traditional legal values."

In the *SARFU* recusal case[27] and the *SACCAWU* case[28] the Constitutional Court had occasion to address the matter of politics and the judiciary directly in the context of deciding on applications for the recusal of judges. Regarding the specific issue of the political opinions of judicial officers, the *SARFU* recusal case contains a number of relevant *dicta* which produced the following opinions:

- Because courts are required to give reasons for their judgments, criticism of the judgments should be focused on those reasons and not be motivated by political discontent or dissatisfaction with the outcome.[29] In the *Mamabolo* case[30] the Court added that a court must in its judgments "rely on moral authority".
- A judicial officer's constitutional duty is to "resist all manner of pressure, regardless of where it comes from".[31]

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26 Dugard 1971 *SALJ* 195.

27 1999 4 SA 147 (CC).

28 *South African Commercial Catering and Allied Workers Union v Irvin and Johnson Ltd* 2000 3 SA 705 (CC).

29 *SARFU* para 68: "Success or failure of the government or any other litigant is neither grounds for praise nor for condemnation of a court. What is important is whether the decisions are good in law, and whether they are justifiable in relation to the reasons given for them. There is an unfortunate tendency for decisions of courts with which there is disagreement to be attacked by impugning the integrity of the judges, rather than by examining the reasons for the judgment. Our courts furnish detailed reasons for their decisions, and particularly in constitutional matters, frequently draw on international human rights jurisprudence to explain why particular principles have been laid down or applied. Decisions of our courts are not immune from criticism. But political discontent or dissatisfaction with the outcome of a case is no justification for recklessly attacking the integrity of judicial officers."

30 *S v Mamabolo* 2001 3 SA 409 (CC) para 16 per Kriegler J: "In our constitutional order the judiciary is an independent pillar of state, constitutionally mandated to exercise the judicial authority of the state fearlessly and impartially. Under the doctrine of separation of powers it stands on an equal footing with the executive and the legislative pillars of State; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential. Having no constituency, no purse and no sword, the judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of state and, ultimately, as the watchdog over the Constitution and its Bill of Rights – even against the state."

31 *SARFU* para 104: "The nature of the judicial function involves the performance of difficult and at times unpleasant tasks. Judicial officers are nonetheless required to 'administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law'. To this end they must resist all manner of pressure, regardless of where it comes from. This is the consitutional duty common to all judicial officers. If they deviate, the independence of the Judiciary would be undermined, and in turn, the Constitution itself."

- The Constitution requires of a judicial officer to adjudicate a case "according to the facts and the law, and not according to their subjective personal views".[32]

The *SARFU* judgment also confronted issues regarding the choice of appropriate candidates for appointment to the bench of the Court. The Court argued that[33] political opposition in pre-constitutional times to the old order was practically a requirement for appointment to the bench of the Constitutional Court. This somewhat startling statement was based upon the argument that the core values of the Constitution are in contrast to the pre-constitutional dispensation. Nevertheless "all judges are expected to put any party political loyalties behind them on their appointment, and it is generally accepted that they do so".[34] In the opinion of the Court[35] "it follows that a reasonable apprehension of bias cannot be based upon political associations or activities of judges prior to their appointment to the bench unless the subject matter of the litigation in question arises from such associations or activities".

The remarkable frankness of the Court on the point of political engagement in the "liberation struggle" as a virtual pre-requisite for membership of the Court appears to be logical, given the profoundness of the constitutional change that occurred in 1994. However, if the argument is drawn to its rational conclusion, it would also mean that a person who was politically passive before 1994, or who opposed the "old order" on different political grounds than those espoused by the "liberation movements", but nevertheless subscribed to the values currently reflected in the Constitution, would not be eligible to the bench of the Court. Although the judgment only dealt with the bench of the Constitutional Court, the

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32 *SARFU* para 70: "That a judge may have engaged in political activity prior to appointment to the bench is not uncommon in most if not all democracies including our own. Nor should it surprise anyone in this country. Upon appointment, judges are frequently obliged to adjudicate disputes which have political consequences. It has never been seriously suggested that judges do not have political preferences or views on law and society. Indeed, a judge who is so remote from the world that she or he has no such views would hardly be qualified to sit as a judge. What is required of judges is that they should decide cases that come before them without fear or favour according to the facts and the law, and not according to their subjective personal views. This is what the Constitution requires."

33 *SARFU* para 72: "The core values of our new order are reflected in the provisions of s 1 of the Constitution. None of those values was recognised by the old order which was replaced by the Constitution. Where we used to have a supreme Parliament, we now have a supreme Constitution. The Constitutional Court has been given the responsibility of being the ultimate guardian of the Constitution and its values." And para 74: "[I]t would be surprising if respect and support for the core values of the Constitution by candidates for appointment to all of our courts, and particularly the Constitutional Court, were not taken into account by the Judicial Service Commission when preparing a list of nominees for submission to the President. It would be equally surprising if the President and the Cabinet failed to do so. Barely five years into the new order it is all but inevitable that in the professional or public lives of such candidates their antipathy and opposition to the evils and immorality of the old order, to a greater or lesser extent, would have manifested themselves. The public hearings of the Judicial Service Commission reflect this reality."

34 *SARFU* para 75 then continues: "In South Africa, so soon after our transition to democracy, it would be surprising if many candidates for appointment to the bench had not been active in or publicly sympathetic towards the liberation struggle. It would be ironic and a matter for regret if they were not eligible for appointment by reason of that kind of activity."

35 *SARFU* para 76.

logic would seem to apply to other judicial appointments considered by the Judicial Service Commission as well. Put negatively, this means that[36] the ranks from which judicial appointments can be made are limited to those who demonstrably opposed the pre-constitutional order from a particular political perspective. This amounts to "struggle" activism being elevated to the level of a prerequisite for appointment as a judge.

Given the fact that the judiciary cannot escape the responsibility of making rulings on matters of a political nature or with political implications, requiring any specific political attitude on the part of candidates for the bench is obviously a hazardous route to take. One is reminded of the excellent analyses that were done by liberal scholars in the 1970s and 1980s on judicial attitudes and inarticulate premises. At the height of the crisis of positivistic judicial implementation of emergency regulations, Hugh Corder, for example, wrote:

> "While it is inevitable that judges, as human beings, will reflect in their attitudes the values of the social stratum from which they are drawn, too close a subconscious identification with the *status quo* damages the judicial reputation for independence and the ideal of independence itself."[37]

4 THE DETERMINATION OF THE BOUNDARIES BETWEEN THE *TRIAS POLITICA*

In a constitutional democracy such as ours, in which the Constitution is the supreme law of the Republic, substantial power has been given to the judiciary to uphold the Constitution. In exercising such powers, obedience to the doctrine of the separation of powers requires that the judiciary, in its comments about the other arms of the state, show respect and courtesy, in the same way that these other arms are obliged to show respect for and courtesy to the judiciary and one another.[38]

The doctrine of the separation of powers involves a variety of possible relationships between components in the structure of the state. The courts are not always an element in the equation, but may, in most instances, eventually be called upon to establish whether the doctrine is being respected or violated.

In a seminal paper[39] on the subject, Justice Kate O'Regan commented on the Supreme Court of Appeal's judgment in *Speaker of the National Assembly v De Lille*,[40] a case patently involving parliamentary politics, as follows:

> "This judgment demonstrates a principle of the separation of powers which makes clear that the judiciary recognises that it is its role to uphold fundamental rights, and that separation of powers concerns cannot be used to render organs of state, including the legislature itself, immune from constitutional challenge based on the fundamental rights in our Constitution. The Court is saying that the role of the

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36 At least for these first years of the new constitutional dispensation until likely candidates for appointment to the bench who were too young before 1994 to be politically active, reach sufficient seniority for consideration.

37 Corder "The record of the judiciary (2)" in Corder (ed) *Democracy and the Judiciary* (1989) 47.

38 *Van Rooyen v The State* 2002 5 SA 246 (CC) para 48.

39 "Checks and Balances – Reflections on the Development of the Doctrine of Separtaion of Powers under the South African Constitution" 2005(1) *Potchefstroom Electronic Law Journal* www.puk.ac.za/fakulteite/regte/per/issue05v1.html 13–14.

40 1999 4 SA 863 (SCA).

> courts under our constitutional order requires courts to intervene to protect rights and that, accordingly, the principle of non-intrusion with the affairs of another branch of government, an important aspect of the separation of powers must give way to the need to provide protection for individual rights which lie at the heart of our democratic order. It is clear from the Court's jurisprudence that the principle of non-intrusion is an important aspect of our doctrine of separation of powers, if not absolute."

As has already been pointed out, the Constitutional Court considers one of its primary functions to be the resolution of the most difficult matters of a political nature frequently involving the separation of powers. It would also appear to perceive its function as a protector of the rest of the judiciary from politics. The Court, for example, stated in August 2006:[41]

> "The principle underlying the exclusive jurisdiction of this Court under section 167(4) is that disputes that involve important questions that relate to the sensitive areas of separation of powers must be decided by this Court only. Therefore, the closer the issues to be decided are to the sensitive area of separation of powers, the more likely it is that the issues will fall within section 167(4). It follows that where a dispute will require a court to decide a crucial political question and thus intrude into the domain of Parliament, the dispute will more likely be one for the exclusive jurisdiction of this Court."

When called upon[42] to determine whether the Constitution conformed to the requirements of the separation of powers as was prescribed by Constitutional Principle VI in the 1993 Constitution, it took the position that despite some basic principles characteristic of the doctrine, "[n]o constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation", and that the South African model "reflects the historical circumstances of our constitutional development".[43]

In *De Lange v Smuts*,[44] the Court stated that the South African model to be developed by the courts should establish:

> "[A] delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest."

The Court also tended to depend on its interpretation of the Constitution to discern the perimeters of the separation, confirming its support of the sentiments of Tribe[45] that:

> "[W]here constitutional text is informative with respect to a separation of powers issue, it is important not to leap over that text in favor of abstract principles that one might wish to see embodied in our regime of separated powers, but that might not in fact have found their way into our Constitution's structure."[46]

In its development of the notion of enforceable socio-economic rights, the Constitutional Court has of necessity been exploring the perimeters of judicial

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41 *Doctors for Life International* 2006 6 SA 416 (CC) para 24.

42 *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) (the "first certification judgment").

43 Paras 109 and 112.

44 *De Lange v Smuts* 1998 3 SA 785 (CC) para 60, reconfirmed in *South African Association of Personal Injury Lawyers v Heath* 2001 1 SA 883 (CC) para 24.

45 *American Constitutional Law* Vol 1 3 ed (2000) 127.

46 The *Van Rooyen* judgment para 34.

authority *vis-à-vis* the other branches of government. For its leading role in this regard the Court found much justification in the provisions of the Constitution.

The first indication of the Court's readiness to blaze a new trail in the context of the justiciability and enforceability of socio-economic rights appeared in the process of constitutional certification.[47] The Court conceded that these rights did not fall into the category of "universally accepted fundamental rights" as required by Constitutional Principle II provided for in the 1993 Constitution, but rejected an argument that the enforcement of such rights in a manner that would have implications on the budget of government would be in conflict with the separation of powers. The Court stated its view that the socio-economic rights were "at least to some extent, justiciable" and that, at the very least, "socio-economic rights can be negatively protected from improper invasion".[48]

In the first case which tested this attitude, the Court declined an application for an order that a provincial hospital should provide costly renal dialysis to a terminally ill patient on the basis, *inter alia*, of the limited resources available to the state. The Court declared[49] that a "court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters". *Good faith* and *rationality* on the part of the executive and the administration were thus indicated to be of key importance for the purposes of defensible non-delivery of services. The next two cases, however, broke new ground.

In the *Grootboom* judgment,[50] the Court examined the policy on the provision of access to housing to the indigent in all three spheres of government, and concluded that it was sorely lacking. The Court held that the state is obliged by the Constitution to devise and implement a coherent, co-ordinated programme designed to meet its s 26 obligations, and that the existing programmes "fell short of the obligations imposed upon the state by section 26(2)". The Court therefore ordered the state to devise a programme including "reasonable measures . . . to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations". An essential element of this judgment, which provided a basis for the further development of the law on the enforcement of socio-economic rights, is the emphasis on the *reasonableness* of implementation policies. Although this approach is not foreign to legal thinking, it remains inevitable that the determination of reasonableness will entail subjective considerations and will therefore always be prone to inconsistency.

This certainly does not mean that a court is free to make unreasoned, biased determinations. The most useful exposition to date of the way in which a court is required to deal with the standard of reasonableness was provided by the Constitutional Court in its *Metrorail* judgment.[51] Generally, a reasonable action must "fall within the range of possible conduct that a *reasonable decision-maker* in the *circumstances* would have adopted". Relevant factors in the circumstances

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47 The first certification judgment.
48 Para 78 of the first certification judgment.
49 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) para 29.
50 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).
51 *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 2 SA 359 (CC) paras 86–88.

may include the nature of the duties of the decision maker, the social and economic context in which it arises, the range of factors that are relevant to the performance of the duty, the extent to which the duty is closely related to the core activities of the duty-bearer, the extent of any threat to fundamental rights should the duty not be met as well as the intensity of any harm that may result, and the relevant human and financial resource constraints that may hamper the organ of state in meeting its obligation. According to the Court, "[t]he standard of reasonableness so understood conforms to the constitutional principles of accountability, on the one hand, in that it requires decision-makers to disclose their reasons for their conduct, and the principle of *effectiveness* on the other". The *context* within which decisions are made is fundamental. A court may not, however, usurp the role of the decision maker. There should be "an appropriate balance between the need to ensure that constitutional obligations are met, on the one hand, and recognition for the fact that the bearers of those obligations should be given appropriate leeway to determine the best way to meet the obligations in all the circumstances". Should a court come to a decision after weighing all these considerations, its conclusions are likely to be well-reasoned, although still inevitably subjective: two different forums may still reach different results. If this were not so, cybernetic adjudication may have been viable.

In the *TAC*[52] case, the Government's policy to make the retroviral drug Nevirapine available only to mother-and-child patients at specified clinics, where the effectiveness and safety of the drug was being determined experimentally, was found by the Court not to be reasonable. The powers of the judiciary in deciding disputes on socio-economic rights were investigated thoroughly. In para 101 it was concluded that:

> "A dispute concerning socio-economic rights is . . . likely to require a court to evaluate State policy and to give judgment on whether or not it is consistent with the Constitution. If it finds that policy is inconsistent with the Constitution it is obliged . . . to make a declaration to that effect. But that is not all . . . [T]he Constitution contemplates that where it is established that a right in the Bill of Rights has been infringed a court will grant 'appropriate relief'. It has wide powers to do so and in addition to the declaration that it is obliged to make . . . a Court may also 'make any order that is just and equitable'."

The Court resolved the matter by issuing an extensive order to Government, requiring it, *inter alia*, to devise and implement a comprehensive and co-ordinated programme affording access to health services to combat mother-to-child transmission of HIV to pregnant women and new-born children, specifying key elements of the plan to be devised against the background of the shortcomings of the existing policy, and to remove the restrictions that prevent Nevirapine from being made available for the purpose of reducing the risk of mother-to-child transmission of HIV at public hospitals and clinics that are not research and training sites.

The effects of its judgments on the separation of powers in matters concerning socio-economic rights have constantly been in the minds of the judges. This is richly evidenced in the *TAC* judgment. In para 38 of the judgment, the Court, for example, stated:

> "Courts are ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community. The Constitution

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

> contemplates rather a restrained and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance."

The suggestion that the Court would be slow to intervene where its judgment would have "multiple social and economic consequences for the community" is not particularly convincing coming from a Court which has from its inception been at the centre of the social restructuring of the country. There can be no doubt that profound consequences flowed from the Court's declaration of the death penalty and corporal punishment to be unconstitutional, its wide-ranging jurisprudence on equality concerning, *inter alia*, affirmative action, gender issues, the position of homosexuals, religious freedom and the responsibility of the state towards victims of crime at the hand of accused persons out on bail, all in the course of less than a decade.

The "restrained and focused role" that the Court says is contemplated by the Constitution, also creates the impression of a studied understatement if the bold approach reflected in the jurisprudence on socio-economic rights is considered. Where the Court orders the state "to take measures to meet its constitutional obligations" and subjects the reasonableness of government conduct to evaluation, it can, by definition, not be a meek and inhibited role. The Court has made it patently clear that, in terms of the powers granted it by the Constitution, it primarily lies within its domain to determine what is consistent with the Constitution and what not. The standard of measurement for this determination, viz reasonableness, can mean nothing other than "reasonable in the opinion of the Court". Showing its teeth, as it were, the Court stated in paragraph 99 of the *TAC* judgment:

> "Even simple declaratory orders against government or organs of state can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so."

The Court's approach in these matters should not necessarily be considered to be wrong. The Court is indeed entrusted with the kind of responsibilities that it has described in its judgments to serve as an important guardian over the Constitution. Thus far it has mostly been successful if one considers the frequency with which Parliament, provincial legislatures, the President, the Government, Premiers and Ministers have contested cases before the Court in which their actions were found lacking and which required them to effect corrections.

The theoretical vagueness of aspects of the separation of powers has not escaped comment by the Court. In the *TAC* judgment it referred to the various decisions in which it stated "that although there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others". Nevertheless, the Court continued:[53]

> "Where state policy is challenged as inconsistent with the Constitution, Courts have to consider whether in formulating and implementing such policy the State

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53 Paras 98 and 99.

> has given effect to its constitutional obligations. If it should hold in any given case that the State has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the Executive, that is an intrusion mandated by the Constitution itself."

Regarding the adjudication of matters involving the separation of powers, which by definition would frequently involve political considerations, it is therefore clear that the boundaries between the *trias politica* are where the judges say they are.

5 CONCLUSION

Does this then mean that the general trust in constitutional justiciability indicates a political distrust of democracy? I would venture to suggest that it is indispensable to democracy that a court with final and generally binding constitutional jurisdiction functions effectively and inspires public trust. Distrusting the bearers of political power, while trusting the judiciary to keep politicians within the boundaries of their constitutional and legal authority, is an inherent prerequisite for a successful constitutional democracy. This is so provided that politicians hold themselves bound to the Constitution and law as interpreted and applied by the judiciary, and that the judiciary is itself capable and willing to adjudicate matters of a political nature in an unbiased manner, clearly detached from the political arena. The courts of the fresh South African democracy, torn between the drive to reform the system on the one hand, and frustration on the other by the lack of political will and capacity to improve and maintain the functions and procedures characteristic of a modern constitutional state, are increasingly hard put to find the balance between political engagement and judicial detachment.

To find such balance, it is necessary, ironically, that it should be acknowledged by all judicial officers that they cannot escape politics. Such a recognition is a precondition for a judge to engage with political material while keeping an open mind. A judge suppressing or ostensibly disowning his or her political inclinations in the belief, or on the pretext that, adjudication is merely an abstract, neutral activity, is prone to produce findings consciously or subconsciously tainted by those same inclinations. The detached and well-considered style of judicial language traditionally associated with the bench is, however, a precious aid to finding the right balance, because without it, either political frustration pours forth in inappropriate language, or real political prejudice is concealed behind verbosity. Especially in political cases therefore, a judge's inarticulate premisses should be articulated (even if they are not made public) before making judgments instead of expressing them in "a monological voice that effaces the appearance of freedom of choice".[54]

The doctrine of the separation of powers has much to do with politics. The articulation by the judiciary of a sound and balanced understanding of its implications for our constitutional system is therefore crucial. Determination of the perimeters and modalities of the separation of powers is indeed within the domain of the courts, especially the Constitutional Court, but for the development of a legitimate and consistent doctrine, the drawing of the lines should be consistent and not be clothed in demure language disowning the gravity of the demarcation.

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54 Lenta 2004 *SAJHR* 29.

Judicial Review and the Transformation of South African Jurisprudence with Specific Reference to African Customary Law

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1 INTRODUCTION

The law of South Africa is undergoing a transformation from the law of the old order, which enforced white supremacy and racial discrimination, and created inequality of treatment between races and tolerated unequal protection of the law between men and women, to the law of a non-racial and non-sexist democratic country. The Constitution was adopted to heal the divisions of the past, and to establish a society based on democratic values, social justice, and fundamental human rights.[1] It is also the supreme law of the Republic. Law (including legislation, common law and African law) or executive conduct inconsistent with it is invalid, and the obligations imposed by the Constitution must be fulfilled.[2]

The Bill of Rights, contained in Chapter 2 of the Constitution, is the cornerstone of democracy, and it enshrines the rights of all people in the Republic while it affirms the democratic values of human dignity, equality and freedom.[3] The Bill of Rights applies to all law, and binds the legislature, the executive and the judiciary, and all organs of state,[4] which must respect, protect, promote and fulfil the entrenched rights.[5] However, these rights are not absolute, but are susceptible to limitation in terms of a law of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[6]

This constitutional framework constitutes the historic bridge between the old South Africa that was characterised by strife, hatred, violence and vengeance; and the new South Africa that recognises the value of *ubuntu* as the basis of human interaction.[7] The Constitution requires all three pillars of state power and

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1 The Preamble to the Constitution of the Republic of South Africa, 1996.

2 Section 2.

3 Section 7(1).

4 Section 8(1).

5 Section 7(2).

6 Section 7(3) read with s 36(1) of the Constitution.

7 In *Investigating Directorate, Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2000 10 BCLR 1079 (CC), 2001 1 SA 545 (CC) paras 21–22. Langa DP (as he then was) held: "The Constitution is located in a history which involves a transition from a society based on division,

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their organs to commit themselves to the achievement of a transformative agenda that prioritises the reversal of the injustices done in the past, and the development of a jurisprudence based on democratic values, social justice and fundamental human rights. It is therefore clear that the transformation of the South African society is the imperative imposed by the Constitution on the state as a whole, and it is not open to any state institution to neglect to comply with it.

The judiciary is charged with the function of final constitutional interpretation, and its understanding of what the Constitution requires prevails in the event of a difference from that held by the executive and the legislature. Before they can start performing their functions, the members of the cabinet[8] (including the President),[9] as well as the members of Parliament,[10] take an oath to respect and uphold the Constitution and to implement it according to their own understanding of its principles.

There is therefore nothing in the Constitution which prevents the political branches from (politically) construing the nature of the envisaged post-Apartheid society in its own way, except that, in the event of the Constitutional Court disagreeing with this interpretation, the latter's (learned) understanding prevails. In other words, whilst our politicians must follow their own understanding of the measures they have to take in implementing the social changes envisaged by the Constitution, such measures must be reasonable in the eyes of the Constitutional Court.

2 THE NATURE OF SOUTH AFRICAN JUDICIAL REVIEW

The Constitution requires the courts to promote the foundational values that underlie an open and democratic society based on human dignity, equality and freedom when interpreting the Bill of Rights;[11] and to promote the spirit, purport and objects of the Bill of Rights when interpreting legislation and when developing the common law and customary law.[12] Although these injunctions may appear to demand the observance of different imperatives for the interpretation of the Bill of Rights from those demanded for the interpretation of other laws, the courts seem to understand them as references to those provisions of the Constitution they regard as important for its proper construction.

An occasion for promoting the spirit, purport and objects of the Bill of Rights (whether it be in the interpretation of legislation or the development of common and customary law) cannot be taken as an opportunity for neglecting the promotion of the values that underlie an open and democratic society based on human

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injustice, and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognize the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterizes the constitutional enterprise as a whole."

8 Section 95.
9 Section 87.
10 Section 48.
11 Section 39(1)(a).
12 Section 39(2).

dignity, equality and freedom.[13] In other words, while the founding values give substance to the provisions of the Constitution, the rights entrenched in the Bill of Rights give effect to such founding values and must be construed consistently with them.

By promoting the spirit, purport and objects of the Bill of Rights we are also advancing the democratic values based on human dignity, equality and freedom, which appear in Chapter 1 of the Constitution (the Founding Provisions). Differently put, s 39 provides our legal and constitutional interpreters with an interpretative imperative, which requires them to combine the import of s 39 with that of the foundational values and the Bill of Rights in order to give effect to the transformative agenda eloquently expressed in the Preamble.

In this regard Langa DP (as he then was) said:

> "The purport and objects of the Constitution find expression in s 1 which lays out the foundational values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways, which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as possible, in conformity with the Constitution."[14]

Interestingly, there is no s 39-like checklist to guide the political branches in construing their constitutional responsibilities while drafting legislation and formulating policy. Yet they are also required to comply with the interpretative imperative of promoting the objects of the Bill of Rights and advancing the fundamental values of the Constitution in making their gubernatorial decisions. Moreover, like the judiciary, these branches must also make decisions that pursue the agenda for which the Constitution was adopted, namely, healing the divisions of the past, laying the foundations for a democratic and open society, improving the quality of life and building a democratic South Africa.[15] In doing so, they, like the courts, must promote the objects of the Bill of Rights and reflect the values entrenched in the Founding Provisions of the Constitution.

This is a uniquely South African agenda, which is a direct result of our national negotiation process, and aims at curing specific social ills. Madala J puts it thus:

> "Unfortunately what happens in South Africa today results squarely from our unsavoury recent past. It means, for me, that uniquely South African problems require uniquely South African solutions and that one cannot simply import into a South African situation a solution derived from another country – no matter how democratic it is said to be."[16]

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13 In *Minister of Home Affairs v National Institute for Crime Prevention (NICRO)* 2004 5 BCLR 445 (CC) Chaskalson CJ held at paras 21–23: "The values enunciated in section 1of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution ... The rights entrenched in the Bill of Rights include equality, dignity, and various other human rights and freedoms. These rights give effect to the founding values and must be construed consistently with them."

14 *Investigating Directorate, Serious Economic Offences v Hyundai Motor Distributors* paras 21–23.

15 The Preamble to the Constitution.

16 *Minister of Home Affairs v National Institute for Crime Prevention (NICRO)* para 114.

Hence our courts, haunted as they often are by the demons of the past, continue to acknowledge the reality of our diversity as a basis for developing the jurisprudence of our envisaged future. In doing this they review the actions of the executive and the legislature, and the provisions of the common law and customary law, in the light of our constitutional agenda, as construed through the spirit of the Bill of Rights, read together with the foundational values.

3 THE IMPACT OF THE CONSTITUTIONAL COURT ON SOUTH AFRICAN JURISPRUDENCE

After following this approach, the Constitutional Court found that the death penalty,[17] corporal punishment,[18] unequal treatment of different marriage systems[19] and unreasonable social delivery programmes,[20] among many, are inconsistent with the judicial vision of our constitutional agenda. In declaring these laws and programmes to be unconstitutional, the Constitutional Court found that these failed to advance the national agenda and promote the sort of society envisaged by the Constitution. The result of the judicial contribution in the advancement of this agenda is an emerging human rights-oriented jurisprudence for the democratic South Africa.

In Makwanyane various injustices of the past, namely, the arbitrariness that results from the fact that a small group of prisoners, mainly black, got sentenced to death and executed, because they lacked resources to hire effective lawyers; while others, mainly white, managed to escape the penalty because of affluence, indicated to the court that this punishment did not belong to the post-constitutional dispensation. Such a penalty also failed to redeem its existence under the new order because the convicted prisoners were not treated with human dignity, and the effects of the sentence were not remediable. More significantly, the court found the level of waiting inherent in the execution process unacceptable in a democratic society characterised by freedom and equality envisaged by the interim Constitution.

Similarly, the court found in Williams that the whipping of convicted juvenile offenders constituted cruel, inhuman and degrading punishment. In other words, the sentences of death and whipping represented some of the injustices of the past, which were contrary to the humane morality of the new order. Accordingly, the court removed these penalties from the penal code of the new South Africa, and found that their retention would not contribute to the establishment of a society based on fundamental human rights. Thus, the court has contributed to the establishment of respect for the values of human dignity, equality and freedom in South Africa and has promoted the objectives of the Bill of Rights.

Although the executive branch is equally enjoined to implement the constitutional imperative to establish a human rights order, it is paradoxically this branch of government that continues to oppose the removal of these unjust apartheid laws from the statute books. Not only is the executive failing to fulfil its mandate

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17 *S v Makwanyane* 1995 6 BCLR 665; 1995 3 SA 391 (CC).
18 *S v Williams* 1995 7 BCLR 861 (CC); 1995 3 SA 632 (CC).
19 *Daniels v Campbell NO* 2004 5 SA 331 (CC).
20 *Treatment Action Campaign v The Minister of Health (1)* 2002 1 BCLR 1033 (CC); *(2)* 2002 10 BCLR 1075 (CC); *Grootboom v Government of the Republic of South Africa* 2000 1 SA 46 (CC).

to pursue a human rights-orientated legislative policy, aimed at ridding the law of its unjust provisions, but it vehemently resists the court's efforts to develop a transformative human rights jurisprudence, as the nation witnessed in the *Grootboom*[21] and *TAC*[22] cases. Similarly, the state defended the death penalty on the ground that it has a deterrent effect on other would-be offenders, while it effectively prevents the executed prisoner from committing criminal acts again.

More importantly, the state argued that the death penalty was redeemable because it uniquely offers the best form of retribution. However, this argument was rejected because it did not show why the alternative of imposing the more humane life imprisonment was not preferable to the retention of a retributive penalty in a free and democratic society founded on fundamental human rights. The court also did not believe that because whipping was a useful alternative to imprisonment, this cruel, inhuman and degrading punishment should be baptised into the practice of an open and democratic society.

With regard to the court's efforts to contribute to the emergence of a jurisprudence based on social justice, the cases of *Grootboom* and *TAC* are worthy of consideration. In these cases the elusive matter of the enforcement of socio-economic rights came to the fore. In *Grootboom* the court assessed whether the state's actions, in making no provision for a temporary shelter for homeless people, while complying with the constitutional requirement to provide everyone with access to adequate housing, were a reasonable contribution to the establishment of a society based on democratic values, social justice and fundamental rights.

It found that the state had come up with a good plan to roll out its housing delivery programme, and was diligently pursuing it as effectively as was necessary in order to fulfil its constitutional obligations. The court was, however, not convinced that neglecting those most in need was a reasonable way to conduct a housing delivery programme for a society that is based on human dignity, equality and freedom. The executive did not demonstrate any urgency about treating the homeless people involved in the case differently from the way it was treating the general problem of homelessness, despite the fact that these people were in an extreme condition of emergency. On the contrary, the state resisted the challenger's application to the court to direct it to take effective steps to improve the quality of life for these citizens in the manner envisaged by the Constitution.

Similarly, the challengers in the *TAC* case interpreted the state's obligation to improve the quality of their lives to mean that expeditious and effective steps would be taken to ensure that the nevirapine treatment, which reduces the risk of mother-to child-transmission of the HIV virus, was administered to all pregnant mothers who were HIV positive in order to save their babies from contracting the disease. While some mothers who had access to the few treatment points selected by the government for the rolling out of the drugs could manage to save their babies from the disease, the majority of the needy people could not be reached by the plan designed by the government.

This was a selective way of improving the quality of life of the citizens of South Africa, and was a far cry from the envisaged society in which every citizen

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21 *Grootboom v Government of the Republic of South Africa* 2000 1 SA 46 (CC).

22 *Treatment Action Campaign v The Minister of Health (1)* 2002 1 BCLR 1033 (CC); *(2)* 2002 10 BCLR 1075 (CC).

is equally protected by law. Because the majority of the mothers would not have the opportunity to save their babies from infection if the state's programme were to be endorsed, the court found the programme to be unreasonable, and ordered the state to follow a plan of action that would enable it to comply with its constitutional obligations. In both these cases the attitude of the government reflected a remarkable failure to distinguish between the transformative obligations of a democratic state from those of the Apartheid state driven by moral values that accepted the violability of black lives.

The jurisprudence that came out of these cases is that the reasonableness of the exercise of the state's functions in the implementation of socio-economic rights is justiciable, and that the requirement that the state must take reasonable measures, within its available resources, to achieve a progressive realisation of these rights, still obliges it to deliver socio-economic goods with the necessary expedition and effectiveness. The court finally asserted its status as a watch dog of the Constitution and dispelled any illusions that the state's policies concerning socio-economic delivery are not justiciable.

4 THE CONSTITUTIONAL COURT AND APARTHEID LEGISLATION

In the past, words and concepts were interpreted in ways that accorded with Apartheid morality. In the *Daniels* case the Constitutional Court reviewed previous judgments in which Muslim marriage partners were denied the status of spouses in South African law, and found that there was nothing in the ordinary meaning of the word "spouse" that compelled the exclusion of Muslim husbands and wives from being called spouses. It was found that under the old order the courts had put a strain on the word "spouse" in order to give it a meaning that excluded Muslim marriage partners from its benefits.

In this case the court was interpreting the word "spouse" as it was used in the Intestate Succession Act[23] and the Maintenance of Surviving Spouses Act.[24] The word "spouse" was not defined in these acts, and there was nothing to suggest that it was intended to exclude Muslim marriage partners from benefits enjoyed by spouses under these Acts. The court considered it its constitutional imperative to give legislation a meaning that reflects the spirit, purport and objects of the Bill of Rights, and the imperative to heal the divisions of the past, by promoting democratic values, social justice and fundamental human rights.

It accordingly removed the strain placed on the word "spouse" by previous legal interpreters, and ordered that the statutes in question could no longer be interpreted to exclude Muslim spouses from the benefits of the word "spouse". Indeed, if "South Africa belongs to all who live in it, united in our diversity"[25] and if all spouses are "equally protected by law", there was no need to single out Muslim spouses from the benefits enjoyed by the spouses of other religions. Again the court's decision contributed to the transformation of our jurisprudence, and ended the era in which partners had to abandon their religion, and marry according to the religion preferred by the state, in order to be accorded the appropriate status.

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23 Act 81 of 1987.
24 Act 27 of 1990.
25 The Preamble to the Constitution.

In this connection Ngcobo J held:

> "Our Constitution contemplates that there will be a coherent system of law built on the Bill of Rights, in which common law and indigenous law should be developed and legislation should be interpreted so as to be consistent with the Bill of Rights and with our obligations under international law. In this sense the Constitution demands a change in the legal norms and the values of our society. This change is indeed reflected in a number of statutes which now expressly recognize Muslim marriages for the purposes of the rights that they vest in the spouses. In my view the word 'spouse' in the statutes under consideration must be construed to reflect this change. It follows that the word 'spouse' must now be construed in a manner that is consistent with the foundational values of human dignity, equality and freedom."[26]

It is clear that our constitutional jurisprudence is unique with regard to the extent to which the courts can develop the common law and African law. While the legislature is the bearer of primary law-making responsibilities,[27] "the courts should remain vigilant and ensure that the common law [and African law] is developed to reflect the spirit, purport and the objects of the Bill of Rights".[28] Therefore, the courts cannot confine themselves to incremental changes which are necessary to keep our law in step with the dynamic and evolving fabric of the society, because, unlike in Canada, our constitution-making enterprise ushered in a completely new and different set of legal norms.[29]

The Constitutional Court also emphasised the fact that the courts are obliged to develop the law. They do not enjoy a discretion in this regard.[30] In other words, it is not enough for the courts to enunciate the pre-constitutional developments of our law. Under the Constitution the courts must now ensure that such developments reflect the spirit, purport and objects of the Bill of Rights, so that the envisaged post-constitutional jurisprudence can emerge. Consequently, the common law notion of public interest immunity in terms of which the state previously escaped liability for delictual conduct, was found to be deficient in promoting the objectives of s 39(2).[31] Although this was a complete defence under Apartheid, the court has now rejected it because it is inconsistent with the values of human dignity, equality and freedom on which the democratic South Africa is founded.

5 THE DEVELOPMENT OF AFRICAN LAW UNDER THE CONSTITUTION

When it comes to the pervasive problem of developing African customary law, the judiciary faces the additional challenge of determining the living version of customary law for the community concerned. One of the injustices of the past, which our constitutional interpreters must reject in striving to heal our historical divisions, is the distortion caused to African law by the application of the

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26 *Daniels v Campbell* para 56.

27 Section 43 of the Constitution reads: " In the Republic, the legislative authority – (a) of the national sphere of government is vested in Parliament".

28 *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) para 36.

29 *Ibid*.

30 *Carmichele* para 39.

31 *Carmichele* para 49. Section 39(2) of the Constitution states: "When interpreting legislation and when developing the common law and the customary law the courts must promote the spirit, purport and objects of the Bill of Rights."

interpretative technique of repugnancy. This method removed the philosophical underpinnings (which the colonial officials perceived to be in conflict with Western morality) from African customary law.

The resulting official version became a distorted version that depended on alien values for its validity. The official version was therefore reduced to a subsystem of the common law, and its indigenous African characteristics were removed for conflicting with the dictates of Western civilization.[32] This supremacist interpretation was premised on the assumption that the Western method was the model for all systems which deserved to exist. The tragedy was that the authorities who decided to "elevate" the standards of morality among Africans were not Africans, and did not know African culture. They relied on their own (Western) perceptions of justice and equity in order to determine that a particular African customary practice was repugnant to civilized behaviour, and therefore should be "elevated" to their standard of morality.

This has resulted in the nuisance of cultural imperialism, which is problematic in a number of ways. First, African law as a customary system was part of a cultural tradition that contained rules which have commended themselves for use by society over long periods of time. These rules performed legal, moral, religious, cultural, psychological and other functions which regulate the life of a person belonging to a non-specialised tradition. Secondly, such a community was not in the habit of consciously enacting its laws, and was continually and unconsciously reinterpreting the rules that worked well for it. Thirdly, there was no culture of adjudication by a lone judge who was an expert in law. A dispute was discussed in a meeting of the community, which looked at the matter in a multi-faceted way.[33] In this way, experience in the life of the community played a much more important role than specialising in a particular field, such as law. As a result, the African tradition placed a lot of emphasis on respect for old age and seniority as reservoirs for wisdom. The traditional tribunal had the advantage compared to today's courts of providing the community with the opportunity of assessing the extent to which their own social practice had transformed their culture over time.

Because the duty of resolving disputes rested on the members of the community as a whole, instead of a lone legal expert, African law never developed safeguards such as judicial independence and impartiality.[34] The community leader or king did not play a prominent role in the matter, but occupied a back seat, which allowed the ordinary people to express themselves without inhibition from

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32 In *Tshiliza v Ntshongweni* 1908 NHC 10 at 11 Campbell JP held: "I quite admit that, under unmodified Native law such a transaction as the one alleged might have been allowed. But the Code attempts to elevate the standard of morality among the Natives and Section 230 was evidently framed with such an end in view . . . Even long established custom has to give way before statute law, and therefore this custom must give way before Section 230." More recently, in *Tshabalala v Estate Tunzi* 1950 NAC 46 (C) at 48 Marsberg P held: "[T]he Court was aware that this is in conflict with Native custom, but when Native custom is repugnant to justice and equity it must give way."

33 Mqhayi *Ityala lamawele* (1914) 6.

34 *Hlantalala v Head of the Western Tembuland Regional Authority; Bangindawo v Head of Inyanda Regional Authority* 1998 3 SA 262 (Tk).

contributions of those in authority.[35] He would then pronounce the resolutions of the meeting, after summarising the history of the dispute and the arguments that were made by the parties and participants.[36] Even suggestions regarding the conduct of the proceedings and calling of witnesses and experts came from the participants.[37]

This approach made it completely awkward for an outsider to adjudicate on a customary dispute and to pronounce upon the morality of indigenous traditions. That is why the efforts of colonial judges and legislators to universalise African customary law resulted in a distorted version with which the adherents could not identify themselves in South Africa. African customary law comprises numerous community traditions based on group behaviours of customary communities. Together these customary systems form the African legal family because they share most of their characteristics and methods. Unfortunately, the positivistic approach of Western law, which only recognises African customary law once it is consciously enacted in a statute or judgment, continues to bedevil judicial efforts to transform African jurisprudence today.

The effect of this is to ignore the transformative developments which customary communities have achieved through deliberative engagement. Our judges do not come from these small customary communities. They sit alone and do not have the benefit of the experience of the adherents of the system. Moreover, as products of the positivistic Western legal training, they do not only regard themselves as developing African customary law even when the system has evolved on its own, and needed only to be recognised by the courts – they also declare vital elements of the system unconstitutional. In this way, an inescapable feature of these judgments is judicial disregard for group contingency of African law, which demands that the courts should always recognise the special ways in which the various rules, principles and doctrines affect the different groups.

By using Western methods for determining the validity of African law, the valueless official version imported legal concepts and institutions belonging to the common law into customary law. In *Sigcau v Sigcau*[38] the Appellate Division handed down a judgment which described an individual as the owner of a palace, instead of describing the winning defendant as the head and controller of the royal estate. This is in stark contrast with what the pre-colonial court, in which the members of the customary community freely debated disputes as social problems, would have done. Such a court's understanding was that the successor could not own communal property because even his (deceased) predecessor did not own it.

However, the learned Chief Justice refused to vacate his common law comfort zone, although he was dealing with an African customary law problem. He

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35 Mqhayi *Ityala lamawele* 4 says: "Inkosi iphikele ukutshaya nje, iqondele phantsi; ayenzanga nelimdaka". This can be translated as follows: "The king continued to smoke, looking down, without saying a word."

36 Mqhayi *Ityala lamawele* 22.

37 Mqhayi *Ityala lamawele* 8. Zwini, an ordinary participant, called for the evidence of the birth monitors, who were present during the birth of the twins, to resolve a primogeniture dispute between them.

38 1944 AD 67 at 79. Watermeyer CJ held that "the defendant was found . . . to be entitled to the ownership . . . of the property."

continued to use the same institution, which his experience of the common law made him use, to describe the rights of the defendant, in an African law matter. By doing this he unwittingly committed an unforgivable comparative law mistake, namely, looking at foreign law (African customary law) with the eyes of his own system (common law).

Ironically, this refusal to come out of the common law comfort zone when reasoning through an African law problem has continued in the post-constitutional era. In *Mthembu v Letsela*[39] the Transvaal High Court felt that the matter in dispute fell to be decided under African customary law. Yet the property in question was held to be individually owned by the senior male relative of the deceased, instead of holding that in African customary law property is collectively owned by the members of the family to which the deceased belonged. The senior male who, as a father, had headed the family during the lifetime of his deceased son, would continue heading the family and managing the property, as he had done during the latter's lifetime.

Instead, the ownership issue was handled in the same manner in which it would have been handled if it was a common law matter. Tragically, the Supreme Court of Appeal endorsed the latter view. In other words this court continued to treat African customary law as a sub-system of the common law, in the same way that its predecessor, the Appellate Division, had done in the *Sigcau* case, although *Mthembu* was decided under the Constitution that places African law at the same level with the common law.

Responding to the constitutional concerns which various legal interpreters and feminist activist continued to raise in the wake of *Mthembu*, the Cape High Court in the *Bhe* case declared the primogeniture rule unconstitutional. Regrettably, this happened after Ngwenya J's analysis of his understanding of the African notion of ownership had raised hopes that he was about to deliver a judgment based on indigenous principles.[40] The judgment is disappointing in the sense that it endorsed the false consciousness created by colonial legalism that the individualistic common law concept of ownership applied to African law as well.

In the end the indigenous rule of primogeniture, which was misunderstood to prefer males for ownership, although it simply placed the responsibility of managing and controlling property belonging to the family collective on the senior male, was struck down. This happened because the colonially imposed distorted dominant version of the concept of primogeniture posed constitutional difficulties. The most tragic outcome of this case was the judicial reluctance to deconstruct the lie that the customary heir is the owner of family property, as opposed to the acceptance of the indigenous counter-version which recognises the collective nature of African ownership under the control of the senior male.

Most unfortunately, the Constitutional Court majority has also failed to debunk this particular colonial construct before deciding to strike down the rule of primogeniture.[41] The falsity of the individualistic construct of African customary

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39 1998 2 SA 675 (T).

40 In *Bhe v The Magistrate, Khayelitsha* 2004 2 SA 544 (C) Ngwenya J held: "Ownership in African Customary Law is not individualistic. It is collective. Differently put, every member of the family is the owner of the common property through the owner."

41 *Bhe v The Magistrate Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC).

law, which looked natural and necessary because it resembled the common law, still does not worry our courts. Also, African customary law's adaptation in practice to accommodate women, many of whom are now heads of households, was ignored. Perhaps, even developing African customary law to the extent suggested in Ngcobo J's opinion would not have been necessary, had the false consciousness that the living customary law of inheritance necessarily discriminated against women been dispelled.

One would have liked to understand Ngcobo J's suggestion as a call for recognition of the existing rule of living law that has always existed (albeit as a counter-rule) and used in social practice to compete with the dominant (official) rule that was privileged under the old order, rather than a call for the development of the rule which, because it also affords women the rights previously enjoyed by men only, already promotes the objects of the Bill of Rights. All that the court needed to do was to recognise it, since its natural development had left no room for further judicial improvement.

It is submitted that there was sufficient evidence that the living law of inheritance did not discriminate between males and females. Instead of striking down the rule of primogeniture, upon which a big part of African culture depends for its survival, the Constitutional Court majority could have distinguished between the official version of the rule, which is distorted and sexist, and its living counterpart, which does not have constitutional difficulties because it had already been transformed by social practice. Had it followed the latter route, the Court would invariably have chosen the living version, since the official version forms part of the injustices that were created to promote the divisions of the past. Consequently, the majority would not have gone through the pain of striking the rule down. Similarly, Ngcobo J would not have felt obliged to comply with the s 39(2) injunction to develop the rule, since it would have been clear that social practice had already rendered our living primogeniture jurisprudence compliant with constitutional requirements.

6 CONCLUSION

Unless we become honest and deal with African customary law as a customary system, and adopt a shared vision of the system's development with its adherents, we are not going to deal with the colonial legacy effectively. With the best of intentions, our diverse judges, appointed through the transformed process, cannot perform the functions of a customary community, which negotiates and re-negotiates the dynamics of its dimensions in the process of continuing socio-legal deliberations. While it did not constitute sufficient participation by customary communities, the involvement of "native assessors" in the Native Appeal Court amounted to a recognition of the fact that the distinctiveness of African law requires some level of collective deliberation about the condition of the system.

While their expertise in indigenous law equipped them with insights into the African culture, the "native commissioners" appreciated the limitations of their Western legal training, which did not prepare them to grasp the elusive problems nuanced in the tradition's narratives. The "native commissioners" accordingly acknowledged that the pre-colonial authorities did not preside over customary law disputes alone, but were always assisted by the customary communities. It is significant to remember that such commissioners did this without any democratic imperative to involve the community in decision-making processes. Under democratic conditions one would expect more, not less, consultation.

As a non-specialised system of law, African law combines legal issues with deliberations about cultural, religious and sociological concerns in the resolution of a dispute. That being so, even individual adherents of the tradition cannot claim mastery of all the jural postulates that are embedded in the system, without the benefit of contributions from the customary community. This is because the originality of indigenous law, as a customary system, consists in its uniqueness as a narrative and deliberative method of communication. It requires a deep insight into the spiritual foundations of the African concept of justice to understand why a lone judge cannot succeed in his efforts to develop the African jurisprudence envisaged in the Constitution.

This explains why the admirable efforts of the "native commissioners" to include adherents of customary law as assessors were also not sufficient. Very often chiefs, headmen, priests and teachers were used as assessors, but not the masses of the people who are the actual negotiators of the aggregate behaviour in the community. For this reason, in the post-colonial period, customary disputes were subjected to different methods of investigation from those of the pre-colonial era. Unfortunately, our courts do not seem to believe that the pre-colonial collective approach to adjudication can produce the envisaged African jurisprudence of the twenty-first century. Strangely enough, our judges know that what remains of customary law today is the product of collective deliberations of the customary communities, who refused to adopt the imposed official version which is devoid of indigenous values. Instead, these communities continued to interrogate their tradition together with their leaders.

In this context the African law of succession, inheritance, property and marriage, among other branches, developed from the patriarchal pre-colonial system that placed emphasis on male leadership to the living version that grew to embrace the values of non-sexism through interaction with the struggle against Apartheid. This is the approach that was overthrown and substituted by the European method, which shifted the adjudicatory function from the people to the authorities. This is why this usurpation should now be rejected as one of the injustices of the past, and customary communities that were overthrown reinstated as drivers of customary self-determination.

The problem with the method of selecting assessors modelled on the lines of the native commissioners' courts is that it could easily promote elitist values, above those of the grass root majority in society. The prominence of such values would pervert the constitutional mandate to establish an African jurisprudence based on democratic values, social justice and fundamental human rights. By ignoring the values of the majority, the project would subvert the democratic imperative in the transformation process.

If the highest court endorses the imposition of elitist values, despite this democratic imperative, the national transformative mandate would be rigged. That is why the present approach, where the courts sit without any kind of participation by the adherents of customary law, cannot be expected to deliver the envisaged post-Apartheid African jurisprudence in South Africa. This is so because the determination of the standard of customary behaviour by the judges, without the assistance of the community would be equally elitist.

To sum up, our courts are doing well in developing the common law of South Africa. This is commendable since the common law applies to all sections of the population of South Africa, and was abused most in the implementation of

Apartheid. However, the common law is a hybrid system that comprises important parts of both the Romano-Germanic and Anglo-American legal families. As a Western legal system the common law creates a particular consciousness during the training of lawyers and of the law, which does not necessarily make its professionals suitable for the development of African law. Unlike the common law, African law did not originate from the universities and the courts, but from totally different popular discourses within the various communities.

Had it not been for the colonisation, these communities would still be involved in the making of the decisions that are crucial in the development of the system. At this stage of social development, where the Constitution was adopted to ensure that the government is based on the will of the people, all forms of colonisation, including the usurpation of the adjudicatory process by the authorities should be stopped. This can be achieved by the inclusion of panels of about ten community members to sit with the judge whenever a rule or principle of African law has to be interpreted or developed. In this way our Western legal training would be reconciled with the African traditional approach, to the benefit of the process of Africanisation.

From "Repugnancy" to "Bill of Rights": African Customary Law and Human Rights in Lesotho and South Africa

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1 INTRODUCTION

The contest between African law and western law in plural legal societies is an enduring clash of cultures played out on an uneven socio-legal field.[1] Ensconced in the plurality of legal systems, the contest presents the greatest challenge to the harmonisation of law in African societies. And because its manifestations so far have revealed a preponderance of western values over the indigenous culture, the hope that the institutions of African law could acquire status akin to that of other legal polities within the "modern" state have floundered.[2] Yet, traditional law and customs still regulate the lives of the majority of populations in African countries. In South Africa for example, it is estimated that about 40 percent of the total population live in rural communities, and are subject to customary law.[3] In Lesotho, the regime of African law is much more widespread, and is estimated to be favoured by about 90 percent of the population.[4] Still, African law subsists on the fringes of juridical activism, its authority and content articulated within

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1 The term "African law" is used interchangeably with "African customary law". Both encompass the regimes of law variously described as "indigenous law", "African customary law", "tribal law", "local law", "native law", "primitive law", and "folk law". These regimes are distinguished from all other bodies of law which fall under the rubric of "western" or "modern law". In western legal scholarship, the distinction is often drawn between "formal" and "informal law", while in contemporary gender based research, the difference between African law and western law is captured by the concept of semi-autonomous social field. See the elucidation in Moore "Law and Social Change: The Semi-Autonomous Field as an Appropriate Field of Study" 1978 *Law & Society Review* 719–746. The discussion of the concept in relation to Southern Africa can be found in Armstrong "Rethinking Women's law in Southern Africa" in Ncube & Stewart (eds) *Widowhood, Inheritance Laws, Customs & Practices in Southern Africa* (1995) 116–148.

2 In *Du Plessis v De Klerk* 1996 3 SA 850 (CC), Mokgoro J described the declining status of African law in the following words: "Customary law has lamentably been marginalized and allowed to degenerate into a vitrified set of norms alienated from its roots in the community." See also Omotola "Primogeniture and Illegitimacy in African Customary Law: The Battle for Survival of Culture" 2003 *Speculum Juris* 181–203.

3 Bennett *Customary Law in South Africa* (2004) 111. Other writers put the estimate at about three quarters of the population in South Africa. See Ndima "The African Law of the 21st Century in South Africa" 2003 *CILSA* 323, quoting Hosten *et al Introduction to South African Law and Legal Theory* 2 ed (1995) 1248.

4 Maqutu *Contemporary Family Law: The Lesotho Position* (2005) 6.

the narrow margins of utility provided by pluralism. But even within this narrow space, African law still has to contend with "morality" standards pegged on a human rights culture underwritten by regimes of international law.

Although the constriction of African law within the plural legal setting is not a new phenomenon, the idea that human rights has ushered in a new morality which all other systems of law have to meet, raises the issue of legitimacy of cultural institutions residing outside the neo-liberal constituencies, and the question as to whether traditional systems still have capacity to contribute towards the development of law.[5] Already, human rights scholars are arguing that although human rights originated from a set of values espoused in one culture, its principles have acquired universal acceptance.[6] But this argument only goes so far as to acknowledge the grand narrative of the human rights project. It does not speak to the dearth of human rights principles in a myriad of volatile political situations in Africa, or the narrow application of international regimes in the domestic arena where plurality seems to indicate an accommodation of customary law and traditional practices. Also, it does not eliminate the significance of the cultural context in which the scope and degree of human rights protection is being articulated.[7]

It has been argued therefore, that in Africa, human rights require the collaboration of cultural institutions to be effective – what scholars have called the "cultural legitimation of human rights".[8] A measure of such collaboration is seen in the current constitutions of countries such as Namibia, Uganda, Sierra Leone, DR Congo, Lesotho and South Africa, all of which recognise African law alongside their Bills of Rights.[9] But, because the Bills of Rights are entrenched, and African law is made subject to it, some commentators see the constitutional regimes as a hindrance to the development of customary law, and the Bill of Rights constituting a new repugnancy regime.[10] Thomas and Tladi for example,

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5 Juma "The Legitimacy of Indigenous Legal Institutions and Human Rights Practice in Kenya: An Old Debate Revisited" 2006 *African Journal of International & Comparative Law* 176–203.

6 Donnelly "Human Rights and Western Liberalism" in An-Na'im & Deng (eds) *Human Rights in Africa: Cross Cultural Perspectives* (1990) 31; An-Na'im and Hammond "Cultural Transformation and Human Rights in African Societies" in An-Na'im (ed) *Cultural Transformation and Human Rights in Africa* (2002) 17; Panikkar "Is the Notion of Human Rights a Western Concept?" 1982 *Diogenes* 75; Howard *Human Rights in Commonwealth Africa* (1986).

7 Rwezaura *Traditionalism and Law Reform in Africa* (1983) 5; Marasinghe "Traditional Conception of Human Rights" in Welch & Meltzer (eds) *Human Rights and Development in Africa* (1984) 32.

8 An-Na'im "Towards a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman or Degrading Treatment or Punishment" in An-Na'im (ed) *Human Rights In Cross-Cultural Perspectives: A Quest for Consensus* (1992) 19–23; Juma "African Customary Law and Human Rights in Kenya: In Search of a Viable Framework for Coexistence" 2002 *East African Journal of Peace & Human Rights* 53–82.

9 This is what the court said in in *Alexkor Ltd v The Richtersveld Community* 2003 12 BCLR 1301 (CC) para 51: "While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law but to the Constitution".

10 Bennett "The Equality Clause and Customary Law" 1994 *SAJHR* 122; Kerr "Inheritance in Customary Law, Under the Interim Constitution and Under the Present Constitution" 1998

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perceive the recognition of customary law in the constitution as "nothing more than palliative" since the Bill of Rights "represents the new repugnancy clause".[11] In their view, we are back to where we started – that whereas in the repugnancy days, limitations on African law were based on its failure to meet morality and public policy standards, today its rules may be struck out if they offend the provisions of the Bill of Rights. The authors see the repugnancy regime and human rights as treating customary law with the same degree of opprobrium. And because African law and regimes of international human rights law offer two irreconcilable principles, especially in relation to gender discrimination, they can never have anything in common.[12] In political circles, as well, the new constitutional regime is viewed with scepticism. Recently, Mosibudi Mangena, the president of Azania Peoples Organization, cautioned his party supporters against the wholesale acceptance of the pronouncements of the Constitutional Court in relation to gay and lesbian issues: "We should indicate what our view is on the question of same sex marriages, more fundamentally, whether it is acceptable for the judiciary to determine issues of morality, norms, values and culture. Or, do we believe that whatever the courts say is law and should be obeyed?"[13]

Despite the foregoing, none of these constituencies deny the desirability of human rights principles of dignity and human equality, just as much as they do not dismiss the idea that Africans could best be served by regimes that uphold these principles. It seems therefore, that the debate on the future of African law will remain centred on how successfully its principles can function in a medium saturated with ever-expanding notions of individual rights and freedoms. This article will contribute to this debate in two ways. First, it will endeavour to dispel the notion that the promotion of human rights in multicultural societies spells doom for African law, and advance in its stead the view that human rights, unlike the repugnancy doctrines, offer the best chance for the development of African law. In this endeavour, I shall draw on the discourses, ideas and jurisprudence that emerged from the era of colonial domination to fashion an understanding of why the repugnancy regimes, as opposed to the current principles of human rights, were inimical to the development of African law. I shall take the position that even though both paradigms have shown tendencies to restrict the application of African law on the basis of some moral high ground, the ideological framework within which human rights principles are being articulated shows greater accommodation of legal diversity than could be said of the repugnancy regimes.[14]

SALJ 262; Cobbah "African Values and Human Rights Debate: An African Perspective" 1987 *Human Rights Quarterly* 309.

11 Thomas & Tladi "Legal Pluralism or a New Repugnancy Clause" 1999 *CILSA* 354.

12 Thomas & Tladi 1999 *CILSA* 361.

13 Gqola "Welcome to the Slippery Slope" *Mail & Guardian*, September 29 2006 24.

14 Under s 39(2) of the South African Constitution, courts are enjoined to promote customary law, but in terms of the spirit, purport and objects of the Bill of Rights. The implication here is that customary law and Bill of Rights may be complimentary to each other. In s 39(3), African customary law is recognised, but only to the extent that it complies with the Bill of Rights. Section 211(3) also carries a similar provision. Unlike South Africa, Lesotho's Constitution places customary law on a par with the Bill of Rights. While the Constitution in s 18(1) decrees that "no law shall make provision that is discriminatory

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Secondly, I shall attempt to construct a basis for continued development of African law despite the erosion of most of its ideas and principles. In this regard, I shall rely on the assumption that since customary laws and other norms of traditional character form the basis of the ethnic societies in most African countries, attaining national development may be impossible unless people's aspirations and expressions of culture, which are embodied in such norms, are afforded an equal chance for growth. The idea that such norms are anything but static must not be ignored. Indeed, finding a suitable place for African law within the legal system means acknowledging that it has something to offer and that it has capacity to embrace change.[15] It must be conceded that African society today shows much stratification and destabilisation, as urbanisation and other forces of economic change exert pressure on traditional modes of family and rights.[16] This notwithstanding, it must be recognised that African customary tradition is a complex but functional phenomenon of social control that has been moulded out of the imposition of modern political systems, the diffusion of cultures, and internal transformation of societies themselves. It is a complex system of existential experiences of the past that are exerting an orienting normative influence on the present, and which are in themselves shaping to match present day challenges – a process which Ward and Rustow refer to as "reinforcing dualism".[17] The momentums for change that reside within the African traditional structures make them suitable as agents of societal transformation, and not inhibitors of such transformation. But the basis for advancing the notion of the primacy of African law is still predicated on the need to maintain cultural diversity and to afford every cultural community an opportunity for growth within an acceptable normative framework. Such goals appear to be in tandem with the general approach that international institutions seem to favour.[18]

This article will seek to explore these parameters through an enquiry based on three levels of analysis. The first level will elicit the understanding of the dialectics of normative interactions that have taken place in African societies since the advent of colonialism. Here, a descriptive as well as a conceptual approach will be used to provide an insight to the philosophical underpinnings of the plural legal system that was established then, and how it engendered the denigration of traditional institutions of justice. The second level will attempt an epistemological analysis of the effect modern transformative processes have on traditional norms. The third will appraise the ideological force of the human rights paradigm

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either of itself or in its effect", the same is made subject to customary law. Section 18(4)(c) provides that: "Subsection (1) shall not apply to any law to the extent that that law makes for the application of customary law of Lesotho with respect to any matter in the case of persons who under that law, are subject to that law." Further discussion on how the provision erodes the protection against discriminatory laws can be found in Acheampong "Lesotho's Ratification of the Convention of All Forms of Discrimination against Women" 1993 *Lesotho LJ* 79–106; Fanana "Legal Dualism and the Rights of Women: Thoughts of Law Reform in Lesotho" 2004 *Lesotho LJ* 119–150.

15 Mqeke "Customary Law and Human Rights" 1996 *SALJ* 364; Dlamini "The Future of Customary Law" in Sanders (ed) *The Internal Conflict of Laws in South Africa* (1990) 5–6.

16 Mohmud "The State and Human Rights in Africa in the 1990s: Perspectives and Prospects" 1993 *Human Rights Quarterly* 485 491.

17 Ward & Rustow *Political Modernization in Turkey and Japan* (1963) 466.

18 See for example, the Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, June 1993, U.N. Doc. A/CONF.157/24 (Part I) (1993) 20.

and how it is likely to affect the development of African law. These three levels of enquiry provide a framework for investigating how "cultural legitimation of human rights" could serve the dual purpose of improving the human rights condition, and also nurturing institutions of African law.

2 Dialectics of Normative Interaction

2 1 The Nature of Customary Law

African customary law is often perceived to be synonymous with culture and customs. Its content is thought to be no more than a repertoire of traditional practices and customs that derive from culture and which dictate people's modes of behaviour.[19] That is why Eurocentric ideologues of the past century believed that it had no role in matters of public law and commerce. Seidman for example, argued that law and institutions necessary for economic transformation in Africa must be sought elsewhere than in African law.[20] Such erroneous assumptions about the utility of customary law arose from ethnocentrism, but more profoundly, from equating custom to law. Invariably, the inability to distinguish the two diminishes the general understanding of the processes of normative development in a multicultural society. Also, it takes the study of African law away from the province of jurisprudence, thus diminishing its value in an analysis of legal theory. Accordingly, lawyers must endeavour to distinguish "law" from "custom" to facilitate a more reasoned appreciation of the place African law ought to occupy in the legal system.[21] Posner describes the relationship between custom and African law as follows:

> "The source of customary law that dominates primitive law is custom. It is custom that prescribes the compensation due, for killing a man, the formalities for making a contract, the rules of inheritance, the obligations of kinship, the limitation on whom one may marry and so forth. Custom (including customary law) resembles language in being a complicated, slowly changing and decentralized system of highly exact rules."[22]

Custom refers to practice; what people do. Law is the norm; what people ought to do. Custom is the "raw material out of which customary norm is manufactured".[23] According to Hoebel, both custom and law have regularity.[24] They define relationships and promote sanctions. However, the sanction of law may involve physical coercion, and is distinguishable from custom since it bestows on certain individuals the "privilege-right of applying the sanction of physical coercion, if need be".[25] Moreover, law has been described as the coercive instrument for regulating human behaviour.[26] Though value-neutral in application, it

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19 Stone *Social Dimensions of Law and Justice* (1966) 743; Clanchy *From Memory to Written Record, England* (1979) 1066–1307.

20 Seidman "Law and Economic Development" 1966 *Wisconsin LR* 999 1027.

21 In *Hlope v Mahlalela* 1998 1 SA 449 (T) 457, Van Den Heever AJ observed that not "all cultural practices are indigenous law and vice versa". See also Maqutu *Contemporary Family Law: The Lesotho Position* 1–3.

22 Posner "A Theory of Primitive Society, with Special Reference to Primitive Law" 1980 *Journal of Law & Economics* 1–53.

23 Allott "The People as Lawmakers: Custom, Practice and Public Opinion as Source of Law in Africa and England" 1977 *Journal of African Law* 1 5.

24 Hoebel *The Law of Primitive Man: A Study in Comparative Legal Dynamics* (1954) 276.

25 *Ibid*.

26 Hart *The Concept of Law* (1961).

regulates the character of society. In fact, it is the compulsion element in the legal norm that makes it a superior mechanism for achieving broad social goals. Such goals may include the re-ordering and stabilisation of society, the planning and direction of change, and the consolidation of political power.[27] Every society enjoys a measure of social equilibrium imparted by the instrumentality of law. Thus, it ensures that every society exists as a coherent social whole.[28] And African traditional societies are no exception in this regard. Specifically, their legal control and response to the violation of norms was backed by use or threat of force.[29] Force varied from one group to another and was applied directly against a person, or generally against his property, to bring about the settlement of a dispute, while punishment for the guilty involved fines, or banishment.[30]

Thus, the term African customary law may, in itself, be misleading. This is because it implies a distinction between "African Law" and "laws made by the state". This connotation assisted the colonial enterprise in distinguishing British law from African law; the former applicable to the white settlers, and the latter to the indigenous groups.[31] Today, with the unification of the judicial system in most African countries, the connotation has served to diminish the relevance of customary law in the face of other systems or laws. Further, the term implies that the only source of African law is custom. This is not correct. The traditional African legal systems comprised not only of rules derived from customs, but also legislation and precedents of important previous cases.[32] Fernyhough has noted that African traditional societies were characterised by a preoccupation with law, customary and written, and with legal procedure.[33] He gives the example of the Amhara of Ethiopia, who relished litigation and lengthy cross-examination of witnesses. It seems appropriate, therefore, to acknowledge the critical imperatives of custom, but to elevate the *principles* of African law so that these can claim a viable constituency in the articulation of norms in African society. In the circumstances, it might be appropriate for judicial systems to reconsider the suggestion made by Nhlapo that the term "African indigenous law" best captures the essence of African law as undiluted by the nuanced forms of socio-cultural factors which "African customary law" has been made to bear.[34]

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27 Allott "Legal Development and Economic Growth in Africa" in Anderson (ed) *Changing Law in Developing Countries* (1963) 194 and 209. Kwame Nkurumah once said that "law should be the legal expression of the political, economic and social condition of the people and of their aims of progress". Law in this regard is being defined as acceptable interrelationships between political, economic and social goals of society. Professor Harvey has defined law as "a specific technique for ordering, deriving its essential character from its reliance upon the prestige, authority and ultimately reserved monopoly of force of politically organized Society". Harvey "The Challenge of Rule of Law" 1961 *Michigan LR* 603 605.

28 Hoebel *The Law of Primitive Man* 275.

29 Hoebel *The Law of Primitive Man* 276.

30 Hoebel *The Law of Primitive Man* 276, 278 and 279.

31 Morris "English law in East Africa: a Hardy Plant in an Alien Soil" in Morris & Read (eds) *Indirect Rule and the Search for Justice: Essays in East African Legal History* (1972) 73, 75.

32 Juma "Reconciling African Customary Law and Human Rights in Kenya: Making a Case for institutional Reformation and revitalization of Customary Adjudication Processes," 2002 *St Thomas LR* 459–511.

33 Fernyhough "Human Rights in Pre-colonial Africa" in Cohen *et al* (eds) *Human Rights and Governance in Africa* (1993) 39–73.

34 Nhlapo "Indigenous Law and Gender in South Africa: Taking Human Rights and Cultural Diversity Seriously" (1994–5) *Third World Legal Studies* 49 53.

Be that as it may, the idea that African customary law derives from custom implies fluidity and flexibility. Himonga and Bosch have described it as "dynamic and constantly adapting to changing social and economic conditions".[35] Recent anthropological studies have recognised that traditions are reproduced and transformed through activities of members of a community, and thus, can never represent a monolithic and extant regime of law.[36] In this conception, "tradition is not taken in the sense of dead weight of an ossified past but as something that people inherit, employ, transmute, add to, and transmit".[37] But, since African customary law has never been allowed to grow, its nature is often misunderstood and thus portrayed as rigid and static. From a juridical standpoint, African customary law represents the official "customs" which consist of rigid rules embedded in by-laws, judicial decisions, administrative orders and statutes, all of which are devoid of the "dynamism and adaptability which distinguished African precolonial customs".[38] Further, African customs have suffered so many distortions and alterations that they no longer bear the true essence of the African society. Such distortions have played a significant role in defining property relationships in traditional societies. Today, African customary law has been used to deny women the right of ownership of land, thus diminishing their capacity to participate in the economic development of their regions.[39] Nhlapo makes the argument that whereas patriarchy has often been a feature of customary practice, it was often fortified with checks and balances that ensured the welfare of women and children.[40] He argues that it is because of these distortions that customary institutions have adopted such a rigid posture. Using the example of the customary land tenure system that currently gives male members of a household property-holding capacity to the exclusion of all females, he demonstrates how the official customary law has enacted a "perpetual minority" status for women, thus removing all legal protection hitherto available to females and children in society.[41] Ndima argues that the widely believed notion that in African custom women could never own capital assets was baseless, because the assets "belonged to a home as a whole rather than to an individual however highly placed". [42] In his view, male domination, as far as ownership of property is concerned, is a distortion wrought upon African customary law by the erroneous interpretation of custom by those in authority.[43]

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35 Himonga and Bosch "The Application of African Customary Law under the Constitution of South Africa: Problem Solved or Just the Beginning" 2000 *SALJ* 306 319.

36 Lindholm "Coming to Terms with Tradition" in Hoibraaten & Gullvag (eds) *Essays in Pragmatic Philosophy* (1985) 109, 110; Swindler "Culture in Action: Symbols and Strategies" 1986 *American Sociological Review* 273–286.

37 Barth "Problems in Conceptualizing Cultural Pluralism with Illustrations from Sohar, Oman" in Maybury-Lewis (ed) *Prospects for Plural Societies* (1982) 77–87.

38 Nabudere "Towards the Study of Post-traditional Systems of Justice in the Great Lakes Region of Africa" 2002 *East Africa Journal of Peace & Human Rights* 1 7.

39 Munyeki *Women and Land in Africa: Culture, Religion and Realizing Women's Rights* (2003); Nyamu "Are Local Norms and Practices Fences or Pathways? The Example of Women's Property Rights" in An-Na'im (ed) *Cultural Transformation and Human Rights in Africa* (2002) 126–150.

40 Nhlapo "African Customary Law in the Interim Constitution" in Liebenberg (ed) *The Constitution of South Africa from a Gender Perspective* (1995) 162.

41 *Ibid*.

42 Ndima 2003 *CILSA* 330–331.

43 *Ibid*.

The trend towards the distortion and denigration of African law has been dictated by a myriad of factors, but most prominent has been its interaction with other normative regimes. Such interactions have occurred within a historical period. This article proposes to discuss the outcomes of such interactions within the framework of legal pluralism, which by and large, define the nature of legal systems in Lesotho and South Africa. In this regard, it will draw, as well, on experiences of other African countries where pluralism continues to dictate the trends of normative development.

2 2 The Changing Phases of Legal Pluralism

Normative interaction in African states has been dictated by the structure of pluralism. Thus, its outcome has always been predetermined by the ideological factors that influence systems of legal separation within society. Such factors inhere in perceptions and narratives that have changed with time and space.[44] From these ideas and discourses, a proper understanding of what has been an enduring dissonance on the perceptions of the role of customary law in the development of law and the notion of individual freedoms and rights can be constructed. The purpose will be to illustrate how such dissonance is slowly giving way to a more accommodating approach, where the need for developing African law finds support within institutions that are faithful to the promotion of human rights. As far as African law is concerned, its relationship with other norms can be read from the changing phases of pluralism, beginning with the period when statehood became a factor of African political organisation,[45] to the present period, when norms consistent with individual rights and freedoms are becoming entrenched in the legal system. Within this trajectory, three distinct phases of normative development, demarcated by temporal changes in the rise of ideas, discourses and trends of socio-political mobilisation, can be discerned.

2 2 1 The First Phase – The rise of Dualism and the Repugnancy Regime

The first phase of pluralism began with the establishment of European-style legal system in Africa.[46] It was informed by ethnocentrism and a racist ideology which denied equality to persons not of European descent. Africans were perceived as lesser human beings and their law worthy of recognition only in so far as it could help in the process of political subjugation. To mask this racist attitude, colonial jurists argued that African law was inchoate and difficult to understand, because it was enmeshed in customs and traditional practices: "[C]learly the realm of law was not articulated, defined or formalized: It was an element of social life inextricably entwined in the religion, political, social and moral structures of

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44 Juma "Socio-Legal Contests to Customary Authority: A Human Rights Perspective on the Changing Character of Indigenous Norms in Kenya" 2006 *Lesotho LJ* (forthcoming).

45 The imposition of the state structure on African has been a subject of an expanded debate among scholars. See for example, Bodunrin "The Question of African Philosophy" in Serequeberhan (ed) *African Philosophy: The Essential Readings* (1991) 63; Ojwang "Legal Transplantation: Rethinking the Role and Significance of Western Law in Africa"; Sack & Minchin (eds) *Legal Pluralism: Proceedings of the Canberra Law Workshop VII 99* (1986) 111.

46 Mutua "Why Redraw the Map of Africa: A Moral and Legal Enquiry" 1995 *Michigan Journal of International Law* 1113; Juma "Africa, its Conflicts and its Traditions: Debating A Suitable Role for Tradition in African Peace Initiatives" 2005 *MSU Journal of International Law* 463.

traditional societies."[47] Thus, no effort was made to discern African legal principles from the whole morass of custom and traditional beliefs, because the process would have been incompatible with the colonial agenda.[48] Unfortunately, this ideology informed the growth of the legal system. And since the courts were privy to it, they produced precedents clothed with racial bias. As will be shown later in this article, everything that was un-European, ranging from payment of *lobola* to the institution of marriage itself, was dismissed on account of being contrary to "justice and morality".

Primarily, the object of the colonial legal system was to re-model principles of African law so that its content and utility could be supervised by institutions created through the instrumentality of a modern state. Such institutions included the African courts, the chieftaincy, the provincial administration, the mainstream judicial and legislative bodies and, of course, the imperial political organs. The success of this process was seen to depend, in part, on the codification of rules of African law. But codified African law did not fare so well. In Lesotho for example, a partial codification was attempted to reduce customary principles into a definitive legal criteria for easy adjudication of local disputes. The *Laws of Lerotholi* (later the *Code of Lerotholi*) promulgated in 1903 by the Basutoland National Council set up by the British colonial administration, which were subsequently amended in 1938,[49] constituted the official custom.[50] Although the Lerotholi Code still remains the main source of the Basuto customary law, it has faced considerable challenge as part of Lesotho common law. In *Bereng Griffith v Mantsebo Seeiso Griffith* (the *Regency Case*), Lawsdown J stated:

> "No legislative authority or official recognition has been extended to this code; nevertheless it is helpful, though not conclusive, on any question as to the existence or extent of any customary practice among the Basuto people . . . It is in no sense written law. Its provisions though reduced to print do not emanate from any lawgiver."[51]

Also, the content of the code has been eroded by legislation. But the gist of it still reflects the extant nature of customary regimes applied by the local courts under the Native Courts Proclamation of 1938. And unlike South Africa, the duality of the Lesotho legal system has sustained the legality of the Code, despite social change and many of its rules bearing little relevance to current customary practices.

In this era, the sum of African customary law and practice was defined by reference to native custom. But its substantive and procedural applicability was regulated by the repugnancy doctrine, its viability limited by cultural intimidation, and the opportunity for growth restricted by racist and separatist policies.[52]

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47 Read "Customary Law under Colonial Rule" in Morris & Read (eds) *Indirect Rule and the Search for Justice: Essays in East African Legal History* 167 169.

48 The intention of the colonialists was to use African customary law to shape society. Chanock *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (1985) 3; Shadle "Changing Traditions to Meet Current Altering Conditions: Customary Law, African Courts and the Rejection of Codification in Kenya, 1930–60" 1999 *Journal of African History* 411–412.

49 The Native Administration Proclamation 61 of 1983, ss 5 and 8.

50 See a text of the code in Maqutu *Contemporary Family Law: The Lesotho Position*.

51 (1926–53) HCTLR 50 58.

52 Although African law was applied in the Magistrates' Courts as early as 1879 (Proclamation 110 of 1879), the 1913 Natives Land Act (Act 27 of 1913) and the 1927 Native

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In Lesotho for example, the repugnancy regime was enunciated by the General Law Proclamation of 1884. It provided in part that African law would be administered by the traditional chiefs. But such law would only be applied in cases where parties were Africans, and if it was not repugnant to justice and morality.[53] When the traditional chiefs courts were replaced by the Natives Courts in 1938, the latter were required under s 9(a) of the Natives Courts Proclamation No. 62 to apply: "Native law and custom prevailing in the territory, so far as it is not repugnant to justice or morality or inconsistent with any law in the territory."[54] The courts took the view that customary law could be repugnant to justice and morality if it conflicted with any statute.[55] In the Natal Province of South Africa, the colonial authorities allowed native law to operate, but subject to its compatibility with the "principles of humanity observed throughout the civilized world".[56] With the passing of the Native Administration Act (Act 38 of 1927), which later became the Black Administration Act, the repugnancy principle was written into s 1(1) of the Act. Customary law could only apply if it was not repugnant to public policy and natural justice. The same principle has survived in s 1(1) of the Law of Evidence Amendment Act of 1988.

Like Christianity, repugnancy clauses advanced a moral cause that ensured the domination of European culture over all others. The belief was that, stripped of their own morality, the Africans could internalise their inferiority and fully embrace the European way of life. The result would be that they (Africans) would become loyal subjects to the imperial power. Religion, especially Christianity, assisted the colonial enterprise in this endeavour by influencing normative development. In the British areas, Christianity provided the moral content of marriage law. Thus, polygamy, wife inheritance, female circumcision and a myriad other traditional practices were deemed to be against morality and public policy.[57] Indeed, the moral contest over these traditional practices was the harbinger of the violent uprisings against the colonial powers that occurred in the later half of the twentieth century. Religion was also used to justify the inapplicability of African customary law in the field of commerce. Indeed, the African

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Administration Act were the initial forms of legislation that ensured separate justice system for blacks in South Africa. But the special courts established under the 1927 Act were abolished by Special Courts for Blacks Abolition Act of 1986 and their functions assumed by the Magistrates' Courts through an amendment of the Magistrates' Courts Act 32 of 1944. Brookes *The History of Native Policy in South Africa from 1830 to Present Day* (1924); Bennett *A Sourcebook of African Customary Law for South Africa* (1991) 63.

53 Regulation 12 of Proclamation 2B issued by the High Commissioner in on 29 May 1884.

54 In 1965 the Native Courts Proclamation was renamed the Central and Local Courts Proclamation, and the courts adopted a similar name. The morality threshold remains the same except that now plaintiffs can elect whether to bring their cases in local courts or in the magistrate's court. Poulter *Legal Dualism in Lesotho: Study of the Choice of Law Question in Family Matters* (1999) 17–19.

55 *Ramalapi v Letsie* HC Civ/A/21/1971.

56 Ordinance 2 of 1849. See also Banda, *Women, Law and Human Rights: An African Perspective* (2005) 34.

57 There are ample studies that show how payment of bohali (lobolo) in colonial Lesotho was deemed unchristian, and anyone who participated in the practice was liable to be removed from church. See Casalis *The Basutos* (1861) 182–186; Ellenberger *A Century of Mission Work in Basutoland* (1938); Smith, *The Mabilles of Basutoland* (1939) 124, 188, 341–342. The issue of female circumcision in the colonial times is discussed in Keck & Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (1998) 39, 59–60.

custom, which largely relied on communal appropriation of property, could not be trusted to support the capitalist venture that the colonial territories had become. Thus, its influence on commerce was radically eliminated by the imposition of imported law. Some scholars have even argued that the creation of "official customary law" was in itself a measure aimed at alienating indigenous groups from their resources.[58] It is evident therefore, that the repugnancy doctrine was pegged upon the morality of Christianity and the ideology of resource exploitation that informed the entire colonial enterprise. That is why the repugnancy doctrine was to suffer such opprobrium after independence.

But, despite the subterfuge with which the superior morality was perpetrated, it did not prevent the European culture from exporting its revolutionary values, such as sovereignty, to non-western cultures – the same values that the colonised people had been denied.[59] Ultimately, it was these same values that legitimated the anti-colonial movement in Africa and bred forth ideas through which European domination was fought and defeated. But this occurred because racism and religion, especially the Christian religion, were not the only forces driving the colonial enterprise. Other factors, such as free trade, democracy, and human rights, all rooted in the capitalist character of the post-industrialised European society and so well articulated by the western neo-liberal agenda, subsumed the blind autocracy of imperialism. Colonialism, just like apartheid, was seen by most Africans as a violation of their fundamental rights and freedoms.[60] By asserting their right to self determination and insisting on democratic rule of the majority, claims which found footing on the evolving structure of the international human rights regimes, the edifice of colonialism and apartheid lost their legality. Institutions of African law and culture provided the rallying point for a collective opposition against the racist tendencies of the colonial edifice, and served to localise politics of freedom and democracy.

2 2 2 The Second Phase – Political Consolidation and Cultural Resuscitation

At the dawn of independence, a second phase of pluralism began to unfold. The fight for independence had been predicated upon the plight of "African people" as distinct persons with unique needs, aspirations, culture, and law. Incidentally, these struggles had been legitimised by the notions of political and civil rights of the African people, borne out of international human rights instruments and inspired by liberalism and constitutionalism. Upon independence, the claim to African culture was seen as crucial ingredient in forging nationalism. But, the new governments, burdened by the need to improve the economic conditions of

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58 Snider "Colonialism and Legal Form: The Creation of Customary Law in Senegal" 1981 *Journal of Legal Pluralism* 19; Currie "The Future of Customary Law: Lessons from the Lobola Debate" 1994 *Acta Juridica* 146; Manuh "The Women, Law and Development Movements in Africa and the Struggles for Customary Law Reform" (1994–95) *Third World Legal Studies* 211.

59 Hinsley *Sovereignity* (1986) 214. I am in no way suggesting that African culture was bereft of the ideas of sovereignty or human rights for that matter. The argument here is that the notion that benefits of freedom and rights could be vindicated against the state, a creature of the colonial authority, gave impetus to African nationalists who sought to use the same institutions to fight racism and establish a fair system of government.

60 Mojekwu "International Human Rights: The African Perspective" in Nelson & Green (eds) *International Human Rights: Contemporary Issues* (1980) 87–88.

their people and to restore civility in the grand march towards national development, ignored and sometimes rubbished the claim to cultural diversity.[61] They sought to establish national morality through a unified government and court system, while adopting wholesale the western principles of individualism and capitalism. Pluralism was maintained, but as a mere appeasement to constituencies that sought political power on the basis of cultural or traditional legitimacy. The claim for surviving African Customary Law fitted very much with the haphazard policies of cultural aggrandizement propelled by the empty rhetoric of the ruling cliques.[62]

Although the human rights ideas of equality and freedom that had inspired independence movements became part of domestic law through constitutional dispensation, their application never found much support.[63] The suspicion with which human rights principles were regarded by institutions of government reflected itself rather starkly in the political system where "official customary law" was being used as a buffer against the encroachment of liberal ideas.[64] In the judicial arena, the application of "official customary law" in courts rendered very unsatisfactory results. In fact, in a majority of cases, the courts gave affirmation to customary principles that had little or no relevance to values of society.[65] The Zimbabwean case of *Veneria Magaya v Nakayi Shonhiwa Magaya*,[66] and the much publicised decision of the Kenyan Court of Appeal in *Virginia Edith Wambui Otieno v Joash Ochieng Ougo*,[67] are examples from across Africa which illustrate this fact.

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61 Asante "Nation Building and Human Rights in Emergent African Nations" (1969) *Cornell Journal of International Law* 85; M'baye "Human Rights in Africa" in Vasak & Alston (eds) *The International Dimension of Human Rights* (1982) 587.

62 Chanock "Neither Customary Nor Legal: African Customary Law in an Era of Family Law Reform" *International Journal of Law & Family* 1989 72–88; Coleman & Rosberg *Political Parties and National Integration in Tropical Africa* (1964) 661–662; Sandbrook *Closing The Circle: Democratization and Development in Africa* (2000) 59.

63 Wai "Human Rights in Sub Saharan Africa" in Pollis & Shwab (eds) *Human Rights: Cultural and Ideological Perspectives* (1979) 115; Welch "Human Rights as a Problem in Contemporary Africa" in Welch & Meltzer (eds) *Human Rights and Development in Africa* 11–15.

64 The African traditional practice that demands respect to elders has often been promoted as a bar to criticisms against autocratic leadership. An example of the Malawian official who defended the dictatorial regime of the late Hastings Kamuzu Banda on precisely the same terms (respect to elders) has been cited by El-Obaid Ahmed *et al* "Human Rights in Africa – A New Perspective in Linking the Past to the Present" 1996 *McGill LJ* 819.

65 The arguments for duality of courts have been made precisely for these reasons. See for example, Juma 2002 *St Thomas LR* 459.

66 The Zimbabwean Supreme Court ruled that a married woman could not inherit property of her family so long as a male is available to do so. A fifty-eight year-old Veneria Magaya had been evicted by her half brother from property she had inherited from her father. This decision, described as "customary legalized tyranny" by some women's groups in Zimbabwe, represents a widely accepted customary law practice in many African countries. See Coldham *The Status of Women in Zimbabwe*: *Veneria Magaya v Nakayi Shonhiwa Magaya* (SG 210/98) 1999 *Journal of African Law* 248 (discussing the case in the context of gender inequity inherent in customary law).

67 Civil Appeal No. 31 of 1987 (Nairobi); See Cotran *Casebook on Kenya Customary Law* (1995) and Van Doren "Death African Style: The Case of S.M. Otieno" (1988) *American Journal of Comparative Law* 329 343 (reporting on the Court of Appeal judgment and generally commenting on the case); See also Monari "Burial Law: Some Reflections on the

continued on next page

It can be argued, therefore, that without concern for improving the stature of African culture, the immediate post-independence pluralism engendered a more rapid degeneration of customary principles, its *modus operandi* exhibiting acute intolerance to contests against neo-liberal policies and law. [68] Indeed, in sub-Saharan Africa, autocracy and the general decay in all facets of public administration made judicial institutions turn into instruments of cultural suffocation, thus providing affirmation of the inferiority of African customary law to other legal traditions.[69] In the Southern African region, the same policies prevailed, but with an exaggerated relevance in the Republic of South Africa where a long history of apartheid added to the conundrum of unfavourable factors that inhibited the growth of customary law.[70]

2 2 3 Third Phase – Democratic Dispensation and the Hegemony of Rights

After the demise of the Cold War, the subsequent overthrow of the single party oligarchies and the dismantling of apartheid, a new phase of pluralism began to manifest itself in the form of increased attention to human rights. In these nascent democracies, the nationalist ideology eschewed the ills of the past and sought to establish a new path of development based on the respect of individual rights and freedoms. The constitution thus became the kingpin of this agenda, and its interpretation a matter of affirming the new morality based on human rights. The judges of the South African Constitutional Court were quick to indicate that such a role was consistent with the purpose of the constitution itself, and the future aspirations of the South African society. Mohamed J stated this rather succinctly:

> "In some countries, the constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African constitution is different: it retains from the past only what is defensible and presents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular and repressive and a vigorous identification of and commitment to a democratic universalistic caring and aspirationally egalitarian ethos expressly articulated in the constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic."[71]

S.M. Otieno Case" 1988 *Howard LJ* 667, and Cohen *et al Burying SM: The Politics of Knowledge and Sociology of Power in Africa* (1992); Juma 2002 *St Thomas LR* 462–464.

68 In some African countries, judicial organs established by colonial authorities to administer customary law were abolished. Customary law was seen to be inimical to nationalism and hence, economic progress. Juma 2002 *St Thomas LR* 472.

69 Although the failure of dualism is often seen in terms of the incompatibility of customary law principles with human rights and other modern principles emanating from the neo-liberal thinking, some scholars have articulated a much more compelling theme. Mamdani for example, sees the dichotomy between rural and the urban communities created by the duality of legal systems as a manifestation of its failure. He argues that the duality has created a "bifurcated state" where the rural populations are the subjects, while the elite in urban areas enjoy civil rights of citizenship. See Mamdani *Citizen and Subject* (1996).

70 T Nhlapo "African Customary Law in the Interim Constitution" in Liebenberg (ed) *The Constitution of South Africa from a Gender Perspective* 163; Chanock "Neo-Traditionalism and the Customary Law in Malawi" 1978 *Africa Law Studies* 80; Gordon "The White man's Burden: *Ersatz* Customary Law and Internal Pacification in South Africa" 1989 *Journal of Historical Sociology* 41.

71 *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC) para 262.

Currently, the challenge to African law is not rooted in racism or cultural exploitation, but a universal morality that gives expression to the rights available to persons because they are members of the human society. This morality is prescribed by international human rights instruments such as the Universal Declaration of Human Rights (UDHR),[72] the International Covenant on Civil and Political Rights (ICCPR),[73] International Covenant on Economic, Social and Cultural Rights (ICESCR),[74] and a myriad of subsequent instruments. Regional treaties such as the African Charter on Human and Peoples Rights (also known as the Banjul Charter on Human and Peoples Rights),[75] have followed the same path. The fundamental principles of human rights contained in these instruments have found expression in domestic law through the enactment of the Bill of Rights.

Thus, the current phase of pluralism is defined by a more liberal judicial interpretation of the Bill of Rights. The courts are adding their voices to the strengthening of human rights principles by issuing judgments that demand compliance with regimes of international human rights law. The trend is pervasive throughout Africa. The *Unity Dow* decision in Botswana for example, indicated the extent to which the courts were willing to uphold the human rights standards of equality by striking out the provision of s 15 of the Citizen Act for being *ultra vires* the Constitution, on account of its discrimination against women.[76] In South Africa, the new constitutional dispensation seems to have brought with it a level of commitment to the ideas of human equality, dignity and freedom, unparalleled by any other democracy. The courts have taken the view that sustenance of democracy is contingent upon the affirmation of individual rights and freedoms as prescribed by international human rights regimes, and the articulation of such rights within the framework of national constitutions.

The constitutional court has equally shown much willingness to adopt human rights standards in resolving cultural disputes. In *Bhe v Magistrate Khayelitsha*, *Shibi v Sithole* and *South African Human Rights Commission v President of the Republic of South Africa*,[77] for example, the court interpreted the rights to equality under s 9 of the South African constitution to infer a responsibility of providing an opportunity for *all*, "including those who have been subjected to unfair discrimination in the past", to enjoy benefits of an "egalitarian and non-sexist society".[78] The court also reiterated its commitment to human rights standards demanded by international instruments to which South Africa is a party, and affirmed their suitability as necessary tools of societal change. The protection of the rights of women, the abolishment of *all* laws that discriminate against them, and the elimination of racial discrimination, the court observed, were

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72 G.A. Res 217A (III), UN Doc No A/810 (1948) 71.

73 21 G.A. Res 2200, U.N. GAOR, Supp. No. 21 at 52 [hereinafter ICCPR] (*adopted* 16 Dec. 1966, 999 U.N.T.S. 171, *entered into force* 23 Mar. 1976), U.N. Doc A/6316 (1966).

74 21 UN GAOR, Supp. (No. 16) 49, U.N. Doc A/6316 (1966), *adopted* Dec. 19, 1966, *entered into force* Jan. 3 1976, G.A. Res. 2200A (XXI), [hereinafter ICESCR] (As of September 18, 2000, 143 states were parties to the ICESCR).

75 OAU Doc. CAB/LEG/67/3/Rev 5 (1981), *reprinted in* 21 ILM 58 (1982), (1981) *International Commission Jurists Rev*.

76 *Attorney General v Unity Dow* (1992) BLR 119.

77 2005 1 SA 580 (CC).

78 *Bhe* para 50.

needs decreed by international instruments and which found expression in the Constitution. And since constitutional principles took precedence over all other laws, the customary rule that excluded women from inheritance on the grounds of gender was found to be a clear violation of s 9(3). It stated that such rule was "a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order".[79]

It seems, therefore, that in the current phase of pluralism, there is willingness on the part of judicial institutions to demand compliance with human rights principles even in the face of a hegemonic customary practice. So, one might surmise the current trends evince an expansion of human rights, rather than the diminution of it. However, as far as African law is concerned, the expansion of human rights does not necessarily spell the demise of its principles. As will be shown here, the articulation of human rights in a fashion removed from the tenets of societal norms may impede its development by causing its legitimacy to be denied in cultural communities. Likewise, African law needs the human rights principles to refine its rules and procedures, so that it maintains relevance to the evolving character of society. More than ever, the current phase of pluralism necessitates a debate on how processes of internal cultural dynamics and change can be harnessed to reconcile tensions that exist between these two paradigms.

3 Transformative Processes and their Impact on African Law

As already stated, the idea of cultural mobility and change is central to the understanding of how African law could best be developed. Undoubtedly, the current form or expression of culture in Africa and elsewhere manifests a profound link to forces of societal change that are externally motivated. Globalisation trends that we are witnessing today have affected normative process in all parts of the world, but probably with greater force in multicultural environments. This trend, and the concomitant liberalisation in many facets of international and domestic economies, has stimulated the proliferation of networks of a translational character.[80] In popular parlance, networks infer social, political and economic linkages which function as institutions "characterized by voluntary and reciprocal and horizontal patterns of communication and exchange".[81] From the vantage point of a social constructionist, a "network" is a social structure that brings together actors who are interdependent but linked together through complex social, economic and political interactions. They are trans-border agents or structures, closely linked, and acting in concert with one another. In the realm of economics, networks are perceived as the third mode of economic organisation, removed from the mainstream, and yet efficient in the "exchange of commodities whose value is not easily measured".[82]

Transnational Advocacy networks therefore refer to those actors who work across borders, but are bound together in a cosmic wave of ideas, discourse and

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79 *Bhe* para 91.

80 Bob "Globalization and Social Construction of Human Rights Campaigns" in Brysk (ed) *Globalization and Human Rights* (2002) 133–147.

81 Keck & Sikkink *Activists Beyond Borders: Advocacy Networks in International Politics* (1998) 8.

82 Powel "Neither Market nor Hierarchy: Network Forms of Organization" 1990 *Research in Organizational Behavior* 295–296, 303–304.

information.[83] In the context of this discussion, they are presented as agents of normative and cultural change. Often, networks provide political and social space for formal and informal negotiation on social matters, culture, and even politics. This is because a network may comprise a full array of actors from international and domestic NGOs, local social movements, foundations, media, churches, consumer organisations, and even intellectuals.[84] The actors in a network share values, information and services.[85] They have the ability to improvise by invoking new methods of bringing issues to the public agenda and thereby effecting procedural, substantive and normative change – what has been described by some as "strategic portrayal".[86] And because they challenge the realist conception of a state-dominated system, they are able to exert influence on local conditions without the encumbrance of state institutions and bureaucratic inhibitions.[87] In the human rights field therefore, networks have been able to promote norm implementation by pressuring target actors to adopt new policies, and by monitoring compliance with international standards. Thus, the role of networks in creating awareness and minimising friction between cultures can be discerned from the campaigns that they have been able wage over the years. Campaigns against female circumcision, gender inequality and patriarchy, have all threatened the hegemony of African custom, thus bringing to the forefront of national debate normative possibilities of addressing these tensions. In South Africa, such characteristics have been most evident in the gay and lesbian movement. The movement, together with the Human Rights Commission, has been able to build a powerful civil and governmental force that is working towards the elimination of discriminatory laws.[88]

The diffusion of ideas that affect cultural institutions occurs through the linkage of trans-national networks to social movements and vice versa. But the locus of change is in the rural villages, where social movements have the greatest hold. Defined by Tétreault and Teske as "organized efforts at grassroots to represent interests excluded from poorly represented in formal arenas of authoritative negotiation and value allocation", these movements have represented the greatest

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83 Mitchell "Networks Norms and Institutions" in Boissevan & Mitchell (eds) *Network Analysis* (1973) 23.

84 Kirten *Getting to the 21st Century: Voluntary Action and the Global Agenda* (1990).

85 Feree & Miller "Mobilization and Meaning: Toward an Integration of Social Psychological and Resource Perspectives on Social Movements" 1985 *Sociological Inquiry* 49–50; Meyer & Whittier "Social Movement Spillover" 1994 *Social Problems* 277–298.

86 Stone *Policy, Paradox and Political Reason* (1988) 6.

87 This theme has been discussed more elaborately in Risse *et al* (eds) *The Power of Human Rights: International Norms and Domestic Change* (1999); Rosenau *Along the Domestic-Foreign Frontier: Exploring Governance in a Turbulent World* (1997); Risse-Kappen *Bringing Transnational Relations Back In: Non State Actors, Domestic Structures and International Institutions* (1995); Lipschutz "Reconstructing World Politics: The Emergence of a Global Civil Society" (1992) *Millennium Journal of International Studies* 21.

88 The "right to be different", affirmed by jurisprudence emanating from the Constitutional Court, shows how progressive these movements have been in litigating their cause. See the cases of *Minister of Home Affairs v Fourie*; *Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC). A commentary of the case can be read in Gee and Webber "A Confused Court: Equivocation on Recognisisng Same Sex Relationships in South Africa" 2006 *MLR* 831–842. See also *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC), 1999 1 SA 6 (CC).

challenge to cultural expressions inimical to the dignity and respect of women.[89] Generally speaking, social movements have four major characteristics, namely, transformative, reformative, redemptive and alternative.[90] Thus, "strong" social movements, according to Hassim, have capacity to articulate particular interests of its members, mobilise them in defence of such interests and to "develop independent strategies to achieve its aims while holding open possibilities of alliance with other progressive movements".[91] Women's movements, which form a majority of social movements in South Africa, have included local burial societies, *stokvels*, religious groups and ruling party operatives. These movements have edged into the civil society constituency to exert pressure for the promulgation of laws minimising gender inequality and, generally, for removing the social stigmatisation of women. Their efforts seem to have been rewarded in the passage of legislations such as the Recognition of the Customary Marriages Act,[92] the Maintenance Act,[93] and the Domestic Violence Act.[94] Unlike in the past, when women were considered minors, this legislation now elevates the position of women and makes them equal to the men in a marital contract.[95] For example, the Recognition Act in section 6 now provides:

> "A wife in a customary marriage has on the basis of equality with her husband and subject to matrimonial property system governing the marriage full status and capacity, including the capacity to acquire assets and to dispose of them to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law."

Unlike South Africa, where pro-democracy movements of the 1980s had given impetus to the proliferation of social movements fighting for equality within the wider spectrum of the political and socio-economic campaign against apartheid, Lesotho has seen minimal grass-roots activity. The campaign against discrimination is mainly carried by elitist NGOs such as the Federation of International Women Lawyers (FIDA) and Women and Law Southern Africa (WLSA), based in Maseru. However, their campaigns have registered some successes in the adoption of the Sexual Offences Act of 2003. Currently, they have mounted significant pressure on the government to enact the Equality Bill and to withdraw its reservation to the Convention on Elimination of Discrimination against Women (CEDAW).[96] But because of the strong cultural hold in the rural community, and

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89 Tétreault & Teske "Introduction: Framing the Issues" in Teske & Tétreault (eds) *Conscious Acts and the Politics of Social Change: Feminist Approaches to Social Movement, Community and Power, Volume 1* (2000).

90 Cohen & Rai "Global Social Movements: Towards a Cosmopolitan Politics" in Cohen & Rai (eds) *Global Social Movements* (2000).

91 Hassim "Voices, Hierarchies and Spaces: Reconfiguring the Women's Movement in Democratic South Africa" A case study for the UKZN project: *Globalisation, Marginalization and the New Social Movements in Post-Apartheid South Africa* 2004 www.nu.ac.za/ccs/files/Hassim%20Womens%20Movement%20RR.pdf.

92 Act 120 of 1998.

93 Act 99 of 1998.

94 Act 116 of 1998.

95 In s 11(3) of the Black Administration Act, s 27(3) of the KwaZulu Act on the Code of Zulu Law, and the Natal Code of Zulu Law of 1927, the woman was a perpetual minor, subject to the authority of the husband. See also Pienaar "African Customary Wives in South Africa: Is there Spousal Equality after the Commencement of the Recognition of Customary Marriages Act" 2003 *Stellenbosch LR* 256 259.

96 Acheampong 1993 *Lesotho LJ* 79.

the duality of the legal system, tensions between human rights principles and customary practices are yet to come to the forefront of national debate.

4 Human Rights and the Development of Customary Law

It is not the intention of this article to discuss the principles espoused by international human rights instruments in detail, as these can be read elsewhere.[97] However, it is important to note that these instruments, by and large, acknowledge that diversity is a fact of human life. And even though the human rights movement has always dictated that rights and freedoms should be accorded all human beings by virtue of their status as individuals, there is considerable evidence that rights conferred by these instruments can be appropriated by individuals operating within a group. In the human rights project, the idea of cultural diversity is amplified in the recognition of cultural rights.[98] Though less developed, the international regime of cultural rights has emerged from a deep understanding of the equilibrium of societal values that predispose humans to the performance and enjoyment of other rights. Thus, the enjoyment of rights to human dignity may be defeated if a person is not accorded the cultural space to exercise and enjoy this right.[99] This is particularly important in the African context, where individual rights are protected in the context of a group.

> "Many African cultures value the group – one should never die alone, live alone, remain outside social networks unless one is a pariah, insane or the carrier of a feared contagious disease. Corporate kinship in which the individual are responsible for the behaviour of their group members is a widespread tradition. But in addition, the individual person and his or her dignity and autonomy are carefully protected in African traditions, as are individual rights to land, individual competition for public office, and personal success."[100]

In South Africa, the right to belong to cultural communities and participate in cultural activities of one's community is guaranteed under s 31 of the Constitution. However, this right is subject to the Bill of Rights. [101] In the Lesotho text, the freedom to participate in the cultural activities is expressed as an element of state policy and not a right. Section 35 of the Constitution provides that the government will "endeavour to ensure that every citizen has an opportunity to freely participate in the cultural life of the community and to share in the benefits of scientific advancement and its application".

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97 For example, Humphrey "Universal Declaration of Human Rights: Its History, Impact and Judicial Character" in Ramcharam (ed) *Human Rights: Thirty Years of Universal Declaration of Human Rights* (1979). For commentaries on the Banjul Charter, see Rembe *Africa and Regional Protection of Human Rights* (1985); Wa Mutua "The Banjul Charter and the African Cultural Finger Print: An Evaluation of Language and Duties" 1995 *Virginia Journal of International Law* 339; Obinna Okere "The Protection of Human Rights in Africa and the African Charter on Human and Peoples Rights: Comparative Analysis with the European and American Systems" 1984 *Human Rights Quarterly* 141; Umozurike "The African Charter on Human and Peoples Rights" 1983 *American Journal of International Law* 902; Turack "The African Charter on Human and Peoples Rights: Some Preliminary Thoughts" 1984 *Akron LR* 365.

98 Article 15 of the ICESCR; Article 27 of the ICCPR; article 22 and 27(1) of the UDHR.

99 Kymlicka *Liberalism, Community and Culture* (1989) 152.

100 Cohen "Endless Teardrops: Prolegomena to the Study of Human Rights in Africa" in *Cohen et al* (eds) *Human Rights and Governance in Africa* (1993) 14.

101 Section 31(1).

Although a collective claim to cultural rights can now be articulated, albeit to a limited degree, within the international human rights regime, nevertheless, there are still aspects of African culture and legal tradition that offend regimes of international human rights law.[102] Out of these, it is legal equality and non-discrimination that are seen to be most problematic. But just as there are situations of incongruence, there is evidence that human rights ideas were present, and indeed respected, in African traditional societies.[103] This divergence underscores what can be termed the human rights "paradox": the notion that a cultural community could subscribe to norms which deny some sections of it equality and at the same time articulate a deep sense of justice and respect for human dignity. Some discourses have avoided taking sides in this paradox, and instead focused on the useful purposes that customary rules serve in rural societies.[104] Others have taken a middle ground, and suggest that African cultural societies have respected human rights just as much as western societies have. While they admit that certain African customs are not exactly consonant with principles of human dignity, such a phenomenon is not peculiar to Africa. Moreover, culture changes just as much as human rights principles are expanding. It means that the claim of universality of the human rights paradigm must reckon on the acquiescence of other cultures.[105] Makau Mutua, for example, argues that to command universal acceptance of human rights, a painstaking study of each culture must be undertaken, so that the norms and ideals consonant with human rights can be

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102 See, for example, Lehnert "The Role of the Courts in the Conflict Between African Customary Law and Human Rights" 2005 *SAJHR* 241; Nicholson "The Realization of Human Rights within the Context of African Customary Marriages" 2003 *THRHR* 373–389; Van der Meide "Gender Equality v. Right to Culture: Debunking the Perceived Conflicts Preventing the Reform of Marital Property Regime of the Official version of Customary Law" 1999 *SALJ* 100–110; Armstrong "Uncovering Reality: Excavating Women's Rights in African Family Law" 1993 *International Journal of Law & Family* 314 327.

103 For example, a late eighteenth century African writer noted of slaves from Africa: "Their freedom and rights are as dear to them as those privileges are to other people. And it may be said that freedom and the liberty of enjoying their own privileges, burns with as much zeal and fervour in the breast of an Ethiopian as in the breast of any inhabitant on the globe." See Cugoanao *Thoughts and Sentiments on the Evils of Slavery* (1787), quoted in Silk "Traditional Culture and the Prospect for Human Rights in Africa" in Na'im & Deng (eds) *Human Rights in Africa: Cross Cultural Perspectives* 303; Wiredu "An Akan Perspective on Human Rights" in Na'im & Deng (eds) *Human Rights in Africa: Cross Cultural Perspectives* 243–260. The concept of *ubuntu* in Southern Africa, which represents the values of humanism, has been held to indicate some content of the human rights principles within African societies. See Kroeze "Doing Things with Values: The Case of Ubuntu" 2002 *Stellenbosch LR* 252; Mokgoro "Ubuntu and the Law in South Africa" 1998 *Buffalo Human Rights LR* 43; Ejidike "Human Rights in the Cultural Traditions and Social Practices of the Igbo of South Eastern Nigeria" 1999 *Journal of African Law* 71; Koyana "Customary Law and the Rule of the Customary Courts Today" 1997 *Consultus* 126.

104 Knoetze "Westernization or Promotion of African Women's Rights?" 2006 *Speculum Juris* 105–111.

105 Some scholars have suggested that we should today talk of the "human rights culture" when we measure the influence that the movement has had on the "mixing of cultures" phenomenon. Li *Ethics, Human Rights and Culture: Their Compatability and Interdependence* (2006); Wilson *Human Rights, Culture and Context: Anthropological Perspectives* (1999); Clements & Young *Human Rights: Changing the Culture* (1999).

identified. [106] The observance and respect for human rights will be attained only by "locating the basis for the cultural legitimacy of human rights norms and mobilizing social forces on that score".[107]

The path for human rights development envisions the accommodation of normative structures that inhere in African traditional communities, and affording them the opportunity for growth. And, as has already been affirmed by the United Nations, global diversity can never be a hindrance to the commitment to human rights.[108] Thus, the idea of cultural legitimation, which advocates for commitment to socio-economic as well as cultural rights, becomes the key to the promotion of norms sensitive to cultural diversity as well as human rights on the continent. Recently, scholars of this persuasion have stated:

> "The human rights paradigm is unlikely to have much significance for Africans if it does not include concerns about their fundamental economic, social and cultural claims/entitlement in the mediation and guidance of the local definitions and implementation of rights."[109]

4 1 Cultural Legitimation of Rights

As has already been mentioned, the African human rights experience has not overcome the tension between the need to ensure that people enjoy the same rights within communities, while respecting their cultural autonomy. The tension, which many believe is a product of the many years of stagnation that customary law has suffered, has made African law appear inflexible and thus incongruent with human rights. The problem also lies with the manner in which human rights principles have been propagated. Whereas the majority in *Bhe* might want us to believe that the time has now come when those tensions can be eradicated by the strict application of human rights law, empirical research and a number of anthropological studies indicate the contrary.[110] The belief that gender inequity, or any other issues of African law that have a bearing on individual freedoms and rights, can be determined on the basis of a constitutional regime alone, is largely unrealistic. In communities where customary law and tradition has a hold on the majority, the morality of human rights or even constitutional law does not provide all the answers. Further, the social networks and indigenous legal institutions have in many cases diminished the relevancy of human rights, even when the latter is backed by a constitutional regime. Researchers for the Women and Law Southern Africa Project (WLSA) have said as much in their report about widow inheritance problems in Southern Africa.

> "We assumed that this was because women did not know their rights, so we 'educated' them. But then we saw that even when women were 'educated' about the law, they still did not go to court to enforce their rights. We then assumed that was because there were 'other factors' such as fear of courts and inadequate finances.

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106 Mutua "The Banjul Charter: The Case for an African Cultural Fingerprint" in An-Na'im (ed) *Cultural Transformation and Human Rights in Africa* 68; Dlamini, *Human Rights in Africa: Which Way Africa?* (1995).

107 Mutua in An-Na'im (ed) *Cultural Transformation and Human Rights in Africa* 79.

108 Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, June 1993, U.N. Doc. A/CONF.157/24 (Part I) (1993).

109 An-Na'im "Introduction" in An-Na'im (ed) *Cultural Transformation and Human Rights in Africa* 68.

110 See, for example, Grant "Human Rights, Cultural Diversity and Customary Law in South Africa" 2006 *Journal of African Law* 2; Juma 2006 *Lesotho LJ* (forthcoming).

> To overcome these we then helped women enforce their rights. But this did not always work either. One of the turning points in our ideas was when group of WLSA members helped a woman go to court and obtain a court order declaring that all the property which had been in her house was hers and that her deceased husband's family should return it to her. They did so. However subsequently, the widow took all the property and delivered it back to her husband's relatives."[111]

If the human rights paradigm is articulated as the universal morality, then the benefits of diversity may be diminished. Further, it may resuscitate the repugnancy arguments, especially if weighed against other regimes of law that are slow to embrace its principles. Undoubtedly, these concerns raise the issue as to whether different cultures of the world have a stake in the development of their own law, and whether pluralism and diversity in any country could be sustained by a morality that does not respect multiculturalism. In this regard therefore, the orientation of African human rights scholarship has been focused on the development of both a human rights paradigm and African law, through a collaborative process. This process involves the cultural legitimation of human rights within plural legal communities. Also, it involves the guarantee of autochthonous independence to indigenous legal institutions in their pursuit of principles of human dignity, equality and freedom. The argument is that unless human rights are seen to develop from within cultural institutions, or sanctioned by them, their effect may be less significant in plural communities.[112] This collaboration between human rights and African law is important for both paradigms, because it will sustain diversity while at the same time extending the limits of freedoms and rights.

The concept of cultural legitimation of human rights must therefore be understood as embracing the necessary processes of mediating the social construction of rights by creating a political and social space for more inclusive and equitable change. The concept involves the equitable recognition of the various normative systems within a cultural society that have traditionally provided the formalistic definition of rights. It requires that these systems be engaged through dialogue, bearing in mind the cultural dynamics of change, to find concrete and practical value of rules within them, and to evolve a conception of rights that is acceptable across cultures. The negotiated rules can then find expression and application through the legal norms and institutions of state. Absent such negotiation or collaboration, judicial action may evoke considerable opposition. Indeed, courts which abrogate rules of custom do so at the peril of alienating sections of the community from their culture and upsetting societal balance. That is why, when the court in *Bhe* struck out the customary rule of male primogeniture, it was at pains to explain how communities who still believed and practised this custom would thereafter manage their affairs. The court did not see itself as a mediatory institution, but rather, as an agent of cultural change. On reading the majority opinion, it seems that the judges recognised how onerous such a task might be and so shifted the burden to the legislature. Langa DCJ, who wrote the majority opinion stated:

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111 Armstrong "Law and Women's Development: An Introduction" in Ncube & Stewart (eds) *Widowhood, Inheritance Laws, Customs & Practices in Southern Africa* 9.

112 An-Na'im in An-Na'im (ed) *Human Rights In Cross-Cultural Perspectives: A Quest for Consensus* 19–23.

> "I consider . . . that the legislature is in the best position to deal with the situation and to safeguard the rights that have been violated by the impugned provisions it is appropriate forum to make adjustments needed to rectify the defects identified in the customary law of succession."[113]

But rectifying the defects in customary law of succession meant adjusting the African traditional family, which incorporates members of the extended family, and requiring it to conform to the western nuclear family model.[114] And with human rights providing the necessary justification for doing so, the court sought to establish a new benchmark for measuring "morality" in African law. This approach is no different from the colonial approach, and by implication, the repugnancy regime.[115] Consider the 1950 case of *Tshabalala v Estate Tunzi*,[116] where the learned judge made the following observation:

> "According to pure native law no woman can own property but the native Appeal Court has held that the widow is entitled to retain in her own right property earned by her husbands death; the court was aware that this is in conflict with Native custom, but when native custom is repugnant to justice and equity it must give way."

Both *Bhe* and *Tshabala* arrived at the same results, although through different paths. Also, neither sought cultural legitimation in the sense that is discussed here, but took as a given the idea that a superior morality was inherent in normative systems apart from African law.

But all is not lost in *Bhe*. There seems to be an accommodation of diversity, but without necessarily tapping into the collaborative synergy so well intended by the Constitution.[117] The court recognised that African law was an integral part of the South African legal system and needed to be developed. But, except for the little glimpses in the dissenting opinion, it offered no guide on how this could be done. However, the idea of "living law", which the court articulated as the panacea to what it perceived as the defect in African law, indicates a path that may lead into the overall argument being made in this article. That perhaps, more than has been stated before, the human rights regime needs African law as much as African law needs it. And that the social construction of rights should be a product of cross-cultural negotiation that neither wholly embraces external influences, nor fully relies on discourses internally located within culture.

4 2 The Concept of "Living Law"

Living law is a concept which reflects the understanding of African law as an evolving phenomenon. Thus, it is often used to distinguish the "official customary law" with the "law actually lived by the people".[118] In South Africa, the concept has found constitutional recognition in the latter's requirement that courts

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113 *Bhe p*ara 115.
114 Mbatha "Reforming the Customary Law of Succession" 2002 *SAJHR* 259.
115 Thomas & Tladi 1999 *CILSA* 354.
116 1950 NAC 46 (C) 48.
117 The Constitution in s 39(3) provides as follows: "The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."
118 Bennett *A Sourcebook of African Customary Law* vi; Allott "Customary 'Arbitrations' in Nigeria: A Comment on *Agu vs. Ikewibe*" 1998 *Journal of African Law* 231. According to Allott, "judicial customary law" is the law that judges have found or made through case law. He distinguishes this from "popular or practiced customary law" which "comprises of rules which people follow and may change from time to time".

should develop customary law. This requirement is obviously predicated upon the appreciation of the denigration and distortion that African law has suffered over the years, and which may have diminished the relevance of its principles to modern day living. Also, it is a recognition that if African law is going to take its proper place in the legal system, as the Constitution anticipates, then its utility must be in consonance with the needs of those who use it. The concept, which carries with it the idea of change, has attained judicial affirmation in the wake of the struggle to break away from the inequities of the past. This changing judicial attitude was captured by Moseneke J in the following words:

> "True to their worldview, the judges of the past displayed remarkable ethnocentric bias and arrogance at the expense of those they perceived different. They exalted their own and demeaned and excluded everything else. Inherent in this disposition . . . is inequality arbitrariness intolerance and inequity."[119]

Therefore, the concept of living law removes African law from the antiquated domain of traditional perceptions, and places it in a more accommodating and evolving system of societal organisation that we see in African communities today.

In a number of discourses, African law has been shown to posses a deep-seated consciousness which dictates social practice and moulds rules in accordance with societal change. Such a consciousness could be equated to a "grundnorm" of sorts; a centre of gravity from where rules emanate and also find their validity.[120] The "grundnorm" reflects the true essence of an African communal life: it is just, equitable, forgiving, and takes care of the interests of women, children, the weak, poor, as well as the old. Recognising the "grundnorm" in any set of circumstances assists in determining whether tampering with a rule of customary law could have the potential of upsetting the societal balance. It is a tool which agents of change, be they transnational advocacy groups, social movements or civil society groups, could use to locate the entry point for their campaign. An example of how this approach has been successful is in the amelioration of tensions between the African practice of female circumcision and human rights. The civil society groups working in this area have emphasized the "right of passage" implication for the practice, which is not inimical to the human rights paradigm, and sought to retain its ideological essence by advocating for other physical ways of achieving it.[121] Likewise, in the current debate about the male primogeniture rule of African law, scholars have suggested that a triple-pronged approach that advocates for the retention of the choice of law rules (albeit in a modified manner), the recognition of the essence of customary succession, and the development of African law within the framework of communal societies and the Constitution.[122] If the Supreme Court of Appeal in *Mthembu v*

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119 *Daniels v Campbell NO* 2004 7 BCLR 735 (CC), 2004 5 SA 331 (CC),.

120 The concept of the "grundnorm" is discussed in Juma 2003 *CILSA* 330.

121 Eliah "In Uganda, Elders Work with UN to Safeguard Women's Health" 1999 *UN Chronicle* 31–33; Mwakisha "Alternatives to FGM that are Working" *Daily Nation* (Nairobi, April 14, 1991) http://library.northernlight.com/FD19990413530000116.html?cb=0&sc=0#doc.

122 Knoetze 2006 *Speculum Juris* 110. See also Kerr "The Constitution, the Bill of Rights and the Law of Succession (2)" 2006 *Speculum Juris* 1–16. The author suggests that other than abolishing rules of customary law by way of judicial action, probably a commission should be established to investigate amongst communities what the appropriate rules should be in regard to Bill of Rights. This position supports the argument made in this

continued on next page

Letsela[123] had followed this approach, it would not have avoided the deliberations in African law that place emphasis on communal ownership rather than on individual ownership. Thus, it could have been cautious of the father-in-law's claim that the woman whom his son loved and lived with in his own house should be denied the benefit of property belonging to the home.[124] Moreover, it could have appreciated the purpose and nature of customary succession, which is to protect family and the community from the "burden of looking after the deceased's dependants".[125]

Mthembu has now been effectively overruled by *Bhe*, where the Constitutional Court pronounced that the practice of male primogeniture in customary succession was *ultra vires* the Constitution. But since the court did not bother to investigate the "grundnorm", it found itself inhibited in pronouncing what the living law was in this circumstance. But, conscious that it was abrogating a community's culture, the court was at pains to show that such abrogation was for the good of African law, and African culture, by extension. And that by doing so, it (the court) was departing from the mistakes committed in the past, which had resulted in the failure "to interpret customary law in its own setting, but rather attempting to see it through the prism of the common law or other systems of law".[126] And yet, without offering any safety net to the affected communities, the court was doing exactly the same thing. Indeed, the gist of its opinion was that a proper interpretation of customary law meant weighing its rules against the constitutional regime, and soliciting from it compliance with the spirit, purport and objects of the Bill of Rights. The court failed to give guidance on the development of African customary law, thus squandering an opportunity to give judicial affirmation to the cultural legitimation process.

Be that as it may, it is useful to remember that the propriety of a rule of African law may be litigated in a modern judicial system, but the determination of its true worth and value will still reside in communities who utilise it. Thus, a new analytical framework for understanding the role of African law needs to be developed, in an era where the notion of equality and fundamental freedoms are elevated to international standards through a constitutional dispensation process. It may no longer be useful to question the morality of a Bill of Rights regime like the courts did with the repugnancy doctrine, or like die-hard relativists have argued in opposition to the universalism of human rights. However, finding latitudes for the development of African law that represent the current aspirations and values in society indicate a new approach, which commits to the idea of human dignity, and at the same time respects diversity. The concept of living law invigorates the evolution of legal principles within African law. This could foster cultural transformation, and promote the debates on the construction of a human rights agenda that do not alienate people from their cultural community or their resources.[127]

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paper that the "grundnorm" in customary law could be sustained even with the diffusion of rules and adoption of human rights standards of equality and rights.

123 2000 3 SA 867 (SCA).

124 Ndima 2003 *CILSA* 323.

125 Mbatha 2002 *SAJHR* 260, relying on Bekker & Coertze *Seymour's Customary Law in Southern Africa* 4 ed (1982).

126 *Bhe* para 43.

127 Juma 2006 *African Journal of International & Comparative Law* 177.

5 Conclusion

During the repugnancy era, the denigration of African law was part of a deliberate government policy, aided by religious constituencies and other social factors. Although government action, religion, and other social interactions still have profound impact in the development of African law in South Africa and Lesotho, such policies are not aimed at denigrating African law, nor are they motivated by racism and economic exploitation. And with the arrival of the human rights paradigm, and with governments showing a willingness to embrace the principles of African law, the opportunities for diversified growth are improved. The South African Constitution even enjoins judicial institutions to develop African law, thus affording African law latitude for internal and external re-assertion. These developments carry with them the collaborative synergy that both human rights and African law need to enhance the overall quality of the legal systems in these two countries.

The Equality Act: Enhancing the Capacity of the Law to Generate Social Change for the Promotion of Gender Equality

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1 INTRODUCTION

Since the advent of democracy in 1994 and the adoption of the 1996 Constitution,[1] South Africa has been committed to the promotion of gender equality. This commitment is clearly manifested in the founding provisions of s 1(b) of the Constitution and the preamble to the Equality Act,[2] which acknowledges the inequalities and discrimination that remain deeply embedded in social structures, practices and attitudes. Such inequalities continue to undermine the aspirations of our democracy, despite the progress made in restructuring and transforming our society and its institutions.

The Equality Act was passed in response to the constitutional obligation to ensure that national legislation was enacted to give effect to the right to equality, including gender equality.[3] There are also a number of other pieces of legislation that have been passed for the same purpose.[4] Together, the Equality Act and these other pieces of legislation entrench a series of rights, including socio-economic rights,[5] that have a direct bearing on the improvement of the quality of women's lives.

Though these other pieces of legislation have the potential to improve the status and the quality of life of women in South Africa, the Equality Act is of particular significance. The focus in this paper primarily falls on this piece of legislation, as it is acknowledged to be a potentially powerful tool for the achievement of gender equality in South Africa.[6] The importance of the Equality

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1 The Constitution of the Republic of South Africa, 1996, hereinafter referred to as the "Constitution".

2 The Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000, hereinafter referred to as the "Equality Act".

3 See s 9(4) of the Constitution.

4 For example, the Domestic Violence Act 116 of 1998, hereinafter referred to as "DVA", the Recognition of Customary Marriages Act 120 of 1998, and the Maintenance Act 99 of 1998, which have a direct bearing on the promotion of gender equality.

5 See *In re: Certification of the Constitution of the Republic of South Africa* 1996 10 BCLR 1253 (CC); *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC).

6 See Jagwanth and Murray "Ten Years of Transformation: How has Gender Equality in South Africa Fared?" 2002 *Canadian Journal of Women and Law* 7, where they refer to the importance of this Act as a "constitutional genesis".

Act lies in its express aim to prevent unfair discrimination and promote equality through the use of special legal and other measures.[7] The Act thus prohibits unfair discrimination on a number of grounds, including gender, sex, pregnancy, marital status, and requires affirmative action measures to promote the achievement of gender equality. Before the Act was passed, the Constitutional Court in *Hugo*[8] held:

> "[T]he prohibition on unfair discrimination seeks not only to avoid discrimination against people who are members of the disadvantaged groups, it gives recognition to the purpose of the new constitutional and democratic order in establishing a society in which all human beings are accorded equal dignity and respect, regardless of their membership of particular groups."[9]

What is equally important is the establishment of the Equality Courts[10] within the magisterial sphere. The enforcement of gender equality at the magistrates' court level in South Africa is an important example of the use of the law as a tool for social change.

The purpose of this paper is to assess the Equality Act as a particular example of the use of law as a vehicle for social change. Specifically, I shall ask the question: how might the right to equality, through its enforcement in the magistrates' courts, improve the quality of life of women in South Africa? In so doing, this paper draws on international debates over the use of law as a strategy to promote gender equality.

2 GIVING MEANING TO THE RIGHT TO "EQUALITY"

The South African Constitution has provided a framework for addressing the legal and socio-economic structures at the root of gender inequality and, in particular, women's weak position in law and society. Ngcobo J in *Minister of Finance v Van Heerden*[11] highlighted the distinct advantage that the South African Constitution has when compared with other Constitutions, as it recognises that decades of systematic discrimination cannot be eliminated without positive action being taken to achieve positive results.[12]

The Constitution, which puts in place the key principles with regard to eradicating inequalities, explicitly commits society to improve the quality of life of all

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7 The greatest challenge at this stage for the implementation of the Equality Act is the fact that the promotional regulations have not yet been passed by the Department of Justice and Constitutional Development. The jurisprudence that has emanated from the Equality Courts does not have a direct bearing on gender equality, since most of the cases concern unfair race discrimination. But the decisions have at least worked towards the eradication of unfair disadvantages. See, for example: *Pillay/De Vos v Sliver Club*, Cape Town Equality Court, Western Cape, 6 October 2003; *Mkhize v Edgemead High School,* Blue Downs Equality Court, Western Cape, 3 December 2003; *Black v Broederstroom Valansie-Oord,* Brits Magistrates' Court, North West, 5 March 2005; *Robin Neo v Ncusane*, Durban Magistrates' Court, 6 May 2005.

8 *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC).

9 *Hugo* para 41. The Court further acknowledged that the achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that is a goal of the Constitution that should not be overlooked.

10 See Chapter IV, s 16 of the Act. There are more than 350 courts established and launched at this stage that are in operation throughout South Africa.

11 See *Minister of Finance v Van Heerden* 2004 11 BCLR 1125 (CC).

12 *Van Heerden* para 127.

citizens and free the potential of each person. In essence, it seeks to restore and protect the equal worth of everyone and heal the divisions of the past in order to establish a caring and just society as envisaged in its Preamble. In this regard, it promotes not only equal protection of the law and non-discrimination, but also, as Moseneke DCJ put it in *Van Heerden*, a "start of a credible and abiding process of reparation for past exclusion . . . within the discipline of the constitutional framework".[13]

In furthering the objectives of the Constitution, the Constitutional Court has, on a number of occasions,[14] given meaning and content to the concept of "equality". It interpreted and applied the values and principles entrenched in the equality laws in a manner that addresses systemic disadvantage and discrimination experienced by those who are vulnerable, and in particular by women.[15] It took into account South Africa's history of exclusions and inequalities that undermined the human worth of an individual, which were further perpetrated by the direct use of state apparatus. It confirmed this contention in *Prinsloo v Van der Linde*[16] that "until recently, very many areas of both public and private life were invaded by systematic legal separateness coupled with legally enforced advantage and disadvantage. It is the majority not the minority which has suffered from this legal separateness and disadvantage".

This legal separateness and disadvantage affirmed in *Prinsloo* created particular values that were designed to deepen and perpetuate a misunderstanding of values and morality. Furthermore, this system had dehumanised many societies and individuals and caused damage in many other ways. It introduced an extreme level of intolerance and because it had to be maintained through extreme violence, it encouraged violence at every level of society. That in turn contributed directly to the inequalities that we are trying to correct today. As Mokgoro J put it in *Van Heerden*:

> "Apartheid was not merely a system that entrenched political power and socio-economic privilege in the hands of a minority nor did it only deprive the majority of the right to self actualization and to control their own destinies. It targeted them for oppression and suppression. Not only did apartheid degrade its victims, *it also systematically dehumanized them, striking at the core of their human dignity*. The disparate impact of the system is today still deeply entrenched."[17]

This was confirmed by the Constitutional Court in *Brink v Kitshoff*,[18] where it held that the policy of apartheid, in law and in fact, systematically discriminated against Black people in all aspects of social life, and the deep scars of this appalling programme are still visible in our society.

The Constitutional Court has further rejected the same or identical treatment standard of equality when interpreting the equality clause. It has thus recognised that not every instance of differential treatment will result in inequality, and that,

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13 *Van Heerden* para 25.

14 See *Hugo* above; *Fraser v Children's Court, Pretoria North* 1997 2 BCLR 153 (CC), *Bhe v Magistrate, Khayelitsha*; *Shibi v Sithole; SAHRC & Women's Legal Centre Trust v President of the Republic* 2005 1 BCLR 1 (CC).

15 See for example, *Daniels v Campbell* 2004 7 BCLR 735 (CC).

16 1997 6 BCLR 759 (CC) para 20.

17 See *Van Heerden* para 71 (my emphasis).

18 *Brink v Kitshoff NO* 1996 4 SA 197 (CC) para 40.

conversely, identical treatment may produce serious inequality.[19] The entrenchment of the right to equality in the Constitution is viewed as a commitment that represents a radical departure from a past based on exclusion and intolerance, and represents a movement towards the acceptance of the need to develop a society based on equality and respect by all for all.[20]

At face value, the entrenchment of the right to equality extends to everyone the right to equal protection and benefit of the law.[21] The conception of equality underlying the equality clause is a substantive one that requires courts to decide cases in a way that actually ensures the equal enjoyment of all the rights and freedoms.[22] This approach is in line with the views of Manfred,[23] who argues that substantive equality demands that law and policy should be concerned with actual difference in the social and political conditions of specified groups, rather than with the neutral application of formal rules to similarly-situated individuals.

Indeed, Ngcobo J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*[24] contended that the purpose of equality is to improve the quality of life of those who are disadvantaged, and not to perpetuate the privileges of the advantaged. This contention requires that the actual conditions of human life must be addressed and not the abstract concept of identical treatment envisaged in the founding provisions and s 9(1) of the Constitution. The Constitutional Court has developed an understanding of substantive equality that recognises that women and other disadvantaged groups are not subjected to forms of inequality which are systemic in nature and embedded in the manner in which our societies are structured. For example, O'Regan J in *Brink v Kitshoff*[25] emphasised the Constitution's commitment to eliminate discrimination against women (and in particular Black women) when she held that gender discrimination in our society has resulted in deep patterns of disadvantage which are particularly acute in the case of Black women, where race and gender discrimination has overlapped.

The constitutional commitment to establish a non-sexist society which is underpinned by democratic values and human rights requires a conception of equality that goes beyond mere formal equality and promoting identical treatment in every instance. This also requires an approach or enquiry that would establish the substantive basis in assessing the impact of the discrimination. In furthering this objective, the Constitutional Court in *Harksen*[26] developed a three-stage approach in assessing the unfairness of the discrimination, which is:

- the position of the complainant in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;

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19 See *Harksen v Lane* 1997 11 BCLR 1489 (CC). Sachs J in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 6 BCLR 726 (CC) reiterated the Court's views on the centrality of the self-worth to the idea of equality and said that inequality is established not simply through group-based differential treatment, but through differentiation which perpetuates disadvantage.

20 See, Justice Sachs in *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC).

21 Section 9(1).

22 See s 9(2).

23 Manfred *Feminist Activism in the Supreme Court: Legal Mobilization and the Women's Legal Education and Action Fund* (1996) 171.

24 2004 7 BCLR 687 (CC) para 74.

25 Para 44.

26 See *Harksen* para 51.

- the nature of the provision or power and the purpose sought to be achieved by it; and
- any other relevant factor to determine the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity.

From this test, the question may be asked whether the purpose has an important societal goal and how the courts should interpret the equality clause in giving effect to this determination. There are opposing views on the proper interpretation of the equality clause. For instance, Moseneke J in *Van Heerden* developed a three-stage enquiry in giving effect to the right to equality on the basis of s 9(2). This entails whether:

- the programme of redress is designed to protect and advance a disadvantaged class;[27]
- the measure is designed to protect or advance those disadvantaged by unfair discrimination;[28] and
- the measure does promote the achievement of equality.[29]

This test adopted by Moseneke J seeks to ensure that the translation of formal equality requires the eradication of the patterns of discrimination which were generated by our history, colonialism and the patriarchal nature of our society. Therefore, s 9(2) requires the adoption of pro-active measures to help ameliorate the impact of the past, together with effective enforcement mechanisms, since discrimination cannot be eliminated by the paper right alone.

Though Mokgoro J did concur with Moseneke J in the order, on this approach and his analysis of the requisites of s 9(2), she holds a different opinion: that the determination and proper interpretation of the equality clause should be undertaken on the basis of s 9(3), not s 9(2). She argues that the approach in s 9(3) is quite different from s 9(2), which requires an assessment on the basis of the perspective of the goal intended to be advanced.[30] Section 9(3) focuses on the group or categories of persons disadvantaged by unfair discrimination, which in this instance would be women. She further argues that the impact on the complainant and his position in society is of utmost importance (as outlined in *Harksen*) because the aim of the challenged measure and whether it advances a legitimate government purpose will be important in relation to the category of persons which it seeks to advance.[31]

But there is an intersection between these two subsections: it would prove very difficult for an aggrieved party to rely solely on the courts without the existence of legislative and other measures that are adopted to assist those experiencing an unfair advantage. In fact Mokgoro J is advancing the argument by Faundez[32] that legislative change is a "fatal attraction" and is just a backward sphere for social change. Further, the law is miles away from social realities as it is enclosed unto itself, blind and not attentive to the broader society in which it operates.[33]

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27 *Van Heerden* para 38.
28 *Van Heerden* para 41.
29 *Van Heerden* para 44.
30 *Van Heerden* para 78.
31 *Van Heerden* para 79.
32 See Manfred *Feminist Activism in the Supreme Court*.
33 Sierra *Law, Social Change and Lawyers in Chile: From the Shrillness of the 60s to the Silence of Today* (2002) 6.

Monreal[34] emphasised this contention through her assertion that new values and social needs unceasingly lash the petrified and inadequate law that is unable to adapt itself to emerging realities.

In a nutshell, she affirms the view that law lags behind the changes in society and would never produce significant social changes. Therefore, the judiciary is better placed to produce social changes as it would have to analyse the impact the discrimination has on the aggrieved party.

These two subsections form the bedrock of our equality clause because without a legislative and policy guideline, the burden would be on the courts to establish the basis upon which the discrimination is founded. The adoption of these legislative measures seeks to curtail this burden, as the state is required to be proactive in eliminating these inequalities without requiring the courts constantly to intervene first. This requires the state to debate and adopt the best possible measures of overcoming decades of inequalities. It should be remembered that it is not only the courts that are responsible for vindicating the rights enshrined in the Bill of Rights – the legislature is in the frontline in this respect.[35] Furthermore, the more direct and accessible strategies in laying the foundation for the promotion of gender equality in South Africa have been through legislation and policy.[36]

Also, the mere passing of laws may not have the desired effect and will certainly not automatically eliminate discrimination and prejudice without effective tools that would ensure their proper implementation. The adoption of these laws and their enforcement by the courts are not distinct from each other. They are interdependent because it is important for the courts to develop an understanding of equality that can be used to secure substantial equality for both men and women. The struggle to secure gender equality should not be confined to courtrooms, because litigation has its own limitations and tends to be the privilege of the economically empowered.[37]

The interpretation of the equality clause by the Constitutional Court serves as a point of reference for the magistrates' courts when enforcing the Equality Act and other gender-based legislation. Furthermore, the magistrates' courts (including the Equality Courts) are required to move beyond the use of standard measures in relation to the right to equality, and to take into account the socio-political conditions of the litigants in the cases before them.[38]

The evolution of our equality jurisprudence, the Constitutional Court has held, must occur on the basis of a proper understanding of South Africa's history of

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34 Monreal *The Law as an Obstacle to Social Change* (1975).

35 See Sachs J in *Fourie* above.

36 The courts become involved only when it is alleged that the state has failed or has adopted a "dragging of the feet approach" with regard to the implementation of the adopted laws. For instance, the Equality Act requires the South African Human Rights Commission to monitor the extent to which unfair discrimination still persists in the Republic, prioritising race, gender and disability as key areas of focus (s 28(2)). These laws set the tone for harmonising gender relations in South Africa without the courts becoming involved at the initial stages.

37 See Mokgoro "Constitutional Claims for Gender Equality in South Africa: A Judicial Response" 2003 *Albany LR* 567.

38 *Ibid.*

institutionalised racial and gender discrimination.[39] Like the Court's rejection of the identical treatment standard of equality, this context-based approach must be taken into account by magistrates when applying the Equality Act and other equality legislation.

3 THE USE OF THE "RIGHTS-BASED APPROACH" IN PROMOTING GENDER EQUALITY

The successful enforcement of the right to equality in South Africa depends on the effectiveness of the law in bringing about social change. The Equality Act establishes rights and provides a potential framework for social change, but its success ultimately depends on whether the enforcement mechanisms put in place by the legislature are capable of achieving their stated goals. In this sense, the rights in the Equality Act are not the sort of rights that Madala J said in *Soobramoney*[40] were "an ideal and something to be strived for", but rights whose legitimacy depends on their immediate enforceability.[41]

But how does the use of the law produce social change? Before engaging with this question it is worth noting that an examination of the concept of "law", "social" and "change" should be undertaken. This is based upon the assumption that law is not just a set of formal rules. It requires the translation of those rules into practical realities that will ensure the equal enjoyment of all the rights and fundamental freedoms entrenched in our laws. In this regard, Minow[42] in her analysis of these concepts suggests that:

- "law" includes judicial, legislative and regulatory action, but also their inaction, and the contrasting activities of the private groups and individuals who pursue law enforcement or otherwise seek to alter the way the society is governed;
- "social" should be read to include the context of politics and culture in which people forge consciousness of their society and their aspirations for it. It further includes the arenas for debates over what morality and economic justice should entail; and
- "change" includes not only specific, discrete alterations, but also processes of renovation and continuing challenge of the *status quo*.

The examination of these terms, though it has not been thoroughly canvassed in this article, provides a splendid and solid symbol for the use of the context-based approach in consolidating a significant shift in approach to the advancement of the promotion of gender equality. Goonesekere[43] has identified that this approach has benefits that other approaches lack, such as, for example:

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39 See Sachs J in the *National Coalition* case above.

40 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) para 42.

41 This interpretation reduced the quality of the protection given to the fundamental rights of everyone by the Constitution and reflected no considerations of social realities.

42 Minow "Law and Social Change" 1993 *UMKC LR* 171. She acknowledges the lack of consensus on the actual meaning of these terms and further poses a challenge to those with different opinions if her analysis sparked a debate as they remain largely unexamined in debates over law and social change.

43 Goonesekere "A rights-based approach to realizing gender equality" www.un.org.za/womenwatch/rights (accessed 06-11-2006).

- Both national and international framework of human rights provides a forum for asserting individual claims of human rights violations including gender equality;
- The use of this approach allows legitimate claims to be articulated with moral authority as it stimulates deep chords of response in many;
- It has the potential to empower individuals and communities at grassroots level to believe that they have to exercise their right to equality;
- It establishes a set of demands premised on the intrinsic worth of the individual; and
- The use of this approach does not only justify legitimate claims based on the right in question but because the realisation of the right to equality is an important goal in itself.

In essence, this means that the use of this approach, based on the infringement of the right to equality, creates a platform for legal entitlements claims. It further requires an active response from the state as it creates positive duties for the state and negative ones for private bodies. At the core of this approach is a two pronged strategy that aims to strengthen the duty of the state to fulfil its obligations and to empower people (and in particular women) to invoke their rights, as Lunjman has argued.[44] This requires an analysis of the ideals that this approach strives to attain, what vision it represents and how this vision is contrasted with existing practices. The distinct advantage of this approach is that it allows people to demand justice as a "right" not as "charity".[45]

The rights-based approach, in other words, requires the magistrates' courts to move beyond the limits of the law, because law itself is not necessarily the most important factor in understanding how society changes. It cannot resolve problems such as inequality which have their origins elsewhere; for example, in beliefs or ideologies.[46] The courts are important as they manage disputes and remedy specific injustices that emerge from these problems, but these problems nonetheless resurface in other guises and situations.

This approach is thus not without shortfalls. There are factors that limit the potential use of this approach in ensuring that the envisaged objectives are achieved. Without providing a comprehensive list of these factors, the following, should, for example be taken into account:

- Due to the lack of legal representation and awareness about both legal and constitutional rights in South Africa, statutory rights are not always implemented in practice;
- People may also not be aware of their rights and responsibilities as citizens or find it difficult to claim their rights and effectively participate in democratic processes;[47] and

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44 Ljungman "A Rights Based Approach to Development" in Mikkelson *Methods for Development Work and Research – A New Guide for Practitioners* 2 ed (2005).

45 A term adopted by Kofi Annan "Human rights and development" www.unhchr.ch (accessed on 12-07-2006).

46 See Anleu "Courts and Social Change: A View from the Magistrates' Courts" Proceedings of the Social Change in the 21st Century Conference, 28 October 2005, Queensland University of Technology, 4.

47 O'Donnell "Beyond Justiciable Rights – Standards and Quality" paper presented at the Conference titled "Global Trends in Disability Law – the Context for Irish Law Reform"

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- The fact that the right to equality competes with other claims such as the right to culture or religion, which in some instances, compromises the dignity of women. For instance, it may prove difficult to reconcile and balance competing human rights values. This is clearly highlighted by the debates on the adoption of the Civil Union Act[48] on 1 December 2006; that for example, the issue of same sex marriages is un-African and runs contrary to the prescripts of the Bible that entitles marriage only to a male and female. But what is interesting is the fact that the Bible does not say that same sex-couples should not marry.

Then the questions may further be asked: do these factors limit the potential use of this approach in promoting gender equality? Do they strengthen the view that law is out of pace with societal changes? Do they also become a reason for rejecting the rights-based approach? Then, how do these questions on the use of this approach by the courts achieve the social change objectives envisaged in the Equality Act?

There are opposing views on this question. Mukhopadhyay argues that due to the patriarchal nature of both the state and our society, and given the bias in the dispensation of justice by the judiciary and its functionaries relating to gender equality, it is not sensible to expect that the law can ever be a potent force to change existing social structures. He argues that "the hope of ensuring gender equality using the law as an instrument of social engineering is an altogether impossible dream though it is a central legitimating mechanism in the implementation of gender equality".[49]

This argument by Mukhopadhyay was given a concrete content by the decision of the Komga Magistrate's Court, where the magistrate reduced the concept of "gender equality" to mere "women's equality". This case (*State v Mbuyiselo Hlalatu*)[50] provides an example of gender bias in the dispensation of justice by the judiciary which compromised the significant gains achieved since the dawn of democracy in 1994. In this case, Plasket J of the Eastern Cape High Court reviewed and set aside the decision of the Magistrate's Court. The accused had been convicted of contravening the terms of a protection order issued under s 7 of the Domestic Violence Act. On review, and without detailing what ensued at the Magistrate's Court, Plasket J found that:

- There were a number of flaws in respect of the manner in which the case was handled;
- The magistrate was hostile towards the accused;

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organised by Human Rights Commission, Law Society of Ireland and the National Disability Authority, 13th September 2003, Dublin 7.

48 Act 17 of 2006.

49 Mukhopadhyay "Law as an Instrument of Social Change: The Feminist Dilemma" Forums, Portland State University (2003) 13 at www.hsph.harvard.edu (accessed 14-04-2006). As Lorde puts it in "The Master's Tools Will Never Dismantle the House" in *Sister Outsider: Essays and Speeches* (1984) 454, the courts will never be able to bring about a genuine change in promoting social justice.

50 The fact that women are most often at the receiving end when it comes to issues of inequality and discrimination cannot be dismissed. This does not mean that men should be treated with indignity, if the purpose is to advance the strategic goals of harmonising social relations. The respondent in this matter happened to be a man who needed the protection of the court.

- The questioning of the accused by the court was also very suspect; and
- The state closed its case without leading any evidence.

Although the argument by Mukhopadhayay and the decision of the Komga Magistrate might prove bias and identify barriers in the legal system in using the law in advancing strategic objectives as envisaged in the Equality Act, a need exists to raise the eyes above the law in order to come back to it again and reflect on its interface with society.[51] As Thornton[52] notes, the law may not be able to play a "*decisive role*" in producing social change, but it should not be disregarded altogether in understanding its potential use, and how strategies can be developed that would enhance the capacity of the law so as not to undermine the core agenda of gender equality and non-discrimination. Furthermore, the law plays a significant role in consolidating, expressing, underpinning and supporting the existing power relations in societies, including those between women and men. It is the "hidden infrastructure" which conditions our society and pervades almost every aspect of our lives.[53] In consolidating this argument, Sachs J held that law is a great teacher, establishes public norms that become assimilated into daily life and protects vulnerable people from unjust marginalisation and abuse.[54]

In this regard, law has a legitimating role in the construction and maintenance of social relations, a point that Mukhopadhyay also acknowledges. In the end, as Agnes argues, law may be better approached not as the embodiment of "justice" but as a "strategy" for social change.[55] In enhancing Agnes's argument, the effective and proper implementation of the Equality Act requires an analysis of the identified problem relating to the category of people that the equality clause seeks to advance, which in this instance, would be women, as outlined in *Harksen,* in order to assess the unfairness of the discrimination.

This task requires the development of steps that should be taken to ensure the proper implementation of the right to equality through the massive allocation of resources, both human and financial. Also, the establishment of the South African Human Rights Commission[56] in terms of s 181(1)(b) of the Constitution, and other bodies such as the Commission for Gender Equality,[57] gives recognition to the fact that it is not exclusively through the courts that this right may be enforced – a "soft mechanism"[58] is another possibility. For, instance the Equality

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51 See Sierra *Law, Social Change and Lawyers in Chile*.

52 Thornton "Feminism and the Contradictions of Law Reform" 199 *International Journal of the Sociology of Law* 455.

53 Boss "Constitutional and Legal Reform in Ireland, 1937–1998: The American Context, An Essay in Culture and Law" in Porsdam (ed) *Folkways and Law Ways: Law in American Studies* (2001) 122.

54 See *National Coalition* above.

55 Agnes "Legal Strategies for Women's Empowerment: Evolving Feminist Jurisprudence" in *Changing the Man's World so It's also A Woman's Place* (1998) 17 at www.zaza.com/awomansplace. She furthers this assertion that the courts are a ground for expressing skill and legal acumen rather than a forum to attain justice as battles can be won only through carefully worked out legal strategies.

56 Hereinafter referred to as "SAHRC".

57 Hereinafter referred to as "CGE" and established in terms of s 181(1)(d) of the 1996 Constitution.

58 See De Vos "Pious wishes or directly enforceable human rights? Social and economic rights in South Africa's 1996 Constitution" 1997 *SAJHR* 67, where he drew a distinction

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Act places a great emphasis on the role of both institutions to ensure the proper implementation of this Act.[59] These institutions should collaborate in monitoring and assessing the extent of enjoyment of the right in question.

Furthermore, the mandate of, for example, the SAHRC contained in s 28(2) of the Equality Act must be read in conjunction with other functions and powers that are provided in s 184 of the Constitution and other provisions of the Act. For instance, s 25(2) provides that:

> "The South African Human Rights Commission and other relevant constitutional bodies may, in addition to any other obligation, in terms of the Constitution or any law, request any other component falling within the definition of state or any person to supply information on any measures relating to the achievement of equality including, where appropriate, on legislative and executive action and compliance with legislation, codes of practice and programmes."

The purpose of this section is not merely to gather information concerning the implementation and the promotion of the right to equality. The gathered information must still be analysed and evaluated in terms of its mandate in s 28(2). Of particular importance for the SAHRC is the striking of a difficult balance between ensuring that it is possible for the state to provide such information, whilst also providing an effective basis for evaluating the state's performance.

In addition, Friedman[60] has stressed the importance of the participation of civil society in the decision making process, and that such participation would help people to develop a broad based awareness of national human rights standards. Through such participation, they will be able to foster social mobilisation and involvement, respect for and the creation of a culture of human rights. Although Friedman was writing about socio-economic rights (which, of course, directly or indirectly affect women) he affirmed that there are two most important rights in the Constitution that would ensure the efficacy of our law. These are:

- The capacity of the general public to participate in the democratic processes; and
- To hold those in power accountable for the decisions they make relating to the implementation of socio-economic rights.

In a nutshell, the use of the rights-based approach gives recognition to the importance of claims of inequality and non-discrimination. Further, enhancing women's capacity needs a commitment to translate the paper right into reality through the design and implementation of the core agenda of women's rights. This approach should continue to be used by women because the key question is not whether to use the law for social change, but how to do it and to do it effectively.

4 THE SPECIALISED EQUALITY COURTS: AGENTS FOR SOCIAL CHANGE?

Without providing a comprehensive review of the role of the ordinary magistrates' courts in promoting gender equality, it is clear that the operation of these courts was seriously flawed, and this compromised women's struggle for equality

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between the hard protection of socio-economic rights through the courts and their enforcement through bodies such as the South African Human Rights Commission.

59 See ss 25 and 28(2) of the Act.

60 Friedman "South African Human Rights Commission Consultative Workshop on Monitoring Socio-Economic Rights" 5–6 December 2006, Johannesburg.

in South Africa.[61] The ordinary magistrates' courts were simply not equipped to apply the values and principles entrenched in the new gender laws in a manner that would address the systemic discrimination and disadvantage experienced by vulnerable groups, particularly women.

The decision to establish specialised magistrates' courts was taken against this background. These equality courts have benefits that the ordinary magistrates' courts cannot offer, including:

- The appointment of a special magistrate and clerk to deal with matters of equality for the effective implementation of the legislation in question. As soon as the magistrate undertakes his or her duty after being trained, his or her expertise and understanding on the subject-matter will grow as he or she becomes more familiar with the process and how to dispose of equality cases.
- Secondly, as the magistrate's expertise grows, his or her comprehensive understanding of equality will provide greater consistency in the decision-making processes.
- Thirdly, the magistrate's in-depth knowledge of the area in question will enable him or her to identify the important issue in a case during the "directions hearing"[62] and thereby give the parties concerned a more informed decision.
- Fourthly, these courts should reduce the delay in the disposal of cases as the Act prescribes time periods in which the matter should be resolved.[63]
- Fifthly, the fact that rules of evidence are relaxed at these courts favours the required context-sensitive approach to the right to equality, and moves the trial away from an adversarial approach towards a more inquisitorial one.
- Lastly, specialised magistrates' courts are able to direct individuals to the most appropriate sources of support and advice. For instance, in the *Edgemead High School*[64] case, the Blue Downs Equality Court ordered the applicant to go for counselling after hearing evidence of an exchange of racial insults between her and her fellow school-mate and her mother. The Court also ordered the respondent to go for diversity training and ordered the South African Human Rights Commission to monitor the implementation of this order.

The *Edgemead* decision shows the potential of the Equality Courts to empower individuals and communities at grass roots level. The court selected measures or remedies that enhanced the psychological and physical well-being of the applicant. It also acknowledged the intrinsic worth of the respondents as human beings

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61 For example, the *Bhe* decision is a case in point where the Khayelitsha Magistrate's Court upheld and rigidly applied the customary rule of male primogeniture that acted as a barrier for women and children to inherit the estate of their relatives, despite the legislative guarantee on equality as entrenched in the Customary Act.

62 At these hearings the magistrate identifies what is not in dispute before he proceeds with the actual trial.

63 The clerk of the Equality Court must within seven days after receipt of the complaint, notify the respondent of the complaint lodged against him and the respondent has ten days within which to respond to the allegation. A copy of the response must be sent to the complainant within seven days after the clerk has received the response from the respondent. All these documents pertaining to the matter must be sent to the Magistrate within three days after the clerk has collected the necessary information.

64 *Mkhize v Edgemead High School,* Blue Downs Equality Court, Western Cape, 3 December 2003.

and referred them for diversity training, thus addressing the root cause of the problem. At the same time, the court did not compromise the core values of the justice system, and interpreted the Equality Act in a manner that ensured that justice was not only done but also effectively seen to be done. Further, the order of the Durban Equality Court was another case where it ordered Ms Robin Neo to attend diversity training after she made derogatory remarks to Ms Ncusane.[65] The decisions of this nature take into account the legacy of our history as they seek to change attitudes and behaviours to ensure racial harmony amongst people of all races.

In this instance, the most significant role of these courts is their adoption of the therapeutic approach in aligning adjudication with punishment objectives as they seek to rehabilitate the offender by imposing a punishment. For example, South Africa is grappling with resistance to change of the mindsets, attitudes and perceptions of its population relating to race equalities and the role of the courts in effecting social change. The Equality Courts' decisions to direct individuals to the most appropriate advice and support areas become a pillar in undoing a decade of social orientation and stereotyping.

These courts have broad-based outcomes in permeating every "facet" of inequality and unfair discrimination as they:

- Offer a personalised remedy or intervention plan assisting both parties to enhance their self-esteem or counter-balance some of the disadvantage or discrimination;
- Adopt a "social agency" orientation emphasising assistance, guidance and treatment that differs from the traditional legal image of "judicial neutrality"; and
- Also demonstrate the ways in which some judicial officers and their courts should respond to socio-economic changes indicated by shifts in the types of problems presenting everyday in court.[66]

Equality Courts are, of course, not without their shortcomings. The "directions hearings", for example, provide an opportunity for magistrates to impose a preconceived perspective on the matter before them, instead of allowing the issues to be refined in the pleadings and through the hearing of evidence. There are also other factors that hamper the proper and effective implementation of the Equality Act. This directly affects the development of equality jurisprudence that would establish the effectiveness of the Equality Courts in transforming unequal power relations in South Africa. For example, the SAHRC produced an unpublished report in 2005 after monitoring the Equality Courts in the Gauteng Province.[67] The Province was used as a measure to determine the effectiveness of the implementation of the Equality Act. The purpose was further to establish compliance and other procedural difficulties at the Courts in question.

It emerged from this report that the number of cases flowing through the Equality Courts is problematic. This is mainly because of the lack of awareness

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65 See *Mercury* newspaper, 9 May 2005.

66 See King "Innovation in Court Practice: Using Therapeutic Jurisprudence in a Multi-Jurisdictional Regional Magistrates' Court" Paper presented at the 21st Annual Conference of the Australian Institute of Judicial Administration, Fremantle, 20 September 2003.

67 South African Human Rights Commission, Unpublished Report on the Monitoring of the Equality Courts in the Gauteng Province, July 2005.

of the legal processes that often prevent those most affected from using the law to enforce their rights. The situation is especially acute in rural areas, where people are often cut from the national information flow, and where most of the abuses occur. Though the rules and procedures are simplified at these courts, even for those who are aware of their rights might find the enforcement of their rights difficult because it requires a skill that an ordinary person does not have. The fact that litigation procedures have been simplified and the question of the burden of proof re-visited,[68] the reality will always be that poor people will not be able to use the courts unless all stakeholders work together to ensure that such people become aware of the Act and its procedures. If people are aware, they will be able to use such information to achieve the social change objectives as entrenched in the Act, as they will be empowered to uplift themselves from disempowerment.[69] Furthermore, the promotion of the right to equality through awareness and advocacy initiatives is often the first step leading to the protection of the right in question.

As a result of the lack of awareness of the existence of the Courts and the use of both legal and constitutional rights by members of the general public, those who had an opportunity to be trained on the use of the Act have not been able to put their training experience into practice and the Equality Court Clerks end up displaced and deployed to other Units. The implementation of the Act is clearly compromised as a result. Further, the Equality Act prioritises three grounds which should be vigorously monitored and the enjoyment thereof assessed by the SAHRC.[70] Surprisingly, despite the legislative progress since the dawn of democracy in 1994, "race discrimination" is still rife as most cases that have gone through these courts are about "race" as opposed to the other two grounds, namely, gender and disability. There are also other unlisted grounds such as family status, socio-economic status, and so on, that have not been tested at these courts.

These shortcomings should not be a barrier to women to use the law and further develop an effective strategy such as the rights-based approach that would enhance the promotion of gender equality. It is only then that we will be able to determine the significance of the law in generating social change.

5 LITIGATION: AN ANSWER TO INEQUALITIES?

At this stage it is too early to say whether the attempt in South Africa to use law as an instrument for social change has been successful. Albertyn has argued that the Constitution has provided a significant opportunity for using litigation as a transformative strategy, but that it has not yet been a primary strategy for change in practice. Use of the Constitution as a vehicle for social change has tended to be limited to individual organisations and alliances, and has generally not been located in broader strategies for change.[71] This limitation cuts both ways. On the one hand, women living in traditional or tribal systems have limited ability to participate in social change litigation. On the other, the state's enforcement

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68 See s 13 of the Equality Act.

69 See Ntlama "The effectiveness of the Promotion of Access to Information Act 2 of 2000 for the Protection of Socio-Economic Rights" 2003 *Stellenbosch LR* 273.

70 See s 28(2).

71 Albertyn "Defending and Securing Rights through Law: Feminism, Law and the Courts in South Africa" 2005 *Politikon* 219.

mechanisms have limited influence on these sectors of society, resulting in the continuation of local customary practices. Many matters of concern simply never reach the courts, meaning that the effectiveness of the law is never tested.

This situation is further compounded by rural women's lack of awareness of and inability to exercise their constitutional and legal rights. Cumbersome procedures and court processes and a lack of respect by law enforcers and the courts thwart women's ability to use the law.[72] The insufficiency of training among prosecutors and law enforcers, lack of basic equipment and knowledge of professional methods in gathering evidence and social attitudes, alienate many women from instituting their claims at the magistrates' courts. As Mokgoro J has observed, litigation as a strategy tends to be the privilege of the economically empowered.[73]

Acknowledging this limitation, Coomber argues that litigation by privileged groups may nevertheless have lasting effects beyond the individual case, where the impact is obviously maximised.[74] Women's engagement with litigation, particularly in the Equality Courts, must seek to change public attitudes and perceptions, and empower vulnerable groups to understand the importance of the law, and the potential role of the courts in bringing about social change. Agnes endorses this view in arguing that the purpose of litigation is to transform both the processes that take place in court as well as social relations outside it.[75] Positive legal precedents have multiplier effects that go beyond the immediate parties to the litigation.

The question still remains whether the types of remedies imposed by Equality Courts are capable of producing the social changes required. For instance, one of the remedies that these courts may order is an unconditional written apology to the survivor of unfair discrimination. What would the order of apology do to somebody who has not shown any remorse for his actions?[76] Though the Equality Act sets out clear objectives in dealing with inequalities, the mindset of the South African population has to be acknowledged. The payment of damages in monetary terms and orders to attend diversity training may not have their intended effects. For instance, the order by the Brits Equality Court for the *Broederstroom Couple*[77] to attend diversity training may prove difficult for an ordinary South African to understand.

Litigation is in any case not the only method or tool for social change. In order for it to be effective, it needs to be used in conjunction with other strategies such as advocacy, media and civil society initiatives. The difficulty with litigation in

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72 The assault of a woman by the Maintenance Officer at the East London Magistrate's Court attests to the lack of respect of the dignity of women and of the law by the court official. See the report by Denver *Daily Dispatch* newspaper, 24 March 2006.

73 Mokgoro "Constitutional Claims for Gender Equality in South Africa: A Judicial Response" 2003 *Albany Law Review* 567.

74 Coomber "Strategic Litigation of Women's Property Rights in Africa: Practical Considerations", in *Strategic Litigation of Race Discrimination in Europe: From Principles to Practice* (2003).

75 Agnes "Legal Strategies for Women's Empowerment: Evolving Feminist Jurisprudence" in *Changing the Man's World so It's also A Woman's Place* 14.

76 See *Sunday Independent* newspaper, 18 June 2006.

77 *Black v Broederstroom Valansie-Oord,* Brits Magistrate's Court, North West, 5 March 2005.

this sphere is that the decisions of Equality Courts are not made public, with the exception of the high-profile cases,[78] as they are not recorded in the South African Law Reports. It is therefore important to use other strategies to publicise and monitor cases that come before these courts.

7 CONCLUSION

The establishment of the Equality Courts in terms of the Equality Act is an important initiative, the impact of which is yet to be fully determined. Women's groups have thus far not devised appropriate strategies to make use of this legislation, and the Act's implementation accordingly remains patchy. An important constraint on the success of the Equality Courts is the urban/rural divide, and the fact that some of the worst abuses occur in areas of the country where there is little access to law, and little state capacity to enforce the new legislation. This assessment calls for a redoubled effort on the part of women's groups to devise strategies that bridge the urban/rural divide. Before such strategies are devised and attempted, it is too early to say whether the use of law as a tool for social change in South Africa has been successful. But the adoption of the Equality Act has shown the legitimacy of law in order to give rise to its use for social change. The maximum use of this Act will help the law to discover its potential to keep abreast of social change. I do not intend to argue, though, that there is close proximity between law and social change, because there are many cases in which the law needs to adapt itself to more complex matters, as evidenced by the adoption of the Civil Union Act.

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78 As evidenced by the publication of the decision of the Pretoria Central Magistrate's Court, where the Chairperson of the South African Human Rights Commission was denied a cut of his black hair at a salon in Centurion on racial grounds. See Info Update No. 12, 1 April 2005.

The National Director of Public Prosecutions in South Africa: Independent Boss or Party Politician?

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1 INTRODUCTION

In 1992 the National Party government passed a law making Attorneys-General in South Africa accountable to Parliament.[1] Previously they were answerable to the Minister of Justice. The idea was "to place the independence of the Attorney-General beyond any doubt".[2] Interestingly, the change occurred at a time when it had become evident that the ANC was on the verge of assuming the reigns of government. The Constitution now provides for a single National Prosecuting Authority (NPA) headed by a National Director of Public Prosecutions (NDPP).[3] The appointment of the first incumbent, Ngcuka, a veteran of the anti-Apartheid struggle and prominent ANC Member of Parliament, drew criticism from the parliamentary opposition as well as from the General Council of the Bar, with the latter pointing to the fact that Ngcuka was a "party-political man who could be susceptible to political influence".[4] Ngcuka brushed aside the criticism, saying that he would tell politicians to back off because he needed to protect the integrity of his office.[5] But only nine years on, the NPA is being criticised for succumbing to political control.

This article studies the relationship between government and the prosecution authority in South Africa as it evolved from the early colonial period to the present. It explores some of the socio-political factors that have impacted on a central function of the prosecuting authority – the exercise of prosecutorial discretion. What the normative legal framework looks like is one thing; how the prosecution service is perceived is another thing. The article addresses these issues.

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1 See the Attorney-General Act 92 of 1992.

2 *Attorney-General Bill* 69-92 (GA).

3 Section 179(1) of the Constitution of the Republic of South Africa, 1996. See also the National Prosecuting Authority Act 32 of 1998, which gave effect to s 179 of the Constitution and which repealed the whole of the Attorney-General Act 92 of 1998.

4 Barrel and Soggot "Nice guy, but can he do the job ?" *Mail and Guardian*, 17 June 1998.

5 Quoted by Lamberti "New legal chief vows to fight off politicians" *Business Day,* 17 July 1998, cited by Schönteich *Lawyers for the People: The South African Prosecution Service* (2001) 47 fn 130.

2 THE COLONIAL EPOCH

2 1 The Dutch Period (1652–1806)

The driving force behind the colonisation of the Cape, including the way in which criminal justice was to be administered, was the Dutch East India Company (*Vereenigde Geoctroyeerde Oost-Indische Compagnie*: hereafter VOC), a joint stock company founded in 1602.[6] The VOC held a Charter from Estates General[7] in Holland which granted it a monopoly of trade at the Cape. The supreme directorate of the VOC was the Council of Seventeen in Holland, whose consent the government at the Cape required before any important decision could be implemented. The Commander at the Cape, later the Governor, who was accountable to the Council of Seventeen, headed up the Cape government. He convened both the Council of Policy and the Court of Justice, the highest court for civil and criminal matters.[8]

Justice was administered in the name of the Estates General in Holland, the only body authorised to make laws for the Dutch colonies. In its judgments, the Council of Justice was required to bear the interests of the VOC in mind.[9] These interests were none other than those of the company's shareholders. All criminal prosecutions were entrusted to a powerful official called the Fiscal – a mediaeval title given to officials appointed by early European monarchs to protect their assets and to prosecute those who violated the sovereign's laws, commands and privileges.[10] The Fiscal also sat in the Council of Policy, a body vested with legislative, executive and judicial powers. As he impersonated VOC mercantilist policy under the guise of the criminal law, he zealously prosecuted anyone who threatened the VOC's commercial interests. Van Riebeeck, the first Dutch commander at the Cape, made no bones about the fact that one of the Fiscal's primary functions was "to instil fear in the common people".[11] Unsurprisingly, the local community loathed him intensely.[12]

By the year 1685 the Fiscal had become so powerful that the he was made independent of the Cape Governor and the local Council of Policy.[13] From the year 1688 he became known by the official title of "Independent Fiscal," which meant that he was answerable only and directly to the Council of Seventeen in Holland.[14] He had the power not only to prevent district *landdrossts* (district

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6 See Rosenthal (ed) *Encyclopaedia of Southern Africa* 3 ed (1965) 161.

7 The Estates General, comprising the seven sovereign provinces of the United Netherlands which existed until 1795, was the sole authorised legislative organ for the territories falling under the Charter of both the West and East Indian Companies (which included the Cape of Good Hope). See Visagie "Die belang van die regsgeleerde by die geskiedenis, met spesifieke verwysing na die tydperk 1652 tot 1828" 1981 *Kronos* 49 51.

8 See generally Hahlo and Kahn *The South African Legal System and its Background* (1968) 537, 538.

9 Visagie *Regspleging en Reg aan die Kaap van 1652 tot 1806* (1969) 88–89.

10 *Meyers Enzyklopädisches Lexikon* vol 8 (1973) 844.

11 *Journal of Jan Van Riebeeck* vol 1 106. See also Guelke "The making of two frontier communities" 1985 *Historical Reflections* 419 427.

12 De Kock *Those in Bondage* (1950) 160.

13 Hahlo and Kahn *The South African Legal System and its Background* 543.

14 In the Dutch colony of Sri Lanka, where the Fiscal, too, was the originator of criminal proceedings, the office of Independent Fiscal was created by the Council of Seventeen in 1687. This was due to the fact that the Sri Lankan colonial government, with a Governor

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magistrates) from prosecuting petty cases affecting VOC interests, but also the power to report the Governor to the Council of Seventeen.

After the local population complained to the authorities in Holland about the arbitrary and oppressive prosecution policies pursued by successive Fiscals, the office was subordinated to the local Government,[15] and the Fiscal's right to a share of the fines imposed on convicted persons was abolished in 1778.[16] He was prohibited from receiving gifts and stopped from acting as a private legal practitioner.[17] The title "Fiscal" had become so repugnant to the colonists that it was changed to that of "Attorney-General" during the Batavian period (1803–1806).[18] Whereas previously no formal legal education was required to become a Fiscal, the incumbent was now required to hold a doctorate in law, and was appointed by the Dutch Government.[19] The discretion he enjoyed was curtailed when his powers to arrest, summons or to prosecute were made subject to the permission of the Court.[20]

2 2 British Rule (1806–1910)

When the British occupied the Cape for the second time in 1806, they reintroduced the title of Fiscal and gave the office-holder the additional authority to function concurrently as Vice-President and Acting President of the Court of Justice, as well as Chief of Police.[21] Absurdly, in all criminal trials the Fiscal sat next to the Chief Justice, a sight which astonished one early South African writer, causing him to wonder what acute feelings ran through the mind "of the unhappy individual who, whilst trembling for his life, perceives the adversary at the ear of the judge".[22] Although the Fiscal was theoretically independent, in political cases the Colonial Government "made communications to him, the tenor of which seemed to convey the intimation of a request or wish, rather than the communication of facts upon which a discretion was to be exercised".[23]

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who was also President of the High Court of Justice, had become so involved in the administration of justice that it began altering the judgements of the courts or refusing to put them into effect. The creation of the independent Fiscal (which happened in the Dutch colony of Ceylon as well) was thus a reaction to the protest against the overlapping of executive and judicial functions. This resulted in the Independent Fiscal being "placed at the summit of the hierarchy of institutions responsible for the administration of justice". See Van den Horst *The Roman Dutch Law of Sri Lanka* (1985) 37–38. For the powers of the Fiscal in Ceylon, see also Wood Renton "The Roman-Dutch law in Ceylon under the British" 1932 *SALJ* 161 163.

15 Botha "The Public Prosecutor of the Cape Colony up to 1828" 1918 *SALJ* 400.

16 Hahlo and Kahn *The Union of South Africa: The Development of its Laws and Constitution* (1960) 201.

17 Visagie *Regspleging en Reg aan die Kaap van 1652 tot 1806* 221.

18 The Batavian Republic was the name given to the United Netherlands Republic after it was conquered by the French revolutionary troops in 1795 and converted into a daughter of the French Republic. *Meyers Enzyklopädisches Lexikon* vol 3 (1971) 579.

19 Visagie *Regspleging en Reg aan die Kaap van 1652 tot 1806* 104–105.

20 Van der Merwe *Regsinstellings en Reg aan die Kaap van 1806 tot 1834* (LLD thesis, UWC, 1984) 59.

21 *Ibid*.

22 Bird *The State of the Cape of Good Hope in 1822* (1823) 17. See also Theal *Records of the Cape Colony* vol XXXII 63.

23 *Ibid*.

With the introduction of the Charter of Justice in 1828, the British established the office of Attorney-General. The incumbent was to act, amongst other things, as public prosecutor. Although the institution of public prosecutor was unknown in England at the time (the crown prosecution service was established only as recently as 1985),[24] the colonial authorities recommended it for the Cape Colony on the grounds that they had successfully experimented with it in the West Indian colonies.[25] They advised the Cape Government to draw on the experience of Scotland, which had a much older, stronger, and more established tradition of public prosecution than England.[26] But the Colonial Office admonished against the Attorney-General acting either as an English Justice of the Peace or as Chief of Police, as the Fiscal earlier had done.

An 1874 Commission of Inquiry recommended that the Attorney-General cease being a member of the Government and that he vacate his office and make way for a Minister of Justice[27] to allow him to discharge his function as a prosecuting authority impartially and efficiently, unencumbered by the duties of political office.[28] The recommendation was rejected, and the Attorney-General continued as political head of his department.

2 3 Attorneys-General in the Boer Republics and Natal

In both the Orange Free State Republic and Transvaal Republic, Attorneys-General were at first independent, but were later made subordinate to their respective Executive Councils.[29] In the Free State Republic this happened because of widespread disaffection with prosecutorial policy.[30] The Transvaal Republic had a high turnover of Attorneys-General, presumably because they had no security of tenure and did not belong to the Executive Council despite their other executive duties and responsibilities.[31] Natal Attorneys-General, too, combined the task of prosecution with a host of other executive functions and they also ran private law practices.[32] One Natal Attorney-General, for example, would act as counsel for bankrupt people who were in fact liable for prosecution

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24 See Delmas-Marty and Spencer *European Criminal Procedures* (2002) 14.

25 See letter of Goderich to Bourke of 5 August 1827 in Theal *Records of the Cape Colony* vol XXXII 266 at 268.

26 In Scotland, prosecution dates back to 1587 when the Scots Parliament gave the Lord Advocate the power to prosecute in the public interest in the High Court. The investigation and prosecution of cases before the sheriff's courts was entrusted to qualified lawyers known as prosecutor fiscals. See Gordon "Institution of Criminal Proceedings in Scotland" 1968 *Northern Ireland Legal Quarterly* 249.

27 Fine *The History of the Cape Supreme Court and Its Role in the Development of Judicial Precedent for the Period 1827–1910* (LLD thesis, UCT, 1986) 292.

28 Judge de Villiers, head of the Commission and himself a former Attorney-General, strongly recommended the separation of the offices. "During his year of office as Attorney-General he had discovered to his cost the difficulties of discharging the legal work of that office alongside his political duties. Apart from the sheer physical strain, there was the spiritual strain by the party connection." See Walker *Lord De Villiers and His Times* (1925) 100.

29 Ordinance No 2 of 1867 *Wetboek* (1891); Volksraad resolution of 18 February 1864, Art 20 Volksraadnotule *Staatscourant* I March 1864.

30 Scholz *Die Konstitusie en Staatsinstellings van die Oranje-Vrystaat 1854–1902* (1937) 180.

31 Hahlo and Kahn *The Union of South Africa* 230.

32 See Art 232 of the *Tranvaalse Grondwet* of 1858. See also Spiller *The Natal Supreme Court: Its Origins (1846–1858)* (PhD thesis, University of Natal, 1982) 207.

for culpable insolvency.[33] Natal colonists were incensed by this "harlequin of functions", condemning it as an infringement of their civil liberty.[34]

Between the end of the second Anglo-Boer and 1910, each of the four territories that later made up the Union had its own Attorney-General who was a member of the respective colonial cabinets and who prosecuted in the name of the British crown.

2 5 Union and Thereafter

When the Union of South Africa was established in 1910, the power to prosecute was entrusted to four Attorneys-General, one for each province.[35] Prosecutions were now absolutely under their power and control, with the prosecution being conducted in the name of the state. Attorneys-General were entirely independent of the Minister of Justice and were also not accountable to Parliament for the way in which they carried out their duties.[36]

This arrangement was changed in 1926 when the Minister of Justice usurped all prosecutorial authority and delegated prosecutorial powers to the Attorneys-General.[37] According to anecdotal evidence, this was because in 1922 a man called Jollie tried to derail a train carrying Smuts, then Minister of Justice, but that the responsible Attorney-General had declined to prosecute. Smuts then had the law changed to allow the Minister to overrule an Attorney-General.[38] However, the year 1926 was also marked by huge labour unrest. The Industrial and Commercial Workers' Union (numbering over 100 000 workers) under the leadership of Clements Kadalie, George Champion and Thomas Mbeki, organised massive worker protests in the rural districts of the Eastern Transvaal (Mpumalanga).[39]

Whatever the reason was for entrusting the Minister with prosecutorial authority, in motivating the need for the amendment to the law the then Deputy Minister of Justice, Roos, argued that Parliamentary control of the Attorneys-General was necessary in the event of a "big case of public importance" or "great troubles, where the Attorney-General, if he can simply go his own way, can plunge the Government and the country into a great calamity".[40] However, the strain of shouldering a political responsibility with a legal one became too unbearable – something that Judge De Villiers had cautioned against already in

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33 Spiller *The Natal Supreme Court* 207–208.

34 Spiller *The Natal Supreme Court* 24–25.

35 See s 139 of the South Africa Act and s 17 of the Criminal Procedure and Evidence Act 31 of 1917. The Solicitor-General of the Cape Eastern Districts and the Crown Prosecutor of Griqualand West retained their previous authority, but the office of the latter was abolished in 1912 and vested with the Attorney-General for the Cape Province. See s 13 of the Administration of Justice Act of 1912. See also generally Berrydale *Responsible Government in the Dominions* vol 2 2nd edition (1928) 730–731.

36 Dugard *Introduction to Criminal Procedure* (1979) 34 fn 79.

37 Section 1 of the Criminal and Magistrates' Courts Procedure Amendment Act 39 of 1926.

38 This was said in a newspaper interview by the former Attorney-General of the Transvaal, Advocate Klaus von Lieres und Wilkau. See *Sunday Star*, 30 September 1990.

39 See Rosenthal *Encyclopaedia of Southern Africa* 253. See also Reader's Digest *Illustrated History of South Africa – The Real Story* (1988) 320–21.

40 See *House of Assembly Debates* (Hansard) vol 6 cols 1196–97 (3 March 1926).

the 1870s.[41] So, in 1935 the Attorneys-General were once again vested with the power of prosecution, but under the control of the Minister of Justice.[42]

3 ATTORNEYS-GENERAL UNDER APARTHEID

When the Nationalists came to power in 1948, they identified the prosecution as one of the key mechanisms in the criminal justice machinery to enforce the racist policies. In their view, the prosecution structure they inherited, according to which Attorneys-General were answerable to the Minister, was far too loose an arrangement. It needed to be tightened. Accordingly, in 1957 Parliament passed, without opposition, a law which gave the Minister of Justice the power to *direct* an Attorney-General, *reverse* his decision, and *exercise* his authority and function.[43]

The change coincided with the start of the famous Treason Trial. It was rumoured at the time that the Attorney-General of the Witwatersrand had in fact declined to prosecute, but that the Minister of Justice had insisted that the prosecution go ahead.[44] It did, and dragged on until 1961, with all accused acquitted.

The Treason Trial characterised a novel prosecutorial policy that began to unfold under Nationalist Party rule. Until 1948, mainly the leaders of political insurrection, illegal strikes, boycotts or demonstrations were put on trial.[45] However, as Apartheid took hold, the rank and file, and even mere bystanders, were prosecuted.[46] For example, shortly after the Treason trial 10 000 people were arrested in what Walter and Albertina Sisulu have called "a massive show of intimidation".[47] In 1963–1964, in the Port Elizabeth area alone, 918 people were arrested for furthering the aims of the then banned ANC.[48] And in 1966, the Minister of Justice boasted in Parliament that in a space of three years some 1 669 people had been tried in the Eastern Cape under laws relating to the security of the state.[49]

In the early 1970s Professors Barend van Niekerk and Anthony Mathews, both of the University of Natal Law Faculty, wrote that in political cases, Attorneys-

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41 See note 28 above.

42 Section 1 of the General Law Amendment Act 46 of 1935.

43 Section 45 (3) of the General Law Amendment Act 68 of 1957.

44 See *House of Assembly Debates (Hansard)* 1973 vol 43 col 4767.

45 These included the 1914 rebellion (*R v De Wet* 1915 OPD 157); the Rand revolution (*R v Long* 1923 AD 52, *R v Erasmus* 1923 AD 73, and *R v Viljoen* 1923 AD 90); the case of the pro-German Afrikaner groups opposed to South Africa's participation in World War II (*R v Leibrandt* 1944 AD 253); and the mineworkers' strike of 1946 and the ensuing trials.

46 Lengthy mass preparatory examinations were held and trials dragged on tortuously. Such was the case, for example, in the trial in 1951 of the 140 tribesmen from the Witzieshoek rural reserve; the trial of 365 workers of the Benoni Amato Textile Mills; the trial in 1958 of the Bafurutsi people who protested against the Bantu Authorities Act that compelled women to carry passes; the trials of some 1000 Black women for protesting against their being issued with passes in Johannesburg, and the Lydenburg trial, proceeding at the same time with the trial of 190 Bapedi tribesmen who had opposed the setting up of so-called "Bantu Authorities" in Sekhukhuniland. See Fairbairn "Mass trials" 1959 *Africa South* 12. See also Sisulu *Walter and Albertina Sisulu: In our Lifetime* 194.

47 Sisulu *Walter and Albertina Sisulu: In our Lifetime* 214.

48 See Dugard *Human Rights and the South African Legal Order* (1978) 215, citing Allister Sparks of the then *Rand Daily Mail*.

49 See Dugard *Human Rights and the South African Legal Order* 215.

General were identified "in the public mind, and certainly in the accused's mind, with the interests of the executive".[50]

Public suspicion that the prosecution service was controlled by political interests was reinforced in 1979 when the Attorney-General of the Transvaal declined to prosecute the former chief of State Security, Van den Berg, for referring to a judicial commission of inquiry as a "farce" and challenging it to publish its findings. The Attorney-General's decision caused widespread public dismay and sparked a heated legal and political controversy.[51] It was speculated at the time that the Attorney-General decided not to prosecute because of the political pressure that was brought to bear on him.[52]

Successive Apartheid Ministers of Justice strenuously denied interfering with the decision-making powers of Attorneys-General. Kruger, Minister of Justice in the 1970s, proclaimed that it was "in the highest tradition of the administration of justice that a Minister does not change an Attorney-General's decision".[53] Coetsee reiterated this in the early 1990s, stating that all he had done was to "vibrate" his belief to an Attorney-General, or he simply "invited them to conformity".[54]

Notwithstanding repeated official reassurances that political authorities never interfered with the prosecution process,[55] in 1992, just before the demise of Apartheid, Parliament passed a law[56] restoring Attorneys-General virtually to the independence they enjoyed during Union, prior to 1926. Prosecutorial authority now vested solely with Attorneys-General, who were elevated from the ranks of the public service and given security of tenure. They were removable only with the consent of parliament.[57]

4 THE NATIONAL PROSECUTING AUTHORITY (NPA) AT PRESENT

Section 179 of the Constitution provides for a single national prosecuting authority headed by a National Director of Public Prosecutions (NDPP) and two National Deputy Directors of Prosecution (NDPPs), all of whom are appointed by the President.

Given the heated debate preceding the adoption of this clause in the Constitution, it came as no surprise that the constitutional provisions regulating the NPA in the Interim Constitution were challenged on the grounds that the appointment of the NDPP by the head of the executive (the President) did not comply with the doctrine of the separation of powers, requiring a separation of powers between the legislature, executive and the judiciary.[58] The Constitutional Court dismissed

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50 Van Niekerk and Mathews "Eulogising the Attorney-General – A qualified dissent" 1972 *SALJ* 89.
51 Devenish "Equality before the law: The constitutional legal background of the office of attorney-general" 1979 *De Rebus* 189.
52 Devenish 1979 *De Rebus* 191.
53 See *Cape Times*, 1 February 1979.
54 *House of Assembly Debates* (loose edition) cols 1028, 10302–3 and 10309 (5 June 1992).
55 See House of Assembly debates (Hansard) 5 June 1992 (loose edition) cols 1028, 10302–3 and 10309.
56 Attorney-General Act 92 of 1992.
57 Sections 3 and 4.
58 *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 10 BCLR 1253 (CC) 1307E–F.

this contention, stating that "[t]he prosecuting authority is not part of the judiciary" and that "even if it were part of the judiciary, the mere fact that the appointment of the head of the national prosecuting authority is made by the President does not in itself contravene the doctrine of separation of powers".[59] The Court declared that the constitutional command that national legislation ensure that the NPA "exercises its functions without fear, favour or prejudice", guarantees the independence of the NPA.[60]

4 1 Appointment and Removal of the NDPP

The NDPP, who must be legally qualified and a fit and proper South African citizen, is appointed by the President for a non-renewable term of 10 years, but must vacate office at the age of 65. The President may remove him or her from office on the limited grounds of ill health, incapacity, or impropriety, but subject to Parliamentary ratification. Also, the President must remove the NDPP or the Deputy National Directors if requested to do so in an address from each of the two Houses of Parliament. The Directors of Public Prosecutions are similarly appointed by the President and their removal from office is subject to a procedure similar to that provided for removing the NDPP. As a safeguard against external influences, the NDPP is paid the same salary as a High Court Judge. But Deputy Directors and all other prosecutors are paid according to civil service salary structures, which means that they are less independent and more vulnerable to outside influences. The NDPP has in fact admitted, with consternation, that a few prosecutors have held themselves open for bribes.[61]

4 2 Accountability to Parliament

The Constitution confers final responsibility for the prosecution service on the Minister of Justice and Constitutional Development. This means that the Minister is answerable to Parliament and through it to the public for the functioning of the prosecution service. The NDPP has to submit an annual report on the operations of the NPA to Parliament. Technically, it is the Minister, as executive head of the NPA, who tables it as part of his responsibility for the Executive as a whole. While the Minister has no power to overrule a decision whether or not to prosecute, he or she may require the NDPP, on request, to report on any case being dealt with by the NPA, as well as the reasons for taking a particular

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59 *Certification* judgment 1253F.

60 *Certification* judgment 1308D. The Constitutional Court referred to the Namibian decision in *Ex Parte Attorney-General, Namibia: In Re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General* 1995(8 BCLR 1070 (NmS). The Constitutional Court noted that the very same Namibian case "stressed the importance of the prosecuting authority in a constitutional state being independent and pointed to the potential danger of empowering political appointees to decide whether or not prosecutions should be instituted" (1307H). The Constitutional Court distinguished the position of both the Namibian Prosecutor-General from that of the Attorney-General of Namibia, pointing out that the latter is a political appointment who holds office at the discretion of the President without any security of tenure, whereas the Prosecutor-General is appointed by the Judicial Services Commission and is constitutionally vested with the power to prosecute in the name of the Republic of Namibia. In the Namibian case the court had to determine whether the Prosecutor-General was subject to the instructions of the Attorney-General and it concluded that he was not: (1307I–J and 1308A).

61 See Quintal "Top scorpion arrested for alleged graft" *Weekend Argus*, 30 September 2006 1.

decision. To ensure that a democratically elected government remains answerable to the public in its efforts to combat crime, the NPA Act precludes the NDPP from making the national prosecution policy without the consent of the Minister. It is equally important that the NDPP has the right to approach Parliament at any time with any matter relating to the prosecuting authority, if he or she deems it necessary. [62]

5 LACK OF AN INDEPENDENT PROFESSIONAL IDENTITY

The restructured prosecution service contains positive features which evince a concerted effort to make the prosecution service more accountable and subject to the Constitution. The centralised prosecution policy, policy directives and code of conduct also introduce a degree of even-handedness in the operations of the prosecutions service. However, given the fact that the need to emancipate the prosecution service from political influence was at the heart of the reform initiative, the independence of the NDPP would have been far more credible if the candidates for the position were to be interviewed by an independent body such as the Judicial Services Commission, as is the case with judges.[63]

The authoritative *Commentary on the Criminal Procedure Act* argues that, given the legislature's intention to create an independent profession of prosecution, there is no reason why the NDPP's independence should not automatically include assuming independent and full responsibility for the NPA's budget.[64] At present, the Director-General: Justice accounts for state monies paid out to or spent by the NPA.[65] In effect, this means that the NPA itself has no say in matters relating to pay increases for its professional staff. The request for a salary increase of the prosecuting personnel has to be directed via the Ministry of Justice to the Minister for the Public Service and Administration who, in turn, requires the concurrence of the Minister of Finance before approving the request.[66] Quite apart from the tedious bureaucracy involved in this process, the fact that the NPA itself has no say in how its personnel are remunerated compromises its profile as an independent entity.

What further undermines the independent, professional status of the prosecution service is that magistrates, who until 1995 were civil servants, appointed traditionally from the ranks of the prosecuting personnel, are now fully independent of the public service. Unlike the arrangement in which the NPA finds itself, the magistrates' profession is able to negotiate salary increases directly with the Minister of Justice. This has led to a disproportionate increase in the chasm between the salaries of magistrates and prosecutors, to the distinct disadvantage of the latter.[67] Unsurprisingly, a total of 109 experienced prosecutors have vacated their posts between 2004 and 2007 to take up positions as

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62 Section 35(2)(b) of Act 32 of 1998.

63 Cf Van Zyl Smit and Steyn "Prosecuting Authority in the New South Africa" 2000 *CIJL Yearbook* 137 151.

64 Du Toit *et al Commentary on the Criminal Procedure Act* 1-4K para 2.

65 This is prescribed by the Exchequer Act 66 of 1975.

66 Section 17 of the NPA Act.

67 For example, whereas in 2002 the salaries of magistrates and senior prosecutors were roughly equal, at present (May 2007), magistrates earn R489 000 (including a car allowance) while senior prosecutors R408 000, meaning that the salaries of magistrates far outstrip those of prosecutors with comparable work experience. See *Cape Argus*, 3 May 2007.

magistrates.[68] The result is that as at May 2007, the NPA was facing a serious shortage of prosecutors and a vacancy rate of 24%.[69] According to the NDPP, the severity of the shortage is evidenced by the fact that very recently a court in the Northern Cape summoned the Director of Public Prosecutions responsible to explain why there were no prosecutors on duty.[70]

Indeed, if the budgets of the independent State Institutions Supporting Constitutional Democracy (so-called Chapter 9 bodies)[71] which, too, are required to perform their functions without fear, favour or prejudice and which also have to report to Parliament, receive their money straight from the Treasury, why should the NPA be treated differently?

Despite the fact that the NPA Act was enacted consciously to break with the past, to give the prosecution service a new identity, and to infuse the prosecutorial function with a novel professional ethos, there is a tendency within the government itself to regard prosecutors as civil servants who work as prosecutors rather than as prosecutors in their own right. But the NPA itself appears to lack the resolve to counter these conventional prejudices by marketing itself as a robust, independent body of professionals. There is a need for it to advertise itself actively in law schools, like private law firms do, in order to lure promising students to the profession.

6 THE POLITICS OF THE NPA'S DECISION-MAKING PROCESS

6 1 Accountability and the Decision not to Prosecute

At the heart of the prosecutorial function is the discretion to decide whether or not to prosecute. A person who is aggrieved by the prosecutorial decision not to prosecute may institute a private prosecution, but only a specified category of persons with a substantial interest have this right.[72] Another limitation is one of costs, as the party has to deposit a sum of money as security that he or she will prosecute the matter to the end and without delay. Private prosecutions are therefore rare.

Under South African law, as is indeed the case in accusatorial criminal justice systems generally, courts are disinclined to review a prosecutor's decision not to prosecute. A reason advanced for this is that it is much harder for prosecutors in adversarial systems to decide whether there is sufficient evidence to go to court or whether to prosecute the suspect on a more serious charge.[73] This is in contrast to the situation that obtains in countries that adhere to a system of mandatory prosecution (eg Germany[74]), where a prosecution must be instituted even *in dubio contra reum*.

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68 *Ibid.*
69 *Ibid.*
70 *Ibid.*
71 These are: the Public Protector; the Human Rights Commission; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Commission for Gender Equality; the Auditor-General; the Electoral Commission; and the Independent Authority to Regulate Broadcasting. See ch 9 of the Constitution.
72 See ss 7 and 8 of the Criminal Procedure Act 51 of 1977.
73 Damaška "The Reality of Prosecutorial Discretion: Comments on a German Monograph" 1981 *Am J Comp L* 119 130–131.
74 Para 152 of the German *Strafprozeßordnung* (Criminal Procedure Code) requires the institution of a prosecution if there is enough evidence. The rule of mandatory prosecution was

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However, the increasing attention that victims are beginning to receive in criminal justice systems has moved courts in Britain and the US, for example, to re-appraise their customary hesitance to examine the decision not to prosecute. Two factors have induced the change of mind. First, it is now recognised that private prosecutions are expensive and vulnerable to the prosecuting authorities taking over the proceedings and stopping the prosecution.[75] Secondly, victims' rights movements are asserting their influence more noticeably on the criminal justice process, thus placing the prosecutors under heavier pressure to balance their independence against accountability, especially towards socio-politically marginalised groups.

As a result of these influences, British courts "are increasingly recognising the need for some accountability to themselves in cases where there a decision not to prosecute".[76] The departure from the standard judicial practice came in the light of the perceived unresponsiveness of the criminal justice system to the complaints by ethnic minorities about police abuse of power and unresolved deaths in police custody – a chronic phenomenon in South Africa, where cases of deaths in police cells are policed by the police themselves, with hardly any ensuing prosecutions.[77] In the US several jurisdictions have responded to the concerns of the victims' rights movement by enacting controversial, so-called "no-drop" laws, which compel the prosecution of domestic violence cases, irrespective of the wishes of the victim. Under this system, the trial takes place either without the victim as a witness or with the victim required to testify.[78] In less serious cases, some states require prosecutors to consult with the victim before deciding whether to charge the alleged wrongdoer.

Whilst on this point, it is disconcerting to note that the NPA in South Africa has done nothing to clarify in public the situation regarding reported accusations of domestic violence allegedly perpetrated by the Director of Public Prosecutions of the Free State, whom it has suspended on full pay.[79] The complainant, who is reportedly suffering from a permanently dislocated arm, damaged vertebrae, and sitting with huge medical bills, told the investigative journal *Noseweek* how she was intimidated into dropping charges, which she did. The complainant has reportedly handed the case file to the NDPP, but nothing has come of the matter to date. Certainly, for as long as the matter is being perceived to be smothered by

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designed to prevent political pressure from influencing the prosecutorial decision. A prosecutor who is ordered by his Minister not to prosecute in a case of political corruption, must disobey the order. See Langbein "Controlling German Prosecutorial Discretion" 1974 *Univ of Chicago LR* 439. Mandatory prosecution applies mainly to serious crimes and not those that are excusable on the grounds of low culpability or public interest. For critique of the mandatory prosecution principle in Italy and Germany, especially with regard to more recent trends to dilute its application in favour of broadening prosecutorial discretion, see Perrodet "The Public Prosecutor" in Delmas-Marty and Spencer *European Criminal Procedures* 449.

75 Cf Damaška 1981 *Am J Comp L* 135–136.

76 Burton "Reviewing Crown Prosecution Service Decisions not to Prosecute" 2001 *Crim LR* 374 376–377, who also analyses the case law and some of the problems that victims still need to overcome.

77 See Masuku "Numbers that count: National monitoring of police conduct" 2004 *SA Crime Quarterly* 5ff.

78 See Krug "Prosecutorial Discretion and Its Limits" 2002 *Am J Comp L* 643 660–662.

79 See *Noseweek*, October 2006 19ff.

the NDPP and not treated with the urgency, seriousness and openness that is called for in a high-profile case such as this one, the NDPP will leave the public in no doubt that his independence is vulnerable to outside influences.

For reasons such as these it may become necessary for South African prosecutors to take more responsibility for their decisions not to prosecute cases involving alleged prison-warder and police abuse of power as well as cases involving allegations of rape, child abuse and domestic violence. There are far too many case of this nature about which nothing at all is done. As Lord Bingham CJ affirmed in the English case *R v DPP, ex parte Manning*:

> "In the absence of compelling grounds for not giving reasons, we would expect the Director to give reasons in such a case: to meet the reasonable expectation of interested parties that either a prosecution will follow or a reasonable explanation for not prosecuting be given . . ."[80]

Given the known resource constraints in the South African prosecution service, and in view of the fact that a prosecution can result in a significant improvement in the quality of the lives of the categories of persons who are habitually victims of abuse, one might well ask whether South African courts should not also widen their reviewing authority to include a select type of case where a complainant is aggrieved by a prosecutor's decision not to prosecute. To quote Lord Bingham CJ again:

> "The standard of review must not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the test were too exacting and effective remedy would be denied."[81]

6 2 The Decision to Prosecute: Is the NPA Politically Manipulable?

The question arises against the background of increasing criticism, coming mainly from within the ranks of the ANC tripartite alliance, that the NPA is using its apparent unchecked prosecutorial discretion as a political weapon. What are the judicial remedies?

In practice, South African courts have traditionally refused to grant an order to stay a prosecution or to interfere with the independent prosecutorial decision to institute a prosecution.[82] The Constitutional Court,[83] too, has taken the view that to bar the prosecution before the trial begins would be too radical an intervention, from both a philosophical and socio-political point of view, for to do so would amount to preventing "the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct".[84] However, the court did not rule out a bar of proceedings in a narrow range of circumstances, for example, where there is proof that the accused has suffered irreparable trial prejudice as a result of the delay.

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80 Cited by Burton 2001 *Crim LR* 379.

81 Burton 2001 *Crim LR* 377.

82 See *Gillingham v Attorney-General* 1909 TS 572; *R v Seboko* 1956 4 SA 619 (O); *S v Bopape* 1966 1 SA 145 (C); *S v E* 1995 2 SACR 547 (A).

83 See *Sanderson v Attorney-General, Eastern Cape* 1998 2 SA 38 (CC).

84 *Sanderson* 58D–E, per Kriegler J. But the Court accepted the fact that there may be cases in which a permanent stay would be appropriate relief without there being trial prejudice. The Court held that ordinarily, especially where the prejudice alleged is not trial-related, less radical remedies were available, such as: a mandamus requiring the prosecutor to start the case; a refusal to grant the prosecution a remand; or damages arising after an acquittal arising out of the prejudice suffered by the accused (58G).

However, in 1999, the Cape High Court[85] ordered a stay in prosecution following a plea bargain agreement on which the prosecution appeared to have reneged. Not overjoyed that he was "the first South African judicial officer" to grant such relief, Uijs AJ held that solemn agreements between accused persons and prosecutors, in terms of which the accused persons renounce their rights in exchange for an abandonment of prosecution, are an example where a stay of prosecution is an appropriate remedy should prosecutors renege on what they have offered as a mutual consideration.[86]

The Promotion of Administrative Justice Act (PAJA) excludes "a decision to institute or continue a prosecution" from the definition of "administrative action".[87] De Ville, who questions the exclusion, is nevertheless of the opinion that the prosecutorial decision to institute or continue a prosecution should, on a deferential standard of review, be reviewable on administrative grounds under the Constitution and the NPA Act.[88] He argues that if one adopts the approach in terms of which the standard of review is determined in respect of lawfulness, reasonableness, and procedural fairness in a specific case, taking into account the nature of the decision as well, then little harm could be done by subjecting at least some prosecutorial decisions to judicial review.[89]

The political quarrel that has erupted within the ANC tripartite alliance, and which flared into the open at the recent ANC policy conference, relates to the unfettered powers enjoyed by the Director of the NPA's Directorate of Special Operations, commonly known as the Scorpions, to authorise an investigation single-handedly on reasonable belief that the facts warrant it.[90] The decision of the Scorpions' director, who is appointed by the President and accountable to the NDPP, is not subject to review. Some prominent ANC leaders, such as Zuma and Phoswa (a former provincial premier) have accused the DSO of abusing its powers, with Zuma's supporters contending the unit is being used as a political tool to undermine his political aspirations.[91] A second point of contention has to do with the fact that the DSO, in which police play a huge role, accounts to Parliament only via the NDPP and through the Minister of Justice and Constitutional Development. Thirdly, the police are annoyed that the DSO is located within the NPA and not under SAPS which, they assert, is the only body constitutionally authorised to police the country.

The controversy began in 1995 when the then first NDPP, Ngcuka, stated publicly that he had *prima facie* evidence of corruption involving former Deputy President Jacob Zuma, but that the State was not sure whether it had a winnable case and would accordingly not prosecute Zuma. While some applauded the

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85 *Northwestern Dense Concrete CC v Director of Public Prosecutions (Western Cape)* 1999 2 SACR 669 (C).

86 683i. The Court avoided using the term plea bargain here as plea bargaining, though conventionally practised in South African criminal law, was not yet formalized into statutory law, as has now been done. See s 105 of the Criminal Procedure Act 51 of 1997 generally for the plea bargaining provisions, and sec 105A(13) for the NDPP's directives that prosecutors are required to follow in negotiating sentencing agreements.

87 As defined in s 1.

88 De Ville *Judicial Review of Administrative Action in South Africa* (2005) 65.

89 *Ibid.*

90 Section 28.

91 See Quintal *et al* "Pressure on Mabandla to speed up judicial transformation" *Sunday Independent*, 1 July 2007 1.

investigation as evidence of the fearless independence of the NPA, others condemned the NDPP's public utterance as a manifestation of how the NDPP had allowed himself to be politically manipulated. Zuma's supporters argued that the statement aimed to disparage Zuma publicly and thus undermine his chances of being elected the next president of the ANC and, possibly, president of the country. Zuma lodged a complaint against Ngcuka with the Public Protector,[92] alleging that his constitutional rights were violated. The Public Protector found that Ngcuka's statement was unfair and improper, in that it infringed Zuma's constitutional right to human dignity thereby causing him to be improperly prejudiced.[93] In his report, the Public Protector recommended that Parliament take "urgent steps" to ensure that Ngcuka was held to account.[94] Ngcuka resigned his position shortly afterwards. Political parties and political analysts reacted angrily, saying that his resignation was forced on him as a result of very effective political pressure.[95] The fact of the matter is that the resignation left little doubt that, from a public perspective, the NDPP's *de facto* independence looked to be on shaky ground.

Indeed, disaffection is bound to arise when the DSO director takes such crucial decisions with unbounded liberty. Such statutorily ordained authority necessarily intrudes on the culture of separateness and differentiated functionality that characterises the co-ordinate relationship between the police and the prosecution. The usual South African criminal justice practice is that the police initiate the investigation, carry it through, and charge the suspect. Public prosecutors have no role to play until a charge is laid against the suspect. Their role is to scrutinise and weigh the prosecution evidence independently and objectively before deciding whether or not to prosecute. The DSO practice of selecting and initiating the investigation not only contradicts conventional practice, but it also takes on the hierarchical arrangement found in continental inquisitorial systems where the public prosecutor leads and directs the police in the criminal investigation. In so doing, the NPA Act unconsciously rigs up the DSO as a European civil law outfit, disregarding the fact that the office of the public prosecutor in Europe developed from a different tradition altogether, namely the office of the inquisitorial judge.

No uniform procedural pattern is discernible in other common law systems with comparable multi-disciplinary investigative units like the DSO. Studies of western prosecutorial systems show that while there is some merit in allowing prosecutors to have a say at the charging stage, there is much value in maintaining an arrangement which gives prosecutors a monitoring role rather than one in which they direct the investigations.[96] To avert the danger of prosecutors becoming too close to the police or too personally involved in the case, some systems have adopted the risk management strategy which is borrowed from the practice

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92 The Office of Public Protector was established under ch 9 of the Constitution.

93 *Report by the Public Protector Submitted to Parliament in terms of Section 182(1)(b) of the Constitution, 1996 and Section 8(2)(b) of the Public Protector Act, 1994* Report 26 (Special Report) paras 24.5 and 24.6 at 93.

94 Paras 25 and 25.1 at 94.

95 Peta "Pretoria"s 'anti-corruption' prosecutor resigns" *The Independent* (London), 27 July 2004 http://findarticles.com/p/articles/mi_qn4158/is_20040727/ai_n12795493 (accessed 31-05-2007).

96 Jackson "The effect of legal culture and proof in decisions to prosecute" 2004 *Law, Probability and Risk* 109 128–129.

of some private companies which place a high premium on eliciting the opinion of an independent and detached legal counsel before implementing a decision.[97] In Canada, for example, where multi-disciplinary units work on cases of organised crime, decisions to prosecute are not taken within the units themselves and the prosecutions are conducted by prosecutors from a federal prosecution regional office.[98]

Redpath[99] has come up with a similar, useful proposal for South Africa. Its essence is that the law be amended to provide for an independent committee, with no government official on it, which would be solely charged with reviewing both the cases selected for investigation by the DSO and the investigation process itself. This is a sound proposal. But changing the law is not enough; what is required, too, is a reciprocal understanding of institutional culture and how to adjust to it.

7 GAINING PUBLIC CREDIBILITY THROUGH PRIVATISATION

The soaring crime rate in South Africa has been accompanied by the phenomenal growth of the private security industry, which today far outstrips the South African Police Services (SAPS) in size, financial muscle, resources, and policing mobility.[100] Although private security firms are not accountable to the public through institutions of representative government, they fill basic service vacuums left by the police where there is an outcry for service delivery. They do not replace state authority, but supplement it. And for as long as they are legitimated by Parliament through statutory law, and operate subject to the law, they enjoy state support in exercising a commercially-based form of social control, which gives them a semi-formal power. Given the fact that the social organisation of power is based fundamentally on both public and private social control, privatisation does not mean that individuals are liberated from traditional social control and supervision. It is only the means and not the goals of social control that are being modernised.[101]

There is accordingly no reason why the quasi-authority of the private criminal justice role-players could not act in tandem with the authority of state power monopoly as far as criminal prosecutions are concerned. Outsourcing of the prosecutorial function would therefore not undermine the independence of the NPA, but disencumber it of its heavy burden. Indeed, the formal criminal justice system has for decades operated side-by-side with African customary law courts, military courts, and municipal traffic courts, all of which are vested with limited penal powers. It is a trite fact that without the limited penal jurisdiction exercised by the customary law courts, which try hundreds of thousands of cases every year, the South African criminal justice system would have collapsed long ago.

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97 Jackson 2004 *Law, Probability and Risk* 129.

98 *Ibid.*

99 Redpath "Weathering the Storm: Tough questions for Scorpions" 2004 *SA Crime Quarterly* 31 35.

100 See Berg *The Accountability of South Africa's Private Security Industry* (2007) 8; *Minnaar Private-Public Partnerships*: *Private Security, Crime Prevention and Policing in South Africa* (2004) 14 www.pmg.org.za/briefings/briefings.php?id=30 (accessed 20-06-2007).

101 Markantonatou "*Vom Panoptismus zum Governement: Privatisierung der Sicherheit und das Staatliche Gewaltmonopol*" 2006 *Das Soziologie Magazin* http://sozmag.soziologie.ch/05/panoptismus.xml (accessed 20-06-2007).

In a recent study of community courts operating in Pretoria and Cape Town[102] (the so-called "Hatfield-type courts", which are public-private partnership projects involving the NPA), the responsible state departments and NGOs, applauded their "dramatic growth in understanding of alternative approaches to dealing with petty offences" and has made several recommendations on how they could increase their effectiveness. The fact that privatisation has already become a feature of the two other key players in the criminal justice sector, namely the police and correctional services, could serve as an incentive for a limited, private outsourcing of the prosecution function. But this step would need to be accompanied by safeguards for ensuring that the constitutional procedural rights of the accused persons are upheld.

8 IS THE ABSENCE OF POST-TRC PROSECUTION POLITICALLY WILLED?

Except for a handful of prosecutions that followed the investigations of the Goldstone Commission in the 1990s, the NPA has not prosecuted any of the people who were denied amnesty by the Truth and Reconciliation Commission (TRC), or who failed to make use of the amnesty process. The TRC offered amnesty only to those who came forward and confessed fully and frankly what role they played in Apartheid state criminality, and if necessary, testified as prosecution witnesses at subsequent trials. The NPA was given a list of 300 names for prosecution,[103] but till now nothing has come of this. In *S v Basson*,[104] the Constitutional Court held that the NPA represents the community and has an obligation to prosecute the crimes of Apartheid.

When the NPA's Priority Crimes Litigation Unit, which was established in 2004, began to act against the Apartheid officials who were behind the attempted murder of Frank Chikane, a leading anti-Apartheid activist, it was "instructed"[105] not to go ahead with the arrests. In the meantime, the NPA has issued post-TRC prosecution guidelines which have been criticised for allowing those who did not meet the amnesty criteria to obtain a *de facto* amnesty. For example the policy requires prosecutors to take into account such irrelevant factors as the "degree of indoctrination to which a perpetrator was subjected".[106]

It is hard to avoid gaining the impression that the NPA's procrastination in instituting prosecutions is traceable to the apparent lack of political will on the part of the Government to confront the past.[107] The Apartheid victim community

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102 Lue-Dugmore *et al* "Petty Crimes that Matter: Evaluating the Western Cape Community Courts" 2005 *SA Crime Quarterly* 27 33–34.

103 Terreblanche "Apartheid massacres go to court" *The Sunday Independent*, 23 April 2006 1. The majority of the approximately 7116 applicants were refused amnesty, most of them without a hearing. Of the 1 973 persons who went through the public process 806 were denied amnesty. See Sarkin J. "The Amnesty Hearings in South Africa Revisited" in Werle (ed) *Justice in Transition: Prosecution and Amnesty in Germany and South Africa* (2006) 46–48.

104 2005 1 SA 171 (CC) para 37.

105 Varney "The politics and problems of international criminal justice in Africa: The South African experience" in Du Plessis and Louw *The investigation and prosecution of 'core international crimes' and the role of the International Criminal Court in Africa* (2006) 77.

106 Varney 77.

107 See Fernandez "Post-TRC Prosecutions in South Africa" in Werle *Justice in Transition* 65 71.

and NGO's have sharply criticised the ANC government for its perceived lack of will to pursue the "unfinished business"[108] of the TRC. What is strange is that it has been the ANC politicians, rather than the NDPP himself, who have made public statements on this matter. It is therefore essential that the NPA be seen, both nationally and internationally, to be asserting itself vigorously on this front. South Africa has an obligation under international law to prosecute international crimes, and a failure to do this will discredit the entire TRC process which has been applauded internationally.

9 CONCLUSION

The administration of criminal justice in colonial times and in Apartheid South Africa was characterised by a discernible manipulation of the prosecution service for unilateral economic and political self-interest. The advent of democracy in 1994 opened an opportunity for the prosecution service to be transformed into a creditable institution of state with a clearly defined identity and staffed by a demographically representative corpus of professional "gatekeepers of the law". Independent decision-making, public accountability and transparent methods of operation are the cornerstone values contained in the constitutional and statutory legal framework governing the prosecution service. The NPA Act has indeed introduced uniform prosecution standards throughout the country. The self-confidence and fearlessness with which the first NDPP stepped into his role as head of the national prosecution service inspired public admiration and wide respect.

Yet, just nine years into its existence, the NPA is exhibiting worrisome signs that it might not be as independent in its decision-making as the law promises. The mysterious resignation of Ngcuka following the Zuma saga is a case in point; accusations that the present NDPP is being used for political self-interest is another. The patent and inexplicable procrastination of the post-TRC prosecutions only serves to fuel public suspicion that political interests have a role to play in the decision-making process. The NPA has become a target of harsh and acrimonious criticism coming from within the ranks of the ANC tripartite alliance. This is worrying. But instead of labouring the negative aspects it would be more constructive to revise the legal framework governing both the appointment of the NDPP and the constraining regulatory provisions governing the way the NPA is funded. A more transparent appointment procedure and financial autonomy are critical components of independence. These are necessary to equip the NPA with the self-confidence to deal more effectively with the intolerably high incidence of crime, and to develop effective partnerships with private role-players and NGOs with the aim of strengthening the proactive capacity of the prosecution service.

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108 Terreblanche "Apartheid massacres go to court" *The Sunday Independent*, 23 April 2006 1.