The constitutional impact of strategic litigation in South Africa

A Klaasen

11232536

Thesis submitted for the degree *Doctor Legum* in Constitutional Law at the Potchefstroom Campus of the North-West University

Promoter: Prof Francois Venter

October 2016

ABSTRACT

The broad focus of the thesis is an analysis of the constitutional limits to strategic litigation involving the state. The first chapter outlines the background of the study and defines the concept of strategic litigation. In the following chapter the application of the *Constitution* on legal disputes involving the state is analysed. In the third chapter the concept of strategic litigation is explored within the context of the doctrine of separation of powers. This analysis seeks to ascertain to what extent strategic litigation can serve as an effective check on the abuse of power by organs of state. The fact that the judiciary is the only effective check on the abuse of power by the executive is acknowledged and the resultant tension between the different branches of government is analysed. In the subsequent chapters, the focus shifts to the role of the judge in strategic litigation and the effect of possible subjective constitutional interpretation on the right of the strategic litigant to pursue his or her rights through the courts with the expectation that the court will adjudicate on the matter impartially and fairly and the expectation that the court will come to a reasoned and just decision. Chapter 5 considers the constitutional limitations of strategic litigation by analysing different examples of strategic litigation and the findings of the South African courts. It is shown that constitutional limitations to strategic litigation are in some instances self-imposed by the courts. Furthermore, procedural rules and regulations and ethical considerations are not effective in holding the state litigant accountable for the flouting of constitutionally imposed positive duties. In the final chapter, a short summary is made and conclusions are drawn. It is argued that there is a need in South African law of civil procedure for a set of rules or guidelines to hold the state litigant constitutionally accountable and to force the state litigant to be the model litigant.

OPSOMMING

Die breë fokus van die proefskrif is die analisering van die tekortkominge van konstitusionele litigasie waar die staat betrokke is. In die eerste hoofstuk word ’n uiteensetting van die agtergrond van die studie verskaf en die konsep van strategiese litigasie word gedefinieer. Vervolgens word die toepassing van die Grondwet op litigasie waarby ’n orgaan van die staat ’n party is geanaliseer. In die derde hoofstuk word die konsep van strategiese litigasie ondersoek binne die konteks van die leerstuk van die skeiding van magte. Die analise poog om vas te stel tot watter mate strategiese litigasie kan dien as ’n effektiewe teenwig teen die misbruik van mag deur staatsorgane. Die feit dat die regbank die enigste effektiewe teenwig is teen die misbruik van mag deur die uitvoerende gesag word erken en die gevolglike spanning tussen die verskillende regeringsinstansies word geanaliseer. Die klem verskuif vervolgens na die rol van die regter in strategiese litigasie en die rol wat moontlike subjektiewe grondwetlike interpretasie mag speel op die reg van die strategiese litigant om sy of haar regte onpartydig en regverdig in die hof te laat aanhoor en die reg dat die hof tot ’n beredeneerde en geregverdigde beslissing sal kom. Hoofstuk 5 ondersoek die grondwetlike tekortkominge van strategiese litigasie deur verskillende voorbeelde van strategiese litigasie en die bevindings van die Suid Afrikaanse howe te analiseer. Die analise dui daarop dat grondwetlike tekortkominge in strategiese litigasie in sekere gevalle deur die howe self opgelê word. Verder word aangetoon dat bestaande prosedurele reëls en regulasies en etiese oorwegings nie effektief die staatslitigant aanspreeklik hou vir die verontagsaming van grondwetlik ingestelde positiewe verpligtinge nie. In die finale hoofstuk word ’n kort opsomming gemaak en gevolgtrekkings word bereik. Daar word geargumenteer dat daar ’n noodsaaklikheid is in Suid Afrikaanse siviele prosesreg vir ’n stel reëls of riglyne om die staatslitigant grondwetlik aanspreeklik te hou en om die staatslitigant te forseer om die model litigant te wees.

KEYWORDS

Application of the Bill of Rights; Bill of Rights; Checks and balances; constitution; constitutional interpretation; constitutional litigation; constitutional values; constitutional rights; organs of state; doctrine of separation of powers; judges; justice; justness; positive constitutional duties; judicial activism; judicial review; judicial impartiality; judicial independence; rationality; state litigant; strategic litigation.

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

ACHPR	African Court of Human and Peoples' Rights
AHRLJ	African Human Rights Law Journal
AIAL	Australian Institute of Administrative Law
ANC	African National Congress
BYU J. Pub. L.	Brigham Young University Journal of Public Law
CAPE	Center for Advances in Public Engagement
CBC	Cape Bar Council
CC	Constitutional Court
CCRF	Canadian Charter of Rights and Freedoms
Chap. L. REV	Chapman Law Review
Conn. L. Rev.	Connecticut Law Review
DHA	Department of Home Affairs
DJCIL	Duke Journal of Comparative International Law
ECHR	European Court of Human Rights
Emory Int'l L. Rev.	Emory International Law Review
EU	European Union
Fordham Urb. L.J.	Fordham Urban Law Journal
HARV. J. On Legis	Harvard Journal on Legislation
IDASA	Institute for Democracy in South Africa
J. Pub. L.	Journal of Public Law
JSC	Judicial Service Commission
LAC	Labour Appeal Court
LHR	Lawyers for Human Rights
LRA	Labour Relations Act
MHA	Minister for Home Affairs

N.C. L. Rev.	North Carolina Law Review
NA	National Assembly
NCOP	National Council of Provinces
NDPP	National Director of Public Prosecutions
NEHAWU	National Health and Allied Workers Union
NLM	National Liberation Movement
Nw. U.L. Rev.	Northwestern University Law Review
PAIA	Promotion of Access to Information Act
PAJA	Promotion of Administrative Justice Act
PELJ	Potchefstroom Electronic Law Journal
PER	Potchefstroom Elektroniese Regstydskrif
Pulp	Pretoria University Law Press
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal
SARS	South African Revenue Service
SCA	Supreme Court of Appeal
Scopa	Standing Committee on Public Accounts
Stan. L. Rev.	Stanford Law Review
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UNSW	University of New South Wales
U. Rich. L. Rev.	University of Richmond Law Review
USC	United States Code
WCHC	Western Cape High Court
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

Chapter 1: Introduction

1.1 Background

The difficult issues facing communities are often too complex and involve too many different interests to be successfully resolved at the ballot box alone. Governments and political parties often act contrary to the wishes of the population, causing citizens to lose faith in government and government institutions. Furthermore, political parties do not necessarily act for the public good, but act in what they perceive to be the best interest of their voters. Leighninger states that people feel entitled to the services and protection of their government and yet they do not have much faith that the government will deliver on what they promise.[1] This distrust of governments gives rise to individuals' and organisations' playing a watchdog role over state actions, state spending and legislation; such individuals and organisations lobby and make demands on the state for various public goods.[2]

Ranchod states that, in part, their watchdog role is a way of forcing the government to remain accountable to its citizens in general and their own membership in particular. This civil-society engagement with the state can be viewed as part of political pluralism;[3] this implies tolerance and accommodation of diverse views, passions, interests and demands in the public sphere. According to Ranchod, civil society's engagement with the state between elections is a form of public political participation, which ranges from the mobilisation of public opinion to action on the streets and includes both non-confrontational and confrontational methods of engagement. These methods include litigation, petitions, media campaigns, mass marches, strikes, and civil disobedience.[4] As part of this political participation, organisations and individuals often disregard or distrust the political process and approach the courts to advance their own

---

1 Leighninger 2009 *CAPE* 2.

2 Ranchod 2007 *Policy: Issues and Actors* 3.

3 Political pluralism indicates a participatory type of government in which the politics of the country are defined by the needs and wants of many. Political pluralism is a government of the people, by the people, and for the people. The basic ideas of government become evident through the ideas of individuals and groups to ensure that all the needs and wants of society are met. There is no right or wrong idea: everyone's ideas are valid.

4 Ranchod 2007 *Policy: Issues and Actors* 3.

interests and protect their own rights. Schokman states that the organisation or individual often takes the legal route as part of a strategy to achieve broader systemic change. A lawsuit may create change either through the success of the action and its effect on law, policy or practice, or by publicly exposing injustice, raising awareness and generating broader change. This type of litigation is called strategic litigation.[5]

Section 34 of the *Constitution of the Republic of South Africa, 1996* (hereafter the *Constitution*) grants South Africans the right of access to the courts.[6] The purpose of this right is threefold: firstly, to protect general and individual rights; secondly, to support the separation of powers (specifically the separation of the judiciary from the other branches); and, thirdly, fundamentally to uphold the rule of law.[7] It is a fundamental principle of the rule of law that anyone may challenge the legality of any law or conduct.[8] When challenging conduct or law in this way, individuals and organisations often require the courts to adjudicate on matters traditionally reserved for the executive and legislative branches of government.

Anderson states that, in the absence of clear goals and techniques for programmatic development, recent developments have emphasised the role of legal institutions in empowering disadvantaged groups while holding governments and corporations accountable for anti-humanitarian activities. Anderson continues, however, that legal procedure places serious constraints on the possibilities for popular participation, but that political activism can be used to interrogate and even breach those constraints.[9] This concept of activism by litigation or strategic litigation seems at first glance to be incompatible with the traditional view of litigation.

---

5 Schokman 2012 *Advocates for International Development* 3. The concept of strategic litigation is further explored in section 2.2 where the difference between ordinary litigation and strategic litigation is investigated.

6 Section 34 reads that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

7 *Bernstein v Bester* 1996 (2) SA 751 CC para 105.

8 The concept of "rule of law" was familiar to ancient philosophers such as Aristotle, who wrote that "law should govern" Aristotle *Politics* 3.16.

9 Anderson 1993 *Third World Legal Studies* 178.

It is a feature of strategic litigation that enforcement of the judgment usually lies with the state. This can be problematic, because an organ of state is usually a participant in the litigation. Therefore, the changes that may be effected by the litigation are often contrary to official government policy. In other words, the change required by the judgment may sometimes be politically unacceptable to government and its mandating supporters, with the effect that the political will to apply and enforce such judgments would be lacking. The courts are well aware this, recognising that the institutional limits of the judiciary "often result in courts being forced to watch impotently while a dysfunctional and apparently unrepentant administration continues to abuse its power".[10]

One of the most important principles of South African law is expressed by the maxim *ubi ius ubi remedium*:[11] where there is a right, there is a remedy.[12] This means that the existence of a legal rule implies the existence of an authority with the power to grant a remedy if that rule is infringed. A legal rule or judgment will be deficient if there is no means of enforcing it and if no sanction attaches to a breach of that rule or judgment. The *Constitution* itself provides very little guidance on constitutional remedies,[13] but according to the Constitutional Court in *Fose* –[14]

> [i]t is left for the courts to decide what would be appropriate relief in any particular case. Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.

Noting the special responsibility of the courts to vindicate individual rights, Ackermann J identified a judicial obligation to "forge new tools" and shape "innovative remedies".[15]

---

10 *Vumazonke v MEC for Social Development and Welfare for Eastern Cape Province* 2004 ZAECHC

11 The basic principle contemplated in the maxim is that when a person's right is violated, the victim will have an equitable remedy under law. The maxim also means that the person whose right has been infringed has a right to enforce the infringed right through any action before a court. All courts of law are guided by the same principle of *ubi ius ibi remedium*.

12 Hiemstra *Trilingual Legal Dictionary* 299.

13 Currie and De Waal *The Bill of Rights Handbook* 195.

14 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) paras 18 and 19.

15 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 69.

The powers of the Court in constitutional matters are set out in section 172 of the *Constitution.* Section 172(1) reads as follows:

> (1) When deciding a constitutional matter within its power, a court—
>
> *(a)* must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> *(b)* may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

Section 172 therefore grants the court the power to make any order that is just and equitable, giving force to the judicial obligation recognised by Ackermann J to "forge new tools" and shape "innovative remedies",[16] and so it is clear that the *Constitution* grants wide powers to the courts to right constitutional violations. One can ask, however, whether there is a commitment by both the courts and the organs of state to advance and protect the *Constitution.* Should the courts or organs of state not honour their constitutional obligations, it would undermine the rule of law and the legitimacy of the courts, organs of state and the *Constitution.* Furthermore, the question must be asked whether current law of civil procedure is open to abuse by the capricious state litigant striving to protect organs of state or state individuals who violate the *Constitution.* If such constitutional violations occur, are the remedies offered by the *Constitution* sufficient to allow the courts to protect the *Constitution* or should the courts be forced to watch impotently while a dysfunctional and apparently unrepentant administration continues to abuse its power? After all, legitimacy and confidence in a

---

[16] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).

legal system demand that an effective remedy be provided in situations where the interests of justice cry out for one.[17]

1.2 The changing face of civil litigation in South Africa

In the modern South African constitutional state the concept of litigation has developed on the basis of the traditional common-law principles of claiming for damages wrought, correcting a wrong or obtaining relief from another. The traditional cause of action featured a plaintiff with clear and identifiable rights and a defendant with clear obligations or liabilities. In terms of the common law, the litigants would pray for a remedy that would usually involve monetary compensation, and the effect of the remedy would rarely reach beyond the parties to the case. In modern constitutional litigation, such cases still reach the courts. However, since 1994, the South African *Constitution* provides the strategic litigant with a basis from which to bring before the court matters not possible in terms of traditional common law.

The advent of the *Constitution* made possible the judicial review of state actions. Section 1(c) of the *Constitution* confirms the supremacy of the *Constitution* and the rule of law. Furthermore, section 2 of the *Constitution* provides that the *Constitution* is the supreme law of the Republic, that law or conduct inconsistent with it is invalid, and that the obligations imposed by the *Constitution* must be fulfilled. In a growing number of cases, the post-constitutional concept of litigation sets the tone for strategic litigation in which the litigants are able to enforce constitutional rights, expose corruption and shape and influence government policy. This allows litigants to enforce a change in or to influence or direct executive policy through the courts. Constitutional provisions therefore make it possible for individuals or organisations to hold organs of state and state representatives constitutionally accountable.

1.3 Positive constitutional duties imposed on the state when litigating

Van Doren argues that there is a "fundamental contradiction" between the exercise of state power and individual freedom. This contradiction exists because state power is

---

[17] *Molaudzi v S* 2015 (2) SACR 341 (CC) para 37.

both necessary for, and a great threat to, individual freedom.[18] The South African *Constitution* seeks to balance the contradiction between the rights of the individual and the right of the state to exercise power. The constitutional attempt to create a balance between the exercise of state power and individual rights is also visible when an organ of state engages in litigation. Section 9(1) of the *Constitution* highlights that everyone is equal before the law and has the right to equal protection and benefit of the law. However, when the private individual litigates against an organ of state, the constitutional promise of equality before the law and equal protection and benefit of the law is not always realised. There is sometimes a substantial imbalance of power in litigation with the government. Organs of state may have access to substantial resources, powers to investigate and more experience and specialist expertise in dealing with complex legal matters. To give realisation to constitutional equality before the law it is necessary for the state litigant to act in a manner which is honest, consistent, and fair. The state litigant must be held to a different standard than the private litigant. The state litigant must be the model litigant. It is trite that there is also a legal duty on the private litigant and private legal representative to behave ethically and honestly when litigating. However, the state litigant must be held to a stricter and higher standard than the private litigant. The state litigant has the positive constitutional duty to uphold, defend and respect the *Constitution*. Moreover, given that the state litigant is publically funded, the state litigant must represent the public interest in litigation. In other words, an organ of state can litigate only when it is in the public interest to do so and/or it will vindicate the *Constitution*. The duties placed on the state litigant and state legal representatives transcend the ethical obligations placed upon the private litigant and private legal representative.[19] Ethical obligations provide for minimum standards of conduct, whereas the constitutional injunction placed on the state litigant involves striving for aspirational standards of the highest character.[20]

---

18 Van Doren 1986 *SALJ* 648.

19 State officials ignore their constitutional obligations at their peril. *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* (CCT 143/15; CCT 171/15) [2016] ZACC 11 para 1.

20 The argument that the state litigant must be held to a different and higher standard than the private litigant is recognised in a number of foreign jurisdictions. In the European Court of Human Rights, it is referred to as the 'Principle of Equality of Arms' that forms part of the right to fair trial, regulated

Chapter 2 of the *Constitution* sets out a Bill of Rights, which the state must respect, protect, promote and fulfil.[21] Furthermore, the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.[22] A competent court may be approached with the allegation that a right in the Bill of Rights has been infringed or threatened.[23]

The *Constitution* provides that national legislative authority is vested in Parliament.[24] The President and the National Executive have the powers entrusted to them by the *Constitution* and legislation, including those necessary to perform the functions of Head of State and head of the national executive.[25] The judicial authority of the Republic is vested in the courts.[26] An order issued by a court binds all persons to whom and organs of state to which it applies.[27] Therefore, although the executive branch and Parliament have the constitutional power to fulfil their functions, these powers must be exercised in a manner consistent with the *Constitution* and the obligations it imposes on the state.

Du Plessis *et al* argue that the *Constitution* places a range of positive duties on organs of state. These positive duties also apply when an organ of state engages in litigation. Organs of state must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.[28] The duty placed on organs of state to ensure the effectiveness of the courts entails a positive obligation for the organs of state to place relevant and material evidence before the courts.[29] There is also a strong need for government to provide an explanation for the introduction of

---

by art 6 of the European Convention for Human Rights. In Australia it is referred to as the model litigant obligation. According to Zac Chami 'The obligation to act as a model litigant' (2010) *AIAL Forum* 64, the model litigant extends beyond merely obeying the law and abiding by the ethical obligations that apply to legal practitioners. The ethical obligations provide for minimum standards of conduct, whereas the model litigant obligation involves striving for aspirational standards of the highest character.

21 Section 7(2) of the *Constitution.*
22 Section 8(1) of the *Constitution.*
23 Section 38 of the *Constitution.*
24 Chapter 4 of the *Constitution.*
25 Chapter 5 of the *Constitution.*
26 Chapter 8 of the *Constitution.*
27 Section 165(5) of the *Constitution.*
28 Section 165(4) of the *Constitution.*
29 Du Plessis, Penfold and Brickhill *Constitutional Litigation* 4.

legislation.[30] Furthermore, public administration should be governed by the democratic values and principles enshrined in the *Constitution*, including the following principles:[31]

(a) A high standard of professional ethics must be promoted and maintained.

(b) Efficient, economic and effective use of resources must be promoted.

(c) Public administration must be development-oriented.

(d) Services must be provided impartially, fairly, equitably and without bias.

(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.

(f) Public administration must be accountable.

(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.

(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

The principles contained in section 195(1) apply to the administration in every sphere of government, organs of state and public enterprises.[32] Therefore, an organ of state must ensure that it acts in an ethical, economical, impartial, fair, open and accountable manner when engaging in litigation. The constitutional injunction requiring fairness from the state litigant can be realised by holding the organ of state, the state legal representative and the instructing agent for the organ of the state to a different standard than the private litigant. The constitutional injunction requires the organ of the state to be the model litigant when it makes use of the court process.

1.4 Constitutional accountability of organs of state when litigating

---

30 *Matatiele Municipality v President of the Republic of South Africa* 2006 (5) SA 47 (CC) para 109.
31 Section 195(1) of the *Constitution.*
32 Section 195(2) of the *Constitution.*

The courts have indicated that the commencement, defence and conduct of litigation by the government or government departments constitutes the exercise of public power.[33] Therefore, state litigation is subject to the same scrutiny as any other exercise of public power. The state litigant has to comply with the principle of legality and the rule of law. The rule of law, legality and democratic principles are foundational values of the *Constitution.*[34] When these values are threatened by the organs constitutionally charged with protecting and furthering them, new strategies are needed to protect these values.

In *Permanent Secretary Department of Welfare, Eastern Cape Provincial Government v Ngxuza*,[35] the respondents brought motion proceedings against the Eastern Cape Provincial Government to reinstate the disability grants they had been receiving under the *Social Assistance Act*,[36] which the province terminated without notice to them.[37] They also sought to litigate as representatives on behalf of anyone in the Eastern Cape Province whose disability grants had been cancelled or suspended by the Eastern Cape Government.[38] The applicants challenged both the granting of leave to institute the class action and the disclosure order, without questioning the merits of the case.[39] The applicants did not dispute that the method the province chose to verify and update its pensioner records was not just harsh, but also unlawful. This had been previously established by the Courts.[40] Despite the earlier finding that the actions of the province were unlawful, the applicants again disputed the claims of the respondents.[41] The Court describes the conduct of the applicants as follows:

> The applicants did so by recourse to every stratagem and device and obstruction, every legal argument and non-argument that it thought lay to hand. While offering no undertaking to implement Bushula in relation to the applicant class, it asserted that because of the decision the relief sought was moot. It then contended, contradictorily, that the applicants' claim was not yet ripe for adjudication. It tendered no evidence to

---

33 Du Plessis, Penfold and Brickhill *Constitutional Litigation* 3.
34 Section 1 of the *Constitution.*
35 2001 (4) SA 1184 SCA.
36 59 of 1992.
37 Para 2.
38 Para 3.
39 Para 5.
40 *Bushula v Permanent Secretary, Department of Welfare, Eastern Cape* 2000 (2) SA 849 (E) and *Rangani v Superintendent-General, Department of Health and Welfare, Northern Province* 1999 (4) SA 385 (T).
41 Para 17.

> refute the mass of *indicia* the applicants placed before the Court that showed unlawful conduct against huge numbers of disability pensioners, yet argued that the applicants' evidence was inadmissible hearsay. It obstructed the applicant class's entitlement to be spared physical destitution, yet invoked their privacy rights in contending that the disclosure order should not have been granted. It did not flinch even from deriding the first applicant, who adhered to the founding papers with his thumbprint. Its deponent thought fit to record his doubt that Mr Ngxuza had read the media articles appended to the papers (a claim the first applicant did not make), while the written argument stated that it "boggles the mind" that "a man who never attended school and is presently illiterate" is able to make "learned submissions".

The Court held that all this speaks of contempt for people and process that does not befit an organ of government under our constitutional dispensation.[42] It is not the function of the courts to criticise government's decisions in the area of social policy, but –

> [w]hen an organ of government invokes legal processes to impede the rightful claims of its citizens, it not only defies the Constitution, which commands all organs of state to be loyal to the Constitution,[43] and requires that public administration be conducted on the basis that people's needs must be responded to.[44]

The Court stated that such a process also misuses the mechanisms of the law, which it is the responsibility of the courts to safeguard. The Court held that the province's approach to the proceedings was contradictory, cynical, expedient and obstructionist. It conducted the case as though it was at war with its own citizens. This begs the question of whether existing control mechanisms are sufficient to prevent the state from acting outside the scope of the *Constitution* and to ensure that organs of state comply with their constitutional and legal duties. Should it be found that existing control measures are not adequate to vindicate the *Constitution*, is judicial intervention essential in order to vindicate the rule of law by making certain that the exercise of power accords with the obligations articulated in the *Constitution*? In section 1.3 above it was argued that the state litigant should be held to a different standard than the private litigant. To conform to the equality clause in section 9(1) of the *Constitution* and the basic values and principles that must govern public administration as set out in section 195 of the *Constitution*, a new set of procedural rules or guidelines are needed

---

42 Para 19.

43 Section 41(1)(d) of the *Constitution* provides that all spheres of government and all organs of state must be loyal to the *Constitution*, the Republic and its people.

44 Section 195(1)(e) of the *Constitution* provides that people's needs must be responded to.

to hold the state litigant constitutionally accountable. These rules or guidelines could assist the state litigant to act in the public interest, according to law and the *Constitution*. These procedural rules or guidelines are called the model litigant obligation and are discussed in Chapter 6.

The Constitutional Court has so far played a significant political role in relation to conflict over the powers of the various levels of government and the extent to which political parties use the Court to fight political battles. That is of course not the only types of cases that reach the Court. The Court also adjudicates on ordinary matters in both civil and criminal law where constitutional questions arise.[45] However, the political role of the Constitutional Court is likely to become increasingly important as more political struggles are placed before the courts for resolution. This political role of the courts is not accepted, however, without criticism. The last decade has shown a steadily rising tension between government and the judiciary in South Africa.

This tide of tension between government and the judiciary reflects the fact that although the *Constitution* expressly provides for judicial review, the extent and nature of such review is neither clear nor settled. It is further clear that the dynamics of the separation of powers between the executive, the legislature and the judiciary in the South African constitutional state are far from established and entrenched.

1.5 Problem statement

This study aims to ascertain the constitutional limits to strategic litigation involving the state in South Africa. The question asked is: What are the constitutional limits to strategic litigation involving the state? To answer this question, this study starts off in chapter two by investigating the procedural aspects of constitutional litigation and the changing face of civil litigation in South Africa after the commencement of the *Constitution.* In the third chapter, strategic litigation as an effective check to prevent the abuse of power is investigated in the context of the doctrine of the separation of powers. Chapter four examines the role of the judge in strategic litigation. Chapter five

---

[45] The jurisdiction of the Constitutional Court is further investigated in section 2.4.5.

explores the constitutional limitations on strategic litigation. The chapters in this study are separate from each other, but they also overlap and interrelate. In order to reach a conclusion, they are considered cumulatively in chapter six.

1.6 Research methodology

This study aims to review the constitutional limitations on strategic litigation involving the state in South Africa. A limited legal comparison is applied in some of the chapters to give context and depth to the study. The aim is not to transplant developments in foreign jurisdictions directly into South African law or to compare directly the strengths and the weaknesses of the legal systems concerned. The study of the position in other jurisdictions is aimed at distilling lessons from such jurisdictions. This study takes into account that the jurisprudence is the product of different societies, cultures, and political and legal systems. Therefore, the study relies heavily on South Africa's unique circumstances and the South African *Constitution* is used as the main guideline. The potential value of this methodology for interpreting the constitutional effect and impact of strategic litigation lies, arguably, in the contribution it can make towards giving background and context to the South African position. The study comprises a critical review of relevant legislation and an examination of case law, electronic sources, textbooks and academic articles, after which the constitutional limitations on strategic litigation involving the state is critically evaluated.

1.7 Overview of study

1.7.1 Chapter 1: Introduction

The Introduction sets out the basis on which this research was conducted. This covers the background to this study, the problem statement, the research methodology and an overview of the five research objectives.

1.7.2 Chapter 2: Constitutional litigation and the changing face of civil litigation in South Africa

This study starts with an investigation of strategic litigation within the framework of the South African *Constitution.* The application of the Bill of Rights to legal disputes is analysed and the justiciability of legal disputes debated. In the pre-democratic era, the principle of legality – the idea that administrators and other public actors had to act lawfully – was not always adhered to. The advent of the constitutional era in South Africa has changed this dynamic. Section 33 of the *Constitution* provides that everybody has the right to administrative action that is lawful, reasonable and procedurally fair, and in terms of section 33(3) national legislation must be enacted to give effect to this right. This national legislation must impose a duty on the state to give effect to the right to fair and just administrative action. The concept of legality has a wider meaning that goes beyond administrative action.[46] It also refers to a broad constitutional principle of legality that governs the use of all public power.[47] The principle of legality is an aspect of the rule of law, a founding value of the constitutional order in terms of section 1(c) of the *Constitution.*[48] The fundamental idea it expresses is that the exercise of public power is only legitimate when lawful. The legality of public power exercised by an organ of state may be challenged by litigants, and should the court find that constitutional violations occurred; the court may remedy the violation. The prominence of the rule of law in South Africa is evidenced by the manner in which the courts have invoked the rule of law as a mechanism to limit, regulate and give meaning to how state power is exercised.[49]

---

46 Hoexter *Administrative Law* 224.

47 Hoexter *Administrative La*w 225.

48 Section 1 of the *Constitution* provides that the Republic of South Africa is one, sovereign, democratic state founded on the following values: … "(c) Supremacy of the *Constitution* and the rule of law." According to the Oxford English Dictionary, the rule of law can be defined in the following way: "[T]he authority and influence of law in society, especially when viewed as a constraint on individual and institutional behaviour; therefore it is a principle whereby all members of a society (including those in government) are considered equally subject to publicly disclosed legal codes and processes." The rule of law is therefore a legal principle that law should govern a nation, as opposed to being governed by arbitrary decisions of individual government officials and functions as a constraint upon behaviour, including the behaviour of elected government officials.

49 De Vos *et al South African Constitutional Law in Context* 81.

The introduction of the *Constitution* broadened the scope of the law of civil procedure in South Africa. The procedural aspects of litigation are investigated, with the focus on the traditional and modern constitutional concept of litigation. The advantages and disadvantages of strategic litigation are explored.

The application of the Bill of Rights is concerned not only with the question of whether the Bill of Rights applies, but also with how it applies in a legal dispute. When interpreting the Bill of Rights, a court must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.[50] When interpreting any legislation, and when developing the common law or customary law, every court must promote the spirit, purport and objects of the Bill of Rights.[51] The procedural process of strategic litigation is explored to identify any constitutional limitations on constructive strategic litigation. The constitutional remedies available to courts are investigated with a view to constructing appropriate remedies for constitutional violations.

The duty of organs of state to act fairly in litigation is explored with particular attention to the positive duties imposed by the *Constitution* on organs of state when engaging in litigation. The constitutional injunction requiring honesty and fairness of the state litigant requires the state litigant to be the model litigant. Finally, compliance by organs of state with the constitutionally imposed duties is investigated and the question is asked whether the state litigant consistently acts like the model litigant.

1.7.3 Chapter 3: Strategic litigation as an effective check to prevent the abuse of power in the context of the doctrine of the separation of powers

This chapter analyses the procedural aspects of strategic litigation by examining the concept of the separation of powers in the South African constitutional state and its effect on strategic litigation. The constitutional principle of the separation of powers is an essential feature of modern South African government. Constitutional Principle VI, of the constitutional principles agreed upon during the multi-party negotiating process in

---

50 Section 39(1)(a) of the *Constitution*.
51 Section 39(2) of the *Constitution.*

the early 1990s and annexed to the *Constitution of the Republic of South Africa* 200 of 1993 (hereafter the *Interim Constitution*), was worded as follows:

> There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

However, a complete separation of powers is possible neither in theory nor in practice. At the outset of this chapter, attention is paid to the historical basis of Parliamentary sovereignty in pre-*Constitution* South Africa and the subsequent changeover to a system of constitutional supremacy. The historical background to the doctrine of the separation of powers is investigated with specific emphasis on the development and purpose of the doctrine.

The principle of the separation of powers after the commencement of the *Constitution*, 1996, is investigated and its effect on strategic litigation is explored. Attention is focused on the fact that the *Constitution* does not refer explicitly to the separation of powers, although it is implicit in the document.[52] The effectiveness of the constitutional checks and balances essential for the doctrine of the separation of powers in South Africa is investigated. The fact that the judiciary serves as a check on the abuse of power by other organs of state gives rise to tension in the South African constitutional state. This tension is not new to South Africa, because the judiciary and the executive have clashed on several infamous occasions in the past.[53] The current state of the relationship between the judiciary and the other branches of government is analysed and conclusions are drawn.

The judiciary as a check on the abuse of power by organs of state is addressed and its effect on the supremacy of the *Constitution* and strategic litigation is discussed. The

---

[52] Chapters 4 to 8 of the *Constitution* provide for a clear separation of powers between three spheres of government. Section 43 vests the legislative authority of the Republic of the national sphere in parliament and of the provincial sphere in the provincial legislatures. Sections 85 and 125 vest the executive authority of the Republic in the president and of the provinces in the premiers, respectively. Section 165 vests the judicial authority in the courts.

[53] President Kruger of the old South African Republic clashed with Chief Justice Kotzé in *Executors of McCorkindale v Bok* 1884 1 SAR 202; in *Harris v Minister of the Interior* 1952 (4) SA 769 (A) the government attempted to remove the coloured voters of the Cape Province from the common voters' role.

courts subscribe to a self-imposed culture of deference in judicial review. The question is asked whether a culture of deference places a constitutional limitation on strategic litigation and whether a standard of judicial review based on constitutional provisions and values may be of value.

1.7.4 Chapter 4: The role of the judge in strategic litigation

This chapter augments the debate on the constitutional impact of strategic litigation by investigating the role of the judge in strategic litigation. To view the Constitutional Court as a strictly legal institution is to underrate its significance in the South African political system and its constitutional function. It is a political institution as well, often judging controversial issues of national policy where the "setting" of the case is political.

The effect of the personal prejudices of judges on decisions of the court is therefore explored. This relates closely to constitutional interpretation, statutory construction, and separation of powers.[54] In the stratum of strategic litigation, where the impact of the judgment is far reaching, the effect of the personal prejudice by judges is of special concern.

The chapter begins with a discussion of the judicial appointment process in South Africa and investigates the role that politics and transformation play in the process of appointing judges.

The chief characteristic that distinguishes the courts from the political institutions is judicial independence: independence from government and from political leadership, independence from political parties and political fashion, independence from popular feelings.[55] Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.[56] Judicial independence in South Africa is regulated by the *Constitution*, the *Judicial Service Commission Act* 9 of 1994 and a *Code of Judicial*

---

54 Definitions.net.STANDS4LLC Oct. 2014. http://www.definitions.net/definition/judicial activism.
55 Koopmans *Courts and political institutions* 250.
56 Section 165(4) of the *Constitution.*

Conduct.[57] Judicial independence is discussed with reference to the constitutional provisions guaranteeing the independence of the judiciary.

While judicial independence is objective, judicial impartiality is subjective, because its realisation is dependent on the judge. Impartiality is that "quality of open-minded readiness to persuasion – without unfitting adherence to either party, or to the judge's own predilections, preconceptions and personal views – that is the keystone of a civilised system of adjudication".[58] This does not mean absolute neutrality, however, because judges are human and there is no human being who is not the product of his or her own social experience, education and human interaction. What is possible and desirable is impartiality:[59]

> The wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave. True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.

When adjudicating, judges are realising legal and social order. The strategic litigant should have the real and tangible opportunity of pursuing his rights through the courts with the expectation that the court will adjudicate the matter impartially and fairly and that the court will come to a reasoned and just decision. This requires impartial judges that function with skill, efficiency and professionalism, and asks of judges to deliver judgments that are just, lawful, reasonable and well argued – all principles that are requirements for a fair trial.

Judicial impartiality is investigated with specific reference to the interpretation of constitutional rights and values in what is called "hard cases". Attention is paid to how constitutional interpretation gives rise to the principles of rationality and justice in strategic litigation, and then an acceptable theory of constitutional interpretation based on the underlying moral value system of the *Constitution* is proposed.

---

57 Adopted in terms of s 12 of the *Judicial Service Commission Act* 9 of 1994, published in *Government Gazette* No. 35802 of 18 October 2012.

58 *South African Commercial Catering and Allied Workers Union v Irvin and Johnson Ltd* 2000 (3) SA 705 (CC) para 14.

59 Canadian Judicial Council: *Commentaries on Judicial Conduct* (1991) https://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf 12 accessed December 2015.

1.7.5 Chapter 5: Constitutional limitations on strategic litigation

Strategic litigation aims to effect social and political change while avoiding the traditional field of and vehicles for such change. The wide impact of and consequences ascribed to such judgments beg the question whether litigational activism through strategic litigation is desirable in the South African constitutional state. This chapter examines different examples of strategic litigation and the findings of the courts are discussed and analysed.

The strategic litigation case studies fall into three broad categories: firstly, that of strategic litigants who attempt to "shape" societal norms and values by seeking to change the common or statutory law; secondly, that of strategic litigants who attempt to influence or change executive policy; and thirdly, that of strategic litigants who attempt to hold organs of state accountable to the *Constitution.* The state litigant's compliance with positive constitutional duties is investigated and it is asked whether organs of state involved in the litigation were model litigants. These examples are analysed with reference to the findings and conclusions in the previous chapters.

1.7.6 Chapter 6: Conclusion

Finally, this study concludes with chapter 6, entitled Conclusion. It concludes the research by revisiting the five research objectives.

Chapter 2: Constitutional litigation and the changing face of civil litigation in South Africa

2.1 Introduction

Scholars disagree about the defining features of public litigation, a term often used to refer to the diverse proceedings of modern, non-traditional litigation.[1] Commentators refer to this type of litigation with various terms, including *public litigation*, *modern litigation*, *post-constitutional litigation* and *strategic litigation*. In this work, the term *strategic litigation* is adopted. In references to work of other authors, the terms employed by them are used.

The term *strategic litigation* is used consistently in this chapter to refer to the growing body of lawsuits challenging legislative or executive action, seeking policy changes within government, seeking to restructure the organisation of public institutions or exposing corruption.[2] A focal point of strategic litigation in this sense is that a legislature or the executive will always be a party to the proceedings. Although strategic litigation suits are typically brought following specific violations of constitutional rights, values or obligations, the primary aim is usually not redress for past damages. Unlike the traditional plaintiffs in South African common law, strategic litigants use judicial activism to rectify constitutional violations not easily definable in terms of personal financial loss or other damages claimable at common law. Although the motives for the litigation may vary, strategic litigants may seek to reform the institutional structure from which constitutional violations arose and similar wrongs may arise again. Strategic litigation therefore allows for individuals, minorities and groups that are politically marginalised to participate in the political decision-making process.

---

1 Traditional litigation refers to the common-law principles of litigation as defined in *Ferreira v Levin* 1996 (1) SA 984 (CC) para 229. Litigation is instituted to claim damages, to correct a wrong or to obtain relief from another. The traditional cause of action featured a plaintiff with clear and identifiable rights and a defendant with clear obligations or liabilities. In terms of the common law, the litigants would pray for a remedy, which would usually involve monetary compensation, and the effect of the remedy would rarely reach beyond the parties to the case.

2 In drafting these paragraphs, the work of Fallon 1984 *N.Y.U. L. Rev* 3-5 was consulted and adapted to fit South African circumstances.

Litigants seek to enforce constitutional principles and values that affect others as directly as they themselves are affected, and that are valued for moral or political reasons; economic interests are usually not the interest driving the litigation. Strategic litigants therefore seek to regulate executive and legislative action in accordance with the *Constitution.* The relief claimed aims to restructure the public organisation or conduct by the legislature and/or executive to eliminate a threat to constitutional principles and values enshrined in the *Constitution* or to align unconstitutional conduct by the executive or the legislature with the *Constitution.* A study of case law shows, however, that there are areas where the law of civil procedure inadvertently imposes constitutional limitations on strategic litigation involving organs of the state.

The South African law of civil procedure underwent great changes since the commencement of the *Constitution.* The *Constitution* changed the structure of courts, defined the jurisdictional powers of courts regarding constitutional issues and requires the courts to develop the common law.[3] The changes to the common-law concepts of civil procedure by the adoption of the *Constitution* profoundly affected litigation in South Africa.

In this chapter the characteristics of pre-and post-constitutional litigation is investigated. The advantages and disadvantages of strategic litigation are discussed with reference to both the primary and secondary advantages and disadvantages of strategic litigation.

The Bill of Rights may apply to a legal question in different ways. The direct and indirect application of the Bill of Rights is examined and the application of the principle of legality and the rule of law is analysed. The principle of justiciability refers to the types of matter that the courts can adjudicate. If a case is not justiciable, a court cannot hear the matter. The principle of justiciability is considered by investigating how standing, mootness and ripeness affect strategic litigation. The jurisdictions of the High Court, Supreme Court of Appeal and Constitutional Court are also analysed and discussed.

---

[3] Du Plessis, Penfold and Brickhill *Constitutional Litigation* 1.

When a litigant approaches a court, he or she relies on a cause of action to put the facts of the case before the court. A cause of action is a set of facts giving rise to a claim recognised in law. The *Constitution* and the Bill of Rights contain positive rights that are justiciable if breached or threatened. This could give rise to a parallel system of law when there are common-law remedies available to a litigant to enforce such a breach or when legislation has been adopted to give effect to the realisation of these positive duties. The common law, statutory law and constitutional causes of action available to litigants are considered and the effect of the parallel system of law on strategic litigation is determined. The remedies available to rectify failure to meet constitutional obligations are discussed and the state's compliance with court orders is investigated.

The final section of this chapter examines the constitutional imposition of positive duties on the state and the state's compliance with these duties, as well as the constitutional remedies available to the courts to hold the state legal representative, the state instructing agent and the organs of state constitutionally accountable.

2.2 The pre-constitutional and post-constitutional concepts of civil litigation

2.2.1 The pre-constitutional concept of litigation

2.2.1.1 Introduction

Litigation can be described as legal proceedings in a court or a judicial contest between parties with contesting rights to determine and enforce legal rights. The earliest known example of a lawsuit is the trial depicted as a series of events on the shield of Achilles as described in the eighteenth book of the *Iliad*,[4] verses 497-508. The scene describes a primitive but genuine legal procedure, which is seen as the original source of social control of private disputes exercised at law.[5]

According to Wolf, the public administration of justice developed from a prehistoric habit of settling disputes between individuals by voluntarily dispensing with pursuing

---

4 Attributed to Homer and dated 760–710 BC.
5 Wolf 1946 *Tradition* 34.

justice personally and resorting to arbitration.[6] This tradition was gradually refined into a system under which the parties were prohibited from taking the law into their own hands and forced to bring their cases to bodies designated and empowered to hear the matter and hand down binding judgments. Wolf states that the development of public authorities hearing cases and handing down judgments was encouraged by the pressure of public opinion, as well as by the growing power of the rulers. The purpose of this was to restrain citizens from armed feuds and blood vengeance, and to force them to seek the decision of rulers who, by virtue of their position and authority, were competent to hear such matters. When states developed, the jurisdiction of these authorities passed, after the abolishment of the early monarchy, to the aristocratic city magistrates and, in democracies, to the popular courts.[7]

In the modern South African constitutional state, the concept of litigation has developed on the basis of the traditional common-law principles of claiming for damage wrought, correcting a wrong or obtaining relief from another. The traditional cause of action featured a plaintiff with clear and identifiable rights and a defendant with clear obligations or liabilities. In terms of the common law, the litigants would pray for a remedy, which would usually involve monetary compensation, and the effect of the remedy would rarely reach beyond the parties to the case. Since 1994, the South African *Constitution* provides the strategic litigant with a basis on which to bring before a court matters not possible in terms of traditional common law.

2.2.1.2 Pre-constitutional concept of litigation in the United States of America

Chayes states that in the American legal tradition the lawsuit is a vehicle for settling disputes between private parties about private rights. This predominating influence of the private-law model can be seen in constitutional litigation, which, from its first appearance in *Marbury v Madison*,[8] was understood as an outgrowth of the judicial duty

---

6 Wolf 1946 *Tradition* 31.

7 Wolf 1946 *Tradition* 32.

8 *Marbury v Madison* 5 U.S. 137 1803 was a landmark United States Supreme Court case in which the Court formed the basis for judicial review in the United States under Article III of the American Constitution. The decision helped define the boundary between the constitutionally separate executive and judicial branches of the American form of government.

to decide otherwise-existing private disputes.[9] Chayes argues that litigation also performed another important function, namely the clarification of the law to guide future private actions. This understanding of the legal system, read with the common-law doctrine of *stare decisis*, focused attention on adjudication at the appellate level, for only there did the process reach beyond the immediate parties to achieve a wider import through the elaboration of generally applicable legal rules. He then lists the defining features of what he calls the traditional conception of adjudication:[10]

(a) The lawsuit is bipolar. Litigation is organised as a contest between two individuals or at least two unitary interests, diametrically opposed, to be decided on a winner-takes-all basis.

(b) Litigation is retrospective. The controversy is about an identified set of completed events: whether they occurred and, if so, with what consequences for the legal relations of the parties.

(c) Right and remedy are interdependent. The scope of the relief is derived more or less logically from the substantive violation under the general theory that the plaintiff will get compensation measured by the harm caused by the defendant's breach of duty: in contract, by paying plaintiff the money he would have had in the absence of the breach; in tort (delict) by paying the value of the damage caused.

(d) The lawsuit is a self-contained episode. The impact of the judgment is confined to the parties. If the plaintiff prevails, there is a simple compensatory transfer, usually of money, but occasionally the return of a thing or the performance of a definite act. If defendant prevails, a loss lies where it has fallen. In either case, entry of judgment ends the court's involvement.

---

9 Chayes 1976 *Harvard Law Review* 1282.
10 Chayes 1976 *Harvard Law Review* 1282.

(e) The process is party-initiated and party-controlled. The case is organised and the issues are defined by exchanges between the parties. Responsibility for fact development is theirs. The trial judge is an objective arbiter of their interactions who decides questions of law only if they are put in issue by an appropriate move of a party.

Chayes found that because the immediate impact of the judgment was confined to the parties, the traditional model was relatively relaxed about the accuracy of its fact-finding and that compensatory monetary relief was the usual form of redress.

Chayes's theory of litigation is based on the concept of litigation as found in the United States of America. The traditional South African concept of litigation shows remarkable similarities to the American model.

2.2.1.3 Concepts of pre-constitutional litigation in South Africa

South Africa subscribes to an adversarial system of law. In an adversarial system, judges are impartial in ensuring the fair play of the civil process or fundamental justice, preside over the proceedings and maintain order but does not actively engage with witnesses. The judge is therefore a neutral arbiter between the parties.

In the South African case of *Whittaker*,[11] the Court found that the purpose of procedural law is to –

(a) do justice between the parties;

(b) to ensure that the proceedings are in place for the purpose of seeing that a true account of what actually took place in the matter is placed before the court; and

(c) to ensure that the matter before the court is so that the court can make a declaration based on the facts of the case.

---

[11] *Whittaker v Roos* 1911 TS 1092 para 1102.

The proceedings therefore aim to regulate a dispute between the parties to the litigation and do not involve or interact with other parties. The proceedings are limited to the facts of the case; no other information or facts are investigated by the court.

In *Ferreira v Levin*[12] O'Regan J, in a minority judgment, explored the traditional concept of litigation.[13] She stated that the existing common-law rules of standing have developed in the context of private litigation.[14] She accordingly defined the concept of private litigation as follows:

> Generally, private litigation is concerned with the determination of a dispute between two individuals, in which relief will be specific and, often, retrospective, in that it applies to a set of past events. Such litigation will generally not directly affect people who are not parties to the litigation. In such cases, the plaintiff is both the victim of the harm and the beneficiary of the relief.

This complies with Chayes's concept of traditional litigation. The dispute is limited in scope; the relief is specific and backward-looking and does not affect parties outside the scope of the litigation.

In *Dalrymple v Colonial Treasurer*,[15] Innes J explained the principle of standing in pre-constitutional litigation:[16]

> The general rule of our law is that no man can sue in respect of a wrongful act, unless it constitutes the breach of a duty owed to him by the wrong-doer, or unless it causes him some damage in law. This principle runs through the whole of our jurisprudence. It is not confined merely to the civil side: it is of equal force concerning criminal procedure. Just as no man can claim damages in a civil action unless he has himself been injured, so no man may institute a private prosecution unless he has been specially affected by the crime. Moreover, the rule applies to wrongful acts that affect the public, as well as to torts committed against private individuals. The acts complained of in this instance fall within the former category.

From this *dictum*, it is clear that litigation proceedings are confined to parties with clear rights in the proceedings. Without a clearly identifiable right, a party will not have the necessary standing to bring the matter before court. This was confirmed in *Roodepoort-*

---

12 1996 (1) SA 984 (CC).
13 Para 229.
14 The term *pre-constitutional* or *traditional litigation* is used in the same context as the concept of private litigation used by the judge.
15 1910 TS 372.
16 Para 379.

Maraisburg Town Council v Eastern Properties (Prop) Ltd,[17] in which the Court held that in order to be accorded standing a litigant was required to have "a direct interest in the matter and not merely the interest which all citizens have".

The pre-constitutional concept of litigation in South Africa therefore reflects the following characteristics:

(a) The purpose of litigation is to do justice between the parties.

(b) The proceedings are in place to see to it that the court has a true account of what transpired in the matter.

(c) The matter is before the court so that the court can make a declaration based on the facts of the case.

(d) The litigation is concerned with the resolution of a dispute between two individuals.

(e) The relief sought will be specific and retrospective, applying to a set of past events.

(f) The litigation will generally not directly affect people who are not parties to the litigation.

(g) The plaintiff is both the victim of the harm and the beneficiary of the relief.

(h) A litigant cannot sue in respect of a wrongful act, unless it constitutes the breach of a duty owed to him by the wrongdoer, or unless it causes him some damage in law.

(i) The litigant is required to have a direct interest in the matter and not merely the interest that all citizens have.

The traditional South African model of litigation is similar to the traditional American concept of litigation as outlined by Chayes. It is submitted that the traditional model of

---

[17] 1933 AD 87, 100.

litigation as found in South Africa and the United States is similar across Western adversarial systems of law.

2.2.2 The post-constitutional concept of litigation

The concept of civil litigation changed over time as more countries subscribed to a constitutional form of government and the consequent review powers of constitutional bodies. Nordht states that the post-industrial society of today is characterised in several respects by social, industrial, commercial and environmental structures, which are different from those that existed when the legislation in many fields was developed. Nordht further states that modern society has given rise to new forms of needs and claims that were previously unknown. He postulates that these new forms of needs and claims create problems associated with litigation and states that this applies to new as well as traditional kinds of litigation.[18] Although Nordht was writing on procedural-law changes in Sweden after the *Swedish Code of Judicial Procedure* was enacted in 1948,[19] South Africa finds itself in the same boat. South Africa also experienced significant procedural-law changes after the adoption of the current constitutional order.

Chayes, writing about the American system of litigation, states that the traditional model of litigation is no longer compatible with the features of some modern civil lawsuits. According to him, the private-law theory of civil adjudication became increasingly problematic in the face of a growing body of legislation designed expressly to reshape and regulate social and economic affairs. In describing the predominant attributes of modern litigation, he states that the majority of civil federal lawsuits (in the United States of America) do not arise out of disputes between private parties about private rights. Instead, the purpose of such litigation is the affirmation of constitutional or statutory policies. The change in the legal foundation of the lawsuit explains many, but not all, facets of what is "in fact" going on in federal trial courts. For this reason, although the designation is not wholly adequate, Chayes calls this emerging model "public law litigation". He states that this "new" public law litigation appears in

---

18 Nordht 2001 *DJCIL* 381.

19 The *Swedish Code of Judicial Procedure* was promulgated in 1942 (1942:740) and came into force on 1 January 1948.

most areas of the law where all these fields display, in varying degrees, the features of public law litigation.[20]

It is clear from reading Chayes that the object of litigation is shifting from a contest between two individuals, or at least two unitary interests, diametrically opposed, to lawsuits challenging constitutional or statutory policy by actors, who in some instances do not have a clearly identifiable right or action. However, this does not mean that lawsuits fitting the traditional mould of litigation do not still occur. Lawsuits founded on delict, contract, labour rules or divorce still reach the courts.

Chayes indicates the difference between the public law litigation model and the traditional concept of litigation by listing the characteristics of the former:[21]

(a) The extent of the lawsuit is not necessarily fixed, but is fashioned primarily by the court and the parties.

(b) The party structure is not inflexibly correlative but sprawling and unfixed.

(c) The fact inquiry is not historical and adjudicative but anticipating and legislative.

(d) The relief sought by the parties is not seen as compensation for a past wrong in a structure logically acquired from the substantive liability and limited in consequence to the immediate parties; instead, it is forward-looking, fashioned *ad hoc* on flexible and broadly remedial lines, often having important consequences for many persons, including absentees.

(e) The judgment does not end judicial involvement in the matter: its administration requires the continuing participation of the court.

(f) The judge is not passive, his function limited to analysis and statement of governing legal rules; he is active, with responsibility not only for credible

---

20 Chayes 1976 *Harvard Law Review* 1284-1285.
21 Chayes 1976 *Harvard Law Review* 1296-1302.

fact assessment but also for organising and shaping the litigation to ensure a just and viable outcome.

(g) The subject matter of the lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of public policy.

In Chayes's "public litigation", – the modern construct of litigation – the traditional features of the plaintiff and defendant are changing. The conception of litigation as a mechanism for private dispute settlement only is no longer viable. The same also holds true for the concept of strategic litigation in constitutional South Africa.

In *Ferreira v Levin,*[22] O'Regan J investigated the difference between private and public litigation. She states that in contrast with private litigation, where the plaintiff is both the victim of the harm and the beneficiary of the relief, in litigation of a public character, that nexus is rarely so intimate. The relief sought in public litigation is generally forward-looking and general in its application, so that it may directly affect a wide range of people. In addition, the harm alleged may often be quite diffuse or amorphous. She concedes that no clear line can be drawn between private litigation and litigation of a public or constitutional nature:[23]

> Not all non-constitutional litigation is private in nature. Nor can it be said that all constitutional challenges involve litigation of a purely public character: a challenge to a particular administrative act or decision may be of a private rather than a public character. Nevertheless, it is clear that in litigation of a public character, different considerations may be appropriate to determine who should have standing to launch litigation.

Although the concept of litigation was explored with the object of finding whether the parties to the dispute had the necessary standing to bring the matter before the court, it still serves a meaningful purpose in distinguishing between the traditional concept of litigation and strategic litigation.

---

22 1996 (1) SA 984 (CC) para 229.
23 *Ferreira* para 229.

In *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape*,[24] the Court held as follows:[25]

> The principle of legality implies that public bodies must be kept within their powers. There should, in general, be no reason why individual harm should be required in addition to the public interest of the general community. Public law litigation may also differ from traditional litigation between individuals in a number of respects. A wide range of persons may be affected by the case. The emphasis will often not only be backward looking, in the sense of redressing past wrongs, but also forward-looking, to ensure that the future exercise of public power is in accordance with the principle of legality.

Another feature of post-constitutional litigation is the positive duties that are placed on the state as litigant. In terms of section 165(4) of the *Constitution*, organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts. Therefore, organs of state are constitutionally obligated to place all relevant information in its possession before the courts when litigating. Organs of state must assist the courts in reaching the most correct decision. Section 195(1) of the *Constitution* also requires organs of state to display a high standard of professional ethics when litigating. Therefore, in strategic litigation, the state must be the model litigant.

South African post-constitutional strategic litigation can therefore be described as follows:

(a) In strategic litigation, individual harm is not required for a litigant to have standing; public interest of the general community would be enough.

(b) A wide range of persons may be affected by the issues raised in the case.

(c) The relief required may directly affect a wide range of people with broader goals than the settling of a dispute between individuals.

(d) The harm alleged may often be quite diffuse or unstructured.

---

24 2001 (2) SA 609 (E).
25 Para 619C-D.

(e) The emphasis would often not only be backward-looking, in the sense of redressing past wrongs, but also forward-looking and general in its application to ensure that the future exercise of public power is in accordance with the principle of legality.

(f) The judge may stay involved in the proceedings after the final order is granted. Although South African courts have been reluctant to grant supervisory orders or structural interdicts,[26] courts have more recently granted supervisory orders in several cases.[27]

(g) The judge is active, with responsibility not only for credible fact assessment but also for organising and shaping the litigation to ensure a just and viable outcome.[28]

(h) Constitutional provisions require organs of state to be model litigants.

Post-constitutional litigation may be more ambiguous than private litigation. In private litigation, the outcome of the judgment is clear, indicating which of the parties has the strongest right. In post-constitutional litigation, it is often difficult to measure the effect of the litigation on the protection of constitutional rights.

The description of litigation as provided by the courts in the *Ferreira* and *Ngxuza* cases conforms to the American model of litigation as set out by Chayes. It is clear that the constitutional era in South Africa wrought great procedural structure changes in lawsuits. In a growing number of cases, the post-constitutional concept of litigation sets the tone for strategic litigation, with the litigants able to enforce constitutional rights, expose corruption and shape and influence government policy. The purpose of this

---

26 *Modderfontein Squatters, Greater Benoni Council v Modderklip Boerdery (Pty) Ltd* 2004 (6) SA 40 (SCA).

27 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC*); Nyathi v Department of Health, Gauteng* 2008 (5) SA 94 (CC); *Sibiya v The Director of Public Prosecutions, Johannesburg High Court* 2005 (5) SA 315 (CC).

28 *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* 2009 (4) SA 222 (CC); here the Court called for information as the first step in the supervisory process and ordered the Director-General of the Department of Justice to submit a report to the Court with detailed information relating to the matter.

activism by litigation is often to enforce a change in, or to influence or direct, government policy or legislation.

Chayes, in his investigation of public law litigation, finds as follows:[29]

> In public law litigation, then, fact-finding is principally concerned with "legislative" rather than "adjudicative" fact. In addition, "fact evaluation" is perhaps a more accurate term than "fact finding." The whole process begins to look like the traditional description of legislation: Attention is drawn to a "mischief", existing or threatened, and the activity of the parties and court is directed to the development of on-going measures designed to cure that mischief. Indeed, if, as is often the case, the decree sets up an affirmative regime governing the activities in controversy for the indefinite future and having binding force for persons within its ambit, then it is not very much of a stretch to see it as, *pro tanto*, a legislative act.

The traditional model of litigation was primarily concerned with assessing the consequences for the parties of specific past instances of conduct. This *post factum* look is often dispensable in strategic litigation, where the lawsuit generally seeks to address future or threatened action, or to modify a current course of conduct or a condition existing at present. The outcome of the litigation then directly affects large interest groups outside the immediate scope of the litigation with the same consequence of a legislative act or an executive decision. This gives rise to very pronounced social and political considerations.

South African courts have a constitutional base that affords them a special status in the state dispensation. When acting judicially, the courts should not be subject to government control, and they serve as the final means of ensuring that the constitutional rights of private persons are upheld and protected in relation to the state.[30] When asking the courts to formulate public policy, litigants are requesting the courts to adjudicate on matters traditionally falling within the executive and legislative spheres of government – something the courts may not always be in the best position to do. Because of its function, constitutional adjudication will always have some flavour of politics,[31] with the judgment of the court affecting a wide range of parties beyond the

---

29 Chayes 1976 *Harvard Law Review* 1297.

30 See also Nordht 2001 *DJCIL* 86.

31 In *In re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC), the Court found that, admittedly, a constitution, by its very nature, deals with the extent, limitations and

original concept of plaintiff and defendant. Because of the far-reaching consequences of the judgment, the law is often used in this way to produce rapid and comprehensive social transformation. The notions of the law as a tool to produce social reform is, however, open to criticism.

2.2.3 Advantages and disadvantages of strategic litigation

2.2.3.1 Disadvantages of strategic litigation

According to Anderson, plans for legally induced social revolutions are often frustrated at implementation, and when social changes do conform to the planned objectives, they are mostly ascribed to non-legal causes. He claims that new laws often have unintended consequences that either nullify the required change or create new problems for policy makers.[32] Little supports this claim and states that the question most overlooked in the heat of the litigation is where this all will lead to at the end of the day and, *ex ante*, whether lawyers, litigants and judges are the actors to create such change.[33]

Public interest litigation can be faulted on three grounds: firstly, it is wrong for judges to authorise social reform in a democracy, and, secondly, courts, because of the fact that the judiciary is the weakest of the branches of government owing to financial constraints and political vulnerability, are destined to see their reform efforts defeated.[34]

The third objection relates to the fact that decisions affecting social reform influence executive policy issues, while the courts are not always in a position to decide on the best options available. The first objection deals with the counter-majoritarian difficulty, which in South Africa gives way to constitutional provisions allowing courts to test legislative and executive action against the *Constitution.*[35] The second and third

---

exercise of political power as also with the relationship between political entities and with the relationship between the state and persons (para 27).

32 Anderson 1993 *Third World Legal Studies* 177.

33 Little 2001 *Conn. L. Rev.* 178.

34 Denvir 1975 *N.C. L. Rev.* 1133.

35 Section 2 of the *Constitution* provides that the *Constitution* is the supreme law of the country and any law or conduct inconsistent with it is invalid. In terms of s 167 the Constitutional Court is the final arbiter of constitutional matters. See *S v Makwanyane* 1995 (3) SA 391 (CC) para 87, where the

objections relate directly to South Africa. Socio-economic development is one of the main development goals of the government.[36] The question should be asked whether litigants, activists and judges are the right players to drive such goals. The state allocates the budget for development needs and is in a better position to determine where the finite resources are most needed. Judgments of the court relating to socio-economic issues could mean that money allocated for development in one area must be allocated to the issue raised in the court's judgment. Sometimes this may not serve the best interest of all citizens, especially those who fall outside the scope of the litigation but are affected by the judgment.

In *Soobramoney v Minister of Health (KwaZulu-Natal),*[37] the appellant needed immediate regular renal dialysis to prolong his life.[38] He sought treatment from the renal unit of the Addington state hospital in Durban. The hospital could only give dialysis treatment to a limited number of patients and the applicant was refused because of the limited facilities that were available. The hospital budget did not make provision for more expenditure in this regard and no extra funds were available from the provincial budget.

The appellant approached the High Court,[39] claiming that in terms of the *Constitution* the Addington Hospital is obliged to make dialysis treatment available to him. His application was dismissed. The applicant approached the Constitutional Court relying on sections 27(3) and 11 of the *Constitution.*[40]

Court held that what the majority of South Africans believe to be a proper sentence for murder is irrelevant. The question the Court had to decide was whether the *Constitution* allows such sentence. Majority opinion therefore may have some relevance, but it is no substitute for the duty vested in the courts to interpret the *Constitution* and to uphold its provisions without fear or favour.

36 The Millennium Development Goals of South Africa 2015 http://www.parliament.gov.za/content/MDG%20Report2011_Web.pdf accessed January 2016.

37 1998 (1) SA 765 (CC).

38 Paras 1-2.

39 *Thiagraj Soobramoney v Minister of Health: Province of KwaZulu-Natal* D&CLD 5846/97, 21 August 1997 (unreported).

40 Section 27(3) of the *Constitution* states that no one may be refused emergency medical treatment. Section 11 stipulates that everyone has the right to life.

The respondent stated that the obligations imposed on the state by sections 26[41] and 27[42] of the *Constitution* concerning access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited owing to the lack of resources.[43] Given this lack of resources and the significant demands on them, an unqualified obligation to meet these needs is not capable of being fulfilled.

The Court found that although the *Constitution* imposes positive obligations on the state, and a generous interpretation must be given to a right to ensure that individuals secure the full protection of the Bill of Rights, this will not always be the case.[44] The context may indicate that in order to give effect to the purpose of a particular provision a narrower or specific meaning should be given to it. Therefore, the state has to manage its limited resources in order to address social issues.[45] There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society.

In a separate and concurring judgment, Madala J found that the fundamental issue is whether the Court should require a health authority to adopt a course of treatment, which in the judgement of the practitioner will not cure the patient but merely prolong his life for some time.[46] He held that the Court could not.

Sachs J attempted to justify the decision of the Court by stating that section 27 should be construed to read that it provides for unexpected accidents and that emergency departments will be available to deal with the unforeseeable catastrophes that could

---

41 Housing: (1) Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

42 Health care, food, water and social security: (1) Everyone has the right to have access to: (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. (3) No one may be refused emergency medical treatment.

43 Para 11.

44 Paras 16-17.

45 Para 31.

46 Para 45.

befall any person, anywhere and at any time.[47] The applicant therefore does not qualify because his condition, although life-threatening, does not fit those criteria. Sachs J referred to Canadian jurisprudence,[48] and found as follows:

> The inescapable fact is that if governments were unable to confer any benefit on any person unless it conferred an identical benefit on all, the only viable option would be to confer no benefit on anybody.

In the light of the need for equality expressed in the *Constitution*,[49] this view cannot be supported. The provisions contained in the Bill of Rights are available to all citizens of South Africa on an equal basis.[50]

Sachs further argued that the provisions of the Bill of Rights should not be interpreted in a way that results in courts feeling themselves unduly pressurised by the fear of gambling with the lives of claimants into ordering hospitals to furnish the most expensive and improbable procedures, thereby diverting scarce medical resources and prejudicing the claims of others.[51] This argument cannot be supported either. The applicant approached the Court in terms of constitutional provisions, which he felt had been breached. In such circumstances, the applicant has a constitutional right to approach the courts,[52] no matter how unpleasant it would be for the court to hear such matters.

In *Government of the Republic of South Africa v Grootboom*,[53] the respondents had been evicted from their informal houses situated on private land earmarked for formal low-cost housing development. They applied to the High Court for an order requiring the government to provide them with adequate basic shelter or housing until they obtained permanent accommodation.[54]

---

47 Para 51.
48 *Brown v British Columbia (Minister of Health)* (1990) 48 CRR 137 paras 157-158.
49 Section 1(a) and s 3(2)(a) of the *Constitution.*
50 See also Wesson 2004 *SAJHR* 293.
51 Para 58.
52 Section 38 of the *Constitution* provides that everyone can approach a competent court with the allegation that a right in the Bill of Rights has been infringed or threatened.
53 2001 (1) SA 46 (CC).
54 Paras 3-4.

The High Court held that, in terms of the *Constitution*, the state was obliged to provide children and their parents with rudimentary shelter on demand if the parents were unable to shelter their children; that this obligation existed independently of, and in addition to, the obligation to take reasonable legislative and other measures in terms of the *Constitution*; and that the state was bound to provide this rudimentary shelter irrespective of the availability of resources. The respondents in the High Court case were accordingly ordered by that Court to provide those among respondents who were children, as well as their parents, with shelter.

The appellants appealed against this decision. The respondents based their claim on two constitutional provisions:[55] firstly, on section 26 of the *Constitution*, which provides that everyone has the right to have access to adequate housing, with subsection (2) imposing an obligation on the state to take reasonable legislative and other measures to ensure the progressive realisation of this right within its available resources, and, secondly, on section 28(1)(c) of the *Constitution*, which provides that children have the right to shelter.

The Court held that section 7(2) of the *Constitution* requires the state "to respect, protect, promote and fulfil the rights in the Bill of Rights" and the courts are constitutionally bound to ensure that they are protected and fulfilled.[56] The question is therefore not whether socio-economic rights are justiciable under the *Constitution*, but how to enforce them in a given case. The Court refused to issue an order placing a minimum core obligation on the state in respect of social rights.[57] The Court held that, although it may be possible to do so, sufficient information have not been placed before the Court to determine what would comprise the minimum core obligation in the context of the *Constitution.*

Referring to section 27(2) of the *Constitution*, the Court held that the section requires the state to devise a comprehensive and workable plan to meet its obligations in terms

---

55 Para 13.
56 Para 20.
57 Para 33.

of the subsection.[58] However, subsection (2) also makes it clear that the obligation imposed on the state is not an absolute or unqualified one. The extent of the state's obligation is defined by three key elements that are considered separately: (a) the obligation to "take reasonable legislative and other measures"; (b) "to achieve the progressive realisation" of the right; and (c) "within available resources".

The Court stated that in the realisation of the positive obligation the *Constitution* places on the state, the state must implement measures to ensure the realisation of those rights.[59] The measures must establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the state's available means. The programme must be capable of facilitating the realisation of the right. The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. However, they must ensure that the measures they adopt are reasonable. The reasonableness of the measures put in place by the state will be evaluated by the courts on a case-to-case basis.

The Court stated the following:[60]

> I am conscious that it is an extremely difficult task for the state to meet these obligations in the conditions that prevail in our country. This is recognised by the Constitution, which expressly provides that the state is not obliged to go beyond available resources or to realise these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the state to give effect to them. This is an obligation that courts can, and in appropriate circumstances, must enforce.

The Court therefore held that the programme that had been adopted, and was in force in the Cape Metro at the time that the application was brought; fell short of the obligations imposed upon the state by section 26(2) in that it failed to provide for any form of relief to those desperately in need of access to housing.[61]

---

58 Para 38.
59 Para 41.
60 Para 94.
61 Para 95.

The Court issued a declaratory order stipulating that section 26(2) of the *Constitution* required the state to act to meet the obligation imposed upon it to devise and implement a comprehensive and coordinated programme to realise progressively the right of access to adequate housing.[62] This included the obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need within its available resources. The Court confirmed that section 7(2) of the *Constitution* mandates the state to respect, protect, promote and fulfil the rights in the Bill of Rights, including housing rights. The Court indicated that the measures adopted must establish a coherent public housing programme, directed towards the progressive realisation of the right of access to adequate housing within the state's available resources.

The Court noted that "legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive". The Court therefore instructed the government to comply with its constitutional obligation, but left the realisation of this obligation up to the state.

For Sunstein, the outcome of *Grootboom* meant that the South African government is required to pay close attention to the human interests at stake and to sensible priority setting, without mandating protection for each person whose socio-economic needs are at risk. The virtue of this approach by the Court is that it is respectful of democratic prerogatives and of the limited nature of public resources, while also requiring special deliberative attention to those whose minimal needs are not being met.[63]

In *Grootboom*, the Court recognised that circumstances exist in which the plight of people are so desperate that the courts must interfere with the prerogative of the executive and the legislature to ensure the enforcement of constitutional provisions relating to socio-economic rights. However, the Court clearly interpreted the rights in the *Constitution* as not absolute. In *Soobramoney*, the situation of the applicant was even worse than that of the applicants in *Grootboom*. However, the principle of non-absolute constitutional rights was applied and the applicant was denied relief, although

---

62 Para 96.
63 Sunstein 2001 *Constitutional Forum* 123.

his need was pressing. It has to be asked, however, whether the applicants in *Grootboom* were offered real relief by the Court.

The decision in *Grootboom* laid the foundation for the future adjudication of socio-economic rights.[64] Roux argues, however, that the decision of the Court was not priority setting. In fact, the Court's reluctance to engage in priority setting in the strict sense affected the nature of the order made. Therefore, rather than setting priorities, the Court in *Grootboom* simply expressed a view on what could not reasonably be left out of the housing program.[65]

Both Sunstein and Roux are, to a certain extent, correct in their arguments. In the *Grootboom*-case, the Court held the state to account for its failure to realise the obligations imposed on it in terms of the *Constitution.* However, although the Court ordered the state to amend its housing programme to make provision for those in need, it left the realisation of the consequent obligation to the state. It set no timetable for the accomplishment of its order, although it acknowledged the desperate circumstances of the applicants. In fact, the Court subscribed to and acknowledged one of the disadvantages of strategic litigation referred to above, namely that the courts are not always in a position to decide what the best options available are and that some decision-making should be left to other organs of state. This means that the courts will not make orders that interfere with the budgetary allocations of the other organs of state, as was the case in *Grootboom* and *Soobramoney*. What is of further interest in *Grootboom* and *Soobramoney* is the approach of the state litigants to the litigation. In both cases, the organs of state fulfilled their constitutional duties to place relevant information before the courts[66] and conducted the litigation honestly and fairly.[67] In both cases the state litigants were model litigants.

---

64 Wesson 2004 *SAJHR* 1-2; *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC); *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC); *and Rail Commuters Action Group v Transnet* 2005 (2) SA 359 (CC).

65 Roux 2002 *Forum Constitutionnel* 46-47.

66 Section 165(4) of the *Constitution* that requires that organs of state must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

67 Section 195(1) of the *Constitution*.

South African courts are not constitutionally mandated to initiate proceedings in order to bring matters before the court.[68] Courts and judges have to wait until appropriate proceedings are initiated by a party before the court can adjudicate on executive or legislative action. Courts are therefore powerless to enforce the *Constitution* without a case being brought before it, even in the face of flagrant constitutional violations by other branches of government. The courts cannot order a person to stand trial or tell the executive or the legislature to charge a person even if the court found that that person exceeded his or her power or was corrupt.[69]

2.2.3.2 Advantages of strategic litigation

Chayes argues that there are various reasons why the judiciary may have some important institutional advantages in the tasks it is assuming in public interest litigation.[70] A judge's professional tradition insulates him from political pressures and most judges are likely to have experience of the political process and public policy problems. Judges are also able to make difficult or unpopular decisions that politicians are unable or unwilling to make because of electoral pressure. Justice Harms uses the example of the abolition of the death penalty in South Africa, which the executive left to the courts. Politicians could then hide behind the judgment of the Constitutional Court, which declared it unconstitutional, if the matter became unpopular in public opinion.[71]

Chayes states that the public-law model permits *ad hoc* applications of broad national policy in situations of limited scope. The courts can flexibly tailor the judgment to the needs of the particular situation. This conforms to the Court's decision in *Grootboom*,[72] where the Court stated that the reasonableness of the measures put in place by the executive to effect the realisation of the particular constitutional provisions would be evaluated and tested on a case-by-case basis and, if necessary, adapted by the courts to suit specific situations.

---

68 This is in contrast with the extensive original jurisdiction of the Indian Supreme Court in terms of Article 32 of the *Constitution of India*, 1950.

69 *Shaik v The State* (1) [2006] SCA 134 (RSA).

70 Chayes 1976 *Harvard Law Review* 1307-1309.

71 Harms 2009 *PELJ* 7.

72 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 41.

According to Chayes, the public-law model also permits a high degree of participation by representatives of those who will be directly affected by the decision. It is submitted that the South African *Constitution* already allows for participation of members of the public in the legislative process.[73] In such instances, the legislator may receive a higher degree of participation in its proceedings than when the matter is heard by the courts. The *Constitution* does not allow for participation by members of the public in the executive sphere, but the courts may be approached for review of executive action. The danger remains that the court will not hear the view of the full spectrum of people that could be affected by its decision. Section 38(c) allows class action lawsuits to be brought. In the certification of class action lawsuits, the courts have to determine if the people who would be affected by the court judgment are sufficiently represented to allow them to air their views.[74]

The requirements for standing are discussed more fully in section 4.2.2 below. It is submitted that Chayes's statement about representation in the public law model is also applicable in South Africa.

Chayes argues that the courts have an advantage in gathering and assessing information. He states that there is a strong incentive for parties before the court proceedings to furnish information during litigation. In South Africa, this statement is even more relevant because of the fact that *amici curiae* are allowed to join proceedings and present evidence to allow the courts to make decisions. According to Chayes, because of the limited scope of the proceedings, the information required can be effectively focused and specified. Moreover, the information that is produced will not be filtered through the rigid structures and preconceptions of bureaucracies.

Chayes states that, unlike other organs of state, the judiciary *must* respond to complaints of the aggrieved. The legislature and the executive can and do address specific situations, but only from a position of commitment to particular policy interests.

---

73 Sections 59 and 118 of the *Constitution.*

74 In *Ferreira v Levin; Vryenhoek v Powell* 1996 (1) SA 984 (CC) para 235, the Court held that the certification of a class action lawsuit will depend on the range of persons who may be affected by any order made by the court and the opportunity that those persons have had to present evidence and argument to the court.

The executive and the legislature are composed of members of political parties and therefore there is a danger that the focus of policy would be on the interest of their supporters. In South Africa, bureaucratic inefficiency has reached epidemic proportions.[75] In some instances this leaves the judiciary as the only recourse for aggrieved parties to turn to in order to enforce constitutional rights that have been breached or threatened.

It is submitted that the structural institutional advantages of the judiciary to adjudicate on strategic litigation allow the courts to play an important role in shaping social justice in South Africa. However, strategic litigation can only be effective if the state, as party to the litigation, upholds its constitutional duty to assist and ensure the effectiveness of the courts.[76] This constitutional obligation requires of an organ of state to place all relevant information available to it before the court and further requires the organ of state not to abuse the legal process. The constitutional duty of organs of state to act fairly in litigation, in other words, to be the model litigant, will be discussed in section 2.8 and the final chapter of this work.

Denvir argues that there are secondary uses of litigation that influence its effectiveness. Public-interest litigation takes place in a political context and when properly designed will have an immediate and long-term impact on political actors. He then lists two advantages of public-interest litigation:[77]

> First, and especially in the short run, litigation creates pressures on bureaucratic administrators that cause them to take actions that otherwise would not be taken. Secondly, in the longer run, the facts and value judgments reflected in court decisions help change the perceptions of what administrators, legislators, judges, and the public believe to be proper or legitimate.

According to Denvir litigation is often the only means available to keep large bureaucracies receptive to the lawful demands of the public they are to serve.[78] Litigation would not be necessary in every case; bureaucracies will always attempt to keep themselves from being monitored by other agencies, such as the courts. The

---

75 Amit 2011 *SAJHR* 20-23 and Malherbe and Van Eck 2009 *TSAR* 209.
76 Section 165(4) of the *Constitution*.
77 Denvir 1975 *N.C. L. Rev.* 1134-1135.
78 Denvir 1975 *N.C. L. Rev.* 1136-1138.

threat of a credible court challenge is a sufficient deterrent against engaging in illegal action. Lawsuits, or the threat thereof, then serves as deterrence to illegal conduct by state departments. Denvir also links the deterrence factor to the publicity that strategic litigation generates. The decisions of government departments often have little visibility, despite their far-reaching effects, and as a result escape public notice. Filing lawsuits encourages media coverage, which focuses public attention on actions that often are both morally and politically indefensible. The litigation then creates new forums for the public to express its views, so forcing the agency to accept more input.

Denvir also describes the delaying function of public litigation as another socially beneficial advantage of legal activism.[79] Two important functions are performed here. Firstly, notice is served on the government department of the intensity of the opposition to the project. Secondly, the delay resulting from a lawsuit provides the necessary time delay in which interested groups are able to organise opposition on the political front.

Strategic litigation plays an effective and necessary part in the South African constitutional landscape. The institutional advantages of the courts allow them to make decisions that other organs of state are not always able to make. The secondary effects of strategic litigation must also be kept in mind. The final judgment should not be the only concern or strategy for the strategic litigant. It is submitted that the ripple effects of the litigation often hold more benefits than the judgment. The court case may generate awareness among the public about the issues raised by the litigation. This allows the public to put pressure on the elected representatives to correct constitutional violations. The controversy raised by gross constitutional violations might also be enough to ensure that members of the executive or legislature responsible for such violations are not re-elected in the next election.

2.3 Strategic litigation within the framework of the South African Constitution

---

[79] Denvir 1975 *N.C. L. Rev.* 1142.

2.3.1 Introduction

A litigant may approach the courts in terms of section 38[80] of the *Constitution* if a right in the Bill of Rights has been breached or threatened. Such litigant will rely on a direct application of the *Constitution* to enforce the breached or threatened right. However, a litigant may also approach the court relying on an indirect application of the Bill of Rights. Section 39(2) provides that a court, when interpreting legislation and developing the common law or customary law, must promote the spirit, purport and objects of the Bill of Rights. According to Currie and De Waal, the *Constitution* and the Bill of Rights therefore establish an objective normative system. The normative system consists of values that must be respected whenever the common law or legislation is interpreted, developed or applied.[81] This vertical application of the Bill of Rights performs the task of protecting individuals against the state by imposing a duty on all state institutions to respect the provisions of the Bill of Rights.[82]

The infringement of a fundamental right does not provide the only basis on which the courts may be approached in terms of the *Constitution.* Section 33 of the *Constitution* provides for administrative action that is lawful, reasonable and procedurally fair, and obliges the decision-maker to give reasons for a decision to everyone whose rights have been adversely affected by the administrative action. This opens the way for judicial review of administrative action.[83]

Section 33 also embodies the principle of legality. Hoexter writes that the principle of legality goes beyond administrative action. It refers to a broad constitutional principle of legality that governs the use of all public power rather than the traditionally narrower realm of administrative action. The principle of legality is an aspect of the rule of law,

---

80 Section 38 deals with the enforcement of rights and provides that anyone listed in the section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened.

81 Currie and De Waal *The Bill of Rights Handbook* 32.

82 Section 8(1) of the *Constitution* provides that the Bill of Rights binds the legislature, the executive, the judiciary and all organs of state.

83 Hoexter *Administrative Law* 114.

which is a founding value[84] of the *Constitution.* This principle requires the holder of public power to act in good faith and exercise power legally.[85]

2.3.2 Direct and indirect application of the Bill of Rights

According to Woolman, the unqualified and direct application of the Bill of Rights stems from the interaction of two axioms. Firstly, the state constructs and enforces all law, no matter what form it takes. Secondly, legislation, subordinate legislation, common law and customary law shape relationships between the state and its citizens, as well as relationships between individuals. This means that because the state constructs and enforces all laws, all laws should be measured against constitutional standards.[86]

In terms of section 8 of the *Constitution*, the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. When interpreting the Bill of Rights, a court must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.[87] When interpreting any legislation, and when developing the common law or customary law, every court must promote the spirit, purport and objects of the Bill of Rights.[88] This distinguishes two forms of application of the Bill of Rights. According to Currie and De Waal, direct application entails the imposition of duties by the Bill of Rights on specified actors; a breach of such a duty is a violation of a constitutional right. They write that the indirect application of the Bill of Rights occurs where there is a provision of the ordinary law that mediates between the Bill of Rights and the actors who are subject to that law. Then it is the court's duty to ensure that the ordinary law conforms to the Bill of Rights.[89]

According to Currie and De Waal, the Bill of Rights applies directly to a legal dispute–

---

84 In terms of s 1(c) of the *Constitution* South Africa is founded on the supremacy of the constitution and the rule of law.

85 *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) para 148 and Hoexter Administrative Law 116-117.

86 Woolman "Application" 31-32.

87 Section 39(1)(a) of the *Constitution.*

88 Section 39(2) of the *Constitution.*

89 Currie and De Waal *The Bill of Rights Handbook* 32.

(a) when a right of a beneficiary of the Bill of Rights has been infringed by a person or entity on whom the Bill of Rights has placed a duty not to infringe the right;

(b) during the period of operation of the Bill of Rights; and

(c) in the national territory.

Within this area of application, the Bill of Rights overrides ordinary law and conduct that are inconsistent with it. Currie and De Waal explain that in this context, direct application entails the imposition of duties by the Bill of Rights on specified actors; a breach of such a duty is a violation of a constitutional right.[90]

The Bill of Rights applies directly to state institutions in the following instances:[91]

(a) To the common law and to legislation of the central, provincial and local government legislatures, as well as to non-legislative conduct of these legislatures;

(b) to administrative action, which, in addition, must comply with the criteria listed in the right to just administrative action in section 33[92] of the *Constitution* and in the *Promotion of Administrative Justice Act* (*PAJA*);[93]

(c) to the conduct of organs of state as defined in section 239 of the *Constitution*;[94]

(d) to the conduct of the executive; and

(e) to non-law-making conduct of the judiciary.

Currie and De Waal state that the indirect application of the Bill of Rights means that the influence of the Bill of Rights is mediated through statutory or common law,

---

90 Currie and De Waal *The Bill of Rights Han*dbook 35.
91 Currie and De Waal *The Bill of Rights Handbook* 49-50.
92 The right to just administrative action.
93 3 of 2000.
94 Section 239 defines the meaning of "organ of state".

because all law must be developed, interpreted and applied in a way that conforms to the Bill of Rights.[95] When applied indirectly, the Bill of Rights does not override ordinary law, nor does it generate its own remedies. Instead, law is interpreted or developed in such a way that it conforms to the *Constitution.*[96] They continue by stating that the Bill of Rights respects the procedural rules, the purpose and the remedies of ordinary law, but demands the furtherance of its values through the operation of ordinary law.[97] This is called the principle of avoidance.

The principle of avoidance requires a court first to try to resolve a dispute by applying ordinary legal principles, as interpreted or developed with reference to the Bill of Rights, before applying the Bill of Rights directly to the dispute.[98] According to Currie and De Waal, an important implication of the principle of avoidance is that the special rules in the Bill of Rights relating to the standing of litigants and the jurisdiction of the courts apply only when it is impossible to give effect to the values in the Bill of Rights by applying the ordinary law. Similarly, constitutional remedies are only relevant when the Bill of Rights is applied directly to an issue. If it is possible to resolve the dispute through indirect application, ordinary procedural rules and remedies apply to the dispute.[99]

The Bill of Rights applies to all laws, including pre- and post-constitutional legislation and the uncodified common law. This means that there is only one system of law. This system of law 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.[100]

---

95 Section 39(2) of the *Constitution* reads as follows: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

96 *Batchelor v Gabie* 1999 2 ALL SA 65 (C).

97 Currie and De Waal *The Bill of Rights Handbook* 64-65.

98 Currie and De Waal *The Bill of Rights Handbook* 75.

99 Currie and De Waal *The Bill of Rights Handbook* 77.

100 *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 para 44 and Currie and De Waal *The Bill of Rights Handbook* 34.

In *NEHAWU v University of Cape Town*,[101] the National Education Health & Allied Workers Union (NEHAWU) contended that the interpretation of section 197[102] of the *Labour Relations Act*[103] (*LRA*) adopted by the majority of the Labour Appeal Court (LAC) infringed the right of the workers to fair labour practices conferred by section 23(1) of the *Constitution.*[104] NEHAWU also raised the contention that the interpretation of section 197 adopted by the majority of the LAC fails to promote the spirit, purport and objects of the Bill of Rights.[105]

The Court held that the *LRA* was enacted "to give effect to and regulate the fundamental rights conferred by the Constitution". In doing so, the *LRA* gives content to section 23 of the *Constitution* and must therefore be construed and applied consistently with that purpose.[106] Section 3(b)[107] of the *LRA* underscores this by requiring that the provisions of the *LRA* be interpreted "in compliance with the Constitution". Therefore, the proper interpretation and application of the *LRA* will raise a constitutional issue. This is because the legislature is under an obligation to "respect, protect, promote and fulfil the rights in the Bill of Rights".[108]

The respondents contended that where one is dealing with a statute that gives effect to fundamental rights guaranteed in the *Constitution*, the only constitutional matter that may arise relates to the constitutionality of its provisions.[109] The Court rejected this argument as follows:

> This contention has no merit. In relation to a statute, a constitutional matter may arise either because the constitutionality of its interpretation or its application is in issue or

---

101 2003 (3) SA 1 (CC).

102 In terms of this section, when a business is transferred to a new owner as a going concern, the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer, and all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee.

103 66 of 1995.

104 Section 23(1) provides that everyone has the right to fair labour practices.

105 *NEHAWU* para 13.

106 Para 14.

107 The section provides that any person applying the Act "must interpret its provisions … in compliance with the *Constitution*".

108 Section 7(2) of the *Constitution* provides that "the state must respect, protect, promote and fulfil the rights in the Bill of Rights".

109 *NEHAWU* para 15.

> because the constitutionality of the statute itself is in issue. A challenge to the manner in which the statute has been interpreted or applied does not require the litigant to challenge the constitutionality of the provision the construction of which is in issue. Moreover, in the case of a statute such as the one in issue in this application, which has been enacted to give content to a constitutional right, the proper interpretation of the statute itself is itself a constitutional matter.

The case did not require the Court to go beyond the regulatory framework established by the *LRA*; the Court had to find whether the interpretation of the statute conformed with the constitutional provisions giving rise to it. The Court argued as follows:[110]

> In many cases, constitutional rights can only effectively be honoured if legislation is enacted. Such legislation will of course always be subject to constitutional scrutiny to ensure that it is not inconsistent with the Constitution. Where the legislature enacts legislation in the effort to meet its constitutional obligations, and does so within constitutional limits, courts must give full effect to the legislative purpose. Moreover, the proper interpretation of such legislation will ensure the protection, promotion and fulfilment of constitutional rights and as such will be a constitutional matter. In this way, the courts and the legislature act in partnership to give life to constitutional rights.

Although the state was not a party to this case, it is important for this study because the Court distinguished between the application of the Bill of Rights to legal rules and its application to the actions of organs of state and private institutions executed in terms of those legal rules. The Court further distinguished between the constitutionality of a legal norm and the constitutionality of the application of that norm. In a particular case, only the constitutionality of the legal rules or only the action performed in terms of a constitutionally valid legal rule may be questioned.

Indirect application occurs when there is a provision of ordinary law that mediates between the Bill of Rights and the actors who are subject to that law. The duty then rests on the courts to ensure that the ordinary law conforms to the Bill of Rights in the rights and duties it confers.[111] Therefore, instead of the Bill of Rights directly imposing duties and conferring rights, rights and duties are imposed by the common law or legislation.[112] In principle, a legal dispute should be decided in terms of the existing

---

110 *NEHAWU* para 14.
111 Currie and De Waal *The Bill of Rights Handbook* 35.
112 Currie and De Waal *The Bill of Rights Handbook* 43.

legal rules or principles of ordinary law prior to any direct application of the Bill of Rights.

2.3.3 Just administrative action and the rule of law

According to Woolman and Bishop, the rule of law is a fundamental principle of any constitutional democracy. In its most basic form –[113]

> [i]t reflects, in Thomas Jefferson's well-turned phrase, the idea that a free people should have a government of law, not men. That is, all actors, the governors and the governed, are bound by the same set of rules. Legality, an earlier incarnation of the rule of law doctrine, requires that any act, which does not comply with the law and the Final Constitution, must be found invalid.

Michelman states that the rule of law and the legality doctrine, married to various other constitutional injunctions – for example the requirement of section 39(2) to interpret statutes and to develop the common law in the light of constitutional dictates – have the potential to turn legal disputes into constitutional matters. As a result, "no case, as a matter of logic, falls beyond the jurisdiction of the Constitutional Court".[114]

The rule of law is invoked in constitutional jurisprudence not only as a pervasive value that informs the interpretation of many other rights, but also as a self-standing justifiable and enforceable claim.[115] Fundamental to the rule of law is the notion that government acts in a rational rather than an arbitrary manner.[116]

In *Prinsloo v Van der Linde,*[117] the Court described this as follows:

> [T]he constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest naked preferences that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation. In Mureinik's celebrated

---

113 Woolman and Bishop *Constitutional Conversations* 7.
114 Michelman "Constitutional supremacy" 56-61.
115 Michelman "The rule of law" 11-12.
116 *Matatiele Municipality v President of the Republic of South A*frica 2006 (5) SA 47 (CC) para 100.
117 1997 (3) SA 1012 (CC) para 25.

> formulation, the new constitutional order constitutes a bridge away from a culture of authority to a culture of justification.[118]

The *Constitution* therefore requires that all legislation be rationally related to a legitimate government purpose. If not, it is inconsistent with the rule of law and invalid.[119] Therefore, the exercise of all public power must be authorised by law.

In *Democratic Alliance v Ethekwini Municipality*,[120] the Supreme Court of Appeal remarked that the act of a municipality in changing street names was executive action. Although not administrative action, it nevertheless was not immune from judicial review. The Supreme Court of Appeal found that –[121]

> [t]he fundamental principle, deriving from the rule of law itself, is that the exercise of all public power, be it legislative, executive or administrative — is only legitimate when lawful … . This tenet of constitutional law which admits of no exception, has become known as the principle of legality … .

In the *Fedsure Life Assurance*-case,[122] the Court found that the fundamental idea that the principle of legality expresses is that the exercise of all public power is only legitimate where lawful. Therefore, when a legislature, whether national, provincial or local, exercises the power to raise taxes or rates, or determines appropriations to be made out of public funds, it is exercising a power that under the *Constitution* is a power peculiar to elected legislative bodies.

This power is exercised by democratically elected representatives after due deliberation. The Court clearly stated that in this instance the power exercised by the legislature did not constitute an administrative decision.[123] The Court found that the question then to be considered is the extent of the constitutional controls on the exercise of the powers

---

118 Mureinik 1986 *SAJHR* 32.
119 *United Democratic Movement v President of the Republic of South Af*rica (2) 2003 (1) SA 495 (CC) para 55.
120 2012 (2) SA 151 (SCA).
121 Para 21.
122 *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374.
123 Para 45.

of local government legislatures. The Court held that a local government might only act within the powers lawfully conferred upon it and found:[124]

> There is nothing startling in this proposition – it is a fundamental principle of the rule of law,[125] recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law – to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law.

According to the Court, it is central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.[126]

In *Pharmaceutical Manufacturers Association of South Africa,*[127] the Court had to deal with the issue of the role of the courts in controlling public power. It raised the question whether a court has the power to review and set aside a decision by the President to bring an Act of Parliament into force.[128] The matter arose when the Transvaal High Court was requested to review and set aside the President's decision to bring the *South African Medicines and Medical Devices Regulatory Authority Act*, 1998, into operation. The Court held that the exercise of all public power must comply with the *Constitution*, which is the supreme law, and the doctrine of legality which is part of that law.[129] The Court further held that ultimately, all public power, whether exercised by the legislative, executive or judiciary, is controlled by the *Constitution.*[130]

The Court noted the "reluctance" of courts in other countries to review decisions of this nature because of the political nature of the judgment required and its closeness to

---

124 Paras 55-56.

125 The Court referred to Dicey *Introduction to the Study of the Law of the Constitution* 193, in which Dicey refers to this aspect of the rule of law in the following terms: "We mean in the second place, when we speak of the 'rule of law' as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."

126 Para 58 of the *Fedsure* case.

127 *Pharmaceutical Manufacturers Association of SA in Re: The Ex Parte Application of the President of the Republic of South Africa* 2000 (2) SA 674.

128 Para 1.

129 Para 19.

130 Para 20.

legislative powers.[131] The Court held that the power was not "administrative action" as contemplated in the administrative justice clause in the Bill of Rights, and therefore did not fall within the controls of public power set out in that clause.[132] Rather, it was a power of a special nature, the character of which is neither legislative nor administrative although it is more closely linked to the legislative than the administrative function. However, the exercise of such a power is not beyond the reach of judicial review, because the exercise of all power must conform with the *Constitution*, and, in particular, the requirements of the rule of law: a foundational principle in the *Constitution.*[133]

The Court held that this includes the requirement that a decision, viewed objectively, must be rationally related to the purpose for which the power was given.[134] Thus, even if the President acts in good faith, his decision may be invalid if it does not meet this objective requirement.[135] This does not mean that a court can interfere with a decision simply because it disagrees with it or considers that the power was exercised inappropriately. The Court must find that the decision taken by the President was objectively irrational and therefore unlawful.

The *Constitution Seventeenth Amendment Act of 2012* expanded the jurisdiction of the Constitutional Court. The Court may now hear any matter, if it grants leave to appeal because the matter raises an arguable point of law of general public importance that ought to be considered by it.

The strategic litigant can therefore rely on the *Constitution* to approach the courts in the following circumstances:

(a) When there is direct application of the Bill of Rights in terms of section 8(2) of the *Constitution.*

---

131 Para 70.
132 Para 45.
133 Para 79.
134 Para 85.
135 Para 90.

(b) When there is an indirect application of the Bill of Rights in terms of section 39(2) of the *Constitution.* In this instance, the common-law principles and remedies or statutory law will stand and the court can rule on the constitutionality or interpretation of the provisions.

(c) In terms of section 33 of the *Constitution* a claim should be brought in terms of *PAJA* when the matter relates to administrative action only,, except if the question relates to the interpretation of the Act by functionaries or the constitutionality of its provisions.

(d) In terms of section 33 of the *Constitution*, if a decision or act by the executive relates to the legality principle and the rule of law, and such a decision or act is not an administrative action as defined in *PAJA*.

The application of the *Constitution* is not the only question the litigant should contemplate before an action is brought before the courts. The principle of justiciability should be considered. Justiciability refers to the question of jurisdiction, standing and the timing of the case.

2.4 Justiciability and strategic litigation

2.4.1 Introduction

The courts will not hear every constitutional argument raised by litigants. According to Currie and De Waal, the limitations on the constitutional issues that the courts will hear are governed by jurisdiction and justiciability. Justiciability encompasses three considerations: standing, which relates to the relationship between the applicant and the relief sought, ripeness and mootness, which relate to the timing of the application.[136] Strategic litigants must ensure that the legal rules relating to these considerations are fully understood before embarking on litigation.

---

[136] Currie and De Waal *The Bill of Rights Handbook* 79.

2.4.2 Standing

2.4.2.1 Introduction

Section 34 of the *Constitution* provides that everyone has the right to bring a dispute that can be resolved by the application of law before an independent and impartial body for a decision. Before a person can bring a matter before a court, that person must be entitled to do so, in other words, the person must have standing (*locus standi*) to bring the matter before the court.

The rules of standing are based on the principle that a litigant must have capacity to sue and must have a sufficient interest in the proceedings.[137] The rules operate to allow certain cases through the doors of the court and to keep others out.[138] According to Plasket, the operation of the rules of standing is both important and controversial:[139]

> The drawing of lines by courts to distinguish between those litigants allowed through their doors and those kept outside has obvious implications for the right of the citizenry to access to justice. Standing therefore has constitutional significance.

Cameron states that the elements of the common-law rules are highly manipulable, and the question of whether an applicant's interest is only academic or whether the litigation is premature involves a value judgment that will differ from judge to judge and from case to case. The standing requirement can be manipulated by judges who feel "disinclined to hear certain cases or to decide certain issues for reasons which are not openly expressed".[140]

Section 38 of the *Constitution* deals with the matter of standing in constitutional litigation and anyone listed in the section has the right to approach a competent court alleging that a right in the Bill of Rights has been infringed or threatened. The following persons may approach a court:

(a) Anyone acting in their own interest;

---

137 Baxter *Administrative Law* 644.
138 Craig *Administrative Law* 479.
139 Plasket 2009 *The Annals of the American Academy of Political and Social Science* 1.
140 Cameron "Legal Standing and the Emergency" 65.

(b) anyone acting on behalf of another person who cannot act in their own name;

(c) anyone acting as a member of, or in the interest of, a group or a class of people;

(d) anyone acting in the public interest; and

(e) an association acting in the interest of its members.

Section 38 considerably broadened the standing of people and organisations wishing to enforce constitutional rights and radically altered the common-law rules of standing.[141] The section only applies in cases where a right of a litigant in the Bill of Rights has been infringed or threatened. It will therefore not apply if a provision of the *Constitution* outside of the Bill of Rights has been violated.[142] In such cases, the much narrower common-law principles of standing will apply.

2.4.2.2 Own-interest standing

In *Giant Concerts CC v Rinaldo Investments (Pty) Ltd,*[143] the Constitutional Court investigated the standing of a person acting in his or her own interest. In this matter the eThekwini Municipality sold a plot of land to Rinaldo Investments (Rinaldo) at a vastly reduced price on the understanding that Rinaldo develop the land at its own expense to further the development needs of the Municipality.[144] The statutory foundation for the transaction was a provision of the KwaZulu-Natal *Local Authorities Ordinance*[145] (the *Ordinance*) that permits the Municipality to sell immovable property by private bargain under certain circumstances.[146] Giant Concerts (Giant) launched review proceedings to set aside the Municipality's and the MEC's decisions.[147]

---

141 Du Plessis, Penfold and Brickhill *Constitutional Litigation* 43.
142 Currie and De Waal *The Bill of Rights Handbook* 81.
143 2013 (3) BCLR CC.
144 Para 7.
145 25 of 1974.
146 Section 233(8) of the *Ordinance*.
147 Para 13.

The matter was first heard in the KwaZulu-Natal High Court, Pietermaritzburg, where the Municipality and Rinaldo contended that Giant had no standing to challenge the validity of the sale.[148] The High Court rejected this argument. Giant claimed on a number of grounds, including lawfulness, procedural fairness and reasonableness, that the decisions were invalid. In its judgment, the High Court upheld all Giant's arguments. It set aside the Municipality's decision to sell the property to Rinaldo, as well as the MEC's approval of the sale.[149]

The Supreme Court of Appeal overturned the High Court judgment on the narrow basis that Giant lacked standing to bring the review.[150] It therefore did not find it necessary to comment on the substance of Giant's complaints. In essence, the Court found that "only those with an interest in the 'interests of the borough' have standing" to challenge decisions under the *Ordinance* since it "concerns itself with local interests". The provisions of the *Ordinance* regulating the sale of immovable property are designed to protect the interests of the local community only. The Court reasoned that Giant claimed to act only in its own interest. Its registered address was not in Durban, but in Pietermaritzburg. It therefore did not have ratepayer status in the Municipality.[151]

In its review application, Giant relied on the jurisprudence of the Constitutional Court to argue that the Bill of Rights, in section 38 of the *Constitution*, requires a broader approach to standing (even where the provision is not of direct application). Giant's objection ought therefore not to be dealt with under the restrictive common-law approach to standing.[152] Giant contended the Supreme Court of Appeal's restrictive approach to standing is inconsistent with the right to just administrative action and the principle of legality. It argued that its involvement in the objection process constituted an exercise of its right to political participation and that the judgment undermines this

---

148 *Giant Concerts CC v Minister of Local Government, Housing and Traditional Affairs, KwaZulu-Natal* 2011 (4) SA 164 (KZP)
149 Para 15.
150 *Rinaldo Investments (Pty) Ltd v Giant Concerts CC* [2012] 3 All SA 57 (SCA).
151 Para 16.
152 Para 18.

by precluding it from challenging a sale of municipal land on the basis that it is not a ratepayer.[153]

Rinaldo argued that, despite the constitutional approach to standing being generous, the indispensable requirement remains that a litigant must show "sufficient interest", and that the case was not on of public-interest standing. It supported the finding of the Supreme Court of Appeal that even a generous approach to constitutional standing "does not mean that everyone who alleges an infringement of a fundamental right has an unfettered right of access to court".[154]

The Court stated that in dealing with matters relating to the standing of a party, it must be assumed that its complaints about the lawfulness of the transaction are correct. This is because in determining a litigant's standing, a court, as a matter of logic, must assume that the challenge the litigant seeks to bring is justified.[155] It quoted approvingly from Hoexter: "The issue of standing is divorced from the substance of the case. It is therefore a question to be decided *in limine,* before the merits are considered".[156]

The Court pointed out that standing determines solely on whether a particular litigant is entitled to mount the challenge: a successful challenge to a public decision can be brought only if "the right remedy is sought by the right person in the right proceedings". The Court continued by stating that the interests of justice under the *Constitution* may require courts to be hesitant to dispose of cases on standing alone when broader concerns of accountability and responsiveness may require investigation and determination of the merits. The Court noted the following:[157]

> By corollary, there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even if the applicant's standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest.

---

153 Para 20.
154 Para 23.
155 *Jacobs v Waks* 1992 (1) SA 521 (A) 536A.
156 Hoexter *Administrative Law in South Africa* 488.
157 *Rinaldo Investments* para 34.

Therefore, when a litigant acts solely in his or her own interest, there is no broad or unqualified capacity to litigate against illegalities. Something more must be shown. The Court referred approvingly to the *Ferreira* case,[158] in which it was held that the Constitutional Court should adopt a "broad approach":[159]

> This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of protection to which they are entitled.

The object of the standing requirement is therefore that courts "should not be required to deal with abstract or hypothetical issues and should devote its scarce resources to issues that are properly before it". Own-interest standing does not require that a litigant must be the person whose constitutional right has been infringed or threatened: "What the section requires is that the person concerned should make the challenge in his or her own interest".[160]

The Court found that, while constitutional own-interest standing is broader than the traditional common-law standing, a litigant must nevertheless show that his or her rights or interests are directly affected by the challenged law or conduct. Therefore:[161]

(a) To establish own-interest standing under the *Constitution*, a litigant need not show the same "sufficient, personal and direct interest" that the common law requires, but must still show that a contested law or decision directly affects his or her rights or interests, or potential rights or interests.

(b) This requirement must be interpreted generously and broadly to accord with constitutional goals.

(c) The interest must be real and not hypothetical or academic.

(d) Even under the requirements for common-law standing, the interest need not be capable of monetary valuation, but in a challenge to legislation,

---

158 *Ferreira v Levin; Vryenhoek v Powell* 1996 (1) SA 984 (CC).
159 *Rinaldo Investments* para 36.
160 Para 37.
161 Para 41; Du Plessis, Penfold and Brickhill *Constitutional Litigation* 45.

purely financial self-interest may not be enough; the interests of justice must also favour affording standing.

(e) Standing is not a technical or strictly defined concept. In addition, there is no magical formula for conferring it. It is a tool employed by the courts to determine whether a litigant is entitled to claim court time and to put the opposing litigant to trouble.

(f) Each case depends on its own facts. There can be no general rule covering all cases. In each case, an applicant must show that he or she has the necessary interest in an infringement or a threatened infringement. Moreover, here a measure of pragmatism is needed.

The Court noted that the own-interest provision in section 38(a) is not isolated; it stands alongside section 38(b)-(e). These provisions create scope for public interest, surrogate, representative and associational challenges to illegality. The risk that an unlawful decision could stand because an own-interest litigant cannot establish standing is diminished by the fact that broad categories of other litigants, not acting in their own interest, are entitled to bring a challenge.[162]

Own-interest litigants must therefore demonstrate that their interests or potential interests are directly affected by the unlawfulness they seek to impugn. The Court found that Giant lacked standing and that the *Ordinance* does indeed focus on local interests, but determining own-interest standing under it should be done broadly and generously to ensure that any litigant who establishes that his or her interests or potential interests may be directly affected by a transaction can challenge it.[163] Nevertheless, while constitutional own-interest standing is broad, it is not limitless.[164] Giant never demonstrated that it had any serious commercial interest in the site.

In saying that it wanted to develop the site, but never saying how, the interest Giant claimed remained hypothetical. A hypothetical interest is one that is expressly claimed,

---

[162] Para 42.
[163] Para 45.
[164] Para 50.

but is neither real nor true, and an academic interest is one that is not related to a real or practical situation and is therefore irrelevant. Giant, when it lodged its legal challenge, had to show that its complaint – that it should have been given an opportunity to present its own proposal – was well-grounded because it had the capacity to make a realistic counterproposal.

It did not have to show that its proposal would have carried the day. Giant never showed any intention of making such a counterproposal.[165] The consequence was that Giant lacked standing, since its interest remained incipient and never became direct or substantial.[166] Currie and De Waal state that as long as the causal link between the applicant's interest and the requested remedy is not too tenuous, the courts should grant standing to the applicant.[167]

The courts confirmed the standing of a person to challenge laws when that person has not yet been affected by the law and the threat of application of the law has fallen away. In exceptional circumstances, attorneys may also institute proceedings on behalf of clients who are unable to do so.[168]

2.4.2.3 Surrogate standing

It is possible for a person to act on behalf of another who is not able to act in his or her own name. According to Currie and De Waal the most obvious example is that of a person being detained and prevented from approaching a court him- or herself. The represented person must consent to the representation, and if that is not possible, it must be clear from the circumstances that he or she would have consented to the action.[169]

---

165 Para 54.
166 Para 55.
167 Currie and De Waal *The Bill of Rights Handbook* 81.
168 Du Plessis, Penfold and Brickhill *Constitutional Litigation* 46.
169 Currie and De Waal *The Bill of Rights Handbook* 87.

In *Oostelike Gauteng Diensteraad v Transvaal Munisipale Pensioenfonds*,[170] the Court confirmed this broader approach to standing:

> The category of persons empowered to bring a constitutional matter to a competent court of law is broader than the category of persons who have hitherto been allowed standing in cases where it is alleged that a right has been infringed or threatened. To that extent, the section demonstrates a broad and not a narrow approach to standing.

The Court stated, however, that even if such a broad approach to standing is allowed, the applicant who claims to act on behalf of others must set out the nature and basis for this claim fully and clearly. In this case, the applicant did not claim or specify that he was acting on behalf of persons who were unable to bring the matter to court themselves. In such matters, even a broad approach to standing would not save the applicant and standing would not be granted.

2.4.2.4 Representative standing

Section 38(c) of the *Constitution* allows class action lawsuits to be brought. In *The Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza,*[171] the applicants, assisted by the Legal Resources Centre, litigated as representatives on behalf of anyone in the Eastern Cape Province whose disability grants had, between specified dates, been cancelled or suspended by the Eastern Cape provincial government.[172] The Court explained the class action as follows:[173]

> In the type of class action at issue in this case, one or more claimants litigate against a defendant not only on their own behalf but on behalf of all other similar claimants. The most important feature of the class action is that other members of the class, although not formally and individually joined, benefit from, and are bound by, the outcome of the litigation unless they invoke prescribed procedures to opt out of it.

The Court explained that the issue between the members of the class and the defendant is tried once. The judgment binds all, and the benefits of its ruling accrue to all. The procedure has particular utility where a large group of plaintiffs each has a

---

170 *Oostelike Gauteng Diensteraad v Transvaal Munisipale Pensioenfonds* 1997 (8) BCLR 1066 T para 9.
171 2001 (4) SA 1184 (SCA).
172 Para 3(3).
173 Para 4(7).

small claim that may be difficult or impossible to pursue individually.[174] The reason that the procedure is invoked so frequently lies in the complexity of modern social structures, and the attendant cost of legal proceedings:[175]

> Modern society seems increasingly to expose men to such group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone when he can, there will at best be a random and fragmentary enforcement, if there is any at all.

Because so many in South Africa are in a poor position to seek legal redress and because the technicalities of legal procedure may unduly complicate the attainment of justice, the *Constitution* created the express entitlement that anyone asserting a right in the Bill of Rights could litigate as a member of a group or class of persons.

The Court found that the situation seemed pattern-made for class proceedings:[176]

> The class the applicants represent is drawn from the very poorest within our society; those in need of statutory social assistance. They also have the least chance of vindicating their rights through the legal process. Their individual claims are small: the value of the social assistance they receive – a few hundred rands every month – would secure them hardly a single hour's consultation at current rates with most urban lawyers. They are scattered throughout the Eastern Cape Province, many of them in small towns and remote rural areas. What they have in common is that they are victims of official excess, bureaucratic misdirection and unlawful administrative methods.

The Court therefore held that it is the needs of persons who are most lacking in protective and assertive armour that the Constitutional Court has repeatedly emphasised must animate the court's understanding of the *Constitution's* provisions.[177] In addition, it is against the background of their constitutional entitlements that the Court must interpret the class action provision in the Bill of Rights.

The respondents objected to the standing of the applicants, arguing that their class was not clearly defined. The court judged that there could be no conceptual complaint about

---

174 Para 6(1).
175 Kalven and Rosenfield 1941 *University of Chicago Law Review* 686.
176 *Ngxuza* para 9(11).
177 Para 9(13).

the clarity of the group's definition. From the point of view of practical definition, it was beyond dispute that –

(a) the class is so numerous that joinder of all its members is impracticable;

(b) there are questions of law and fact common to the class;

(c) the claims of the applicants representing the class are typical of the claims of the rest; and

(d) the applicants through their legal representatives, the Legal Resources Centre, will adequately protect the interests of the class.[178]

The quintessential requisites for a class action are therefore present.

What is of further importance in this judgment is that the court held that the class action doctrine allowed a court with jurisdiction over part of a cause to assume jurisdiction over the remainder of the cause for reasons of justice, convenience and good sense. The objection of the organ of state to the standing of the applicants must also be faulted when the positive constitutional obligations placed on the state litigant are analysed. Section 195(1)(e) of the *Constitution* demands that people's needs be responded to, and the public must be encouraged to participate in policy-making. In *Ngxuza,* the organ of state did not encourage the participation of the applicants in policy-making as is constitutionally required. Instead, the organ of state relied on technical arguments to discourage the participation of a wide range of vulnerable people in policy-making. In section 1.4 it was argued that, because of positive constitutional obligations borne by the state litigant, the state litigant should be the model litigant. The state litigant must therefore be held to a different set of rules than the private litigant. The organ of state must ensure that, when it engages in litigation, the reason for the litigation is the vindication of the *Constitution* or because it is in the public interest to do so. In *Ngxuza,* it was not in the public interest to deny a range of people the opportunity to participate in policy-making nor could the litigation vindicate

[178] Para 12(21).

the *Constitution* in any way. The requirement that organs of state should be model litigants therefore requires that the state litigant should not rely on arguments of a technical nature alone when engaging in litigation unless such a strategy is necessary to vindicate the *Constitution* or it is in the public interest to do so.

In the *Children's Resource Centre* case,[179] the applicants attempted to bring a class action based on the common-law cause of action of delict. The Court set the requirement that the applicant class include in its application of certification a draft set of pleadings and a set of affidavits setting out the basis for the proposed action:[180]

(a) The court had to be asked at the outset, and before issue of summons, to certify the action as a class action.

(b) This would involve the definition of the class.

(c) A common claim or issue that can be determined by way of a class action should be determined.

(d) Evidence of the existence of a valid cause of action should be presented.

(e) The court should be satisfied that the representative is suitable to represent the members of the class.

(f) The court should be satisfied that a class action is the most appropriate procedure to adopt for the adjudication of the underlying claims.

The Court found the following:[181]

> Unless it is plain that the claim is not legally tenable, certification should not be refused. The court considering certification must always bear in mind that once certification is granted the representative will have to deliver a summons and particulars of claim and that it will be open to the defendant to take an exception to those particulars of claim.

---

179 *Children's Resource Centre Trust v Pioneer Food* 2013 (2) SA 213 (SCA).
180 Para 23.
181 Para 39.

The applicant class should therefore file the requisite papers on the basis that "the application must be accompanied by a draft set of particulars of claim in which the cause of action is pleaded, the class defined and the relief set out", which would make the process of certifying the class clearer.[182]

2.4.2.5 Public-interest standing

Currie and De Waal are of the opinion that public-interest standing is the most difficult of the section 38 categories.[183] In *Ferreira*,[184] the Court investigated the requirements for standing when a litigant is claiming to appear in the public interest.[185] The Court said that it would be circumspect in affording applicants standing by way of this provision of section 38 and would require an applicant to show that he was genuinely acting in the public interest. Factors relevant to determining whether a person was genuinely acting in the public interest would include considerations such as –

(a) whether there was another reasonable and effective manner in which the challenge could be brought;

(b) the nature of the relief sought, and the extent to which it was of general and prospective application; and

(c) the range of persons or groups who might be affected directly or indirectly by any order made by the court and the opportunity that those persons or groups had had to present evidence and argument to the court.

These factors would need to be considered in the light of the facts and circumstances of each case. The court found that applicants are required to allege an infringement of or a threat to a right contained in the Bill of Rights, but need not point to an infringement of or a threat to the right of a particular person. They need to allege that, objectively speaking, the challenged rule or conduct is in breach of a right. This flows

---

182 Para 43.
183 Currie and De Waal *The Bill of Rights Handbook* 89.
184 *Ferreira v Levin; Vryenhoek v Powell* 1996 (1) SA 984 (CC).
185 Paras 234-235.

from the notion of acting in the public interest. The public would ordinarily have an interest in the infringement of rights generally, not particularly.

The *Ferreira* case was heard in terms of the *Interim Constitution.* The requirements set out in that case were confirmed as consistent with section 38(c) of the *Constitution*, 1996, in *Lawyers for Human Rights v Minister of Home Affairs*.[186]

The Court stated that the issue always is whether a person or organisation genuinely acts in the public interest.[187] A distinction should be made between the subjective position of the person or organisation claiming to act in the public interest, on the one hand, and, on the other, whether it is, objectively speaking, in the public interest for the particular proceedings to be brought. It is ordinarily not in the public interest for proceedings to be brought in the abstract. This is, however, a variable principle. There may be circumstances in which it will be in the public interest to bring proceedings even if there is no live case. The Court further found that the list of relevant factors is not closed. The Court added that the degree of vulnerability of the people affected, the nature of the right said to be infringed, and the consequences of the infringement of the right are also important considerations in the analysis.

2.4.2.6 Associational standing

When an association acts in the interest of its members, it must show that the members have sufficient interest in the remedy it seeks. In terms of the common law, an association must possess a certain corporate character. In *Highveldridge Residents,* the Court held that section 38(e) of the *Constitution* should not be interpreted to include the common-law restrictions placed on the legal standing of voluntary associations. It is therefore not necessary for an association to show that its

186 2004 (4) SA 125 (CC).
187 Para 18.

constitution allows it to sue, that the association has continued existence and a separate identity, and that it can own property, acquire rights, and incur obligations.[188]

In *Transvaal Agricultural Union v Minister of Land Affairs,*[189] the applicant was a body established to represent the interest of its members. It applied to the court for an order declaring certain provisions of the *Restitution of Land Rights Act*[190] and rules regarding the procedure of the Commission on Restitution of Land Rights unconstitutional. The Court stated that the provisions were material to the interests of the applicant's members and it qualified for this category of standing without any difficulty.

In *South African National Defence Force Union v Minister of Defence,*[191] the applicant acted in its own interest and in the interests of its members. It sought to have certain sections of the *Defence Act*[192] declared unconstitutional and invalid to the extent that it prohibits members of the South African National Defence Force from participating in public protest and from joining trade unions.[193] It also sought to act on behalf of those Defence Force members who were not members of the applicant but who wished to join. It asserted that the criminal sanction for which members of the Permanent Force would be liable if they joined the applicant deterred many potential members from joining. The Court found that the applicant had sufficient standing to seek relief in this matter based on its own interest and that of its existing members, so that no further requirements for standing were necessary.[194]

2.4.2.7 Standing of *amici curiae*

Rule 8 of the Constitutional Court Rules,[195] deals with the issue of the intervention of parties in the proceedings. Rule 8(1) provides that any person entitled to join as a party

---

188 *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council* 2002 (6) SA 66 (T); Currie and De Waal *The Bill of Rights Handbook* 91; Peté et al *Civil Procedure a Practical Guide* 15.
189 1997 (2) SA 621 (CC) para 1.
190 22 of 1994.
191 1999 (3) BCLR 321 (T) para 4.
192 44 of 1957.
193 Para 1.
194 Para 4.
195 *Government Gazette* No. 25726 of 31 October 2003.

or liable to be joined as a party in the proceedings may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a party. Persons or organisations who are not a party to a case and who can offer information that may help the court decide the matter before it may apply to be admitted as a party to the case. The standing of *amici curiae* in proceedings is regulated by Rule 10 of the Constitutional Court Rules.[196]

There are two procedures for admission. The *amicus* may seek the written consent of all the parties in the matter before the court and may agree in writing with all the parties before the court to certain terms and conditions and to certain rights and privileges, subject to any directions by the Chief Justice.[197] If the written consent has not been secured, any person who has an interest in any matter before the court may apply to the Chief Justice to be admitted therein as *amicus curiae*, and the Chief Justice may grant such application on such terms and conditions and with such rights and privileges as he or she may determine.[198]

In *Fose v Minister of Safety and Security*,[199] the Court stated the following regarding *amicus curiae*:

> It is clear from the provisions of Rule 9 that the underlying principles governing the admission of an amicus in any given case, apart from the fact that it must have an interest in the proceedings, are whether the submissions to be advanced by the amicus are relevant to the proceedings and raise new contentions which may be useful to the court.

In *Hoffmann v South African Airways*,[200] the Court explained the position and role of *amicus curiae* in court proceedings:

> An *amicus curiae* assist the court by furnishing information or argument regarding questions of law or fact. An *amicus* is not a party to litigation, but believes that the court's decision may affect its interest. The *amicus* differs from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter. An *amicus* joins proceedings, as its name suggests, as a friend of the court. It is unlike a party to litigation who is forced into the

196 Part V Rule 10 of the *Constitutional Court Rules*.
197 Rule 10(1).
198 Rule 10(4).
199 1997 (3) SA 786 (CC) para 9.
200 2000 Case CCT 17/00 (CC) para 63.

> litigation and thus compelled to incur costs. It joins in the proceedings to assist the court because of its expertise on or interest in the matter before the court. It chooses the side it wishes to join, unless requested by the court to urge a particular position. An *amicus*, regardless of the side it joins, is neither a loser nor a winner and is generally not entitled to be awarded costs.

In *Children's Institute v Presiding Officer, Children's Court, Krugersdorp*[201] the issue before the Court was whether an *amicus curiae* may adduce evidence in court along with its submission. The South Gauteng High Court held that it was not permissible for the *amicus* in the matter, the Children's Institute at the University of Cape Town, to adduce evidence.[202] It further held that a High Court may not use its inherent power to regulate its own process, under section 173 of the *Constitution*,[203] to allow an *amicus* to adduce evidence because to do so would amount to creating a new substantive right. According to the High Court, the admission of *amici curiae* is governed by Rule 16A.[204]

The rules provide that, subject to the provisions of national legislation enacted in accordance with section 171 of the *Constitution*, and the rules themselves, any interested party in a constitutional issue raised in proceedings before a court may, with the written consent of all the parties to the proceedings, given not later than 20 days after the filing of the affidavit or pleading in which the constitutional issue was first raised, be admitted therein as *amicus curiae* upon such terms and conditions as may be agreed upon in writing by the parties. If such written consent cannot be obtained, the *amicus* may apply to the court to be admitted as *amicus curiae* in the proceedings.[205] The High Court found that Rule 16A only permits *amicus curiae* to be admitted to the proceedings but prohibits it from leading evidence:[206]

---

201 2013 (2) SA 620 (CC).

202 *SS (A Minor Child) v Presiding Officer of the Children's Court, District Krugersdorp* [2011] ZAGPJHC 139; [2012] 1 All SA 231 (GSJ)

203 Section 173 of the *Constitution* reads: "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interest of justice." "The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

204 Uniform Rules of Court.

205 Para 7.

206 Para 8.

> I am of the view that pursuant to Uniform Rule 16A(2) an interested party may be admitted as *amicus curiae* in proceedings by the court after exercising its discretion judicially whether to admit a party to the proceedings after consideration of all the relevant facts. The admission of additional facts is an entirely different question as there is no provision in Rule 16A for the admission of such evidence.

On appeal, the Constitutional Court found that, properly interpreted, Rule 16A is permissive and allows for an *amicus* to adduce evidence. Both a textual and purposive interpretation of the rule support this conclusion. The Court further found that even if Rule 16A does not provide for evidence to be adduced by an *amicus*, section 173 of the *Constitution* gives courts the inherent power to regulate their own process and this includes the ability to allow *amici* to adduce evidence if the interests of justice so demand.[207] The Court examined the role of *amici curiae* and stated:[208]

> [T]he role of an *amicus* envisioned in the Uniform Rules is very closely linked to the protection of our constitutional values and the rights enshrined in the Bill of Rights. Indeed, Rule 16A(2) describes an *amicus* as an "interested party in a constitutional issue raised in proceedings". Therefore, although friends of the court played a variety of roles at common law, the new rule was specifically intended to facilitate the role of amici in promoting and protecting the public interest. In these cases, *amici* play an important role, first, by ensuring that courts consider a wide range of options and are well informed; and second, by increasing access to the courts by creating space for interested non-parties to provide input on important public interest matters, particularly those relating to constitutional issues.

The courts therefore made it clear that *amici* may join proceedings if they are promoting and protecting the public interest. Their participation in a case is not restricted to the filing of documentary evidence before the court. They will also be allowed to adduce evidence during the proceedings.

2.4.3 Ripeness

According to Du Plessis, the doctrine of ripeness determines that a court will not hear a matter if it is premature in the sense that a right or interest has not been infringed or threatened yet. The term *ripeness* is also used where alternative remedies available have not been exhausted and where an issue can be resolved without recourse to the

---

207 Para 17.
208 Para 26.

Constitution.[209] Motala and Ramaphosa describe ripeness as a court-created barrier to adjudication. According to them, ripeness means that a matter which is premature should not be decided until all the factors necessary for a decision have developed.[210]

In *Ferreira v Levin,*[211] the Court highlighted that the essential flaw in the applicant's case is one of timing or "ripeness". The Court noted that the doctrine of ripeness "serves the useful purpose of highlighting that the business of a court is generally retrospective; it deals with situations or problems that have already ripened or crystallised, and not with prospective or hypothetical ones".

In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs;*[212] the respondents raised the issue of ripeness and contended that the applicants had failed to pursue a non-constitutional remedy, which, if successful, might have rendered it unnecessary to consider the constitutional validity of the section of the Act in question. Such failure was in conflict, so it was contended, with the general principle of ripeness. Where it is possible to decide any case without reaching a constitutional issue, that course should be followed. The Court rejected this argument stating that in the that matter it was unlikely that any other avenue would have brought relief to the applicants.

In *De Vos v Minister of Constitutional Development;*[213] the respondents raised a point *in limine* as to the ripeness of the proceedings. They pointed out that in both matters the proceedings in the magistrate's courts were incomplete, with the result that the applicants had brought the proceedings prematurely.[214] In this context, the respondents relied on *Motsepe v Commissioner for Inland Revenue*,[215] in which the court judged the referral defective because of the general principle that "where it is possible to decide

---

209 Du Plessis, Penfold and Brickhill *Constitutional Litigation* 38.
210 Motala and Ramaphosa *Constitutional Law: Analysis and Cases* 112.
211 1996 (1) SA 984 (CC) para 199.
212 2000 (1) BCLR 39 (2 December 1999) para 22.
213 *De Vos v Minister of Constitutional Development; Snyders v Minister of Constitutional Development* No 4502/10; Case No 5825/14 WC 2015.
214 The principle of avoidance.
215 1997 (2) SA 897 (27 March 1997) para 21.

any case, civil or criminal, without reaching a constitutional issue that is the course which should be followed".[216]

In *De Vos*, the Court recognised the undesirability, in general, of adjudicating on constitutional issues that may arise in criminal proceedings prior to the conclusion of such proceedings. The Court noted, however, that the rule is flexible and the court may depart from it when the interests of justice so require, depending on the circumstances of the individual case. The Court stated that section 38 of the *Constitution* provides that persons, like the applicants, have the right to approach a competent court alleging that a right in the Bill of Rights has been infringed or threatened. The Court referred to the case of *Abahlali baseMjondolo Movement of SA*,[217] where the Constitutional Court confirmed that "where a law threatens constitutional rights, it is not necessary for the applicants to wait until the law has been implemented and the accused person is detained before approaching a court".

The Court found that this principle is also applicable in the matter under discussion because section 77(6)(a)[218] of the *Criminal Procedure Act*[219] threatens the constitutional rights of the accused persons, inasmuch as the result in their criminal cases is predetermined, that is, they will be detained even if they are found not to have committed any offence.

The Court then pointed out that the complaint of the applicants is directed against the scheme of section 77(6)(a) and not against the conduct or findings of the individual judicial officers involved. The Court also referred to the case of *Ferreira v Levin;*

---

216 The court found it unnecessary to decide the constitutional issue because the applicant had failed to follow objection and appeal procedures available to her.

217 *Abahlali baseMjondolo Movement SA v Premier of the Province of Kwazulu-Natal* 2010 (2) BCLR 99 (CC).

218 Section 77 deals with the capacity of accused to understand proceedings and s 77(6)(a) states that when the accused is not capable of understanding the proceedings so as to make a proper defence, the court may, if it is of the opinion that it is in the interests of the accused, taking into account the nature of the accused's incapacity and unless it can be proved on a balance of probabilities that, on the limited evidence available the accused committed the act in question, order that such information or evidence be placed before the court as it deems fit so as to determine whether the accused has committed the act in question and the court shall direct that the accused be detained in a psychiatric hospital or a prison pending the decision of a judge.

219 51 of 1977.

Vryenhoek v Powell,[220] in which the Constitutional Court confirmed that the enquiry into the constitutionality of a statute is an objective one:[221]

> The answer to the first question is that the enquiry is an objective one. A statute is either valid or "of no force and effect to the extent of its inconsistency". The subjective positions in which parties to a dispute may find themselves cannot have a bearing on the status of the provisions of a statute under attack. The Constitutional Court, or any other competent court for that matter, ought not to restrict its enquiry to the position of one of the parties to a dispute in order to determine the validity of a law. The consequence of such a (subjective) approach would be to recognise the validity of a statute in respect of one litigant, only to deny it to another. Besides resulting in a denial of equal protection of the law, considerations of legal certainty, being a central consideration in a constitutional state, militate against the adoption of the subjective approach.

The Court therefore dismissed the *in limine* application of ripeness.[222] The *De Vos* decision and the case of *Abahlali baseMjondolo Movement of SA*[223] are in clear contradiction to an earlier decision by the Constitutional Court in *Transvaal Agricultural Union v The Minister of Land Affairs and the Commission of Restitution of Land Rights*,[224] in which the applicants argued that the Act violated their rights as landowners. The Court ruled that the claim of violation of constitutional rights depended on how the Land Restitution Commission interpreted the Act (and their mandate). In addition, it ruled that there was a need for all the factors that are necessary for the resolution of a dispute to develop before the courts will consider the matter. In *Ferreira v Levin,*[225] the Court held that the business of a court is generally retrospective; it deals with situations or problems that have already ripened or crystallised, and not with prospective or hypothetical ones.

It is submitted that the approach adopted by the courts in *De Vos* and in *Abahlali baseMjondolo Movement of SA* is the correct application of the doctrine of ripeness. In the *Transvaal Agricultural Union* case, the Court held that the applicants had to wait

---

220 *Ferreira v Levin; Vryenhoek v Powell* 1996 (1) BCLR 1 (6 December 1995)
221 Para 13.
222 *De Vos* paras 25-29.
223 *Abahlali baseMjondolo Movement SA v Premier of the Province of Kwazulu-Natal* 2010 (2) BCLR 99 (CC).
224 1996 (12) BCLR 1573 CC paras 25-26; Motala and Ramaphosa *Constitutional Law: Analysis and Cases* 113.
225 Case Number CCT 5/95 1995 (CC) para 199.

until the respondents had shown how the impugned law would be interpreted and applied. In *Ferreira*, the Court held that it would only deal with matters in retrospect. Such an approach could lead to legal uncertainty. The *Constitution* is forward-looking to ensure that the future exercise of public power is in accordance with the principle of legality.[226] As such, the courts are clearly mandated to look at the future consequences of legislation. After all, such a policy would allow the court to prevent constitutional violations before they occur, something that is unquestionably in the public interest. Therefore, the decisions in *Ferreira* and *Transvaal Agricultural Union* cannot be supported. The *Ferreira* and *Transvaal Agricultural Union* decisions can further be faulted because of the fact that the organs of state relied on purely technical arguments to deny the applicants the right to participate in policy-making. This is counter to the requirement set out in section 195(1)(e) of the *Constitution* that requires organs of state to respond to people's needs and to encourage the public to participate in policy-making. To act as the model litigant, the state litigant should refrain from relying on technical arguments alone when litigating. This obligation is discussed in chapter 6 of this work.

2.4.4 Mootness

Mootness refers to the principle that a matter is not justiciable by the court if it no longer presents an existing or live controversy or the prejudice or threat thereof to the party no longer exists.[227] Where ripeness prevents a court from hearing a matter because it is too early, mootness prevents a court from hearing the matter because it was brought too late.[228] Mootness can also arise from a succession of developments that brought about a change in the circumstances of the case that will result in the plaintiff no longer having a stake in the outcome of the case; the courts would then not hear the matter because it has become moot. Therefore, mootness can refer to the plaintiff's interest in the outcome of the case after its commencement and it can

---

226 *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 609 (E) para 619c-d.

227 Du Plessis, Penfold and Brickhill *Constitutional Litigation* 39.

228 Currie and De Waal *The Bill of Rights Handbook* 94.

become moot because of a variety of circumstances, including the death of a party or the repeal of the offending law.[229]

In *JT Publishing (Pty) Ltd v Minister of Safety and Security,*[230] the Court was asked for a declaratory order that provisions of the *Publications Act*[231] were unconstitutional.[232] The Court cautioned that the policy that directs the courts not to decide issues that are abstract, academic or hypothetical is well established. The Court found no reason why the Constitutional Court should not adhere "to a rule that sounds so sensible".[233] The Court stated that a new statute had been enacted, but had not yet been brought into operation. The old statutes, which were already obsolete, would then terminate. The Court ruled that neither of the applicants, nor for that matter anyone else, stood to gain the slightest advantage from an order dealing with the moribund and futureless provisions of the old Acts.[234]

In *Children's Institute v Presiding Officer, Children's Court, Krugersdorp*,[235] the Court had to deal with the issue of mootness. The question before the Court was whether appeal against a decision by the High Court on the admissibility of evidence by an *amicus* should be allowed when the main matter had already been successfully concluded without the assistance of additional evidence by the *amicus*.

The Court found that it could not be said that the issue was moot with regard to other *amici* seeking to adduce evidence in the High Court. Since the decision of the High Court was made by a full bench, it would be highly persuasive to judges hearing an application of this sort and be binding on judges in the South Gauteng High Court, Johannesburg. Under these circumstances, the potential limitation on *amici's* ability to adduce evidence, and therefore render effective assistance to courts in the future, was significantly crippling. This was further exacerbated by the fact that the Supreme Court

---

229 Motala and Ramaphosa *Constitutional Law: Analysis and Cases* 116.
230 1997 (3) SA 514 (CC).
231 42 of 1974.
232 Para 1.
233 Para 15.
234 Para 16.
235 2013 (2) SA 620 (CC).

of Appeal refused leave to appeal. This meant that the High Court's decision stood and was binding.[236]

Counsel for the *amicus* emphasised that because of the High Court judgment, *amici* had been hesitant, on the strength of that decision, to apply for leave to adduce evidence. Given the important role played by *amici curiae* in advocating on behalf of vulnerable groups, clarity on the question of their ability to adduce evidence was warranted and their participation in litigation was to be welcomed and encouraged.[237] The Court judged that, given the importance of the constitutional issues to be determined in the matter and because the order would be final in effect, it was in the interests of justice that leave to appeal be granted.[238]

In *Pheko v Ekurhuleni Metropolitan Municipality,*[239] the Municipality evicted the applicants from a settlement because of sinkholes that posed a danger to the welfare of the community. The evictions were justified in terms of the *Disaster Management Act*.[240] The occupiers unsuccessfully challenged the actions in a High Court and the evacuation and demolition went ahead. In issue on appeal was whether the section permitted an eviction and demolition without a court order.[241]

The Municipality contended that the relief sought had largely become moot as the applicants and their dependants had already been evacuated from the area.[242] The Court referred to *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*,[243] in which it was stated: "A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law."

---

236 Para 14.
237 Para 15.
238 Para 16.
239 2012 (2) SA 598 (CC).
240 57 of 2002.
241 Para 1.
242 Para 19.
243 2000 (2) SA 1 (CC) (2000 (1) BCLR 39 fn18.

The Court also approvingly referred to the following dictum in *Independent Electoral Commission v Langeberg Municipality*:[244]

> This Court has discretion to decide issues on appeal even if they no longer present existing or live controversies. That discretion must be exercised according to what the interests of justice require. A prerequisite for the exercise of the discretion is that any order which this Court may make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity and the fullness or otherwise of the argument advanced. Indeed, if the applicants' rights were not infringed and are no longer threatened, or the applicants have no interest in the adjudication of the dispute, it will not be in the interests of justice to grant leave to appeal directly to this court.

The Court found it beyond question that the interdictory relief sought would be of no consequence as the applicants had already been evicted. Although the removal had taken place, the case still presented a live controversy regarding the lawfulness of the eviction. Generally, unlawful conduct is inimical to the rule of law and to the development of a society based on dignity, equality and freedom. The Court judged that the applicants had an interest in the adjudication of the constitutional issue at stake. The matter could therefore not have been said to be moot.[245]

In *Gaertner v Minister of Finance,*[246] officials of the South African Revenue Service searched the applicant's company premises and home, and copied documents and computer data. The actions were taken under section 4(4) of the *Customs and Excise Act*[247]. The directors of the company applied for a declaration that section 4 was unconstitutional in permitting targeted non-routine searches without a judicial warrant.[248] The South African Revenue Service (SARS) tendered to return all seized material and to pay the applicants' costs to date on a party and party scale.

SARS did not concede that section 4 was invalid or that the searches had been unlawful.[249] The respondents in their answering affidavits asserted that the

---

244 2001 (3) SA 925 (CC) (2001 (9) BCLR 883.
245 *Pheko* para 32.
246 2013 (4) SA 87 (WCC).
247 91 of 1964.
248 Paras 3-7.
249 Para 8.

constitutionality of section 4 and the lawfulness of the searches were moot in the light of the tender that the applicants had accepted. They denied in any event that section 4 was in any respect invalid, asserting that any encroachment on the right to privacy was justifiable under section 36[250] of the *Constitution.*[251]

The Court found the contention of mootness without merit. Section 4 had not been repealed. The case was quite different from the situation in *JT Publishing (Pty) Ltd v Minister of Safety and Security*[252] (referred to above). There the impugned provision had been repealed and the repeal was shortly to take effect. The Court noted that the respondents did not say, and could not say, that the applicants would not in the future be subjected to a search or inspection under the authority of section 4. The respondents themselves asserted, in relation to questions of retrospectivity and suspension, that it was of the utmost importance that SARS should have the powers contained in section 4, indicating their intention to keep on using the section. An enquiry into the validity of section 4 was thus not an academic matter without practical consequence.

The doctrine of mootness will therefore not stand if it is in the interest of justice that the matter be heard. Furthermore, should the case present a live controversy, and if the applicants have an interest in the adjudication of the constitutional issue at stake, the matter will not be moot.

When mootness is offered as a defence by the state litigant, the courts should be circumspect in granting the state litigant the relief asked for. In section 1.4 it was argued that, because of the imposition of positive constitutional duties on the state litigant, the state litigant should be held to a different standard than the private litigant. Therefore, the courts should be hesitant to deny the private litigant the opportunity to

---

250 The limitation of rights.
251 Par 10.
252 1997 (3) SA 514 (CC) (1996 (12) BCLR 1599.

have their grievance heard by the courts should the state litigant rely on a purely technical defence.[253]

2.4.5 Jurisdiction

2.4.5.1 Introduction

Jurisdiction is defined as the power or competence that a particular court has to hear and determine an issue between parties brought before it.[254] This work focuses on the constitutionality of strategic litigation when the state is a party to the proceedings. Consequently, the discussion of jurisdiction will be limited to jurisdictional issues relating to the High Court, the Supreme Court of Appeal and the Constitutional Court.

2.4.5.2 The meaning of constitutional matters

In *Pharmaceutical Manufacturers of South Africa: In re: ex parte President of the Republic of South Africa,*[255] the Court found that the exercise of all public power must comply with the *Constitution*, which is the supreme law of the country, and the doctrine of legality, which is part of that law. According to Currie and De Waal, this holds the implication that any challenge to the validity of any exercise of public power is a constitutional matter, and is ultimately susceptible to the Constitutional Court's jurisdiction.[256]

Constitutional matters include any issue involving the interpretation, protection or enforcement of the *Constitution.*[257] The jurisdiction to determine constitutional matters is an extensive jurisdiction of the Constitutional Court.[258] Constitutional matters encompass the direct application of the Bill of Rights and the direct application of constitutional provisions, as well as the indirect application of the Bill of Rights.[259]

---

253 This issue is more fully discussed in the final chapter of this work.
254 *Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board* 1950 (2) SA 420 (A) para 424.
255 2000 (2) SA 674 (CC) para 20.
256 *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 54; Currie and De Waal *The Bill of Rights Handbook* 104.
257 Section 167(7) of the *Constitution.*
258 *S v Boesak 2001* (1) SA 912 (CC) para 14.
259 Du Plessis, Penfold and Brickhill *Constitutional Litigation* 19-20.

Although the jurisdiction conferred upon the Constitutional Court is wide, it is limited and does not include hearing purely factual matters,[260] unless the Constitutional Court grants leave to appeal because the matter raises an arguable point of law of general importance which ought to be considered by the court.[261]

Most of the matters coming before the Constitutional Court are referred to it on appeal from the Supreme Court of Appeal or the High Court, but there are certain types of constitutional matters which are reserved for the exclusive and original jurisdiction of the Constitutional Court and which are initiated only in the Constitutional Court.

2.4.5.3 Exclusive jurisdiction of the Constitutional Court

The jurisdiction of the Constitutional Court is set out in section 167 of the *Constitution.* The Constitutional Court is the highest court of the Republic.[262] Although section 167(3)(b) originally provided that the Constitutional Court may only decide constitutional matters, this provision was amended by the *Constitution Seventeenth Amendment Act of 2012*.[263] The section now provides that the Constitutional Court may decide constitutional matters and may decide any other matter, if the Constitutional Court grants leave to appeal because the matter raises an arguable point of law of general public importance that ought to be considered by the court.

In terms of section 167(4) only the Constitutional Court may–

(a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;

(b) decide on the constitutionality of any parliamentary or provincial Bill;

(c) decide applications by members of the national Parliament and provincial legislatures to declare all or part of an Act to be unconstitutional;

---

260 Du Plessis, Penfold and Brickhill *Constitutional Litigation* 23.
261 Section 167(3)(b)(ii).
262 Section 167(3)(a).
263 *Government Gazette* No. 36128 of 1 February 2013.

(d) decide on the constitutionality of any amendment to the *Constitution*;

(e) decide that Parliament or the President has failed to comply with a constitutional duty; and

(f) certify a provincial constitution.[264]

The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force.[265]

All matters concerning constitutional issues, other than those listed in section 167(4), will commence in a High Court, unless the Constitutional Court grants an application for direct access to it in terms of section 167(6) of the final *Constitution*, read with Rule 18 of the Constitutional Court Rules.[266]

In *Doctors for Life International v Speaker of the National Assembly,*[267] the Court explained the rationale for the exclusive jurisdiction of the Court:

> The purpose of giving the Constitutional Court exclusive jurisdiction to decide issues that have important political consequences is to preserve the comity between the judicial branch of government and the other branches of government by ensuring only the highest court in constitutional matters intrudes into the domain of the other branches of government.

The principle underlying the exclusive jurisdiction of this Court in terms of section 167(4) is that disputes that involve important questions relating to sensitive areas of the separation of powers must be decided by this Court only. Therefore, the closer the issue to be decided is to the sensitive area of the separation of powers, the more likely it is that the issue will fall within the ambit of section 167(4).

---

264 In terms of s 144 of the *Constitution.*
265 Section 167(5) of the *Constitution.*
266 Constitutional Court Rules, 2003 published in GN R1675 in GG 25726 of 31 October 2003.
267 2006 (6) SA 416 (CC) para 23-24.

Under the *Superior Courts Act ,*[268] whenever the Supreme Court of Appeal or a High Court declares an Act of Parliament, a provincial Act or conduct of the President invalid as contemplated in section 172(2)(a) of the *Constitution*, that court must refer the order of constitutional invalidity to the Constitutional Court for confirmation.[269]

The *Constitution Seventeenth Amendment Act of 2012* expanded the jurisdiction of the Constitutional Court. The Court may now hear any matter, if the Constitutional Court grants leave to appeal because the matter raises an arguable point of law of general public importance that ought to be considered by that court.

The *Constitution*, after amendment by the *Constitution Seventeenth Amendment Act*, provides that the Constitutional Court may decide –[270]

(a) constitutional matters; and

(b) any other matter, if the Constitutional Court grants leave to appeal because the matter raises an arguable point of law of general public importance that ought to be considered by the Constitutional Court.

The Court may therefore decide to grant leave to appeal in a non-constitutional matter if –[271]

(a) the matter raises an arguable point of law;

(b) it is of general public importance, that is, the matter should be important not only for the litigants but for the general public; and

(c) the matter ought to be considered by the Constitutional Court.

This allows the Court to filter out non-constitutional matters it deems not sufficiently important.

---

268 10 of 2013.
269 S 15 .
270 Section 167(3)(b)(i) and (ii).
271 *Paulsen v Slip Knot Investments* 777 (Pty) Limited 2015 (3) SA 479 (CC) paras 13-17 and Du Plessis, Penfold and Brickhill *Constitutional Litigation* 34.

2.4.5.4 Jurisdiction of the High Court

The High Court has wide powers to hear constitutional matters. The High Court may hear any constitutional matter, except where the Constitutional Court has exclusive jurisdiction over the matter.[272] The Supreme Court of Appeal and the High Court have the inherent power to regulate their own process and to develop the common law, taking into account the interests of justice.[273]

The High Court derives its jurisdiction from national legislation,[274] and from the common law.[275] The common law grants inherent jurisdiction to the High Court, the Supreme Court of Appeal and the Constitutional Court. The inherent jurisdiction to adjudicate on cases means that the courts may override the rules of the court or provide a procedural remedy where none existed.[276] The High Court, the Supreme Court of Appeal and the Constitutional Court are therefore enabled to promote a range of innovative new orders to promote the interests of justice.

In *Mjeni v Minister of Health and Welfare, Eastern Cape,*[277] the Court rejected section 3 of the *State Liability Act*,[278] which precluded the imprisonment of state officials, and the argument that contempt proceedings were principally inappropriate in respect of judgments *ad pecuniam solvendam*.[279] The Court found that –[280]

> [i]n more recent years, and in particular the period from 2002 onwards, the courts have been inundated with situations where court orders have been flouted by state functionaries, who, on being handed such court orders, have given very flimsy excuses which in the end only point to their dilatoriness. The public officials seem not to understand the integral role that they play in our constitutional state, as the right to access to courts entails a duty not only on the courts to ensure access but on the state to bring about the enforceability of court orders.

---

272 Section 169(a) of the *Constitution.*
273 Section 173 of the *Constitution.*
274 Section 171 of the *Constitution.*
275 Currie and De Waal *The Bill of Rights Han*dbook 112.
276 Peté et al *Civil Procedure* 88.
277 2000 4 SA 446 (TkH).
278 20 of 1957.
279 Judgments in which the debtor is ordered to pay a sum of money; Kelbrick *Civil Procedure* 121.
280 Para 60.

In *Nyathi v MEC for Department of Health, Gauteng*,[281] section 3 of the *State Liability Act* was declared unconstitutional because it did not provide for the effective enforcement of court orders against the state. The Court found justification for its decision in section 173 of the *Constitution*, which allows the courts the inherent power to protect and regulate their own process and to develop the common law, taking into account the interests of justice. The Court thus held that the Minister could be held in contempt of court for non-compliance with court orders. The declaration of invalidity was confirmed by the Constitutional Court.[282] The courts will exercise its inherent jurisdiction only in exceptional cases where ordinary procedure is not provided for in law.[283]

The doctrine of effectiveness is the most important general principle underlying the jurisdiction of the High Court. The doctrine effectively states that a litigant should not waste the court's time by bringing a matter before it if it is clear that the court's judgment would not be effective.[284] In this instance, an effective judgment means one that can be enforced.

2.5 Strategic litigation and cause of action

To bring a claim in South African courts, the plaintiff must rely on a cause of action. The enquiry into the cause of action is an enquiry into substantive law, assisting in the determination of the appropriate civil procedure to be followed. One of the first questions to be asked what the basis is on which the claim is founded; in other words, what the cause of action is. The cause of action is essential in identifying the elements that must be proved for a successful claim. According to Marnewick, a cause of action is a set of facts that gives rise to a claim recognised by law. This means that the court has to grant judgment for the plaintiff if those facts are proved to the required standard of proof.[285]

---

281 [2008] ZACC 8.
282 *Minister for Justice and Constitutional Development v Nyathi* 2010 (4) BCLR 293 (CC).
283 *Krygkor Pensioenfonds v Smith* 1993 (3) SA 459 (A) para 469G-J.
284 Peté et al *Civil Procedure* 71.
285 Marnewick *Litigation skills* 79.

In principle, it is undesirable for a court in a matter to raise a fresh legal issue not relied upon by the applicants, and upon which the applicants do not wish to rely.[286] The role of a court is essentially to be responsive to litigation brought before it. In the *Matatiele Municipality* case, the Court held as follows:[287]

> As a general matter, a court should decide issues raised by the parties in their pleadings and in argument. They should not embark upon a judicial frolic and decide matters that are not before them. The adjudication of disputes between the parties is not an occasion to engage in an academic exercise of deciding a whole range of issues that are not before a court. But, like all general rules, this too is subject to exceptions. It must yield to the interests of justice.

It is trite that a court is not bound by a legal concession if it considers the concession wrong in law.[288] Were it to be otherwise, this could lead to an intolerable situation in which the Court would be bound by a mistake of law on the part of a litigant.

In South Africa, a cause of action can be derived from common law, statutory law and the *Constitution.*

2.5.1 Common-law cause of action

In South African constitutional law, claims are usually brought against the state based on the common-law principles of delict and contract. In the pre-constitutional era, the review of administrative action could only be sought in terms of the common law. The realm of administrative action at common law was broad, with administrative law viewed as an essential bulwark against the abuse of public power.[289] South Africa has also followed the example of other Commonwealth jurisdictions by adopting the common-law cause of action based on bureaucratic negligence.

In South Africa, public servants have been found liable where officials –[290]

---

286 *Matatiele Municipality v President of the Republic of South Africa* 2006 (5) SA 47 (CC) paras 66-67.

287 Para 66.

288 In *Azanian People's Organisation v President of the Republic of South Africa* 1996 (4) SA 671 (CC) para 16, the Court firmly rejected the proposition that it is bound by an incorrect legal concession, holding that if that concession was wrong in law, it would have no hesitation whatsoever in rejecting it.

289 Hoexter *Administrative Law* 165.

290 Okpaluba and Osode *Government liability* 109.

(a) took no steps to investigate the information supplied by an applicant for a firearm;[291]

(b) failed to investigate the extent to which admissions by an applicant rendered him unfit to possess a firearm;[292]

(c) failed to investigate whether a licence should be withdrawn when members of the Police Service held information that the holder of the firearm was fond of alcohol and misused firearms;[293] or

(d) failed to oppose the bail application of a sex offender by not bringing information known to the police and the prosecutor to the attention of the magistrate.[294]

Problems may arise when the applicant approaches the courts claiming that a right, in the Bill of Rights, has been infringed or threatened. As will be shown in paragraph 2.5.3.3, the litigant might have access to both a constitutional cause of action, because of the breach of a constitutional right, and a common-law cause of action, usually in the form of delict. An example of this may be found in section 12(1)(d) of the *Constitution*, which provides that everyone has the right not to be tortured. If the plaintiff is arrested by the police and then tortured, he or she will have access to a constitutional cause of action because of the breach of his or her section 12(1)(d) constitutional right, but the plaintiff can also rely on the common-law cause of action based on the delict caused by the police. This parallel system of law, or multiple causes of action, is discussed in paragraph 2.5.3.3.

2.5.2 Statutory-law cause of action

A statutory-law cause of action is a civil cause of action created by legislation. A statutory-law cause of action is created to provide a remedy where the common law is

---

291 *Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA).
292 *Minister of Safety and Security v De Lima* 2005 (5) SA 575 (SCA).
293 *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA).
294 *Carmichele v Minster of Safety and Security* 2003 (2) SA 656 (CC).

inadequate or to provide a statutory remedy where the common-law remedy, though adequate in theory, is not available in practice.

The *Human Rights Act*, 1998, of the United Kingdom is an example of statutory law introducing a cause of action into national jurisprudence.[295] Section 8 of the Act offers a judicial remedy when rights contained in the *European Convention for the Protection of Human Rights and Fundamental Freedoms*[296] are breached, and provides, *inter alia*, the following:

(a) In relation to any act of a public authority, which the court finds is unlawful, it may grant such relief or remedy within its powers as it considers just and appropriate.

(b) Damages may, however, be awarded only by a court that has power to award damages, or to order the payment of compensation, in civil proceedings.

(c) No award of damages is to be made unless, taking account of all the circumstances of the case, including (a) any other relief or remedy granted, or order made, in relation to the act in question, and (b) the consequences of any decision in respect of that act, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

The *Human Rights Act* therefore incorporated the provisions of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* into British domestic law.[297] This is a marked departure from the traditional way in which civil liberties have been viewed under British law. Vick states that British constitutional law traditionally refrained from a textual pronouncement of fundamental rights, instead viewing rights as residual, relying on the democratic process, the rule of law, and a

---

295 Okpaluba and Osode *Government liability* 78.

296 *European Convention for the Protection of Human Rights and Fundamental Freedoms* November 4 1950 213 U.N.T.S. 221.

297 Ewing 2003 *The Modern Law Review* 1.

complex system of checks and balances to safeguard civil liberties. Before the *Human Rights Act* was enacted, enforcement of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* could be asserted by individuals in the European Court of Human Rights. The *Human Rights Act* puts courts and other public authorities under a positive duty to give effect to the rights guaranteed under the *European Convention*.[298]

In South Africa, statutory causes of action include the *Promotion of Administrative Justice Act*,[299] the *Promotion of Access to Information Act*[300] and *Promotion of Equality and Prevention of Unfair Discrimination Act*.[301]

The purpose of the *Promotion of Administrative Justice Act* is to give effect to the right to administrative action that is lawful, reasonable and procedurally fair and the right to written reasons for administrative decisions.[302] In terms of section 6 of the Act any person may institute proceedings in a court for the judicial review of an administrative action and the court may review the administrative action if the requirements of subsection (2) are met.

The purpose of the *Promotion of Access to Information Act* is to give effect to the constitutional right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any right.[303] The Act gives effect to section 32 of the *Constitution*, which provides for access to any information held by the state and access to any information that is held by another person that is required for the exercise of any rights.

In terms of section 78 of the Act, a person who requested information from the state or a private party may institute proceedings in a court if the request is refused but only

---

298 Vick 2002 *Texas International Law Journal* 330.
299 3 of 2000.
300 2 of 2000.
301 4 of 2000.
302 Long title of the Act.
303 Long title of the Act.

after exhausting the internal appeal procedures. The court hearing an application may grant any order that is just and equitable, including orders –[304]

(a) confirming, amending or setting aside the decision that is the subject of the application concerned;

(b) requiring from the information officer or relevant authority of a public body or the head of a private body to take such action or to refrain from taking such action as the court considers necessary;

(c) granting an interdict or a declaratory order;

(d) granting compensation;

(e) as to costs.

The *Promotion of Equality and Prevention of Unfair Discrimination Act* gives effect to section 9 of the *Constitution*, which provides for the enactment of national legislation to prevent or prohibit unfair discrimination and to promote the achievement of equality. The objects of the Act are –[305]

(a) to enact legislation required by section 9 of the *Constitution*;

(b) to give effect to the letter and spirit of the *Constitution*, including the equal enjoyment of all rights and freedoms by every person, the promotion of equality, the values of non-racialism and non-sexism, the prevention of unfair discrimination and protection of human dignity, and the prohibition of advocacy of hatred, based on race, ethnicity, gender or religion, that constitutes incitement to cause harm;

(c) to provide for measures to facilitate the eradication of unfair discrimination, hate speech and harassment, particularly on the grounds of race, gender and disability;

---

304 Section 82 of the Act.
305 Section 2 of the Act.

(d) to provide for procedures for the determination of circumstances under which discrimination is unfair;

(e) to provide for measures to educate the public and raise public awareness of the importance of promoting equality and overcoming unfair discrimination, hate speech and harassment;

(f) to provide remedies for victims of unfair discrimination, hate speech and harassment, and for persons whose right to equality has been infringed;

(g) to set out measures to advance persons disadvantaged by unfair discrimination; and

(h) to facilitate compliance with obligations under international law.

The Act provides for the creation of equality courts,[306] in which actions under the Act may be instituted.[307]

The courts can therefore be approached when a right in the Bill of Rights has been breached or threatened by relying on a cause of action created by the statute enacted to realise of the right that has been breached.

2.5.3 Constitutional-law cause of action

2.5.3.1 Introduction

Section 38 of the *Constitution* provides that the categories of person listed in this section may approach a competent court alleging that a right in the Bill of Rights has been infringed or threatened, and that the court may grant appropriate relief. The Court may, furthermore, make any order that is just and equitable.[308] The *Constitution* contains no definition of what would constitute "appropriate" relief or "just and equitable" relief. The South African *Constitution* does not specifically recognise damages

306 Section 16 of the Act.
307 Section 20 of the Act.
308 Section 172(1)(b) of the *Constitution.*

or compensation as appropriate relief for any breach of constitutional rights and freedoms,[309] unlike the constitutions of Namibia,[310] the Seychelles[311] and the Solomon Islands.[312]

Anderson writes that where law presumes to "empower" the disadvantaged, a variety of questions arises. Those he raises are:[313]

> Are new mechanisms of accountability actually designed to translate social demands into effective policy? Is access to a legal remedy genuinely widespread or only available to particular groups aided by legal and political professionals? Are legal categories sufficiently sensitive to popular conceptions of justice, so that democratic voices may find expression in legal form? Finally, are the disadvantaged or injured parties active participants in the legal process, or do they remain alienated, disempowered "victims" at the mercy of an ambivalent altruism?

These questions are especially valid in a constitutional sense when a constitution provides for far-reaching protection for human rights and places a positive duty on the state to protect and give effect to such rights, as is the case in South Africa.[314] The imposition of positive constitutional duties on the state also raises the question of whether the litigant should approach the courts relying on the constitutional provisions that impose such duties. If the state has legislated to give effect to positive duties imposed on the state by the constitution, or the common law provides remedies that the litigant could use to enforce the breach of these duties, which remedy should the litigant employ? Does this create a parallel system of law that is available to the litigant?

---

309 Okpaluba and Osode *Government liability* 52.
310 *Constitution of Namibia* 1990 Art. 25(4).
311 *Constitution of Seychelles* 1983 s 46(5)(d).
312 *Constitution of Solomon Islands* 1978 s 17.
313 Anderson 1993 *Third World Legal Studies* 178.
314 Section 7(1) of the *Constitution* states that the Bill of Rights is a cornerstone of democracy in South Africa and that it enshrines the rights of all people in the country. Section 7(2) places an obligation on the state to respect, protect, promote and fulfil the rights contained in the Bill of Rights.

2.5.3.2 Comparable causes of action in foreign jurisdictions

2.5.3.2.1 Position in the United States of America

In the United States of America, the federal/state divide plays a significant role in the United States jurisprudence in this regard,[315] and remedies for constitutional infringement arise from two sources: the relief provided by Section 1983 of the *Civil Rights Act*,[316] and constitutional damages based directly on the *Constitution.* Claims in tort also fall within the jurisdiction of state courts and there is an element of state immunity when claims are based on tort.

Section 1983 *United States Code* (*U.S.C.*) has been an important federal statutory remedy, in respect of which the states have concurrent jurisdiction, to enforce rights protected by the *Constitution.*[317] In American jurisprudence, a system of duality exists between constitutional (federal) tort actions and torts under state law. Whitman states that constitutional and common law often provide protections that seem to encompass very similar interests. For example, a state may provide personal or property protection that parallels the Fourth Amendment's guarantee against unreasonable searches and seizures.[318] She continues by stating that certain constitutional interests, such as the right to equal treatment, the right to vote or the right to procedural due process, have no equivalent in tort. Other constitutional rights, such as the right to choose to have an abortion or the right of free speech, are uniquely rights against government action.[319] The United States' Congress passed a statute,[320] as part of a *Civil Rights Act,*[321] which allowed civil damage actions to be brought against those who, under colour of state law, have deprived others of their constitutional rights.

---

315 As discussed in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) paras 25-37.

316 17 Stat. 13 1871.

317 The Fourteenth Amendment, which, in Section 1, provides for the extension of certain guaranteed rights against the states, and in addition, in Section 5, empowers Congress to enforce, by appropriate legislation, the provisions of this article.

318 Amendment IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

319 Whitman 1980 *Michigan Law Review* 14.

320 42 U.S.C. 1983.

321 17 Stat. 13 1871.

In *Monroe v Pape,*[322] the Court held that a plaintiff whose constitutional rights have been infringed by one acting under colour of state law could bring a federal cause of action under Action 1983 even where the state provides an adequate remedy through its common law of tort. Section 1983 afforded a federal remedy that was supplementary to any appropriate state remedy and that the latter need not be exhausted before invoking the federal one.[323] The Court found that –[324]

> [o]ne reason the legislation was passed was to afford a federal right in federal courts because, due to prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

Punitive damages are, however, not available against municipalities.[325] The Court, after reviewing common-law authorities covering more than a century, which had consistently denied such punitive damages, examined the objectives of punitive damages in general and their relationship to the goals of Section 1983. The Court rejected the concept of retribution against a municipality, pointing out that punitive damages only punished innocent taxpayers and constituted a windfall to a fully compensated plaintiff. When constitutional damages have been proved, no damages for the abstract value of the right infringed would be awarded, but only nominal damages, which requires actual damages to be proved.[326]

In *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics,*[327] the Supreme Court held that it had the power to fashion a damages remedy directly under the *Constitution* for the invasion of the petitioner's personal interests protected by the Fourth Amendment, despite the fact that the Fourth Amendment made no express provision for a remedy in damages.[328] The petitioner's action was therefore not limited to seeking a remedy under ordinary tort law. The Court held that the local trespass laws

---

322 365 US 167 1961 5.
323 Para 183.
324 Para 180.
325 *Newport v Facts Concerts Inc* 453 US 247, 271 (1981) paras 266-267.
326 *Carey v Piphus* 435 US 247 (1978).
327 403 US 388 (1971).
328 Para 396.

were remedially inadequate,[329] and that the interests protected by state laws regulating trespass and the invasion of privacy might be inconsistent with the Fourth Amendment guarantee.[330] The Court stressed the completely independent nature of the constitutional damages remedy to protect Fourth Amendment rights.[331]

The Fourth Amendment right in question is an independent limitation on the exercise of federal power.[332] The Court stressed the different function of the law when dealing with the rights of individuals *inter se* as compared to dealing with individual rights against the state[333] and highlighted the particular responsibility of the judiciary to vindicate the constitutional interests of individuals entrenched in the Bill of Rights.[334]

In *Carlson v Green,*[335] the court pointed out that a case brought before it based on a constitutional cause of action can be defeated *inter alia* when the defendant shows that Congress has provided an alternative remedy that is explicitly declared a substitute for recovery directly under the *Constitution* and viewed as equally effective.[336]

This gave rise to an explosion of actions and has become a subject of considerable comment and consternation.[337] The dual system of remedies in place in American jurisprudence has generated dissatisfaction since its inception.[338] Although the American system of torts and constitutional damages differs markedly from the South African model, the South African courts found the views concerning the essential nature of the remedy, in a more general normative sense, instructive.[339] However, the *Fose* court remarked on the difference between state liability in the United States and South Africa, and counselled caution against seeking guidance from the United States jurisprudence regarding the content of a suitable constitutional damages remedy. Claims against the

---

329 Paras 393-394 and 409-410.
330 Para 394.
331 Paras 390-395.
332 Para 394.
333 Paras 391-392.
334 Para 407.
335 446 US 14, 28, 28 n 1 (1980).
336 Paras 18-19.
337 Whitman 1980 *Michigan Law Review* 6.
338 Whitman 1980 *Michigan Law Review* 9.
339 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 33.

state in the United States[340] are far more limited in scope and content than similar claims in South Africa.[341] However, when a petitioner to the United States Supreme Court has no other remedy to rely on, the Court readily grants relief in the form of constitutional damages.[342] This principle is also applied by the South African courts, as will be shown in Section 2.5.3.3.

2.5.3.2.2 Position in Canada

Section 24(1) of the *Canadian Charter of Rights and Freedoms*[343] (*CCRF*) states that anyone whose rights or freedoms, as guaranteed by the Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

In *R v Mills*,[344] the Court described the broad discretion the courts are allowed in section 24(1) of the *CCRF*:[345]

> What remedies are available when an application under Section 24(1) of the Charter succeeds? Section 24(1) again is silent on the question. It merely provides that the appellant obtain such remedy, as the court considers appropriate and just in the circumstances. It is difficult to imagine language, which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for the appellate courts to pre-empt or cut down this wide discretion.

The plaintiff in Canada is not limited to an action based on the general law of civil liability, but can seek compensatory and punitive damages as an appropriate relief under section 24(1).[346] The Saskatchewan Court of Appeal has held that appropriateness relates to the efficacy and suitability of the remedy viewed from the

---

340 The *Federal Tort Claims Act* 28 U.S.C. 2680(h) prohibits recovery against the Government for any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

341 Section 1 of the *State Liability Act* 20 of 1957 provides as follows: Any claim against the State which would, if that claim had arisen against a person, be the ground of an action in any competent court, shall be cognizable by such court, whether the claim arises out of any contract lawfully entered into on behalf of the State or out of any wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such servant.

342 *Davis v Passman* 442 US 228 (1979).

343 Part 1 of the *Constitution Act,* 1982.

344 (1986) 29 DLR (4th) 161.

345 Para 181.

346 Okpaluba and Osode *Government liability* 62.

perspective of the complainant and the right violated, whereas justness is a wider concept relating to the interests of all affected by the remedy.[347] The Court described this as follows:

> Appropriateness connotes efficaciousness and suitability from the standpoint of the violation itself – a remedy "to fit the offence" as it were. It suggests a remedy that, from the perspective of the person whose right was violated, will effectively redress the grievance brought about by the violation. The quality of justness, on the other hand, has a broader scope of operation. It must fill a more extensive set of criteria than the quality of appropriateness. To be just a remedy must be fair to all who are affected by it. That group may well include persons other than the person whose right was violated.

The Canadian Supreme Court has not yet pronounced on the question of whether constitutional damages would constitute, in suitable cases, an appropriate and just remedy for *Charter* violations, but it appears to be generally accepted that this would be the case,[348] although such a remedy has not yet been extensively used.[349]

In *Nelles v Ontario,*[350] the Court found that a constitutional damages claim could run concurrently with one for malicious prosecution.

In *Vespoli v The Queen,*[351] the Federal Court of Appeal did not doubt that the court, in terms of section 24(1), has the power to award damages to those whose rights and freedoms have been infringed. However, the Court did not consider it appropriate and just under the circumstances because there was no solid evidence that the appellants really suffered damage because of the illegal seizures.

In *Patenaude v Roy,*[352] exemplary damages were awarded by the Court for a deliberate violation of the *Quebec Charter of Human Rights and Freedoms*[353] when police officers used excessive and unnecessary force in executing a search warrant.

---

347 *Saskatchewan Human Rights Commission v Kodellas* (1989) 60 DLR (4th) 143 162.

348 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 39; Cooper-Stephenson *Charter Damages Claims* 1.

349 Roach *Constitutional Remedies in Canada* 11.10.

350 60 DLR (4th) 609 1989 (SCC) paras 640-643.

351 12 CRR 185 (1984) (Fed CA) para 189.

352 (1994) 123 DLR (4th) 78 (Que CA).

353 *Charte des Droits et Libertés de la Personne*, a statutory bill of rights and human rights code passed by the National Assembly of Quebec on 27 June 1975.

In *Vorvis v ICBC,*[354] the Court rejected limitations on the awarding of punitive damages for constitutional violations.

Exemplary or punitive damages as *Charter* remedies have been awarded in several cases.[355] This must, however, be seen in the light of the fact that Canada's private law system of torts recognises, in common with that of other common-law countries, exemplary or punitive damages in appropriate circumstances in ordinary tort claims.[356] It is trite that, in South African law, no exemplary or punitive damages are awarded by the courts. The plaintiff is awarded the damages he can prove, which means a person can claim compensation from another for harm the claimant has suffered.[357] The common-law principles for awarding damages in South Africa and Canada are markedly different. Currently there is a parallel system of claims in Canada that recognises a claim for damages based on tort and, at the same time, a claim based on the breach of a constitutional right. This dual system of claims has been expressly rejected by the South African Constitutional Court.

2.5.3.3 Approach adopted by the South African Constitutional Court

Currie and De Waal maintain that constitutional rights and remedies, like their counterparts in the common law, are complementary. The difference, however, lies in the harm caused. The harm caused by violating a constitutional right is not merely harm to an individual; it harms society as a whole. They argue that violation of a constitutional right impedes the realisation of the constitutional project of creating a just and democratic society. The object of the remedy should therefore be to vindicate the *Constitution* and deter future infringements. Therefore, constitutional remedies are "forward-looking, community-orientated and structural rather than backward-looking, individualistic and retributive".[358]

---

354 58 DLR (4th) 193 (1989) (SCC) para 206.
355 *Collin v Lussier* 6 CRR (1983) 89 para 107; *Lord v Allison* 3 BCLR (2d) 300 (1986) (SC) para 324.
356 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 40, footnote 88.
357 Loubser and Midgley *The Law of Delict* 4.
358 Currie and De Waal *The Bill of Rights Handbook* 196.

In *S v Mhlungu*,[359] the Court held that where possible any case, civil or criminal, should be heard without reaching a constitutional issue.[360] This supports the principle of subsidiarity, which means that if there is an adequate private-law remedy, whether in common law or statute, that vindicates the right, it should be used. Only if the remedy supplied by existing law is insufficient to fully vindicate the right, should direct reliance be placed on constitutional remedies.[361]

In *Fose v Minister of Safety and Security,*[362] the issue was raised whether constitutional damages could and ought to be awarded as appropriate relief in terms of the provisions of section 7(4)(a)[363] of the *Interim Constitution* for a breach of the plaintiff's right guaranteed by section 11(2)[364] of the *Interim Constitution.* This included the right not to be tortured and not to be subjected to cruel, inhuman or degrading treatment[365] and constituted an infringement of the plaintiff's fundamental rights as entrenched in Chapter 3 of the *Interim Constitution.*[366]

The infringement of the plaintiff's fundamental rights formed part of widespread and persistent similar infringements of the fundamental rights of other South African citizens by members of the South African Police Service. The plaintiff's first two claims were based on pain and suffering, loss of enjoyment of the amenities of life and shock, *contumelia* and special damages in respect of past and future medical expenses. The first claims were therefore based on delict.[367] The plaintiff also claimed for constitutional damages to be awarded, which included an element of punitive damages. The claim for constitutional damages were sought in consequence of the same events and conduct

---

359 1995 (3) SA 867 (CC).
360 Para 59.
361 Bishop "Remedies" 9-80.
362 1997 (3) SA 786 (CC).
363 Section 7(4)(a) of the *Interim Constitution* read: "When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights."
364 Section 11(2) read: "No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment."
365 Para 1.
366 Para 12.
367 Para 13.

that founded the first two delictual claims, but only in respect of the infringement of plaintiff's Chapter 3 rights.

The plaintiff therefore limited his relief to the recovery of specific damages over and above those to which he would have been entitled at common law. The respondent took exception to the third claim on the basis that it did not disclose a cause of action, alleging the following:[368]

(a) An action for damages in the nature of constitutional damages does not exist in law.

(b) An order for the payment of damages does not qualify as appropriate relief as contemplated in section 7(4)(a) of the *Interim Constitution.*

The Court found that the issue before it was whether, for the same assaults as were pleaded in the first two claims, the plaintiff is entitled, in addition to the damages claimed for those assaults in those claims, to recover "constitutional damages" which include "an element of punitive damages".

The plaintiff argued:[369]

> Section 7(4)(a) of the Interim Constitution establishes a separate cause of action, a public law action directed against the state, based on the infringement of a fundamental right entrenched in Chapter 3. The objectives of the law of delict differ fundamentally from those of constitutional law. The primary purpose of the former is to regulate relationships between private parties whereas the latter, to a large extent, aims at protecting the Chapter 3 rights of individuals from state intrusion. Similarly the purpose of a delictual remedy differs fundamentally from that of a constitutional remedy.
>
> The former seeks to provide compensation for harm caused to one private party by the wrongful action of another private party whereas the latter has as its objective (a) the vindication of the fundamental right itself so as to promote the values of an open and democratic society based on freedom and equality and respect for human rights; (b) the deterrence and prevention of future infringements of fundamental rights by the legislative and executive organs of state at all levels of government; (c) the punishment of those organs of state whose officials have infringed fundamental rights in a particularly egregious fashion; and (d) compensation for harm caused to the

368 Para 14.
369 Para 17.

> plaintiff in consequence of the infringement of one or more of the plaintiff's rights entrenched in Chapter 3.
>
> The common law remedies are not directed to the achievement of the first three of these objectives and the common law should not be distorted by requiring it to perform these functions and fulfil the purposes of constitutional law.

The Court found that the issues raised by the plaintiff turned on the proper construction of section 7(4)(a) of the *Interim Constitution*, which entitles any person contemplated in subsection (b) to apply to a competent court of law for appropriate relief, which may include a declaration of rights.[370] Before the adoption of the 1996 *Constitution*, the *Interim Constitution* was the supreme law. It conferred rights on persons and told them that they might look to the courts for the protection and enforcement of such rights. This revolves around the question of appropriate relief and it is left to the courts to decide what would be appropriate relief in any particular case.

The Court found that appropriate relief would in essence be relief that was required to protect and enforce the *Constitution.*[371] Depending on the circumstances of each particular case, the relief might be a declaration of rights, an interdict, a mandamus or such other relief as might be required to ensure that the rights enshrined in the *Constitution* were protected and enforced. The Court held that, if it was necessary to do so, the courts might even have to fashion new remedies to secure the protection and enforcement of these all-important rights. However, the Court declined to award punitive damages to the plaintiff.

In *NAPTOSA v Minister of Education, Western Cape Government;*[372] the applicants argued that the *Constitution* elevates the entitlement to fair labour practices to a fundamental right.[373] Relying on this constitutionalisation of labour rights, the applicants contended that an employee whose fundamental right to fair labour practices had been violated might, instead of relying on the provisions of the *Labour Relations Act* (*LRA*),[374]

---

370 Para 18.
371 Para 19.
372 2001 (2) SA 112 (C).
373 Section 23(1) of the *Constitution* provides that everyone has the right to fair labour practices.
374 66 of 1995.

rely directly on the *Constitution.*[375] The respondent argued that the High Court had no jurisdiction to grant the relief sought in the notice of motion and that the application should have been brought in the Labour Court. The Court found that section 23(1) of the *Constitution* provides that everyone has the right to fair labour practices. The Court ruled that in concluding a contract with the applicants in terms that financially discriminated against them, the respondent committed an unfair labour practice and since the Bill of Rights binds the legislature, the executive, the judiciary and all organs of state,[376] the respondent violated the applicant's constitutional right to fair labour practices. The Court justified its ruling as follows:

> The high court has the primary responsibility for the enforcement of fundamental rights. It has jurisdiction to pronounce upon all violations of fundamental rights. This is plain from section 169 of the Constitution. The qualification in section 157(2) of the LRA is intended to restrict the competence of the labour court to fundamental rights issues in the employment sphere. The applicants have "alleged" a violation of their fundamental right to fair labour practices. It does not matter whether the claim is good or bad. That goes to the merits. If it appears from supporting information that the allegation is without substance a court may already at the stage of the jurisdictional enquiry decide that the case cannot concern a violation of a fundamental right and decline to exercise jurisdiction. This is not such a case. In this case and, I would think generally, once the allegation has been made, the high court would have jurisdiction.

The Court, relying on the judgment in *Fose v Minister of Safety and Security*,[377] stated that there might be circumstances in which a litigant against the state would be entitled to rely directly on a breach of a fundamental right. Whether this would be permissible, would depend, however, on the availability of "appropriate relief".[378]

Appropriate relief in these circumstances would in essence be relief that is necessary to protect and enforce the *Constitution.* In deciding what appropriate relief is, the interests not only of the complainant but also of society as a whole ought to be served.[379] Constitutional rights have complementary remedies and they should be of a kind that vindicates the *Constitution*. Current statutory and common-law remedies may be sufficient for this purpose.

---

375 *NAPTOSA* page 6.
376 Section 8(1) and (2) of the *Constitution.*
377 1997 (3) SA 786 (CC).
378 *NAPTOSA* page 11.
379 *NAPTOSA* page 7.

There were powerful reasons for not excluding common-law and statutory relief from the ambit of section 7(4)(a).[380] The Court found that statutes, such as the *LRA*, seek to codify constitutional rights, and are expressly designed to provide suitable relief for the infringement of constitutional rights.[381] It would undermine the best efforts of the legislature if these remedies were to be excluded from a court's arsenal of remedial options.

The Court stated that the drafters of the *Constitution* did not intend to exclude common-law and statutory remedies from the remedial scheme. A court has a wide range of remedies at its disposal when exercising its section 7(4)(a) powers. These remedies include common-law relief, statutory relief, declaratory relief and a number of potential remedies in terms of sections 98 and 101(4).[382] The Court found that no remedy is excluded, provided the remedy serves to vindicate the *Constitution* and deter its further infringement. Section 1 of the *LRA* provides that the primary objects of the Act are, *inter alia*, to give effect to and regulate the fundamental rights conferred by the *Constitution*, and to promote the effective resolution of labour disputes.[383] The Court argued that –

> [o]ne would expect the LRA, if it were true to its stated objectives, to marry the enforcement of fundamental rights with the effective resolution of labour disputes. This is exactly what it seeks to do. It provides mechanisms for the enforcement of such labour practices as the legislature considers to be fair and the suppression of any labour practice considered to be unfair. If an employer adopts a labour practice which is thought to be unfair, an aggrieved employee would in the first instance be obliged to seek a remedy under the LRA. If he or she finds no remedy under that Act, the LRA might come under constitutional scrutiny for not giving adequate protection to a constitutional right. If a labour practice permitted by the LRA is not fair, a court might be persuaded to strike down the impugned provision.

The Court stated that to grant relief would encourage the development of two parallel systems and that this would be inappropriate. The right to fair labour practices was not

---

380 Section 7(4)(a) of the *Interim Constitution* read: "When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights."

381 *NAPTOSA* page 8.

382 Sections 98 and 101(4) of the *Interim Constitution* dealt with the jurisdiction and powers of the Constitutional Court and the Supreme Court, respectively.

383 Section 1(a) and (d) of the *LRA*.

a right that could be applied directly in the workplace without an intervening regulatory framework.[384] The social and policy issues were too complex for that, because the issue of the horizontal application of the labour relations rights to private citizens would be mainly academic. Existing labour legislation already regulated, to a large degree, private conduct between employers and employees. The horizontal reach of the labour rights therefore extend to matters falling within the scope of the rights but not covered by existing legislation.[385]

The Court, however, stated that section 19(1)(a)(iii) of the *Supreme Court Act*[386] gave the High Court jurisdiction in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right, notwithstanding that such person cannot claim any relief consequential upon the determination.[387] Although it may be competent for a court to make a declaratory order in any particular case, granting such is dependent on the judicial exercise by that Court of its discretion with due regard to the circumstances of the matter before it.

The Court approvingly referred to the case of *Adbro Investment Company Limited v Minister of the Interior*,[388] in which it was found that –[389]

> the Court in each case must … carefully determine whether or not the particular case in question is a proper case for the exercise of its discretion. For a case to be a proper case, in my view, generally speaking it should require to be shown that despite the fact that no consequential relief is being claimed or perhaps could be claimed in the proceedings, yet justice or convenience demands that a declaration be made.

A declaratory order is an order by which a dispute over the existence of some legal right or entitlement is resolved. The right can exist, be prospective or contingent.[390] A declaratory order need have no claim for specific relief attached to it, but it would not ordinarily be appropriate where one is dealing with events that occurred in the past. Such events, if they gave rise to a cause of action, would entitle the litigant to an

---

384 *NAPTOSA* page 9.
385 Page 10.
386 59 of 1959 (subsequently repealed by Act 10 of 2013).
387 *NAPTOSA* page 11.
388 (3) 283 (T).
389 Para 285B-D.
390 *NAPTOSA* page 12.

appropriate remedy. The Court found, however, that substantial delay in bringing the proceedings was a reason for exercising the Court's discretion against the grant of a declaratory order; because of the lateness of the application, a declaratory order would be of academic value only.[391]

In *Chirwa v Transnet Limited*,[392] the applicant approached the High Court in respect of a claim relating to unfair dismissal. She relied on two causes of action available to her: one under the *LRA*[393] and the other flowing from the Bill of Rights, read with the provisions of the *Promotion of Administrative Justice Act*[394] (*PAJA*).[395]

The High Court assumed that it had jurisdiction in the matter, but did not reach this conclusion based on the alleged violation of the provisions of *PAJA* as pleaded by the applicant. Instead, the High Court decided the matter based on common-law rules of natural justice, and concluded that the rules of natural justice had been breached.[396]

The Constitutional Court found that the High Court erred in that it did not consider the applicant's claim in the context of *PAJA*. The cause of action of what is claimed to be an administrative action now arises from *PAJA* and not from the common law, as it would have in the past.[397] The Court further held that when an alternative cause of action can be sustained in matters arising out of an employment relationship in which the employee alleges unfair dismissal or an unfair labour practice by the employer, it is in the first instance through the mechanisms established by the *LRA* that the employee should pursue her or his claims.[398] The constitutional right the applicant sought to

---

391 *NAPTOSA* page 13.
392 (2008) 29 ILJ 73 (CC).
393 66 of 1995.
394 3 of 2000.
395 Para 19 of *Transnet* .
396 Para 21. The High Court based its decision on *Administrator, Transvaal v Zenzile* 1991 (1) SA 21 (A), in which it was held that dismissal of a public sector employee was not simply the termination of a contractual relationship but the exercise of a public power which required the employer to apply the rules of natural justice.
397 Para 23.
398 Para 41.

vindicate was regulated in detail by the *LRA* and, as such, the Labour Court should have been approached.[399]

The applicant was, in the Court's view, not at liberty to relegate the finely tuned dispute resolution structures created by the *LRA*. If that were allowed, a dual system of law would fester in cases of dismissal of employees by employers, one applicable in civil courts and the other applicable in the forums and mechanisms established by the *LRA*. Further, even if the applicant sought to challenge the dismissal by relying on a constitutional issue other than one implemented through *PAJA* (as has been done in the current case by relying on section 195 of the *Constitution*), it was necessary to exhaust all remedies under the *LRA* before raising such an issue in a different forum.[400] However, this line of reasoning would not apply if an applicant sought to challenge the provisions of the *LRA* on the basis that they were inadequate in providing protection to employees in the form contemplated by section 23 of the *Constitution.* That would raise a constitutional matter that was justiciable in the High Court.[401]

In *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders*,[402] the Court found that –

> [t]he values enunciated in section 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves. This is clear not only from the language of section 1 itself, but also from the way the Constitution is structured and in particular the provisions of Chapter 2 which contains the Bill of Rights.

In *Modderklip*,[403] the Court used section 34[404] to develop a general right to an effective constitutional remedy and granted constitutional damages based on the breach of this right. The Court made the strong statement that if a constitutional breach is established

---

399 Para 64.
400 Para 68.
401 Para 69.
402 2005 (3) SA 280 (CC) para 21.
403 *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 3 All SA 169 (SCA) 2004.
404 Section 34 of the *Constitution* provides that everyone has the right to have a dispute resolved by a court.

courts are mandated to grant appropriate relief.[405] The Court found that the applicant's right not to be arbitrarily deprived of property[406] have been breached.[407] The state failed in its constitutional duty to protect the rights of the applicant. It failed to provide the occupiers with land that would have enabled the applicant to enforce an eviction order. Instead, it allowed the burden of the occupiers' need for land to fall on an individual, the applicant in the matter.[408]

Section 9(1) of the *Constitution* provides that everyone is equal before the law and has the right to equal protection and benefit of the law, while section 9(2) provides that equality includes the full and equal enjoyment of all rights and freedoms.[409] The applicant was not treated equally because as an individual it had to bear the heavy burden, which rests on the state, to provide land to some 40 000 people. The right of access to adequate housing is not one enforceable at common law, or in terms of the *Constitution*, against an individual landowner and in no legislation has the state transferred this obligation to such an owner.[410]

The Court found that the only appropriate and justified remedy in those circumstances was that of "constitutional" damages due to the breach of a constitutionally entrenched right.[411] The constitutional damages had the advantage that the occupiers could remain where they were while the applicant was recompensed for that which it had lost. The Court justified and based its ruling on the breach of a constitutional right, even though no common-law or statutory remedy existed for the enforcement of such a right.

The duality that exists when a constitutional principle guaranteeing a basic right is given effect through enabling legislation can best be described with reference to section 32 of the *Constitution.*[412] Section 32(2) provides that legislation must be enacted to give effect to the right entrenched in subsection (1). The legislature complied by adopting

---

405 Para 18.
406 Section 25(1) of the *Constitution.*
407 Para 21.
408 Para 30.
409 Para 31.
410 *Theewaterskloof Holdings (Pty) Ltd, Glaser Afdeling v Jacobsen* 2002 (3) SA 401 (LCC) para 18.
411 Para 43.
412 The right to access to information.

the *Promotion of Access to Information Act* (hereafter *PAIA*).[413] This, however, left the question of whether, once the envisaged legislation had been enacted, such legislation would be the sole means of enforcing one's right of access to information, effectively causing a "permanent constitutional lock-out".[414] Botha *et al* argue that a constitutional cause of action would be supplemental to legislative and executive measures without terming those measures themselves unreasonable.[415]

In *Institute for Democracy in South Africa v African National Congress*,[416] the Court held that access to information might only be pursued through *PAIA* and not through section 32 of the *Constitution.* In this case, the Institute for Democracy in South Africa (IDASA), a non-profit organisation, sent requests to four political parties asking for detailed information about each party's private donations. After all requests were denied, IDASA sought judicial review in the High Court of South Africa in the interests of all South African citizens and in the public interest.[417] The Court addressed three main issues:

(a) Whether IDASA must seek relief under *PAIA* as opposed to seeking relief directly under section 32 of the *Constitution*.[418]

(b) Whether political parties are "public bodies" or "private bodies" under *PAIA*.[419]

(c) Whether records relating to private fund-raising are "required for the exercise or protection of any rights".[420]

For the purpose of this work, only the first question is relevant and is discussed here. The Court concluded that section 32 of the *Constitution* is not capable of serving as an independent cause of action for enforcement of access-to-information rights because to

---

413 2 of 2000.
414 Van Heerden , Govindjee and Holness 2014 *Speculum Juris* 30-31.
415 Botha, Van der Walt AJ and Van der Walt CJ *Rights and Democracy* 114-115.
416 2005 (5) SA 39 (CC).
417 Paras 9-18.
418 Para 22.
419 Para 37.
420 Para 53.

conclude otherwise would cause a confusing juxtaposition with *PAIA* by encouraging the development of two parallel systems, which would be singularly inappropriate.[421] The Court argued that section 32(2) of the *Constitution* merely provided a transitional provision to govern access-to-information rights for a three-year period until the legislation envisaged by that section was enacted. Because *PAIA* has since been enacted, the only possible cause of action that could be brought pursuant to section 32 is a challenge to the constitutionality of *PAIA* itself.[422]

Therefore, as soon as the legislature promulgates legislation protecting a right contained in the Bill of Rights, the statutory cause of action provided for in the enabling legislation provides the basis for a claim, and not the original constitutional principle. This is clearly designed to deny the litigant the choice of whether to proceed with a claim based on the enabling legislation or a claim based on the breach of a constitutional right. This prevents a duality of claims being available to the litigant. However, a claim can still be brought in terms of the *Constitution* when the litigant challenges the constitutionality of the enabling legislation. This means that when the enabling legislation does not sufficiently provide for the protection of the right in question, a challenge can still be brought to the validity and constitutionality of the legislation based on the constitutional right.

In *Rail Commuters Action Group v Transnet*;[423] the Court found that private-law damages claims are not always the most appropriate method of enforcing constitutional rights. Private-law remedies tend to be retrospective in effect, seeking to remedy loss caused rather than to prevent loss in the future. Moreover, the use of private-law remedies to claim damages to vindicate public-law rights may place heavy financial burdens on the state.[424] This does not mean that delictual relief should not lie for the infringement of constitutional rights in appropriate circumstances. There will be circumstances in which delictual relief is appropriate. It is important, however, that the value of public-law remedies as effective and appropriate forms of constitutional relief is

---

421 Paras 33-36.
422 Paras 23 and 33.
423 2005 (2) SA 359 (CC).
424 Para 80.

not overlooked.[425] The Court unfortunately did not set out the circumstances in which public-law remedies would be the appropriate basis on which to approach the courts.

In *Steenkamp v Provincial Tender Board of the Eastern Cape*,[426] the Court considered the future impact of the judgment and refused to award delictual liability for expenses suffered by the applicant for the following reason:[427]

> The chilling effect of the imposition of delictual liability on tender boards in a young democracy with limited resources, human and financial, on balance, is real because if liability were to be imposed, the potentiality of a claim by every successful tenderer would cast a shadow over the deliberations of a tender board on each tender and may slow the process down or even grind it to a halt.

Although it is important for the Court to consider the future effect of its judgments, the reasoning of the Court cannot be correct. In *Mhlungu*,[428] the Court held that the principle of subsidiarity is relevant in South African law.[429] Therefore, when there is an adequate private-law remedy, whether in common law or statute, that vindicates the right, it should be used. In *Steenkamp*, the plaintiff used the law of delict to pursue a claim for just administrative action but the Court, although convinced that the plaintiff did indeed suffer damages, refused to grant compensation.

Bishop argues that, while the principle of subsidiarity is fine in theory, it gives rise to two practical drawbacks. Firstly, the individual litigant is primarily interested in securing individual compensation for the breach of constitutional rights and less concerned about preventing future violations. Broader problems with constitutional violations from state or private action may go unnoticed. Constitutional remedies by necessity need to address systemic problems of constitutional breach and must hold out the promise that future violations of the constitution concerned would be curtailed or at least addressed. The second problem with the doctrine relates to a business-as-usual approach to

---

425 Para 81.
426 2007 (3) BCLR 280 (CC).
427 Para 40.
428 1995 (3) SA 867 (CC).
429 Para 59.

remedies. Bishop asks what the court would have done if Steenkamp had approached the court directly, therefore on a constitutional basis, to found his claim.[430]

In *Steenkamp*,[431] the Court held that the plaintiff's constitutional rights had been breached but that this did not entitle him to delictual damages. The principle of subsidiarity requires the plaintiff to frame his constitutional claim in delictual terms but then allows the law of delict to prevent the vindication of the constitutional right. Bishop proposes that the principle of subsidiarity should be modified to the extent that where the private law remedy only partially vindicates the constitutional right breached, the plaintiff is entitled to rely solely on constitutional law for all aspects of his or her relief. Should the plaintiff do so, the private-law remedy should not be a bar to granting the same relief under constitutional law.[432]

In *MEC for the Department of Welfare v Kate*,[433] the Court applied a modified version of the subsidiarity principle. The case relates to section 27 of the *Constitution* that obliges the state to achieve the progressive realisation of the right that everyone has to social security – including, if they are unable to support themselves and their dependants, appropriate social assistance – by taking reasonable legislative and other measures within its available resources towards that end. In the realisation of this right, the state promulgated the *Social Assistance Act*.[434] The Act obliges the provincial government (subject to the provisions of the Act and the concurrence of the member of the Executive Council responsible for the provincial budget) to make social grants to disabled persons out of moneys appropriated by the provincial legislature for that purpose.[435]

The Court stated that the establishment of a legislative and administrative structure by the state for the making of social grants and the appropriation of moneys for that purpose together went a long way to fulfilling the state's constitutional obligation, but

---

430 Bishop "Remedies" 9-80.
431 *Steenkamp v Provincial Tender Board of the Easter Cape* 2007 (3) BCLR 280 (CC).
432 Bishop "Remedies" 9-81.
433 2006 (4) SA 478 (SCA).
434 59 of 1992.
435 Section 2(a) of the Act.

by themselves they were not enough. Reasonable measures to make the system effective were required. On that score, there had been conspicuous and endemic failure in the Eastern Cape for a considerable time,[436] the result of which was a plethora of litigation in the High Court between the poor of that province and the provincial administration.[437] Regulations were promulgated on the day the Act came into operation.[438] The 1996 regulations required an applicant for a grant to complete and sign an application form in the presence of an attesting officer,[439] and the date on which that was done was deemed the date on which the application was made.[440] The defendant completed and signed the grant application on 16 April 1996 and therefore the disability grant, once approved, accrued from 16 April 1996.[441]

The defendant was advised in August 1999 that her application had been approved, with no explanation at all for the thirty-seven month delay.[442] On 15 October 2003, an application was launched in the High Court in which declaratory relief was sought together with orders for the recovery of the balance of the accrual and interest on that amount.[443] The outstanding balance was paid over to the defendant, so the principal issue that remained in dispute when the matter came before the court was whether the defendant was entitled to the interest that she had claimed on the accrual.[444] The court *a quo* granted declaratory relief and ordered the appellant to pay the interest claimed.[445]

On appeal, the appellant submitted that the claim for payment of the accrual, and for interest on it from the date that it became payable, ought to have been pursued by ordinary action in the magistrates' courts and not by review proceedings in the High

---

436 *Kate* para 3.
437 Para 4.
438 Regulations Regarding Grants, Social Relief Of Distress And Financial Awards In Terms Of The *Social Assistance Act*, 1992, promulgated under Government Notice R.373 in Government Gazette No. 17016 of 1 March 1996.
439 Regulation 8 of the 1996 Regulations.
440 Regulation 9 of the 1996 Regulations
441 *Kate* para 9.
442 Para 10.
443 Para 13.
444 Para 14.
445 Para 15.

Court.[446] Interest during that period was claimed and awarded as a measure of constitutional damages for the unreasonable delay the defendant was constrained to endure. The defendant's case was that the unreasonable delay in considering her application deprived her during that period of her constitutional right to receive a social grant, and for that deprivation, she ought to be recompensed by an order for damages.[447]

The Court held that the matter of constitutional damages should not be approached narrowly.[448] The realisation of substantive rights is usually dependent upon an administrative process. Rights that protect that process are essentially ancillary to the realisation of those substantive rights. Without protection being given to the process, the substantive rights are capable of being denied. Where, as in the case under discussion, the realisation of the substantive right to social assistance is dependent on lawful and procedurally fair administrative action, and the diligent and prompt performance by the state of its constitutional obligations, the failure to meet those process obligations denies to the beneficiary his or her substantive right to social assistance.

The Court found that what had been denied to the defendant was not merely the enjoyment of a process in the abstract, but, through denial of that process, she was denied her right to social assistance, which was dependent for its realisation on an effective process. The denial of that substantive right by the state lay at the centre of her claim. As to appropriate relief, the court held as follows:[449]

> Whether relief in that form is appropriate in a particular case must necessarily be determined casuistically with due regard to, amongst other things, the nature and relative importance of the rights that are in issue, the alternative remedies that might be available to assert and vindicate them, and the consequences of the breach for the claimant concerned.

The appellant submitted that the defendant had delictual remedies that were restorative of any loss that had been caused to her by the failure of the administration

---

446 Para 16.
447 Para 17.
448 Para 22.
449 Para 25.

to perform its constitutional duties and that in those circumstances a remedy of constitutional damages was not required.

The Court rejected the submission, stating that delictual principles are capable of being extended to encompass state liability for the breach of constitutional obligations.[450] Nevertheless, the relief permitted by section 38 of the *Constitution* is not a remedy of last resort, to be looked to only when there is no alternative, and indirect, means of asserting and vindicating constitutional rights. The Court stated that there was no reason why a direct breach of a substantive constitutional right (as opposed to merely a deviation from a constitutionally normative standard) should be remedied indirectly. The endemic breach of the rights that were in issue justified the clear assertion of their independent existence. It is submitted that the Court followed the correct approach in allowing the claim to be brought under the auspices of section 38, that is, the right to approach a competent court should a constitutional right be breached or threatened.

This broad interpretation of section 38 gives sufficient effect to the section to allow for the comprehensive protection of fundamental rights. The Court listed two reasons for allowing direct constitutional damages. Firstly, the constitutional breach was a direct breach of a specific fundamental right and, secondly, the breach was endemic and required a clear assertion of the importance of the constitutional right.[451] Therefore, although a common-law remedy in the form of delict was available, the court allowed the defendant compensation whilst relying on a direct constitutional cause of action.

O'Regan J, in assessing the relationship between common-law remedies in areas of the law covered by the Bill of Rights and direct constitutional remedies, argued that there was no doubt that the *Constitution* required infringements of the *Constitution* to be remedied.[452] The question is whether the *Constitution*, properly interpreted, permits a claim under common law as well as a simultaneous constitutional claim directly under the provisions of section 24 of the *Interim Constitution*, which entrenched the right to administrative justice. She continued by arguing as follows:

---

450 Para 27.
451 Bishop "Remedies" 9-82.
452 O'Regan "On the reach of the Constitution" 71-72.

> Bear in mind that if that were to be so, it might have been quite possible to have a successful claim under say, the Constitution, but not under the common law, or vice versa. The two systems could have co-existed side by side, perhaps based on entirely different rules. Two causes of action could have arisen, for example, where a person complained of an infringement of dignity, or personal liberty, or security of the person. The first would have been under the actio legis aquiliae or actio injuriarum (depending on the nature of the claim) and the other a constitutional remedy. Duplication could have arisen in labour law, administrative law, environmental law, the right to freedom and security of the person and even criminal procedure. Again, with the distinction between the jurisdiction of the Constitutional Court, on the one hand, and the Supreme Court of Appeal, on the other, these claims could have been resolved in different courts, with potentially very different outcomes and scant jurisprudential cross-pollination.

She reasoned that the question of whether the *Constitution* always gave rise to a freestanding cause of action, even where an appropriate common-law or statutory remedy already existed, had been answered in the negative by the Constitutional Court. Textual support for this conclusion is to be found in sections 39(2)[453] and 173(2).[454]

The courts use a wide interpretation of the right of access to court to develop a number of constitutional principles and doctrines, which are not expressly mentioned in the *Constitution*, but have been increasingly used by the courts.[455] Some, like the principle of legality, provides an independent cause of action,[456] while the court has also employed the doctrine of the separation of powers[457] and the principle of *ubuntu*[458] to support its decisions.

In summary, the following points can be highlighted:

(a) The courts subscribe to the principle of subsidiarity, meaning that when there is an adequate private-law remedy, whether of statute or common law, that vindicates a constitutional right it should be used.

---

453 Section 39(2) requires the courts to develop the common law and interpret statutes in a manner that is consistent with the spirit, purport and object of the Bill of Rights.

454 Section 173(2) states that the Constitutional Court has the inherent power to develop the common law.

455 Hoexter *The judiciary in South Africa* 380.

456 *Fedsure* paras 56-59; *Pharmaceutical Manufacturers Association* paras 83-85.

457 *Glenister v President of the Republic of South Africa* 2009 (1) SA 287 (CC).

458 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 37.

(b) A constitutional right can be directly relied on if the remedy provided by the existing common or statutory law is insufficient to fully vindicate the right.

(c) The court will grant damages arising from a breach of a constitutionally entrenched right if no common-law or statutory remedy exists for the enforcement of the right. Furthermore, when there is an endemic breach of constitutional rights, a public-law remedy based on constitutional rights would be acceptable to the courts.

(d) When legislation has been enacted to give effect to a constitutional right, such legislation would be the sole means of enforcing the right, effectively causing a permanent constitutional lockout. In such an instance, the constitutional right can only be used to attack the constitutionality of the legislation in question.

(e) The courts will not grant punitive damages when a constitutional right has been breached. The traditional approach to damages, which requires a plaintiff to claim only the damages that can be proved, is followed.

(f) The relief that a court grants for breach of a constitutional right is not centred on the individual whose right has been breached. The relief granted will be relief that is required to protect and enforce the *Constitution* and must be to the benefit of the plaintiff and society as a whole.

(g) Although the constitutional values enunciated by section 1 of the *Constitution* are of fundamental importance, they do not give rise to discrete and enforceable rights by themselves.

2.6 Constitutional remedies

2.6.1 Introduction

A judicial remedy is the method by which the courts enforce a right, impose a penalty or make an order to impose its will. In the context of constitutional litigation, the remedy is the means by which a court enforces the *Constitution* and corrects the

violation of a constitutional right or holds the legislature and executive accountable to the *Constitution.* Therefore, a remedy is a mechanism used to repair an infringement of rights once a court has interpreted the right and found the conduct of a government department or a private individual to be lacking.[459]

In *Fose*,[460] the Court asked the question what, if constitutional rights have complementary remedies, these remedies should be.[461] The Court answered that the nature of a remedy is determined by its object. According to the Court, the harm caused by violating the *Constitution* "is harm to the society as a whole, even where the direct implications of the violation are highly parochial". Therefore, the rights violator not only harms a particular person, but also impedes the realisation of the constitutional promise. The object of constitutional remedies should be addressing these kinds of harm, vindicating the *Constitution*, and deterring its further infringement.[462]

Vindication is used by the Court here to mean defending against encroachment on or interference with the *Constitution.* It suggests that certain harms, if not addressed, diminish faith in the *Constitution.* It recognises that a constitution has as little or as much weight as the prevailing political culture affords it. The defence of the *Constitution*, its vindication, is a burden imposed primarily on the judiciary. When exercising discretion to choose between appropriate forms of relief, the courts must carefully analyse the nature of the constitutional infringement, and strike effectively at its source.

The remedies offered by the *Constitution* are dependent on the manner in which the Bill of Rights applies to the dispute. The application of the remedies can be described as follows:[463]

(a) Direct and vertical application of the Bill of Rights: Sections 38 and 172(1) of the *Constitution* apply. The sections provide for the following remedies:

---

459 De Vos and Freedman *South African Constitutional Law* 390.
460 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 94.
461 Para 95.
462 Para 96.
463 De Vos and Freedman *South African Constitutional Law* 391-392.

Declaration of invalidity, declaration of rights, interdicts, constitutional damages and meaningful engagement.

(b) Direct and horizontal application of the Bill of Rights: Section 8(2) and (3) of the *Constitution* applies. The section provide for the following remedies: Remedies derived from legislation giving effect to the Bill of Rights, developing the common law to give effect to the Bill of Rights.

(c) Indirect application of the Bill of Rights: Section 39(2) of the *Constitution* applies. The section provide for the following remedies: Common-law remedies and customary-law remedies.

Section 38 of the *Constitution* provides that anyone listed in the section may approach the courts alleging that a right in the Bill of Rights has been infringed or threatened. In terms of section 38, a court *may* grant appropriate relief, including a declaration of rights. Section 38 therefore provides for a flexible approach to remedies.[464] When courts grant relief, they attempt to synchronise the real world with the ideal construct of a constitutional world. This relates to the principle that rights and remedies are complementary.

By contrast, section 39(2) of the *Constitution* provides that when interpreting the Bill of Rights, courts *must* promote the values that underlie an open and democratic society based on human dignity, equality and freedom.

The powers of courts in constitutional matters are set out in section 172 of the *Constitution.* Section 172(1) reads as follows:

> When deciding a constitutional matter, a court –
>
> (a) *must* declare that any law or conduct that is inconsistent with the *Constitution* is invalid to the extent of its inconsistency; and
>
> (b) *may* make any order that is just and equitable, including –
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and

[464] *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) para 38.

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

Section 172 therefore grants the court the power to make any order that is just and equitable, giving force to the judicial obligation recognised by Ackermann to "forge new tools" and shape "innovative remedies".[465]

In terms of section 172(1)(b) of the *Constitution*, courts have the power to order any just and equitable remedy "that would place substance above mere form by identifying the actual underlying dispute between the parties".[466] Therefore, the discretion provided for in section 172(1)(b) to make a just and equitable order is in force even when the outcome of a constitutional dispute is not contingent upon the constitutional invalidity of legislation or conduct.[467]

South African courts have a wide range of powers at their disposal to ensure that the *Constitution* is upheld.[468] These include mandatory and structural interdicts. How they exercise those powers should depend on the circumstances of each particular case. In this regard the appropriate constitutional remedy would arise from constitutional interpretation. Due regard should be paid to the roles of the legislature and the executive in a democracy. However, when it is appropriate to do so, courts may, and if need be must, use their wide powers to make orders that affect policy as well as legislation.

2.6.2 The range of constitutional remedies available

2.6.2.1 Declaration of rights

A declaration of rights allows a party to approach the court to declare what the law is on a specific issue and, consequently, what the rights are of parties affected by the

---

465 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC)
466 *Head of Department of Education: Free State Province v Welkom High School* 2014 (12) SA (CC) para 107.
467 Para 108.
468 *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) para 113.

issue.[469] A declaration of rights is not a declaration of invalidity; the aim of the declaration of rights is to resolve a dispute between parties and it may be given even where no law or conduct has been found to be inconsistent with the *Constitution.*[470]

The High Court may make a declaratory order in terms of section 21(1)(c) of the *Superior Courts Act* (previously section 19(1)(a)(iii) of the *Supreme Court Act*).[471] The section provides that a division has the power, in its discretion, and at the instance of any interested person, enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim relief consequential upon the determination. In *Ex parte Nell*,[472] the Court held that for the granting of a declaration of rights in terms of the provisions of section 19(1)(c) of the *Supreme Court Act* an existing dispute is not a prerequisite to jurisdiction under this section. However, there must be interested parties on whom the declaratory order would be binding.

More recently, the Court confirmed the *Nell* decision in *Myburgh Park Langebaan (Pty) Ltd v Langebaan Municipality*,[473] holding that in deciding whether a declarator should be granted, the Court must consider whether the applicant has an interest in existing, future or contingent rights or obligations as intended in section 19(1)(a)(iii) of the *Supreme Court Act*. If so satisfied, the Court must decide whether the case is a proper one for the exercise of its discretion. The Court confirmed that an existing dispute is not a prerequisite for jurisdiction, but there must be interested parties on whom the declaratory order would be binding.

In *Rail Commuters Action Group v Transnet Ltd t/a Metrorail*,[474] the question was raised of who bears responsibility for ensuring the safety of passengers travelling on commuter trains. The applicants therefore sought declaratory relief. The Court relied on section 172(1)(a) of the *Constitution*, which provides that the Court must declare "any law or conduct that is inconsistent with the *Constitution*" invalid to the extent of its

---

469 Peté et al *Civil Procedure* 426.
470 De Vos and Freedman *South African Constitutional Law* 406.
471 10 of 2013 and 59 of 1959, respectively.
472 1963 (1) SA 754 (A) paras 759A-B.
473 2001 (4) SA 1144 (C) paras 1153B-1154B.
474 2005 (2) SA 359 (CC).

inconsistency.[475] Section 172(1)(a) is a special constitutional provision, different from the common-law rules governing the grant of declaratory orders. This does not prevent a court from making declaratory orders when constitutional inconsistency is not found.

Litigants may rely on section 38 of the *Constitution*,[476] in terms of which a court may grant a declaration of rights if it would constitute appropriate relief. The Court further held that, in contrast to section 172(1)(a), section 38 does not oblige the courts to grant a declaration of rights, but they may do so if they deem it appropriate relief.

In *Islamic Unity Convention v Independent Broadcasting Authority*,[477] the Court examined the difference between the jurisdiction of the High Court to grant declaratory relief and section 172 of the *Constitution.* The Court held that –

> [a] court's power under section 172 of the Constitution is a unique remedy created by the Constitution. The section is the constitutional source of the power to declare law or conduct that is inconsistent with the Constitution invalid. It provides that when a court decides a constitutional matter, it *must* declare invalid any law or conduct inconsistent with the Constitution. It does not however expressly regulate the circumstances in which a court should decide a constitutional matter.

The Court stated that in determining when a court should decide a constitutional matter, the jurisprudence developed under section 19(1)(a)(iii)[478] would have relevance; however, the constitutional setting may introduce considerations different from those which are relevant to the exercise of a judge's discretion in terms of section 19(1)(a)(iii). The Court highlighted some of these differences:

(a) A court should not ordinarily decide a constitutional issue unless it is necessary to do so.

(b) A court should not ordinarily decide a constitutional issue that is moot.

---

475 Para 106.

476 Section 38 provides that anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.

477 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) paras 8-12.

478 *Supreme Court Act* 59 of 1959 (repealed).

(c) The decision as to whether a court should decide a constitutional matter remains one governed by the *Constitution* and its imperatives, not one determined solely by a consideration of the circumstances in which declaratory relief in terms of section 19 of the *Supreme Court Act*[479] would be granted.

The difference between the jurisdiction of the High Court to grant declaratory relief and section 172 of the *Constitution* may lead to legal uncertainty.

In the *Islamic Unity Convention* case, the Court took the applicant's request for a declaration that the provision[480] was inconsistent with the *Constitution* to be a prayer for a declaratory order in terms of section 19(1)(a)(iii) of the *Supreme Court Act*. The High Court refused to deal with the constitutionality of the matter in terms of section 19(1)(a)(iii), holding that, on the assumption that section 19(1)(a)(iii) gave the Court the power to decide the constitutional issue, this was not an appropriate case to decide so important a matter. The applicant appealed directly to the Constitutional Court against the High Court's decision not to deal with the constitutionality of the impugned provision.

The Constitutional Court held that the relief was sought in terms of the *Constitution* itself and not under the *Supreme Court Act* and, accordingly, that the High Court should have dealt with the constitutionality of the provision which formed the basis of the dispute between the applicant and the Board.[481]

It is submitted that there are two different approaches to obtaining declaratory relief in the High Court. The first would be in terms of s 21(1)(c) of the *Superior Courts Act*[482] and the second in terms of section 172 of the *Constitution.* Section s 21(1)(c) does not seem suited for constitutional issues, given the fact that the court must decide whether the case is a proper one for exercising its discretion. Section 172 does not allow for

---

479 59 of 1959 (subsequently repealed by Act 10 of 2013).

480 Code of Conduct for Broadcasting Services, Schedule 1 to the *Independent Broadcasting Authority Act* 153 of 1993.

481 *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC); 2002 (5) BCLR 433 (CC) para 14.

482 10 of 2013.

such discretion and states that, when the constitutionality of an Act is in question, the courts must declare invalid law or conduct inconsistent with the *Constitution.* Until more clarity is obtained from the courts about the difference in jurisdiction implied by section s 21(1)(c) of the *Superior Courts Act* and section 172 of the *Constitution* when approaching the courts seeking a declaratory order, a litigant should rely directly on the *Constitution* and avoid using section s 21(1)(c).

2.6.2.2 Interdictory relief

2.6.2.2.1 Requirements for granting an interdict

An interdict is a court order which either orders a person to refrain from doing something or orders a person to perform a certain act.[483] The requirements for an interdict as a constitutional remedy are the same as the requirements for an interdict under the common law.[484] For an interim interdict the requirements are as follows:[485]

(a) There should be a *prima facie* right.

(b) There should be an apprehension of irreparable harm if relief is not granted.

(c) The balance of convenience should favour the granting of the interdict.

(d) No other satisfactory remedy is available for the applicant.

The requirements for the granting of a final interdict are the following:[486]

(a) A clear right.

(b) Actual harm or a reasonable apprehension of harm.

(c) No alternative remedy available.

---

483 Peté et al *Civil Procedure* 404.
484 Du Plessis, Penfold and Brickhill *Constitutional Litigation* 121.
485 Du Plessis, Penfold and Brickhill *Constitutional Litigation* 121-122.
486 Du Plessis, Penfold and Brickhill *Constitutional Litigation* 123.

In *Veeron Rambali v Ethekwini Municipality*,[487] the state was interdicted from harassing, intimidating or otherwise interfering with informal street traders at the market and the court prohibited officials from impounding goods without an order of court.

In *Motswagae v Rustenburg Local Municipality*,[488] the case started as an application for an interdict in the High Court aimed effectively at prohibiting the respondents from unlawfully disturbing or interfering with the applicants' peaceful possession of their homes.[489]

The High Court held that the applicants had no clear right to interdict the construction activities because their right to privacy and to remain in the structures had not been affected.[490] Furthermore, the Court held that the applicants would not suffer irreparable harm because their rights to privacy and to remain in their homes would be preserved and that they should have objected to the decision to redevelop the land occupied by them when that decision had been taken by the municipality. The High Court therefore refused to interdict the municipality.

The Constitutional Court held that the work authorised by the respondent did interfere with the applicants' peaceful and undisturbed occupation of their homes.[491] The intrusion was plainly so significant a disturbance to the applicants' occupation that it constituted a form of eviction.

The Court held that the respondent should be interdicted from interfering with the applicants' occupation of their homes[492] and stated that the requirements for granting the interdict were the same as those required in terms of the common law. The applicants had a clear right not to be disturbed in the peaceful occupation of their

---

487 Case no. 11162/09 (KZD) (unreported).
488 2013 (3) BCLR 271 (CC).
489 Paras 1-3.
490 *Motswagae v Rustenburg Local Municipality* (1413/2009) [2011] ZANWHC 61 (15 September 2011) paras 1-5.
491 *Motswagae v Rustenburg Local Municipality* 2013 (3) BCLR 271 (CC) para 13.
492 Para 18.

homes, they were suffering irreparable harm, and no alternative remedy was available to them.

2.6.2.2.2 Structural interdicts or supervisory interdicts

In certain circumstances, the courts may grant structural interdicts either to force an organ of state to comply with its orders or to assist the organs of state to comply with the order. A structural interdict is a remedy in terms of which the court orders an organ of state to perform its constitutional obligations and to report to the court on its progress in doing so.[493]. Structural interdicts have a tendency to blur the distinction between the executive and the judiciary and have an effect on the separation of powers.[494] They tend to deal with policy matters and not with the enforcement of particular rights. The court therefore plays a supervisory role in ensuring state compliance with its order.[495]

The issue of structural interdicts was first raised in *City Council of Pretoria v Walker*,[496] in which the court held that the applicant could be given a chance to fashion appropriate remedies to ensure that any strategy pursued by the applicant would comply with the court order, with the court supervising the implementation of the remedies.

In *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* the Court stated:[497]

> In several cases this court has found it fair to fashion orders to facilitate a substantive resolution of the underlying dispute between the parties. Sometimes orders of this class have taken the form of structural interdicts or supervisory orders. This approach is valuable and advances constitutional justice, particularly by ensuring that the parties themselves become part of the solution.

---

493 De Beer and Vettori 2007 *PELJ* 10.
494 *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa and v Modderklip Boerdery (Pty) Ltd* 3 All SA 169 (SCA) 2004 para 39.
495 *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) para 107.
496 1998 (3) BCLR 257 (17 February 1998) para 139.
497 2010 (2) SA 415 (CC) para 97.

The courts therefore view structural interdicts as a tool to advance constitutional rights and hold organs of state accountable to court orders and the *Constitution.*

In *Minister of Home Affairs v Somali Association of South Africa*,[498] the Court found that government had done little to aid the respondents and that previous orders of the courts appeared to have done little to cause the relevant authorities to comply with their obligations. The Court further held that it might be necessary to issue a structural interdict when there is a failure to heed declaratory orders or other relief granted by a court. Therefore, given the intransigence on the part of the relevant authorities, it was important to provide a remedy to the respondents that was effective and meaningful. The Court therefore held that this was an appropriate case for a court to exercise its supervisory jurisdiction to secure compliance with its order.[499]

This was the case for three reasons. Firstly, it was necessary that the respondents should know what progress was being made by the relevant authorities. Secondly, the relevant authorities could always approach the court to extend the period, should it turn out to be too short. Thirdly, the procedure allowed the court to be informed about the progress made in the implementation of its order.

It is clear that the courts will only issue structural interdicts in exceptional circumstances, because it blurs the distinction between the judiciary and other organs of state and raises the issue of the separation of powers. However, if an organ of state wilfully ignored previous orders by a court, the courts would not hesitate to issue structural interdicts to force the organ of state to comply with its orders. A remedy in the form of a structural interdict can therefore be used to ensure that organs of state comply with their constitutional obligations and duties. This includes the positive constitutional duties in place to regulate the conduct of the state litigant.[500] However, such relief is given after the constitutional violation by the organ of state has already occurred. The *Constitution* is forward-looking in nature.[501] What is needed is a set of

---

498 2015 (3) SA 545 (SCA) para 37.
499 Para 39.
500 Sections 1.3 and 1.4 above.
501 *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC) para 42.

rules or guidelines in civil procedural law that clearly state what the constitutional obligations of the state litigant are. This could prevent constitutional violations by the litigating organ of state before it occurs.[502]

2.6.2.3 Damages

In *Fose v Minister of Safety and Security*,[503] the appellant claimed constitutional damages for a breach of his right, guaranteed by section 11(2) of the *Interim Constitution*, not to be tortured and not to be subject to cruel, inhuman or degrading treatment.[504] The Court had to decide whether a remedy of punitive damages is appropriate relief for the infringement of constitutional rights.[505] The test applied by the Court was whether granting punitive damages to the appellant would serve to vindicate the *Constitution* and deter its further violation. The Court regarded as crucial to the case an averment by the appellant, who contended that the infringement of his fundamental rights form part of widespread and persistent similar infringements of the fundamental rights of other South African citizens by members of the South African Police Services.

The Court held that isolated acts of torture, which do not point to a pattern of more widespread harms, might require only the application of standard delictual remedies in order to meet the demands of the constitutional rights. Therefore, when there are systematic, pervasive and enduring infringements of constitutional rights, delictual relief is not an adequate means of vindicating the *Constitution* and deterring further violations of it.[506]

However, the Court held that the relief in the form of damages would come from the public coffers. The implicated police officers could not possibly be deterred by a payment of damages bearing no relation to their own finances.[507] Furthermore, the *Constitution* is not vindicated by enriching a particular claimant at the cost of the

---

502 Such guidelines, known as the model litigant obligation, are discussed in chapter 6 of this work.
503 1997 (3) SA 786 (CC).
504 Para 1.
505 Para 101.
506 Para 102.
507 Para 103.

taxpayer, particularly when the problem is far larger than the claimant concerned. Granting punitive damages therefore does not adequately defend the *Constitution.* However, the Court did not hold that punitive damages would never be appropriate relief for constitutional violations. The facts of a particular case would determine whether an order of damages would be appropriate.

In *Van Eeden v Minister of Safety and Security*,[508] the Court held that the right of freedom and security of the person entrenched in section 12(1)(c)[509] of the *Constitution* included the right to be free from all forms of violence from either private or public sources.[510] Freedom from violence was fundamental to the equal enjoyment of human rights and fundamental freedoms, and section 12(1)(c) required the state to protect individuals, both by refraining from such invasions itself and by taking active steps to prevent violation of the right. It therefore placed a positive duty on the state to protect everyone from violent crime.

The Court further held that section 12(1)(c) had to be read with section 7(2) of the *Constitution*,[511] which imposes a duty on the state to respect, protect, promote and fulfil the rights in the Bill of Rights.[512] Therefore, there was a positive obligation on the state to act in protecting the rights contained in the Bill of Rights.

Section 39(1)(b)[513] of the *Constitution* furthermore imposed the duty on the state to recognise its obligation under international law to protect women against violent crime and against the gender discrimination inherent in violence against women. The Court recognised that the entrenchment of the right to be free from violence in section 12(1)(c), read with section 205(3),[514] of the *Constitution* would, in appropriate

---

508 2003 (1) SA 389 (SCA).

509 "Everyone has the right to freedom and security of the person, which includes the right … to be free from all forms of violence from either public or private sources."

510 Para 13.

511 "The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

512 Paras 14-15.

513 "When interpreting the Bill of Rights, a court, tribunal or forum … must consider international law".

514 "The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."

circumstances, be strongly indicative of a legal duty resting on the police to act positively to prevent violent crime.[515]

The police therefore acted wrongfully, and in view of the admission of negligence, vicarious liability and causation the state had to be held liable for any damages suffered by the appellant.[516] The Court awarded punitive damages to the appellant for the failure of the state to protect her constitutionally enshrined rights.

In *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*,[517] the Court held that, in the particular circumstances of the case, the only appropriate relief available was that of constitutional damages, or damages due to the breach of a constitutionally entrenched right. No other remedy was apparent.

The Court issued a declaratory order. The order had the effect that the applicant would not receive more than what it had lost, while the respondent had already received value for what it had to pay. The order also solved the immediate social problem, while the medium- and long-term problems could be solved as and when the state could afford it.

In summary, the courts will decide on a case-by-case basis whether to award constitutional damages. Constitutional damages may be awarded where such an award would vindicate the *Constitution* and deter its further violation. Where there is evidence of systematic, pervasive and enduring constitutional violations, a delictual remedy is not an adequate remedy to vindicate the *Constitution.* Where no apparent remedy is available for the appellant, constitutional damages may be granted by the court. However, constitutional damages would not prevent future constitutional violations by organs of state. Payment for the damages ultimately comes from the taxpayer and the organ of state would not be deterred from future constitutional violations. Constitutional damages are therefore not an effective remedy to cure and prevent constitutional violations by organs of state.

---

515 Para 18.
516 Para 24.
517 (2004) 3 All SA 169 (SCA) (27 May 2004) para 43.

2.6.2.4 Declarations of invalidity

2.6.2.4.1 Declaring legislation and executive conduct constitutionally invalid

The courts must, when deciding a constitutional matter, declare any law or conduct that is inconsistent with the *Constitution* invalid to the extent of its inconsistency.[518] The courts may make any order that is just and equitable, including limiting the retrospective effect of the declaration of invalidity[519] or suspending the invalidity for any period and on any conditions, in order to allow the competent authority to correct the defect.[520] Another principle in play is that, where possible, legislation ought to be construed in a manner that is consistent with the *Constitution*.[521] Furthermore, the courts subscribe to a rule that requires courts, where possible, to decide cases without reaching constitutional issues.[522]

In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*,[523] the Court had to determine whether the provisions of section 25(5) of the subsequently repealed *Aliens Control Act*[524] (hereafter "the Act") were constitutional. Section 25(5) read as follows:

> Notwithstanding the provisions of subsection (4), but subject to the provisions of subsections (3) and (6), a regional committee may, upon application by the spouse or the dependent child of a person permanently and lawfully resident in the Republic, authorize the issue of an immigration permit.

The High Court declared section 25(5) of the Act invalid to the extent that the benefit conferred exclusively on spouses is inconsistent with section 9(3) of the *Constitution.*[525]

---

518 Section 172(1)(a) of the *Constitution.*
519 Section 172(1)(b)(i) of the *Constitution.*
520 Section 172(1)(b)(ii) of the *Constitution.*
521 *Zondi v MEC, Traditional and Local Government Affairs* 2005 (4) BCLR 347 (CC) para 102
522 *S v Mhlungu* 1995 (3) SA 867 (CC) para 59; *Zantsi v Council of State, Ciskei* 1995 (4) SA 615 (CC) paras 2-5.
523 2000 1 BCLR 39 (CC).
524 96 of 1991.
525 The equality section.

The Court held that it discriminated against same-sex life partners on the grounds of sexual orientation.[526]

The applicants appealed to the Constitutional Court in terms of the provisions of section 172(2)(d) of the *Constitution*,[527] seeking a variation of the order granted by the High Court.

The Court firstly referred to the reading down principle, stating that:[528]

> There is, it is true, a principle of constitutional interpretation that where it is reasonably possible to construe a statute in such a way that it does not give rise to constitutional inconsistency, such a construction should be preferred to another construction which, although also reasonable, would give rise to such inconsistency.

However, such a construction would not be a reasonable one when it can be reached only by distorting the meaning of the expression being considered. The Court stated that there was a clear distinction between the process of reading words into or severing them from a statutory provision that was a remedial measure under section 172(1)(b) and a declaration of constitutional invalidity under section 172(1)(a).[529]

The Court emphasised the fundamentally different nature of the two processes as follows:

> The first process, being an interpretative one, is limited to what the text is reasonably capable of meaning. The latter can only take place after the statutory provision in question, notwithstanding the application of all legitimate interpretative aids, is found to be constitutionally invalid.

Because the word *spouse* had not been defined in the Act, effect would have to be given to its ordinary meaning, which connotes "married person; a wife, a husband". The context of the Act precluded a wider meaning being given to the word.

Whether or not legislation is deemed unconstitutional will depend on whether there is a rational connection between the legislation and the achievement of a legitimate

---

526 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 1999 (3) BCLR 280 (C).

527 Any person or organ of state may appeal directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court.

528 Para 23.

529 Para 24.

government purpose.[530] The Court held that the rational connection test is the standard for reviewing legislation, holding that –

> [t]he first of the constitutional constraints placed upon Parliament is that there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose. Parliament cannot act capriciously or arbitrarily. The absence of such a rational connection will result in the measure being unconstitutional.

In *Zondi v MEC for Traditional and Local Government Affairs*,[531] the Court had to decide on the constitutionality of certain sections of the *Pound Ordinance (KwaZulu-Natal)* (the Ordinance).[532] The question before the Court was whether the impugned provisions unjustifiably limited the right of access to courts;[533] the right to equality;[534] the right to administrative action[535] and the other rights asserted by the applicant.[536] The most important of the impugned sections made provision for the immediate seizure and impoundment of trespassing animals by a landowner without notice to the livestock owner, unless the livestock owner happens to be an owner of land immediately adjacent and the livestock bears the registered brand of that owner.[537]

The Court held that section 34 is an express constitutional recognition of the importance of the fair resolution of social conflict by impartial and independent institutions.[538] The section therefore requires not only that individuals not be permitted to resort to self-help, but also that potentially divisive social conflicts be resolved by courts.[539] The Court found that the scheme set in place by the Ordinance denied the livestock owner the protection of the judicial process and supervision exercised by the

---

530 *New National Party of South Africa v Government of the Republic of South Africa* (3) SA 191 (CC) para 19.
531 2005 (3) SA 589 (CC).
532 32 of 1947.
533 Section 34 of the *Constitution.*
534 Section 9 of the *Constitution.*
535 Section 33 of the *Constitution.*
536 Including section 25(1): the right against arbitrary deprivation of property; section 27(1)(b): the right to have access to sufficient food; section 28(1)(c): every child's right to basic nutrition; section 10: the right to dignity; sections 30 and 31: the right to enjoy one's culture; and section 7(2): the obligation of the state to respect, protect, promote and fulfil the rights in the Bill of Rights.
537 *Zondi* para 2.
538 Para 61.
539 Para 63.

courts.[540] Throughout the whole process, there was no prospect of judicial intervention. Therefore, the Court held that the scheme manifestly limited the right of access to courts,[541] and it was therefore inconsistent with the right of access to courts.[542] The Court found that five sections of the Ordinance were constitutionally invalid,[543] but suspended the declaration of invalidity for a period of twelve months to enable the provincial legislature to correct the inconsistency that has resulted in the declaration of invalidity.[544]

In *Affordable Medicines Trust v Minister of Health*,[545] the Court had to decide on the constitutional validity of certain aspects of a licensing scheme introduced by the government to regulate members of the health profession.[546]

The Court held that the *Constitution* must be construed in the light of our constitutional scheme and our jurisprudence.[547] The Court explained that under our jurisprudence, the exercise of legislative and executive power is subject to two constraints, namely that it must meet the minimum threshold requirement of rationality and that it must not infringe any of the rights contained in the Bill of Rights. If the exercise of power limits any such rights, it must pass the section 36(1)[548] test.

Whether or not legislation is deemed unconstitutional will depend on whether there is a rational connection between the legislation and the achievement of a legitimate government purpose.[549] A constitutional state presupposes a system the operation of

---

540 Para 74.
541 Para 77.
542 Para 86.
543 Para 135(1)(e).
544 Para 135(2).
545 2006 (3) SA 247 (CC).
546 Para 1.
547 Para 91.
548 The limitation section.
549 *New National Party of South Africa v Government of the Republic of South Africa* (3) SA 191 (CC) para 19.

which can be rationally tested.[550] In the *New National Party of South Africa* case, the Court held that the rational connection test is the standard for reviewing legislation:[551]

> The first of the constitutional constraints placed upon Parliament is that there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose. Parliament cannot act capriciously or arbitrarily. The absence of such a rational connection will result in the measure being unconstitutional.

Should legislation fail the rational connection test, the legislation would be declared constitutionally invalid. The same principle holds true in the exercise of public power by members of the executive. The *Constitution* places "significant constraints upon the exercise of public power through the Bill of Rights and the founding principle enshrining the rule of law".[552] The exercise of such power must be rationally related to the purpose for which the power was given. If it does not, it falls short of the standards demanded by the *Constitution* for such action.

In summary, when there is a constitutional challenge to legislation, the test for its constitutional validity is twofold.[553] First, there is the threshold enquiry aimed at determining whether the enactment in question constitutes a limitation on some guaranteed right or another. This entails examining (a) the content and scope of the protected right(s) concerned and (b) the meaning and effect of the impugned enactment.

Should the impugned legislation limit a guaranteed right, the second question is whether the limitation is reasonable and justifiable, regard being had to the considerations stipulated in section 36.[554] If the impugned legislation does not satisfy the justification standard and a remedial option, through reading in notional or actual severance, is not competent, it must be declared unconstitutional and invalid.[555]

---

550 *S v Makwanyane* 1995 (3) SA 391 (CC) para 156.
551 *New National Party of South Africa v Government of the Republic of South Africa* (3) SA 191 (CC) para 20.
552 *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) paras 83 and 85.
553 *Ex Parte Minister of Safety and Security: In Re S v Walters* 2002 (4) SA 613 (CC) para 26.
554 The limitation section.
555 *Thebus v S* 2003 (6) SA 505 (CC) para 30.

2.6.2.4.2 Declaring a rule of the common law constitutionally invalid

In *Carmichele v Minister of Safety and Security*,[556] the Court was primarily concerned with the development of the common-law delictual duty to act. The Court relied on section 39(2) of the *Constitution*, which provides that when developing the common law, every court must promote the spirit, purport and objects of the Bill of Rights.[557] Therefore, when the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation.

The section 39(2) objectives are not discretionary; they are implicit in section 39(2), read with section 173[558], of the *Constitution.* Where the common law is deficient in promoting the section 39(2) objectives, the courts are under an obligation to develop it appropriately.[559]

Should the courts be asked to find whether the existing common law requires development in accordance with section 39(2), a twofold enquiry ensues.[560] Firstly, it requires a reconsideration of the common law in the light of section 39(2). If this inquiry leads to a positive answer, the second stage concerns itself with how such development is to take place in order to meet the section 39(2) objectives.

The Court stated that the *Constitution* requires a court, when developing the common law, to promote the spirit, purport and objects of the *Constitution.*[561] The obligation imposed on courts by section 39(2)[562] of the *Constitution* is thus extensive, "requiring courts to be alert to the normative framework of the *Constitution* not only when some startling new development of the common law is in issue, but in all cases where the

---

556 2001 (4) SA 938 (CC).
557 Para 33.
558 "The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."
559 Para 39.
560 Para 40.
561 Para 15.
562 "When interpreting any legislation, and when developing the common law or customary law, every court tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

incremental development of the rule is in issue".[563] The normative influence of the *Constitution* must be felt throughout the common law.

In *Thebus v S*,[564] the Court had to find whether the Supreme Court of Appeal failed to develop the common-law doctrine of common purpose in conformity with the *Constitution*, as required by section 39(2) and thereby failed to give effect to the applicants' rights to dignity, freedom of the person and a fair trial.[565]

The applicants contended that the pre-constitutional requirements of common purpose unjustifiably limited the appellants' rights to dignity, freedom and security of the person and a fair trial, including the right to be presumed innocent.[566] It was in this context that courts had to apply and develop the common law in order to give effect to a protected right.[567] The Court found that when developing the common law, a court is obliged to "promote the spirit, purport and objects of the Bill of Rights".[568]

The Court held that since the advent of constitutional democracy, all law must conform to the command of the supreme law, the *Constitution*, from which all law derives its legitimacy, force and validity.[569] The Court confirmed the two-stage enquiry developed in *Carmichele v Minister of Safety and Security*.[570] Furthermore, the Court confirmed that the *Constitution* embodied an "objective normative value system" and that the influence of the fundamental constitutional values on the common law is authorised by section 39(2).[571] Therefore, it is within the matrix of this objective normative value system that the common law must be developed.

The Court stated that the need to develop the common law as required by section 39(2) could arise in at least two instances.[572] Firstly, when a rule of the common law is

---

563 Para 17.
564 2003 (6) SA 505 (CC) para 17.
565 Sections 10, 12 and 35(3) of the *Constitution.*
566 Para 23.
567 Para 25.
568 Section 39(2) of the *Constitution.*
569 Para 24.
570 2001 (4) SA 938 (CC).
571 *Thebus* para 27.
572 Para 28.

inconsistent with a constitutional provision, and, secondly when a rule of the common law is consistent with a specific constitutional provision but falls short of its spirit, purport and objects. In the first instance, the Court would have to adapt the common law to resolve the inconsistency. In the second instance, the common law must be adapted so that it grows in harmony with the "objective normative value system" found in the *Constitution*, and the Court held that the influence of the fundamental constitutional values on the common law is authorised by section 39(2).[573]

Therefore, a different approach to the challenge of constitutional validity of legislation and executive conduct is required when a court deals with a constitutional challenge to a rule of the common law:[574]

> Superior courts are protectors and expounders of the common law. The superior courts have always had an inherent power to refashion and develop the common law in order to reflect the changing social, moral and economic make-up of society. That power is now constitutionally authorised and must be exercised within the prescripts and ethos of the Constitution.

Should the common law be found to be inconsistent with constitutional provisions, the court is again required to do a threshold analysis. The question is whether the common-law rule limits an entrenched right. If the limitation is not reasonable and justifiable, the court itself is obliged to adapt, or develop, the common law in order to harmonise it with the constitutional norm.[575]

In this case, the appellants argued that the doctrine of common purpose undermined the fundamental dignity of each person convicted of the same crime with others because it de-individualised him or her. Therefore, it effectively de-humanised people by treating them "in a general manner as nameless, faceless parts of a group".[576]

The Court held that the doctrine of common purpose sets a standard of criminal culpability.[577] It defined the minimum elements necessary for a conviction in a joint criminal enterprise. The standard set by the rule must be constitutionally permissible.

---

573 *Thebus* para 27.
574 Para 31.
575 Para 32.
576 Para 35.
577 Para 36.

Therefore, it may not unjustifiably invade the fundamental rights or principles of the *Constitution.* The norm may only "impose a form of culpability sufficient to justify the deprivation of freedom without giving rise to a constitutional complaint". Should the culpability norm pass constitutional muster, an appropriate deprivation of freedom is permissible.

The Court argued that the doctrine of common purpose did not amount to an arbitrary deprivation of freedom,[578] and held that the doctrine is rationally connected to the legitimate objective of limiting and controlling joint criminal enterprise. It serves vital purposes in the criminal-justice system and the need for a strong deterrent to violent crime is well acknowledged. Therefore, the Court found that a person who knowingly, and bearing the requisite intention, participates in the achievement of a criminal outcome cannot after conviction in a fair trial validly claim that his or her rights to dignity and freedom have been invaded.[579] The Court, therefore, found the common-law principle of common purpose was sufficiently aligned with the spirit, purport and objects of the Bill of Rights and that there was no inconsistency.

In *K v Minister of Safety and Security*,[580] the Court held that the common-law rule of vicarious liability should be developed to render it consistent with the spirit, purport and objects of the Bill of Rights, and to vindicate the applicant's constitutional rights and provide a remedy to correspond to the respondent's constitutional duties.[581]

The Court stated that the *Constitution* requires a court, when developing the common law, to promote the spirit, purport and objects of the *Constitution.*[582] The obligation imposed on courts by section 39(2)[583] of the *Constitution* is therefore extensive, "requiring courts to be alert to the normative framework of the *Constitution* not only when some startling new development of the common law is in issue, but in all cases

---

578 Para 40.
579 Para 41.
580 2005 (6) SA 419 (CC).
581 Para 14.
582 Para 15.
583 "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

where the incremental development of the rule is in issue".[584] The normative influence of the *Constitution* must be felt throughout the common law. This influence required the Court to develop a broader remedy of vicarious liability to allow the applicant to be awarded damages after the violation of her constitutional rights by the state.

In *Paulsen v Slip Knot Investments 777 (Pty) Limited*,[585] the Court confirmed its conclusion in *K v Minister of Safety and Security*:

> It is well within the place of courts to shape the common law in a way that advances constitutional values. The authority imposed upon courts by section 39(2) of the Constitution is thus extensive, requiring courts to be alert to the normative framework of the Constitution not only when some startling new development of the common law is in issue, but in all cases where the incremental development of the rule is in issue.

Although the courts have consistently developed the common law to conform to the object, purport and spirit of the Bill of Rights, it does not mean that they have to develop the common law in each instance when a common-law rule is before it.[586] The courts will have to develop the common law in cases where the development of the rule is in issue.[587]

2.6.2.5 The doctrine of vagueness

In *Affordable Medicines Trust v Minister of Health*,[588] the Court referred to the doctrine of vagueness, one of the principles of common law that was developed by courts to regulate the exercise of public power. The doctrine of vagueness is founded on the rule of law, which is a foundational value of constitutional democracy. It requires that laws must be written in a clear and accessible manner. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly.[589] The Court held that where it is contended that the regulation under consideration is vague for uncertainty, a court must first construe the regulation applying the normal rules of construction including those

---

584 Para 17.
585 [2015] ZACC 5 para 116.
586 De Vos and Freedman *South African Constitutional Law* 342.
587 *K v Minister of Safety and Security* 2005 6 SA 419 (CC) para 17.
588 2006 (3) SA 247 (CC) para 108.
589 Para 109.

required by constitutional adjudication. The ultimate question is whether so construed, the regulation indicates with reasonable certainty to those who are bound by it what is required of them.

Should regulations contain provisions that allow for discretionary powers of state officials, such powers must be constrained. If the regulations do not contain constraints then –[590]

> [t]hose who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision. In the absence of any clear statement to that effect in the legislation, it would not be obvious to a potential applicant that the exercise of the discretion conferred upon the officials is constrained by the provisions of the Bill of Rights and, in particular, what factors are relevant to the decision. If rights are to be infringed without redress, the very purposes of the Constitution are defeated.

Another effect of the doctrine of vagueness is that statutory powers enabling officials to remedy contraventions, remove hazards or mitigate dangerous situations should state precisely the extent of the powers and the circumstances in which they may be exercised.[591] If it is not practical to particularise, then the statute should specify that the powers should be exercised consistent with the purposes of the legislation. The purpose of the legislation should then be clearly spelled out.

Legislation should also specify entry, search and seizure powers to facilitate trouble-free exercise of such powers.[592] This will enable members of the public to understand the extent and conditions of the powers so that they can assess whether officials act within the scope of the powers. Legislation permitting seizure of property should also provide for the return of the property and payment of compensation, should that be necessary.[593]

The principle of vagueness underlies the rule of law to the extent that the exercise of all public power must be authorised by law, which must be clear and accessible to those

---

590 *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 47.

591 *Makwickana v Ethekwini Municipality* 2015 (3) SA 165 (KZD) para 38.

bound by it. The principle of vagueness is a tenet of constitutional law and admits to no exception.[594]

2.6.2.6 Methods of curing constitutional invalidity

2.6.2.6.1 Actual and notional severance

Severance aims to cure the legislation of any constitutional defects.[595] Any legislation or conduct inconsistent with the *Constitution* is invalid only to the extent of the inconsistency.[596] A court can cure legislation of constitutional defect by either actual severance or notional severance.[597] Actual severance means striking down the inconsistent section, phrases or words, while notional severance entails leaving the language of the provisions intact but subjecting them to a condition for proper application.[598]

In *Coetzee v Government of the Republic of South Africa*,[599] the Court explained the concept of severance in constitutional interpretation. The issue before the Court was the constitutional validity of the provisions of sections 65A to 65M[600] of the *Magistrates' Courts Act*[601] relating to the imprisonment of judgment debtors. The question before the Court was whether the procedure in the sections concerned was wholly or partially invalid due to inconsistency with one or more of the rights guaranteed in Chapter 3.[602]

The Court held that, although the sanction of imprisonment was seemingly aimed at the debtor who would not pay, it was unreasonable in that it also struck at those who could

---

592 Thornton *Legislative Drafting* 238.
593 Thornton *Legislative Drafting* 239.
594 *Democratic Alliance v Ethekwini Municipality* 2012 (2) SA 151 (SCA) para 21.
595 *South African Defence Force Union v Minister of Defence* 1999 (4) SA 469 (CC) para 14.
596 Section 172(1)(a) of the *Constitution.*
597 Govindjee et al *Introduction to Human Rights Law* 263.
598 Currie and De Waal *The Bill of Rights Handbook* 201.
599 1995 (4) SA 631 (22 September 1995).
600 The sections make provision for a system to enforce judgment debts and provide for the magistrate to issue an order to commit the judgment debtor to prison for contempt of court for failure to pay the debt.
601 32 of 1944.
602 Fundamental Rights, *Interim Constitution.*

not pay and simply failed to prove this at a hearing, often because of circumstances created by the provisions themselves.[603]

In considering the question of severability, the Court stated that two questions had to be answered with regard to the possible severance of the provisions of the law not consistent with the *Interim Constitution.*[604] Firstly, could the provisions that rendered the option of imprisonment unconstitutional because they did not distinguish between those who could pay but would not from those who could not pay be excised? If not, could the provisions which provided for imprisonment itself be severed from the rest of the system for enforcement of judgment debts? The Court applied the following test to answer the questions:[605]

> If the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute.

The test therefore had two parts: Was it possible to sever the invalid provisions and, if so, was the remainder giving effect to the purpose of the legislative scheme? The Court held that in the matter under discussion it was possible to sever the provisions that made up the option of imprisonment.[606] The Court then asked whether in severing the provisions the object of the statute would nevertheless remain to be carried out. The Court held that it would. Therefore, the infringing provisions could be severed and the balance of the system could usefully remain in force. The Court therefore cured the constitutional invalidity in the legislation by actual severance.

In *First National Bank of SA Limited v Commissioner for the South African Revenue Services*,[607] the Court explored the concept of notional severance. The Court found certain provisions of the *Customs and Excise Act*[608] (the Act) constitutionally invalid.[609] The Court held that it was textually impossible to sever the good from the bad in the

---

603 Para 13.
604 Para 15.
605 Para 16.
606 Para 17.
607 2002 (7) BCLR 702 (16 May 2002).
608 91 of 1964.
609 Para 113.

impugned provisions of the Act without embarking on an extensive redrafting of the provision, an action that would have impermissibly trespassed on the terrain of the legislature and would have been inappropriate in that case.[610] Therefore, the Court stated that –

> [c]onsidering only the successful property attack, the appropriate remedy would be an order declaring the provisions of section 114 to be constitutionally invalid to the extent that they provide that the goods of persons other than the customs debtor referred to in the section are subject to a lien, detention and sale; ...

The Court stressed that it was not possible to tailor a narrower order of constitutional invalidity and held that it might be possible to draft a statutory provision that would be more suitable, but that was the task of the legislature and not the court. The Court therefore resorted to notional severance by restricting the overbroad application of the Act.

Notional severance can therefore be used by the courts when the scope of the legislation is overbroad and therefore constitutionally invalid or when the presence of a provision is constitutionally offensive.[611]

In *Makwickana v Ethekwini Municipality*,[612] the Court scrutinised the constitutionality of the *Businesses Act*[613] and the *eThekwini Municipality: Informal Trading By-law*, *2014,* (the *By-law*) pertaining to the removal and impoundment of the trading goods of informal or street traders by the municipal police.

Section 35(1) of the By-law permits an official to remove and impound goods on the mere suspicion, reasonably held, that the informal trader has contravened a provision of the *By-law*.[614] Effectively, the street trader suffers punishment and dispossession of his property before a court of law has determined his guilt. This is compounded by the power of the respondent's officials to sell, destroy or otherwise dispose of perishable

---

610 Para 114.
611 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 1996 (1) SA 984 (CC) para 64.
612 2015 (3) SA 165 (KZD).
613 71 of 1991.
614 Para 80.

goods and foodstuff not fit for human consumption.[615] Furthermore, the property of street traders is sold without notice to the owners and the street traders and without a reserve price.

The Court held that section 35 of the *By-law* limits the right of access to courts contained in section 34 of the *Constitution*[616] in so far as –[617]

(a) the impoundment and disposal of the street traders' property for alleged non-compliance with the legal formality of producing a licence or permit to trade; and

(b) the indiscriminate disposal of the street traders' property for non-compliance with any restriction or contravention are not supervised by a judicial officer,

did not take place under judicial supervision.

To deprive street traders of their property permanently, section 35 of the *By-law* had to overcome additional hurdles of fair procedure, rationality and proportionality to be valid.[618] According to the Court, procedural fairness required notification to the owners that they are accused of a breach of the *By-law* before their goods are impounded and disposed of, an obligation that the By-law did not impose on officials. The purpose of the deprivation in terms of the *By-law*, in this instance to compel the applicant to produce a licence or permit, was not sufficiently compelling to render the deprivation rational in the constitutional sense of the means being proportional to the ends.

The Court further held that section 35 of the *By-law* limited the right not to be deprived of property contained in section 25 of the *Constitution*[619] in that –[620]

---

615 Para 81 and section 35(6) of the *By-law*.
616 The right to have any dispute resolved by the application of law in a fair hearing before a court.
617 Para 91.
618 Para 96.
619 "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."
620 Para 99.

(a) the impoundment and disposal of the street traders' property for alleged non-compliance with the legal formality of producing a licence or permit to trade; and

(b) the indiscriminate disposal of the street traders' property for non-compliance with any restriction or prohibition,

are irrational and give rise to arbitrary, deprivation of property of street traders.

The Court also held that section 35 of the *By-law* limited the right to trade in terms of section 22 of the *Constitution*,[621] and that section 35 of the *By-law* amounts to discrimination in terms of section 9(3) of the *Constitution.*[622]

The Court further held that section 39 of the *By-law*, which provides for immunity from liability for officials who acted in good faith, was unconstitutional;[623] the possible dishonesty of the officials made an exemption from liability for damages and compensation an unhealthy disincentive to act fairly and reasonably towards street traders.[624]

Concerning an appropriate remedy, the Court found that the scheme of the *By-law* was incapable of giving effect to important constitutional rights and values.[625] The Court decided that amending the *By-law* to curtail the power of officials to impound and confiscate property, to substitute fines for impoundment and to bring judicial or similar independent scrutiny to bear on the conduct of officials as soon as possible could prevent abuse of power.[626] The Court therefore declared sections 35 and 39 of the *By-law* unconstitutional, invalid and unlawful, but the declaration was suspended pending the reform of the *By-law*. The *Makwickana* case is a clear example of actual severance with the Court striking down the impugned sections of the *By-law*.

---

621 Freedom of trade, occupation and profession.
622 Para 125; the right to equality.
623 Para 127.
624 Para 135.
625 Para 138.
626 Para 145.

2.6.2.6.2 Reading in

Reading in is used by the courts to address a constitutional inconsistency resulting from an omission in legislation. It is therefore a constitutional remedy used by the courts after concluding that a provision is constitutionally invalid.[627]

In *Gory v Kolver NO*,[628] the Constitutional Court used the reading-in principle to great effect to cure the constitutional validity of section 1(1) of the *Intestate Succession Act*[629] to the extent that it conferred rights of intestate succession on heterosexual spouses but not on permanent same-sex life partners.

The Court held that the most fitting way to cure this unconstitutionality was by reading in after the word "spouse", wherever it appears in section 1(1) of the Act, the words "or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support".[630]

The courts therefore have the power to cure the unconstitutionality of an Act or provision by inserting a word or phrase into the offending legislation.

2.7 Crafting appropriate remedies for relief of constitutional violations

627 Currie and De Waal *The Bill of Rights Handbook* 204.
628 2007 (3) BCLR 249 (CC).
629 81 of 1987.
630 Para 43.

2.7.1 Ubi ius ibi remedium

One of the most important principles of South African law is expressed by the maxim *ubi ius ibi remedium*[631]: Where there is a right, there is a remedy.[632] This means that the existence of a legal rule implies the existence of an authority with the power to grant a remedy if that rule is infringed. A legal rule or judgment will be deficient if there is no means of enforcing it, and if no sanction attaches to a breach of that rule or judgment.

In the British case of *Bremer Vulcan Schiffbau und Maschinenfabrik v South India Shipping Corp*,[633] the Court described the need for judicial remedies as follows:

> Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant.

In *Taylor*[634], the British Court held that "the need to maintain confidence in the administration of justice makes it imperative that there should be a remedy".

The South African *Constitution* itself provides very little guidance on constitutional remedies.[635] Therefore, according to the Constitutional Court in *Fose* –[636]

> [i]t is left to the courts to decide what would be appropriate relief in any particular case. Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.

---

631 The basic principle contemplated in the maxim is that, when a person's right is violated, the victim will have an equitable remedy under law. The maxim also states that the person whose right has been infringed has a right to enforce the infringed right through any action before a court. All law courts are also guided with the same principle of *ubi ius ibi remedium*.

632 Hiemstra *Trilingual Legal Dictionary* 299.

633 [1981] 1 All ER 289 para 295.

634 *Taylor v Lawrence* [2002] 2 All ER 353 para 55.

635 Currie and De Waal *The Bill of Rights Handbook* 195.

636 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) paras 18 and 19.

In *August v Electoral Commission*,[637] the Court approvingly referred to the judgment by Centlivres CJ in *Minister of the Interior v Harris*:[638]

> As I understand Mr Beyers' argument the substantive right would, in the event of such an Act having been passed, remain intact but there would be no adjective or procedural law whereby it could be enforced: in other words the individual concerned whose right was guaranteed by the Constitution would be left in the position of possessing a right which would be of no value whatsoever. To call the rights entrenched in the Constitution constitutional guarantees and at the same time to deny to the holders of those rights any remedy in law would be to reduce the safeguards enshrined in section 152 to nothing. There can to my mind be no doubt that the authors of the Constitution intended that those rights should be enforceable by the Courts of Law. They could never have intended to confer a right without a remedy. The remedy is, indeed, part and parcel of the right. Ubi jus, ibi remedium.

The Court confirmed that a right requires an appropriate remedy.[639] Where a remedy is not readily available, the courts may construct such remedy by relying on section 172(1)(b) of the *Constitution.*[640]

It would therefore seem as if the maxim is no longer a binding norm in South Africa, at least in constitutional adjudication. When the *Constitution* confers a right on an individual and there is no appropriate remedy available for the realisation of that right, the courts are empowered by section 172(1)(b) of the *Constitution* to craft such a remedy.

2.7.2 The constitutional principle of "appropriate relief"

The United States Supreme Court held in *Milliken v Bradley*[641] that the nature of remedies is determined by the nature and scope of the constitutional violation; the remedy therefore, must be related to the condition alleged to offend the *Constitution.* The court order must be designed with the purpose of restoring the victim to the condition they would have occupied in the absence of the constitutional violation. However, the courts must take into account the interests of the state and local authorities in managing their own affairs, consistent with the *Constitution.*

---

637 1999 (3) SA 1 (CC).
638 1952 (4) SA 769 (A) paras 780-781.
639 *August* para 34.
640 When deciding a constitutional matter, a court may make any order that is just and equitable.
641 433 US 267 (1977) 281.

In South African jurisprudence, the Court defined the principle of appropriate relief in constitutional adjudication as follows:[642]

> Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.

Therefore, where the restoration of a violation of constitutional rights in American jurisprudence is individually focussed – in other words, the focus of the restoration is on the victim of the violation – in South African constitutional jurisprudence, the focus of the relief is to protect and enforce the *Constitution* itself. This provides the reason for the Constitutional Court's rejecting proposed out-of-court settlements between the parties if such would result in a benefit of a constitutional right only to the parties.[643] Therefore, as is the case in American constitutional jurisprudence, South African courts should be considerate to not only the interests of the parties, but also the interests of society.[644]

Something will be appropriate when it is specially fitted or suitable.[645] Suitability, in the context of court orders, is measured by the extent to which a particular form of relief vindicates the *Constitution* and acts as a deterrent against further violations of rights. When deciding on appropriate relief, the courts should consider the nature of the infringement and the probable effect of a particular remedy. The court will therefore analyse the facts surrounding a violation of rights to determine what form of relief is appropriate. The courts do not have to rely only on constitutional remedies to provide appropriate relief for constitutional violations. Common-law and statutory remedies as well as the wide range of common-law administrative remedies can also be suitable for

---

642 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 19.

643 *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) BCLR 596 (CC) para 35. The Court held that an offer to settle a dispute made by one litigant to the other, even if accepted, could not cure the ensuing legal uncertainty, as it would settle the dispute only between litigants. According to the Court, this would not resolve the unconstitutionality of impugned provisions and the interest they have for the broader group of persons who may qualify for a similar benefit.

644 Currie and De Waal *The new constitutional and administrative law* 195.

645 *Fose* para 97.

this purpose.[646] As long as a remedy serves to vindicate the *Constitution* and deter its further infringement, it might be "appropriate relief".[647] The courts have a particular responsibility in this regard and are obliged to forge new tools and shape innovative remedies, if need be, to achieve this goal.[648]

When there is an infringement of the Bill of Rights, the courts have a constitutional duty to ensure that appropriate relief is afforded to those who have suffered the infringement of their constitutional rights.[649] This includes a breach of socio-economic rights.[650] The harm caused by violating the *Constitution* is harm to society as a whole, even if the direct implications of the violation are highly paraxial.[651] The rights violator not only harms a particular person, but also impedes the fuller realisation of the constitutional promise and the object of remedying this kind of harm should be to vindicate the *Constitution* and to deter its further infringement. Legitimacy and confidence in a legal system demand that an effective remedy be provided in situations where the interests of justice cry out for one.[652] The nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in a particular case.[653]

The circumstances of each case will determine the appropriateness of a court order.[654] A remedy issued by the courts should instil humility without humiliation, and should bear the message that respect for the *Constitution* protects and enhances the rights of all.[655] However, the problem of sensible enforcement requires that the state must be able to comply with the order within the limits of its capabilities, financial or otherwise.[656] This

---

646 Para 98.
647 Para 100.
648 Para 69.
649 *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC) para 71.
650 *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) para 106.
651 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 835G.
652 *Molaudzi v S* 2015 (2) SACR 341 (CC) para 37.
653 *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 45.
654 *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (17 February 1998) para 91.
655 *Marlboro Crisis Committee v City of Johannesburg* 2012 ZAGPJHC 187 para 101.
656 *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 3 All SA 169 (SCA) 2004 para 39.

led the courts on occasion to decline to award remedies even when a violation of a constitutional right had been proved if the interests of good governance require this.[657]

Section 172(1)(b) of the *Constitution* states that when deciding a constitutional matter, a court may make any order that is just and equitable. Therefore, the order of the court should be based on what is morally right and fair and the order should be fair and impartial.[658] In terms of section 38 of the *Constitution*, a person alleging that a right in the Bill of Rights has been infringed is entitled to appropriate relief by the courts, "appropriate" meaning suitable and proper for the circumstances. Both of these constitutional provisions provide flexibility for the courts to provide appropriate relief for constitutional violations.

In *Hoffmann v South African Airways*,[659] the appellant was discriminated against because of his HIV status. The Court had to decide on the appropriate relief for the constitutional violation of his right to equality.[660] The Court held as follows:[661]

> Section 38 of the Constitution provides that where a right contained in the Bill of Rights has been infringed, "the court may grant appropriate relief". In the context of our Constitution, "appropriate relief" must be construed purposively, and in the light of section 172(1)(b), which empowers the Court, in constitutional matters, to make "any order that is just and equitable".

Appropriate relief must therefore be fair and just in the circumstances of the particular case. Appropriateness, in the context of the *Constitution*, imports the elements of justice and fairness. Fairness requires a consideration of the interests of all those who might be affected by the order.[662] The Court will have to take into consideration the interests of the individual affected, the employer as well as the broader interest of the community. Therefore, the determination of appropriate relief –[663]

---

657 *East Zulu Motors (Pty) v Empangeni/Ngwlezane Transitional Local Council* 1998 (2) SA 61 (CC); *Steyn v The State* 2001 (1) SA 1146 (CC).

658 Based on the accepted legal definition of the words "just" and "equitable"; Hiemstra *Trilingual Legal Dictionary* 46 and 68.

659 2001 (1) SA 1 (CC).

660 Section 9 of the *Constitution.*

661 Para 42.

662 Para 43.

663 Para 45.

> ... calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case.

In determining appropriate relief, the courts must "carefully analyse the nature of the constitutional infringement, and strike effectively at its source".

The test for the effectiveness of the courts' remedies, therefore, is whether the remedy is appropriate, just and equitable. The court judgment must be fair and just in the context of the particular dispute before the court.[664] The Court highlighted the flexibility of the remedial powers of the courts as follows:[665]

> It is clear that section 172(1)(b) confers wide remedial powers on a competent court adjudicating a constitutional matter. The remedial power envisaged in section 172(1)(b) is not only available when a court makes an order of constitutional invalidity of a law or conduct under section 172(1)(a). A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements. In several cases, this Court has found it fair to fashion orders to facilitate a substantive resolution of the underlying dispute between the parties. Sometimes orders of this class have taken the form of structural interdicts or supervisory orders. This approach is valuable and advances constitutional justice particularly by ensuring that the parties themselves become part of the solution.

In *Port Elizabeth Municipality v Various Occupiers*,[666] the Court had the unenviable task of deciding on an appropriate remedy where groups of indigent families were unlawfully living on private land.[667] The remedy required an appropriate constitutional relationship

---

664 *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 42.
665 *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (3) BCLR 177 (CC) para 97.
666 2005 (1) SA 217 (CC).
667 Paras 1-3.

between rights in the Bill of Rights,[668] in the matter under discussion between property rights,[669] and housing rights.[670]

The Court described the process of deciding on a remedy as follows:[671]

> The courts are to seek concrete and case-specific solutions to the difficult problems that arise. The courts are to consider all relevant factors but the manner in which the courts are to manage the process have been left open. In managing the process, the Courts should not establish a hierarchical arrangement between the different interests involved. Rather it is to balance out and reconcile the opposing claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case.

This confirms that constitutional remedies will differ by circumstance.[672]

When deciding on an appropriate remedy the court should consider the different fundamental rights involved, determine whether they had been breached and then judge whether and, if so, what appropriate relief should be granted.[673] In realising constitutional rights, the courts should not be overawed by practical problems.[674] Courts should attempt to synchronise the real world with the ideal construct of a constitutional world[675] and they have a duty to mould an order that will provide effective relief to those affected by a constitutional breach.[676] However, despite the wide powers of the courts to grant appropriate relief when a constitutional right has been breached, current case law illustrates the magnitude of the lack of political commitment to implement judicial orders and underscores the urgency of the need to devise strategies to ensure compliance with court orders.[677] The lack of political commitment to implement judicial orders places unwarranted constitutional limitations on strategic litigation. Such limitations can be cured by setting out the positive constitutional obligations that the

---

668 Para 19.
669 Section 25 of the *Constitution.*
670 Section 26 of the *Constitution.*
671 *Port Elizabeth Municipality* paras 22-23.
672 *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* (2004) 3 All SA 169 (SCA) (27 May 2004) para 43.
673 Para 20.
674 Para 42.
675 *Fose v Minister of Safety and Se*curity 1997 (3) SA 786 (CC) para 94.
676 Para 102.
677 *Vumazonke v MEC for Social Development and Welfare for Eastern Cape Province* 2004 ZAECHC; *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).

state litigant must comply with, including respecting and implementing the order of the court as soon as it is possible to do so, in a set of guidelines or rules. These guidelines or rules, known as the model litigant obligation, are discussed in chapter 6 of this work.

2.8 The duty of the state to act fairly in litigation

2.8.1 Principles of co-operative government and intergovernmental relations

Chapter 3 of the *Constitution* sets out the principles relating to co-operative government to which all spheres of government must adhere and within the parameters of which they must conduct all activities. In terms of section 41(1)(e) all spheres of government and organs of state must respect the constitutional status, institutions, powers and functions of government in the other spheres. Section 41(1)(f) and (g) provide that organs of state may not assume powers or functions not conferred on them by the *Constitution* and may not exercise their powers and perform their functions in a manner that encroaches on the integrity of government in another sphere. The spheres of government are expected to co-operate with one another in mutual trust and good faith by fostering friendly relations and assisting one another.[678]

Organs of state involved in an intergovernmental dispute must make reasonable efforts and must exhaust all other remedies to settle that dispute before approaching the courts.[679] If a court finds that no such efforts have been made, the court may refer the dispute back to the organs of state involved for compliance.[680]

The *Constitution* allocates powers to three spheres of government: the national, the provincial and the local spheres. One sphere of government may not usurp the powers of another sphere. Section 100 of the *Constitution*, however, allows the national government to intervene in a provincial administration in certain defined instances.

Section 100(1) provides that, when a province cannot or does not fulfil an executive obligation in terms of the *Constitution* or legislation, the national executive may

---

678 Section 41(1)(h) of the *Constitution.*
679 Section 41(3) of the *Constitution.*
680 Section 41(4) of the *Constitution.*

intervene by taking any appropriate steps to ensure fulfilment of that obligation, including –

(a) issuing a directive to the provincial executive, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; and

(b) assuming responsibility for the relevant obligation in that province to the extent necessary to (i) maintain essential national standards or meet established minimum standards for the rendering of a service; (ii) maintain economic unity; (iii) maintain national security; or (iv) prevent the province from taking unreasonable action that is prejudicial to the interests of another province or to the country as a whole.

In *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal,*[681] the Constitutional Court explored the effect of section 100(1)(b):[682]

> The scope of intervention by one sphere in the affairs of another is highly circumscribed. The national and provincial spheres are permitted by sections 100 and 139 of the Constitution to undertake interventions to assume control over the affairs of another sphere or to perform the functions of another sphere under certain well-defined circumstances, the details of which are set out below. Suffice it now to say that the national and provincial spheres are not entitled to usurp the functions of the municipal sphere, except in exceptional circumstances, but then only temporarily and in compliance with strict procedures.

The *Intergovernmental Relations Framework Act*[683] (hereafter the *Framework Act*) was enacted to provide appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes. The long title of the *Framework Act* sets out its purpose as follows:

> To establish a framework for the national government, provincial governments and local governments to promote and facilitate intergovernmental relations; to provide for mechanisms and procedures to facilitate the settlement of intergovernmental disputes; and to provide for matters connected therewith.

---

681 2010 (6) SA 182 (CC).
682 Para 44.
683 13 of 2005.

The Act applies to the national government, all provincial governments and all local governments.[684] It does not apply to the following institutions:[685]

(a) Parliament.

(b) The provincial legislatures.

(c) The courts and judicial officers.

(d) Any independent and impartial tribunal or forum contemplated in section 34 of the *Constitution* and any officer conducting proceedings in such a tribunal or forum.

(e) Any institution established by Chapter 9 of the *Constitution.*

(f) Any other constitutionally independent institution.

(g) Any public institution that does not fall within the national, provincial or local sphere of government.

The object of the Act is to provide within the principle of co-operative government set out in Chapter 3 of the *Constitution* a framework for the national government, provincial governments and local governments, and all organs of state within those governments, to facilitate co-ordination in the implementation of policy and legislation, including –

(a) coherent government;

(b) effective provision of services;

(c) monitoring implementation of policy and legislation; and

(d) realisation of national priorities.

---

684 Section 2(1).
685 Section 2(2).

Chapter 2 of the Act provides for the creation of a President's Co-ordinating Council, national intergovernmental forums, provincial intergovernmental forums, municipal intergovernmental forums and intergovernmental technical support structures aimed at facilitating the implementation of the objectives of the Act. Chapter 3 regulates the conduct of intergovernmental relations. Chapter 4 relates to the settlement of intergovernmental disputes.

Section 40(1) of the Act provides that all organs of state must make every reasonable effort to avoid intergovernmental disputes when exercising their statutory powers or performing their statutory functions and to settle intergovernmental disputes without resorting to judicial proceedings. An organ of state that is a party to an intergovernmental dispute with another government or organ of state may declare the dispute a formal intergovernmental dispute by notifying the other party of such declaration in writing.[686]

Once a formal intergovernmental dispute has been declared, the parties to the dispute must promptly convene a meeting between themselves or their representatives and appoint a facilitator to assist in settling the dispute.[687] In terms of section 45 of the Act, no government or organ of state may institute judicial proceedings in order to settle an intergovernmental dispute unless the dispute has been declared a formal intergovernmental dispute in terms of section 41 and all efforts to settle the dispute in terms of this Chapter were unsuccessful.

In *Centre for Child Law v Minister of Basic Education*,[688] the Minister of Basic Education and the Director-General of Basic Education were cited as respondents. The Minister took a decision to place the Eastern Cape Department of Basic Education under the administration of the national government in terms of section 100(1)(b) of the *Constitution*, and the Director-General is the functionary responsible for the execution of that administration.[689] The question before the Court was what the implications of the

---

686 Section 41 of the Act.
687 Section 42 and 43 of the Act.
688 2013 (3) SA 183 (ECG).
689 Para 4.

intervention in terms of section 100(1)(b) were in respect of the powers, functions and duties of the Minister and the Director-General. The Court referred approvingly to the *dictum* in the above-mentioned *Johannesburg Metropolitan Municipality* case.[690] The Court found that while the latter case dealt with powers assigned to the local sphere of government, the observations that that court made applied equally to a situation in which the national sphere of government has, in terms of section 100(1)(b), intervened in a province's administration.[691] When the national sphere does so, it assumes the powers of the provincial administration, and it assumes its obligations.

Such an intervention must be done in the light of what the Constitutional Court said of the purpose of the section 100 power in *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, *1996*.[692] In the *Certification* judgment, the Court explained that section 100 provides that when a province cannot or does not fulfil an executive obligation, the national executive may take appropriate steps to ensure fulfilment of that obligation.[693] What is contemplated is that the national executive either put the province on terms to carry out its obligations or assume responsibility for such functions itself to the extent that it is necessary to do so for any of the purposes set out in section 100(1)(b).[694]

In *Centre for Child Law*, the Court held that the respondents were obliged to fulfil the obligations of the provincial departments, including the recruitment and appointment of staff for public schools in the province.[695]

2.8.2 Constitutional imposition of positive duties on the state

The executive, the judiciary, the legislature and all organs of state are bound by the Bill of Rights.[696] The *Constitution* further imposes general duties on those bound by it to

---

690 Para 7.
691 Para 8.
692 1996 (4) SA 744 (CC).
693 Para 263.
694 Para 265; New Text 100(1)(b): The text drawn up by the Constitutional Assembly in terms of the Constitutional Principles of the *Interim Constitution.*
695 Para 34.
696 Section 8(1) of the *Constitution.*

respect, protect, fulfil and promote the rights in the Bill of Rights.[697] The state, therefore, has the duty to comply with all these obligations.

Du Plessis *et al* argue that the *Constitution* places a range of positive duties on organs of the state. Organs of state must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.[698] The duty placed on organs of state to ensure the effectiveness of the courts puts a positive obligation on the organs of state to place relevant and material evidence before the courts.[699] This duty was articulated by the Court in *Matatiele Municipality v President of the Republic of South Africa*[700] as follows:

> In this respect, the Constitution requires candour on the part of government. What is involved is not simply a matter of showing courtesy to the public and to the courts, desirable though that always is. It is a question of maintaining respect for the constitutional injunction that our democratic government be accountable, responsive and open. Furthermore, it is consistent with ensuring that the courts can function effectively, as section 165(4) of the Constitution requires.

A lack of information may disempower a court, making it unable to reach a decision. The Court continued by stating that the notion that "government knows best, end of enquiry" is not compatible with a democratic government based on the rule of law as envisaged by the *Constitution.*[701] There is a strong need for government to provide an explanation for the introduction of legislation. The foundational values of the rule of law and of accountable government do not exist in discreet categories; they overlap and reinforce each other.[702] Openness of government promotes both the rationality the rule of law requires, and the accountability multi-party democracy demands.

The Bill of Rights regulates laws affecting human rights, and such laws may be tested against the *Constitution* to determine their constitutionality. The Bill of Rights also regulates all conduct, including state conduct. The *Constitution* and the Bill of Rights

---

697 Section 7(2) of the *Constitution*, which requires the state to respect, protect, promote and fulfil the rights in the Bill of Rights.
698 Section 165(4) of the *Constitution.*
699 Du Plessis, Penfold and Brickhill *Constitutional Litigation* 4.
700 2006 (5) SA 47 (CC) para 107.
701 Para 109.
702 Para 110.

thus prevent the individual from being placed in a vulnerable position and the state from abusing its powers. The Bill of Rights performs this task by protecting individuals against the state through imposing duties on all branches of the state to respect its provisions. The executive, the judiciary, the legislature and all organs of state are bound by the Bill of Rights in terms of section 8(1) of the *Constitution.* In addition, the *Constitution* imposes general duties on those bound by the *Constitution* to respect, protect, fulfil and promote the rights in the Bill of Rights. The state has the duty to comply with all these obligations.

Public administration must further be governed by the democratic values and principles enshrined in the *Constitution*, including the following principles:[703]

(a) A high standard of professional ethics must be promoted and maintained.

(b) Efficient, economic and effective use of resources must be promoted.

(c) Public administration must be development-oriented.

(d) Services must be provided impartially, fairly, equitably and without bias.

(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.

(f) Public administration must be accountable.

(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.

(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

The principles contained in section 195(1) apply to the administration in every sphere of government, organs of state and public enterprises.[704]

---

703 Section 195(1) of the *Constitution.*
704 Section 195(2) of the *Constitution.*

Du Plessis *et al* state that the Constitutional Court has frequently confirmed that there is a duty on the state to ensure that all relevant evidence is placed before the court.[705]

In *Khosa v Minister of Social Development,*[706] the Court held that if the necessary evidence were not placed before the courts by the state, the courts' ability to perform their constitutional mandate would be hampered and the constitutional scheme itself put at risk. It is government's duty to ensure that the relevant evidence is placed before the court.

In *Gory v Kolver*,[707] the Minister of Justice and Constitutional Development did not see fit to oppose the applicant's challenge to the constitutional validity of section 1(1) of the *Intestate Succession Act*.[708] The Court, dissatisfied with the state's failure to form part of the proceedings and therefore placing much needed information before the Court, declared its displeasure as follows:

> To my mind, something more substantive is required when a state official is called upon to deal with the constitutionality of a statutory provision falling under his or her administration and with the formulation of an appropriate remedy in the event that such provision is held to be constitutionally invalid is under consideration by a court.

According to Malherbe and Van Eck, the *Constitution* implies a social contract between the state and its citizens.[709] It controls, instructs and directs the state in its actions and limits the state's powers and prevents their abuse. It is therefore imperative that the state comply with the provisions of the *Constitution* and with all the duties contained in it. The duties imposed on the state form the bedrock of the *Constitution* and the state must comply with them to ensure the legitimacy of the *Constitution* and the realisation of its democratic objectives and ideals. Non-compliance with the duties undermines the foundations of the *Constitution*, and may jeopardise the existence and future development of a constitutional democracy in South Africa.

---

705 Du Plessis, Penfold and Brickhill *Constitutional Litigation* 5.

706 *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC) para 19.

707 2007 (4) SA 97 (CC) para 64.

708 81 of 1987.

709 Malherbe and Van Eck 2009 *TSAR* 212.

2.8.3 The state's compliance with constitutional duties

The courts have indicated that the commencement, defence and conduct of litigation by the government or government departments constitute the exercise of public power.[710] As such, state litigation is subjected to the same scrutiny as any other exercise of public power. Therefore, state litigation must comply with the principle of legality and the rule of law. Malherbe and Van Eck[711] note that the state can fail to comply with its constitutional duties in two ways:

> The first instance is where the state bona fide misinterprets legislation or makes a mistake. The second instance is where the state negligently ignores or wilfully disregards its duties, or deliberately takes on "imagined powers".

They continue that the rule of law, legality and democratic principles are foundational values of the *Constitution.*[712] A bona fide misinterpretation of constitutional duties by an organ of the state can be rectified with a structural interdict setting out the duties and monitoring the compliance thereof. However, the second example of non-compliance with constitutional duties mentioned by Malherbe and Van Eck raises serious concern. The rule of law, legality and democratic principles are foundational values of the *Constitution*. It is therefore inconceivable that these basic principles might be under threat by the structures set in place to ensure that these foundational values are realised.[713]

In *Abdi v Minister of Home Affairs*[714] the Court expressed its displeasure at the respondent (officials of the Department of Home Affairs) to be open and honest with the Court in its submission. The persons appearing for the Minister of Home Affairs (MHA) misrepresented the case in its founding and supporting affidavits. The respondent adopted an evasive approach by refusing to disclose certain information in its possession. The information – the fact that the applicant was issued with a valid Refugee Status Permit – made the applicant's arrest illegal. The respondent knew of

---

710 Du Plessis, Penfold and Brickhill *Constitutional Litigation* 3.
711 Malherbe and Van Eck 2009 *TSAR* 211.
712 Section 1 of the *Constitution.*
713 Malherbe and Van Eck 2009 *TSAR* 212.
714 (734/10) [2011] ZASCA 2 (2011) para 34.

that fact, continued to detain the applicant, and resisted the attempt to have him released.

The respondents were duty-bound to set the record straight, but continued in their heads of argument with the denial of being in possession of any record relating to the appellants, putting them to needless effort and expense to meet that spurious defence.[715]

The Court noted:[716]

> Our courts have on several occasions expressed their disquiet at the failure of Government officials, including the Department's officials, to respect the rights of individuals they deal with and to act in accordance with their duties imposed by the Constitution.[717]

The Court held that the respondent caused unnecessary litigation and wasted costs.

In *Permanent Secretary Department of Welfare, Eastern Cape Provincial Government v Ngxuza*,[718] the respondents brought motion proceedings against the Eastern Cape Provincial Government seeking to reinstate the disability grants they had been receiving under the *Social Assistance Act*,[719] which the province had terminated without notice to them.[720] They also sought to litigate as representatives on behalf of anyone in the whole of the Eastern Cape Province whose disability grants had been cancelled or suspended by the Eastern Cape government.[721] The applicants attacked both the grant of leave to institute the class action and the disclosure order, without questioning the merits of the case.[722] The applicants did not dispute that the method the province chose to verify and update its pensioner records was not just harsh, but also unlawful. This had been

---

715 Para 35.
716 Para 36.
717 *Eveleth v Minister of Home Affairs* 2004 (11) BCLR 1223 (T) paras 45 to 48; *Nyathi v MEC for the Gauteng Department of Health* 2008 (5) SA 94 (CC); *Total Computer Services (Pty) Ltd v Municipal Mayor, Potchefstroom Local Municipality* 2008 (4) SA 346 (T) para 21; *Van Straaten v President of the Republic of South Africa* 2009 (3) SA 457 (CC).
718 2001 (4) SA 1184 SCA.
719 Act 59 of 1992.
720 Para 2.
721 Para 3.
722 Para 5.

previously established by the Courts.[723] Despite the previous findings of the unlawfulness of the actions of the province, the applicants again assailed the claims of the respondents.[724] The Court described the conduct of the applicants as follows:

> The applicants did so by recourse to every stratagem and device and obstruction, every legal argument and non-argument that it thought lay to hand. While offering no undertaking to implement *Bushula* in relation to the applicant class, it asserted that because of the decision the relief sought was moot. It then contended, contradictorily, that the applicants' claim was not yet ripe for adjudication. It tendered no evidence to refute the mass of indicia the applicants placed before the Court that showed unlawful conduct against huge numbers of disability pensioners, yet argued that the applicants' evidence was inadmissible hearsay. It obstructed the applicant class's entitlement to be spared physical destitution, yet invoked their privacy rights in contending that the disclosure order should not have been granted. It did not flinch even from deriding the first applicant, who adhered to the founding papers with his thumbprint. Its deponent thought fit to record his doubt that Mr Ngxuza had read the media articles appended to the papers (a claim the first applicant did not make), while the written argument stated that it "boggles the mind" that "a man who never attended school and is presently illiterate" is able to make "learned submissions".

The Court held that all this spoke of contempt for people and process that did not befit an organ of government under our constitutional dispensation.[725] It was not the function of the courts to criticise government's decisions in the area of social policy, but –

> [w]hen an organ of government invokes legal processes to impede the rightful claims of its citizens, it not only defies the Constitution, which commands all organs of state to be loyal to the Constitution,[726] and requires that public administration be conducted on the basis that people's needs must be responded to. It also misuses the mechanisms of the law, which it is the responsibility of the courts to safeguard. [727]

The Court held that the province's approach to the proceedings was contradictory, cynical, expedient and obstructionist. It conducted the case as though it was at war with its own citizens, the more shamefully because those it was combatting were the neediest of the poor. The Court was harsh in its description of the applicants' objection

---

723 *Bushula v Permanent Secretary, Department of Welfare, Eastern Cape* 2000 (2) SA 849 (E); *Rangani v Superintendent-General, Department of Health and Welfare, Northern Province* 1999 (4) SA 385 (T).

724 Para 17.

725 Para 19.

726 Section 41(1)(d) of the *Constitution* requires all spheres of government and all organs of state to be loyal to the *Constitution*, the Republic and its people.

727 Section 195(1)(e) of the *Constitution* requires public administration to respond to people's needs.

relating to jurisdictional issues in the matter, stating that it was of a piece with the rest of its filibustering approach to the litigation as a whole, and as devoid of substance.[728]

In *Van Der Merwe v Taylor,*[729] the case concerned the right to claim the return of property, in the light of the *Constitution*, following its seizure by the State. Specifically, the case was about the seizure of a large sum of foreign currency by state officials and a claim for its return.[730] The applicant submitted that the respondents' conduct as organs of state conflicted with their duties under the *Constitution*, in particular sections 1 and 195.[731] They had acted contrary to the basic values governing public administration contained in section 195 of the *Constitution.* These provisions require, among others things, a high standard of professional and ethical conduct and accountability, with which the respondents had failed to comply.[732] The State, they submitted, did not lead by example.[733]

The Court held that the case raised a constitutional issue relating to section 25(1) of the *Constitution.*[734] In terms of this section, no one, including those accused of contraventions of the law, as in this case, may be deprived of property except in terms of a law of general application. That law, however, may not permit the deprivation of property in an arbitrary manner. Section 25(1) generally protects all rights held in relation to property, including ownership.

The Court asked whether the respondents had acted contrary to sections 1 and 195 of the *Constitution* and held that, although the seizure of the foreign currency was lawful and was a justified basis for the applicant's arrest, the conduct of the respondents created circumstances of grave legal uncertainty and compelled the applicant to seek

---

728 Paras 1-7.
729 2008 (1) SA 1 (CC).
730 Para 1.
731 Para 15.
732 The applicants relied on the following case law: *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) paras 133-134; *Reuters Group PLC v Viljoen NO* 2001 (2) SACR 519 (C) paras 2-4 and 33-35; *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) para 74; *York Timbers Ltd v Minister of Water Affairs and Forestry* 2003 (4) SA 477 (T) para 506B.
733 *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC) para 68.
734 Para 25. Section 25(1) provides that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

answers from the courts.[735] The respondents' constant vacillation with regard to the legal basis for the seizure and holding of a substantial amount of foreign currency made it difficult for the applicants to formulate their case before the courts with the necessary precision.

The Court held that section 1, read with section 195, of the *Constitution* sets high standards of professional public service.[736] The Court framed this as follows:[737]

> The democratic approach to public service accountability is broadly based in comparison with the past. Read together with section 195(1) of the Constitution, the public service policy of *Batho Pele* requires that public administration should serve the best interests of the public by enabling the achievement of individual rights encompassed in the provisions of the Constitution. In the past accountability was focused on the reporting by state parties to Parliament and not to the public. In those days even if the public was to approach courts for relief, the courts' hands were tied by the principle that they could not interfere with executive action unless gross unreasonableness was alleged.

A professional public service requires ethical, open and accountable conduct towards the public by all organs of state.[738] These are basic values for achieving a public service envisaged by the *Constitution*, which requires the state to lead by example. In this case, the state failed to do so.

The Court held that the remissness by the respondents should not be countenanced:[739]

> In this constitutional era, where the Constitution envisages a public administration, which is efficient, equitable, ethical, caring, accountable and respectful of fundamental rights, the execution of public power is subject to constitutional values.

According to the Court, section 195 reinforces these constitutional ideals. It contemplates a public service in the broader context of transformation as envisaged in the *Constitution* and aims to reverse the disregard, disdain and indignity with which the public in general had been treated by administrators in the past. Section 195 envisages that a public service reminiscent of that era has no place in our constitutional

---

735 Para 70.
736 Para 71.
737 Footnote 81.
738 Para 71.
739 Para 71.

democracy and must be discouraged.[740] In that context, the conduct of the respondents was indeed contrary to sections 1 and 195 of the *Constitution.*

In *Matatiele Municipality v President of the Republic of South Africa,*[741] legislative enactments[742] altered the boundaries between the provinces of KwaZulu-Natal and the Eastern Cape, with the effect that the area of the Matatiele Local Municipality was transferred from KwaZulu-Natal to the Eastern Cape; new municipal boundaries were consequently created.[743]

One of the issues before the Court was whether the Demarcation Board, the authority determining municipal boundaries, was independent of outside influence. The Court stated that the independence of the Board is crucial to constitutional democracy.[744] One of the founding values of our constitutional democracy is "a multi-party system of democratic government, to ensure accountability, responsiveness and openness".[745]

The Court stated that this founding value had to be given expression at the level of national, provincial and local government. Therefore, one of the objects of local government was to provide democratic and accountable government for local communities.[746] The purpose of section 155(3)(b)[747] was "to guard against political interference in the process of creating new municipalities".[748] The Court held that if municipalities were to be established along party lines or if there was to be political interference in their establishment, this would undermine a multi-party system of democratic government. A deliberate decision had therefore been made to confer the power to establish municipal areas on an independent authority.

---

740 Para 72.
741 2006 (5) SA 47 (CC).
742 *Constitution Twelfth Amendment Act* of 2005 and the *Cross-boundary Municipalities Laws Repeal and Related Matters Act* 23 of 2005.
743 Para 1.
744 Paras 39-41.
745 Section 1(d) of the *Constitution.*
746 Section 152(1)(a) of the *Constitution.*
747 Section 155(3)(b) provides that national legislation must establish criteria and procedures for the determination of municipal boundaries by an independent authority.
748 *Executive Council, Western Cape Legislature v President of the Republic of South Africa* 2000 (1) SA 661 (CC) para 50.

The Court found that it was clear that the purpose of the *Constitution Twelfth Amendment Act of 2005* (hereafter the *Amendment Act*) was to re-determine the geographical areas of the nine provinces of the Republic.[749] The *Amendment Act* therefore had the effect of re-determining the boundaries of the Sisonke and Alfred Nzo District Municipalities.[750] The applicants contended that Parliament could not do this because it amounted to performing the functions that vest in the Board in terms of section 155(3)(b). The issue that arose from the applicants' contention was the following: Did Parliament, in the exercise of its constitutional authority to redefine provincial boundaries, have the authority to alter municipal boundaries? The Court answered the question in the negative, stating that in altering provincial boundaries the *Amendment Act* did not usurp the powers conferred upon the Municipal Demarcation Board by section 155(3)(b) of the *Constitution* and was therefore not inconsistent with the *Constitution* on that ground.[751]

In a concurring judgement, Sachs J was critical of the paucity of information from the government as to the objectives intended to be served by the relocation of Matatiele from KwaZulu-Natal to the Eastern Cape.[752] He stated:[753]

> Our country has moved a long way since Stratford CJ said that "Parliament may make any encroachment it chooses upon the life, liberty or property of any individual subject to its sway, and that it is the function of courts of law to enforce its will". For a decade, we have now lived in a constitutional democracy in which all power, whether legislative, executive or judicial, has had to be exercised in keeping with the Constitution.

He quoted approvingly from *S v Acheson*,[754] where Mahomed AJ said:

> The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the Constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion.

---

749 *Matatiele* para 46.
750 Para 48.
751 Para 85.
752 Para 95.
753 Para 96.
754 1991 (2) SA 805 (NmHC) para 813.

Sachs J stated that the spirit of the *Constitution* was not a ghostly presence that attaches itself to the text.[755] Rather, it was immanent in the text itself,[756] which clearly established the structures, overall design, above all the fundamental values of the *Constitution* as set out in its section 1.[757] These fundamental values set positive standards with which all law must comply in order to be valid. A founding value of particular relevance is that of a multi-party system of democratic government to ensure accountability, responsiveness and openness.[758] The *Constitution* required candour on the part of government. What was involved was not simply a matter of showing courtesy to the public and to the courts, desirable though that always is. It was a question of maintaining respect for the constitutional injunction that our democratic government be accountable, responsive and open.[759]

In *Makwickana v Ethekwini Municipality*[760] the Court found that respect by the authorities for the rule of law is crucial for a defensible and sustainable democracy.

Malherbe and Van Eck state that it is evident that existing control mechanisms have not prevented the state from acting outside the scope of the *Constitution* and have not ensured state compliance with its constitutional and legal duties. They argue that –[761]

> [i]t is essential in a democracy that the state shall comply with the provisions of the Constitution and the law. The main objective of the Constitution is to structure the state and the way in which the governing function is performed. The Constitution regulates not only the authority of the state; it also controls the exercise of that authority. It is the primary mechanism to prevent the state from abusing its authority. State compliance with the Constitution goes a step further, as the Constitution also ensures that the state remains true to the democratic principles enshrined in the Constitution. Should the state act outside the boundaries of the constitution, the state runs the risk of eroding the principles of democracy on which the Constitution is

---

755 Para 98.

756 *Premier, KwaZulu-Natal v President of the Republic of South Africa* 1996 (1) SA 769 (CC) para 47.

757 Section 1 provides as follows: "The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. (b) Non-racialism and non-sexism. (c) Supremacy of the *Constitution* and the rule of law. (d) Universal adult suffrage, a national common voter's roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

758 *Matatiele* para 99.

759 Para 107.

760 2015 (3) SA 165 (KZD) C 2015 (3) SA para 78A.

761 Malherbe and Van Eck 2009 *TSAR* 214.

> founded. To ensure the sustainability of democracy in South Africa, it is imperative that the state acts in accordance with the Constitution and in doing so, upholds democracy itself.

In *Van Niekerk v Pretoria City Council*,[762] the Court discussed the effect of section 32 of the *Constitution*, which deals with the right of access to information, on the right to ethical, open litigation.[763] The Court held the following:

> In my view, section 23 entails that public authorities are no longer permitted to play possum with members of the public where the rights of the latter are at stake. Discovery procedures and common-law claims of privilege do not entitle them to roll over and play dead when a right is at issue and a claim for information is consequently made. The purpose of the Constitution as manifested in section 23, is to subordinate the organs of the state, including municipal authorities, to a new regime of openness and fair dealing with the public.

The Supreme Court of Appeal has similarly characterised problems the applicants encountered with the Department of Social Development as reflecting "a contempt for people and processes" that is not in line with South Africa's constitutional order. The Court declared that the Department's conduct "misuses the mechanisms of the law, which it is the responsibility of the courts to safeguard".[764] Amit states that in such circumstances judicial intervention is essential in order to vindicate the rule of law by making certain that exercises of power accord with the rights found in the *Constitution.*[765]

Amit describes instances when the Department of Home Affairs (DHA) has acted in blatant defiance of the court process.[766] In *Bakamundo v Minister of Home Affairs*,[767] Lawyers for Human Rights (LHR) brought legal proceedings against the DHA because the detention of the applicant was unlawful. Two days before the Court hearing, while the Department's attorneys were engaged in settlement negotiations with LHR, the DHA deported the applicant. The Court later found that the applicant had been illegally deported, in violation of the non-refoulement principle, and instituted constructive

---

762 1997 (3) SA 839 (T) para 850.
763 Du Plessis, Penfold and Brickhill *Constitutional Litigation* 5.
764 *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza* [2001] ZASCA 85 para 19.
765 Amit 2011 *SAJHR* 11.
766 Amit 2011 *SAJHR* 19.
767 (SGHC) unreported case no 17271/2009 (12 May 2009).

contempt proceedings against the DHA for interfering with the Court process. Amit describes the tactic of the DHA as follows:[768]

> Despite seemingly strong laws advancing asylum-seeker and refugee rights, DHA officials have chosen to interpret the law in a manner that limits these rights. The department's approach suggests that it does not feel bound by a strong legal precedent that pre-determines and bounds its actions. Instead, it has offered various legal interpretations developed to suit its needs in a particular case. Some of these changing positions skirt the doctrine of estoppel, which, in general terms, precludes a party from asserting a position that contradicts one it has previously put forth.

This indicated that the DHA did not feel bound by the law, but instead acted according to what it deemed to be "necessary and justifiable", irrespective of whether such necessity accorded with the law.[769]

Officials of the DHA have even turned to spurious charges to justify the continued detention of asylum seekers[770] and persisted in lodging peripheral and unfounded allegations in an effort to dismiss affidavits, responded to legal challenges by attacking the lawyers who bring these cases, without addressing the legal arguments.[771] Officials even argued that LHR staff who depose to affidavits lack standing and may be acting improperly or even illegally.[772]

Section 9(1) of the *Constitution* states that everyone is equal before the law and everyone has the right to equal protection and benefit of the law. However, is there equality before the law and equal protection and benefit of the law when the average citizen engages in litigation against an organ of the state? Little examines the circumstances where a state joins as a party to litigation in the United States of America and describes it as follows:[773]

> A state is a subsidised political plaintiff, driven by interest groups and ideology and its officers' political ambitions; it can afford to bring a weak case and pursue it more vigorously than could any private plaintiff. When the state takes over, the operation of partisan interests and ideologies must be taken into account, as must indifference to

---

768 Amit 2011 *SAJHR* 21.
769 Amit 2011 *SAJHR* 24.
770 *AS v Minister of Home Affairs* (SGHC) unreported case no 101/2010 (12 January 2010).
771 *Zimbabwe Exiles Forum v Minister of Home Affairs* [2011] ZAGPPHV 29
772 Amit 2011 *SAJHR* 25.
773 Little 2001 *Conn. L Rev*. 1168.

> the costs of litigation, a zealous plaintiff will be less inhibited than a risk-neutral plaintiff and will act as if the odds of success are higher than an objective, risk neutral appraisal would show them to be.

Little goes further and state that the remedies and enforcement powers available to the state as litigant are simply not available to the private litigant. The same scenario is playing out in South Africa. The state as litigant is in a more powerful position than the average litigant finds him- or herself in. Organs of state usually have access to more information and funds than their opponents do. This enables the state litigant to drag a case through the court for years, indifferent to the cost incurred. After all, a cost order against an organ of the state is paid for by the taxpaying public.

A case in point is *President of the Republic of South Africa v M & G Media Limited*.[774] In this case, the respondents sought the release of Khampepe-Moseneke report on the legality of the 2005 elections in Zimbabwe. It included two appearances in the High Court, two appearances in the Supreme Court of Appeal and one appearance in the Constitutional Court. The process dragged on for a period of twelve years despite the courts holding that the arguments that the applicant relied on were disingenuous and untrue. Lawyers for the respondent stated before the release of the report that a concomitant risk is that state officials will be inclined to evade accountability simply by refusing access to a record and then dragging the matter through the courts until the issue becomes moot.[775] Mootness in this context refers to the principle that a matter is not justiciable by the court if it no longer presents an existing or live controversy or the prejudice or threat thereof to the party no longer exists.[776]

The organ of state may therefore abuse the court process by dragging out the proceedings until their adversary gives up, runs out of money or until the matter before the court no longer presents an existing controversy or a threat or prejudice to the other party, with the risk that the court may dismiss the matter as moot. When an organ of state engages in such an obstructionist and cynical approach to litigation, it

---

774 2015 (1) SA 92 (SCA).

775 Legalbrief Today *'Constitutional values threatened by Khampepe appeal – lawyer'* No:3626 October 2014, available at http://legalbrief.co.za/story/constitutional-values-threatened-by-khampepe-appeal-lawyer/ accessed May 2016.

776 Du Plessis, Penfold and Brickhill *Constitutional Litigation* 39.

does not do justice to the constitutional notion of equality before the law nor to the notion of equal protection and benefit of the law. Furthermore, it prevents the realisation of constitutional rights that is the object of the litigation in many cases. In order to level the playing-field of litigation, it is important that government departments be held to a stricter set of rules during court proceedings than their citizen opponents.

Du Plessis *et al* argue that sections 7(2)[777] and 34[778] of the *Constitution* oblige the government litigant to respect the rights contained in them by ensuring that the matter is adjudicated on the correct facts. The courts have put it beyond doubt that it is a duty that the state should not take lightly, including by making adverse cost orders when the state failed to comply with this duty.[779]

The state's failure to fulfil its constitutional duties is unacceptable in a constitutional democracy such as South Africa. Such failure by the state challenges the bedrock of the *Constitution* and endangers democracy itself. It follows from the great number of cited cases and the displeasure the courts expressed with government litigants that the state and state litigants persist in flouting constitutional duties. This strategy by state officials constitutionally limits the positive application of strategic litigation and restrains the realisation of constitutional rights. The state litigant then does not act as it is constitutionally obligated to do; it is not the model litigant.

The current practice of curing vexatious proceedings with a punitive cost order is clearly not effective when the state, "clutching the unlimited public purse", is the offending party.[780] Adverse cost orders against the state punish the innocent taxpayer. Therefore, there is a need in South African law of civil procedure for a set of guidelines or principles with which the government litigant has to comply. The guidelines are essential for two reasons. Firstly, the state has much more access to funds, information and legal representation than the average litigant. This is contrary to the right to equality contained in section 9 of the *Constitution.* Secondly, there is a pressing need

---

777 The state must respect, promote and fulfil the rights in the Bill of Rights.

778 Right to access to courts.

779 *Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T) and Du Plessis, Penfold and Brickhill *Constitutional Litigation* 6.

780 *Fose v Minister of Safety and Security* 1997 (3) SA 789 (CC) para 87.

for organs of state to comply with positive constitutional duties. Such principles or guidelines must be aligned with section 1, read with section 195, of the *Constitution.* This would allow the courts to test whether the litigants have complied with their constitutional duties. Levelling the litigation playing-field would lead to fairness in litigation against state actors. It would also bring greater clarity for legal representatives of the state about the legality of instructions taken from state institutions. It is submitted that such guidelines would allow lawsuits to be settled more quickly and fairly, and would give more clarity to government officials about the correct way to conduct litigation when instructing state legal representatives. These guidelines would assist the state litigant to be the model litigant. The guidelines are developed and discussed in chapter 6 of this work.

2.9 Conclusion

The advent of the constitutional era brought significant changes to the South African law of civil procedure by expanding the duties and powers of the courts. The *Constitution* changed the structure and jurisdiction of the courts and granted more power to the courts, including the power of judicial review. This brought about changes to the traditional concept of litigation in South Africa. The pre-constitutional concept of litigation is one of a lawsuit that is generic, retrospective and confined to the parties of the case. Although such traditional litigation still reaches the courts, the post-constitutional concept of litigation has shifted from lawsuits enforcing private rights and obligations to lawsuits challenging constitutional or statutory policy or orders.[781] Therefore, the harm alleged is often diffused and not limited to a clearly identifiable right and the relief required is often forward-looking and general in application, affecting a wide range of people.

The post-constitutional concept of litigation sets the tone for strategic litigation in which litigants are able to enforce constitutional values, expose government corruption and influence and shape government policy. Because of the far-reaching consequences of the judgment in such a case, the litigation is often used this way to produce rapid and

---

[781] Para 2.2.2 above.

comprehensive social transformation. The fact that litigants, lawyers and judges induce social change in this way has often been criticised.[782] The court, as the weakest branch of government, has no power or ability to enforce the implementation of its orders. Therefore, the courts often have their orders frustrated at the implementation stage. The South African courts have stressed that the constitutional obligations imposed on the state will be monitored by the courts. The court will therefore instruct the government to comply with its constitutional obligations, but will leave the realisation of these obligations to the state.[783] These obligations are, however, not absolute or unqualified. An obligation often rests on the state to take reasonable legislative and other measures to achieve the progressive realisation of the right within the resources available to it. Such measures will be evaluated by the courts on a case-by-case basis.

The judiciary is institutionally suited for the task of judicial review it assumes in strategic litigation. The lack of political pressure from the electorate allows the courts to make unpopular decisions that are based on constitutional interpretation, allowing politicians to escape blame from the electorate.[784] The structural and institutional advantages of the judiciary to adjudicate on strategic litigation allow the courts to play an important role in shaping social justice in South Africa. When a litigant approaches the courts, various procedural hurdles can influence the success of the case. The litigant must choose what cause of action to use and must determine if the case is justiciable.

When bringing a lawsuit in South Africa, the plaintiff must set out the cause of action on which he or she relies to prove his or her claim. A cause of action is a set of facts giving rise to a claim recognised in law. In strategic litigation, the cause of action can be derived from the common law, statutory law or the *Constitution.* The litigant may often have more than one possible cause of action to rely on. If a right in the Bill of Rights has been breached or threatened, the litigant can approach the court relying on the constitutional guarantee of the protection of that right. In other words, the plaintiff

---

782 Para 2.2.3 above.
783 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).
784 *S v Makwanyane* 1995 (3) SA 391 (CC).

then relies on a constitutional cause of action. The breach may also give rise to a delict in terms of the common law. The common law therefore also provides a remedy for the plaintiff to use. The same occurs when the state has legislated to give effect to the realisation of a right in the Bill of Rights.[785] Therefore, there is more than one possible cause of action available for the plaintiff to employ. The Constitutional Court has found, however, that the availability of different remedies does not create a parallel system of laws. The court held that, where possible, any case, civil or criminal, should be heard without reaching a constitutional issue.[786] The courts therefore subscribe to the principle of subsidiarity, which means that if there is an adequate private-law remedy, whether in common law or statute, that vindicates the right, it should be followed. The courts, therefore, have stated clearly that there is no parallel system of laws in place in South Africa.

The *Constitution* imposes positive duties on the state to respect, protect, fulfil and promote the rights in the Bill of Rights.[787] Organs of state must also assist and protect the courts to ensure the independence and effectiveness of the courts.[788] This places a positive obligation on the state to place all relevant and material evidence before the court when the state is a party to litigation.[789]

There is a constitutional injunction on the government to be accountable, responsive and open.[790] The courts require candour from the government. Public administration must be governed by the democratic values and principles enshrined in the *Constitution*,[791] including professional ethics, accountability, transparency and fairness. This principle applies to the administration of every sphere of government, organ of state and public enterprise.[792] The *Constitution* implies a social contract between the

---

785 For example, the *Promotion of Access to Information Act* 2 of 2000, which gives effect to section 27 of the *Constitution.*
786 *S v Mhlungu* 1995 (3) SA 867 (CC).
787 Section 7(2) of the *Constitution.*
788 Section 165(4) of the *Constitution.*
789 Du Plessis, Penfold and Brickhill *Constitutional Litigation* 4.
790 *Matatiele Municipality v President of the Republic of South Africa* 2006 (5) SA 47 (CC).
791 Section 195(1) of the *Constitution.*
792 Section 195(2) of the *Constitution.*

state and its citizens.[793] It contracts, instructs and directs the state's powers and prevents their abuse. It is therefore imperative that the state complies with its constitutional duties. However, the state often fails to comply with constitutionally imposed duties. The courts have frequently expressed their displeasure at the conduct of the state, for instance saying it acted "as though it is at war with its own citizens".[794] The courts have also held that remissness of the state to comply with constitutional duties should not be tolerated.[795] The *Constitution* contains fundamental values that set positive standards with which all law and conduct by the state must comply, also when the state engages in litigation. These fundamental values therefore set out how the organ of state ought to behave before, during, and after litigation. It is vital that organs of state should not be litigating with the intention of winning the case, no matter the tactics employed. Organs of state should be acting in the public interest, according to the *Constitution*. Organs of state should be model litigants.

It is evident that existing control mechanisms have not prevented the state from acting outside the scope of the *Constitution* and have not ensured state compliance with the *Constitution* and the legal duties conferred on it by the *Constitution*.[796] It is furthermore evident that the wide constitutional powers conferred on the courts do not prevail when confronted with organs of state that are systematically ignoring court orders and constitutionally imposed positive duties. The lack of effective control mechanisms to ensure that organs of state comply with constitutionally imposed duties constitutionally limits strategic litigation. Therefore, judicial intervention is essential in order to vindicate the rule of law by making certain that state power is exercised in accordance with the rights in the *Constitution.*[797] Comprehensive guidelines that regulate the conduct of the state litigant are urgently needed in South Africa. The state litigant must be held constitutionally accountable when litigating. The state must be the model litigant. Such guidelines are developed and discussed in the final chapter of this work.

---

793 Malherbe and Van Eck 2009 *TSAR* 210.
794 *Permanent Secretary Department of Welfare, Eastern Cape Provincial Government v Ngxuza* 2001 (4) SA 1184 SCA.
795 *Van Der Merwe v Taylor* 2008 (1) SA 1 (CC).
796 Malherbe and Van Eck 2009 *TSAR* 214.
797 Amit 2011 *SAJHR* 11.

Chapter 3: Strategic litigation as an effective check to prevent the abuse of powers in the context of the doctrine of the separation of powers

3.1 Introduction

> Debates about the proper role and limits of judicial authority in the state are unusually heated, enduring and inconclusive. Talk about judicial review, the democratic deficit, the counter-majoritarian difficulty and the separation of powers matters, because what is at stake is the formal identification of the ultimate forum for political decision-making in a constitutional democracy.[1]

The Supreme Court of South Africa was created as a direct result of the union between the four colonies in Southern Africa: the Cape of Good Hope, Natal, the Orange River Colony and Transvaal. The *South Africa Act*[2] created a single Supreme Court with the Appellate Division at its apex. This presented an excellent opportunity for judicial review in South African legal history. The new Court was unencumbered by legal precedent and the *South Africa Act* failed to lay down the limits of judicial authority.[3] Judges were therefore not bound to an uncritical disposition to governmental actions and legislation. Judicial review was also known in South Africa. The *Constitution* of the Orange River Colony entrenched several rights that required a large majority of the *Volksraad* to amend,[4] and the judges of the former South African Republic (Transvaal) attempted to follow the lead of the American legal system by declaring invalid particular legislative procedures used by the *Volksraad*. The Roman-Dutch legal tradition of South African law also gave greater prominence to the concept of justice and less to the will of the legislature.[5]

At its establishment, the South African Constitutional Court found itself in the same and even more powerful position than the Appellate Division in 1910. The Court was

---

1 Corder *Legal* 2004 *Studies* 253.
2 South Africa Act, 1909.
3 Corder *Judges at work* 8.
4 Section 20 guaranteed the right to peaceful assembly, s 58 equality before the law and s 60 the right to property.
5 Corder *Judges at work* 9-10.

unencumbered by legal precedent, and, in addition, the 1996 *Constitution*[6] made special provision for its powers of review.[7] The *Constitution* has since its adoption laid the legal foundation on which the social and political order in South Africa is founded. It lays down the principles of democratic governance, and establishes and defines the powers and functions of governmental institutions, as well as the values that underpin the democracy.

Constitutional Principle VI, of the constitutional principles negotiated during the Multi-Party Negotiating Process in 1993 and annexed to the *Interim Constitution*, provided the following:

> There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

In the 1996 *Constitution* there is no express statement as to the separation of powers; it is however implicit in the document itself.[8] Although the Constitutional Court on numerous occasions indicated a commitment to maintain the doctrine of the separation of powers, it has not addressed the issue of dominant-party democracy or the overconcentration of power in institutions.[9]

The dominance of the ruling party and the partial fusion of the legislature and executive branches of government in South Africa have left the judiciary as the only effective check on the abuse of power by the other branches of government. This gives rise to tension between the courts constitutionally mandated to uphold the *Constitution* and a government espousing the majoritarian principle of government.

---

6 *Constitution of the Republic of South Africa*, 1996.

7 Section 165(2) states 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; s 167(5) provides that the Constitutional Court makes the final decision about the constitutionality of any Act or executive decision.

8 Chapters 4 to 8 of the *Constitution* provide for a clear separation of powers between three spheres of government. Section 43 vests the legislative authority of the Republic in the national sphere in Parliament and in the provincial sphere in the provincial legislatures. Sections 85 and 125 vest the executive authority of the Republic in the President and of the provinces in the Premiers, respectively. Section 165 vests the judicial authority in the courts.

9 Choudhry 2009 *Constitutional Court Review* 34.

Strategic litigation allows people, groups and political parties to influence and direct government policy between elections. An executive-leaning judiciary stacks the odds against the litigant challenging executive decisions in the courts, which compromises the avenue for participatory democracy through strategic litigation. The bias or perceived bias of judicial institutions may cause a "chilling effect" on individuals and organisations wishing to enforce constitutional rights.

This chapter analyses the nature of the doctrine of the separation of powers in South Africa and the effect of the hybrid parliamentary form of government on this doctrine. This analysis starts with an investigation into the historic development of the doctrine of the separation of powers. A limited legal comparative element is employed to investigate the application of the doctrine in South Africa, the United States of America and some European countries. The tension between the different branches of government is explored, attention being given to the standard of judicial review employed by the courts and its effect on strategic litigation. The independence of the judiciary and judicial institutions is investigated, especially with regard to adverse executive influence on the judiciary and judicial institutions.

3.2 The development of the doctrine of the separation of powers and its purpose

3.2.1 Historical development of the doctrine of the separation of powers

3.2.1.1 Early philosophers on the concept of the state

In ancient Greece, philosophers articulated different ideas about the "ideal" state.[10] The philosopher Herodotus of Halicarnassus specified in the fifth century BC that there are three forms of state to counteract the absolute exercise of power. He categorised monarchy, aristocracy and democracy as forms of government that counteract absolute power.[11] Aristotle laid down the division of the forms of state that is still regarded as

---

10 Guthrie *The Greek Philosophers* 81.

11 Labuschagne *'n Funksionele en strukturele ontleding van die 1993- en 1996-Grondwet* 23.

correct today.[12] His theory rested on the premise of a supreme organ in which power is concentrated and to which all other organs are subordinate. This division started from the conception of the sovereign, rather than governmental authority. According to Aristotle, democracy was the most acceptable form of government. Democracy suggests a relationship between the citizens and the ruler and means that political control is in the hands of the people, while arbitrary and absolute power is not entrusted to the ruler alone. This meant that people had the right to exercise real control over the government.[13]

According to Labuschagne, the city-states in ancient Greece represented the first model of democracy and they are usually regarded as the purest. Greek philosophers based their ideas of the state on human nature and maintained that only in the state can man attain perfection and find true satisfaction.[14] The state for them was the moral order of the world in which human nature fulfils its end.[15] Plato likened the workings of the state to that of the human body, stating that if one organ of the state could not work sufficiently, all other organs of the state would experience discomfort. Plato argued as follows:[16]

> The best state is that which approaches most nearly to the condition of the individual. If a part of the body suffers, the whole body feels hurt and sympathises altogether with the part affected.

Aristotle declared the state to be an association of clans and village communities in a complete and self-sufficient life. Man is by nature a political animal and Aristotle considered the state to be a product of human nature. According to Aristotle, "the state comes into being for the sake of mere life, but exists for the sake of the good life". The individual therefore requires the state to give him legal existence; excluded from the state, he has neither safety nor freedom.[17]

---

12 Bluntschli *The Theory of the State* Book VI.
13 Labuschagne *'n Funksionele en strukturele ontleding van die 1993- en 1996-Grondwet* 23.
14 Labuschagne *'n Funksionele en strukturele ontleding van die 1993- en 1996-Grondwet* 24.
15 Bluntschli *The Theory of the State* 39.
16 Plato *The Republic* 462, quoted by Bluntschli *The Theory of the Sta*te 39.
17 Bluntschli *The Theory of the State* 40.

Labuschagne writes that in the Greek city-states decisions were taken by citizens eligible for voting at mass meetings. This body of citizens or the *ecclesia,* took all important decisions, including the election of officials. According to Labuschagne, public officials were appointed by casting the lot and in such a way that it represented a broad representation of the civil society. The executive functions were administered by a committee of 500, of which the leader committee changed daily.[18] Aristotle added a further political and moral dimension by asking whether the ruler acts on his own behalf or on the behalf of those he ruled. Labuschagne writes that these early checks and balances against arbitrary authority were followed by the development of practical mechanisms of mixed government aimed at creating a more balanced political system. These mechanisms against arbitrary authority in the early philosophy sowed the seeds for constitutional development that influenced Western political thinking and the development of the modern constitutional state.[19]

Bluntschli posits that the term *mixed government* or *mixed state* may be understood as indicating a state in which the monarchy, aristocracy or democracy may be limited by the formation of an aristocratic senate and a primary representative assembly of the people.[20] Aristotle contributed to the concept of mixed government by arguing that, in a healthy political system, there must be a balance between the different constituencies. According to his theory, this balance would only be achieved if the middle class holds the power, because they are numerically superior and they collectively hold more power than the rich and the poor. This balance would have the effect of strengthening mixed governments.[21]

3.2.1.2 Germanic influence on the development of the state

Montesquieu argued that the birthplace of parliamentary constitutions is to be found in the forests of Germany.[22] According to Bluntschli, the rudimentary beginning of free

---

18 Labuschagne *'n Funksionele en strukturele ontleding van die 1993- en 1996-Grondwet* 24.
19 Labuschagne *'n Funksionele en strukturele ontleding van die 1993- en 1996-Grondwet* 24.
20 Bluntschli *The Theory of the State* 273.
21 Labuschagne *'n Funksionele en strukturele ontleding van die 1993- en 1996-Grondwet* 24.
22 Bluntschli *The Theory of the State* 45; Labuschagne *'n Funksionele en strukturele ontleding van die 1993- en 1996-Grondwet* 25.

representative government which later centuries produced can be found in the primitive forms of government as described by Tacitus, where the Teutonic kings cooperated with local princes and chiefs, on the one hand, and with the greater community of freemen on the other. The Germanic law was not directly derived from the will of the nation. Here the individual claims an inborn right which the state must protect, but which the state did not create, and for which the individual is willing to fight, even against the authority of his own government. Individual freedom was therefore the supreme right, but the individual was required to sacrifice a part of that freedom to the state in order to keep the rest more securely.[23] Bluntschli writes that the Germanic idea of the state respected the independence of private rights more decidedly than any other system of government then in use. The freedom of the person and the family was more assured and extended than in the Roman Empire. He states that the rights of the state were therefore limited by the rights of the individual. Consequently, the Germanic public law admitted no absolute power of the state, even in matters where the community was affected. Bluntschli, on the Germanic people, stated: "Before obeying they wish to deliberate and vote". Their *Stände* were a political power with which the king had to unite in order to make laws. However, the idea of the state as a collective was unknown to them. The concept of state was embodied in a king, who was at the head of the courts of justice and of the assembly of people, the *Gau*, the *Zenf* and the *Volksgemeinde*. These sometimes strengthen and sometimes limit one another, thus the whole community experience freedom. These ideas of the state did not show themselves in the form of a philosophy or a theory, rather they could be found in practice.[24]

According to Labuschagne, this development of state institutions in Germania is important because it shows traces of state diversity, where power is distributed among various actors. The composition of the tribal meetings (folk-moot) and the chosen kingship already contain the basic elements of state diversity.[25] Tacitus writes that the king's power was neither unlimited nor arbitrary. Minor matters could be disposed of by

---

23 Bluntschli *The Theory of the State* 45.
24 Bluntschli *The Theory of the State* 45.
25 Labuschagne *'n Funksionele en strukturele ontleding van die 1993- en 1996-Grondwet* 23.

the chiefs; important matters were deliberated before the assembly of people where the popular vote settled the matter. He states that this assembly of people was held regularly and on fixed days and not at the whim of the king or chief and it was before the assembly of people that criminals were charged and tried. The king, chiefs and generals might not execute, bind or even strike a delinquent. That power was reserved for the priests after deliberation by the assembly of people.[26] There was therefore a subscription to the concept that political power had to be limited by established institutions and prescribed procedures.[27] In Tacitus's writing *circa* AD 98, we see the basic conception of a legal state (*Rechtsstaat*) in Germania. This idea of a legal state implies that individual rights could not be affected without a legal process and the exercise of government power is constrained by law.[28] It contained the first signs of specialised government entities with some form of separate powers for these institutions.

3.2.1.3 Separation of powers and the state

Montesquieu, the 18th century French social and political philosopher, argued that man has a natural propensity to misuse political power entrusted to him. Because of man's propensity to abuse power, every form of government will fall into despotism if there are no restrictions placed on the state. Montesquieu's book, *Spirit of the Laws*, is considered one of the great works in the history of political theory and jurisprudence, and it inspired the Declaration of the Rights of Man and the Constitution of the United States.[29] Montesquieu explained the division of power in states as follows:[30]

> Republican government is that in which the people as a body, or only a part of the people, have sovereign power; monarchical government is that in which one alone governs, but by fixed and established laws; whereas, in despotic government, one alone, without law and without rule, draws everything along by his will and his caprices.

---

26 Tacitus *Germania* VII-XII.
27 Labuschagne *'n Funksionele en strukturele ontleding van die 1993- en 1996-Grondwet* 24.
28 Schmitt *The Concept of the Political* Chapter 7.
29 Labuschagne *'n Funksionele en strukturele ontleding van die 1993- en 1996-Grondwet* 23.
30 Montesquieu *The Spirit of the laws* 25.

Montesquieu described the fundamental maxim of the republican form of government "as government where officials are elected by the people". In order for the people to trust the government, they must elect its members, either choosing the members themselves as in Athens, or establishing some magistrate to elect them as was occasionally the practice in Rome. Writing on the English system of government, he states that there are three sorts of powers: legislative power, executive power over the things depending on the right of nations, and executive power over the things depending on civil right. He argues as follows on the principle of the separation of powers:[31]

> When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically. Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge could have the force of an oppressor.

He maintained that to promote liberty, these three powers must be separate and acting independently, and said:[32]

> All would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised these three powers: that of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals.

Montesquieu further argues that judges must be elected from the population so that the accused does not suppose that he has fallen into the hands of people inclined to do him violence.[33] There must be tribunals to arbitrate disputes and make decisions and:[34]

> These decisions should be preserved; they should be learned, so that one judges there today as one judged yesterday and so that the citizens' property and life are as secure and fixed as the very Constitution of the state.

Montesquieu writes that it is a great drawback in a monarchy for the ministers or the princes themselves to judge contested suits. He further makes it clear that it is the

---

31 Montesquieu *The Spirit of the laws* 174.
32 Montesquieu *The Spirit of the laws* 173-174.
33 Montesquieu *The Spirit of the laws* 158.
34 Montesquieu *The Spirit of the laws* 175.

prince as the executive who makes the law, but that others should enforce the law. Political liberty is found to be present only when power is not abused, and so that one cannot abuse power, power must check power by the arrangement of things.[35] This can be achieved if voting is done in public and the law comes from the people. A constitution must be of such a nature that no one will be constrained to do the things the law does not oblige him to do or be kept from doing the things the law permits him to do.[36] Abusive state power can thus be curbed by writing provisions into a constitution with the aim of limiting or defining the power of the state.

John Calvin favoured a system of government that divided political power between democracy and aristocracy (mixed government). In order to reduce the danger of the misuse of political power, he suggested setting up several political institutions, which should complement and control each other in a system of checks and balances. In this way Calvin and his followers resisted political absolutism and furthered the growth of democracy. Calvin's aim was to protect the rights and the well-being of ordinary people.[37]

Mojapelo writes that Montesquieu's eighteenth-century thinking has served as a sound and brilliant practical guideline for the prevention of the concentration of power and its almost inevitable abuse in the hands of one individual or institution. He states that it is inherently impossible to achieve an absolute separation of powers. This is where there is room for legitimate variation in accordance with the peculiar circumstances of each case.[38] Montesquieu's work had wide political impact, exporting the principle of the separation of powers to an international audience.[39]

Montesquieu's theory was influenced by an idealised but erroneous conception of the style of government in England.[40] The British system is founded on Acts of Parliament and judicial decisions, on political practice and the common law. Thus, the executive,

---

35 Montesquieu *The Spirit of the laws* 155.
36 Montesquieu *The Spirit of the laws* 14.
37 Olmstead *History of Religion in the United States* 9-10.
38 Mojapelo *The doctrine of separation of powers (a South African perspective)* 45.
39 Labuschagne *'n 'Funksionele en strukturele ontleding van die 1993- en 1996-Grondwet* 39.
40 Devenish *Commentary on the South African Constitution* 12.

judiciary and legislative branches were not completely independent of each other.[41] According to Bluntschli, England was considered a mixed state in which rule is divided between three supreme powers: the King, the House of Lords and the House of Commons, and that this English state has been regarded as perfect, just because it is the ideal representation of a mixed form of government. He further states that it is an error to suppose that the English constitution has arisen from a division of the governing power. Bluntschli argues that it was the gradual limitation of the monarchy that gave the state its special form. This limitation was first enacted by a powerful aristocracy and later by the admission of democratic elements.[42]

3.2.1.4 Development of the doctrine of the separation of powers in England

According to Wade and Bradley, the first attempt to introduce some form of devolution of power in England was through the Magna Carta, enacted in 1215. It did not, however, set out the doctrine of the separation of powers as it is known today. The Magna Carta was a statement of grievances brought by a union of important classes against the king.[43] Wade and Bradley write that the Magna Carta set out the rights of the various classes and the principle that the church was to be free from the state. It also contained the famous clauses that no person should be punished except by the judgment of his or her peers or the law of the land, and none should be denied justice. The Magna Carta for the first time placed limitations on the absolute power of the monarch. Henceforth the monarch who overstepped his or her powers would be confronted with a constitutional document embodying the principle of the rule of law.[44] This constitutional development was the start of the supremacy of the law in England. The supremacy of the law was an important development in combating the arbitrary use of power by rulers. Carroll, on the importance of the rule of law, argues as follows:[45]

---

41 Wade and Bradley *Constitutional and Administrative law* 5.
42 Bluntschli *The Theory of the State* 274.
43 Wade and Bradley *Constitutional and Administrative law* 5.
44 Wade and Bradley *Constitutional and Administrative law* 14.
45 Carroll *Constitutional and Administrative law* 40.

> The rule of law is neither a rule nor a law. It is now generally understood as a doctrine of political morality, which concentrates on the role of law in securing the correct balance of rights and powers between individuals and the state in free and civilised societies.

In 1620, a group of English separatist Congregationalists and Anglicans, who later became known as the Pilgrim Fathers, founded Plymouth Colony in North America. Enjoying self-rule, they established a bipartite democratic system of government. The "freemen" elected the General Court, which functioned as legislature and judiciary and which in turn elected a governor, who together with his seven "assistants" served in the functional role of providing executive power.[46]

According to Wade and Bradley, the revolution of 1688 brought about the downfall of James II (of England) and James VII (of Scotland). The English and Scottish Parliaments restored the monarchy in the two kingdoms on terms laid down by the *Bill of Rights* and *Claim of Rights*, respectively. This laid down the foundations for the modern Constitution by disposing of the extravagant rights of the Stuarts to rule by right. It contained the following important provisions:[47]

(a) The power of suspending laws or the execution of laws by regal authority without the consent of Parliament is illegal;

(b) the free election of members of Parliament; and

(c) freedom of speech in Parliament and proceedings in Parliament cannot be impeached or questioned in a court of law.

The Bill of Rights limited the executive and legislative authority of the monarch and he or she therefore could not decide, without permission of Parliament, which laws to enforce or not. It also meant that the crown had to work more closely, and consult more often, with Parliament. In 1689, John Locke penned the Second Treatise of Civil

---

46 Christopher *Plymouth Colony Legal Structure* Histarch.uiuc.edu.

47 Wade and Bradley *Constitutional and Administrative law* 14.

Government in which he set out the theory of limited government, which justified the constitutional developments that took place in England.[48]

The *Act of Settlement* passed in 1700 by the English Parliament contained the provisions that judges' commissions should be made *quamdiu se bene gesserint*,[49] their salaries guaranteed and established, and that they may only be lawfully removed after addressing both Houses of Parliament.[50]

According to Koopmans, the British form of government has shown a gradual evolution into its present system. It slowly transformed the king-as-ruler into the king-in-Parliament; it put the absolute and central powers of the king into the hands of Parliament.[51] The British form of government, which would later become known as a system of parliamentary sovereignty or the Westminster system, has had a huge effect on the systems of government of especially British colonies. This leaves the question: What is the purpose and limits of the doctrine of the separation of powers and how does it relate to strategic litigation?

3.2.2 Purpose and limits of the doctrine of the separation of powers

The main objective of the doctrine of the separation of powers is to prevent the abuse of power in the different spheres of government. According to Gildenhuys and Knipe, government enjoys legislative, executive, judicial and administrative authority in the modern state. The legislative function involves the enactment of general rules determining the structure and power of public authorities and regulating the conduct of citizens and private organisations. They write that the legislature is given the authority to make laws pertaining to the common affairs of nations. The task of the executive is to execute the orders of the legislature as contained in the laws made by the legislature. Gildenhuys and Knipe continue that the mandate of the judiciary is the interpretation of laws and adjudication on their execution and on the contravention of

---

48 Labuschagne *'n Funksionele en strukturele ontleding van die 1993- en 1996-Grondwet* 23.

49 A clause found in grants of certain offices (as that of judge or recorder) to secure the office holders in their posts so long as they are not guilty of abusing them.

50 Wade and Bradley *Constitutional and Administrative law* 15.

51 Koopmans *Courts and Political Institutions* 19.

such laws by the public. Under this model, the state is divided into branches, each with separate and independent powers and areas of responsibility so that the powers of one branch are not in conflict with the powers associated with the other branches.[52]

According to Montesquieu, it is the natural inclination of humanity to misuse authority granted. "Unlimited power will corrupt"[53] or, in the words of Lord Acton, "Absolute power corrupts absolutely".[54] When there is no diversification of power between the structures of the state, a concentration of political power will follow. Sir William Blackstone referred to this phenomenon as follows: "If the right of making and enforcing laws is vested in the same man, and whenever these two powers are united, there can be no public liberty."[55]

According to Wade and Bradley, the concept of the separation of powers may mean at least three different things, namely:[56]

(a) the same persons should not form part of more than one of the three organs of government, for example ministers should not sit in Parliament;

(b) one organ of government should not control or interfere with the work of another, for example the legislature should be independent of the executive; and

(c) one organ of the government should not exercise the functions of another, for example ministers should not have legislative powers.

Davis writes that the Bill of Rights is another area where the courts play a major role and sometimes even intrude into the spheres of power of the other branches of government. This requires the judiciary to examine both the procedural and substantive

---

52 Gildenhuys and Knipe *The Organisation of Government* 7.
53 Montesquieu *The Spirit of the laws* 133.
54 Figgis and Laurence *Lord Acton* 1990.
55 Blackstone *Commentaries on the laws of England* Chapter 1.
56 Wade and Bradley *Constitutional and Administrative Law* 53.

elements of legislative and executive decisions and, where such decisions are in conflict with the Bill of Rights, the judiciary has the authority to declare them unconstitutional.[57]

According to Wade and Bradley, the United States contributed to the doctrine of the separation of powers with the principles of checks and balances. This requires that each organ of state be entrusted with special powers designed to keep a check on the exercise of functions by the others so that equilibrium in the distribution of powers may be maintained, although a complete separation of powers is not possible in theory or in practice.[58] In modern legal systems, there will always be some overlap between the different organs of state, but there must be effective checks and balances to prevent the arbitrary exercise of power by the different branches of government.

It is not the exclusive aim of the doctrine of the separation of powers to create separate institutions of government. A primary aim of the development of the doctrine is to prevent the overconcentration of power in a single institution or individual.[59] Machiavelli, a strong exponent of central control in government, preached practical rules for politicians to obtain and hold on to power. Machiavelli insisted that power was more important than ethics and morality.[60] Machiavelli produced his work during the period of absolutism (1485-1789) when the classical ideas of mixed government and democracy were frustrated.[61]

The doctrine of the separation of powers developed as a counterbalance to absolute power and decries the concentration of power in one individual or institution. It is important to note that a primary aim of the principle of the separation of powers is therefore to prevent the overconcentration of power in a single individual or

---

57 Davis *Fundamental Rights in the Constitution* 3-4.

58 Wade and Bradley *Constitutional and Administrative Law* 53.

59 In *Helen Suzman Foundation v President of the Republic of South Africa; Glenister v President of the Republic of South Africa* 2015 (1) BCLR 1 (CC) para 165, the Court stated that the dilution of power possessed by any single person to appoint the head of a directorate (*in casu*, the Head of the Hawks) he desires resonates with the separation of powers and attaches a significant counterweight to the power of the executive and its members.

60 Labuschagne *'n Funksionele en strukturele ontleding van die 1993- en 1996-Grondwet* 28.

61 Labuschagne *'n Funksionele en strukturele ontleding van die 1993- en 1996-Grondwet* 28.

institution.[62] As will be shown below, in the South African constitutional context, the lack of effective checks and balances between the executive and legislative branches and the resulting concentration of political power have opened the door to political activism through strategic litigation to counterbalance the power of the executive. However, unwarranted constitutional limitations on strategic litigation may erode the effectiveness and purpose of the litigation.

3.3 The South African model of the separation of powers

3.3.1 Pre-constitutional parliamentary sovereignty

3.3.1.1 Introduction

The system of parliamentary sovereignty is known as a merger between the executive and the legislative branches of government rather than a model based on the doctrine of the separation of powers. Members of the executive are appointed from among the representatives of the party with the majority in the legislature after a general election. Members of the executive are therefore also represented in the legislative branch. Labuschagne maintains that this has the effect that executive programmes can be conducted effectively from Parliament, but it has the drawback of a fusion between the legislative and executive branches. This places the executive in a very dominant position.[63] Lord Mustill defines the doctrine of the separation of powers in England as follows:[64]

> It is a feature of the peculiar British conception of the separation of powers that Parliament, the executive and the courts have each their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed.

---

62 In *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 CC para 112 the Court stated that the New Text (drawn up by the Constitutional Assembly relying on the Constitutional Principles of the *Interim Constitution*) expressed concern for the over-concentration of power.

63 Labuschagne *'n Funksionele en strukturele ontleding van die 1993- en 1996-Grondwet* 49.

64 *R v Home Secretary, Ex Fire Brigades Union* 1995 2 at 513 and 567.

According the Wade and Bradley, the legislative supremacy of Parliament means that there are no legal limitations on the legislative competence of Parliament. This doctrine consists essentially of a rule that governs the legal relationship between the courts and the legislature, meaning that the courts are duty-bound to apply the legislation made by Parliament and may not hold an Act of Parliament to be invalid or unconstitutional.[65] No court can therefore question the validity of a statute and every law-making body in the country is subject to it.[66] The British Westminster system of parliamentary supremacy was transformed by the decision in 1973 to join the European Union and the introduction of the *Human Rights Act,* 1998,[67] that opened the door to judicial review in Britain.

Dicey, writing on the British parliamentary system in 1885, explained the legislative procedure by defining the collaboration between Parliament and the judiciary. He stated that the sovereignty of Parliament means just this: Parliament under the English Constitution has the right to make or unmake any legislation and no person or body is recognised by the law in England as having the right to override or set aside the legislation of Parliament.[68] According to Koopmans, the success of the doctrine of the sovereignty of Parliament in England is encouraged by English conceptions of jurisprudence, legal theory and philosophy. The positive intellectual climate and the unpopularity of natural law with English philosophers also encouraged the growth of a centralist system of government. British constitutional law served as a model for other countries, in particular when Great Britain was at the height of its powers.[69] The Westminster system of government that is prevalent in Britain was exported to most of the British colonies and South Africa was no exception.

3.3.1.2 Pre-constitutional parliamentary sovereignty in South Africa

During the period 1910 to 1993, the South African government was marked predominately by the dominance of a fused executive and legislature in a parliamentary

---

65 Wade and Bradley *Constitutional and Administrative Law* 65.
66 Koopmans *Courts and Political Institutions* 15.
67 Para 3.4.2.2.
68 Dicey *An Introduction to the Study of the Law of the Constitution* Chapter 1.
69 Koopmans *Courts and Political Institutions* 15-19.

system of government, which survived the introduction of a republican state in 1961.[70] This constitutional arrangement inhibited the separation of powers between the legislature, the executive and the judiciary.[71] The original intention of parliamentary sovereignty as an effective check on the power of the executive was corrupted in South Africa into a means of ensuring the retention of political power by the white inhabitants of the country.[72]

The Union of South Africa was formed in 1910, shortly after the *South Africa Act*[73] was adopted in 1909. The Act had been drafted by the 1908 National Convention, which met on 12 October 1908 and completed its work on 11 May 1909. This Convention settled on the terms and *Constitution* of a governmental, legislative and economic Union. These proposals were transmitted to the British government, which duly prepared a Bill to give effect to these wishes. The Bill was passed by Parliament on 20 September 1909 and on that date King Edward VII of the United Kingdom proclaimed that the Union of South Africa would be established on 31 May 1910. The Act introduced government institutions of British design for the whole of South Africa and provided for a bicameral Parliament consisting of a directly elected House of Assembly and a partly elected and partly nominated Senate.[74] The Cabinet had to enjoy the support of the majority in the House of Assembly and all British conventions applicable to the King, Prime Minister, Cabinet and lower and upper houses were followed more or less unchanged in relation to the corresponding South African institutions.

In 1961 South Africa became a Republic in terms of the *Republic of South Africa Constitution Act*.[75] The most prominent change brought about by the 1961 *Constitution* was the replacement of the British monarch by a ceremonial State President. The

---

70 Venter 2012 *McGill Law Journal* 723.
71 Labuschagne *The doctrine of separation of powers* 1.
72 Venter 2012 *McGill Law Journal* 723.
73 *South Africa Act* 1909.
74 Rautenbach and Malherbe *Constitutional Law* 12.
75 32 of 1961.

existing institutions of the House of Assembly, the Senate and the Westminster system of government were retained intact.[76]

Hoexter writes that during the time of the Westminster system of government in South Africa, judicial review was the primary, and almost the only, significant control of administrative power. The alternative was a set of administrative appeals; the only safeguards in the administrative process were the Auditor-General, and (from 1979) an Advocate-General, neither of which was very effective. The Supreme Court had the inherent power to test delegated legislation and administrative decisions on grounds established at common law.[77] Innes CJ described this common-law jurisdiction as follows:[78]

> Whenever a public body has a duty imposed on it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of duty, this Court may be asked to review the proceedings complained of and set aside or correct them. This is no special machinery created by the legislature; it is inherent in the Court.

Hoexter writes that there are two distinctive models for judicial control of administrative action. The first is the traditional system of parliamentary sovereignty as found in the British government system. A feature of this system is that administrative bodies are subject to supervision by the ordinary courts.[79] The second system is found in French law and other legal systems based on it. In this system, the administrative bodies are subject to supervision by special administrative courts rather than the ordinary courts. Hoexter says that the second system is generally informed by a strict conception of the separation of powers. South Africa has always fitted clearly into the first model: the supervision of the legality of administrative action falls under the jurisdiction of the superior courts, while the task of assessing the merits rests on organs within the executive or the legislature.[80]

---

76 Rautenbach and Malherbe *Constitutional Law* 12-14.
77 Hoexter *Administrative Law in South Africa* 12-13.
78 *Johannesburg Consolidated Investment Co Ltd v Johannesburg Town Council* 1903 TS 111.
79 Hoexter *Administrative Law in South Africa* 60.
80 Hoexter *Administrative Law in South Africa* 60.

The doctrine of parliamentary sovereignty was a fundamental constraint on the powers of the courts. Hoexter states that while the courts had the power to review administrative conduct, Parliament was free to decide what was lawful and what was not. It could simply authorise administrative officials to interfere with people's rights by conferring such wide discretionary powers on the official that it was difficult for the Court to fault the exercise of discretion.[81] Dean described the South African administrative law during this period as follows:[82]

> Administrative law has developed within a system of government which concentrates enormous power 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 a 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.

Venter writes that during this period South Africa was internationally known as a human rights offender. The public law of the country was devoid of any positive recognition of human rights. This created a situation in which the doctrine of human rights was reduced "to either an instrument of oppositional social and political commentary and mobilisation, or an abstract academic and philosophical theme with undertones of wishful thinking about a better public law future".[83]

The advent of the democratic era has brought dramatic change to the South African legal system, including a constitutional dispensation in which the doctrine of the separation of powers is enshrined, a Constitutional Court at the apex of the legal order with wide-ranging powers to review the actions of the legislature and the executive, and a remodelling of the legal system around a dominant Bill of Rights.

---

81 Hoexter *Administrative Law in South Afric*a 13.
82 Dean 1986 *SAJHR* 164.
83 Venter 2012 *McGill Law Journal* 729.

3.3.2 Separation of powers in the Interim Constitution

3.3.2.1 Introduction

The constitutional principle of the separation of powers is an essential feature for modern government. Klug explains that three sets of values in present-day modern governments frame traditional notions of constitutionalism, namely –[84]

(a) federalism, or the spatial divisions of power;

(b) the separation of powers between the different branches of government; and

(c) the notion of constitutional rights.

These values allow different approaches to addressing the problem of limitations on government. South Africa chose the option of a written *Constitution* with the doctrine of the separation of powers entrenched in the document.

In 1993, during the multi-party negotiations, an agreement was reached on the particulars of an interim constitution, the arrangements necessary to ensure free and fair elections, and the establishment of a transitional executive council to supervise the implementation of the *Interim Constitution.*[85] The *Interim Constitution*[86] was assented to on 25 January 1994 and commenced on 27 April 1994. The *Interim Constitution* acknowledged the need to create a new order in which all South Africans would be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens are able to enjoy and exercise their fundamental rights and freedoms.[87]

---

84 Klug *Constituting democracy* 24-25.
85 Rautenbach and Malherbe *Constitutional Law* 16.
86 200 of 1993.
87 Preamble to the *Interim Constitution.*

The negotiating parties agreed that an interim government, established and functioning under the *Interim Constitution*, would govern the country on a coalition basis while a final *Constitution* was being drafted.[88] A National Legislature, elected (directly and indirectly) by universal adult suffrage, would double as the constitution-making body and would draft the new *Constitution* within a given time. The new *Constitution* had to comply with certain guidelines agreed upon in advance by the negotiating parties. An independent arbiter, in the form of a Constitutional Court, had to ascertain and declare whether the new *Constitution* indeed complied with the guidelines before it could be put into operation.[89] The Preamble to the *Interim Constitution* characterised the Constitutional Principles as "a solemn pact" in the following terms:

> And whereas in order to secure the achievement of this goal, elected representatives of all the people of South Africa should be mandated to adopt a new Constitution in accordance with a solemn pact recorded as Constitutional Principles.

The Preamble of the *Interim Constitution* therefore acknowledged the Constitutional Principles to be foundational to the new *Constitution.*

The *Interim Constitution* made express provision for the doctrine of the separation of powers and the independence of the judiciary. Constitutional Principle VI, of the constitutional principles negotiated at the multi-party negotiating process in the early 1990s and annexed to the *Interim Constitution*, provided as follows:

> There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

Constitutional Principle VII of the negotiated principles read as follows:

> The judiciary shall be appropriately qualified, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.

---

88 *In re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 CC para 13.

89 Section 71(2) of the *Interim Constitution* reads as follows: "The new constitutional text passed by the Constitutional Assembly, or any provision thereof, shall not be of any force and effect unless the Constitutional Court has certified that all the provisions of such text comply with the Constitutional Principles referred to in subsection (1) (a)."

The duty to certify whether the final *Constitution* complied with the negotiated Constitutional Principles rested with the newly appointed judges of the Constitutional Court.

3.3.2.2 Certification of the *Constitution*

In certifying the *Constitution*, the Court had to deal *inter alia* with objections regarding the doctrine of the separation of powers, as was required by Constitutional Principle VI of the *Interim Constitution*.[90] This Constitutional Principle dealt with issues that directly or indirectly affected the relationships between the judiciary, on the one hand, and the legislature and executive, on the other. The Court's reasoning will be investigated, as this forms the future basis of the application of the doctrine of the separation of powers in the South African constitutional state.

3.3.2.2.1 Objections regarding the doctrine of the separation of powers

The principal objection was directed at the provisions of the section 47(1)(a) of the *Constitution*,[91] which provides that members of the executive may also be members of the legislatures at all three levels of government. It was submitted that this failure to effect full separation of powers enhanced the power of executive government (particularly in the case of the President and provincial Premiers), thereby undercutting the representative basis of the democratic order.[92]

The objection did not state that there had not been an adequate separation of the judicial power from the legislative and executive power, or that there had not been an adequate separation of the functions between the legislature, the executive and the judiciary. The objection was directed at the fact that members of the Cabinet continued to be members of the legislature and, by virtue of their positions, were able to exercise a powerful influence over the decisions of the legislature. The objection was that this

---

90 *In re: Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 CC.

91 Section 47(1)(a)(i), in terms of which only the President has to leave the National Assembly whereas the Deputy President, Ministers and Deputy Ministers are entitled to remain members. The section contains no provision requiring members of cabinet – other than the President - to resign from their positions in the National Assembly.

92 Para 106.

was inconsistent with the separation of powers and cited as examples to be followed the United States of America, France, Germany and the Netherlands.[93] The Court decided as follows:[94]

> There is, however, no universal model of separation of powers, and in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute. This is apparent from the objector's own examples. While in the USA, France and the Netherlands members of the executive may not continue to be members of the legislature, this is not a requirement of the German system of separation of powers.

Moreover, because of the different systems of checks and balances that exist in these countries, the relationship between the different branches of government and the power or influence that one branch of government has over another, differs from one country to another.[95] The principle of the separation of powers, on the one hand, recognises the functional independence of branches of government, and –[96]

> [o]n the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation.

The Court stated that Constitutional Principle VI required that there should be a separation of powers between the legislature, executive and judiciary. It did not prescribe what form that separation should take. The Court found that constitutional provisions must not be interpreted with technical rigidity. The language of Constitutional Principle VI was sufficiently wide to cover the type of separation required by the New Text.[97] The Court accordingly rejected the objection.

The Court found support for its argument in Australian constitutional law.[98] In the Australian case of *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and*

---

93 Para 107.
94 Para 108.
95 Para 108.
96 Para 109.
97 Para 113; New Text 89: The text drawn-up by the Constitutional Assembly in terms of the Constitutional Principles of the *Interim Constitution.*
98 Para 113.

Meakes v Dignan.[99] Dixon J, dealing with the Australian Constitution, which distinguishes between legislative, executive and judicial powers in much the same manner as does section 47, said: "These provisions, both in substance and in arrangement, closely follow the American model of separation of powers upon which they were framed."

Later in *Victorian Stevedoring*, it was found that –

> [t]he arrangement of the Constitution and the emphatic words in which the three powers are vested by sections 1, 61 and 71 combine with the careful and elaborate provisions constituting or defining the repositories of the respective powers to provide evidence of the intention with which the powers were apportioned and the organs of government separated and described.

The Australian Court thus held that a strict division between the executive and legislature was not practical and re-affirmed that the Australian Constitution supported this view.

It is debatable whether the Court followed the correct route by rejecting the objection based on Australian constitutional law. In Australia, there is little separation between the executive and the legislature, with the executive required to be drawn from, and maintain the confidence of, the legislature.[100] In the *Certification* judgment, the court unfortunately subscribed to a future South African constitutional landscape where the executive branch and Parliament are "fused", with the result that Parliament is unable to function as an effective check on the power of the executive.

In *Executive Council, Western Cape Legislature v President of the Republic of South Africa*,[101] the Constitutional Court was asked for the first time to adjudicate on the principle of the separation of powers. In this case, the legislature delegated the authority to amend a local government Act to the President. The President promulgated the *Local Government Transition Act*[102] transferring the power to appoint and dismiss

---

99 (1931) 46 CLR 73 at 89.

100 The *Commonwealth of Australia Constitution Act* 1900 incorporates responsible government, in which the legislature and the executive are effectively united. This incorporation is reflected in sections 44, 62 and 64 of the *Constitution.*

101 1995 (4) SA 877 (CC).

102 209 of 1993.

Provincial Committee members (responsible for the demarcation and delimitation of the Western Cape into areas of jurisdiction of transitional councils and transitional metropolitan sub-structures for the purposes of the local government elections held on 1 November 1995) from the provincial to the national government.[103] This delegation had the potential for negatively affecting the doctrine of the separation of powers. The executive usurped the power of the provincial legislature.[104]

On appeal the Constitutional Court held that the legislature did not have the competence to delegate its legislative authority to the executive. The Court found that section 37 of the *Interim Constitution* placed legislative authority in the hands of Parliament and that it did not make provision for this authority to be delegated to the executive.[105] The Court argued that this power could be used to introduce contentious provisions into what was previously uncontentious legislation.[106] The Court reasoned that assuming this was done at a time party A had a majority in the Assembly, but not in the Senate, it would be difficult for other parties to secure a resolution of Parliament, which would be needed to invalidate the delegation. It is interesting to note that the Court took into account the overconcentration of power in state institutions in the judgment. Unfortunately, this reasoning was not extended to later cases. The judgment of the Court highlighted the fact that the doctrine of the separation of powers was part of the South African constitutional state and demonstrated that it was willing to hold the executive to account should this principle be breached. The Court also affirmed the supremacy of the Court in constitutional matters.

It is an essential deficit that the principle of the separation of powers was not clarified to a greater degree in the *Interim Constitution* and that the partial fusion between the legislative and executive was not averted. This oversight and the subsequent refusal of the Constitutional Court to contemplate the danger of the overconcentration of powers in state institutions led to the situation in which there still is a hybrid parliamentary system in place with a corresponding concentration of power in the hands of the

---

103 Para 12.
104 Para 48.
105 Para 64.
106 Para 63.

executive.[107] O'Regan declares that a brief review of the South African *Constitution* makes it plain that the various branches of government are not hermetically sealed from one another. In particular, the *Constitution* opted for a model of the relationship between the legislature and the executive modelled more closely on the Westminster system than on the presidential system found in France and the United States.[108] Unfortunately, this weakens the ability of Parliament to function as an effective check on the abuse of power by the executive.

3.3.2.2.2 Objection about the independence of the judiciary

The main objection with regard to the impartiality of the judiciary[109] was centred on[110] the composition and independence of the Judicial Service Commission (hereafter the JSC).[111]

Concerning the JSC, the Court stated that the JSC had a pivotal role in the appointment and removal of judges. It consisted, at the time of the judgment, of the Chief Justice, the President of the Constitutional Court, one Judge President, two practising attorneys, two practising advocates, one teacher of law, six members of the National Assembly, four permanent delegates to the National Council of Provinces, four members designated by the President as head of the national executive, and the Minister of Justice. The practising attorneys and advocates and the teacher of law are to be designated by their respective professions; the Judge President serving on the Commission is to be designated by the Judges President; at least three members of the National Assembly must come from opposition parties; the four delegates of the National Council of Provinces must be supported by the vote of at least six of the nine provinces; and the four presidential appointments are to be made after consultation with the leaders of all the parties in the National Assembly.[112]

---

107 Labuschagne *'n Funksionele en strukturele ontleding van die 1993- en 1996-Grondwet* 218.
108 O'Regan 2005 *PELJ* 125.
109 *In re: Certification of the Constitution of the Republic of South Africa, 1996* (4) SA 744 CC.
110 Para 119.
111 Section 178 of the *Constitution.*
112 Para 120; ss 174 and 178 of the *Constitution.*

The objection stated that Parliament and the executive were over-represented on the JSC and that the President, who appoints the Minister of Justice, the Chief Justice, the President of the Constitutional Court and four members of the JSC, and who selects the Constitutional Court judges from the JSC list or lists, has been given too dominant a role in the appointment of judges.[113] The President is required to do this after consulting the profession concerned and is required to consult the JSC before appointing the Chief Justice.[114] The President is also required to consult with the JSC and the leaders of parties represented in the National Assembly before appointing the President of the Constitutional Court.[115]

Constitutional Principle VI made provision for the separation of powers between the legislature, executive and judiciary and Constitutional Principle VII required the judiciary to be "appropriately qualified, independent and impartial". Section 174(1) of the *Constitution* requires that a person appointed to judicial office be "appropriately qualified" and a "fit and proper person" for such office.[116]

The Court found that these are objective criteria subject to constitutional control by the courts, and met the requirements of Constitutional Principle VII in that regard. The Constitutional Principles did not require a JSC to be established and contained no provision dealing specifically with the appointment of judges. The Court stated that an essential part of the separation of powers is an independent judiciary.[117] The Court found that the fact that the executive makes, or participates in, the appointment of judges was not inconsistent with the doctrine of the separation of powers or with the judicial independence required by Constitutional Principle VII as Parliament and the executive decide on judicial appointments in different jurisdictions where the principle of separation of powers is well entrenched.

The Court argued that the crucial principle of the doctrine of the separation of powers and the independence of the judiciary is that the judiciary should enforce the law

---

113 Para 121.
114 Section 174(4) of the *Constitution.*
115 Section 174(3) of the *Constitution.*
116 Para 122.
117 Para 123.

impartially and that it should function independently of the legislature and the executive. Section 165 is intended to achieve this by vesting the judicial authority in the courts and protecting the courts against any interference with its authority. Constitutionally, therefore, all judges are independent. The JSC contains significant representation from the judiciary, the legal professions and political parties of the opposition. It participates in the appointment of the Chief Justice, the President of the Constitutional Court and the Constitutional Court judges, and it selects the judges of all other courts. The Court rejected the objection, stating that the JSC as an institution provides a broad-based selection panel for appointments to the judiciary and provides checks and balances on the power of the executive to make such appointments.[118]

It is unfortunate that the Court did not explore the effect of the "fusion" between the legislative and the executive branches, especially on the appointment of judges. Faure and Lane predicted in 1996 that the effect would be the centralisation of power and authority in the office of the President, the institutionalisation of executive power, the decline of Parliament and the creation of informal systems of influence based upon patronage to the leader. They wrote that despite the importance of the Bill of Rights and the Constitutional Court, it was inevitable that the *Constitution* would give the executive the foundation upon which to accumulate considerable power.[119] The challenge is therefore how to balance this authority of the executive with the danger to liberty that power always entails.[120] The Constitutional Court, from its first judgment, dismissed the notion of overconcentrated executive power in the JSC, thus ignoring one of the basic tenets of the doctrine of the separation of powers, namely the prevention of the overconcentration of power in public institutions. Although there is some diversification in the composition of the JSC, it is not enough to prevent the overconcentration of political power that Montesquieu cautioned against.[121]

---

118 Para 124.
119 Faure and Lane *South Africa: Designing new political institutions* 73.
120 Faure and Lane *South Africa: Designing new political institutions* 74.
121 Para 3.2.2 above.

3.3.3 Separation of powers in the South African constitutional state

3.3.3.1 Constitutional provisions

In the 1996 *Constitution* contains no express statement about the separation of powers; it is, however, implicit in the document, and the structure and wording of the *Constitution* embody a separation of powers.[122] Chapters 4 to 8 of the *Constitution* provide for a clear separation of powers between three spheres of government. Section 43 vests the legislative authority of the Republic in the national sphere in Parliament and in the provincial sphere in the provincial legislatures. Sections 85 and 125 vest the executive authority of the Republic in the President and of the provinces in the premiers, respectively. Section 165 vests the judicial authority in the courts. Section 2 of the *Constitution* states unequivocally that the *Constitution* is the supreme law, that law or conduct inconsistent with it is invalid and that the obligations imposed by it must be fulfilled. The legislative authority is vested in Parliament (in the national sphere of government), provincial legislatures (in the provincial sphere) and in municipal councils (in the local sphere).[123] In the national sphere, the executive authority is vested in the President as head of the national executive and exercised together with other members of the Cabinet.[124] In the provincial sphere, the same applies to the premier and the executive committee of every province.[125]

In terms of the *Constitution* –

(a) the legislative authority at the national level is vested in Parliament;[126]

(b) the executive authority is vested in the President; and[127]

(c) judicial authority is vested in the courts.[128]

---

122 Van der Westhuizen 2008 *AHRLJ* 255.
123 Sections 43, 44, 104 and 156 of the *Constitution.*
124 Sections 83 and 85 of the *Constitution.*
125 Section 125 of the *Constitution.*
126 Section 43(a) of the *Constitution.*
127 Section 85(1) of the *Constitution.*
128 Section 165(1) of the *Constitution.*

The constitutional role of the courts are clearly defined in section 165(1) of the *Constitution*, which provides that the judicial authority of the Republic is vested in the courts – and only in the courts, not in the government, nor in any organ of civil society.[129]

3.3.3.2 Constitutional role of the courts

The role of the Constitutional Court includes deciding disputes between organs of state, deciding on the constitutionality of legislation and, under certain circumstances, Bills, and on the constitutionality of any amendment to the *Constitution*, and deciding the question whether Parliament or the President has failed to fulfil a constitutional obligation.[130] The Constitutional Court is the highest court in all constitutional matters and thus decides appeals from other courts in disputes involving natural and juristic persons and the state, including criminal matters, if the matter is a constitutional matter or an issue connected with a decision on a constitutional matter.[131] The *Constitution Seventeenth Amendment Act* of 2012 expanded the jurisdiction of the Court. The Court may now hear any matter, if the Constitutional Court grants leave to appeal because the matter raises an arguable point of law of general public importance that ought to be considered by that court.

The *Constitution* makes it clear that the courts are independent and subject only to the *Constitution* and the law.[132] All persons to whom and organs of state to which a court order or decision applies are bound by it.[133] The courts must apply the *Constitution* and the law impartially and without fear, favour or prejudice.[134] When taking office, judges swear or solemnly affirm to uphold and protect the *Constitution* and the human rights entrenched in it and to administer justice to all persons alike, without fear, favour or prejudice, in accordance with the *Constitution* and the law.[135] The *Constitution* is emphatic about the independence of the courts. Section 165(3) provides that no person

---

129 Van der Westhuizen 2008 *AHRLJ* 256.
130 Section 167 of the *Constitution.*
131 Section 167(3) of the *Constitution.*
132 Section 165(2) of the *Constitution.*
133 Section 165(5) of the *Constitution.*
134 Section 165(2) of the *Constitution.*
135 Item 6 of Schedule 2 of the *Constitution.*

or organ of state may interfere with the functioning of the courts. Nevertheless, the overconcentration of executive power in judicial institutions begs the question: is the judiciary truly independent?

In *De Lange v Smuts*,[136] the Court had to deal with questions regarding the independence of the judiciary. The applicant was convicted of the unlawful possession of a firearm and ammunition and challenged the legality of the proceedings in the regional court, contending that the magistrate's court lacked the institutional independence as required by the *Constitution.* He subsequently sought to supplement his appeal by review proceedings in which similar issues pertaining to the lack of institutional independence of the regional court were raised. The case raised important issues concerning the constitutionality of provisions of the *Magistrates' Courts Act*,[137] the *Magistrates Act*,[138] and regulations made in terms of the *Magistrates Act*.[139]

The Constitutional Court found that the core of judicial independence is the complete freedom of individual judicial officers to hear and decide the cases that come before them, with no outside interference or attempt to interfere with the way in which judicial officers' conduct their cases and make their decisions. Individually, judicial officers must be free to act independently and impartially in dealing with the cases they hear and, at an institutional level, there must be structures to protect courts and judicial officers against external interference. These safeguards must include security of tenure and a basic degree of financial security.[140]

In deciding whether a particular court lacks the institutional protection it requires to function independently and impartially, it is relevant to have regard to the core protection given to all courts by the *Constitution*, to the functions that the particular court performs and to its place in the court hierarchy. Lower courts are, for instance, entitled to protection by the higher courts should their independence be threatened.

---

136 1998 3 SA 785 (CC).
137 32 of 1944.
138 90 of 1993.
139 Regulations for Judicial Officers in the Lower Courts, 1994, published under GN R361 in *Government Gazette* No 15524 of 11 March 1994 (as amended), and the Complaints Procedure Regulations, 1998, published under GN R1240 in *Government Gazette* No 19309 of 1 October 1998.
140 Para 70.

The greater the protection given to the higher courts, the greater is the protection that all courts have. Judicial independence can be achieved in a variety of ways and the mere fact that the legislation dealing with lower courts differs from the *Constitution*'s provision for higher courts is no reason for holding it to be unconstitutional.

The Court stated that the test for assessing whether the requirements for judicial independence have been satisfied included an element of appearance or perception of the court from the objective standpoint of a reasonable and informed person. Would the court be perceived as enjoying the essential conditions of independence?[141] The Court found reasoning for this argument in the Canadian case of *Valente v The Queen*[142] and stated:[143]

> Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception.

The constitutionality of many of the challenged provisions depends on whether the Magistrates Commission is an independent body or subject to control by the Minister. The Commission must be chaired by a High Court judge and must include magistrates, lawyers in private practice and parliamentarians. The Commission's objectives include ensuring that the appointment, promotion, transfer or discharge of, or disciplinary steps against, magistrates take place without favour or prejudice and that no influencing or victimisation of magistrates takes place. Therefore, although the executive influences the selection of the Commission's members, this body is an important safeguard of judicial independence. There is no reason to believe that its members will not discharge their duties with integrity.[144]

The Court unfortunately overlooked the premise of the doctrine of the separation of powers. One of the main objectives of the doctrine of the separation of powers is *to*

---

141 Para 32.
142 (1986) 24 DLR (4th) 161 (SCC).
143 Para 70.
144 Para 38.

prevent the abuse of power within different spheres of government.[145] De Vries argues that from a conceptual point of view, the doctrine of the separation of powers is logically as much about the concept of power as it is about the concept of separation between the branches of government.[146] The main aim of the separation of powers of government is therefore "that of securing liberty by preventing the concentration of power and by restraining its arbitrary deployment".[147] The fact that the executive can appoint the majority of members of the Magistrates Commission may lead to an overconcentration of power in this institution and may result in the abuse of power.

Ellmann states that the composition of the JSC mixes considerations of professional expertise and political choice. He acknowledges that political actors make up much of the JSC's membership but leaves open the question of whether the system allows for too much political influence.[148] Mbazira examined the composition of the appointments to the Constitutional Court and found that it has been dominated by persons who were intricately involved in the ruling party.[149] At the time of his research all judges of the Constitutional Court have either been former ANC people or sympathetic to the ANC's social policies. He argues that a political background may well be viewed as an asset rather than a liability. In support of this argument, he quotes a passage from the JSC interview with Sachs (before he was appointed to the Constitutional Court). Sachs was asked about his political affiliation and how this history would influence his decisions as a judge. He answered as follows:[150]

> I might say that I do not think that it is a disadvantage to the court to have a member who has had political experience and I say this with the confidence I got having been to Germany. … The test is not whether or not you are being politically active and involved, the test is do you have the independence and the credibility as a thinker and as a person to work well. And the feeling there is that if you are going to have somebody who is going to act as a brake on Parliament, a brake on the executive, it is

---

145 Mojapelo *The doctrine of separation of powers* 38.
146 De Vries 2006 *Politeia* 43.
147 Pennock and Smith *Political science: An introduction* 264.
148 Ellmann 2009 *Constitutional Court Review* 114.
149 Mbazira 2009 *Constitutional Court Review* 154; Faure and Lane *Designing new political institutions* 85.
150 Sachs's response to interview questions at the JSC http://www.constitutionalcourt.org.za/site/judges/transcripts/albertlouissachs.html accessed February 2015.

> better to have people, at least some of the Judges who know the mechanisms and the working and the thought process to be able to be most effective in that respect. … It is not enough to be honourable and clever, you are working in a society and you are relating to other institutions of Government and a good Constitutional Court functions well within that context. And I think from that point of view a little bit of experience in the world outside of the courts will not be at all damaging to the court and I will be happy to contribute that.

Mbazira states that a short review of Sachs's judgments shows that in the main it has been directed, not by black-letter law, but rather by what he conceptualises as an ideal society shaped by the values to which he is committed and worked to bring into existence.[151]

There can be no doubt that Sachs J brought a wealth of experience and knowledge to the Constitutional Court bench. Indeed, it is not the intention of this work to impugn the integrity of any of the past or serving judges of the Constitutional Court. It must, however, be explored to what extent the influence of the executive on the appointment of judges reflects on the credibility of the courts.

In *Van Rooyen v The State*,[152] the Court again investigated the independence of the magistrates' courts after the recomposition of the Magistrates Commission. The High Court found that the control exercised over magistrates by the Minister of Justice does indeed impermissibly limit their judicial independence and declared a number of provisions of the *Magistrates' Courts Act*, the *Magistrates Act* and the Regulations for Judicial Officers in Lower Courts inconsistent with the *Constitution* and invalid. On appeal to the Constitutional Court, the Court found that the constitutionality of many of the challenged provisions depended on whether the Magistrates Commission was an independent body or subject to control by the Minister. The Court stated that, although the executive influences the selection of the Commission's members, this body is an important safeguard of judicial independence. The Court again cited with approval the

---

151 Mbazira 2009 *Constitutional Court Review* 157.
152 2002 (5) SA 246 CC.

"perceived independence" test from *Valente v The Queen*.[153] The Court, in investigating the issue of appearance, stated that –[154]

> [t]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal: "that test is what would an informed person, viewing the matter realistically and practically, and having thought the matter through conclude."

The Court agreed that an objective test properly contextualised is an appropriate test for the determination of the issues raised about the separation of powers. The perception that is relevant for such purposes is, however, a perception based on a balanced view of all the material information.[155] The Court construed it as follows:

> Bearing in mind the diversity of our society this cautionary injunction is of particular importance in assessing institutional independence. The well-informed, thoughtful and objective observer must be sensitive to the country's complex social realities, in touch with its evolving patterns of constitutional development, and guided by the Constitution, its values and the differentiation it makes between different levels of courts.

The Court then analysed the recomposition of the Magistrates Commission and found that it has served a legitimate purpose to make it more representative of the South African society, and continued that the changes made facilitated this, which would have been understood by an objective observer taking a balanced view of all the relevant circumstances.[156] The Court again neglected to apply its mind to Montesquieu's warning of the *overconcentration* of power in an institution and its effect on the doctrine of the separation of powers.

When the same test of the objective observer is applied to the Constitutional Court, the following question has to be asked: What would the objective observer conclude,

---

153 (1986) 24 DLR (4th) 161 (SCC).
154 *Committee for Justice and Liberty v National Energy Board* (1976) 68 DLR (3d) 716 at 735.
155 Para 34.
156 Para 61.

concerning the political affiliation of the appointees, about the independence of the institution? The Court answered the question in the *SARFU Recusal* case[157]:

> 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.[158]

Venter states that it is accepted that politicians deal subjectively (politically) with policy references in the making of laws and their execution and administration. He continues that it is generally supposed that judges should maintain an attitude of objective rationality in the adjudication of cases.[159] Can the judiciary maintain such an attitude of objective rationality when hearing matters, especially those where the executive is a party? The call by the ANC's National Executive Committee in 2005 to bring "the collective mind-set of the judiciary" into consonance with the vision and aspirations of the millions who engaged in struggle to liberate our country from white minority domination" is therefore ominous.[160] Given this approach, the threat remains that the executive might progressively try to ensure that executive-minded judges are appointed to the bench.

The Constitutional Court have to date not squarely confronted a fundamental issue relating to the doctrine of the separation of powers, namely that of the overconcentration of powers in institutions. Malan writes about the JSC as follows:[161]

> If the broad review powers of the South African courts with their actual and potential political implications are taken into account, the composition of the JSC and its decisions pertaining to recommendations of candidates, disciplining of judges – provided for in the Constitution and other legal instruments referred to below – are

---

157 *President of the Republic of South Africa v South African Rugby Football Union* 1999 4 SA 147 (CC) para 70.
158 Para 74.
159 Venter *PELJ* 130.
160 De Klerk 2010 *PELJ* 8.
161 Malan 2014 *PELJ* 1968.

> obviously of political significance, rendering the JSC nothing less than an important political body.

Although the JSC does not form part of the executive, its composition secures a dominant position for the ruling party, at least twelve of its members being politicians appointed by the ruling party.[162] Labuschagne writes that the status of the JSC, as independent judicial guard dog, has been politically tampered with. He states that the cadre appointments and a series of controversial judiciary Bills that have been proposed,[163] shows an attempt to bring the judiciary more in line with the majority sentiment and firmly under control of the executive.[164] None of the proposed Bills has to date been promulgated, but Malan makes the interesting observation that the appointment of judges is excluded from the ambit of administrative actions reviewable under the *Promotion of Administrative Justice Act*[165] (hereafter *PAJA*). Malan argues that the appointment of judges is political in nature and for that reason government has an interest in not allowing these decisions to be subject to the strict requirements that govern administrative actions.[166]

Devenish remarks that the executive's influence on the composition of the Standing Committee on Public Accounts (Scopa) is a cause for concern and that this should be considered unacceptable because it adversely affects the independence of Parliament.[167] This premise is also relevant to the executive's influence on the JSC as it adversely affects the independence of the judiciary. A casual glance will show that there is a prodigious concentration of powers friendly to the executive on the Magistrates Commission, the JSC and the Constitutional Court. After adoption of the *Interim Constitution*, the ruling party in practice controlled seven of the eleven appointments to

---

162 Malan 2014 *PELJ* 1968-1969.

163 During 2005, the government released five draft Bills, including a constitutional amendment (*Constitution Fourteenth Amendment Bill*) that would have effectively placed and subjected the Bench to the authority of the Minister of Justice (executive authority). This was followed by the *Superior Courts Bill*, 2006, that echoed the sentiments of the *Constitution Fourteenth Amendment Bill*, which also would have shifted court administration and budgeting to the Minister of Justice. At the time of writing, none of these amendments happened. Indeed, the *Superior Courts Act* 10 of 2013 places the administration of the courts in the hands of the Chief Justice.

164 Labuschagne 2011 *Politeia* 20.

165 3 of 2000, s 1(gg) of the Act.

166 Malan 2014 *PELJ* 1969.

167 Devenish 2003 *THRHR* 89.

the Constitutional Court, including that of the President of the Court, and six judges appointed from the JSC's list of nominations.[168] The 1996 *Constitution* provides that both the Chief Justice and the Deputy Chief Justice must be appointed by the President after consultation with the JSC and the National Assembly.[169] The rest of the judges are appointed by the President, after consultation with the National Assembly, from a list prepared by the JSC.[170] The capacity to control judges therefore depends on the capacity to control the JSC.[171] With the ruling party in a position to appoint the majority of the members of the JSC,[172] there can be no other conclusion than that the JSC is controlled by the ruling party and therefore the ruling party is controlling the Constitutional Court. Such executive-leaning structures are worrisome when contemplating litigation against the state.

In *Ferreira v Levin,*[173] the Constitutional Court recognised the potential danger of an adverse cost order in constitutional litigation having a chilling effect on litigants' willingness to enforce their constitutional rights. The potential perception of an executive-minded judiciary may lead to the same conclusion. It can have a "chilling effect" on litigants wishing to protect their constitutional rights against abuse by the executive. This "chilling effect" would place an unconstitutional limitation on strategic litigation. This reflects negatively on the "moral authority" of the courts to hear matters impartially and independently. In *S v Mamabolo*[174] Kriegler J said:

> 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.[175]

---

168 Roux *The politics of principle* 167-168.
169 Section 174(3) of the *Constitution.*
170 Section 174(6) of the *Constitution.*
171 Roux *The politics of principle* 169.
172 Malan 2014 *PELJ* 1968-1969.
173 1996 (1) SA 984 (CC) para 155.
174 2001 3 SA 409 (CC).
175 Para 16.

Although the *Constitution* clearly envisions a separation of powers between the different branches of government, the application of the doctrine in South Africa is far from settled. Ackerman J stated the following:[176]

> I have no doubt that over time our courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects 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.[177]

The fact that the executive is attempting to colonise independent institutions meant to check its exercise of power leads to the question of how the South African constitutional order and, in particular, the Constitutional Court will respond.[178]

The *Constitution Seventeenth Amendment Act of 2012*[179] provides explicitly that the Chief Justice is the head of the judiciary and has responsibility to establish and monitor norms and standards for all courts, which is undoubtedly an important step in safeguarding the independence of the judiciary and must be lauded. However, until the independence of the judiciary and its constitutional duty is fully understood and accepted by the other branches of government, tension between the executive and the judiciary will remain.

3.3.4 The rising tension between the executive and the judiciary

3.3.4.1 Introduction

The court process is often used by individuals, organisations and the state to advance their own goals and objectives. The fact that the judiciary may change or modify official government policy often leads to tension between the different organs of state.

Before the advent of the constitutional order in South Africa, Corder argued as follows:

---

176 *De Lange v Smuts NO* Case CCT 26/97 1998 CC para 60.
177 Para 60.
178 Choudhry 2009 *Constitutional Court Review* 3.
179 The Act came into operation on 23 August 2013.

> It seems to me that we should rapidly become aware of the extent of the impact the presence of a Bill of Rights will have on the appointment and accountability of the judiciary and the way in which legal challenges are argued and decided. In addition, we should harbour few illusions that the law, through a Bill of Rights, will fashion some miraculous breakthrough which will render further struggles for political democracy redundant.

Corder pleads for a sober understanding of such a Bill's inherent limitations, including the difficulty of enforcing it.[180]

3.3.4.2 International position

3.3.4.2.1 Position in the United States of America

In *Marbury v Madison*,[181] the American Supreme Court announced for the first time the principle that a court may declare an Act of Congress void if it is inconsistent with the *Constitution.* Marshall CJ formulated this opinion by declaring how the American *Constitution* defines and limits the powers of the legislature. It does this by attributing certain powers to the federal Congress and leaving others to the state legislature, and by forbidding Congress from making certain laws.[182] The authorities from whom these rules proceed are supreme because they have been established by the people themselves. The people thus have an original right to establish the rules applicable to future government and they exercise this right by assigning to different institutions their respective powers. The Chief Justice concluded with the following statement:[183]

> The Constitution is either a superior paramount law, unchangeable by any ordinary means, or it is on a level with ordinary legislative acts and, like any other act, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Since *Marbury v Madison* the American Supreme Court has been the final arbiter of the constitutionality of congressional legislation. This does not mean that there is not an on-going debate about the validity of judicial review in the United State of America.

---

180 Corder 1992 *SALJ* 206.
181 5 US 1 Cranch 137 1803.
182 Koopmans *Courts and Political Institutions* 37.
183 Koopmans *Courts and Political Institutions* 37.

Professor Corder, in analysing the arguments of Robert Bork on the separation of powers in the United States of America,[184] comments that Bork is concerned with the judicial role in government under the American *Constitution.* His basic argument is that the law, through the judgments of the Supreme Court, has become "seduced" into playing a political role to which it is unsuited and which the *Constitution* did not intend it to assume.[185] Bork remarks that "politics" has seduced institutions; he reasons as follows:

> In the past few decades American institutions have struggled with the temptations of politics. Professions and academic disciplines that once possessed a life and structure of their own have steadily succumbed to the belief that nothing matters beyond politically desirable results, however achieved. In this quest, politics invariably tries to dominate another discipline, to capture and use it for politics' own purposes, while the second subject – law, religion, literature, economics, science, journalism, or whatever – struggles to maintain its independence. It is coming to be denied that anything counts, not logic, not objectivity, not even intellectual honesty, that stands in the way of the "correct" political outcome.

Bork concludes with the following:[186]

> There are heavy costs for the legal system, heavy costs for our liberty to govern ourselves, when the Court decides it is the instrument of the general will and the keeper of the national conscience. Then there is no law; there are only the moral imperatives and self-righteousness of the hour.

Bork argues that the spectacular efflorescence of modern constitutional theory is not a sign of vigour and health but in reality is the brilliant flower of decay. He states, however, that constitutional theory is necessary for attempts to resolve what he calls the "Madisonian dilemma", which is one of the central problems for any constitutional court: the conflict between the principle of self-government by the majority and that of protection of the individual or a minority against the tyranny of the majority.[187]

Koopmans comparatively analysed the current and past decisions of the American Supreme Court and noticed a difference in emphasis. The current Supreme Court prefers to limit the scope of cases before it and is more concerned with formal elements

---

184 Corder 1992 *SALJ* 207.
185 Bork *The Tempting of America* 209.
186 Bork *The Tempting of America* 210.
187 Bork *The Tempting of America* 211.

such as admissibility.[188] In *Arizonians for Official English v Arizona*,[189] the Court stated that a more "cautious approach" to judicial review was in order. Koopmans refers to the deeply divided political landscape of the American society and states that the choices made by the Court may again come under the political spotlight. He observes that the volatile character of American politics does not rest easy with the consistency that the American Supreme Court strives to achieve in its constitutional interpretation.[190]

3.3.4.2.2 Position in European countries

During the nineteenth century, judicial review of legislation remained an American phenomenon. Judicial review of legislation was part of a specifically American conception of democracy that was completely at odds with the dawning democratic government in Europe.[191] Koopmans states that the European perception started to change as faith in the reliability of political institutions, even when democratically elected, began to shrink after Europe experienced dictatorship and world wars. Judicial review was also being considered as an expression of the idea that protection of civil liberties might not be safe in the hands of, if wholly entrusted to, political institutions.[192]

Austria was the first European country to introduce judicial review of legislation. The *Republican Constitution* of 1920 reinforced the protection of civil liberties by setting up a specialised court to which issues of the compatibility of legislation with provisions of the *Constitution* could be referred. Ireland followed with the 1937 *Constitution*, which explicitly provided for judicial review of legislation.[193]

After the Second World War, both Italy and Germany followed suit and adopted constitutions that entrusted judicial review to specialised courts. In France, one enduring legacy of the French Revolution was the prohibition of judicial review. The purpose of the prohibition was to seal off the "political function" (law-making) from the "judicial function" (dispute resolution), thereby securing the supremacy of statute within

188 Koopmans *Courts and Political Institutions* 61-62.
189 520 US 43 1997.
190 Koopmans *Courts and Political Institutions* 62.
191 Koopmans *Courts and Political Institutions* 40.
192 Koopmans *Courts and Political Institutions* 41.
193 Koopmans *Courts and Political Institutions* 42.

the legal order.[194] The French *Constitution* of 1958 introduced judicial scrutiny of the compatibility of statutes with the *Constitution* before the statute is officially promulgated and published. The *Constitution* introduced the *Conseil Constitutionnel*, or Constitutional Council, as the highest constitutional authority in France. Strictly speaking, the French Constitutional Court could not exercise judicial review because it could only look into questions of constitutionality between the passing of the bill and the promulgation of the statute: it "previews" rather than reviews.[195] Its main activity was to rule on whether proposed statutes conformed to the Constitution, after they had been approved by Parliament and before they were signed into law by the President of the Republic. However, the position was changed by the French constitutional law of 23 July 2008,[196] which amended article 61 of the French *Constitution.* Courts may now submit questions of unconstitutionality of laws to the Constitutional Council.[197] The Court of Cassation (Supreme Court over civil and criminal courts) and the Council of State (Supreme Court over administrative courts) filter the requests coming from the courts below them.

The principle of judicial review and the issue of the doctrine of the separation of powers are settled in most European countries. In terms of the European *Convention for the Protection of Human Rights and Fundamental Freedoms,* all member countries of the European Union must abide by the provisions of the Convention.[198] The European Court of Human Rights is jurisdictionally empowered to review matters relating to human rights in member countries. The purpose is to ensure that the standards of the Convention and its protocols are observed by the governments, authorities, executives, judiciaries and citizens of the states concerned.[199] The Convention places an obligation on all members to respect human rights and to secure the rights and freedoms defined in the Convention for all within their jurisdictions.[200] This obligation puts pressure on the traditional view of sovereignty in the English legal system, the primacy of the European

---

194 Sweet 2003 *Faculty Scholarship Series* 2746.
195 Koopmans *Courts and Political Institutions* 43.
196 Loi constitutionnelle de modernisation des institutions de la Ve République.
197 Article 61: Constitutional recourse.
198 Preamble to the Convention.
199 Brownlie *Basic Documents in International Law* 244.
200 Article 1 of the Convention.

Convention having been confirmed in jurisprudence.[201] The British Westminster system of parliamentary supremacy was transformed by the decision to join the European Union in 1973 and the introduction of the *Human Rights Act*, 1998,[202] which opened the door to judicial review in Britain.

Sweet writes that European constitutions written after World War II placed considerable constraints on government, including restrictions on legislative and executive authority in the form of human rights, which go far beyond the American Bill of Rights. Most constitutions provide for constitutional review by a constitutional court, but unlike the United States' Supreme Court, the European Constitutional Court is a specialised jurisdiction, with institutions independent from the judiciary hearing constitutional matters. Sweet states that in European constitutionalism –

(a) state institutions are established by, and derive their authority exclusively from, a written constitution;

(b) such constitution assigns ultimate power to the people by way of elections;

(c) the use of public authority, including legislative authority, is lawful only insofar as it conforms with the tenets of the European *Convention for the Protection of Human Rights and Fundamental Freedoms*; and

(d) the law will include constitutional rights and a system of constitutional justice to defend those rights.

The American system of judicial review is diffuse. Any court, at any time, at the behest of any litigating party, has the power to declare a law unconstitutional.[203] As such, judicial review remains a judicial matter because it is necessary to resolve specific cases. Sweet states that American judicial review is activated by a claim that the enforcement of an unconstitutional law caused damages to one of the litigants. This has

---

201 Jowell and Oliver *The Changing Constitution* 92.
202 Para 3.4.2.2 below.
203 Sweet 2003 *Faculty Scholarship Series* 2770.

the effect of American courts' denying standing to parties that fail to show some degree of direct interest in the review of impugned legislation.

In contrast to the American system, European constitutional review is concentrated, being exclusively located in a specialised organ of state. European judicial review is also more abstract and can proceed in the absence of litigation: the judge reads the legislation against the constitutional law of the member state concerned and the *Convention for the Protection of Human Rights and Fundamental Freedoms* and then decides on its constitutionality.[204]

3.3.4.3 Position in South Africa

3.3.4.3.1 Introduction

Section 2 of the 1996 *Constitution* provides that the *Constitution* is the supreme law of the Republic and that any law or conduct inconsistent with it is of no force and effect. Section 172(2)(a) provides that the Supreme Court of Appeal, the High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court. Section 167(4)(e) provides that only the Constitutional Court may decide that Parliament or the President has failed to comply with a constitutional duty.

The principle of judicial review of legislative and executive action is therefore firmly entrenched in the South African *Constitution.* The review powers of the courts, although firmly entrenched in the *Constitution*, often leads to tension between the courts and the other two branches of government.

Labuschagne states that –[205]

> [i]n South Africa, the first detectable signs of state instability have largely emanated from a disturbance of the desired harmonious intra-relationship between the fused executive/legislature and the judiciary, within the constitutional state.

---

204 Sweet 2003 *Faculty Scholarship Series* 2771.
205 Labuschagne 2004 *Politeia* 2.

Labuschagne goes on to say that the balance of power within a state – between the legislature, executive and judiciary (separation of powers and internal checks and balances) – is of paramount importance to guard against the arbitrary use of power or other factors which might disturb the balance. Currently, however, the ruling party's dominance is institutionalised in a fused legislature/executive that is "hostile" towards the judiciary, which is seen as restrictive and hampering the majority will. The logical and inevitable result of this development, if taken to the extreme, will be an over-centralised state, a degraded rule of law and, ultimately, the destabilisation of the state.[206] The tension between the judiciary and the executive branch is not new to South Africa. An analysis of South African legal history shows that it has occurred before.

3.3.4.3.2 Historical clashes between the judiciary and executive in South Africa

The earliest example of a clash between the executive and the judiciary occurred in 1898 when the President of the South African Republic, President Paul Kruger, clashed with Chief Justice Kotzé.

In the last third of the 1880s, the *Volksraad*, the legislative body of the South African Republic, developed a practice of legislating by means of informal resolutions (*besluiten*) that were in complete disregard of the procedure laid down by the 1858 *Constitution* (*Grondwet*).[207] The Court, however, upheld the validity of resolutions in *Nabal v Bok*[208] and in *Executors of McCorkindale v Bok*[209]. In these decisions, the executive was vested with sovereign powers and the *Constitution* was seen to have the same status as an ordinary Act of the *Volksraad*. The reasoning of the Court started to change in *Trustees in the Insolvent Estate of Theodore Doms v Bok.*[210] Kotzé CJ, for the majority, stated that it was desirable that the *Constitution* be revised and a provision inserted into it, as in the *Constitution* of the United States, in terms of which the High Court was granted the power of deciding on the constitutionality of laws and

206 Labuschagne 2004 *Politeia* 6.
207 Barry 2014 *TSAR* 817.
208 1883 1 SAR 60.
209 1884 1 SAR 202.
210 (1885-1888) 2 SAR TS 189.

resolutions, and applying to these the test of the *Constitution.*[211] The Chief Justice found that "[t]he duty of the judge is merely to interpret and enforce the laws, as laid out by the Legislator".[212]

Jorissen J, in a minority dissenting opinion, was of the opinion that the *Constitution* bound the *Volksraad* and that informal *besluiten* could not constitute legislative acts. He held that the formal procedure for legislation set out in the *Constitution* had to be followed by the legislature, arguing that the *Volksraad*, as representatives of the people, possessed sovereign powers by virtue of the *Constitution* and thus in accordance with its provisions.[213] Jorissen then asked the following questions:

> What is the meaning of a constitution, if the body or power for which it is prescribed raises itself above it?" Whatever may be the grounds on which the Volksraad possesses the power of altering the constitution, a second question is in what way must it be done? By the law? Or by resolution?

In *Brown v Leyds*,[214] Kotzé CJ, having been swayed by the minority opinion in the *Theodore Doms* case, stated that the question of judicial review should be explored again.[215] The Chief Justice found that the *Volksraad*, consisting of representatives or delegates of the people, had been assigned the power of exercising, under certain limitations, the legislative power and of making the laws of the country under the *Constitution*.[216] Therefore, although the *Volksraad* was designated the highest or supreme authority –[217]

> [w]e are not, however, justified in concluding from this that the Volksraad, as the highest authority, is, in the sense of the absolute power, above the Constitution, but rather, and indeed, that the portion of the sovereign power entrusted to the Volksraad by the people shall be exercised under and in accordance with the terms of the authority or mandate as expressed in the Constitution. Were this not so, the agent or mandatory would have greater power than the principal, a position which cannot for a moment be maintained.

---

211 Page 192.
212 Page 191.
213 Page 196-197.
214 (1897) 4 Off Rep 17.
215 Page 24.
216 Page 25.
217 Page 26-27.

> The people, who have declared their independent existence in the Constitution, and who possess the sovereign power in this Republic, have entrusted this power, in various measure, to the Volksraad, the executive, and the judiciary. Each of these bodies derives its authority from the Constitution, and must regulate itself, each within its own sphere and scope, in accordance with the terms thereof. None of these powers is above or independent of the Constitution. That the Volksraad is declared to be the highest authority in the land is quite consistent with this view, for there is nothing contradictory in the fact that the highest authority in a state must conform to the terms of the Constitution, which created it, and is not at liberty to exceed the prescribed limitations. What would otherwise be the use of a Constitution, if it is not to be observed by the various departments of state, to which it has been appointed as a guide?

The Chief Justice found that the Court had to determine and decide upon both the facts and the law as applicable to those facts. This right and this duty belonged exclusively to the Court. In exercising this function the Court did not by any means raise itself above the Legislature, but remained within its province, by inquiring whether what had been submitted to it was in reality a law.[218]

The Court ruled that the *besluiten* were invalid as to form (procedure). It was further held that Act 4 of 1890, to the extent that it decreed to the contrary, was unconstitutional and invalid. The effect of the Court's decision was dramatic. It meant that all the *besluiten* on the statute book could have been declared invalid as well as other laws passed by the *Volksraad* that were in conflict with the *Constitution.*[219]

Landman states that the decision of the Court did not go down well with the *Volksraad* and the *Volksraad* empowered President Kruger to put to the judges the question, *inter alia*, whether they renounced their claim to a testing right. The President was charged with the duty of dismissing any judge who gave a negative or an insufficient answer or no answer. The judges provided answers that were linked to legislative amendments and were considered satisfactory, but President Kruger regarded a communication on the subject by Kotze CJ as a renunciation of his undertaking and dismissed him, even though the Chief Justice objected that he had been appointed for life.[220] The first attempt by the judiciary to defy the executive did not end well for the judiciary; the

---

218 Page 27.
219 Barry 2014 *TSAR* 817.
220 Landman 2000 *Judge's Forum* 44.

High Court subsequently became subject to a form of control, which constituted a dangerous intrusion on its independence and created an "uncontrolled legislature".[221]

Another infamous example of a clash between the judiciary and the executive occurred during the 1950s in the Union of South Africa. Here the Appellate Division of the Supreme Court clashed with the National Party government over the power of Parliament to amend an entrenched provision in the *South Africa Act* (the constitution) and the power of the Appellate Division to overturn the amendment as unconstitutional. In the case of *Harris v Minister of the Interior*,[222] the government attempted to remove the coloured voters of the Cape Province from the common voter's role. The government argued that Parliament could adopt any procedure it saw fit and the courts had no power to question the validity of its acts.

The resulting order of the Appellate Division was that the *Separate Representation of Voters Act* 46 of 1951 was invalid and of no legal force and effect. The ruling, authored by Centlivres CJ and handed down on 20 March 1952, was unanimous. The government responded that it found the ruling unacceptable, that the government refused to abide by it, and that steps would be taken to have it overturned. The government ended the controversy by enlarging the Senate and altered its method of election, allowing the amendment to be successfully enacted.

Both of these cases are examples of clashes between the judiciary and the executive, resulting in defeat for the judiciary.

3.3.4.3.3 Current position in South Africa

The negotiated constitutional settlement in South Africa during the early 1990s has resulted in a new constitutional dispensation after years of parliamentary supremacy. The judiciary is protected by the *Constitution*, which establishes the courts as guardians of the *Constitution*, with the resulting duty to intervene should the *Constitution* be

221 Barry 2014 *TSAR* 824.
222 1952 (4) SA 769 (A).

violated.[223] It did, however, give rise to the "Madisonian dilemma" as described by Bork. Labuschagne describes the South African Madisonian dilemma as follows:[224]

> The fused legislative/executive systems, which present the subjective aspirations, needs and desires of the people, was set up against an unelected body (judiciary) that represented objective, universal human rights and values. This scenario set the stage for a collision somewhere in the future, and was compounded by the prior experience of the frustration of the majority will in South Africa by undemocratic pre-1994 governments. After the attainment of democracy, it seemed to the majority of people that their needs and aspirations would be frustrated again, sometimes in favour of their former oppressors.

The Madisonian dilemma is compounded in the South African constitutional state because, while South Africa's *Constitution* and Bill of Rights can certainly be described as "truly modern",[225] the reality is that the majority of South African individuals are not so "modern" in their political values.[226] Many of the rights embraced by the *Constitution* and the Bill of Rights do not reflect majoritarian sentiments; instead, they are based on international human rights norms.[227] Therefore, while the *Constitution* is representative in its nature,[228] which in principle espouses the majoritarian sentiment, it and Bill of Rights are not universally embraced in South Africa. Labuschagne, after examining the public speeches of political leaders, writes as follows:[229]

> However, it seems that this "outlandish" Constitution has little appeal for the majority of the citizens, who visualise it as a compromise between the country's elites, and not as representative of the will of the people.

As a result, some of the rights guaranteed (and particularly some of the subsequent decisions of South African courts enforcing and defining those rights) run contrary to public concerns and desires.[230] The South African Constitutional Court therefore finds

---

223 Section 2 of the *Constitution* provides that the *Constitution* is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and obligations imposed by it must be fulfilled. Section 165(2) reads: "The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice."

224 Labuschagne 2004 *Politeia* 26.

225 Kende 2003 *CHAP. L. REV* 160.

226 Goodsell 2007 *BYU J. Pub. L* 111.

227 Van der Vyver 2000 *Emory Int'l L. Rev*. 788.

228 Currie and De Waal *The Bill of Rights Handbook* at 14.

229 Labuschagne 2004 *Politeia* 19.

230 Goodsell 2007 *BYU J. Pub. L.* 111.

itself embroiled in the same political quagmire as the American Supreme Court as described by Bork. Labuschagne sums up the position as follows:[231]

> The political community also clearly displays strong material populist tendencies, favouring majoritarianism that aligns strongly with the characteristics of an organic state. This creates systemic stress within the restrictive nature of a constitutional state, because the logical response is to attack the restrictions that hamper the realisation of the majority will. This also explains why politicians of the ruling majority party have started an undeclared war on the judiciary, and in effect on the constitutional state. This political "attack" on the constitutional state follows a two-prong strategy: firstly to erode the material status of the judiciary, and secondly to use their numerical advantage to oppose constitutional restrictions in the way of unbridled majority will.

Hulme and Pete write that South African lawyers and academics experience a deep sense of unease at the prospect of a possible clash between the executive and the judiciary on an issue that goes to the heart of South Africa's post-apartheid constitutional democracy. That issue is the nature and extent of the powers of the judiciary *vis-à-vis* the legislature and the executive, which concerns the doctrine of the separation of powers.[232] What is also worrying is the lack of acceptance the executive displays regarding the doctrine of the separation of powers and the part of the judiciary in the doctrine. Hulme and Pete state that –

> [t]he present South African executive seems to be struggling with the idea that the power conferred upon it by the electorate can be limited by an unelected judiciary which acts in terms of a Constitution as the final source of authority. Of course, this view is predicated upon a simple "majoritarian" as opposed to a "liberal" (or "constitutional") concept of democracy.

Hulme and Pete further state that in situations in which there is conflict between the branches relating to the doctrine of the separation of powers compromise on such foundational issues are often impossible. The conflict must be resolved in favour of one side or the other, with profound implications for the society in question. History has shown that such conflicts have dire implications for the societies where they occurred.[233] One of the earliest examples of a clash between the executive and the judiciary on the question of the separation of powers took place in the 17th century between King

---

231 Labuschagne 2004 *Politeia* 19.
232 Hulme and Pete 2012 *PELJ* 16.
233 Hulme and Pete 2012 *PELJ* 35.

James I of England and his Chief Justice, Edward Coke, which ultimately resulted in a bloody civil war and the formation of an absolutist dictatorship.[234]

Hulme and Pete compare the Proclamations del Roy of 17th-century England with the current South African position. They state that both James I and President Jacob Zuma regard the source of their authority to be self-evident and irrefutable. James, working from the premise of the divine right of kings, believed that he was duly anointed by God. President Zuma, working from the premise of a simple majoritarian concept of democracy, believes his authority to be derived directly from "the people". Hulme and Pete state that each of these claims to authority is potent in their respective contexts. King James challenged the authority of parliament with his claim of divine sponsorship. President Zuma[235] challenges the bedrock of the *Constitution* with his claim of speaking with the "voice of the people".[236]

Former South African Chief Justice Arthur Chaskalson, in a speech at a workshop held at the University of Cape Town, pointed out that a degree of tension between politicians and judges was inevitable in a constitutional democracy characterised by the rule of law with an independent judiciary tasked with the judicial review of legislative and executive action.[237] According to him, such tension is inherent in all systems that respect the doctrine of the separation of powers. He continued:[238]

> The executive has no doubt been frustrated by a number of high-profile cases that it has lost before the courts, and this may be the reason for complaints by political leaders about the judiciary. Unsuccessful litigants are inclined to blame the court rather than themselves and politicians are no exception to this. Such attacks, coming from senior politicians, undermine the constitutional order and pose a threat to our democracy.

---

234 Hulme and Pete 2012 *PELJ* 36.

235 Hulme and Pete 2012 *PELJ* 54. Zuma is reported (direct quotes) to have said, *inter alia*, the following: "The powers conferred on the courts cannot be regarded as superior to the powers resulting from a mandate given by the people in a popular vote. We must not get a sense that there are those who wish to co-govern the country through the courts, when they have not won the popular vote during elections. We also wish to reiterate our view that there is a need to distinguish the areas of responsibility between the judiciary and the elected branches of the state, especially with regards [sic] to policy formulation. Our view is that the executive, as elected officials, has the sole discretion to decide policies for government."

236 Hulme and Pete 2012 *PELJ* 55.

237 Chaskalson www.timeslive.co.za.

238 Hulme and Pete 2012 *PELJ* 26.

This statement made by the former Chief Justice is undeniably true. Tension between the different branches of government will ebb and flow as different ideas and personalities take up posts in government institutions, including the judiciary. The tension will also depend on the strength of will of the actors in both the executive and the judiciary. Both the executive and the judiciary will at times push for more autonomy and attempt to broaden the influence of the different branches of government. What is worrying is that the undue influence of the executive on judicial institutions may weaken the judiciary to such an extent that judges will not have the necessary will to implement the *Constitution* as it was intended. A weakened judiciary without the will to hold the executive to account for the abuse of power will result in the redundancy of strategic litigation. This will constitutionally limit strategic litigation against a state party. Furthermore, the tension between the judiciary and the executive is exacerbated by the failure of the executive, and indeed a number of other organs of state, to always comply with constitutionally imposed positive duties. The failure of organs of state to comply with constitutional duties often leads to the situation where the state does not always act in the public interest. This can be readily adduced in situations where the organ of state abuses the court process to protect politically connected individuals or organisations from being held constitutionally accountable. Constitutional obligations require a high standard of professional ethics from organs of state.[239] This requires that the state litigant must be ethical in its approach to litigation. The organ of state must be the model litigant.

The *Constitution*, however, contains checks and balances to restrict branches of government in their exercise of power.

3.4 Checks and balances on the separation of powers in the South African constitutional state

[239] Section 195(1)(a) of the *Constitution.*

3.4.1 Introduction

It is universally accepted that government authority can never be exercised by a single government body in a democratic state.[240] In modern states, government authority is distributed among various government bodies, branches and levels of government. The doctrine of the separation of powers entails that the freedom of citizens of a state can be ensured only if a concentration of power, which can lead to abuse, is prevented by a division of government authority into legislative, executive and judicial authority.[241]

To prevent one branch from becoming supreme and to protect the minority from the majority, and to induce the branches to cooperate, constitutional orders that employ the doctrine of the separation of powers need a way to balance each of the branches. This is typically accomplished through a system of "checks and balances", the origin of which, like the separation of powers itself, is specifically credited to Montesquieu. Checks and balances allow for a system-based regulation that allows one branch to limit another, such as the power of the United States Congress to alter the composition and jurisdiction of the federal courts.[242]

3.4.2 Checks and balances: the legislature

3.4.2.1 Participatory democracy

Section 57(1)(b) of the *Constitution* provides that the National Assembly may make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement. Similar provisions provide for public participation in respect of the National Council of Provinces and the provincial legislatures (sections 70(1)(b) and 116(1)(b) of the *Constitution*).

The concept of participatory democracy was addressed in *Merafong Demarcation Forum v President of the Republic of South Africa.*[243] The question before the court was to what extent the legislator should take into account the views raised by concerned

---

240 Rautenbach and Malherbe *Constitutional Law* 66.
241 Rautenbach and Malherbe *Constitutional Law* 68.
242 Rautenbach and Malherbe *Constitutional Law* 66.
243 2008 (5) SA 171 (CC).

citizens. In the *Merafong* case, the legislature used the *Constitution Twelfth Amendment Act of 2005* to change provincial boundaries, including the boundary between the provinces of Gauteng and North West, with the result that one part of the Merafong City Local Municipality was relocated from Gauteng to North West, which was where the other part of the same municipality was located prior to the enactment of the amendment.[244] A public hearing on the issue was publicised and held, and the views expressed at the meeting indicated that the overwhelming majority of people were opposed to the relocation.[245] The Portfolio Committee of the Gauteng Provincial Legislature then adopted a "negotiating mandate" to support the *Constitution Twelfth Amendment Act* of 2005 "on condition that the municipal area of Merafong was included in the Gauteng Province", that is, it undertook to propose an amendment to the Amendment Act in the National Council of Provinces (NCOP) in order to locate Merafong in Gauteng.[246] Subsequently, however, the Portfolio Committee established that the amendment was not possible in law,[247] and after deliberation changed its position, adopting a final voting mandate providing that Gauteng would support the Bill in the NCOP.[248] The Gauteng Provincial Legislature adopted the final voting mandate and voted in support of the Bill, which was passed. Thereafter the whole of Merafong was incorporated into North West.

The first applicant was an organisation which, according to its founding document, campaigned "for democracy to prevail in Merafong". It consisted of members of the community drawn from political organisations, taxi associations, a women's movement, students, trade unions, churches, businesses and professionals, including teachers, nurses and lawyers. Its primary purpose was "to fight and defeat the undemocratic move by government to transfer Merafong from Gauteng to North West".

The applicants applied for direct access to the Constitutional Court, seeking an order –

---

244 Para 1 of the judgment.
245 Para 31-33.
246 Para 34.
247 Para 36.
248 Para 37.

(a) declaring that the Gauteng Provincial Legislature did not comply with its constitutional obligation to facilitate public involvement in its processes leading up to the approval of the *Constitution Twelfth Amendment Bill* by the NCOP;[249] alternatively,

(b) declaring that the Gauteng Provincial Legislature did not exercise its legislative powers rationally when it voted in support of the relevant parts of the *Constitution Twelfth Amendment Bill*.[250]

The applicants' argument regarding (a) was that the process of public involvement was not meaningful because the Portfolio Committee changed its position after the negotiating mandate and before the final voting mandate without further consultation with the community and that this was unreasonable. Their argument regarding (b) was based on the contentions (1) that the change of position was irrational, and (2) that the decision to relocate Merafong lacked merit.[251]

The current discussion focuses on the first argument raised by the applicants only, which related to the question of meaningful public involvement in the decisions of the legislature. The Court found that when provincial boundaries are at stake (which is a constitutional matter), national and regional needs and perceptions must often be balanced against each other. Government must be open and responsive to the wishes of communities, which may not necessarily be adequately represented in national elections and could therefore find expression in localised resistance. However, it also must act in the national interest, be loyal to those who voted it into office and strive to realise the constitutional ideal of achieving the equitable distribution of resources across the country and between provinces.

The Court stated that the requirement to facilitate public involvement is in line with the contemplation in the *Constitution* of elements of participatory democracy, in addition to representative democracy. Participatory and representative democracy must be seen as

---

249 The *Constitution Twelfth Amendment Act of 2005* changed provincial boundaries. As this is a provincial matter, the Bill had to be adopted by the province in terms of s 114 of the *Constitution.*

250 Para 40.

251 Para 41.

mutually supportive. According to the Court, such public involvement also enhances responsible citizenship and legitimate government. It furthermore accords with the constitutional principle of cooperation and communication between national and provincial legislatures, as institutionalised in the National Council of Provinces.

The Court found that legislatures have discretion to determine how to fulfil the obligation and that it is open to innovation. It was emphasised, however, that citizens must have a meaningful opportunity to be heard. The applicants contended in part that the consultations were not meaningful because the outcome was always a done deal; they also submitted that the Portfolio Committee's change of position between the negotiating mandate and the final voting mandate, without further consultation with the community, was unreasonable.[252] In support of the first submission, the applicants relied on the majority judgment of Ngcobo J in *Doctors for Life*,[253] emphasising the need for citizens to be involved in public affairs, to identify with institutions of government, and to become familiar with laws.[254] Ngcobo J found[255] that public participation strengthens the legitimacy of legislation in the eyes of the people and that it is an important counterweight to secret lobbying and influence-peddling.[256]

The applicants also relied on the concurring judgment of Sachs J in the same case,[257] which highlights the assurance that people or groups who have been the victims of historical silencing will be listened to, and the need for people to feel that they have been given a real opportunity to have their say and that they are taken seriously.[258]

---

252 Para 47.

253 *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC).

254 *Merafong Demarcation Forum* para 44.

255 Para 44.

256 The particular passage reads as follows: "If the will of the Parliamentary majority will in the end mostly prevail in any event, and all that is required is to 'involve' the public by, for example, mechanically holding public hearings for every piece of legislation — or to make sure that hearings are not promised as in this case — participatory democracy would appear to be quite cosmetic and empty, in spite of any idealistic and romantic motivation for promoting it."

257 Para 45.

258 They relied on the following passage: "All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and their views will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion."

The question for a court to determine, therefore, is whether the legislature has done what is reasonable in all the circumstances.[259] In determining whether the legislature acted reasonably, the Court will take into consideration what the legislature decided to be the appropriate method.[260] The method and degree of public participation that are reasonable in a given case depends on a number of factors, including the nature and importance of the legislation and the intensity of its impact on the public. The Court found that, from the perspective of respectful dialogue and the accountability of political representatives, it might well have been desirable to report to the people of Merafong that it was impossible to adhere to the position taken by the Portfolio Committee in the negotiating mandate.[261] To the extent that the community was given the impression that the Committee agreed with them and that an understandable expectation was created that their views would prevail,[262] it was possibly disrespectful not to return to inform them of subsequent events.[263] The Court said that the question, though, was whether the omission to consult again after the alteration of the Portfolio Committee's negotiating mandate amounted to a failure to facilitate public involvement in the processes of the Gauteng Provincial Legislature. The Court judged that the failure to report to the Merafong community did not rise to the level of unreasonableness, which would have resulted in the invalidity of the *Constitution Twelfth Amendment Act* that was otherwise properly passed by Parliament.[264]

The process of the demarcation of Merafong was accompanied by protests, including disruption of schools, petrol-bombing the homes of ANC councillors, blocking roads and destruction of municipal property. Residents also boycotted the 2006 municipal elections, which saw only 130 people casting votes in that voting district.[265] The municipality was part of the North West Province from 2005 to 2009, when it was reincorporated into the Gauteng Province by another amendment to the *Constitution*,

---

259 Para 57.
260 Para 114.
261 Para 115.
262 Para 52.
263 Para 55.
264 Para 55.
265 Mail & Guardian *ANC meets forum over Merafong demarcation* 25 Jun 2008.

following the often violent protests in the area.[266] Ultimately, therefore, the residents were successful in their efforts to keep the Merafong district part of the Gauteng Province, not through following the legitimate legal channels by approaching the courts, but through violent protest. Merafong serves as an example of public mass mobilisation influencing state action when officials refuse to acknowledge the public will and strategic litigation fails.

3.4.2.2 General elections

Section 1(d) of the *Constitution* provides that regular elections under a system of universal adult suffrage be held. The *Constitution* further provides that the National Assembly is elected to represent the people and to ensure government by the people under the *Constitution.*[267]

The legislature is ultimately accountable to the voters, who can use the power of their vote to show their displeasure with the legislature. In most democracies, the legislature will always judge the public mood and desire, lest they be voted out in the next general elections. This serves as the main check on the power of the legislature and its exercise of power.

3.4.3 Checks and balances: the executive

3.4.3.1 Public control

Public control over the executive branch of government is exercised by a variety of means. Rautenbach and Malherbe state that an important form of control over the executive is exercised through the press, public conferences, debates and a large variety of interest groups in the community, such as consumer groups, churches and cultural institutions.[268] This involvement of citizens in public life between elections leads

---

266 The Local Government Handbook http://www.localgovernment.co.za/locals/view/63/merafong-city-local-municipality accessed December 2015.

267 Section 42(3) of the *Constitution.*

268 Rautenbach and Malherbe *Constitutional Law* 209.

to the opening of social and political spaces for ordinary people to participate in decision-making processes and their own development.[269]

The *Constitution* does not provide for direct public participation in the decision-making process of the executive branch of government; public control therefore is effected indirectly. The *Constitution* provides the necessary tools for civil-society engagement with the executive. The so-called "expressive" rights contained in sections 15 to 19 of the *Constitution* are important in this respect. Section 15 provides that everyone has the right to freedom of conscience, religion, thought, belief and opinion. Section 16 provides that everyone has the right to freedom of expression, including freedom of the press and other media and the freedom to receive or impart information or ideas, while section 17 provides that everyone has the right to assemble, to demonstrate, to picket and to present petitions. Section 18 provides that everyone has the right to freedom of association, and in terms of section 19 everyone is free to make political choices, including the right to form, to participate in the activities of, or to campaign for, political parties. Section 19 also guarantees every citizen the right to free and fair elections in which they have the right to vote for a political party of their choice or to stand for election. These constitutionally guaranteed rights offer avenues for individuals, organisations and minorities to make their opinions heard.

In South Africa, a variety of civil-society groups attempts to influence the executive to some extent. The most active civil organisations are unions and political organisations, which exercise far-reaching lobbying powers over the executive. These civil-society groups use a variety of strategies to influence government policy and to advance the rights of their members. Thus organisations and their members play a watchdog role over state actions, state spending and legislation. These organisations also lobby and make demands on the state for various public goods.[270]

Ranchod posits that, in part, the watchdog role of such organisations is a way of forcing the government to remain accountable to citizens in general and their own membership

---

269 African Human Security Review: African Commitments to civil society engagement: A review of eight Nepad countries http://www.africanreview.org/docs/papers/civsoc.pdf accessed August 2015.

270 Ranchod 2007 *Policy: Issues & Actors* 3.

in particular. This civil-society engagement with the state can be viewed as part of political pluralism;[271] this implies tolerance and accommodation of diverse views, passions, interests and demands in the public sphere. According to Ranchod, the engagements by civil society with the state between elections is a form of public political participation, which ranges from mobilisation of public opinion to action on the streets and includes both non-confrontational and confrontational methods of engagement. Methods include litigation, petitions, media campaigns, mass marches, strikes and civil disobedience. As part of this political participation, organisations and individuals often disregard or distrust the political process and approach the courts to advance their own interest and to protect their own rights.[272] Schokman states that the organisation or individual takes on the legal case as part of a strategy to achieve broader systemic change. The case may bring about change either through the success of the action and its impact on law, policy or practice, or by publicly exposing injustice, raising awareness and generating broader change.[273]

Around the world, litigation or judicial review has become immensely popular as a treatment for the pains of modern governance.[274] South Africa is no exception to this phenomenon.[275] This activism by litigation consists of efforts to promote, impede, or direct social, political, economic or environmental change, or stasis.[276] However, for litigational activism to be effective it requires the organ of state to abide by constitutional obligations compelling it to assist the courts by placing all relevant material in its possession before the courts when engaging in litigation. It further

---

271 The view that in liberal democracies power is (or should be) dispersed among a variety of economic and ideological pressure groups and is not (or should not be) held by a single elite or group of elites. Pluralism assumes that diversity is beneficial to society and that autonomy should be enjoyed by disparate functional or cultural groups within a society, including religious groups, trade unions, professional organizations, and ethnic minorities. www.britannica.com/EBchecked/.../pluralism

272 Ranchod 2007 *Policy: Issues & Actors* 3.

273 Schokman 2012 *Advocates for International Development* 3.

274 Hertogh and Halliday *Judicial review and bureaucratic impact in future research* 15.

275 Hoexter *Administrative Law in South Africa* 104.

276 Schokman 2012 *Advocates for International Development* 3.

requires the state litigant to behave ethically when litigating and to respect and comply with the court's decision. The state litigant must be the model litigant.[277]

3.4.3.2 Parliamentary control over the executive

In South Africa, the executive president is elected by the National Assembly. While this violates the strict doctrine of the separation of powers, it has the advantage of ensuring that the executive does not get too powerful and is ultimately answerable to Parliament. The National Assembly, as the elected representatives of the voters, is mandated to control the actions of the executive on behalf of the electorate.[278] The National Assembly must also provide for mechanisms to ensure that all executive organs of state in the national sphere of government are accountable to it and to maintain oversight of the exercise of national executive authority, including the implementation of legislation.[279]

The National Assembly exercises constitutionally mandated control over the executive in the following ways:[280]

(a) Question time in the houses of Parliament, during which time members may ask questions of ministers on any aspect of the exercise of their powers and functions.

(b) Interpellations, which are used to obtain explanations from ministers with regard to their actions.

(c) Parliamentary committees that investigate and report on activities of the executive.

---

277 The model litigant obligation that is placed on the state litigant is discussed in the final chapter of this work.

278 In terms of s 42(3) of the *Constitution* the National Assembly is elected to represent the people and to ensure government by the people under the *Constitution.* It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive actions.

279 Section 55(2) of the *Constitution.*

280 Rautenbach and Malherbe *Constitutional Law* 210.

(d) The tabling of subordinate legislation and of reports by the executive in order to keep Parliament informed.

(e) Approval of the budget, which in general comprise an evaluation of the actions by the executive and individual ministers.

(f) Consideration of the reports by the Auditor-General on the accounts, financial statements and financial management of executive organs.[281]

The Public Protector, has the power to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice.[282]

Parliamentary control over the executive is however stymied by the heavy influence the executive exerts over the parliamentary committees, which act rather as a rubber stamp of approval for executive actions and decisions.[283] Choudhry states that the dominant status of the ruling ANC has undermined those procedures and mechanisms that should operate through political means to check its power. An early casualty of the ANC's dominance was legislative oversight of the executive in Parliament, stymied by the ANC's strict enforcement of party discipline against its own members. Therefore, although legislative authority formally vests in Parliament, its role has been reduced to approving bills drafted by the executive.[284] Giliomee writes:[285]

> Ostensible authority resides in the Constitution, Parliament and the Cabinet, but real authority resides in the party (ANC). Real decision-making occurs outside of formal constitutional structures such as Parliament and is instead conducted behind the closed doors of party forums.

According to documents of the ruling party, transformation of the state entails, primarily –[286]

---

281 Section 188 of the *Constitution.*
282 Section 182 of the *Constitution.*
283 Devenish 2003 *THRHR* 89.
284 Choudhry 2009 *Constitutional Court Review* 11.
285 Giliomee, Myburgh and Schlemmer 2001 *Democratization* 44-45.
286 The State, Property Relations and Social Transformation, Umrabulo No.5, 3rd Quarter 1998.

> [e]xtending the power of the National Liberation Movement (NLM) over all levers of power: the army, the police, the bureaucracy, intelligence structures, the judiciary, parastatals, and agencies such as regulatory bodies, the public broadcaster, the central bank and so on.

Choudhry raises the question whether there are effective external checks that operate outside the constitutional system on the ANC that can serve as functional substitutes for the internal institutional checks provided by the formal institutions for parliamentary democracy that the ANC's dominance has eroded.[287] It is suggested that strategic litigation, through judicial control over the executive, provides for such an "external check" by keeping executive power contained within the parameters set by the *Constitution.*

In *National Director of Public Prosecution v Zuma*,[288] the Court had no difficulty in defining and restricting executive power in relation to the National Director of Public Prosecutions (hereafter the NDPP). The Court held that the Minister may not instruct the NDPP to prosecute or to decline to prosecute or to terminate a pending prosecution.[289] The Court found that ministerial responsibility entails only that the Minister is entitled to be kept informed in respect of all prosecutions initiated or to be initiated which may arouse public interest or involve important aspects of legal or prosecutorial authority.[290]

The judgment severely curtails the power of the executive and protects the independence of the prosecution authority. Section 179 of the *Constitution* does not clearly define the position of the Minister *vis-à-vis* the prosecution authority, so the real basis of the judgment can be found in the proposition that "any prosecution authority ought to be free from executive or political control".[291] The same proposition can be made for all independent public institutions, including the JSC and Magistrates Commission, which would allow the courts to test whether there is an overconcentration of powers in such institutions.

---

287 Choudhry 2009 *Constitutional Court Review* 12.
288 2009 2 SA 277 SCA.
289 Para 28.
290 Para 30.
291 Choudbry 2009 *Constitutional Court Review* 56.

3.4.3.3 Judicial control over the executive

Although the *Constitution* does not provide for direct public participation in executive decision-making, section 33 of the *Constitution* requires administrators to act lawfully, reasonably and procedurally fair and to be able to give reason for their actions. The *Constitution* further guarantees the right to have any dispute that can be resolved by the application of law decided in a court or, where appropriate, another independent tribunal.[292]

The principle of legality, as enshrined in section 33, goes beyond administrative decisions. It is a broad constitutional principle that governs the use of all public power rather than the narrower realm of administrative power.[293] The principle of legality is an aspect of the rule of law, a founding value of the *Constitution.*[294]

The fundamental idea the principle of legality expresses is that the exercise of all public power is only legitimate when lawful.[295] In the *Fedsure Life Assurance* case,[296] the Court found that when a legislature, whether national, provincial or local, exercises the power to raise taxes or rates, or determines appropriations to be made out of public funds, it is exercising a power that under our *Constitution* is a power peculiar to elected legislative bodies. This power is exercised by democratically elected representatives after due deliberation. The Court clearly stated that in this instance the power exercised by the legislature did not constitute an administrative decision.[297] The Court found that the question that had to be considered was the extent of the constitutional controls on the exercise of the powers of local government legislatures. The Court held that a local government might only act within the powers lawfully conferred upon it and found –[298]

---

292 Section 34 of the *Constitution.*
293 Adelman 1994 *Journal of Law and Society* 317.
294 Section 1(c) of the *Constitution.*
295 *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374.
296 *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374.
297 Para 45.
298 Paras 55-56.

> [t]here is nothing startling in this proposition – it is a fundamental principle of the rule of law,[299] recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law – to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law.

According to the Court, it was central to the conception of our constitutional order that the legislature and executive in every sphere were constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.[300]

In *Pharmaceutical Manufacturers Association of South Africa;*[301] the Court had to deal with the issue of the role of the courts in controlling public power. It raised the question whether a court has the power to review and set aside a decision by the President to bring an Act of Parliament into force.[302] The matter arose when the Transvaal High Court was requested to review and set aside the President's decision to put the *South African Medicines and Medical Devices Regulatory Authority Act, 1998,* into operation. The Court held that the exercise of all public power must comply with the *Constitution*, which is the supreme law, and the doctrine of legality, which is part of that law.[303] The Court further held that ultimately all public power, whether exercised by the legislative, executive or judiciary, is controlled by the *Constitution.*[304]

The Court noted the "reluctance" of courts in other countries to review decisions of this nature because of the political nature of the judgment required and its closeness to legislative powers.[305] The Court held that the power was not "administrative action" as contemplated in the administrative justice provision in the Bill of Rights, and therefore

---

299 The Court referred to Dicey *Introduction to the Study of the Law of the Constitution* 193, in which Dicey refers to this aspect of the rule of law as follows: "We mean in the second place, when we speak of the 'rule of law' as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."

300 Para 58.

301 *Pharmaceutical Manufacturers Association of SA in Re: The Ex Parte Application of the President of the Republic of South Africa* 2000 (2) SA 674.

302 Para 1.

303 Para 19.

304 Para 20.

305 Para 70.

did not fall within the controls of public power set out in that provision.[306] Rather, it was a power of a special nature, the character of which is neither legislative nor administrative, although it is more closely linked to the legislative than the administrative function. However, the exercise of such a power is not beyond the reach of judicial review, because the exercise of all power must conform with the *Constitution*, and, in particular, the requirements of the rule of law: a foundational principle in the *Constitution.*[307]

The Court held that this includes the requirement that a decision, viewed objectively, must be rationally related to the purpose for which the power was given.[308] Therefore, even if the President acts in good faith, his decision may be invalid if it does not meet this objective requirement.[309] This does not mean that a court can interfere with a decision simply because it disagrees with it or considers that the power was exercised inappropriately. The Court may find, however, that the decision taken by the President was objectively irrational and therefore unlawful.

In *Democratic Alliance v President of the Republic of South Africa,*[310] the question was asked whether the appointment of the Director of Public Prosecutions by the President was lawful. The matter was first heard by the High Court, which found that, while the appointment of Mr Simelane as the National Director raised some concerns, it could not be said that the conduct of the President fell afoul of the *Constitution.*[311] The Supreme Court of Appeal reversed the High Court's decision, finding that the appointment was inconsistent with the *Constitution* and invalid. The matter was then referred to the Constitutional Court in terms of section 172(2)(a) for confirmation. The Court found that it was common cause that the decision of the President was an executive decision

306 Para 45.
307 Para 79.
308 Para 85.
309 Para 90.
310 2013 (1) SA 248 (CC).
311 *Democratic Alliance v President of the Republic of South Africa* (263/11) 2011 ZASCA 241.

and that the decision had to be rational.[312] The issues before the Court were defined as follows:

(a) The question whether the requirement that the National Director must be a fit and proper person to be appointed to that position is an objective jurisdictional fact antecedent to appointment.

(b) The requirements of rationality concerned in particular with –

(i) the distinction between reasonableness and rationality and the relationship between means and ends;

(ii) whether the process as well as the ultimate decision must be rational;

(iii) the consequences for rationality if relevant factors are ignored; and

(iv) rationality and the separation of powers.

(c) An investigation into whether the decision of the President to appoint Mr Simelane was rational and, in particular, whether the President's failure to take into account the finding in relation to and evidence of Mr Simelane in the Ginwala Commission was rationally related to the purpose for which the power to appoint a National Director was conferred.

(d) If the decision is found to be rational in this sense then the Court must evaluate whether –

(i) the evidence shows that Mr Simelane is a fit and proper person to be appointed the National Director; and

(ii) the President had an ulterior purpose in making the appointment.

In their argument, the executive placed considerable emphasis on the fact that the role of the prosecuting authority was policy-driven and that the National Director was what

[312] Para 12.

was referred to in argument as "a political appointee". The Court stated that while it is true that the National Director is appointed by the President, it does not follow that this renders the incumbent of that office "a political appointee".[313] The Court approvingly quoted the following:[314]

> The most important change brought about by section 179 … is that a single national prosecuting post was created. Previously there was a direct link between the Minister of Justice and the various attorneys-general, whose activities such Minister coordinated and to whom they reported. What section 179 did was to slot the NDPP in between the political head of the Department of Justice and the officers at the head of the provincial prosecutorial divisions. The effect of the change was to gather the strands of the country's prosecutorial services in the hands of one non-political chief executive officer directly appointed by the President.

In terms of the qualification of the appointee, the Court held that the *Constitution* does not leave the determination of appropriate qualification to the President. It obliges the legislature to ensure that the National Director is appropriately qualified.[315] On the premise of whether the appointee was a "fit and proper person", the Court ruled that the Act[316] itself does not say that the candidate for appointment as National Director should be fit and proper "in the President's view". The legislature could easily have done so if the purpose was to leave it in the complete discretion of the President. Crucially, the section is couched in imperative terms. The appointee "must" be a fit and proper person.[317]

The Court argued as follows on the question as to whether the President exercises a value judgment in the appointment process:[318]

> It is correct that the determination whether a candidate does fulfil the fit and proper requirement stipulated by the Act involves a value judgment. But it does not follow from this that the decision and evaluation lies within the sole and subjective preserve of the President. Value judgments are involved in virtually every decision any member of the executive might make where objective requirements are stipulated. It is true that there may be differences of opinion in relation to whether or not objective criteria

---

313 Para 16.
314 *Minister of Defence v Potsane and Another; Legal Soldier (Pty) Ltd v Minister of Defence* 2002 (1) SA 1 (CC).
315 Para 21.
316 *National Prosecuting Authority Act* 32 of 1998.
317 Para 22.
318 Para 23.

have been established or are present. This does not mean that the decision becomes one of subjective determination, immune from objective scrutiny.

The courts have shown that executive and legislative actions will be evaluated in terms of the *Constitution* and, if such are found wanting, the courts will not hesitate to declare such actions unlawful. The danger of executive influence on the judiciary as highlighted above remains, and the overconcentration of executive power in judicial institutions can negatively affect the independence of these institutions, which runs contrary to the doctrine of the separation of powers. The lack of independence of the judiciary, perceived or otherwise, might limit the effectiveness of strategic litigation. However, although the judiciary is centrally placed as a check on the abuse of power by Parliament and the executive, the question remains whether there are any checks and balances on the power of the judiciary. *Quis custodiet ipsos custodes?*[319]

3.4.4 Checks and balances: the judiciary

In most democratic countries, judicial control is the most effective way to ensure that the legislative and executive branches comply with the law.[320] This raises the question of whether there is any control by the other branches of government over the judiciary. A problem exists in reconciling any control over the judiciary with the principle of judicial independence.[321] The *Constitution* vests the judicial authority of the Republic in the courts and the independence of the courts is guaranteed and subject only to the *Constitution* and the law, which they must apply impartially and without fear, favour or prejudice.[322]

The following are examples of control over the judiciary:

(a) Few modern constitutions provide for the direct election of judges and magistrates. They are usually appointed, subject to safeguards to ensure

---

319 Juvenal *Satires* VI lines 347–348: "Who will guard the guards themselves?"
320 Rautenbach and Malherbe *Constitutional Law* 234.
321 Rautenbach and Malherbe *Constitutional Law* 235.
322 Section 165(2) of the *Constitution.*

their independence, by the executive or the legislative branch, or by both branches.[323]

(b) For the sake of an independent judiciary, the right of freedom of expression and the right of the media to report on the judiciary are curtailed by the offence of contempt of court,[324] but this does not exclude all criticism of the court.[325] Analysis and academic criticism of court judgments is a form of public control over the judiciary.

(c) The system of appeal and review of the decisions of lower courts by higher courts amounts to an extensive form of judicial control.[326]

(d) International Law and institutions such as the African Court on Human and Peoples' Rights and the United Nations Human Rights Council can be approached to enforce international human rights law. This can apply as a form of oversight of the Constitutional Court, whose decisions, as apex court in South Africa, cannot be appealed.

Judicial officers are not immune to civil actions, which may result from their decisions. Immunity will only apply if the officer acted *bona fide*. If the officer acted *mala fide*, he or she will be held liable.[327]

A judge may be removed from office if the JSC finds that the judge suffers from incapacity, is crossly incompetent or is guilty of gross misconduct, and the National Assembly, by a resolution adopted by at least a two-third majority of its members, calls for the judge to be removed.[328]

---

323 Sections 174, 175 and 178 of the *Constitution.*
324 Rautenbach and Malherbe *Constitutional Law* 235.
325 *S v Van Niekerk* 1972 3 SA 706 (A) 720-721.
326 Rautenbach and Malherbe *Constitutional Law* 235.
327 Rautenbach and Malherbe *Constitutional Law* 235.
328 Section 177 of the *Constitution.*

A judge who is the subject of investigation by the JSC may be suspended by the President on the advice of the JSC.[329]

Although there is some oversight over the judiciary by other branches of government, any further attempts at oversight will negatively influence the independence of the judiciary. The independence of the judiciary as the "weakest" of the branches of government is of paramount importance. This means that the judiciary should approach the question of judicial review cautiously with due regard to the doctrine of the separation of powers and the independence of the legislative and the executive branches.

3.5 Judicial review and strategic litigation

3.5.1 Introduction

In *Glenister v President of the RSA*,[330] the Court found the following:

> In our constitutional democracy, the courts are the ultimate guardians of the Constitution. They not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so. It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention. … But even in these circumstances, courts must observe the limits of their power.

When this statement is analysed it becomes clear that it raises a number of issues. Firstly, courts have the right and duty to intervene to prevent the violation of the *Constitution.* This forms the bedrock on which strategic litigation is brought before the courts. Secondly, courts will not automatically venture into the domain of other branches of government; some qualification is needed before a court will take that step. Thirdly, after a court has made the decision to intervene, the scope of such intervention will have to be determined. The second and third issues will for the most part depend on the standard of judicial review that the courts subscribe to. The South African courts subscribe to a standard of judicial review based on deference to the other branches of

---

329 Section 177(3) of the *Constitution.*
330 2009 1 SA 287 CC par 33.

government.[331] The standard for judicial review is of critical importance in strategic litigation. It is imperative for litigants and activists to know when the court will intervene in the sphere of other state institutions and when the court will defer to such institutions. Lastly, the courts would constantly have to observe the limits of their power. The courts will not make a ruling if the ruling cannot be complied with or implemented.[332] Strategic litigation should therefore focus on attainable and implementable orders that fall within the powers of the court. The standard for judicial review is of critical importance when contemplating strategic litigation against the executive or legislature. Bias or perceived bias by the courts in favouring the executive or legislature may intimidate individuals or organisations from pursuing litigation to right wrongs and expose corruption.

3.5.2 Determination of the "proper standard" for judicial review

O'Regan argues that an important aspect of the South African doctrine of the separation of powers is that the separation between judicial, legislative and executive contains a structural and functional distinction between the arms of government which, in order to preserve their institutional integrity and their democratic function, needs to be preserved from intrusion.[333] It is however not only the judiciary that must be protected from intrusion by the other branches of government. The doctrine of the separation of power (and therefore the principle of good governance) will be breached when the judiciary unconstitutionally interferes in the area of responsibility of the other branches of government.

Mureinik wrote: "The principles of judicial review represent the core of the judicial conception of justice."[334] Dyzenhaus lists the following principles, which were articulated by Mureinik and are considered fundamental for judicial review:[335]

---

331 Para 5.2 below.
332 Chapter 5.
333 O'Regan 2005 *PELJ* 131.
334 Mureinik 1994 *SALJ* 617.
335 Dyzenhaus 1998 *SAJHR* 18.

(a) The principle that policy should be implemented in a reasonable or non-discriminatory fashion.

(b) The principle that someone whose rights will be affected by an official decision has a right to be heard before that decision is made.

(c) The principle that, when a statute says an official should have reason to believe that x is the case before he or she acts, the court should require that the reasons produced are sufficient to justify that belief.

(d) The principle that no executive decision can encroach on a fundamental right unless the empowering statute specifically authorises that encroachment.

(e) The principle that regulations made under discretionary powers (for example, the power to make regulations declaring and dealing with a state of emergency) must be capable of being defended in a court of law by a demonstration that there are genuine circumstances of the kind which justifies invoking the power and that the powers actually invoked are demonstrably related to the purpose of the empowering statute.

If the above-mentioned principles are analysed, it becomes clear that Dyzenhaus argues for a policy of non-discrimination, openness, justification, accountability and participation. A person whose rights are affected must be given an opportunity to be heard, reasons must be given for decisions and the decisions must be based on and related to an empowering statute.

Dyzenhaus proposes three separate approaches to the problem of the judicial role in reviewing decisions of the administration:[336]

(a) Law as authority: the law reflects the preferences of the majority of society as developed through the medium of a democratically elected legislature.

---

[336] Dyzenhaus 1998 *SAJHR* 11.

(b) Law as a culture of neutrality, which seeks to protect a range of individual rights from interference by the state. Statutes that infringe on the individual's right to decide how to live, for example, are illegitimate; they offend against public reason, the custodians of which are the judges.[337]

(c) Law as a culture of justification, which seeks to promote the idea that parties are entitled to participate in decisions which affect them, that is, decisions which determine their rights, and further, that the decisions of organs of state must be justified by the decision-maker within the public discourse fashioned by the *Constitution*, thereby rendering the decision-maker accountable to the public he serves.

The third approach proposed by Dyzenhaus corresponds with the fundamental principles articulated by Mureinik. Law as a culture of justification also resonates with the constitutional values of accountability, participation, justification and openness.

In *Speaker of the National Assembly v De Lille*,[338] the Court noted that the constitutional order requires courts to intervene to protect rights and that, accordingly, the principle of non-interference with the affairs of another branch of government, an important aspect of the doctrine 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. O'Regan states that it is clear from the court's jurisprudence that the principle of non-intrusion, although not unqualified, is an important aspect of our doctrine of the separation of powers.[339]

In *Premier of Mpumalanga v Executive Committee of State-aided Schools, Eastern Transvaal*,[340] the Court held that –[341]

> [i]n determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and

---

337 Davis 2006 *Acta Juridica* 29.
338 (297/98) [1999] ZASCA 50; [1999] 4 All SA 241 (A).
339 O'Regan 2005 *PELJ* 132.
340 1999 (2) BCLR 151 (CC); 1999 (2) SA 91 (CC).
341 Para 41.

> implement policy effectively (a principle well recognised in the common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the executive to act efficiently and promptly.

The Court thus recognised the importance of allowing the executive to carry out its functions without undue hindrance. The Court reasoned as follows:[342]

> In treating the decisions of administrative agencies with the appropriate respect, a court is recognising the proper role of the executive within the Constitution. In doing so a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. … This does not mean however that where the decision is one which a will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision. A court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.

The Court thus subscribes to a vision of the doctrine of the separation of powers which recognises the need to protect the institutional character of each of the three branches of government in a manner that will prevent their ability to discharge their constitutional role being undermined.[343] O'Regan frames this vision as follows:[344]

> The role of the courts under our Constitution is to protect the Constitution, and in particular individual fundamental rights. At times, in asserting this function, courts will have to intrude to some extent on the terrain of the legislature and the executive. In doing so, however, it is clear from the jurisprudence that is emerging that courts must remain sensible to the legitimate constitutional interests of the other arms of government and seek to ensure that the manner of their intrusion, while protecting fundamental rights, intrudes as little as possible in the terrain of the executive and legislature.

O'Regan stated that the courts, when they intrude into the domain of other branches, should be circumspect and intrude as little as possible. The key question, then, concerns the function of the judge in mediating between the law and legislative and

---

342 *Bato Star Fishing* para 48.
343 *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC).
344 O'Regan 2005 *PELJ* 132.

executive politics.[345] In other words, what should be the proper standard of judicial review that the courts subscribe to?

3.5.3 The direction of the Constitutional Court

The principle of judicial review is well established in the South African constitutional state. The *Constitution* clearly mandates the courts to review legislation or conduct that is inconsistent with constitutional provisions.[346]

Hoexter, in seeking to develop an appropriate response to judicial review in a constitutional dispensation, contends that the judiciary must display –[347]

> [a] willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate.

Hoexter contends that these considerations permit the adoption of a concept of deference which is consistent with the concern for individual rights and a refusal to tolerate corruption and maladministration. She states that because of the wide powers conferred on the courts to review executive and legislative actions, it is essential that courts justify their intervention or non-intervention. It is also important that this be done candidly and consciously rather than in a formalistic or coded style.[348] The culture of deference has been increasingly employed by South African courts.[349]

Given the fusion between the executive and the legislature in South Africa, and the overconcentration of executive power in the legislature and judicial institutions, the concept of deference in judicial review falls short of finding the correct balance between

---

345 O'Regan 2005 *PELJ* 132.

346 Section 2 of the *Constitution* which reads: "The *Constitution* is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

347 Hoexter 2000 *SALJ* 501.

348 Hoexter *Administrative Law in South Africa* 138.

349 *Logbro Properties CC v Bedderson* 2003 (2) SA 460 (SCA) paras 20–21; *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd* 2003 (6) SA 407 (SCA).

the constitutional values of participation, openness, justification and accountability, and the doctrine of the separation of powers. Pieterse argues:[350]

> Given the executive's stranglehold over the legislature, citizens increasingly look to the judiciary to ensure accountability and for the protection of their basic interest. Today, the judiciary acts both as watchdog over the other branches' adherence to the doctrine of separation of powers and as primary protector of citizens' rights within its confines. In South Africa, as elsewhere, this reality has been underscored by the introduction of a justiciable Bill of Rights, which "fundamentally changed the place of the judiciary in South Africa's constitutional and political order".

Although there should be a culture of mutual co-operation and respect between the different branches of government,[351] the courts are mandated by constitutional provisions to ensure that the executive and legislature operate within the boundaries of the *Constitution.* Davis writes that the concept of deference is employed by the courts to promote certain basic principles, namely:[352]

(a) South Africa is committed to transformation and to meeting the needs of the poor, hence government and its administrations are of critical importance;

(b) often, the substance of decisions made by government agencies is not appropriate to judicial decision-making, particularly because of the poly-centricity of task and consequence; and

(c) the government official/agency is an expert or at least more of an expert than the court deciding the issue in question.

When the principles promoted by the Court's reliance on the notion of deference are analysed, there is no provision for the realisation of the values and objectives enshrined in the *Constitution.* Furthermore, the notion of deference falls short of holding the state litigant constitutionally accountable for the high standard of professional ethical

---

350 Pieterse 2004 *SAJHR* 383.
351 Chapter 3 of the *Constitution.*
352 Davis 2006 *Acta Juridica* 26.

behaviour required from it.[353] It brings the state litigant no closer to the model litigant that the *Constitution* requires it to be.

The principles listed by Davis were clearly illustrated by the finding of the Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs.*[354] The question was raised of the extent to which an executive decision is susceptible to review under the constitutional order. The Court employed the following test to determine whether the decision was reviewable:[355]

> If we are satisfied that the Chief Director did take into account all the factors, struck a reasonable equilibrium between them and selected reasonable means to pursue the identified legislative goal in the light of the facts before him, the applicant cannot succeed. The task of allocation of fishing quotas is a difficult one, intimately connected with complex policy decisions and requires on-going supervision and management of that process by the departmental decision-makers who are experts in the field.

Ngcobo J formulated a different approach by way of the constitutional framework within which all decisions of state organs need to be assessed. He commenced his judgment by referring to the transformative objectives of the *Marine Living Resources Act.*[356] He then emphasised that a foundational principle of the Act is the transformation of the fishing industry. Ngcobo J concluded that, if the Minister were to fail to heed the transformative considerations enshrined in the Act, "he would be acting unlawfully and his decision would be open to attack".[357] The duty of the courts, however, does not extend to telling the functionaries how to implement transformation. That must be left to the functionaries concerned.[358] Therefore, although Ngobo J sets a standard to which the executive must aspire – the attainment of the transformation of the fishing industry – the Court deferred to the executive on how to achieve this goal. It is submitted that this culture of deference fails to satisfy the foundational values of the *Constitution.*

---

353 Section 195 of the *Constitution.*
354 2004 (4) SA 490 (CC) para 48.
355 18 of 1998, para 50.
356 Para 69.
357 Para 85.
358 Para 104.

O'Regan J, in ascribing to the deference of the courts to other branches of government, stated as follows:[359]

> In treating the decisions of administrative agencies with the appropriate respect, a court is recognising the proper role of the executive within the Constitution. In doing so, a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government.

Davis criticises this *dictum*:[360]

> This dictum appears to be more concerned with judicial restraint than with the construction of a coherent concept of deference that might serve as a guide to a court, which seeks to mediate between law and the implementation of legislative and executive politics.

He continues by citing from paragraph 48 of the *Bato Star Fishing* case, where the court argues as follows:

> This does not mean however that where the decision is one which will not reasonably result in the achievement of the goal, or which is not supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision. A court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.

According to Davis, this illustrates an "absence of a coherent theory of review in a constitutional context".[361] While O'Regan J's judgment turns on the deference owed to the expertise of the department charged with the decision to allocate fishing quotas, Ngcobo J bowed to transformational prominence and the fact that "functionaries should be given the scope to implement these objectives".

Davis is rightly critical of both judgments and states that it is bizarre that the full bench concurred with both judgments:[362]

> One judgment is, at best, committed to respect for the principle of separation of powers. The other judgment appears to nudge the legal community to accept that an interrogation of constitutional values rather than a conflation of a contested concept of institutional competence with the principle of separation of powers must be the key guideline for review of administrative decisions. But, as it is about to take the conclusive step, it falters into line with the judgment of O'Regan J. The coherent

---

359 Para 48.
360 Davis 2006 *Acta Juridica* 26
361 Davis 2006 *Acta Juridica* 26.
362 Davis 2006 *Acta Juridica* 28.

> theory of review in the constitutional era appears as much an illusion as the respondent department's commitment to transformation!

Davis proposes a culture of justification for judicial review that takes into account the democratic prerogative of the elected branches of government to fashion and implement public policy within the framework of the *Constitution.* This culture accepts that the role of judicial review is to foster a culture of democracy, and that the judiciary must commence from a standpoint that it operates within a governmental system that is based upon a doctrine of the separation of powers.[363] Davis rightly states that the *Constitution* does not contain a programme which judges can "download" on to their computers and which would then provide them with the exact boundaries within which they must operate in each case of review that comes before them. They have to interpret their own role in a constitutional democracy, not only about unlocking the big constitutional conundrums, but also about the manner that they go about the business of review of the administration.[364] He argues that –

> [i]f the model of government is based on the idea of participation by citizens in decisions which affect them, the right to express views about any decision which an administrative agency is about to take which may determine a right of a citizen needs to be robustly protected, as would the right to reasons for any such decision and the corollary thereto, the provision of all reasonable means to participate in the decision-making process. The principle of separation of powers should not be allowed to undermine these rights of participation; in other words, deference should usually not play a significant role in the formulation of the scope and content of these procedural rights.

The culture of justification ensures that the government justifies its decisions to the governed and that the principles of participation and accountability are fostered. Although deference may have been the correct approach for the Constitutional Court at its inception, the Court and the *Constitution* are now a permanent feature of the South African state. Therefore –[365]

> [a] group of judges collectively committed to the ideal of adjudication according to the law might disregard the political constraints impacting on their decisions without any conscious appreciation of their decisions on their court's capacity to withstand political attack.

---

363 Davis 2006 *Acta Juridica* 8.
364 Davis 2006 *Acta Juridica* 30.
365 Roux *The politics of principle* 95.

The *Constitution* sets the values against which executive and legislative action must be tested. The inherent values of openness, justification, participation and accountability, which form the basis of the South African *Constitution*, are not realised when the courts subscribe to a policy of deference. Furthermore, it does not encourage the ethical behaviour constitutionally required of the state litigant. In its role as the reviewer of policy, the judiciary must commence from a standpoint that it operates within a governmental system that is based upon the doctrine of the separation of powers.[366] The culture of justification allows the courts to test executive and legislative action against the foundational values of the *Constitution* and finds the correct balance in the application of the principle of the separation of powers. It is suggested that it is time for a change of direction by the Constitutional Court, as the Court cannot be said to have achieved the degree of institutional independence characteristic of a court in a mature democracy.[367] Chief Justice Mogoeng Mogoeng accused the executive of interfering in the judiciary's independence and said that the judiciary needed to take collective responsibility and do things differently.[368] He said the following:

> We ought to be worried when there is instability or a measure of instability in the executive and in the legislative arm of government. But we ought to be terrified and deeply concerned when the judiciary does not appear to be what it was established to be. When there is a possibility, no matter how remote, that the judiciary might be manipulated then we have to be vigilant. Without an independent judiciary democracy is doomed.

Dworkin rejects judicial restraint because judicial review exists to protect minorities against the oppression of the majority, and judges should not defer to the will of the legislature but should instead interpret constitutional rights according to the demands of precedent and integrity. Dworkin is also sceptical about the seriousness with which the legislature takes its responsibility to interpret the *Constitution* faithfully and to act in accordance with that interpretation. He distrusts elected officials, believing that they are

---

366 Davis 2006 *Acta Juridica* 31.

367 Roux *The politics of principle* 391.

368 Chief Justice Mogoeng Mogoeng addressing the Association of Regional Magistrates of Southern Africa Litigator https://litigator.co.za/hands-off-judiciary-warns-chief-justice.

likely, because of electoral pressure, to ignore the *Constitution* and to take the side of the majority against the minority.[369]

Dworkin's view is relevant in the South African constitutional state for two reasons, the first being the "fused" nature of the South African legislature and executive and the overconcentration of ANC power in state institutions. The second reason relates to the ANC's subscription to majoritarianism. Moreover, the demands of precedent and integrity, as argued by Dworkin, can be met by relying on the inherent values of openness, justification, participation and accountability that form the basis of the South African *Constitution.* This makes the principle of judicial deference particularly unsuited to South Africa.

Owing to the influence of Dicey, parliamentary systems have a deep distrust for any supervisory role of the courts over the administration. For Dicey, all exercise of public power was to be channelled through parliament, as parliament reflects the will of the people and hence is the appropriate mechanism in a democratic state to exercise such an oversight role.[370] This distrust is still evident in South Africa with its hybrid parliamentary form of government. Davis states that in a constitutional democracy the principle of accountability means that decisions of the administrative agencies must be accountable to constitutional provisions and values and must mean more than the right to be informed about decisions. This principle must be true to a concept of "public interest", which is defined by constitutional values.[371] Davis's principle of accountability can be strengthened by the notion that when litigating, the state litigant must display the ethical characteristics that the *Constitution* demands from it. A constitutionally accountable litigant would be a model litigant. The strength of the executive means that it increasingly displays an unwillingness to engage with the courts through judicial proceedings[372] by ignoring the process[373] or by questioning the final judgment.[374]

---

369 Dworkin *Is Democracy Possible Here?* 134.
370 Davis 2006 *Acta Juridica* 24.
371 Davis 2006 *Acta Juridica* 31.
372 McLean 2009 *PULP* 208.
373 *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) where the executive failed to respond to the court's direction.

In *Minister of Home Affairs v Somali Association of South Africa Eastern Cape,*[375] the Minister failed to adhere to a court order instructing the state to reopen a refugee reception office. The Court stated that it is a most dangerous thing for a litigant, particularly a State department and senior officials in its employ, wilfully to ignore an order of court.[376] The Court found that:[377]

> The cornerstone of democracy and the rule of law is the uncompromising duty and obligation upon all persons, more especially State departments, to obey and comply with court orders. There are processes in place for those who disagree with court orders. But they are not free to simply turn a blind eye to the order nor do they have any discretion to not obey the order.

The Court found that no democracy could survive if court orders were shunned and trampled on as happened in this matter and if there was a likelihood of a future repetition of similar conduct on the part of the relevant authorities [378]

Lenta writes that the political majority enjoyed by the ANC may tempt the government not always to act in a way that furthers the common good, but rather in a way that prioritises the government's and its supporters' interests over considerations of justice.[379] It is imperative that judicial review is structured in such a manner that state action is kept within the bounds of the *Constitution.* Venter posits that the justification for constitutional review should rather be sought in the need for the qualification of blind popular majoritarianism with rational judicial argument.[380] The principle of deference is not an effective qualification of the concept of majoritarianism. In fact, the principle of deference subscribes to a majoritarian vision of democracy by countenancing a "superior role" for the legislature and executive *vis-à-vis* the courts. Venter argues as follows:[381]

---

374 The Minister of Health stated that she would ignore the court order handed down in Minister of *Health v Treatment Action Campaign* (No 2) 2002 5 SA 721 (CC).
375 (831/2013) [2015] ZASCA 35 (25 March 2015).
376 Para 35.
377 Para 33.
378 Paras 35-36.
379 Lenta 2004 *SAJHR* 30.
380 Venter 2005 *ZaöRV* 145.
381 Venter 2005 *ZaöRV* 158-159.

> 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.

Although this statement was made concerning judgments relating to socio-economic rights, there is no reason why a more expansive, uniform theory of constitutional review cannot be implemented by the courts. Davis argues: "The courts should ascribe to a more expansive theory of judicial review which would embrace the values and objectives which are quarried from the constitutional text."[382]

The dominance of the executive over Parliament means that at all three levels of government there are few effective checks and balances on the abuse of power by the executive. The deployment policy of the ANC uses language that is unapologetically Leninist, calling for the placement of "cadres" in key positions in national, provincial and local government and the public sector, even the independent Chapter 9 institutions, with the aim of bringing these institutions under its control.[383] According to documents of the ruling party, transformation of the state entails, primarily –[384]

> [e]xtending the power of the National Liberation Movement (NLM) over all levers of power: the army, the police, the bureaucracy, intelligence structures, the judiciary, parastatals, and agencies such as regulatory bodies, the public broadcaster, the central bank and so on.

McLean states that this means that the traditional separation of powers between the three branches of government is effectively found only between the courts on the one hand and the executive and legislature on the other. In the absence of robust checks and balances elsewhere, courts should respond, not by adopting a deferential position, but by ensuring that the other branches of government are held accountable to it and the *Constitution.*[385]

The "culture of participation" approach, as proposed by Davis, finds the correct balance for judicial review in both an objective interpretation of constitutional provisions and the

---

382 Davis 2006 *Acta Juridica* 31.
383 Roux *The politics of principle* 181.
384 The State, Property Relations and Social Transformation, Umrabulo No. 5, 3rd Quarter 1998.
385 McLean 2009 *PULP* 209.

values inherent to the *Constitution* and the doctrine of the separation of powers. South Africa subscribes to a democratic style of government based on accountability, responsiveness and openness.[386] When government action is tested against the culture of participation, it allows these values to be explored and realised. Furthermore, it allows for the ethical principles constitutionally required from the state litigant to be realised. The circumstances in which the South African constitutional state currently operates, where multiparty democracy comes under pressure, non-majoritarian constitutional review is essential for the survival of constitutionalism.[387] Venter words this need as follows: "Strong and fearless judicial consistency is needed as a corrective to majoritarian arrogance rather than judicial echoes of government policy and ideology."[388]

3.6 Conclusion

An analysis of the historical development of the doctrine of the separation of powers shows that unrestrained government power will be corrupted. Such uncontained power without effective checks and balances will result in despotism. In order to prevent absolutism and despotism, institutions should be set up in a system that complement and control each other with checks and balances.[389] A complete separation of powers is possible neither in theory nor in practice. In modern legal systems, there will be some form of overlap between the different organs of state. However, although there will invariably be an overlap between the organs of state, there should be checks and balances to check the arbitrary exercise of powers by the branches of government.

The doctrine of the separation of powers was developed not only to create separate institutions of government; a primary aim of the development of the doctrine was to prevent the overconcentration of power in a single institution or individual. From a conceptual point of view, the doctrine of the separation of powers is logically as much

---

386 *Hugh Glenister v President of the Republic of South Africa* CCT 07/14 and CCT 09/14 2014 ZACC 32 para 165, in which the Court states our *Constitution* pointedly regards as a fundamental value not only universal adult suffrage but also "accountability, responsiveness and openness" of government.

387 Venter 2005 *ZaöRV* 165.

388 Venter 2005 *ZaöRV* 165.

389 Para 3.4.3 above.

about the concept of power as it is about the concept of separation between the branches of government. The main aim of the separation of powers of government is therefore "that of securing liberty by preventing the concentration of power and by restraining its arbitrary deployment". [390]

During the multi-party constitutional negotiations, an agreement was reached in 1993 on the particulars of an *Interim Constitution*, which came into operation in 1994. The Constitutional Principles of 1993 expressly provided for the doctrine of the separation of powers. The *Constitution* of 1996 does not expressly provide for the doctrine of separation, but the doctrine is implicit in the document itself. It is an crucial deficiency that the concept of the separation of powers was not clarified to a greater degree in the *Interim Constitution.* This allowed a hybrid parliamentary system of government to be put in place in South Africa with a partial fusion between the executive and legislative branches of government. This "hybrid" Westminster form of government weakens the ability of Parliament to act as an effective check on the misuse of power by the executive and allows the executive, through a system of political appointees and cadre deployment, to dominate state institutions. This left in place a form of separation of powers with the judiciary on the one hand, and the executive and legislature on the other, with few effective checks and balances on the power of the executive.[391]

The courts have ignored this fusion between the legislative and executive branches and its corresponding effect on the doctrine of the separation of powers. Roux argues that the Constitutional Court has failed to work out a convincing institutional role for itself. The Court relies on a thin conception of democracy that is inadequate to the task of ensuring that the ruling party does not abuse its dominant position. Roux argues convincingly that the Constitutional Court's deferential review policy misconstrues the contribution a robust political jurisprudence might have made to the Court's long-term independence.[392]

---

390 Para 3.3.3 above.
391 Para 3.2.2.2 above.
392 Roux *The politics of principle* 10.

Choudhry argues that one of the pathologies of a dominant-party democracy (such as South Africa) is the colonisation of independent institutions meant to check the exercise of political power by the dominant party (such as the ANC).[393]

Labuschagne writes that the status of the JSC, as independent judicial guard dog, was politically tampered with. He states that the ruling party, through cadre deployment to the JSC, attempts to bring the judiciary more in line with the majority sentiment and firmly under control of the executive.[394] Devenish remarks that the executive's influence on the composition of Parliament's Standing Committee on Public Accounts (Scopa) is cause for concern and that this should be considered unacceptable because it adversely affects the independence of Parliament.[395] This premise is also relevant to the executive's influence on the JSC, as it adversely affects the independence of the judiciary. Machiavelli, the primary exponent of central control in government, preached practical rules for politicians to obtain and hold on to power. Machiavelli insisted that power was more important than ethics and morality.[396] The ruling party seems to subscribe to the philosophy of Machiavelli, namely exercising power over all public institutions despite the constitutional provisions enshrining the doctrine of the separation of powers.

The courts have found that the requirements for judicial independence lie in the complete freedom of individual judicial officers to hear and decide cases with no outside influence or interference. In *De Lange v Smuts* and *Van Rooyen v The State*, the Court approvingly referred to the "perceived-independence" test as formulated in Canadian jurisprudence.[397] The Court stated that a prerequisite of judicial independence includes an element of the appearance or perception of the independence of the judiciary from the objective standpoint of a reasonable and informed person. If this test is applied in the South African constitutional context, it cannot fail to show that there is a prodigious

---

393 Choudhry 2009 *Constitutional Court Review* 3.
394 Labuschagne 2004 *Politeia* 20.
395 Devenish 2003 *THRHR* 89.
396 Para 3.2.1.3 above.
397 Para 3.3.2.2 above.

concentration of powers friendly to the executive on the Magistrates Commission and the JSC.

The method of appointing Constitutional Court judges has been lamented because one branch of government – the executive, and specifically the majority party and its leader, the President – dominates this process.[398] In 1996, Faure and Lane said that the Constitutional Court was unlikely to enjoy the independence it needed to be an effective guarantor of the *Constitution.* This has not happened. The Constitutional Court has on some occasions ruled against the executive, the President and the ruling party. Nevertheless, the perception of bias is not healthy for the Constitutional Court or the South African constitutional landscape. There is a danger that the entire legal system and the law will become discredited and delegitimised by an excessively politicised Constitutional Court.[399] The perception that the judiciary may eventually be dominated by the executive is worrisome for anyone contemplating litigation against the state. It can place a "chilling effect" on litigants wishing to protect their constitutional rights against abuse by the executive. This reflects negatively on the "moral authority" of the courts to hear matters impartially and independently.[400]

The hybrid parliamentary system of government in South Africa has led to tension between the judiciary and the other branches of government, with the judiciary as the only check on the abuse of power by the legislature and the executive. Although constitutional provisions clearly define the role and duty of the judiciary to enforce the *Constitution*, the populist predisposition of the executive challenges the bedrock of the *Constitution* and fuels this tension. The history of South Africa is replete with examples of infamous clashes between the executive and the judiciary, with the judiciary ultimately losing out to executive power.[401] In the current constitutional dispensation, where the courts are constitutionally mandated to review executive and legislative

---

398 Faure and Lane *Designing new political institutions* 86.
399 Faure and Lane *Designing new political institutions* 86.
400 Para 3.3.2.2 above.
401 Para 3.3.4.3.2 above.

action,[402] the courts must ensure that this mandate is not eroded by the executive through the overconcentration of powers friendly to the executive in judicial institutions.

Public control over the executive in the form of strategic litigation remains a viable option to curb the abuse of power when executive and legislative action is placed before the courts for review. Strategic litigation against the state by individuals, civil-society groups and political parties fosters a culture of accountability by publicly exposing injustice and corruption.[403] The Constitutional Court practices a system of judicial review based on principles of non-intrusion and deference. This culture of non-intrusion and deference that the courts adhere to fails to find the correct balance between the constitutional duty of review and the right of the other branches of government to function effectively without undue interference. Owing to the fused nature of the executive and legislative branches and the dominance of the executive in public institutions, there are no effective checks and balances on the powers of the executive. The fact that the courts do not address the issue of overconcentration of executive power in public institutions sufficiently holds grave danger to the principle of separation of powers in South Africa.

Montesquieu is relevant here: "Political liberty is found to be present only when power is not abused, and so that one cannot abuse power, power must check power by the arrangement of things."[404] Any government, despite its form, will therefore turn despotic if there are no checks and balances placed on it: "Unlimited power will corrupt."[405] The doctrine of the separation of powers aims to curb absolute power and decries the overconcentration of power in one individual or institution. This subscribes to a system of different levels of government with the power of each branch clearly defined and checks and balances to limit the power of each branch. The deference policy of judicial review employed by the courts does not function effectively as a check on the power of the executive and further fails to satisfy the constitutional values fundamental to the South African *Constitution.*

---

402 Sections 2 and 165 of the *Constitution.*
403 Chapter 2 par 2.2.3.2 above.
404 Montesquieu *The Spirit of the laws* 155.
405 Montesquieu *The Spirit of the laws* 133.

Mureinik argues for a policy of judicial review based on non-discrimination, openness, justification, accountability and participation. Dyzenhaus suggests an approach to judicial review based on law as a culture of justification, which promotes Mureinik's approach. Both these approaches satisfy a value-based assessment of the *Constitution.*[406] The executive's stranglehold on the legislature and state institutions leads to citizens looking to the judiciary to ensure accountability and the protection of their basic interests.[407] Davis argues for a culture of justification in judicial review that will take into account the prerogative of the elected arms of government to fashion and implement public policy within the framework of the *Constitution.*[408] Such a culture accepts that the role of judicial review is to foster a culture of democracy, including strengthening the principle of the separation of powers. This culture of justification meets the tenets of judicial review as set out by both Mureinik and Dyzenhaus and finds application in an objective interpretation of constitutional provisions and values.

When government action is tested by strategic litigation, a culture of justification would allow the values of accountability, responsiveness and openness to be explored and realised. This will allow the courts to review executive and legislative action within the framework of the *Constitution* and thus fashion a system of the doctrine of the separation of powers that will survive the fused nature of the legislative and the executive. This will further allow the ethical component, constitutionally required of the state litigant, to be tested. The culture of justification can then assist in forcing the state litigant to conduct itself as the model litigant.

Although it is imperative that the courts recognise the need to protect the institutional character of each of the branches of government in a manner which will not prevent their ability to discharge their constitutional role, the courts are mandated to uphold constitutional provisions, including the doctrine of the separation of powers. The doctrine of the separation of powers is as much about power[409] as it is about separate

---

406 Para 4.5.3 above and 5.2 below.
407 Para 4.5.3 above and 5.3 below.
408 Para 4.5.3 above and 5.3 below.
409 De Vries 2006 *Politeia* 43.

and independent public institutions.[410] It is therefore imperative that the overconcentration of executive power in public institutions be addressed, something the courts seem unwilling to do. As the only check on executive power, a strong and fearless judiciary is needed as a corrective to executive power, rather than judicial deference and respect.[411] The overconcentration of executive power in public institutions such as the JSC might result in manipulation of the process of appointing judges. This can lead to an executive-leaning judiciary, which could place constitutional limitations on strategic litigation against the state.

---

410 Para 3.2.1.3 above. In *Hugh Glenister v President of the Republic of South Africa* CCT 07/14 and CCT 09/14 2014 ZACC 32 para 165, the Court stated that the dilution of power possessed by any single person to appoint the head of an institution (*in casu*, the Head of the Hawks) he desires resonates with the separation of powers and attaches a significant counterweight to the power of the executive and its members. In *In re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 CC para 112, the Court stated that the New Text (drawn-up by the Constitutional Assembly relying on the Constitutional Principles of the *Interim Constitution*) expresses concern for the over-concentration of power.

411 Para 4.5.3 above and 5.3 below.

Chapter 4: The role of the judge in strategic litigation

4.1 Introduction

The traditional function of a judge in civil litigation is to resolve disputes between litigants. However, under a supreme constitution, courts, and the Constitutional Court in particular, have to –[1]

> pronounce on the validity of legislation and executive conduct and to guard over our Constitution, its democratic structures, and the values and rights in it, build a constitutional jurisprudence and human rights culture, protect the weak against abuse of power, facilitate access to justice for those who most need it and often cannot afford it and generally strive to further our constitutional project.

Therefore, while the judge must resolve disputes, this must be done in a culture that promotes justice and fairness.

Chapter 2 discussed the way strategic litigation serves as an effective check to prevent the abuse of powers in the context of the doctrine of the separation of powers. Public control over the executive in the form of strategic litigation remains a viable option to curb the abuse of power when executive and legislative action is placed before the courts for review. Strategic litigation against the state by individuals, civil-society groups and political parties fosters a culture of accountability by publicly exposing injustice and corruption. However, strategic litigation against the state would be meaningless without an independent and impartial judiciary.

In Chapter 3, it was shown that the South African law of civil procedure underwent great changes since the advent of the *Constitution.* The *Constitution* changed the structure of the judiciary, defined the jurisdictional powers of courts regarding constitutional issues and requires of the courts to develop the common law. The changes to the common-law concepts of civil procedure set in place by the *Constitution* profoundly affected litigation in South Africa as well. Chapter 3 also focused on the changes to the traditional role of the courts. In strategic litigation, the judge may stay involved in the proceedings after the final order has been granted. The judge is active,

---

1 Van der Westhuizen 2008 *AHRLJ* 260.

with the responsibility not only for credible fact assessment but also for organising and shaping the litigation to ensure a just and viable outcome. Therefore, the advent of a supreme *Constitution* also changed the traditional adjudicative role of judges. However, although South Africa has a constitution as supreme law or guiding principle for adjudication, there still is uncertainty about the role of the judge in litigation. The constitutional function of the courts is undeniably political in nature and so is the role of the judge when adjudicating. The political role of judges brings a new dynamic to adjudication, with the court's decision in some instances reaching well beyond the parties to the litigation and affecting a wider range of people. Changes made to the political and constitutional landscape by a court's decision are difficult if not impossible to alter, as the Constitutional Court is the final arbiter in constitutional matters.

This chapter investigates the constitutional landscape in which judges adjudicate.

Section 2 explores the judicial appointment process in South Africa and analyses how political considerations and transformation issues can affect the independence of judges.

In Section 3, the judicial independence and impartiality as a requirement for a fair trial is discussed. Judicial independence is explored by highlighting the objective prerequisites for judicial independence in South Africa. The impartiality of judges is investigated by focusing on the recusal of judges and judicial impartiality in South Africa.

Section 4 explores the interpretation of constitutional rights and values by focusing on the sources for constitutional interpretation and the effect of so-called "hard cases" on interpretation. The section further explores the interpretation of constitutional rights and values by the courts by examining relevant case law.

In Section 5, the concepts of rationality and justness in adjudication are investigated. The focus is placed on so-called "hard cases" in which objective legal interpretation is problematic. However, the concepts of rationality and justness require that the court reach a just decision that is correct from a legal point of view. The methods and

sources of constitutional interpretation used by the Constitutional Court are analysed by reference to case law and the possibility of a legitimate theory of constitutional interpretation is explored.

4.2 The judicial appointment process

4.2.1 The importance of the judicial appointment process

With the advent of the constitutional era, South Africans opted to accomplish a significant portion of law making through adjudication. According to Klare, this is a decision fraught with institutional consequences. At the most superficial level, South Africans have chosen to limit the supremacy of Parliament and to increase the power of judges, each to an unknowable extent.[2]

Viewing the Constitutional Court strictly as a legal institution is to underrate its significance in the South African political system and its constitutional function. It is also a political institution, often judging on controversial issues of national policy in which the "setting" of the case is political.[3] Venter points out that the Constitutional Court considers it unavoidable that its judgments in certain critical political areas within its jurisdiction will have political consequences.[4]

Chief Justice Langa unapologetically stated that there is no longer place for assertions that the law can be kept isolated from politics. He reasoned as follows:[5]

> While they are not the same, they are inherently and necessarily linked. At the same time, transformative adjudication requires judges to acknowledge the effect of what has been referred to elsewhere as the personal, intellectual, moral or intellectual preconceptions on their decision-making. We all enter any decision with our own baggage, both on technical legal issues and on broader social issues. While the policy under apartheid legal culture was to deny these influences on decision-making, our constitutional legal culture requires that we expressly accept and embrace the role that our own beliefs, opinions and ideas play in our decisions.

---

2 Klare 1998 *SAJHR* 147.
3 Dahl 1957 *J. Pub. L.* 279. The phrase was adopted from Dahl into a South African setting.
4 Venter 2003 *PELJ* 173.
5 Langa 2006 *Stell LR* 353.

The possible political repercussions of Constitutional Court judgments cannot be denied. However, the acceptance of the political essence of court judgments raises the question of judicial activism. If the judgments of the Constitutional Court are political in nature, to what extent are the political leanings of judges allowed to shape court decisions and how can such decisions be rationally justified? Finally, is the political predisposition of the judge a criterion in the political appointment process?

The judiciary fulfils an important function in a democratic society, preserving the rule of law. Therefore, judges must interpret the law fairly and consistently and remain free from undue political influence. Because of the primacy of having competent and impartial judges, the process for selecting judges is of critical importance for strategic litigation. The goal of the selection process can best be articulated by the words of Chief Justice Arthur T. Vanderbilt:[6]

> An essential of a sound judicial system is, of course, a corps of judges, each of them utterly independent and beholden only to the law and to the Constitution, thoroughly grounded in his knowledge of the law and of human nature, including its political manifestations, experienced at the bar in either trial or appellate work and preferably in both, of such a temperament that he can hear both sides of a case before making up his mind, devoted to the law and justice, industrious, and, above all, honest and believed to be honest.

Akkas describes the judicial appointment process as follows:[7]

> Mechanisms for judicial appointment are important factors in appointing judges. In any society, the appointment of judges involves some formal and informal practices. The whole system depends largely on the political culture and social values of a society. Consequently, mechanisms for judicial appointment differ between jurisdictions. There are no standardised systems of appointment. Whatever mechanism is used in any particular country, it should be transparent and open to public scrutiny. Transparency and public scrutiny in the mechanisms for judicial appointment are of paramount importance to ensure appointment of the best available persons to judicial office and to enhance public confidence in the judiciary.

When these statements are analysed, two conclusions are reached. Firstly, the focus is on the judge himself, calling for the appointment of persons of fitness of character that

---

6 Vanderbilt 1953 *Nw. U.L. Rev.* 3.
7 Akkas 2004 *Bond Law Review* 201.

are suitably qualified and experienced. Secondly, the focus is on the mechanisms and institutions responsible for judicial appointments.

4.2.2 Appointment of judges in South Africa

The procedure for the appointment and removal of judges embodied in the South African *Constitution* provides for security of tenure and for safeguarding judicial independence. The appointment of judges is regulated by section 174(3) and (4) of the *Constitution.* The *Constitution* provides for the establishment of the Judicial Service Commission (JSC) and the JSC is entrusted with a key role in making all judicial appointments.[8]

The powers and functions of the JSC are assigned to it in terms of the *Constitution* and national legislation and the JSC may advise the national government on any matter relating to the judiciary or the administration of justice.[9] The functions of the JSC are to recommend suitable persons to the President for appointment as judges and to provide oversight over judicial conduct and the accountability of judicial officers.[10] The composition of the JSC is therefore of vital importance for judicial independence in South Africa.

The *Constitution* regulates the composition of the JSC, which consists of the following persons:[11]

- The Chief Justice, who presides at meetings of the Commission.
- The President of the Supreme Court of Appeal.
- One Judge President designated by the Judges President.
- The Cabinet member responsible for the administration of justice, or an alternate designated by that Cabinet member.

---

8 Section 178 of the *Constitution.*
9 Section 178(4) and 178(5) of the *Constitution.*
10 Chapter 2 of the *Judicial Service Commission Act* 9 of 1994.
11 Section 178(1)(a)-(k) of the *Constitution.*

- Two practising advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President.

- Two practising attorneys nominated from within the attorneys' profession to represent the profession as a whole, and appointed by the President.

- One teacher of law designated by teachers of law at South African universities.

- Six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly.

- Four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces.

- Four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly.

- When considering matters relating to a specific Division of the High Court of South Africa, the Judge President of that Division and the Premier of the province concerned, or an alternate designated by each of them.

Members of the JSC hold office for a term not exceeding five years, but[12]the President must remove any such member from office at any time if the designator who or which designated such member, so requests, or a member may resign from office by giving at least one month's written notice thereof to the chairperson.

The composition of the JSC at first glance seeks to ensure that persons from diverse political, social and cultural backgrounds, representing varying interest groups, would participate in its deliberations.[13] The fact that legal practitioners, judges and members of opposition parties are included in the decision-making process makes the process inclusive and therefore legitimate. Such legitimacy is, however, of no value if there is an

---

12 Section 2(1) *Judicial Service Commission Act* 9 of 1994, (as amended by the *Judicial Service Commission Amendment Act* 20 of 2008.

13 *Judicial Service Commission v Cape Bar Council* 2012 (11) BCLR 1239 (SCA) para 35.

overconcentration of one group in the composition of the JSC which allows that group to dominate.

4.2.3 Politics and the judicial appointment process

Malan states that, in the light of the broad review powers assigned to the courts and the political implication thereof, the composition of the JSC and its decisions are of political significance. Therefore, the JSC is an important political body.[14] The JSC is independent of the executive, although its composition could secure a dominant position for the executive. At least twelve of the twenty-three members of the JSC will be politicians appointed by the President from the ranks of the majority party in the national legislature.[15]

Van Zyl also regards the JSC as politically loaded, fifteen out of the twenty-three members being politicians. Van Zyl recommends a new approach, in which the *Constitution* is amended to provide for a JSC consisting substantially, if not exclusively, of judges, practising advocates and attorneys, and legal academics that are better suited to decide on the appointment of judges.[16] Van Zyl's approach may well lead to the merit-based appointment of judges; however, such an appointment process may be seen as elitist if lawyers only have the power to appoint judges. Nevertheless, it is clear that a more balanced and inclusive judicial appointment process is called for. This process should include politicians, but without the overconcentration of a parliamentary majority of a single political party on the JSC as is the current situation.

Currently, the appointment of judges invites arbitrariness because it allows executive interference in judicial process. According to Venter, in certain areas the Constitutional Court invariably chooses to adopt the stance of the current political majority by, for example, giving in its interpretation the constitutional provisions on equality an extensive ideological meaning, which is unique in the world.[17] Although the Constitutional Court is mandated to give voice to the inherent values and principles of

---

14 Malan 2014 *PELJ* 1968.
15 Malan 2014 *PELJ* 1969.
16 Van Zyl 2009 *PELJ* 10.
17 Venter mentions equality and the ownership of land as significant.

the *Constitution*, "as final interpreter of the Constitution it cannot rely on one method of interpretation of those values and principles". The danger exists that emphasis on the supremacy of the *Constitution* can become a "sub-conscious stratagem behind which the unexpressed political and moral presuppositions of a judge are concealed".[18]

The danger inherent in such a stratagem is that judges may substantively try to correct perceived injustices in the law using any number of extra-constitutional sources. Extra-constitutional sources in this context include the ideology of political parties. Although Venter emphasises that this kind of judicial choice should be distinguished from executive-mindedness, the Constitutional Court cannot be bound to the ideological stance of a political party. It would of course not be a problem if the ideological discourse of the party were clearly aligned with the *Constitution.* However, the court cannot in its interpretation of the values and principles seek meaning in the ideological reasoning of any political party. Such constitutional interpretation would make a mockery of the notion of the separation of powers, judicial independence and judicial impartiality and integrity.

4.2.4 Transformation and the judicial appointment process

The JSC's criteria for judicial appointments were adopted in 1998 and published in 2010.[19] In terms of the criteria, the following questions are asked:

(a) Is the particular applicant an appropriately qualified person?

(b) Is he or she a fit and proper person?

(c) Would his or her appointment help to reflect the racial and gender composition of South Africa?

Other criteria reflect the need for appointees to show commitment to the values and principles of the *Constitution*:

---

[18] Venter 2007 *Speculum Juris* 63.

[19] JSC *Criteria for Judicial Appointment* 2010 http://www.justice.gov.za/saiawj/saiawj-jsc-criteria.pdf accessed October 2015.

- Is the proposed appointee a person of integrity?
- Is the proposed appointee a person with the necessary energy and motivation?
- Is the proposed appointee a competent person?
    (i) Technically competent
    (ii) Capacity to give expression to the values of the *Constitution*
- Is the proposed appointee an experienced person?
    (i) Technically experienced
    (ii) Experienced concerning the values and needs of the community
- Does the proposed appointee possess appropriate potential?
- Symbolism. What message is given to the community at large by a particular appointment?

The first criteria are a repeat of section 174(1) and (2) of the *Constitution.* The precise meaning of section 174(2) is unclear. According to Hoexter and Olivier, two possible meanings could be attributed to the section: firstly, that it advocates a thick notion of diversity, or, secondly, a thinner idea of representativeness. Therefore, the *Constitution* may require the appointment of more female and black judges or it could demand something deeper, a judiciary that is more sensitive to the multiple values of the *Constitution*, one that delivers a better and different quality of justice, promotes the values of the *Constitution* and helps to create a more egalitarian society.[20]

This viewpoint is echoed by Malan, albeit in a different context. According to Malan, there are the transformationists whose supporters are insisting on the preference of transformation and representativeness as deciding criteria for judicial appointments. The opposing view is held by the liberals, who reproach the JSC for its alleged

---

[20] Hoexter and Olivier *The judiciary in South Africa* 247.

preference for recommending less competent and pliant pro-government candidates. The liberals have misgivings about the JSC's bias against liberal and independent-minded candidates, who are regarded as the foremost subscribers to the values underpinning the South African *Constitution.*[21]

It is submitted that, as in the *Constitution*, the criteria of merit and fitness of person are *qualified* by the criteria of representativeness. As such, merit and fitness of person should be the primary criteria for judicial appointment, tempered by representativeness. Fitness of person has been described by the Constitutional Court as follows:[22]

> The overarching requirement for suitability is "fit and proper" which, broadly speaking, means that the candidate must have the capacity to do the job well and the character to match the importance of the office. Experience, integrity and conscientiousness are all intended to help determine a possible appointee's suitability "to be entrusted with the responsibilities of the office concerned". Similarly, laziness, dishonesty and general disorderliness must of necessity disqualify a candidate.

Should the appointed person not display the kind of experience, the work ethic and the disposition to the truth that are required, a successful legal challenge may be mounted against that appointment. The appointment criteria of the JSC address the potential appointee's commitment to constitutional values and principles as well as judicial competence. It has given rise, however, to tension among the members of the JSC.

In *Judicial Service Commission v Cape Bar Council*,[23] the JSC decided to recommend only one candidate from a shortlist of candidates, with the result that two positions on the bench remained vacant.[24] The Cape Bar Council (CBC) brought an application in the High Court seeking an order declaring the proceedings of the JSC to be inconsistent with the *Constitution*, unlawful and consequently invalid and declaring the failure by the JSC to fill two judicial vacancies on the bench of the WCHC[25] to be unconstitutional and unlawful.[26] The Court held that the decisions of the JSC are reviewable under the

---

21 Malan 2014 *PELJ* 1970-1971.
22 *Helen Suzman Foundation v President of the Republic of South Africa; Glenister v President of the Republic of South Africa* 2015 (1) BCLR 1 (CC) para 63.
23 2012 (11) BCLR 1239 (SCA).
24 Para 2.
25 Western Cape High Court.
26 Para 3.

doctrine of legality.[27] The power to advise the President on the appointment of judges of the High Court is derived from section 174(6)[28] of the *Constitution* and, as such, it is undoubtedly a public power.[29]

The CBC argued that the JSC's failure to recommend any of the unsuccessful candidates for appointment to the two remaining vacancies was irrational and therefore invalid.[30] The CBC relied on the provisions of section 174(1) and (2)[31] of the *Constitution.* Three of the shortlisted candidates were supported by the CBC on the basis that they met the requirements in section 174(1).[32] The CBC requested reasons from the JSC for its decision to leave two vacancies instead of recommending any one of these candidates. The JSC's only response was that none of these candidates received a majority vote. The JSC did not deny that the three candidates proposed by the CBC were appropriately qualified persons who were fit and proper for judicial appointment as contemplated by section 174(1),[33] nor did the JSC profess to have been influenced by considerations of racial and gender representativeness contemplated in section 174(2) when it decided not to recommend any of the unsuccessful candidates. The only reason it gave why none of these candidates were nonetheless recommended to fill the two vacancies, was that no one secured sufficient votes for recommendation.

The JSC answered the charge that it had failed in its duty to provide reasons for not recommending any of the unsuccessful candidates at three levels:[34]

(a) That there is no duty imposed upon it, either by the *Constitution* or by any other legislative enactment, to give reasons for that decision.

---

27 Para 20.
28 This section provides that the President must appoint judges of all courts on the advice of the JSC.
29 Para 22.
30 Para 37.
31 Section 174(1) provides that any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. In terms of s 174(2), the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.
32 Para 38.
33 Para 39.
34 Para 42.

(b) That it has in any event given a reason for not selecting any of the unsuccessful candidates, namely that none of them received enough votes.

(c) That because of its secret voting procedure it was not possible to provide better reasons than the one it gave.

The Court firstly held that the JSC is under a constitutional duty to exercise its powers in a way that is not irrational or arbitrary.[35] Secondly, because the JSC is an organ of state it is bound by section 195 of the *Constitution*[36] to the values of transparency and accountability. The JSC is therefore obliged to give reasons for its decision not to recommend a particular candidate if properly called upon to do so.[37]

The Court therefore held that, since the JSC is under a constitutional obligation to act rationally and transparently in deciding whether or not to recommend candidates for judicial appointment, it follows that, as a matter of general principle, it is obliged to give reasons for its decision not to do so.[38] The response that the particular candidate did not garner enough votes, does not meet that general obligation, because it amounts to no reason at all. The Court continued by stating that, in a case such as this, where the undisputed facts gave rise to a *prima facie* inference that the decision not to recommend any of the suitable candidates was irrational, the failure by the JSC to adhere to its general duty to give reasons inevitably leads to confirmation of that *prima facie* inference.

The decision of the Court to rebuke the JSC for not recommending two suitable white candidates for the bench as irrational and therefore incompatible with the principle of legality and the rule of law seems to strengthen the argument of the liberal-leaning writers. It is clear from the judgment that should the JSC decide not to recommend suitable and qualified candidates based on race, the decision should be rationally justified to escape scrutiny by the courts. The judgment of the Court supports the

---

35 Paras 43 and 44.
36 Basic values and principles governing public administration.
37 Para 45.
38 Para 51.

notion that the primary criteria for judicial appointment are merit and fitness of character and that the issue of transformation plays a secondary role. The judgment also confirms the aim to promote the transformative justice of the *Constitution* premised on the fact that the principle of legality must be observed.[39]

Section 174(1) of the *Constitution* provides that any appropriately qualified woman or man who is a fit and proper person is eligible for an appointment as a judge. However, the need for the judiciary broadly to reflect the racial and gender composition of South Africa must be considered in the appointment process of judges.[40] According to Andrews –[41]

> [t]his project of constitutional transformation has not occurred without rancour, as the sometimes competing challenges of racial and gender transformation and representation, on the one hand, and integrity, competence, skill, and merit, on the other hand, are evaluated and balanced.

The statement by Andrews encapsulates the tension between the liberals and the transformationists in the judicial appointment process. It is also argued that transformation is used as an excuse for creating a more compliant judiciary. Therefore, "the government's assertions that judicial appointments are based on the need to increase diversity and promote a more rights-oriented judiciary are really pretexts for appointing individuals who are less likely to challenge official policies and programmes".[42] Such individuals would also be less likely to hold the state litigant constitutionally accountable.

When the independence of the judiciary is questioned, it reflects negatively on the legitimacy of the judiciary. Legitimacy in this sense refers to the possibility of the governed recognising and accepting the exercise of power as the exercise of authorised power.[43] The judiciary is not supposed to have an interest in the outcome of its decisions; they do not represent the people's will or interest but administer the existing

---

39 *South African Police Service v Solidarity OBO Barnard* 2014 (6) SA 123 (CC) para 38.
40 Section 174(2) of the *Constitution.*
41 Andrews 2006 *Osgoode Hall Law Journal* 567.
42 Gordon and Bruce *Transformation and the independence of the judiciary in South Africa* Centre for the Study of Violence and Reconciliation: Project on Justice and Transition 2007 www.csvr.org.za 48 accessed August 2015.
43 Bax and Van der Tang *Theses on control in Constitutional Law* 92.

law with due consideration of the *Constitution.* Therefore, "judicial decisions are provided with legitimacy in so far as they present themselves as applications of the law in concrete controversies by an independent and impartial institution".[44]

The appointment of judges oriented towards the ideology of a political party leaves the possibility that judges will have an interest in the outcome of the case when that party was part of the proceedings. In the words of Malan,[45]

> [j]udicial impartiality would not be possible, especially where the state is a party to litigation, for example, unless the court is independent from the legislature and the executive; that is, insulated from external interference in conducting its judicial responsibilities.

If a judge then found for the political party, the decision, even when correctly arrived at, could be suspect in the eyes of the public because of potential bias. An impartial system of judicial selection offers the best option. No judicial ruling should be questioned because of a cloud of suspected partisanship hanging over the judge.

According to the *Burgh House Principles on the Independence of the International Judiciary* (hereafter the Burgh Principles),[46] the following criteria are important when considering judicial appointments:

> Judges should be chosen from among persons of high moral character, integrity and conscientiousness who possess the appropriate professional qualifications, competence and experience required.

Criteria to ensure the fair representation of people in an area are acceptable, but appropriate personal and professional qualifications must be the overriding consideration in the nomination, election and appointment of judges.

Although the Burgh Principles were drafted as guidelines for the appointment of judges in international forums, they provide helpful and acceptable criteria for the appointment

---

44 Bax and Van der Tang *Theses on control in Constitutional Law* 95.

45 Malan 2014 *PELJ* 1983.

46 Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals*: Burgh House Principles* http://www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf. accessed October 2015.

of judges in national jurisdictions.[47] The criteria to ensure representativeness are of the utmost importance for the appointment of judges in South Africa. However, the Principles clearly state that although representativeness in the judiciary is important, appropriate personal and professional qualifications must be the overriding consideration in the nomination, election and appointment of judges.

Further confirmation of this argument can be found in the *Basic Principles on the Independence of the Judiciary,*[48] according to which persons selected for judicial office should be individuals of integrity and ability with appropriate training or qualifications in law.[49] The rest of the section states that –

> [a]ny method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

It is clear from this section that rejecting a suitable candidate for judicial appointment because of his or her race would be considered discriminatory and therefore unacceptable and illegal.

The appointment of judges oriented towards the ideology of a political party leaves the possibility that judges may have an interest in the outcome of the case if that party takes part in the proceedings. This relates directly to strategic litigation because judicial impartiality would not be possible when the state is a party to the litigation. As is shown in section 4.4 below, subjective inclinations in the process of constitutional adjudication are an inescapable part of the constitutional landscape. This may lead to a situation where the courts are "functionally associated with the executive and consequently

---

47 The *Code of Judicial Conduct*, adopted in terms of section 12 of the *Judicial Service Commission Act* 9 of 1994, published in *Government Gazette* No. 35802 of 18 October 2012, refers approvingly to the Principles.

48 Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

49 Section 10.

unable to control the executive's power with the detachment and independence required by the Constitution".[50]

A situation in which the courts are functionally associated with the judiciary holds an inherent danger for the independence of the judiciary. Oseko writes that, in Kenya, the president had sole powers to appoint the chief justice.[51] Therefore, the president made an important executive decision affecting the judiciary, but that decision was unchecked by either the judiciary or the legislature. This unchecked power resulted in the following:

> The President took over all appointments with no fettered discretion. The concentration of powers in the executive was evident. That the executive powers had been expanded at the expense of the judiciary is visible. The folly of this arrangement is that it exposed the judiciary to abuse by the subsequent executives, thus compromising the independence of the judiciary. The Chief Justice could influence the decisional independence of judges and magistrates over whom he held enormous administrative authority.

According to Oseko, public confidence in the office of the chief justice was very low as a result and he was perceived to be a puppet of the president. Oseko accordingly called for urgent amendments to the *Constitution*, providing for a more stringent appointment process, comprising checks by the legislature.[52]

The 2010 *Constitution* of Kenya,[53] currently in force, replaced the 1969 *Constitution.* The 2010 *Constitution* now reads that the president may only appoint the chief justice in accordance with recommendations made by the Judicial Service Commission and subject to the approval of the National Assembly.[54] The unfettered power of the president to appoint the chief justice in Kenya has been curtailed. However, the same danger of executive interference in the judicial appointment process, and partisan judges consequently, remains in South Africa.

---

50 Gordon and Bruce *Transformation and the independence of the judiciary in South Africa* Centre for the Study of Violence and Reconciliation Project on Justice and Transition 2007 www.csvr.org.za 28 accessed August 2015.

51 Section 61(1) of the *Constitution of Kenya*, 1969.

52 Oseko *Judicial independence in Kenya* 139.

53 *Constitution* of Kenya, 2010.

54 Section 166(1) of the *Constitution* of Kenya, 2010.

The South African courts recognise the danger a perception of partisan judges may cause, stating that nothing is more likely to impair confidence in judicial proceedings than actual bias or the appearance of bias in the officials who have the power to adjudicate on disputes.[55] Should the public lose their trust in the courts, something that will surely happen if the courts are perceived to be biased, other ways will be sought to settle disputes, including means such as self-help and violence.[56]

Van Zyl writes that struggle credentials appears to have been elevated to a qualification, if not a prerequisite, for judicial appointment, with the subsequent loss of qualified candidates for appointment to the various courts in South Africa.[57] The Constitutional Court has held that pre-1994 involvement in struggle politics does not reflect on the ability of a judge to hear matters independently.[58] However, this surely cannot mean that struggle credentials are a prerequisite for judicial appointment. In strategic litigation, the primary litigant is the state. The Constitutional Court is entrusted with the final jurisdiction in constitutional cases. The availability of law-based dispute resolution between the state and other parties, especially concerning the exercise of public power, is of paramount importance. If this approach is compromised, it will undermine the supremacy of law in the South African constitutional structure. No sitting judge should operate with the realisation that his or her career depends on the extent his or her rulings in the lower court pleased or displeased the primary litigant.

What is needed is the appointment of non-partisan, non-political and appropriately qualified judges. If the JSC rose above political ideology, the judicial appointment process could be balanced, inclusive and open to participation. Such a balanced approach would lead to creating and sustaining an intellectually and legally distinguished and a politically independent and representative judiciary. Gordon and Bruce says that if appointments were based on merit as opposed to party allegiance or other inappropriate factors, judges would be less likely to feel that they need to favour

---

55 *President of the Republic of South Africa v South African Rugby Football Union* 1999 4 SA 147 (CC) para 35.

56 Malan 2014 *PELJ* 2024.

57 Van Zyl 2009 *PELJ* 9 also Venter 2007 *Speculum Juris* 68-69.

58 *President of the Republic of South Africa v South African Rugby Football Union* 1999 4 SA 147 (CC) para 72.

the people who appointed them. Such judges would also be more likely hold the state litigant constitutionally accountable. Merit-based appointments would also ensure that judges have the necessary legal education and experience, both of which help foster and reinforce the importance of judicial independence.[59]

It is undeniable that the interpretation of indeterminate constitutional values requires a diverse judiciary. In *R v S (R.D.)*,[60] the Court held as follows:

> It is obvious that good judges will have a wealth of personal and professional experience, that they will apply with sensitivity and compassion to the cases that they must hear. The sound belief behind the encouragement of greater diversity in judicial appointments was that women and visible minorities would bring an important perspective to the difficult task of judging.

In the Constitutional Court, the differences in interpretation of constitutional rights and values by the judges are readily discernible. The analysis in section 4.4 below shows the different approaches of judges in reasoning, interpreting the *Constitution* and selective sourcing. This sets the background for a liberal democratic and social democratic culture of constitutional interpretation premised on justification.

The differences of opinion and interpretation of the *Constitution* provide plurality and give meaning to the rights and values imbedded in the *Constitution.* The judicial appointment process must provide judges who have the necessary skills and qualifications and who can contribute different opinions to constitutional interpretation. This articulates the thick version of diversity described by Hoexter and Olivier that strives for a multiple intersectional difference of race, gender, culture and sexual orientation, for diverse judicial attitudes and values, and for diverse values and modes of adjudication.[61]

Should the plurality necessary for constitutional interpretation be stifled by the appointment of judges of similar political orientation, the integrity of the courts as well as the principle of participation as articulated by the *Constitution* would be

---

59 Gordon and Bruce *Transformation and the independence of the judiciary in South Africa* Centre for the Study of Violence and Reconciliation Project on Justice and Transition 2007 www.csvr.org.za accessed August 2015.

60 (1997) 118 CCC (3d) 353 para 119.

61 Hoexter and Olivier *The judiciary in South Africa* 247.

compromised and might lead to a monopoly on constitutional interpretation or interpretive consensus. Interpretive consensus might limit the extent of constitutional interpretation and force consensus, but not because the *Constitution* itself compels agreement. This might lead to an attempt by similarly minded judges to force conformity or their version of the truth on all. Interpretive consensus would then not be based on constitutional principles and values, but on political ideology.

The Constitutional Court inevitably and frequently makes decisions that have political implications. Therefore, constitutional adjudication is necessarily political, because it is guided by the values and principles of the *Constitution*, which have to be interpreted and applied within a specific socio-political reality.[62] Constitutional interpretation therefore cannot be driven by any brand of political ideology.

4.3 Judicial independence and impartiality

4.3.1 International law and the independence and impartiality of the judiciary

According to Lummis, "the moment a decision is controlled or affected by the opinions of others or by any form of external influence or pressure, that moment the judge ceases to exist".[63] Judicial impartiality requires that the judge reach a decision based on the acceptable current law, free from outside interference.

The Burgh Principles,[64] noting that each court has its own characteristics and functions, consider the following principles of international law to be of general application to ensure the independence and impartiality of the judiciary:[65]

(a) Judges must enjoy independence from the parties to cases before them, their own states of nationality or residence, the host countries in which they

---

62 *Helen Suzman Foundation v President of the Republic of South Africa; Glenister v President of the Republic of South Africa* 2015 (1) BCLR 1 (CC) para 205.

63 Lummis *The trial judge* 10, quoted by Volcansek 2007 *Fordham Urban Law Journal* 383.

64 Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals*: Burgh House Principles* http://www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf.

65 Preamble of the Report.

serve, and the international organisations under the auspices of which the court or tribunal is established.

(b) Judges must be free from undue influence from any source.

(c) Judges must decide cases impartially, based on the facts of the case and the applicable law.

(d) Judges must avoid any conflict of interest, as well as being placed in a situation which might reasonably be perceived as giving rise to any conflict of interests.

(e) Judges must refrain from impropriety in their judicial and related activities.

These Principles set the minimum standard required for the impartiality of the judiciary.

Internationally, the independence and impartiality of courts are required for any democracy. The international standards, endorsed by the resolutions of the General Assembly of the United Nations,[66] include two principles: Firstly, the independence of the judiciary must be guaranteed by the state and enshrined in the *Constitution* or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary. Secondly, the judiciary must decide matters before them impartially, based on facts and in accordance with the law, without any restrictions, improper influence, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

The *International Covenant on Civil and Political Rights*[67] guarantees that all persons are equal before the courts and that in the determination of any criminal charge or of rights

---

66 *Basic Principles on the Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

67 Signed by South Africa in October 1994 but not ratified.

and obligations in a suit at law, everyone is entitled, without undue delay, to a fair and public hearing by a competent, independent and impartial tribunal established by law.[68]

In the *Bangalore Code of Judicial Conduct* 2001[69] (hereafter the Bangalore Code), chief justices of a number of countries laid down the premises for judicial integrity:

> A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason. Judges shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate. A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom. In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently.

Under the Bangalore Code, impartiality is essential for the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

Another principle laid down in the Bangalore Code is equal treatment of all before a court. In the application of the equality treatment, the Bangalore Code provides as follows:

- A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds").

- A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.

- A judge shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without

---

68 Article 14(1) of the *Covenant*.

69 The *Bangalore Draft Code of Judicial Conduct* 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002.

differentiation on any irrelevant ground, immaterial to the proper performance of such duties.

- A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or control to differentiate between persons concerned in a matter before the judge, on any irrelevant ground.

- A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds, except such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy.

The Bangalore Code is instrumental in testing the conduct of judges. The *Constitution*, in particular, and strategic litigation, by necessity, require an independent judiciary with structures and constitutional principles guaranteeing such independence. Strategic litigation also calls for judges who are fair and impartial, non-partisan and averse to promoting a particular political ideology.

4.3.2 Judicial independence in South Africa

The chief characteristic distinguishing the courts from political institutions is judicial independence: independence from government and from political leadership, independence from political parties and political fashion, independence from popular feelings.[70] According to Malan, as its basic tenet, judicial independence –[71]

> implies that the courts must stand in an independent relationship to the legislature and the executive, and that judges must be in a position to discharge their functions free from interference of whatever nature and from whatever source.

However, he continues that it would be "unrealistic and incorrect to portray the judiciary as the supreme power centre in the constitutional system which the weak political branches must obey". Ultimately, the power of the courts rests on the

---

70 Koopmans *Courts and political institutions* 250.
71 Malan 2014 *PELJ* 1984.

willingness of the public, and the political actors accountable to it, to respect the independence and the decrees of the court.[72]

Judicial independence in South Africa is regulated by the *Constitution*, the *Judicial Service Commission Act* 9 of 1994 and a *Code of Judicial Conduct*.[73]

In terms of the *Constitution*, the judicial authority in South Africa is vested in the courts.[74] The courts are independent and subject only to the *Constitution* and the law, which they must apply impartially without fear, favour or prejudice.[75] No person or organ of state may interfere with the functioning of the courts.[76] Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.[77] The *Constitution* provides a blueprint for a judiciary that is insulated from interference from the other branches of government. The *Constitution*[78] requires national legislation to be enacted to ensure the independence of the judiciary.

In terms section 12 of the *Judicial Service Commission Act*, a code of judicial conduct was adopted that serves as the prevailing standard for judicial conduct, to which judges must adhere.[79] The *Code of Judicial Conduct* (hereafter the Code)[80] was compiled by the Chief Justice, acting in consultation with the Minister, and tabled by the Minister in Parliament for approval.[81]

Any wilful or grossly negligent breach of the Code constitutes misconduct, which will lead to disciplinary action in terms of section 14 of the Act. The preamble to the Code states that it is necessary for public acceptance of the authority and integrity of the

---

72 Friedman 2006 *New York University Law and Economics Working Papers* 261.
73 Adopted in terms of section 12 of the *Judicial Service Commission Act* 9 of 1994, published in *Government Gazette* No. 35802 of 18 October 2012.
74 Section 165(1) of the *Constitution.*
75 Section 165(2) of the *Constitution.*
76 Section 165(3) of the *Constitution.*
77 Section 165(4) of the *Constitution.*
78 Section 179(6) of the *Constitution.*
79 Section 12(5) of the Act.
80 *Code of Judicial Conduct*, adopted in terms of Section 12 of the *Judicial Service Commission Act* 9 of 1994, published in Government Gazette no. 35802, 18 October 2012.
81 Section 12(1) of the Act.

judiciary in order to fulfil its constitutional obligations that the judiciary should conform to ethical standards that are internationally accepted, in particular as set out in the *Bangalore Principles of Judicial Conduct* (2001) as revised at The Hague (2002).

Article 4 of the Code highlights the importance of judicial independence in South Africa. Therefore, a judge must –

(a) uphold the independence and integrity of the judiciary and the authority of the courts;

(b) maintain an independence of mind in the performance of judicial duties;

(c) take all reasonable steps to ensure that no person or organ of state interferes with the functioning of the courts; and

(d) not ask for nor accept any special favour or dispensation from the executive or any interest group.

Note 4 requires the following:[82]

- A judge acts fearlessly and according to his or her conscience because a judge is only accountable to the law.[83]

- Judges do not pay any heed to political parties or pressure groups and perform all professional duties free from outside influence.[84]

- Judges should not appear at public hearings or otherwise consult with an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice.[85]

---

82 Explanatory footnotes for each Article.
83 Note 4(i).
84 Note 4(ii).
85 Note 4(iii).

- Judicial independence is not a private right or a principle for the benefit of judges. It denotes freedom of conscience for judges and non-interference in the performance of their decision-making.

The Code further requires that judges act honourably,[86] comply with the law,[87] ensure equality at all times,[88] and take reasonable steps to enhance transparency.[89] Judges must be fair in resolving disputes[90] and perform judicial duties diligently.[91] Judges should not comment on the merits of a case and not enter into public debate about a case irrespective of criticism levelled against the judgment.[92] The right to association of judges is curtailed, as they are not allowed to belong to any political party or secret organisation and must sever all professional links to such organisations upon appointment.[93]

Each judge and acting judge must also take an oath or solemnly affirm to be faithful to the Republic of South Africa and to uphold and protect the *Constitution* and the human rights entrenched in it and administer justice to all persons alike without fear, favour or prejudice, in accordance with the *Constitution* and the law.[94]

The Constitutional Court relied[95] on Canadian jurisprudence[96] when it defined judicial independence:

> Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider — be it government, pressure groups, individuals or even another judge — should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.

---

86 Article 5 of the Code.
87 Article 6 of the Code.
88 Article 7 of the Code.
89 Article 8 of the Code.
90 Article 9 of the Code.
91 Article 10 of the Code.
92 Article 11 of the Code.
93 Article 12 of the Code.
94 Item 6 of Schedule 2 of the *Constitution.*
95 *De Lange v Smuts* 1998 3 SA 785 (CC) para 70; *Van Rooyen v S* 2002 5 SA 246 (CC) para 19.
96 *The Queen in Right of Canada v Beauregard* (1986) 30 DLR (4th) 481 (SCC) 491.

According to Van der Westhuizen, independence of the courts places a huge responsibility on the judiciary. Firstly, the courts have to value, assert and protect their own independence. This means that the judiciary must resist all attempts at interference in the form of corruption or instructions or requests from the politically powerful. Van der Westhuizen further states that the judiciary should reject fear of rejection or a desire for popularity.[97] This would allow the courts to build institutional legitimacy and play an effective role in democratic politics. The rejection of fear or a desire for popularity would allow the judge to hold the state litigant to account for the constitutional violations. This could assist in creating a culture of accountability. Such a culture would insist that the state litigant is ethical and fair when appearing in court. In other words, it would require the state litigant to be the model litigant.

When the state is a party to litigation, the relationship between the parties and between the court and the parties may affect proceedings. Dyzenhaus puts it as follows:[98]

> At the moment that a court accepts jurisdiction over a controversy between government and an individual, government is demoted — it loses its claim to be the exclusive representative of the state. At the same time, the individual is promoted to a public role, to one with an equal claim to represent the state. The court, then, in deciding between these claims, articulates a vision of what the state is and publicly draws the line between law and politics. In order to articulate this vision, the court needs to be independent.

This statement by Dyzenhaus encapsulates a basic tenet of strategic litigation and indeed the law in general. When involved in litigation, it is a principal element of the law and the court to level the playing field and to ensure that parties to the litigation are equal in the eyes of the law and the court. Therefore, the state party, for the purpose of the litigation, loses its public representative mandate. The state is placed on equal constitutional footing with the litigant who challenged the policy. The court, as objective arbiter of the dispute, relies on principles and values articulated by the *Constitution* to ensure that the matter reaches a fair and just conclusion. However, to reach the level of fairness and justness as required by the *Constitution*, it may be

---

97 Van der Westhuizen 2008 *AHRLJ* 259.
98 Dyzenhaus 1998 *SAJHR* 172.

necessary for the court to hold the state litigant to a different standard than the private litigant. Constitutional obligations require this from the courts. After all, there is sometimes a meaningful imbalance of power in litigation against the government with its access to substantial resources.[99]

There is ample constitutional protection for the independence of the judiciary in South Africa. However, it is essential that both the executive and the legislature respect and promote the independence of the courts. In 2015, Chief Justice Mogoeng Mogoeng accused the executive of interfering in the judiciary's independence and said that the judiciary needed to take collective responsibility and do things differently.[100] He said that –

> [w]e ought to be worried when there is instability or a measure of instability in the executive and in the legislative arm of government. But we ought to be terrified and deeply concerned when the judiciary does not appear to be what it was established to be. When there is a possibility, no matter how remote, that the judiciary might be manipulated then we have to be vigilant. Without an independent judiciary democracy is doomed.

Ultimately, the responsibility for maintaining the independence of the judiciary rests with the judiciary itself; this independence can be achieved by holding the executive and Parliament to account whenever judicial independence is threatened.

4.3.3 Judicial impartiality in South Africa

4.3.3.1 Recusal of judges

The issue of recusal of judges was heard by the Constitutional Court in *President of the Republic of South Africa v South African Rugby Football Union*.[101] The respondent in the case stated that he had reasonable apprehension that every member of the Court would be biased against him and that, as a result, he might not get a fair trial.[102] The Court firstly held that if that apprehension was reasonable, all its members would have

---

99 This argument is further explored in section 6 of this work.

100 Chief Justice Mogoeng Mogoeng addressing the Association of Regional Magistrates of Southern Africa Litigator https://litigator.co.za/hands-off-judiciary-warns-chief-justice accessed October 2015.

101 1999 (7) BCLR 725 (CC).

102 Para 6.

been under a duty to recuse themselves, despite the fact that no formal application for such relief was made.

The Court stated that a judge who sits in a case in which he is disqualified from sitting because there is a reasonable apprehension that such judge might be biased would act in a manner that is inconsistent with section 34 of the *Constitution.*[103] Such a judge would also be in breach of the requirements of section 165(2)[104] of the *Constitution* and the prescribed oath of office.[105] A judge who incorrectly refuses to recuse himself could fatally contaminate the ultimate decision of the Court.[106]

The Court reasoned that there are two possible tests to determine bias. The first is to ask whether there is a real likelihood of bias and the second is whether there is a reasonable suspicion or apprehension of bias.[107] The Court held that the preferred test is that of reasonable apprehension of bias.[108]

The Court stated that the test for apprehension of bias is objective and that the onus of establishing it rests on the applicant. Furthermore, the apprehension of bias must be reasonable and held by reasonable and right-minded persons, applying themselves to the question and obtaining all the required information.[109]

The question that a court will ask when a recusal application is made is therefore –[110]

> whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel.

---

103 Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court.

104 Courts are independent and subject only to the *Constitution* and the law, which they must apply impartially and without fear, favour or prejudice.

105 Item 6 of Schedule 2 of the *Constitution*.

106 *SARFU* case para 32.

107 Para 36.

108 Para 38.

109 Para 45.

110 Para 48.

Should the answer to this question be in the affirmative, the judge would have to recuse him- or herself. Failure to recuse him- or herself would lead to the invalidity of the decision of the judge.

In practice, the judges recuse themselves where one of the parties to the litigation is a close family member. However, this does not always relate to the situation where the family member appears as counsel before the judge. The son of Chief Justice Chaskalson on occasion appeared before him in the Constitutional Court, as did the daughter of Justice Yacoob. Chief Justice Mogoeng Mogoeng's wife appeared before him in the High Court. None of these judges recused themselves. Justice O'Regan did recuse herself when her husband appeared before her in the Constitutional Court.[111]

The fact that the judges failed to recuse themselves does not mean they were biased. There is a presumption that judges will be impartial in adjudication.[112] However, absolute neutrality on the part of a judicial officer can hardly, if ever, be achieved.[113] Therefore, previous political positions held by a judge cannot be regarded as proof that the judge will be biased. Indeed, it is appropriate for judges to utilise their life experiences in the adjudication process.

4.3.3.2 Judicial impartiality in South Africa

Impartiality is that "quality of open-minded readiness to persuasion without unfitting adherence to either party, or to the judge's own predilections, preconceptions and personal views that is the keystone of a civilised system of adjudication".[114] Impartiality, in short, requires a mind open to persuasion by the evidence, facts and the legal arguments placed before the court by the parties to the litigation. However, this does not mean absolute neutrality; judges are human and there is no human being who is

---

111 Hoexter and Olivier *The judiciary in South Africa* 229.

112 *Justice Alliance of South Africa v President of the Republic of South Africa* 2011 (5) SA 388 (CC) para 40.

113 *President of the Republic of South Africa v M & G Media Ltd* 2012 (2) SA 50 (CC) para 42.

114 *South African Commercial Catering and Allied Workers Union v Irvin and Johnson Ltd* 2000 (3) SA 705 (CC) para 14.

not the product of his or her own social experience, process of education and human contact. What is possible and desirable is impartiality:[115]

> The wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave. True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.

Another core element of impartiality is that the judge has not let media pressure, public opinion or any other outside influence, including social, political, ideological or religious pressure, dictate the hearing and the decision in the case. The trial judge's primary concern should be that the parties before him be afforded a fair trial.[116]

When adjudicating, judges are realising legal and social order. The individual should have the real and tangible opportunity of pursuing his rights through the courts with the expectation that the court will adjudicate on the matter impartially and fairly and that the court will come to a reasoned and just decision. This requires impartial judges that operate with skill, efficiency and professionalism, and asks of judges to deliver judgments that are just, lawful, reasonable and well argued, all principles that are requirements for a fair trial.

According to Gordon and Bruce, the independence of the judiciary is objective and protected by constitutional and other legal guarantees, while the impartiality of the judiciary is subjective and refers to a judge's state of mind.[117] Therefore, judges themselves carry the burden of remaining impartial. The question of impartiality is significant when judges are asked to interpret the often vague and undefined constitutional provisions. When a judge is confronted with these broad formulations and imprecise notions –[118]

---

115 Canadian Judicial Council: *Commentaries on Judicial Conduct* (1991) https://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf 12 accessed December 2015.

116 Botein *Trial judge* 132.

117 Gordon and Bruce *Transformation and the independence of the judiciary in South Africa* Centre for the Study of Violence and Reconciliation: Project on Justice and Transition 2007 www.csvr.org.za para 2.3 accessed October 2015.

118 Venter 2003 *PELJ* 25.

> [t]his may inspire unwarranted reactions, such as the rejection of the law of the Constitution as "real" or "black letter" law, or it may seem like a justification of the idea that the Constitution means what the judges wish it to mean.

Judges come onto the bench with their own ideological views and may apply them in resolving cases. In the American Supreme Court, attitudinalists are able to predict with an enormous degree of success[119] how the American Supreme Court Justices' vote based on ideology.[120] Although precedent carries substantial weight to constrain judges, empirical evidence in the United States shows that even if the judges are deciding cases in good faith based on their best understanding of the law, they still are voting according to their own values.

There is no comparable empirical study in South Africa relating to the judgments of the Constitutional Court. However, public statements by judges and court *dicta* shed light on whether the personal views of judges may affect judgment.

Sachs J had this to say about the impartiality of the judges of the Constitutional Court:[121]

> Our function is to interpret the text of the Constitution as it stands. Accordingly, whatever our personal views on this fraught subject might be, our response must be a purely legal one.

According to Sachs, judges are not supposed to have their personal views interfere when they adjudicate on the bench. Kentridge AJ articulated this in another way:[122]

> While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single "objective" meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.

In *S v Zuma*,[123] the Court held that while it may not be easy to avoid the influence of one's personal intellectual and moral preconceptions, the Court has from its very

---

119 Quoted by Friedman: There are legal commentators who predict with 70% accuracy how judges will vote based on their ideology.

120 Friedman 2006 *New York University Law and Economics Working Papers* 272-273.

121 *S v Makwanyane* 1995 (6) BCLR 665 (CC) para 349.

122 *S v Zuma* 1995 (4) BCLR 401 (CC) para. 17.

inception stressed the fact that "the Constitution does not mean whatever we might wish it to mean". Therefore, cases fall to be decided on a principled basis.

Each case that is decided adds to the body of South African constitutional law, and establishes principles relevant to the decision of cases that may arise in the future. Where principles have not yet been established, courts may draw on the international jurisprudence on constitutional rights. It is therefore the duty of the courts to develop constitutional jurisprudence based on principle and to decide cases in the light of established precedent.

In *President of the Republic of South Africa v South African Rugby Football Union*,[124] the Court held as follows:

> By the same token a judicial officer is required to adjudicate a case in accordance with the facts and the law and not according to his or her personal views or opinions. In this regard a pragmatic approach appears from the SARFU case: 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 constitutional duty common to all judicial officers. If they deviate, the independence of the judiciary would be undermined, and in turn, the Constitution itself.

Therefore, whatever the personal beliefs of the judge, justice must be administered to all persons alike without fear, favour or prejudice. This includes holding the state litigant accountable to the *Constitution*, even where such litigant is a high-ranking member of government. However, the Court also found that given that all people have emotions, experiences and beliefs, it is virtually impossible for judges to be absolutely neutral and that it is appropriate for judges to draw on their own life experiences, thereby adding diversity of perspectives when adjudicating cases.[125] Judges are

---

123 1995 (2) SA 642 (CC) para 17.
124 1999 4 SA 147 (CC) para 104.
125 Para 42.

unavoidably the product of their own life experiences, and this perspective informs each judge's performance of his or her judicial duties.[126]

Justice Langa, lecturing on the transformative nature of the *Constitution*, said the following on the transformation of the legal culture:[127]

> It is no longer sufficient for judges to rely on the say-so of parliament or technical readings of legislation as providing justifications for their decisions. Under a transformative Constitution, judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but also by reference to ideas and values. This approach to adjudication requires an acceptance of the politics of law. There is no longer place for assertions that the law can be kept isolated from politics. While they are not the same, they are inherently and necessarily linked. At the same time, transformative adjudication requires judges to acknowledge the effect of what has been referred to elsewhere as the "personal, intellectual, moral or intellectual preconceptions" on their decision-making. We all enter any decision with our own baggage, both on technical legal issues and on broader social issues. While the policy under apartheid legal culture was to deny these influences on decision-making, our constitutional legal culture requires that we expressly accept and embrace the role that our own beliefs, opinions and ideas play in our decisions. This is vital if respect for court decisions is to flow from the honesty and cogency of the reasons given for them rather than the authority with which they are given.

In embracing the role of own "beliefs, opinion and ideas" on decision-making, it is clear that the Chief Justice envisioned a greater degree of judicial activism in the judiciary and judicial decision-making. The statement by the judge shows more acceptance of the role of a judge's own beliefs in adjudication. However, judges still have to justify their decisions not only by reference to authority, but also by reference to constitutional ideas and values.

The concept of subjective constitutional interpretation rests uneasy with the principle of justification, especially in the form of a court order. After all, the power and influence of judges rest to a large degree "on the confidence reposed in the soundness of their decisions and the purity of their motives".[128] Therefore, should a judgment not clearly reflect the rational application of existing law, including adherence to constitutional

---

126 *South African Commercial Catering and Allied Workers Union v Irvin and Johnson* Ltd 2000 (3) SA 705 (CC) para 14.

127 Langa 2006 *Stell LR* 353.

128 *United States v Lee* 106 US 196 223 (1882).

values, the purity of the motive of the judge might be questioned. A judge whose motives are questioned undermines public confidence in the law and the *Constitution.*

Although an objective approach to adjudication is preferred, the values ingrained in the *Constitution* lend themselves to a degree of subjective interpretation. It is inescapable that substantive reasoning will accompany the interpretation of the values of the *Constitution.* Nevertheless, it is important that substantive reasoning is not based on the concealed and capricious pre-conceived political, moral or religious notions of the adjudicator. What is needed is an acceptable and legitimate theory of interpretation of the values embedded in the *Constitution.* Such a constitutional theory of interpretation would not necessarily establish a generic content of the values of the *Constitution* which is neither desirable nor possible. Developing a theory, which calls for the establishing of generic content of the values of the Constitution, falls beyond the scope of the present study. Constitutional interpretation based on the values imbedded in the *Constitution* would provide legitimacy to such interpretation.

4.4 Interpretation of constitutional values and rights

4.4.1 Sources for constitutional interpretation

According to Fuller and Winston –[129]

> [c]ourts can be counted on to make a reasoned disposition of controversies, either by the application of statutes or treaties, or in the absence of these sources, by the development of rules appropriate to the cases before them and derived from general principles of fairness and equity.

The rule of law therefore places a restriction on the arbitrary exercise of power by subordinating it to well-defined and established legal norms. In South Africa, the first source for judicial decision-making will be the *Constitution*, followed by the accepted current law in the form of statutory law, common law and customary law as well as court precedent.[130]

---

129 Fuller and Winston 1978 *Harvard Law Review* 372.

130 Hereafter, any reference to "current law" includes these sources.

In most cases commonly before the courts, the legal sources point to a clearly defined outcome after the facts and legal arguments have been heard. The sources of law that the judge must interpret to arrive at a just and fair conclusion are obvious. If the plaintiff in a delictual claim for damages proved, by fact and legal argument, that he has been assaulted intentionally and unlawfully by the defendant, he is entitled to the damages that he can prove. The legal sources point in one direction: a delict was committed and the plaintiff is entitled to damages. Therefore, there is conformity in the objective legal interpretation of the sources. However, adjudication is also sought in matters where the accepted sources of law are not always clear, may contradict one another, or may offer no clear and acceptable legal sources for the resolution of the dispute. These are referred to as "hard cases", in which an objective way of reaching a judgment based on the accepted sources of law is problematic. Therefore, there is a lack of clear consensus on the interpretation of the applicable current law.

4.4.2 Constitutional interpretation in hard cases

Posner states the following regarding hard cases:[131]

> If a case is difficult in the sense that there is no precedent or other text that is authoritative, the judge has to fall back on whatever resources he has to come up with a decision that is reasonable, that other judges would also find reasonable, and ideally that he could explain to a layperson so that the latter would also think it a reasonable policy choice. To do this, the judge may fall back on some strong moral or even religious feeling. Of course, some judges fool themselves into thinking there is a correct answer, generated by a precedent or other authoritative text, to every legal question.

Therefore, in hard cases, where the court is asked to resolve an issue fairly, the court is asked to decide something about which the parties themselves could not agree and for the determination of which no standard exists.[132] This sometimes requires subjective interpretation from the judge, imposing on him- or her, his or her own moral, religious or political belief. The judge then is the "interpreter for the community of its sense of

---

131 Segall *The Court: A talk with Judge Richard Posner* The New York Review of Books http://www.nybooks.com/articles/archives/2011/sep/29/court-talk-judge-richard-posner/ 2011 accessed November 2015.

132 Fuller and Winston 1978 *Harvard Law Review* 373.

law and order and must supply omissions, correct uncertainties, and harmonise results with justice through a method of free decision".[133]

According to Dworkin, a hard case is a situation in law that gives rise to genuine arguments about the truth of a proposition of law that cannot be resolved by recourse to a set of plain facts determinative of the issue.[134] If objective analysis is problematic when adjudicating on hard cases, what consistent legal method can be used to reach a conclusion of what the law is and what verdict should be reached?

In terms of the *Constitution*, courts are constrained in their decision-making by the supremacy of the *Constitution* and the rule of law.[135] However, the courts are further constrained by legislation, the common law, precedent and procedural rules in order to arrive at the outcome that is the most correct, both on the factual basis of the case and the application of the law to the matter. Examples of these include the exclusionary rules of evidence, the *audi alteram partem* rule and the right to legal representation.

In the South African constitutional setting, established legislation, prevailing precedents and other accepted sources of law can be used by the courts in the adjudication process. The judgment of the court serves as the basis on which the legality of the trial is weighed.

In *Helen Suzman Foundation v Judicial Service Commission*,[136] the Court described the duty to give reasoned decisions:

> In the first place, a duty to give reasons entails a duty to rationalise the decision. Reasons therefore help to structure the exercise of discretion, and the necessity of explaining why a decision is reached requires one to address one's mind to the decisional referents which ought to be taken into account. Secondly, furnishing reasons satisfies an important desire on the part of the affected individual to know why a decision was reached. This is not only fair: it is also conducive to public confidence in the administrative decision-making process. Thirdly — and probably a major reason for the reluctance to give reasons — rational criticism of a decision may only be made when the reasons for it are known. This subjects the administration to public scrutiny and it also provides an important basis for appeal or review. Finally, reasons may serve

133 Cardozo *The nature of the judicial process* 16.
134 Guest *Ronald Dworkin* 136.
135 Section 1 of the *Constitution.*
136 2015 (2) SA 498 (WCC) para 14.

> a genuine educative purpose, for example where an applicant has been refused on grounds which he is able to correct for the purpose of future applications.

The decision maker therefore has to deliberate before reaching a decision and justify the decision made. In this way the duty to give reasons tempers the exercise of discretion present in decision-making. Furthermore, the furnishing of reasons allows an aggrieved party to evaluate and argue the rationality, lawfulness, reasonableness and justness of the impugned decision.[137] This means the decision of the court should be based on fact and sound reason and it must be well founded in the prevailing law. It must present a just appraisal of the facts, evidence and arguments placed before the courts. However, this leaves open the questions whether the decision arrived at is equitable and just.

4.4.3 The interpretation of constitutional values and rights by the courts

Venter describes constitutional values as follows:[138]

> As an abstract concept, it indicates a standard or a measure of good. A constitutional value may therefore be deemed to set requirements for the appropriate or desired interpretation, application and operationalization of the Constitution and everything dependent thereupon.

In *Minister of Home Affairs v National Institute for Crime Prevention*,[139] Chaskalson CJ described the values in section 1 of the *Constitution* as follows:[140]

> The values enunciated in section 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves. This is clear not only from the language of section 1 itself, but also from the way the Constitution is structured and in particular the provisions of Chapter 2 which contains the Bill of Rights.

Although abstract, the constitutional values form the standard for constitutional interpretation. The values are abstract because they do not spell out the impact they are intended to have on any actual situation or how these values are to be compromised against other values or rights. However, the values are fundamental to

---

137 *Helen Suzman Foundation v Judicial Service Commission* 2015 (2) SA 498 (WCC) para 16.
138 Venter 2001 *PELJ* 25.
139 2005 (3) SA 280 (CC).
140 Para 21.

the *Constitution*, establishing its character and structure. The core values of the *Constitution* are not enforceable on their own but the authority of the state should be employed to enable it to secure and effect the realisation of these values.

Interpretation of the *Constitution* is governed by its section 39. When interpreting the *Constitution* courts must promote the values that underlie a democratic society based on human dignity, equality and freedom. The courts must consider international law and may consider foreign law. South African courts readily consider foreign law when interpreting constitutional rights and values.

In *S v Zuma,*[141] the Court explored the principles on which a constitutional Bill of Rights should be interpreted. The Court stated that it was the task of the courts to interpret a written instrument, acknowledging the fallacy of supposing that general language must have a single "objective" meaning.[142]

The Court further acknowledged the difficulty of avoiding the influence of personal intellectual and moral preconceptions in interpreting the *Constitution*, but stressed that the *Constitution* does not mean whatever one might wish it to mean. The Court stated that the language employed in the drafting of the *Constitution* must be respected, holding that, if the language used by the lawgiver is ignored in favour of a general resort to "values", the result is not interpretation but divination.[143] Therefore, embodying fundamental rights should as far as its language permits be given a broad construction.

The Court, in exploring the burden of proof in criminal matters, interpreted constitutional provisions by taking into account the historical background of the rules and comparable foreign case law.[144] The Court also argued that the interpretation promoted the values underlying an open and democratic society.

---

141 1995 (2) SA 642 (CC).
142 Para 17.
143 Para 18.
144 Para 33.

In *Qozeleni v Minister of Law and Order*,[145] the Court found that, because the *Constitution* is the supreme law against which all law is to be tested, it must be examined with a view to extracting from it those principles or values against which law can be measured and that the *Constitution* must be interpreted to give clear expression to the values it seeks to nurture for a future South Africa. Interpretation of the *Constitution* should therefore be forward-looking.

In *S v Makwanyane*,[146] the Court had to deal with the undefined rights and values articulated by the *Interim Constitution.* The Court held that because there is no definition of what is to be regarded as cruel, inhuman or degrading punishment,[147] the Court had to give meaning to these word itself.

Makwanyane is an example of a "hard case" for its extremely difficult interpretive choices. The drafters of the *Constitution* left the resolution of the question of the constitutionality of the death penalty up to the courts. The text of the *Interim Constitution* offered no guidance, and section 11 was unqualified, stating that everyone has the right to life. The general limitation provisions of section 36 stated that rights could be limited but there were no previous precedent or comparable South African jurisprudence to guide the adjudication.

The Court held that provisions of the *Constitution* should not be construed in isolation, but in their context, which includes the history and background of the adoption of the *Constitution* together with the other provisions of the *Constitution* itself and, in particular, the provisions of the Bill of Rights.[148] Provisions must also be construed in a way that secures for "individuals the full measure" of its protection.

The Court further held that it was permissible in interpreting a statute (in this case the *Constitution*) to have regard to the purpose and background of the legislation in

---

145 1994(1) BCLC 75(E) paras 80 and 81.
146 1995 (3) SA 391 (CC) para 8.
147 Section 11(2) of the *Interim Constitution.*
148 Para 10.

question.[149] The Court referred approvingly to the *dictum* in *Jaga v Dönges*,[150] where the Court stated:

> Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that "the context", as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background.

The Court further found that, when interpreting a statute, it might be permissible to take into account debates of Parliament, statements by the Minister responsible for the legislation, explanatory memoranda providing reasons for new bills and the report of a judicial commission of enquiry on the object of the legislation.[151] Background material in the form of reports by technical committees assisting the multi-party negotiating process can provide a context for the interpretation of the *Constitution.*[152]

Chaskalson CJ, pronouncing on whether the death penalty constituted cruel and unusual punishment, referred to reports by the South African Law Commission,[153] press statements by the Minister of Justice[154] and international and foreign comparative law.[155] The Chief Justice stated that public international law would include non-binding as well as binding law to be used as tools of interpretation. Furthermore, international agreements and customary international law provided a framework within which the Human Rights Charter of the *Interim Constitution* could be evaluated and understood. Therefore, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, could be sourced in constitutional

---

149 Para 13.
150 1950 (4) SA 653 (A) 662G-H.
151 *Makwanyane* para 14.
152 Para 17.
153 Para 22.
154 Para 23.
155 Para 33.

interpretation.[156] However, in relation to interpreting the *Constitution* by sourcing comparative international and foreign law, he said:[157]

> In dealing with comparative law, we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the Constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.

The Court acknowledged that the majority of South Africans favour the retention of the death penalty but stated that public opinion could not sway the Court. The question that had to be answered was whether the *Constitution* allowed the sentence.[158]

The Court therefore listed appropriate sources for the interpretation of constitutional rights and values. However, the judges were not consistent in the method of interpretation and sources used in their individual interpretation of the constitutional values.

Although the judgment of the Court was unanimous, the judges based their reasoning and decisions on different aspects of constitutional interpretation and different rights, values and sources of law.

Chaskalson CJ stated that the core argument against the death penalty is based on section 11(2), which prohibits cruel and inhuman punishment.[159] From this right flow other constitutional rights such as the right to life, equality and dignity. Because of the arbitrariness of the death penalty, these rights would be breached.

Ackerman J also based his decision on the prohibition of cruel and inhuman punishment, but added that the constitutional right to life cannot be qualified.[160] He further relied on the fact that the arbitrariness of the death penalty results in unequal treatment of persons, therefore violating the right to equality. The judge argued that

---

156 Para 35.
157 Para 39.
158 Para 87.
159 Para 8.
160 Para 155.

when deciding on whether to impose the death penalty, the decision maker had to make a subjective decision. This involved weighing up mitigating and aggravating factors and, subsequently, a value judgement as to whether the death sentence was appropriate. This left wide latitude for difference of individual assessment, evaluation and normative judgment that are inescapably prejudiced.

Didcott J emphasised the constitutional right to life.[161] He argued that the imposition of the death penalty called for a value judgment that could be influenced by one's own moral attitude and feeling. He acknowledged, however, that the courts' experience and training warned against the trap of undue subjectivity.

Kentridge J argued that the imposition of the death penalty was not a question of the right to life, but whether the imposition of the death penalty constituted cruel and inhuman punishment.[162] He found that the imposition of the death penalty was cruel and inhuman because it infringed on the right to life, dignity and equality.

Kriegler J argued that the question called for legal and not moral or philosophical reasoning.[163] However, value judgements in the answering of the question were inescapable. The judge stated that law does not operate in a vacuum and calls for value judgements in which extra-legal considerations may loom large. The judge unfortunately did not specify what extra-legal considerations would be deemed acceptable. The judge found that the right to life was unqualified and therefore it was unnecessary to consider further inconsistencies with other constitutional rights.

Langa J emphasised the right to life and used the principle of *ubuntu* as a source to define the right to life and human dignity.[164]

Madala J also looked to the principle of *ubuntu* as a source to define the constitutional values. Central to this was the ideas of humaneness, social justice and rehabilitation.[165]

---

161 Para 177.
162 Para 194.
163 Para 207.
164 Para 215.
165 Para 235.

Because the death penalty offered no chance for rehabilitation, it was cruel and inhumane.

Mahomed J argued that the *Constitution* articulated the shared aspirations of a nation and defined the values which bind its people, and were the basic premises upon which judicial, legislative and executive power was to be wielded.[166] The judge was rational in his interpretational approach, reasoning that there was no rational justification for the death penalty. Facts and argument for the retention of the death penalty did not justify a rational and judicious judgment for its retention.

Mokgoro J referred to indigenous South African values that had to be recognised in promoting the underlying values found in an open and democratic society.[167] The concept of *ubuntu* embodied these values. According to the judge, constitutional interpretation involved making constitutional choices by balancing competing fundamental rights and freedoms. This could only be done by reference to a system of values extraneous to the *Constitution.* These principles constituted the historical context in which the text was adopted and which explained the meaning of the text. However, the courts would have to make the necessary value choices.

The judge argued that balancing opposing rights required value judgements, which form the nature of constitutional interpretation. However, because the *Constitution* allows the courts to seek guidance in international norms and foreign judicial precedent reflective of the values which underlie an open and democratic society based on freedom and equality, and by articulating rather than suppressing values which underlie the judgment, the court was not being subjective. Because the courts set out the foundations for their interpretations in a transparent and objective way and made their decisions available for criticism, the courts were objective in their reasoning.

O'Regan J argued that the right to life encapsulated all other rights in the *Constitution.*[168] Therefore, the right to life could not be qualified. The Justice referred to

---

166 Para 261.
167 Para 300.
168 Para 318.

acceptable common-law principles as sources for values to provide guidance for constitutional interpretation.

Sachs J did not agree with the reliance placed on the prohibition against cruel and inhuman punishment.[169] He argued that the right to life was unqualified. He further argued that whatever one's personal view might be, the response had to be a purely legal one. The judge took a rational interpretational approach by arguing that based on rationality and proportionality the death penalty could not be justified. The judge was also more formalistic in his interpretation, stating that section 9 should be read to mean exactly what it says: every person shall have the right to life. Because it was not qualified in any way, the drafters of the *Constitution* did not intend to allow the state to take the life of its citizens. He also referred to customary law as a source to interpret constitutional values.

The analysis of the *Makwanyane* case shows that although the judgment was unanimous, the judges reached their decisions by relying on different constitutional values and rights, different methods of constitutional interpretation and different sources for their interpretation. They were faced with an inescapable normative choice in deciding which constitutional values and rights should be prevalent. The argument of each judge presented an interpretive choice between the constitutional values or sets of values. Six of the judges premised their arguments on the right to life, with two reasoning that this right could not be qualified. Three based their findings on the fact that the death penalty constituted cruel and inhuman punishment,[170] while two said that the death penalty violated the right to dignity and equality and as such was arbitrary and unconstitutional.

---

169 Para 345.

170 Kentridge J went so far as to state that the matter before the court was not a question of the right to life. *Makwanyane* para 194.

The *Makwanyane* judgment illustrates four methods of interpretation based on an adapted version of the Savignian model[171] described by Du Plessis:[172]

(a) Grammatical interpretation: concentrating on ways in which the conventions of natural language can assist legal interpretation and can help to limit the many possible meanings of a provision. The Court quoted approvingly from *Jaga v Dönges NO*,[173] where the Court held that words and expressions used in legislation must be interpreted according to their ordinary meaning.[174]

(b) Systematic interpretation: as a manifestation of contextualism, calling for an understanding of a specific provision in the light of the text or instrument as a whole and of extra-textual *indicia*. The Court held that constitutional provisions should not be construed in isolation but in their context, which includes the history and background of the provisions.[175]

(c) Purposive interpretation: that sheds light on the possible meanings of a provision with reference to its purpose. The Court must have regard to the purpose of the constitutional provisions.[176]

(d) Historical situating: a provision in the tradition from which it emerged and allowing qualified recourse to information concerning the genesis of the text in which the provision occurs and concerning the provision itself. The Court held that the history and background of the adoption of the *Constitution* together with the other provisions of the *Constitution* itself and, in

---

171 Le Roux "Six (individually-named) notes" 73: The traditional continental model of interpretation in which various common-law canons of statutory interpretation must be classified into grammatical, systematic, purposive, historical and comparative reading strategies.
172 Du Plessis 2005 *PELJ* 86.
173 1950 (4) SA 653 (A) para 662g-h.
174 *Makwanyane* para 13.
175 Para 10.
176 Para 13.

particular, the provisions of the Bill of Rights must be taken into account when interpreting constitutional provisions.[177]

However, the analysis also shows that the judges acknowledged that subjective constitutional interpretation is unavoidable in constitutional jurisprudence. Mokgoro J argued that, because judgments of the courts are articulated and available for criticism and are based on acceptable sources in the form of applicable international and foreign precedent, the interpretation is not subjective.

This argument is not entirely correct. Although the Court considered applicable international law and foreign law, it did not consider sources that argued that the death penalty was an appropriate penalty.[178] This reflects the critical role of interpretive choice in adjudication.[179] Interpretive choice is still a measure of subjective interpretation, choosing the sources of law that will support your own subjective view of constitutional interpretation. However, this does not make the decision of the Court arbitrary or unrestricted.

The Court was transparent in its analysis of the inherent fundamental values of the *Constitution.* However, the judges did not explain their reliance on the particular case law of the countries in question. This leaves the possibility that the subjective disposition of the judges was a deciding factor in choosing these sources.

The *Makwanyane* case laid the foundation for a particular style of constitutional interpretation. The opinions of the judges were the product of a human rights text setting forth a liberal culture of rights founded upon human rights and values and premised on justification. The Court turned to these human rights and values for guidance in their constitutional interpretation. According to Harcourt, the judges were strongly optimistic and idealistic in the realisation of these rights and values. The Court

---

177 Para 10.

178 The Court relied heavily on jurisprudence of the United States of America and India that argued against the death penalty, although the death penalty was considered a competent sentence in both of these countries. The Court also referred to African countries (Namibia, Mozambique and Angola), where the death penalty was abolished, but it did not refer to Botswana, a constitutional democracy, where the death penalty was a competent verdict. *Makwanyane* para 33.

179 Harcourt 1996 *Harvard Human Rights Journal* 256.

was able to articulate forcefully and transparently the fundamental changes that have taken place in South Africa, thereby setting forth a culture of rights and justification.[180]

The *Makwanyane* case also shows the conundrum of constitutional interpretation. Judges work in a liberal constitutional context based on human rights and values and premised on justification. It is in in this context that judges will have to interpret the *Constitution. Makwanyane* further stands as an example of the state litigant litigating fairly and honestly. The organs of state involved in the matter provided the court with all available information, allowing the court to formulate a just and fair conclusion to the death penalty in South Africa. In this case the state litigant was a model litigant.

4.4.4 The transformative nature of the South African Constitution

Chief Justice Langa referred to the transformative nature of the *Constitution* as a permanent ideal.[181] He stated:

> Transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant. This is perhaps the ultimate vision of a transformative, rather than a transitional Constitution. This is a perspective that sees the Constitution as not transformative because of its peculiar historical position or its particular socio-economic goals but because it envisions a society that will always be open to change and contestation, a society that will always be defined by transformation.

Therefore, the transformative nature of the *Constitution* calls for a society that will always be in flux, consistently changing to best realise constitutional values and goals. This suggests that constitutional interpretation would also have to be consistently changing, evolving and adapting.

Andrews states that the *Constitution* provides the basis for a fundamental restructuring of the entire legal system. Its purpose is to render the system representative,

---

180 Harcourt 1996 *Harvard Human Rights Journal* 267.
181 Langa 2006 *Stell LR* 351-360.

accountable and accessible, and to allow the system to provide justice to all South Africans, irrespective of race, gender and ethnicity.[182]

The transformative nature of the *Constitution* has been acknowledged by the courts. In *S v Makwanyane,*[183] the Court held that "[w]hat the Constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting future". In *Du Plessis v De Klerk*,[184] the Court stated that "the Constitution is a document that seeks to transform the status *quo ante* into a new order". In *Rates Action Group v City of Cape Town*,[185] the Court described the *Constitution* as transformative and a mandate, a framework and a blueprint for the transformation of society.

In *City of Johannesburg v Rand Properties (Pty) Ltd*,[186] the Court described the *Constitution* as follows:

> Our Constitution encompasses a transformative provision. As such, the State cannot be a passive bystander in shaping the society in which individuals can fully enjoy their rights. The full transformative power of the rights in the Bill of Rights will only be realised when they are interpreted with reference to the specific social and economic context prevalent in the country as a whole, and the social and economic context within which the applicant now finds itself in particular.

Langa said that the ideal of the transformation of the South African society is the creation of a new society, based on the values and provisions expressed in the *Constitution.* This new society is one based on substantive equality, a social and economic revolution with the objective of a truly equal society. According to Langa, under this new envisioned society –[187]

> [t]he Constitution demands that all decisions be capable of being substantively defended in terms of the rights and values that it enshrines. It is no longer sufficient for judges to rely on the say-so of parliament or technical readings of legislation as providing justifications for their decisions. Under a transformative Constitution, judges

---

182 Andrews 2006 *Osgoode Hall Law Journal* 565-566.
183 1995 3 SA 391 (CC) para 262.
184 1996 3 SA 850 (CC) para 157.
185 2004 12 BCLR 1328 (C) para 100.
186 2006 6 BCLR 728 (W) paras 51-52.
187 Langa 2006 *Stell LR* 351-360.

> bear the ultimate responsibility to justify their decisions not only by reference to authority, but also by reference to ideas and values.

Interpretation of the *Constitution* based on its transformative nature requires two value assessments. Firstly, economic transformation to achieve substantive equality and realise socio-economic rights is a necessity. Secondly, a changed legal culture and society based on the values and provisions expressed in the *Constitution* and premised by justification must be achieved. In realising a premise of justification, it could be helpful to develop a set of rules to assist the state litigant in observing the positive constitutional obligations placed upon it. When the state litigant is able to justify its decision to litigate and its conduct during the trial, the state litigant could be the model litigant.

The *Constitution* must be interpreted with reference to the specific social and economic context prevalent in the country as a whole. However, such interpretation must be lawful and nuanced.[188] The interpretation must be reactive and transformative through the determination not to repeat the abuses of the past.[189]

It is clear that the notion of transformation has played and will play a vital role in interpreting the *Constitution.* Such interpretation must be achieved by "reconciling the compelling need for transformative justice with the core function of the Constitution to integrate, in a fair and proportional manner, the diversity of rights and interests at stake".[190] The courts will have to achieve this with due regard to the need not only to uphold the *Constitution*'s democratic values and fundamental human rights, but also to promote social justice.[191] The aim to promote the transformative justice of the *Constitution* is further premised on the fact that the principle of legality must be observed and the human dignity of those affected may not be unduly compromised.[192]

4.5 Rationality and justness in constitutional adjudication

---

188 *SA Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development* 2015 (2) SA 430 (WCC) para 223(e).

189 Ackermann 2004 *New Zealand LR* 643.

190 Pretorius 2010 *SAJHR* 569.

191 *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC) para 61; *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 95.

192 *South African Police Service v Solidarity OBO Barnard* 2014 (6) SA 123 (CC) paras 30 and 38.

4.5.1 Rationality in constitutional adjudication

The purpose of the rule of law is to protect basic individual rights by requiring the government to act in accordance with pre-announced, clear and general rules that are enforced by impartial courts in accordance with a fair procedure.[193] The principle of legality, an offshoot of the rule of law, requires that the court reach a decision that is correct from a legal point of view. Fuller and Winston describe the adjudication process as follows:[194]

> Adjudication is, then, a device which gives formal and institutional expression to the influence of reasoned argument in human affairs. As such it assumes a burden of rationality not borne by any other form of social ordering. A decision which is the product of reasoned argument must be prepared itself to meet the test of reason. We demand of an adjudicative decision a kind of rationality we do not expect of the results of contract or of voting.

Rationality is therefore a measure of the lawfulness of the court's decision. In *Wednesbury*[195] the Court explored the relation between reasonableness, rationality and justness. The Court held as follows:

> It is true the discretion must be exercised reasonably. Now what does that mean? It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in Short v Poole Corporation gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and in fact, all these things run into one another.

According to Black's Law Dictionary Online Legal Dictionary,[196] reasonableness is defined as agreeable to reason; just; proper and ordinary or usual. There is therefore a correlation between reasonableness, rationality and justness in legal adjudication. In adjudication, rationality means that the decision of the court must be based on facts

---

193 Dicey *An introduction to the study of the law of the Constitution* xcvi-xcvii.
194 Fuller and Winston *Harvard Law Review* 366-367.
195 [1948] 1 KB 223 para 229.
196 http://thelawdictionary.org/reasonable/ accessed February 2017.

and reason. Therefore, the court's judgment must be agreeable to reason, show itself exercising reason and this reason must be based on acceptable principles. Judges therefore must form judgments logically and objectively, based on facts, evidence or reasoned legal argument and provide the reasons on which the decisions are founded. This argument conforms to the principle of *Begriffsjurisprudenz*, a brand of legal positivism.

The principled legal thinking of *Begriffsjurisprudenz* is in general assigned to three interrelated elementary positions:[197]

(a) That the given law contains no gaps.

(b) That the given law can be traced back to a logically organised system of concepts.

(c) That new law can be logically deduced from superordinate legal concepts, which themselves are found inductively.

According to Du Plessis, in terms of *Begriffsjurisprudenz*, legal problems are solved when, through deductive reasoning, a concrete situation is subsumed under a norm relevant to the exigencies of that type of situation. Therefore:

> The state is the source of law and law, in its turn, allegedly rests on an independent foundation of reason and logic. Courts are autonomous institutions that apply the law in a systematic (even mechanistic) way as if it were a system of fixed (and predictable) rules. The "is" and the "ought" of law are markedly distinct, as are "law" and "morality" as well as "law" and "politics".

Du Plessis is critical of the paradigm described above. According to him, the Basic Law perceives fundamental rights as antecedent to the state and the state's law and therefore as subject to the objective order of values enshrined in the Basic Law. Law and morality can therefore not be neatly separated.[198] Reason and logic alone cannot form the basis for judicial interpretation; some measure of morality must be injected to assure justice is achieved.

---

197 Haferkamp Enzyklopädie zur Rechtsphilosophie IVR (Deutsche Sektion) und Deutsche Gesellschaft für Philosophie http://www.enzyklopaedie-rechtsphilosophie.net/inhalts accessed January 2016.

198 Du Plessis 2005 *PELJ* 85.

By relying on rationality alone to justify a decision by the court, one may find that the decision was reached by applying the facts and evidence of the court case to the relevant and current law in question. Reason and logic were employed. However, was the outcome just? Has justice been served? How can one measure the ethical and moral impact of the outcome of a trial? After all, the court judgment must be fair and just within the context of the particular dispute before the court.[199] Furthermore, section 172(1)(b) of the *Constitution* provides that when deciding a constitutional matter, a court may make any order that is just and equitable. This means that the test for the effectiveness of the court's order is whether the remedy is appropriate, just and equitable. Therefore, the order of the court should be based on what is morally right and fair and the order should be fair and impartial.[200]

4.5.2 The concept of justice in adjudication

With rationality one can answer the question of whether a court decision conforms to the accepted current law and is correctly based on the facts of the case. In other words, one can answer as to the lawfulness of the decision. However, as is submitted in section 4.5.1, by relying on rationality alone to provide justification for the decision of the court, the question of whether the outcome was just is left open. Has justice been served? Rationality alone as a yardstick for justification of the court's decision does not measure the ethical and moral impact of the decision.

Justice as a principle in adjudication plays a prominent part in the social ordering of a community and consists of two aspects: formal and substantive justice.[201] Formal justice is the impartial and consistent application of established rules or laws. This aspect of justice is clearly capable of being reinforced by the concept of rationality in adjudication. Substantive justice, on the other hand, offers interpretation of the specific delivery of corrective actions in response to a violation of the rights of another.

---

199 *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 42.

200 Based on the accepted legal definition of the words "just" and "equitable"; Hiemstra *Trilingual Legal Dictionary* 46 and 68.

201 Bosman en Hosten *Inleiding tot die Suid-Afrikaanse reg en regsleer* 21.

Substantive justice therefore focuses on the content of the legal norm itself, while formal justice focuses on the procedural aspect of the trial.

According to Radbruch, law is the will to do justice and justice involves judging the individual without bias and measuring each person by the same standard.[202] This concept is reinforced in South Africa by the predominance of the values of dignity and equality in the *Constitution.* Section 1(a) of the *Constitution* acknowledges human dignity, the achievement of equality and the advancement of human rights and freedoms as the founding values of the Republic of South Africa. Further reference to human dignity can also be found in the Bill of Rights.[203] Section 7(1) of the *Constitution* provides that the Bill of Rights affirms the democratic values of human dignity, equality and freedom.

In section 36,[204] the *Constitution* requires any limitation of rights entrenched in the Bill of Rights to meet the threshold of the extent to which the proposed limitation is reasonable in an open and democratic society based on human dignity, equality and freedom. In section 39(1)(a), judicial authorities interpreting the Bill of Rights are required to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. The principle of dignity and equality therefore lies at the heart of the *Constitution.*

Venter writes that the prime goal of the enlightened state must be securing and preserving optimal fairness and justice for all.[205] If this is accepted as valid, fairness and justice can be regarded as fundamental principles of law that are greater than any legal decree, and then any law that defies these fundamental principles loses its validity. This view is echoed by the courts as well. The court judgment must be fair and just in the context of the particular dispute before the court.[206]

---

202 Gustav "Five minutes of legal philosophy" 233.
203 Chapter 2 of the *Constitution.*
204 The limitation section.
205 Venter *Constitutionalism and religion* 2.
206 *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 42.

The courts, therefore, should attempt to synchronise the real world with the ideal construct of a constitutional world[207] premised on fairness and justice for all. Furthermore, the courts have a duty to mould an order that will provide effective relief to those affected by a constitutional violation.[208] The remedy issued by the courts should instil humility without humiliation, and should bear the message that respect for the *Constitution* protects and enhances the rights of all.[209] These statements again reflect the reliance placed on the concepts of dignity and self-worth in constitutional interpretation.

According to Venter, the potential of these principles to be generally accepted lies in the ethical norm of reciprocity: treat others as you want them to treat you. The essential values of a constitutional state, namely the inherent dignity of a person and the need for fair non-arbitrary government, flow from reciprocity. The principle of reciprocity therefore manifests itself as a major truth equal to the acceptance of murder, theft and dishonesty as constituting reprehensible conduct.[210]

This means that there is an underlying value system in a community that should inform the legal norms in that community. This concept is not new. Hart stated: "Moral and legal rules of obligation and duty have certain striking similarities, enough to show that their common vocabulary is no accident."[211] The common vocabulary found between morals and legal rules can be explained in terms of common normative development. This means that certain morals, indicating how the majority would act in certain circumstances, attained the property of what to do or how to act in such circumstances.[212] This does not mean, however, that the law and moral convictions are the same. Although the moral code of a community may provide an overriding and supreme principle that lends validity to legal norms, the morals of the community and the legal norms differ in terms of content and practical application. Not all the moral convictions of the community find expression in the law. The law may also change as

---

207 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 94.
208 *Fose* para 102.
209 *Marlboro Crisis Committee v City of Johannesburg* 2012 ZAGPJHC 187 para 101.
210 Venter *Constitutionalism and religion* 83.
211 Hart *The concept of law* 168.
212 Bosman en Hosten *Inleiding tot die Suid-Afrikaanse reg en regsleer* 2.

the *boni mores* of a community adapt to changing circumstances. Adultery, for instance, may be socially unacceptable but it is not a crime, at least not in South Africa. This principle was confirmed in *Thebus v S*,[213] where it was held that –

> [t]he superior courts have always had an inherent power to refashion and develop the common law in order to reflect the changing social, moral and economic make-up of society. That power is now constitutionally authorised and must be exercised within the prescripts and ethos of the Constitution.

In *Executors of Mc Cordindale v Bok*,[214] Kotzé CJ stated: "Our notions of morality may differ, but the simple question for a court of justice is 'what is the law?'". This concept that morality is irrelevant to the idea of law is not consistent with the *Constitution.* The South African state is founded upon values.[215] These values lend moral conviction and validity to legal norms.[216]

The Constitutional Court recognises the importance of self-worth in the lives of individuals.[217] Therefore, the value of human dignity in the *Constitution* is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society.[218] The concept of self-worth and dignity requires individuals to display respect for other people's identities that differ from their own, which is in turn reciprocated by others. This reciprocity requires mutual respect and that no individual attempt to impose his or her vision on others.[219]

In terms of section 172(1)(b) of the *Constitution*, courts have the power to order any just and equitable remedy that would place substance above mere form by identifying

---

213 *Thebus v S* 2003 (6) SA 505 (CC) para 31.
214 (1884) 1 SAR 202 para 216.
215 Section 1 of the *Constitution.*
216 Section 2 of the *Constitution*, which provides, *inter alia*, that any law inconsistent with the *Constitution* is invalid.
217 In *Le Roux v Dey* 2011 (3) SA 274 (CC) para 138, the Court held that the concept of dignity embraces the self-worth of an individual.
218 *Khumalo v Holomisa* 2002 (5) SA 401 (CC) para 27.
219 Bilchitz and Williams 2012 *SAJHR* 168.

the actual underlying dispute between the parties.[220] Justice and fairness are therefore critical components in the legal reasoning of the courts.

It is submitted that this concept of reciprocity can form the foundation of the quest for justice in strategic litigation. As was shown, constitutional interpretation is of necessity influenced by the personal history, views, convictions, etc. of the judge. The concepts of dignity, mutual respect and reciprocity as fundamental principles in constitutional interpretation and adjudication set the basis for the realisation of justice at a fundamental level.

4.5.3 Building an acceptable theory of constitutional interpretation

Klare is of the opinion that judges will always be confronted with conflicting pulls and tensions of freedom and constraint. He articulated this tension between judicial constraint and judicial freedom as follows:[221]

> On the one hand, there is a grand constitutional text replete with broad phrases and redolent with magnificent hopes to overcome past injustice and move toward a democratic and caring society. Yet, on the other, just about everyone takes for granted that adjudication is not and cannot be infinitely plastic and open-ended, that judges and lawyers are not completely at large to say and do as they please by the lights of whatever personal vision of freedom they hold.

Klare's point of view is undoubtedly true of the rights and values contained in the South African *Constitution.* These rights and values are often vague and undefined. What encapsulates dignity for one reader of the *Constitution* will not necessarily mean the same for another. As such, substantive interpretation is an integral ingredient of constitutional adjudication in South Africa. While this does not mean that judges are not impartial, absolute neutrality in adjudication is impossible.[222] The culture of substantive adjudication must, however, be balanced by justification in the form of the court's decision.

---

220 *Head of Department of Education: Free State Province v Welkom High School* 2014 (12) SA (CC) para 107.

221 Klare 1998 *SAJHR* 149.

222 *South African Commercial Catering and Allied Workers Union v Irvin and Johnson Ltd* 2000 (3) SA 705 (CC) para 14.

The value concepts of the *Constitution* are clearly based on Western liberal-democratic principles, with dignity, equality and freedom prominent. As these values are not defined, their interpretation will depend on the subjective value set of the interpreter. In a constitutional democracy, set in a multi-cultural community, this is certainly a necessity:[223]

> Judges will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the bench. The reasonable person does not expect that judges will function as neutral ciphers; however, the reasonable person does demand that judges achieve impartiality in their judging.

Nevertheless, interpreters of the values of the *Constitution*, including and especially judges, should be aware of their own preconceived notions.[224]

In the *M & G Media Ltd* case,[225] the Supreme Court of Appeal acknowledged that discretion plays an important part in decision-making and that discretion "permits abstract and general rules to be applied to specific and particular circumstances in a fair manner". The scope of these discretionary powers may vary.[226]

Where broad discretionary powers are conferred, there must be some constraints on the exercise of those powers so that those who are affected by the exercise of the powers will know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision.[227]

An example of broad discretionary powers conferred on the courts can be obtained from the power of the courts to ascertain what constitutes a reasonable member of the public, and what their views would be. This is not done in a vacuum; it is context-specific. Judges often rely on their own experience as members of society to determine

---

223 *R v S (RD)* (1997) 118 CCC (3d) 353 para 38.
224 Venter 2007 *Speculum Juris* 74.
225 *President of the Republic of South Africa v M & G Media Ltd* 2011 (2) SA 1 (SCA) para 1.
226 *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 53.
227 *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) para 34.

this.[228] The same principle holds true for the often vague and undefined constitutional rights and values.

In adjudication, the judge engages in a fact-finding exercise. The court attempts to give a meaningful interpretation of a set of events, so fact-finding seems unavoidable. According to conventional understanding, fact-finding involves establishing congruence between statements made about the world and the world itself.[229] However, most facts litigants seek to establish in adjudication, and in particular strategic litigation, are social facts rather than phenomena intrinsic to nature.[230] When adjudicating on matters relating to social facts, divergent viewpoints can cause problems for the administration of justice. This is especially likely in a deeply split society, like South Africa, where normative standards are uncertain. The undefined rights and values fundamental to constitutional interpretation may aggravate this uncertainty.

Does this mean that constitutional legal discourse has been reduced to a system of contradictory discourse that is never conclusive because there is no prevailing standard method of interpretation of constitutional values and no supreme principle determining which value should prevail? Judges are human and therefore absolute neutrality in judicial officers is not possible.[231] Cardozo describes this as follows:[232]

> There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals can. All their lives, forces which they do not recognize and cannot name, have been tugging at them, inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, the total push and pressure of the cosmos, which, when reasons are nicely balanced, must determine where choice shall fall.

Therefore, "[w]e may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own."[233] However, constitutional

---

228 *Helen Suzman Foundation v President of the Republic of South Africa; Glenister v President of the Republic of South Africa* 2015 (1) BCLR 1 (CC) para 207.
229 Damaska 1998 *Yale Law School Faculty Scholarship Series* 291.
230 Damaska 1998 *Yale Law School Faculty Scholarship Series* 293.
231 *South African Commercial Catering and Allied Workers Union v Irvin and Johnson Ltd* 2000 (3) SA 705 (CC) para 14.
232 Cardozo *The nature of the judicial process* 12.
233 Cardozo *The nature of the judicial process* 13.

adjudication requires that judicial officers interpret the *Constitution* in ways which will give effect to its fundamental values. When the constitutionality of legislation is in issue, judges are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the *Constitution.*[234]

Proponents of the Critical Legal Studies Movement highlight the role of ideology in law by claiming that the legal reasoning and justifications of courts are only argumentative techniques. There can never be a "correct legal solution" that differs from the correct ethical and political solution to a legal problem. The Movement claims that legal text does not constrain the judge's interpretation in any significant way.[235] Therefore, adjudication cannot be separated from subjective interpretation or ideological influence. This statement is supported at a fundamental level by the notion that when assigning meaning to the values of the *Constitution*, each person seeking interpretation will face the danger that what is sought will be a construction of the "search" instituted to find it. This means that each individual's search for constitutional value interpretation will be a construct of his or her own making. Such construct will in turn depend on the subjective disposition of the individual him- or herself. Therefore, when giving meaning to constitutional rights and values, the judge's search is an extension of his or her own beliefs.

The interpretation by the courts of the *Constitution*, including its undefined rights and values, is critically important in strategic litigation. The rights and values are fundamental to, and entrenched in, the *Constitution*, establishing its character and structure. Judges of the South African Constitutional Court recognise the danger of unrestrained subjective interpretation of the *Constitution.* Therefore, the Constitutional Court seeks to implement the moral vision of the *Constitution*, as articulated by the imbedded values, while justifying its decisions in terms acceptable to the legal community. Furthermore, the process of interpreting the *Constitution* must "recognise

---

234 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC) para 22.

235 Kennedy 1986 *Journal of Legal Education* 518.

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".[236] However, these democratic values are again open to a degree of subjective interpretation.

The courts recognise that legal training and experience prepare judges for the difficult task of fairly determining where the truth may lie in a welter of contradictory evidence.[237] Legal tradition, in the form of community expectations, the legal training of the judge and the traditions of the bench, the advocates' bars and the different law societies also condition a judge to be fair and just in adjudication.[238] Furthermore, judicial conditions of service and codes of conduct provide valuable guidelines for ensuring a fair trial. Therefore, judges are assumed to be people of conscience and intellectual discipline, capable of judging a particular controversy fairly based on its own circumstances.[239] This will show in instances where the judge may differ from the political, religious or traditional ideology of a party, or may have sympathy with a party, but still adjudicate the case on the strength of constitutional principles to reach a just and lawful conclusion. Furthermore, it is appropriate for judges to bring their own life experience to the adjudication process.[240] Nevertheless, Cardozo asks the following questions:[241]

> If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals?

When adjudicating, a judge must recognise the internal view that comes into play when hearing a case. The judge should look to his or her conscience, consider his or her own moral position, the facts and evidence of the case, the litigants and the constitutional rights and values at stake, and conclude that his or her own moral presumptions do not

---

236 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC) para 21.

237 *President of the Republic of South Africa v South African Rugby Football Union* 1999 4 SA 147 (CC) para 40.

238 Boten *Trial judge* 291.

239 *United States v Morgan* 313 U.S. 409 (1941) para 421.

240 *President of the Republic of South Africa v South African Rugby Football Union* 1999 4 SA 147 (CC) para 42.

241 Cardozo *The nature of the judicial process* 10.

cloud the judgment. The internal view acknowledges that inherent personal views may influence the judgment of the court. This introspective view gives rise to a theory of acknowledgement, which allows judges to frame subjective predispositions into the court's reasoning.

In articulating the theory of acknowledgment, the argument of Mokgoro J in *S v Makwanyane*[242] may useful. The judge argued that, because judgments of the courts are articulated and available for criticism and are based on acceptable sources in the form of applicable international and foreign precedent, the interpretation is not subjective. This is true to a certain extent. However, in the quest for objectivity, judges should acknowledge and address the extent of their own predisposition on the case before them. Should the introspection show that the judge's own moral predisposition might be in play, this must be articulated in the court's decision.

The Mogoeng CJ's ambivalence over gay rights was put in the spotlight when he dissented from a judgment of the Constitutional Court that said it was not defamatory to call someone gay.[243] The Chief Justice provided no reasons for his dissent. While it is not possible to determine the reason behind the dissent, it seems likely that it was based on his personal moral convictions. If that was indeed the case, for the sake of legal clarity and objectivity it would have been preferable if this was articulated in the judgment. Although it might have opened the decision of the Chief Justice to criticism, it would certainly have been more preferable than a bland denial of subjective predispositions and an absence of justification.

In *Justice Alliance of South Africa v President of the Republic of South Africa*,[244] the Court had to decide whether the Chief Justice might continue to serve after the expiry of the non-renewable term of twelve years.[245] The Court held that any attempt to extend the term of the Chief Justice would be unconstitutional. However, three

---

242 1995 (3) SA 391 (CC) para 300.
243 *Le Roux v Dey* 2011 (3) SA 274 (CC).
244 2011 (5) SA 388 (CC).
245 Section 176 of the *Constitution.*

members of the Court did not agree with the decision of the Court.[246] Neither the names of the dissenting judges nor their reasons for dissent were given. This again raised the spectre of possible subjective predispositions that should have been acknowledged and articulated in the judgment.

The theory of acknowledgment provides legitimacy and objectivity to the judgment by exposing the subjective interpretational element to criticism. Political judging, then, is not the problem; it becomes a problem when it is not recognised and acknowledged as such. The theory of acknowledgement allows for a process through which subjective interpretation becomes objectively verifiable and provides acceptable grounds for interpretation and justification. If subjective adjudication is influenced by the moral presumptions of our judges, it is their duty to articulate and make public such influences for insight and possible criticism.

The theory of recognition also allows for the realisation of the words of Chief Justice Langa:[247]

> Articulating the subjective interpretational element in adjudication allows the realisation of our constitutional legal culture, which requires that we expressly accept and embrace the role that our own beliefs, opinions and ideas play in our decisions.

4.6 Conclusion

The adoption of the *Constitution* changed the civil role of the courts. Their pre-constitutional mandate in civil matters was primarily to adjudicate disputes between parties. This is still the case, but under a constitutional dispensation, the courts, and in particular the Constitutional Court, may be called upon to pronounce on the validity of legislation and executive conduct and thus to guard over the *Constitution.* As was shown in Chapter 2, strategic litigation is often prompted by the desire to "shape" societal values and to influence or change laws or executive conduct accordingly. Societal values are, in turn, regulated by the often vague and undefined constitutional values.

---

246 Para 95.
247 Langa 2006 *Stell LR* 353.

The analysis done in section 4.3 above shows the different approaches to reasoning, constitutional interpretation and selective sourcing by the judges of the Constitutional Court. Because of the ambiguity inherent in language, the constitutional text has no static meaning. Meaning is in the eye of the interpreter. Therefore, plurality of constitutional interpretation is essential to give effect to a liberal and social democratic culture of constitutional interpretation that is premised on justification.

Through manipulation of the judicial appointment procedure, training or hierarchy, some like-thinking groups may obtain a monopoly on constitutional interpretation, which may lead to interpretive consensus. This interpretive consensus may limit the extent of constitutional interpretation and force consensus, thus providing for a monopoly on constitutional interpretation. Consensus among judges would then not be based on constitutional values and principles but rather on shared political ideology or similar like-minded thinking. Different moral views are needed in constitutional interpretation to give legitimacy to the courts and the *Constitution* and to ensure judicial independence.

The responsibility for judicial independence rests on the courts themselves when they are faced by the executive or Parliament as a party to the litigation. In litigation, it is the duty of the court and the purpose of the law to level the playing field and to ensure that parties to the litigation are equal in the eyes of the law and the court.[248] When the controversy before the court is a matter traditionally falling in the sphere of the executive or Parliament, it becomes more problematic. After all, the executive and Parliament are democratically and constitutionally mandated to shape policy. However, when such a policy is challenged on constitutional grounds, the executive and Parliament cannot claim political considerations to trump constitutional imperatives. As such, political ideology is not at issue in the adjudication process. The state as litigant is placed on an equal constitutional footing with the litigant challenging the policy. The court as impartial arbiter of the dispute is bound to and must be guided by the principles and values articulated by the *Constitution* to ensure that the matter reaches a

[248] Section 3.2 above.

just and fair conclusion. Furthermore, when the court is guided by constitutional principles such as justification, openness and accountability, the court is able to hold the state litigant to the constitutional promise that the state litigant would display a high standard of professional ethics.[249] The court can then ensure that the state litigant is a model litigant.

A cornerstone of any fair and just legal system is the impartial adjudication of disputes brought before the courts.[250] This calls for judgments that are well reasoned and correct, are within the confines of the law and are marked by impartiality and the equal treatment of all parties. In South Africa, the benchmark for a fair trial is set by constitutional values. Human dignity, equality, freedom, democracy, supremacy of the *Constitution*, the rule of law, non-racialism and non-sexism constitute the norm.[251]

Rationality is an important but not exclusive measure of the lawfulness of adjudication.[252] However, although rationality can be used as a measure of the lawfulness of a court's decision, it does not adequately answer questions relating to the justness of the decision. In terms of rationality, judges must form decisions logically and objectively, based on the facts, evidence and reasoned legal argument produced during the trial, and provide the reasons on which the decision of the court is founded. The reasons provided by the court must conform to the applicable law. Therefore, rationality can show whether the decision of the court was lawful and, furthermore, whether formal justice has been achieved, in other words, whether an impartial and consistent application of established rules or norms took place. However, rationality is not sufficient in itself as a measurement of the substantive justice of the court's decision.

Law is the will to do justice and justice involves judging the individual without bias and measuring each person by the same standard.[253] This statement articulates the values

---

249 Section 195(1) of the *Constitution*.
250 *President of the Republic of South Africa v South African Rugby Football Union* 1999 4 SA 147 (CC) para 35.
251 Section 1 of the *Constitution.*
252 Section 5.1 below.
253 Radbruch 2006 *Oxford Journal of Legal Studies* 233.

of dignity and equality that lie at the heart of the *Constitution.* Venter believes that the prime goal of the enlightened state must be securing and preserving optimal fairness and justice for all.[254] If that is so, dignity, equality, fairness and justice can be viewed as fundamental principles of law that are greater than any legal decree.

The South African state is founded on values.[255] These values lend moral conviction and validity to legal norms.[256] Therefore, the values of dignity, equality, fairness and justice should be the norm in constitutional interpretation and adjudication.

In section 4.5.2, it was shown that there is an underlying moral value system in the *Constitution* that should inform all legal norms, as well as the *Constitution* itself. This includes the interpretation of the undefined constitutional values. This moral value system is based on the principles of fairness and justice, which can be realised by subscribing to the ethical norm of reciprocity: treating others as you want them to treat you.[257] Reciprocity is therefore integrated in the very core of the text of the *Constitution* and underlines the concepts of dignity and equality articulated in the *Constitution.*

The Constitutional Court recognises the importance of dignity and self-worth in the lives of individuals. Therefore, the value of human dignity in the *Constitution* is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society.[258] The concept of self-worth and dignity requires individuals to show respect for other people's identities that differ from their own and this is reciprocated by the other. Reciprocity is based on mutual respect and requires that no individual seek to impose his vision on others.[259] All parties must respect and benefit from this relationship. Should reciprocity not be practiced, in other words, should one of the parties disrespect the dignity and self-worth of the other by imposing his or her own vision on the other, it would lead to resentfulness and anger. Therefore, should the judge expect the litigant to abide by the *Constitution* but fail to keep

---

254 Venter *Constitutionalism and religion* 2.
255 Section 1 of the *Constitution.*
256 Section 2 of the *Constitution*, which provides, *inter alia*, that any law inconsistent with the *Constitution* is invalid.
257 Venter *Constitutionalism and religion* 83.
258 *Khumalo v Holomisa* 2002 (5) SA 401 (CC) para 27.
259 Bilchitz and Williams 2012 *SAJHR* 168.

reciprocity in mind by ensuring justice and fairness to the litigant and arbitrarily imposing his own vision on the litigant, the litigant might justifiably feel aggrieved.

Judges have to interpret the *Constitution* and consider and adjudicate the "hard cases". The power that the *Constitution* puts into their hands is great and may, like all power, be open to abuse. However, the legal system, legal traditions and legal training prepare judges for the need for principled adjudication. There is no guarantee for justice except the honest, principled, independent and competent judge. Reciprocity is the basis of the trust in the judges and the basis for the legitimate power of the courts. However, as has been shown in section 4.3, judges enter a decision under the effect of their own personal history, both on technical legal issues and on broader social issues. Furthermore, transformative adjudication requires judges to acknowledge the effect of what has been referred to as their personal, intellectual, moral or intellectual preconceptions on their decision-making.[260]

It is accepted that the often vague and undefined rights and values imbedded in the *Constitution* lend themselves to a degree of subjective interpretation. Subjective interpretation might be influenced by the moral, religious or political predisposition of the judge. After all, absolute neutrality in adjudication is impossible.[261] Judges should be aware of this and look inward when adjudicating. This introspection recognises that inherent personal background might influence the judgment of the court. This allows judges to acknowledge the possibility of subjective personal views influencing the adjudication process.

The rule of acknowledgement allows a judge to articulate the possible influence of moral, religious or political predispositions on the decision of the court.[262] This provides rationality and objectivity by justifying the court's decision and opening the decision for public scrutiny and rational criticism. In the end, the theory allows judges to accept expressly and embrace the role that their own beliefs, opinions and ideas play in

---

260 Langa 2006 *Stell LR* 353.

261 *South African Commercial Catering and Allied Workers Union v Irvin and Johnson Ltd* 2000 (3) SA 705 (CC) para 14.

262 Section 4.5.3 above and Section 5.3.

judgments. However, when embracing and acknowledging the effect that subjective views may have on the decision of the court, the judge should also ensure that substantive justice is served by the decision of the court.

In section 3.5.2 and 3.5.3 above, it was argued that a guiding principle in the South African constitutional state is the premise that citizens are allowed to participate in decisions that may affect them. This calls for a more expansive and uniform theory of constitutional review that fosters a culture of participation and justification. The culture of justification satisfies a value-based assessment of the *Constitution.* This culture of justification and the principle of reciprocity are mutually supportive.

The principle of reciprocity facilitates the right to participation by preventing the arbitrary imposition of the personal view of the judge. This means that when meaning is assigned to undefined constitutional values, the judge must acknowledge the inner self and articulate the reasoning process that gave rise to the decision of the court for public scrutiny. Reciprocity then allows the judge to adhere to the constitutional commitment to justice, including treating litigants equally, thereby bestowing dignity and self-worth on the litigant and fostering a culture of justice, openness, justification and participation in adjudication. In strategic litigation this means that, whatever the outcome of the litigation, justice as a concept is realised by the way the litigants are treated by the court and eventually by its judgment. Furthermore, the constitutional promise of ethical and professional behaviour required of the state litigant can be realised. The principles of justice, openness and justification allow the courts to demand from the state litigant to behave as the model litigant.

Chapter 5: Constitutional limitations on strategic litigation

5.1 Introduction

In chapter 2, it was argued that the strategic litigant seeks to regulate executive and legislative action in accordance with the *Constitution.* The relief claimed aims at restructuring the public organisation or conduct by the legislature and/or executive to eliminate a threat to the principles and values enshrined in the *Constitution* or to align unconstitutional conduct of the executive or the legislature with the *Constitution.* It was further shown that the *Constitution* contains fundamental values that set positive standards with which all law and conduct of the state must comply, including when it engages in litigation. From chapter 2 it is evident that the existing control mechanisms have not prevented the state from acting outside the scope of the *Constitution* and have not ensured state compliance with the legal duties constitutionally conferred upon it. It is furthermore evident that the wide constitutional powers conferred upon the courts are not always adequate when they are confronted with organs of state that, when litigating, are sometimes ignoring court orders and constitutionally imposed positive duties. The *Constitution* requires that the organ of state must be held to a different standard than the private litigant. Constitutional obligations demand that the state litigant display a high standard of professional ethics when litigating.[1] The state litigant must also assist the courts and ensure the effectiveness of the courts.[2] This can be achieved when the state litigant places all relevant information in its possession before the court to allow the court to come to a just and correct decision. Therefore, the state must conduct itself as the model litigant.

Chapter 3, indicated that the doctrine of deference to which the courts subscribe does not function as an effective check on the misuse of power by state organs. It was further argued that the doctrine of deference does not satisfy the constitutional values fundamental to the South African *Constitution.* Instead, a policy of judicial review that is based on non-discrimination, openness, justification, accountability and participation

---

1 Section 195 of the *Constitution*.
2 Section 165(4) of the *Constitution*.

was suggested. Such a value-based assessment of the *Constitution* supported by a culture of justification allows for the values of accountability, responsiveness and openness to be explored and realised. This will allow the courts to review executive and legislative action within the framework of the *Constitution* and thus fashion a model of the doctrine of the separation of powers that will survive the fused nature of the legislative and the executive in South Africa.

In chapter 4, it was submitted that there is an underlying moral value system in the *Constitution* that should inform all legal norms, as well as the *Constitution* itself, including the interpretation of the undefined constitutional values. This moral value system is based on the principles of fairness and justice, which can be realised by subscribing to the ethical norm of reciprocity. Reciprocity underlies the concepts of dignity and equality articulated in the *Constitution* and can be used to ensure justice and fairness.

This chapter uses three case studies to illustrate, with reference to the conclusions drawn from the previous chapters, the constitutional limitations of strategic litigation against a state party. The case studies fall into the following broad categories: firstly, that of strategic litigants who attempt to "shape" societal norms and values by seeking to change the common or statutory law; secondly, that of strategic litigants who attempt to influence or change executive policy; and, thirdly, that of strategic litigants who attempt to hold individuals or organs of state accountable to the *Constitution.* In practice, these categories may overlap.

In section 5.2 an example is discussed of a strategic litigant who attempted to "shape" societal norms and values by endeavouring to change the common-law definition of rape to include male-on-male rape. The difference between the majority and minority opinions of the court is examined, highlighting the contrasting approaches to constitutional interpretation. In this matter, the minority decision sought to use a wider approach to constitutional interpretation not recognised by the majority of judges. The minority opinion embraced a more expansive theory of judicial review in an attempt to give the fullest effect to constitutional values.

Section 5.3 deals with an example of a strategic litigant attempting to influence or shape executive policy. This section examines the tension between rationality and formal and substantive justice in the context of the value system inherent in the *Constitution* and whether the moral value system underlying the *Constitution* can shape the decisions of the courts and promote substantive justice.

Section 5.4 scrutinises the attempt by a strategic litigant to hold an organ of state – in this instance the executive – accountable to the *Constitution.* This section analyses the legal battle for the release of the Khampepe-Moseneke Report. The case was heard twice in the High Court and the Supreme Court of Appeal, and once in the Constitutional Court. The state persisted in its efforts to justify its refusal to release the report despite its failure to establish an evidential basis for the refusal and multiple orders for costs granted against it. This case study highlights the occasional failure of organs of state to comply with their constitutional obligations and further illustrates how punitive cost orders do not necessarily deter organs of state from abusing the court system.

5.2 Masiya v Director of Public Prosecutions

In *Masiya v Director of Public Prosecutions;*[3] the case revolved around the constitutional validity of the gender-specific, common-law definition of rape.[4] The issues raised in this matter involve the protection of the rights to dignity,[5] equality,[6] freedom and security of the person,[7] and children's rights,[8] as well as the applicant's rights to fair trial.[9]

---

3 2007 (5) SA 30 (CC).

4 Para 1.

5 Section 10 of the *Constitution* provides that everyone has inherent dignity and the right to have their dignity respected and protected.

6 Section 9(1) provides that everyone is equal before the law and has the right to equal protection and benefit of the law.

7 Section 12 provides, *inter alia*: "(1) Everyone has the right to freedom and security of the person, which includes the right (a) not to be deprived of freedom arbitrarily or without just cause; … (c) to be free from all forms of violence from either public or private sources; … (2) Everyone has the right to bodily and psychological integrity, which includes the right … (b) to security in and control over their body; …".

8 Section 28(1)(d) provides that every child has the right to be protected from maltreatment, neglect, abuse or degradation.

5.2.1 Majority decision

The Court found that the current definition of rape criminalises unacceptable social conduct that is in violation of constitutional rights.[10] The definition ensures that the constitutional right to be free from all forms of violence, whether public or private, and the right to dignity and equality are protected. What is therefore required is that the definition be extended instead of eliminated to promote the spirit, purport and objects of the Bill of Rights.[11]

However, the Court found it not necessary to consider whether the definition should be extended to include rape of males. The Court stressed that it is not desirable that a case be dealt with because of what the facts might be rather than what they are.[12] The development of the common law is a power that has always vested in the courts. It is exercised in an incremental fashion, as the facts of each case require.[13] The Court therefore refused to amend the common-law definition of rape to include male-on-male rape, and instead left the amendment of the common law to the legislature.[14]

5.2.2 Minority decision

Langa CJ and Sachs J dissented from the judgment penned by Nkabinde J, reasoning that there was no reason why the issue of male rape could not be included in the development of the common law.[15] They held that refusing to give equal protection to both sexes failed to give full effect to the constitutional values of dignity, equality and freedom: dignity through recognition of a violation; equality through equal recognition of that violation; and freedom because rape negates not only dignity, but also bodily autonomy. All these concerns applied equally to men and women and necessitated a

---

9 Section 35(3) provides, *inter alia*: "Every accused person has a right to a fair trial, which includes the right … (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted; … (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; …".

10 Para 25.

11 Para 27.

12 Para 29.

13 Para 31.

14 Para 30.

15 Para 84.

definition that was gender-neutral concerning victims; the criminalisation of rape was about protecting the "dignity, sexual autonomy and privacy" of all people, irrespective of their sex or gender.[16]

5.2.3 Similar examples of strategic litigation

In *Van Deventer v National Director of Public Prosecutions NO*,[17] the applicant sought an order directing the respondent to consider the applicant's representations for the diversion of a criminal case and to take such steps as necessary to ensure that the application for diversion be reconsidered. In the alternative, the applicant sought an order directing the respondent to determine a proper policy and/or guidelines for diversion cases, alternatively specific guidelines for diversion of specific crimes. The applicant contended that the decision of the respondent to proceed with the prosecution was arbitrary, irrational, capricious and in a manner inconsistent with the provisions of section 179(2) of the *Constitution.*[18] The Court held that the respondent considered the available evidence and the circumstances under which the offence was committed, the personal circumstances of the applicant and the interest of society in exercising its discretion. The court further held that the respondent's exercising its discretion not to divert the case could not be faulted. The application was dismissed with costs.

In *Carmichele v Minister of Safety and Security*,[19] the applicant instituted proceedings for damages against the respondents, claiming that members of the South African Police Service and public prosecutors had negligently failed to comply with the legal duty they owed her to take steps to prevent an assailant from causing her harm. The applicant sought to bring the common-law delictual duty to act in line with the *Constitution.*

---

16 Para 80.
17 (64268/2013) [2015] ZAGPPHC 550 (7 August 2015).
18 Section 179(2) provides that the prosecuting authority has the power to institute criminal proceedings on behalf of the state and to carry out any necessary functions incidental to instituting criminal proceedings.
19 2001 (4) SA 938 (CC).

The Court held that the *Constitution* is the supreme law and that section 173 of the *Constitution* gives to all higher courts the inherent power to develop the common law, taking into account the interests of justice.[20] Where the common law deviates from the spirit, purport and objects of the Bill of Rights, the courts have an obligation to develop it by removing that deviation. Therefore, the courts should remain vigilant and should not hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights. The Court held that it was implicit in the applicant's case that the common law had to be developed beyond existing precedent. The Court was satisfied that the case for the applicant had sufficient merit to require careful consideration to be given to the complex legal issues it raised. The Court therefore referred the matter back to the court *a quo* to deal with the matter based on the facts as determined by it.

In *K v Minister of Safety and Security*,[21] the applicant sought damages in delict from the respondent, on the basis that she was raped by three uniformed and on-duty police officers after she had accepted a lift home from them when she found herself effectively stranded in the early hours of the morning. The Court held that the question of the protection of the applicant's rights to security of the person, dignity, privacy and substantive equality is of profound constitutional importance. Furthermore, it was part of the three policemen's work to ensure the safety and security of all South Africans and to prevent crime. The Court held that the rape was clearly a deviation from their duties. Furthermore, when committing the rape, the three policemen were simultaneously omitting to perform their duties as policemen. The policemen all bore a statutory and constitutional duty to prevent crime and protect the members of the public. That duty was a duty which also rested on their employer and they were employed by their employer to perform that obligation. As such, the employer was vicariously liable for the delict they committed. The case successfully widened the scope of the vicarious liability of the Minister of Safety and Security under South African law.

---

[20] Section 173 reads: "The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[21] 2005 (6) SA 419 (CC).

In *Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer Port Elizabeth Prison*,[22] the foundation of the applications was that the statutory authority of the orders committing the particular debtors to prison had been vitiated by sections 11(1)[23] and 25(3)[24] of the *Interim Constitution.* Those subsections, it was argued, made imprisonment without a fair trial unconstitutional. The Court held that to put someone in prison is a limitation of that person's right to freedom. To do so without any criminal charge being levelled or any trial being held is manifestly a radical encroachment upon such right. The Court therefore held that the statutory authority of the orders committing a debtor to prison was incompatible with constitutional provisions.

In *Helen Suzman Foundation v President of the Republic of South Africa; Glenister v President of the Republic of South Africa*,[25] the applicant unsuccessfully argued that the legislative scheme that created the Directorate for Priority Crime Investigation was defective and therefore constitutionally invalid.[26] The majority opinion held that the applicant (Glenister), in pursuit of an otherwise legitimate constitutional cause of ensuring that there was an adequately independent corruption-fighting agency, chose to be careless and to overburden the court record with an ocean of irrelevancies, and ordered cost against him. Furthermore, the majority held that legislative scheme that created the Directorate for Priority Crime Investigation was constitutionally valid.

In *Makwickana v Ethekwini Municipality*,[27] the Court scrutinised the *eThekwini Municipality: Informal Trading By-law*, 2014, pertaining to the removal and impoundment of the trading goods of informal or street traders by the municipal police. The applicant contended that the removal and impoundment of the trading goods of a trader who failed to produce a licence to trade were *ultra vires* and invalid. The Court held that the *By-law* was an unjustifiable limitation on constitutional rights that led to

---

22 1995 (4) SA 631 (22 September 1995).
23 "Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial."
24 "Every accused person shall have the right to a fair trial …"
25 2015 (1) BCLR 1 (CC).
26 Amendments to the *National Prosecuting Authority Act* 32 of 1998.
27 2015 (3) SA 165 (KZD) C 2015 (3) SA.

self-help and abuse of power by officials of the respondent. Therefore, the Court amended the *By-law* to curtail the power of officials to impound and confiscate property.

5.2.4 Conceptual analysis of the decision

The *Masiya* judgment shows the different approaches to constitutional interpretation, which give rise to minority opinions and divided judgments. The majority opinion sets forth the decision of the court and explains the rationale behind the court's decision; however, judges may give different reasons for reaching the same conclusion. A minority or dissenting opinion will be the opinion of a judge or judges who express disagreement with the majority opinion. The dissenting judge(s) may disagree with the majority for a number of reasons: different interpretation of the current law, the application of different principles or values, or a different interpretation of the facts of the case.[28]

In the *Masiya* judgment, the minority judgment sought a wider approach to constitutional interpretation not recognised by the majority. The fact that the majority of the Court refused to entertain a broad constitutional interpretation is problematic, given the Constitutional Court's previous finding that the *Constitution* should be generously interpreted to give individuals the full benefit of the fundamental rights in the *Constitution.*[29] The refusal by the majority to entertain a broad constitutional interpretation was not convincingly explained, with the Court preferring to defer to the legislature for the necessary amendment.

The courts should attempt to synchronise the real world with the ideal construct of a constitutional world,[30] premised on fairness and justice for all. This the minority opinion attempted, by an interpretation of the constitutional values that is functional and lends to the substantive meaning of the values a functional and not symbolic effect. Furthermore, courts have a duty to mould an order that will provide effective relief to

---

28 Taken from Oxford Dictionaries Online https://en.wikipedia.org/wiki/OED accessed January 2016.
29 *S v Zuma* 1995 (2) SA 642 (CC) paras 8-9.
30 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 94.

those affected by a constitutional breach.[31] Interpretation should therefore view the *Constitution* as a resource for coping with present as well as future constitutional violations.

In chapter 2, a more expansive theory of judicial review was called for.[32] This theory of judicial review embraces the values and objectives quarried from the constitutional text, and strives for the correct balance between the constitutional values of participation, openness, justification and accountability, and the doctrine of the separation of powers. The minority judgment of Langa CJ and Sachs J subscribes to such a broad theory of judicial review.[33]

The minority opinion stressed the necessity of giving full effect to the constitutional values of dignity, equality and freedom. The judges preferred a wider approach to constitutional interpretation not echoed by the majority. This embodied a more generous interpretation of the *Constitution* and attempted to give individuals the full measure of protection that the fundamental constitutional rights offer.

The majority argued that in the South African constitutional democracy the legislative branch has the major responsibility for law reform and that this should be recognised and respected by the courts.[34] The Court therefore based its refusal to extend the definition of rape to male non-consensual intercourse on the issue of the separation of powers and the principle of deference in judicial review. This argument is fallacious, to say the least; the development of the common law has traditionally resided in the powers of the courts, as acknowledged by the majority in the next paragraph of the judgment.[35]

The majority opinion was that the common-law definition of rape was not unconstitutional when it excluded male-on-male rape,[36] but the majority also argued that the common-law definition of rape had to be adapted appropriately to

---

31 *Fose* para 102.
32 Section 5.3 above.
33 Section 3.2 above.
34 *Masiya* para 30.
35 Para 31.
36 Para 32.

acknowledge male-on-male rape. The majority did not clarify why the definition had be adapted if it was not unconstitutional, and in conformity with what norm, if not the *Constitution*, the definition had to be adapted.

Section 8(3) of the *Constitution* requires the courts to give effect to the Bill of Rights by developing the common law to ensure the realisation of those rights. Furthermore, the majority's reliance on the principle of deference resulted in a situation where the constitutional values of dignity, equality and freedom were apparently not entertained by the court in reaching its decision.

In the *Masiya* case, the applicant was ultimately not successful in shaping the prevalent norm. However, the wider approach to constitutional interpretation exercised by the judges in the minority opinion vindicated the *Constitution* by taking into account constitutional values in adjudication. The other examples of strategic litigation mentioned above show that, in some of the cases, the strategic litigant was successful in attempting to shape societal norms.

The *Van Deventer* case attempted to change prosecutorial considerations relating to a charge of driving under the influence of alcohol. However, from the facts of the case it appeared that the applicant challenged the impugned policy entirely for his own benefit. He was unable to show a wider impact of the presumed constitutional violations. The *Helen Suzman Foundation* case also was unsuccessful in attempting to change the structure of the investigation of priority crime in South Africa.

Both cases against the Minister of Safety and Security (*Carmichael* and *K*) were successful in broadening the scope of vicarious liability against the Minister of Safety and Security. In both these cases the courts used a broad approach to constitutional interpretation by focusing on fundamental constitutional rights and values, such as the rights to personal safety, bodily integrity, freedom from violence and dignity.

The *Coetzee* case changed the common law as well as the societal norm of putting debtors in prison. The decision changed not only the way debt is collected in South Africa but also the way credit is provided.

The *Makwickana* case was successful in changing the practice of removing and impounding the trading goods of a trader who failed to produce a licence.

It is clear that the courts will follow a broader approach to constitutional interpretation and adjudication when the affected parties are regarded as vulnerable.

5.3 Walker v Stadsraad van Pretoria[37]

5.3.1 Background to the case

The respondent, a local authority, had sued the appellant in a magistrate's court for arrear rates and levies imposed by it on the appellant's property, which was situated in a formerly white area of the respondent's jurisdiction.[38] The appellant had refused to pay his accounts in full because the respondent had assessed him at a user-based tariff (as measured by meters installed at his home), while the residents of two neighbouring, formerly black, townships under the respondent's jurisdiction were being charged a flat rate for the same services. Residents of these areas who had paid a metered rate were refunded their moneys and no legal action was taken against delinquent ratepayers residing there, while several thousand summonses were issued in the formerly white areas. The appellant contended that this amounted to unfair discrimination against him.

The trial court (magistrate's court) held that, although the respondent had discriminated between the two formerly black townships, on the one hand, and the area in which appellant resided, on the other, the discrimination had not been based on race but on area of residence. Therefore, the appellant had not been able to show that the discrimination was unfair in terms of section 8 of the *Interim Constitution.*[39]

---

37 1997 (4) SA 189 (T).

38 Page 197(a)-(g).

39 The right to equality. All references in this discussion to the *Constitution* are to the *Constitution of the Republic of South Africa* 200 of 1993.

5.3.2 Decision of the High Court[40]

The High Court held that when conduct was tested against section 8(2),[41] it had to be determined, in the first place, whether there had been differentiation between the complainant and others and, in the second place, whether such differentiation had been unfair.[42] The question of whether there had been unequal treatment was a question of fact, and the question of whether the unequal treatment had been unfair required a value judgement that had to be made based on society's norms.[43] There was no onus on a party to convince the Court that the conduct or measures in question were fair or unfair; the Court had to make a decision once all the relevant facts had been determined.

Furthermore, the Court held that there was no indication in section 8 that discrimination had to be limited to the specifically stated grounds.[44] The built-in limitation was to be found in the word "unfair" and not in the word "discrimination" or in the specifically stated grounds.

The Court held, as to the question of whether the discrimination practised by the respondent had been unfair, that the imposition of a flat rate on some ratepayers and a metered rate on others was not inherently unfair.[45] It would have been different if the flat rate did not reflect the fair value of the services rendered. Therefore, if the services were equivalent but the payment charged not, the discrimination was unfair.

The Court held that unfair discrimination was clarified by section 178(2) of the *Constitution*,[46] which provided that municipal levies and the recovery thereof had to be

---

40 *Walker v Stadsraad van Pretoria* 1997 (4) SA 189 (T).

41 "No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language."

42 Page 206(c).

43 Page 206(g)-(i).

44 Page 207(g)-(h).

45 Page 207(i)-(j) and para 208(a)-(b).

46 "A local government shall, subject to such conditions as may be prescribed by law of a competent legislature after taking into consideration any recommendations of the Financial and Fiscal Commission, be competent to levy and recover such property rates, levies, fees, taxes and tariffs as

based on a uniform structure for the local authority's area of jurisdiction. Therefore, the section did not allow for any exceptions to the requirement of uniformity, not even on grounds of efficiency.[47]

The Court held that the appellant had *prima facie* clearly been unfairly discriminated against because of his area of residence.[48] The Court argued that to distinguish between white and black residential areas in so far as the levying and recovery of service charges was concerned was not justifiable. Therefore, there was a burden of rebuttal on the respondent to justify its *prima facie* unfair conduct.

The respondents contended that it could not read the installed meters in the black areas as this would have led to the destruction of its installations and the intimidation of its staff members.[49] However, the Court found that this argument lacked conviction because there was no evidence of intimidation of its staff members or threats to its property placed before the Court. Furthermore, the ability of the new consumers in the black areas to pay for their services was never questioned, nor was any convincing reason given for the cross-subsidisation of services or the refunding of paid moneys to customers in the predominantly black areas.

The Court stated that the grounds of justification offered by the respondent were not convincing; it was clear that administrative red tape was the reason for the delay in installing meters in the black areas, and the respondent was not entitled to hide behind its own negligence.[50] Furthermore, the indications were that the moratorium on the payment for services provided in the predominantly black areas was instituted under pressure and for the sake of political expediency and not based on sound business principles.

---

may be necessary to exercise its powers and perform its functions: Provided that within each local government such rates, levies, fees, taxes and tariffs shall be based on a uniform structure for its area of jurisdiction."

47 Page 208(d)-(f).

48 Page 209(f)-(g).

49 Page 209(g).

50 Page 210(b).

The Court held that the imposition of the flat rate amounting to cross-subsidisation, the selective summonsing of residents based on historically race-defined geographical divisions, and the imposition of different tariffs on residents of two different areas when both sets of residents had meters was unconstitutional.[51]

The applicant had raised unfair discrimination as an absolute defence.[52] The Court therefore had to be innovative in providing the appellant with a remedy. The appropriate remedy for the applicant was absolution from the instance with costs.

5.3.3 Decision of the Constitutional Court[53]

5.3.3.1 Majority decision

The applicant (City Council of Pretoria) appealed to the Constitutional Court. The Court held that the following background issues were raised:[54]

(a) Electricity and water charges in the council's area were levied on a differential basis.

(b) The residents of old Pretoria, including the respondent, were levied on a tariff based on actual consumption measured by means of meters installed on each property. This had been the position long before the amalgamation.

(c) Residents of the former black areas, in the absence of meters, were levied based on a uniform rate for every household.

The respondent's objections to the council's conduct were based on the following grounds:[55]

---

51 Page 211(a)-(b).
52 Page 211(d)-(e).
53 *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (17 February 1998) (CC).
54 Para 5.
55 Para 6.

(a) The flat rate in former black areas was lower than the metered rate and this therefore meant that the residents of old Pretoria subsidised those of the two townships.

(b) The differentiation in the tariffs continued even after meters had been installed on some properties in the former black areas.

(c) Only residents of old Pretoria were singled out by the council for legal action to recover arrears whilst a policy of non-enforcement was being followed in respect of the former black areas.

(d) The imposition of differential rates was a contravention of section 178(2) of the *Interim Constitution.*

(e) The applicant did not take the residents of old Pretoria into its confidence when the target dates for the implementation of a consumption-based tariff were not met. Instead, misleading information was given to old Pretoria residents, leaving them under the impression that the metered rate was being uniformly applied at a time when it was not.

The respondent's complaint was that the council's conduct amounted to unfair discrimination and was therefore in breach of section 8 of the *Interim Constitution.*

The Court stated that the dispute should be seen in the light of changes which have come about because of the adoption of a new constitutional order.[56] Therefore, it would be surprising if the process of bringing together, in a constitutional sense, people and communities who were kept apart for many years did not result in difficulties and tensions. These difficulties were the result of disparities and imbalances inherent in the South African society, which resulted from policies of the past.

The Court referred to the glaring disparities between the two black townships and old Pretoria, in property values, delivery of services and infrastructure.[57] The inferiority of

---

[56] Para 17.
[57] Para 19.

the infrastructure in the black townships included no meters for water and electricity. The residents were levied a flat rate for such services as they received and this situation had been carried over after the amalgamation of the different areas. Therefore, from the outset, the council faced a challenge to provide services and to treat all the residents within its jurisdiction equally.[58] The council announced in 1995 a consumption-based tariff for its entire area (including the former black areas).[59] At that time, meters had already been installed on some of the properties in the townships. The consumption-based tariff was, however, not applied to those properties; they continued instead to be charged according to the flat rate. The decision was taken not to implement the consumption rate until meters had been installed on all the properties.

The respondent belonged to a group that called itself *Besorgde Belastingbetalersgroep* (the BBG), whose members refused to pay the full amount for electricity, instead paying a lower amount which was equivalent to the flat rate applicable in the former black areas.[60]

The Court held that it was clear that the council treated the respondent, together with the other residents of old Pretoria, in a manner different to the treatment accorded to the residents of the black areas by –[61]

(a) operating a flat rate in the former black areas while a consumption-based tariff, which was higher, was used in old Pretoria;

(b) differentiating between old Pretoria and those parts of the black areas where meters had already been installed; and

(c) taking legal steps to recover arrears from the residents of old Pretoria only and failing to take similar action against defaulters in the former black areas.

---

58 Para 20.
59 Para 21.
60 Para 22.
61 Para 23.

The Court noted that this differentiation was, at least partly, an inherited one.[62] The flat rate in the historically black areas was a convenient practical expedient because of the poor infrastructure. This differentiation was not initiated by the new council; however, it became the council's responsibility to end it.

The Court held that the question whether there had been a violation of section 8 of the *Interim Constitution* had to be assessed against the background of the case.[63] The respondent argued that "[t]he conduct of the council could not be said to have been authorised by section 8(3)(a) of the Interim Constitution inasmuch as the discriminatory measures had not been 'designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination'".[64] The position of the applicant was, however, that the differentiation was rationally connected to the legitimate objective of dealing with the period of transition by phasing in the required changes in order to achieve equality between the residents of the different areas.

The Court held that when dealing with issues relating to equality before the law or equal protection of the law, the *dictum* articulated by the Court in *S v Ntuli*[65] should be followed. This entails that the right to equality before the law is concerned more particularly with entitling everybody, at the very least, to equal treatment by our courts of law. Furthermore, no one is above or beneath the law and all persons are subject to law applied and administered impartially. This rationality criterion is equally applicable whether we are dealing with equality before the law or equal protection of the law.

The Court therefore held that the differentiation in the present matter was rationally connected to legitimate governmental objectives. The measures were of a temporary nature and designed to provide continuity in the rendering of services by the council while phasing in equality in terms of facilities and resources during a difficult period of

---

62 Para 24.
63 Para 26.
64 Para 27.
65 1996 (1) BCLR 141 (CC) para 18.

transition. However, this left the question of whether the differentiation complained of constituted discrimination and, if it did, whether that discrimination was unfair.

The Court found that the impact of the applicant's policy was clearly one that differentiated in substance between black residents and white residents.[66] Therefore, the impact of the policy that was adopted by the council was to require the white residents to comply with the legal tariff and to pay the charges made in terms of that tariff on pain of having their services suspended or legal action taken against them.[67] In contrast, the black residents were not held to the tariff, were called upon to pay only a flat rate, which was lower than the tariff, and were not subjected to having their services suspended or legal action taken against them.

The Court stated that differentiation on one of the specified grounds referred to in section 8(2) gives rise to a presumption of unfair discrimination.[68] Therefore, the applicant bears the burden of rebutting the presumption of unfair discrimination.[69] This requires an examination of the impact of the discrimination on the respondent.[70] The Court held that intention to discriminate is regarded as an essential element of unfair discrimination.[71] Furthermore, there was nothing in the language of section 8(2) that called for the section to be interpreted as requiring proof of intention to discriminate as a threshold requirement for either direct or indirect discrimination.[72] Therefore, the elements of discrimination and unfairness must be determined objectively in the light of the facts of each particular case.

The Court stated that the respondent belonged to a group that had not been disadvantaged by the racial policies of the past.[73] The respondent's group is neither disadvantaged nor vulnerable, having been benefited rather than adversely affected by discrimination in the past. The Court highlighted that generalisations are invidious but

---

66 Para 32 of *Walker*.
67 Para 33.
68 Para 35.
69 Para 36.
70 Para 37.
71 Para 39.
72 Para 43.
73 Para 47.

that courts must be astute to distinguish between genuine attempts to promote and protect equality, on the one hand, and actions calculated to protect pockets of privilege at a price, which amounts to the perpetuation of inequality and disadvantage to others, on the other.[74]

The Court pointed out that the applicant had a responsibility to deliver services to all residents in its area.[75] This task had to be performed in a manner which did not unfairly discriminate against any one of the residents. The applicant was also entitled to be paid for the delivery of services. Therefore, the applicant was required to put in place effective measures for the collection of municipal charges.

The Court held that there was no reasonable alternative to a flat charge.[76] Meters had not been installed in residential premises in the former black areas and without them there was no way of measuring the consumption of individual users. Therefore, the method used by the applicant was dictated by the circumstances with which it was confronted.[77]

The Court held that the view of the High Court that cross-subsidisation was discriminatory and that the levying of different rates for the same services was always unfair was incorrect, stating that it looked to formal rather than substantive equality.[78]

The Court investigated the complaint of selective enforcement by referring to historical factors such as the culture of payment in the former white areas against the culture of non-payment in the black areas.[79] The applicant adopted a policy to address this problem by enforcing payment of arrear charges in the white areas, if necessary by means of suspension of services or legal action, and by encouraging payment of arrears

---

74 Para 48.
75 Para 49.
76 Para 52.
77 Para 53.
78 Para 62.
79 Para 70.

by residents in the black areas, but not taking legal action against them while the installation of meters was still in progress.[80]

The Court held that section 8 of the *Constitution* guaranteed that at least at the level of law-making and executive action hurtful discrimination would no longer be a feature of South African life.[81] Equality is one of the core values of the *Constitution* and section 8 calls for more than formal equality. However, the *Constitution* requires that the applicant's debt-collection policy be rational and not constitute unfair discrimination.

The Court argued that the reasons given for the policy of the applicant were pragmatic, hoping to avoid anything that might provoke a hostile reaction from the residents of the former black areas at a time when the contractors were engaged in the installation of meters in the two townships.[82] Furthermore, the policy was implemented not only without public notice but also in secrecy and after untrue and misleading public statements had been made by the officials concerned with regard to that policy.[83] For the Court, this painted a picture of confusion and uncertainty, with officials being pulled in different directions by different pressure groups, and of the truth being concealed and false information being disseminated.[84]

The Court held that no members of a racial group should be made to feel that they are not deserving of equal concern, respect and consideration and that the law is likely to be used against them more harshly than others who belong to another race group.[85] Therefore, the impact of the policy of selective enforcement on the respondent and other persons similarly placed, viewed objectively in the light of the evidence on record, affected them in a manner which is "at least comparably serious to an invasion of their dignity". This was exacerbated by the fact that they had been misled and misinformed by the council.

---

80 Para 72.
81 Para 73.
82 Para 74.
83 Para 76.
84 Para 79.
85 Para 81.

The Court found that the policy of selective enforcement amounted to unfair discrimination within the meaning of section 8(2). The *Constitution* was infringed by the manner in which the tariff was applied and enforced.[86]

In ascertaining what appropriate relief for the respondent would be, the Court took into consideration the particulars of the case. The Court decried the self-help the respondent resorted to, stating that local government is functioning for the common good, but it cannot do so efficiently and effectively if every person who has a grievance about the conduct of a public official or a governmental structure were to take the matter to court.[87] The Court stated that the kind of society envisaged in the *Constitution* implied also the exercise of responsibility towards the systems and structures of society. The Court, therefore, refused to countenance the respondent's refusal to pay for services received.

5.3.3.2 Minority decision

Sachs J was unable to agree with the majority that the selective enforcement of debt recovery by the applicant amounted to unfair discrimination against the respondent.[88]

The judge articulated his concern with the finding of unfair discrimination as follows:[89]

> I find it jurisprudentially incongruous to regard the complainant as a victim of unfair discrimination as a result of such a process. He was disturbed in no way in his enjoyment of residence in a neighbourhood which had been made affluent by state-enforced advantage in the past. The group with which he identified himself continued to get the benefit of regular municipal services at all material times. He was not called upon to do any more than to pay what he owed for services he had always received. He was not being singled out or targeted in any way, neither because of his race nor even because he lived in a comfortable neighbourhood. In my view, although treated differently, he was not discriminated against in any manner whatsoever; alternatively, if the council's conduct can correctly be classed as discriminatory against him, it was by no means unfair.

The judge argued that section 8 provided two major principles to guide programmes aimed at achieving substantive equality through the application of differential treatment

---

86 Para 87.
87 Para 93.
88 Para 100.
89 Para 103.

for those who start off in unequal situations.[90] Firstly, once duly adopted, laws must be administered in an impartial and even-handed way. Secondly, such programmes must be designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.

The judge disagreed that the issue raised was one of discrimination at all, direct or indirect.[91] Thus, there was no direct discrimination on the grounds of race, nor was there indirect discrimination on the grounds of race simply because whites lived in one area and blacks in another.

Sachs J further stated that –

> [t]here is overwhelming evidence to show that the complainant has in fact benefited from accumulated discrimination and that he continues to enjoy structured advantage of a massive kind. I find nothing in the papers, on the other hand, to prove that he has been prejudiced by discrimination, whether direct or indirect, or whether in the past or at present. The mere coincidence in practice of differentiation and race, without some actual negative impact associated with race, is not, in my view, enough to constitute indirect discrimination on the grounds of race.

He defined the "impact" required as follows:[92]

> Indeed, the very word "impact" which is usually contrasted with "intention", presupposes an element of forceful contact or collision that in some way disturbs the existing equilibrium of the contacted object. Implicit in it is the notion of adverse effect equivalent in outcome to that of an intended blow. Thus absent some additional contextual element, a one-off caress to A is not a blow to B, especially when A is in need of tender care and B is in good health. There is simply no impact on B. The action does not reach B. If, on the other hand, there has been a history of systematic favouritism to A and neglect of B, then, of course, there would be symbolical impact of a prejudicial kind, since even a slight gesture would track and reinforce structured disadvantage and maintain internal disequilibrium.

The core of the judge's argument was therefore that the respondent had not made out a case of having suffered *prima facie* discrimination at all. In order to invoke the presumption of unfairness contained in section 8(4), some element of actual or

---

90 Para 104.
91 Para 105.
92 Para 105, footnote 10.

potential prejudice must be immanent in the differentiation, otherwise there is no discrimination to be evaluated.[93]

The judge acknowledged, however, that, in the light of our history of institutionalised racism and sexism, there might be sound reasons for treating direct differentiation on the grounds specified in section 8(2) as *prima facie* proof of discrimination without further evidence of prejudice being required, thereby triggering the presumption of unfairness contained in section 8(4). In the case of differential impact of an indirect nature, the judge held that there was no scope for any such *per se* assumption of discrimination, and that some element of prejudice, whether of a material kind or to self-esteem, had to be established.[94]

The judge interpreted section 8 in a historical setting. He argued that the text made it clear that equality was not to be regarded as being based on a neutral and given state of affairs from which all departures had to be justified.[95] Rather, equality was envisaged as something to be achieved through the dismantling of structures and practices that unfairly obstructed or unduly attenuated its enjoyment. He held that the presumption of unfairness as provided for by section 8(4) then made perfectly good sense when there was either overt or direct differentiation on one of the specified grounds, such as race or sex, or where patterns of disadvantage based on such grounds were being reinforced without express reference but as a matter of reality. However, the presumption made no sense at all when invoked to shield continuing advantage gained because of past discrimination from the side-winds of remedial social programmes designed to reduce the effect of such structured advantage.

Sachs continued by stating that the complainant was being deprived of nothing by the measure that he attacks.[96] His objection was simply that he was being left out of a programme that relieves other persons from obligations whose objective circumstances are markedly different from and inferior to his.

---

93 Para 106.
94 Para 107.
95 Para 109.
96 Para 110.

According to the judge, for a question of indirect unfair discrimination under section 8(2) to be raised, something more had to be shown than differential impact on persons belonging to groups specified in section 8(2).[97] Therefore, to establish that the impact of the indirect differentiation was *prima facie* discriminatory on grounds specified in section 8(2), the measure had at least to impose identifiable disabilities, burdens or inconveniences, or threaten to touch on or reinforce patterns of disadvantage, or in some proximate and concrete manner threaten the dignity or equal concern or worth of the persons affected. The judge concluded that the decision not to issue summonses against persons in black areas did not in any way threaten or was in any way capable of imposing burdens or reinforcing disadvantage for the respondent. It was not withholding benefits from him or undermining his dignity or sense of self-worth.

Expanding on the concept of indirect discrimination, Sachs J argued that he was unaware of the concept being expanded to favour the beneficiaries of overt and systematic advantage.[98] He further held that, because of the history and legacy of the country, almost every piece of legislation, and virtually every kind of governmental action, would affect the groups specified in section 8(2) of the *Constitution* differently.[99] For the judge, then, section 8 would be spread too thinly to achieve its purpose if each measure of such kind were to be regarded as effecting indirect discrimination, which was presumptively suspect.[100]

In articulating the principle of fairness, the judge said the following:[101]

> The doors of the courts must, of course, be equally open to all South Africans, independently of whether historically they have been privileged or oppressed. Indeed, minorities of any kind are always potentially vulnerable. Processes of differential treatment which have the legitimate purpose of bringing about real equality should not be undertaken in a manner which gratuitously and insensitively offends and marginalises persons identified as belonging to groups who previously enjoyed advantage.

---

97 Para 113.
98 Para 115.
99 Para 116.
100 Para 118.
101 Para 123.

However, the place of a complainant in the structures of advantage and disadvantage will always be one of the central elements in the determination of how fair or unfair the challenged discrimination is. Coupled with this is the fact that the societal objective pursued by the issuing of the summonses was the unproblematic one of recovering a debt, thereby enabling the applicant to meet its obligations towards the inhabitants in its area.[102] The soft approach to non-payment the applicant preferred towards the people living in the black areas was to overcome rather than to perpetuate inequality.[103]

The judge further stated:[104]

> I simply cannot see how the complainant's rights were affected or his fundamental human dignity impaired by his receiving a summons to pay for something that was due. Nor do I discern any other injury of comparable gravity that he may have suffered.

The judge relied on the work of Dworkin[105] to state "the right to equality means the right to be treated as equals, which does not always mean the right to receive equal treatment".[106] Sachs acknowledged that, even in the absence of concrete disadvantage, the symbolic effect of a measure could impair dignity in a way which constitutes unfair discrimination.[107] However, the more manifestly justifiable the public purpose in the light of the objectives of the *Constitution*, the less scope for a legitimate feeling of having been badly done by.

The judge argued that what was fair or unfair had to be viewed simultaneously from the diverse points of view of all the inhabitants of the whole of Pretoria, bearing in mind the values enshrined in the *Constitution.*[108] All were entitled to equal respect, and all had the right to have their concerns and sensitivities taken account of in an equal manner. However, this did not require the same treatment for all.

---

102 Para 125.
103 Para 126.
104 Para 127.
105 Dworkin *Taking Rights Seriously* 226.
106 Para 128.
107 Para 129.
108 Para 130.

The judge held that, ultimately, the case was not about money but about the rights and responsibilities of citizenship.[109] In attempting to eliminate the inequalities of the past, the applicant adopted a path of negotiations, which was correct under the circumstances.[110]

5.3.4 Similar examples of strategic litigation

In *City of Cape Town v South African National Roads Authority Limited*,[111] the applicant applied for the judicial review and setting aside of the declaration of parts of the N1 and N2 national roads to be toll roads in terms of section 27[112] of the *South African National Roads Agency Limited and National Roads Act* (hereafter *SANRAL Act*).[113] The applicant's challenge to the declaration rested on the allegation that the decision to declare the roads toll roads was irrational because the Minister of Transport approved the declaration of the affected portions of the N1 and N2 to be toll roads without knowing what the cost of the project or the toll fees would be, and, furthermore, that the Minister failed to consider whether the toll fees would be affordable, or whether tolling would afford a financially sustainable or socio-economically appropriate means of undertaking the work needed on the roads in issue. The Court dismissed the application for interdictory relief. However, the Court held that the decision taken by the Minister was not remotely compliant with the requirements of the *SANRAL Act*. Therefore, the decision was reviewed and set aside.

In *Government of the Republic of South Africa v Grootboom*,[114] the applicant applied to court to change the housing policy of the three tiers of government, requiring that government provide them with adequate basic shelter or housing until they obtained permanent accommodation and were granted certain relief. The Court ordered the applicant to comply with its constitutional duties. Therefore, the applicant had to develop a housing programme that had to include reasonable measures to provide relief

---

109 Para 133.
110 Para 134.
111 (20786/2014) [2015] ZASCA 58.
112 Levying of toll by the Agency.
113 7 of 1998.
114 2001 (1) SA 46 (CC).

for people who have no access to land, have no roof over their heads, and are living in intolerable conditions or crisis situations. Unfortunately, the Court did not structurally interdict the applicant to provide a time frame for the implementation of the programme.

In *Soobramoney v Minister of Health (Kwazulu-Natal)*,[115] the applicant attempted to change the policy set in place by the respondent owing to a shortage of resources. The guidelines or policy provided that the applicant was not eligible for treatment. The applicant claimed that in terms of the *Constitution*, 1996, the respondent was obliged to make treatment available to him. The Court held that the positive obligations imposed on the state in terms of various provisions of the Bill of Rights must be construed to allow the state to fulfil its primary obligations to provide health care services within its available resources. The Court argued that the applicant's case was not an emergency which called for immediate remedial treatment. It was an on-going state of affairs resulting from a deterioration of the applicant's renal function, which was incurable. In the Court's view, section 27(3)[116] of the *Constitution* did not apply to these facts. Therefore, the Court held that the state's resources were limited and that the appellant did not meet the criteria for admission to the renal dialysis programme.

In *Minister of Health v Treatment Action Campaign*,[117] the respondent challenged the applicant's HIV policy because of perceived shortcomings in its response to aspect of the HIV/AIDS challenge. More specifically, the respondent argued that the applicant had acted unreasonably in (a) refusing to make an antiretroviral drug called Nevirapine 3 available in the public health sector where the attending doctor considered it medically indicated and (b) not setting out a time frame for a national programme to prevent mother-to-child transmission of HIV. The Court held that section 27(1) and (2)[118] of the *Constitution* required the government to devise and implement, within its

---

115 1998 (1) SA 765 (CC).

116 "No one may be refused emergency medical treatment."

117 (No. 2) 2002 (5) SA 721 (CC).

118 Section 27(1) and (2) of the *Constitution* reads: "(1) Everyone has the right to have access to (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependants, appropriate social

available resources, a comprehensive and coordinated programme to realise progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV.

In *Minister of Health v New Clicks South Africa (Pty) Ltd*,[119] new measures to introduce control in the production, distribution and pricing of medicine provoked strong opposition from within the pharmaceutical industry, including litigation challenging the validity of certain provisions of amending legislation. The litigation challenged the policy of the applicant aimed at giving effect to a pricing system for the sale of medicines. The respondents were partially successful with their application, the Court holding that certain of the regulations issues by the applicant were not authorised by the *Medicines and Related Substances Control Amendment Act* [120] and were accordingly invalid.

In *Minister of Justice and Constitutional Development v The Southern Africa Litigation Centre*,[121] the applicant appealed an order by the court for the arrest of President Bashir of the Sudan on an international warrant of arrest issued by International Criminal Court. South Africa was under obligation to arrest President Bashir under the *Implementation of the Rome Statute of the International Criminal Court Act* 27 of 2002 during his visit to South Africa. The respondent challenged executive policy, which held that a visiting head of state was immune from arrest even when an international warrant of arrest had been issued. Of interest here is that the state legal representatives requested postponement on more than one occasion while refuting media reports that President Bashir was in the process of leaving South Africa. The Court was repeatedly reassured during the entire hearing that President Bashir was still in the country. It was later established that he had left the country even before proceedings commenced. The Court held that this was a violation of the interim order issued by the Court ordering the state to prevent President Bashir from leaving the country until the proceedings were finalised. The Court felt it necessary to rebuke the

---

assistance. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."

119 2006 (8) BCLR 872 (CC).

120 90 of 1997.

121 2016 (1) SACR 161 (GP).

executive for ignoring the interim order issued, stating that "a democratic State based on the rule of law cannot exist or function if the government ignores its constitutional obligations and fails to abide by court orders. A court is the guardian of justice, the corner-stone of the rule of law. If the State, an organ of State or State official does not abide by court orders, the democratic edifice will crumble stone-by-stone until it collapses and chaos ensues". The Court invited the National Director of Public Prosecutions to consider whether criminal proceedings against the respondents were appropriate.

5.3.5 Conceptual analysis of the decision

The *Walker* case is a clear example of strategic litigation in which the applicant desired to influence or change the legal norms and executive action. It also highlights the different approaches to constitutional interpretation the court followed to draw different inferences from the *Constitution.* Although the case relates to a matter which falls under the traditional powers of the executive – the implementation of policy – neither the majority nor the minority opinion referred to the principle of deference so eminent in later decisions of the Constitutional Court.

The majority decision of the Court relied on an interpretational approach based on rationality, whereby all persons are subject to the law and the law is applied and administered impartially.[122]

The Court acknowledged, however, that the rationality principle only gives rise to formal and not substantive equality.[123] Therefore, the levying of different rates for the same services for different groups of people would not always be unfair. The Court therefore acknowledged that rationality by itself could not give rise to substantive justice, but when the Court investigated the complaint of the selective enforcement of non-payment of rates, it reverted to relying on the rationality principle.[124] The Court held that although section 8 of the *Constitution* called for more than formal equality,

---

122 Para 27.
123 Para 62.
124 Para 73.

the selective enforcement of non-payment could not be justified by relying on substantive equality.

The minority decision argued that section 8 catered for substantive equality that might necessitate the differential treatment of those who start in unequal situations.[125] Therefore, programmes (and laws) must be designed to achieve the adequate protection and advancement of people disadvantaged by previous unfair discrimination. The selective enforcement policy of the applicant therefore did not discriminate either directly or indirectly against the respondent, as it was aimed at achieving substantive justice. This argument appears at first glance to be correct; however, the judge also argued that a person relying on section 8 had to prove an element of actual or potential prejudice when arguing discrimination.[126] Therefore, actual or potential prejudice had to be shown when persons belonging to different groups were treated unequally.[127] This argument of the judge favours substantive justice but does not take into consideration the aspects of rationality and formal justice. In section 5.2 above, it has been shown that there is an moral value system underlying the *Constitution* that should inform all legal norms, as well as the *Constitution* itself. By subscribing to this moral value system, the courts could allow for the values of dignity, equality, fairness and justice to be realised. The decision in the High Court recognised this by stating that when a question of whether the unequal treatment of persons or groups was unfair had to be answered, it required a value judgement based on society's norms.[128] Societal norms in South Africa are, of course, derived from the *Constitution.*

In such a scenario, the moral value system first enquires whether the principles of rationality and formal justice have been realised. This requires an impartial and consistent application of legal norms. When there is differentiation in applying the law to subsections of the community by an organ of state, such differentiation means that the principles of rationality and formal justice have not been realised. No proof of prejudice is needed. However, should the organ of state show that the differentiation is

---

125 Para 104.
126 Para 106.
127 Para 113.
128 *Walker* (High Court) para 206(g)-(i).

required to realise substantive justice or equality, the courts can test the fairness of the differentiation.

The second question that should be addressed in terms of the moral value system underlying the *Constitution* is whether substantive justice is advanced by focusing on the content of the legal norm in question. In identifying whether the content of the legal norm in question advances substantive justice when differentiating between different groups, the process of judicial review based on a culture of justification as argued in Chapter 3 can greatly assist the courts. Then, even though the impugned legal norm differentiates between members of the community, such differentiation is essential to establish substantive equality or justice for the disadvantaged, who need to be protected or advanced.

This is where the moral value system underlying the *Constitution* comes into play. The moral presumption inherent in the *Constitution* allows for what Mureinik called conscientious argument by conscientious advocates to reach conscientious judges.[129] In this instance, a conscientious judge would look to the *Constitution* to promote the fundamental values of equality, dignity, openness and justification. However, the *Constitution* also calls for conscientious litigants. The values of the *Constitution* are applicable to all people in South Africa. Reciprocity in this context does not apply to the judge only, but also to the litigants involved in the controversy. After all, the *Constitution* does have some measure of horizontal application.[130] The principle of reciprocity allows for the realisation of substantive as well as formal justice by allowing differentiation when it is constitutionally justifiable to promote the fundamental values inherent to the *Constitution.*

The *Walker* case was partially successful in changing or influencing executive policy. In the similar examples of strategic litigation mentioned above, all but one was successful. The case of *Soobramoney v Minister of Health* shows that, in some instances, budgetary constraints on organs of state would prevent the courts from vindicating

---

129 Mureinik 1988 "Dworkin and Apartheid" 182.
130 Section 8(2) of the *Constitution.*

constitutional rights and values. However, the successful cases show that where the executive policy is far reaching and affecting the vulnerable or poor, the courts will not hesitate to invoke the question of substantive justice. The *Grootboom* and the *Treatment Action* cases show that the court would intrude on official executive policy and influence or change the legal norms and executive action accordingly. These cases further show that where the people affected by the impugned executive policy are deemed vulnerable or poor by the court, the court will be much more inclined to follow a wider approach to constitutional interpretation in order to give the maximum effect to constitutional rights and values. The conduct of the state litigant cannot be faulted in any of the discussed cases. The state placed all relevant information in its possession before the courts to assist the courts in reaching just and fair decisions. The constitutional values and rights at stake during the litigation were not clearly defined, nor was the role that the organs of state had to play in fulfilling its duty to respect and promote these rights and values. The litigation was therefore in the public interest as it allowed the courts to define the state's role in promoting and respecting constitutional rights and values.

5.4 President of the Republic of South Africa v M & G Media Limited

The history of the case is as follows:[131] President Mugabe of Zimbabwe faced a critical presidential election in 2002. Concerns over the conduct of the election in Zimbabwe prompted debate in the Commonwealth and led to the difficult decision to suspend Zimbabwe from the organisation. The then President Mbeki supported President Mugabe during this period.

In 2002, President Mbeki appointed two senior South African judges[132] to assess the constitutional and legal issues relating to the national elections in Zimbabwe. The two judges were sent to ascertain whether the election held in the country was free and fair.

---

131 *President of the Republic of South Africa v M & G Media Limited* Case CCT 03/11 [2011] ZACC 32 para 1.

132 Judges Sisi Khampepe and Dikgang Moseneke.

After the conclusion of the election in Zimbabwe, the judges returned to South Africa and prepared a report that was submitted to President Mbeki.[133] The report was never released to the public. M & G Media Limited (M & G), the publisher of a weekly newspaper, the *Mail & Guardian*, requested access to the report relying on section 11[134] of the *Promotion of Access to Information Act* (hereafter *PAIA*).[135] The Presidency refused the request on two grounds:[136] firstly, that disclosure of the report would reveal information supplied in confidence by or on behalf of another state or an international organisation, contrary to section 41(1)(b)(i) of *PAIA*,[137] and, secondly, that the report had been prepared for the President to assist him in formulating executive policy on Zimbabwe, as contemplated in section 44(1)(a) of *PAIA*.[138]

5.4.1 First hearing in the High Court

The applicant pursued the matter in terms of section 78 of *PAIA*[139] in the North Gauteng High Court, Pretoria.[140] The applicant argued that the respondent had provided no factual basis in support of the grounds relied upon to refuse the release of the report and that any confidential information contained in the report could be redacted, while the rest of the report was released as envisaged in *PAIA*. The High Court found for the applicant and ordered the respondent to make the entire report available. The order of the High Court included an order as to costs.

---

133 The Khampepe-Moseneke Report.

134 The right of access to records of public bodies.

135 2 of 2000.

136 *M & G* case para 2.

137 A public body may refuse a request for access to a record of the body if its disclosure would reveal information supplied in confidence by or on behalf of another state or an international organisation.

138 A public body may refuse a request for access to a record of the body if the record contains an opinion, advice, report or recommendation obtained or prepared for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law.

139 Applications to court: Applications regarding decisions of information officers or relevant authorities of public bodies or heads of private bodies.

140 *M & G Limited v President of the Republic of South Africa* [2010] ZAGPPHC 43 Case No 1242/09, 4 June 2010 (unreported) para 13.

5.4.2 First appeal to the Supreme Court of Appeal

The state took the matter on appeal to the Supreme Court of Appeal.[141] The case was heard by a full bench of five judges. The Court held that open and transparent government and a free flow of information concerning the affairs of the state are the lifeblood of democracy.[142] Central to the Bill of Rights is the constitutional guarantee to everyone of the right of access to any information that is held by the state.

The Court referred to a culture of justification that permeates the *Constitution* and *PAIA*. Any request for information held by a public body may only be refused by the information officer when he or she can justify withholding the information by advancing adequate reasons for the refusal; the public body bears the burden of proving that the secrecy is justified.[143] Therefore, an evidential burden is cast on the public body to allege sufficient facts to justify the refusal.[144]

The Court found that the affidavits that had been filed by the applicant (the executive) asserted conclusions reached by the deponents of the affidavits, with no evidential basis to support the conclusions in the apparent expectation that their assumptions put an end to the matter.[145] However, the Court held that the *Constitution* and *PAIA* require a court to be satisfied that secrecy was justified and that a proper evidential basis to justify the secrecy was laid.

Furthermore, the three people who had direct knowledge of the mandate that was given to the judges, Mr Mbeki and the two judges, had not deposed affidavits.[146] The applicant's case amounted to no more than rote recitation of the relevant sections and bald assertions that the report fell within the realm of secrecy. The Court therefore held that there was no evidential basis for refusing to release the report and consequently dismissed the appeal with costs.

---

141 *President of the Republic of South Africa v M & G Media Ltd* 2011 (2) SA 1 (SCA).
142 Para 1.
143 Para 11.
144 Para 14.
145 Para 19.
146 Para 20.

5.4.3 Referral to the Constitutional Court

The state then appealed to the Constitutional Court.[147] The important issue raised in the matter was how the state discharged the burden, in terms of section 81(3) of *PAIA*,[148] of establishing that its refusal to grant access to a record was justified.[149] The Court referred to *PAIA* and held that, in South African law, the disclosure of information is the rule and exemption from disclosure is the exception.[150] The constitutional guarantee of the right of access to information held by the state gives effect to accountability, responsiveness and openness as founding values of the South African constitutional democracy.[151] However, there are reasonable and justifiable limitations on the right of access to information as articulated by *PAIA*.[152]

The Court said that at stake was the constitutional and statutory framework within which claims for exemption from disclosure must be considered and evaluated.[153] The Court turned to foreign jurisprudence in formulating the standard to assess whether the state had properly discharged its evidentiary burden in refusing to disclose.[154]

The Court first turned to the United States with its well-developed jurisprudence concerning access to information.[155] As in South Africa, the agency claiming the exemption can discharge its burden only by presenting the court with evidence that the information withheld falls within the exemption claimed. In presenting evidence, the state may not rely on affidavits that are conclusory, merely repeat the language of the statute, or are founded on sweeping and vague claims. Affidavits filed by the state must also describe the justification for nondisclosure with reasonably specific detail for the requester of information to be able to mount an effective case against the claim for exemption.

---

147 *President of the Republic of South Africa v M & G Media Ltd* 2012 (2) SA 50 (CC).
148 The burden of establishing that the refusal of a request for access complies with the provisions of this Act rests on the party claiming that it so complies.
149 Para 5.
150 Para 9.
151 Section 1(d) of the *Constitution.*
152 The exemptions from disclosure contained in Chapter 4 of *PAIA*.
153 Para 12.
154 Para 16.
155 Para 17.

In Canadian jurisprudence, the evidentiary burden of establishing that a challenged refusal is authorised rests with the state institution refusing access to the information.[156] The Canadian courts, however, limit their review to whether or not the refusal was reasonable, but the state must provide evidence that the record falls within the description contemplated by the statutory exemption invoked. Therefore, the state must provide actual, direct evidence of the confidential nature of the information at issue, which must disclose a reasonable explanation for exempting the record.

In Australian jurisprudence, the test for determining whether a refusal was justified is a reasonableness test, and the state's burden is not discharged merely by showing that the refusal was not irrational, absurd or ridiculous.[157] The state must show that, in the light of the public interest, there are reasonable grounds for the refusal. Even where a government minister has certified refusal on the grounds of public interest, the court still has to ask itself whether, in the light of countervailing factors in the public interest, there were reasonable grounds for the refusal.

The Court deduced from the comparative analysis of the standards applied by courts in other jurisdictions with legislation comparable to *PAIA* that the state might discharge its evidentiary burden only when it has shown that the record withheld falls within the exemptions claimed.[158] Furthermore, exemptions are construed narrowly, and neither the mere *ipse dixit* of the information officer nor his or her recitation of the words of the statute is sufficient to discharge the burden borne by the state. At the least, the refusal of access to information held by the state must be reasonable. Therefore, the question that a court must answer is whether the state has put forward sufficient evidence for a court to hold that, on the probabilities, the information withheld falls within the exemption claimed.[159]

The Court stated that –[160]

---

156 Para 20.
157 Para 21.
158 Para 22.
159 Para 23.
160 Para 24.

(a) the recitation of the statutory language of the exemptions claimed is not sufficient for the state to show that the record in question falls within the exemptions claimed; and

(b) mere *ipse dixit* affidavits cannot be offered by the state; the affidavits for the state must provide sufficient information to bring the record within the exemption claimed.

The question, then, was not whether the best evidence to justify refusal had been provided, but whether the information provided was sufficient for a court to conclude, on the probabilities, that the record fell within the exemption claimed. If it did, then the state has discharged its burden under section 81(3) and the refusal to provide information would be justified.[161]

The Court held that a deponent's assertion that information was within his or her personal knowledge was of little value without some indication, in the context of the case, of how that knowledge had been acquired.[162] Knowledge may emerge from the duties of the deponent and the office he occupies, as well as the seniority of the deponent in the office and his prior experience with similar activities or procedures in the office.[163]

According to the Court, proceedings under *PAIA* differ from ordinary civil proceedings in a number of aspects:[164]

(a) Firstly, *PAIA* disputes involve a constitutional right of access to information.

(b) Secondly, access-to-information disputes are not purely private disputes; requesters of information often act in the public interest and the outcome of these disputes therefore affects the general health of our democratic polity.

---

161 Para 25.
162 Para 28.
163 Para 31.
164 Para 33.

(c) Thirdly, parties to these disputes may be constrained by factors beyond their control in presenting and challenging evidence.

(d) Finally, courts are empowered to call for additional evidence in the form of the contested record.[165]

The Court said that the "judicial peek" allowed by section 80 of *PAIA* empowers courts to review independently the record in order to assess the validity of the exemptions claimed, and provides legislative recognition that, through no fault of their own, the parties may be constrained in their ability to present and refute evidence.[166] The purpose of section 80 is to test the argument for non-disclosure by using the record in question to decide the merits of the exemption claimed and the legality of the refusal to disclose the record.[167]

The Court held that the argument of the applicant – that the report contained information that was received in confidence – had not been established by acceptable evidence and therefore it would have been in the interests of justice if section 80 had been invoked.[168]

Cameron J, in a minority judgment, held that the applicant had failed to justify its refusal of access to the report under *PAIA*. The judge held that the applicant's plea "fails to meet even a baseline standard to warrant further probing".[169]

The judge based his reasoning on two facts. Firstly, the "hands-tied" argument of the applicant was only raised in its opposing affidavits, creating the appearance of having been added as an afterthought.[170] There was no mention of such difficulty when the state first refused the M & G's request for the report in terms of *PAIA*. The second reason related to the applicant's failure to explain why evidence that seemed to have

---

165 Section 80 of *PAIA*.
166 Para 42.
167 Para 52.
168 Para 55.
169 Para 113.
170 Para 114.

been readily available was not produced.[171] Not one of the presidents[172] who dealt with the report during their time in office supplied evidence to support the allegations of the applicant in the case.[173] What was also telling was the absence of evidence by the judges who were asked to report on the election in Zimbabwe.[174] They were living and seemingly available to depose affidavits. The judge pointed out that an affidavit by either of them could have quickly shed light on the matter before the courts.

The majority of the Court, however, held that the case should be remitted to the High Court to examine the report in terms of section 80 of *PAIA* and to determine its release or otherwise.[175]

5.4.4 Second hearing in the High Court

In terms of the referral from the Constitutional Court, the North Gauteng High Court examined the report in terms of section 80 of *PAIA*.[176] Most of the argument of the case were centred on the question of how the procedural aspects of section 80 of *PAIA* should be construed by the Court.[177] An interesting aspect of this hearing was that the applicant attempted to introduce new evidence in the form of an affidavit by former President Thabo Mbeki. Both the court of first instance and the Supreme Court of Appeal lamented the fact that the original conveyor of the mission did not explain, by way of affidavit, why the report should be kept secret. The Court refused the application to have new evidence admitted, because the applicant could not justify the late filing of the evidence.[178]

After a section 80 "judicial peek" at the report, the Court held that its contents did not support the argument that disclosure of the report would reveal information supplied in

---

171 Para 115.
172 Presidents Mbeki, Motlanthe and Zuma held office during the time that M & G requested access to the report.
173 Para 116.
174 Para 117.
175 Para 72(3).
176 *M & G Media Ltd v President of the Republic of South Africa* 2013 (3) SA 591 (GNP).
177 Paras 8-24.
178 Paras 25-56. The Court refused leave to file new evidence on the basis that the affidavits were filed more than three years after the first hearing of the application by the court.

confidence by another state or organisation.[179] There was also no indication that the report had been prepared for assisting the President in formulating executive policy on another country. What the report did was to give a balanced reflection of the events prior to, during and after the elections.

The Court reiterated that the disclosure of information held by the state is the rule in South African law. Exemption from disclosure of information is the exception.[180] The Court held that most of the information in the report was common knowledge.[181] Furthermore, the information was supplied by people who did not qualify as members of another state.

The Court held that the report contained information about whether the legal requirements for the elections in Zimbabwe had been met. Furthermore, the report could never be reasonably construed as information supplied in confidence by another state. The Court quoted from jurisprudence of the European Union, stating:[182]

> The mere fact that certain documents contain information or negative statements about the political situation or the protection of human rights in a third country does not necessarily mean that access to them may be denied on the basis that there is a risk that public interest may be undermined.

The Court held that the report disclosed evidence of a substantial contravention of and failure to comply with the law.[183] Therefore, public interest superseded the harm that may ensue from releasing the report. The Court held that the entire report should be made available to the applicants within ten days.[184] The Court again awarded costs against the respondent, including the costs of two counsel.

Of further interest in the case was the Court's description of what had transpired previously.[185] The Court stated that the matter had travelled a vicious circle, starting in the High Court with an appeal to the Supreme Court of Appeal and finally to the

---

179 Para 59.
180 Para 61.
181 Para 62.
182 *Kuljer v EU Council* (no 2) [2002] 1 WLR 1941.
183 Para 67.
184 Para 69(2).
185 Para 32.

Constitutional Court and then back again to the High Court. Illuminating is the manner in which the Court debunked the arguments of the respondent. From the judgment, it is clear that none of the reasons advanced by the respondent to refuse disclosure had any merit. The fact that the respondent tried to file new evidence, which should have been filed to oppose the original application, also showed the respondent's disregard for the court procedure. No attempt was made to justify the late filing of evidence. Furthermore, the respondent relied on a bare denial of the M & G's argument throughout the case. The respondent claimed it was hamstrung by the provisions of *PAIA* itself, which prevented it to present evidence relating to its arguments. However, the Court reiterated that the arguments set forth by the respondent were simply not correct.

It can be construed that the respondent used the bare denial in its arguments to prevent the disclosure of a report that might have been politically embarrassing to the state or individuals connected with the state.

5.4.5 Second appeal to the Supreme Court of Appeal

The executive persisted with its efforts to halt the release of the report. It appealed the decision of the High Court and the matter was again heard in the Supreme Court of Appeal.[186]

The Court held that it was common cause that the requester (M & G) met the procedural requirements in terms of *PAIA*, therefore M & G did not have to justify its request for access to the report.[187] The onus rested on the appellants (hereafter jointly the Presidency) to justify their refusal. The Presidency again argued that it was hamstrung by *PAIA* itself to give reasonable grounds for the refusal to disclose the report and, as a result, it was unable to give "adequate reasons for the refusal".[188]

---

186 *President of the RSA v M & G Media Ltd* 2015 (1) SA 92 (SCA).
187 Para 5.
188 Para 8.

The Supreme Court of Appeal then analysed the evidence the Presidency relied on in the previous cases.[189] The Presidency relied on three affidavits containing the grounds for the refusal to allow the release of the report. The three affidavits consisted of a recital of the provisions of *PAIA* allowing the refusal to release the report,[190] followed by the reassurance that the report is covered by the stated provisions. Two of the affidavits contained assurances by the deponents that the report contained information provided by representatives of the Zimbabwean Government in confidence.

The Court then referred to the previous findings of the courts relating to the evidence tendered by the Presidency.[191] This was summarised as follows: None of the deponents were privy to the appointment of the judges. Therefore, the deponents could not describe the judges' mandate or their terms of reference from their own knowledge, nor could they, on their own account, testify as to what took place in Zimbabwe and as to how, from whom and on what basis the information reflected in the report had been obtained. Therefore, the applicant established no proper evidential basis for refusing access to the report. Not one of the three deponents on behalf of the Presidency could have had any direct knowledge of facts essential for the grounds on which the refusal relied.

The Constitutional Court also concluded that the evidence put forward by the Presidency in its answering papers was insufficient to discharge the onus resting on it in terms of *PAIA*[192] to establish that the report fell within the scope of the exemptions claimed. However, the Constitutional Court acknowledged that parties might be constrained by factors beyond their control in presenting and challenging evidence. The Constitutional Court then referred the matter back to the High Court for a "judicial peek" at the report.

---

189 Para 10.
190 Sections 41(1)(b)(i) and 44(1)(a) of *PAIA*.
191 Para 11.
192 Section 81(3).

The Court then dealt with the second hearing in the High Court.[193] The Court initially focused on the attempt by the state to submit further evidence in the form of an affidavit by former President Mbeki, which was submitted by the Presidency in an effort to stop the Court from having a "judicial peek" at the report. The Court held that this was in clear contravention to the guidelines the Constitutional Court had issued. The affidavit tried to plug some of the holes in the case of the Presidency that were pointed out in the judgments of the courts in the previous round of litigation and particularly in the minority judgment of Cameron J in the Constitutional Court. However, Raulinga J held that the Constitutional Court had directed him to take a judicial peek at the report and that he proposed to do so.

The second appeal to the Supreme Court raised two issues: firstly, whether the High Court should have allowed the Presidency to tender further evidence,[194] and, secondly, whether the two affidavits, in combination with the judicial peek at the report, should have had the effect that refusal of access to the report was justified.

The Court held that this was an attempt by the Presidency to introduce evidence through the backdoor. The affidavits should have been introduced in its original answering papers.[195] The Court referred approvingly to the minority judgment of Cameron J when the matter was heard in the Constitutional Court, holding that the judge rightly suspected that the state's failure to make out a case had nothing to do with being hamstrung at all.[196] The Court was critical of the attempt by the Presidency to introduce the new evidence stating that, at the time it filed the affidavit, it knew what was in the report. The Presidency must have realised that the lifeline the majority of the Constitutional Court had thrown it could not save its case, since the contents of the report did not support the grounds of refusal upon which it relied. Therefore –

> [w]hat it then tried was to head off the consequence of a judicial peek by tendering evidence which should have been adduced at the outset during the first round of

193 Para 16.
194 Para 22(a)-(b).
195 Para 24.
196 Para 25.

> litigation. It clearly did so in the hope that this would persuade the court to refuse M & G's application on a basis which had nothing to do with the contents of the report.

The Presidency therefore attempted to use the referral back to the High Court for a purpose that was the exact opposite of what the Constitutional Court had in mind. According to the Supreme Court of Appeal, this conduct amounted to an abuse of process that could not be tolerated. The Court also described the applicant's reliance on arguments that the judges on the mission to Zimbabwe were diplomatic envoys as bald and unlikely propositions that bordered on the cynical.[197] For the Court it was clear that the two judges were not on a diplomatic mission but were deputed to focus on matters of law.

The Court held that the appeal could not succeed, as there was nothing in the report to support the grounds on which the state refused access to the report.[198] The Court accordingly dismissed the appeal with costs, including the costs of three counsel.[199]

5.4.6 Content of the Khampepe-Moseneke Report [200]

When analysing the report, the following becomes clear: In the introduction and terms of reference of the report, the mission is described as a Judicial Observer Mission (JOM) to the Zimbabwe presidential elections.[201] There is no mention of the diplomatic status of the mission as had been consistently claimed by the executive. The terms of reference of the JOM are given as to observe and report on whether in the period before, during and after the election –[202]

(a) the *Constitution* and electoral and other laws of Zimbabwe could ensure free and fair elections; and

(b) the elections were conducted in substantial compliance within this legislative framework.

---

197 Para 29.
198 Para 27.
199 Para 32.
200 The report is available at https://eisa.org.za/pdf/zim2002KhampepeReport.pdf accessed December 2015.
201 Para 1 of the Report.
202 Para 2 of the Report.

The report referred to the *Electoral Act (Modification) Notice,* 2002, issued by President Mugabe, which had the effect that an estimated 96 000 voters could not participate in the elections.[203] Previously, this class of voters had full status to vote in the elections in Zimbabwe. This legislation was passed of few days before the elections.

The Report also referred to the *General Laws Amendment Act*,[204] which inserted a residential qualification for a voter to register for the election.[205] The amendment allowed the Registrar-General to remove from the voters' roll voters who had failed to reside for a continuous period of twelve months in the constituency. Furthermore, the Registrar-General had the power to demand proof of residency from any registered voter. The Report mentioned that this disfranchised voters who resided outside Zimbabwe, voters who were unable to prove continuous residence for a period of twelve months in the constituency of voting and any voters who might have been displaced by violence, including pre-election violence.[206]

The voters affected by the residential qualifications were estimated to be anything from half a million to two million voters.[207] The *Amendment Act* was held to be unlawful in its enactment by the Zimbabwe Supreme Court.[208] However, Zimbabwean citizens could still only vote within their constituency of residence. The Report questioned how many voters were disfranchised by the legislation and its last-minute recall.[209]

Another cause for concern was the enactment of the *Electoral (Amendment) Regulations*, 2002, which limited the appointment of electoral observers to members of the Zimbabwean public service.[210] The Report raised concern over this amendment, pointing out that monitors should be drawn from the broad citizenry since the impartiality of members of the public service was at best suspect.

---

203 Para 15 of the Report.
204 2 of 2002 (Zimbabwe).
205 Para 16 of the Report.
206 Para 17 of the Report.
207 Para 18 of the Report.
208 Para 19 of the Report.
209 Para 20 of the Report.
210 Para 25 of the Report.

The *Zimbabwean Electoral Act*[211] was also amended so that no person other than the Electoral Commission or a person authorised by it may provide voter education. This excluded opposition political parties from providing voter education.[212]

The Report also mentioned wide-spread disruptions and cancellation of opposition rallies by the police,[213] pre-election violence, intimidation and harassment principally perpetrated by the supporters of the government.[214] These perpetrators of violence consisted of militias of unemployed youths who received military training from the state. The number of opposition members killed was estimated at 107. Many rural areas were also sealed off from the opposition as no-go areas.[215] As a result, many opposition party members had to flee their homes and sought refuge elsewhere. It was also alleged that the police were complicit in this violence by either actively participating in the violence or turning a blind eye towards the activities of the youth militias.

The Report highlighted a particular example where the JOM was on an observation visit to a polling station before the elections.[216] Members of the opposition reported that militias were camping in a school in the area to intimidate opposition members not to vote. The JOM intervened and reported the matter to the police, who took steps to remove the militia from the school.

The Report also highlighted the arrest of members of the opposition, including the leader of the main opposition.[217] These arrests were conducted just two weeks before the election but the charges against the arrested persons dated from years back.

The Report further noted that partisan coverage by the state media broadcaster,[218] and the invitation of electoral observers only from countries considered friendly by the government cast a bad light on the elections.[219] The Report also referred to the decision

---

211 1992. Section 14(d) of the Act.
212 Para 27 of the Report.
213 Para 47 of the Report.
214 Para 51 of the Report.
215 Para 52 of the Report.
216 Para 54 of the Report.
217 Paras 55-57 of the Report.
218 Paras 58-63 of the Report.
219 Para 70 of the Report.

of the state to reduce the number of polling stations in areas where the opposition had majority support, while increasing the number of polling stations in areas where the state found support.[220]

The Report reached the following conclusions:[221]

(a) The majority of people killed in the run-up to the elections were opposition party members.

(b) The youth militia trained by the government were the main perpetrators of violence.

(c) The violence and intimidation engendered fear in connection with the electoral process, which compromised freedom of choice, movement, speech, assembly and association of voters.

(d) There was no equal access to publicly owned and funded media.

The state disregarded the rule of law by either failing to give effect to court orders or by introducing statutory instruments or regulations that altered, reversed or undermined court decisions.

The Report concluded by stating that, having regard to all the circumstances, and in particular the cumulative substantial departures from international standards of free and fair elections, the elections could not be considered free and fair.[222]

Although there were widespread reports of violence and intimidation reported in the run-up to the election, the South African government released a statement on the 2002 elections in Zimbabwe on 13 March 2002. According to the official website of the Department of International Relations and Cooperation, the South African government noted the outcome of the Presidential elections in Zimbabwe, and it welcomed the fact that the actual elections and subsequent processes proceeded without any significant

---

220 Para 73 of the Report.
221 Paras 86-96 of the Report.
222 Para 99 of the Report.

conflict among the participants.[223] The government also declared the Zimbabwe elections fair and legitimate. The Khampepe-Moseneke Report was not made public for a period of twelve years, and then only after the lengthy legal battle by the *Mail & Guardian*.

5.4.7 Similar examples of strategic litigation

The application in *Freedom Under Law v National Director of Public Prosecutions*[224] was a matter of public interest and national importance on account of its raising significant issues of propriety, accountability and justifiable conduct in the governance of the Republic. The main issue was whether certain decisions made by the various respondents to withdraw criminal and disciplinary charges against the fifth respondent, Lieutenant-General Richard Mdluli, the Head of Crime Intelligence in the South African Police Service, were unlawful. The Court described the approach of the respondent in the proceedings as dilatory and obstructive, holding that it was necessary to expedite the prosecution of Mdluli, not only in the public interest, but also in the interests of Mdluli, who could not resume his duties while the charges were pending.

The Court held that the statement of the respondent that "it would be presumptuous and foolhardy" to prosecute was wrong in law and symptomatic of the irrationality of his decision, evincing as it does a lack of rational connection between the purpose of his decision, the various empowering provisions, the evidence before him and the reasons he gave for his action. Therefore, the decision to withdraw the murder and related charges was taken in the face of compelling evidence for no proper purpose and was irrational and therefore reviewable on legality and rationality grounds. The Court set the decision aside and ordered the prosecution of Mdluli. However, on appeal, the Supreme Court of Appeal confirmed all the decisions by the High Court, except the order to proceed with the criminal proceedings and the disciplinary proceedings without delay.[225]

---

223 Department of International Relations and Cooperation: *Statement of the South African Government on the Elections in Zimbabwe* http://www.dirco.gov.za/docs/2002/zimb0313a.htm dated 13 March 2002 accessed December 2015.

224 [2013] 4 All SA 657 (GNP).

225 *National Director of Public Prosecutions and Others v Freedom Under Law* 2014 (2) SACR 107 (SCA).

The SCA held that this would constitute interference with the functions of the executive and a transgression of the separation of powers.

In *Trustees, Biowatch Trust v Registrar: Genetic Resources*,[226] the applicant instituted action against government agencies to compel them to comply with their responsibilities under the *Genetically Modified Organisms Act*.[227] The Court held that the case was about the failure of state officials to meet their constitutional obligations. The applicant requested access to a range of documents from the respondent to allow it to do a risk assessment on certain genetically modified organisms in South Africa. Essentially, the information sought covered the content of permit applications submitted under the *Genetically Modified Organisms Act*; the decisions on those applications; and the processes of decision-making bodies established under the Act. After these requests were ignored, the applicant instituted application proceedings in court for the release of the information.

The Court held that the applicant had a clear right to most of the information sought – eight out of the eleven categories identified in the applicant's requests – and that the applicant's rights under section 32[228] of the *Constitution* had been infringed by the respondent's failure to grant access to the records.

In *Democratic Alliance v South African Broadcasting Corporation Ltd*,[229] the applicant applied for an urgent interdict directing the immediate suspension of the Chief Operations Officer of the respondent, pending the finalisation of disciplinary proceedings and review of decisions by the Board of the respondent and the Minister to recommend and confirm his appointment. Orders directing the institution of such disciplinary proceedings and the appointment of a suitable replacement were also sought. The application was based on the findings and recommendations of remedial action by the Public Protector following an investigation into corporate governance failures, maladministration and undue political interference in the affairs of the

---

226 2009 (6) SA 232 (CC).
227 15 of 1997.
228 Everyone has the right of access to any information held by the state.
229 2015 (1) SA 551 (WCC).

respondent. The Court held that the disregard of the Public Protector's findings constituted irreparable harm to the public interest. Therefore, the applicant made out a proper case that SABC and the public would suffer irreparable prejudice unless the order (to institute disciplinary action against the Chief Operations Officer of the respondent) were put into operation.

In *Helen Suzman Foundation v Judicial Service Commission*,[230] the applicant instituted review proceedings against the respondent for an order declaring its decision to advise the President to appoint certain candidates, and not others, unlawful and/or irrational and therefore invalid. The Court held that, in weighing up the applicant's interest against the respondent's need for confidentiality, the relief sought would not advance the constitutional and legislative imperatives of the respondent. Therefore, the applicant was not being deprived of the procedural and substantive safeguard, which was the underlying rationale for the rule. The application was dismissed.

In *Magidimisi v Premier of the Eastern Cape*,[231] the applicant sought to ensure that the respondents, all functionaries of the provincial government, took the necessary steps to ensure that money judgments ordered by the court against the province were paid. The applicant's grounds for doing this were that the *Constitution* and other legislation placed such an obligation on the respondents, but that they had failed to fulfil those obligations. The Court held that not only private persons or entities had to comply with court orders made against them, but also the executive and legislative arms of government and all other organs of state. Furthermore, it was clear that the respondents were under a misapprehension as to the nature and extent of their constitutional duty to obey and give effect to court orders.

The Court held that full compliance with a court order was the only proper fulfilment of the respondent's constitutional and legislative obligations to respect and give effect to court orders. The Court described the response of the respondent in its affidavits as arrogant and even callous. The Court confirmed that one of the fundamental principles

---

230 2015 (2) SA 498 (WCC).
231 2006 JOL 17274 (CK).

of the rule of law is that everybody, including the state, is subject to the law and judgments of the courts. Each of the four respondents bore the constitutional duty to act in accordance with the rule of law, which in the context of the application meant that they had to ensure that court orders for payment made against the province were paid. The Court therefore ordered that the respondents take the administrative and other steps necessary to ensure that the Eastern Cape Government complied with any prior orders within 14 days of the date of the order. Furthermore, the respondents had to deliver a report in writing to the registrar of the court and to the applicant's attorneys within 21 days of the date of the order, on the manner and extent of their compliance.

In *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality*,[232] the appellants complained that the respondent made no proper attempt to comply with the terms of orders the courts previously granted against it. The appellants attempted to have the Director: Housing Resource Management of the respondent committed to prison for contempt of court arising from an alleged failure by the respondent to comply with one of those orders. The Court held that an order for contempt of court was not appropriate in the circumstances. Instead, the Court held that there was a real likelihood of the parties' finding a workable solution if there was the will to do so. In this instance, the parties had to find innovative methods to resolve the competing interests of the different factions of the community.

5.4.8 Conceptual analysis of the decision

Because of the many cases discussed and the consequent reversal of applicants and respondents, in the analysis of *M & G v President of the Republic of South* Africa, the M & G will be referred to as the respondent and the Presidency as the applicant.

[232] 2015 1 All SA 299 (SCA).

The process to have the report released dragged on for a period of twelve years. Lawyers for the respondent stated before the release of the report:[233]

> A concomitant risk is that state officials will be inclined to evade accountability simply by refusing access to a record and then dragging the matter through the courts until the issue becomes moot.

This certainly seemed to have been the strategy of the executive in trying to block the release of the report.

After a glimpse into the content of the report, both the High Court and the Supreme Court of Appeal stated that the arguments that the executive relied on were disingenuous and untrue. The executive's argument that the government would be prejudiced in its diplomatic relationship with another country was also held to be spurious. In fact, the only reason that can be gleaned from the battle to withhold the report is that it would have been publicly embarrassing for the executive should the report be released into the public domain.

It is impossible to know how much money the executive spent on trying to keep the report secret. Cost orders against the state included the cost of the two hearings in the High Court, the cost of two hearings in the Supreme Court of Appeal and the cost of one hearing in the Constitutional Court. All the cost orders included the cost of two or three counsel. The amount of money spent unsuccessfully to stop the release of the report must be exorbitant.

It is very clear that the granting of punitive cost orders against an organ of state when litigation is misused is not an effective way of ensuring that the state comply with the range of positive duties placed upon it by the *Constitution.*[234]

The lawyers appearing on behalf of the executive should have informed their instructing agents that no reasonable grounds existed to prevent the release of the report. The statement that the strategy of the executive was to prevent the release of the report by

---

233 Legalbrief Today *Constitutional values threatened by Khampepe appeal* – lawyer No:3626 October 2014.

234 As discussed in section 2.8.3 of chapter 2 and para 5.6.

dragging the matter through the courts until it became moot, or until the applicant ran out of money, seems likely. It further shows the executive guilty of wasting state resources on trying to defend the indefensible, undermining the office of the Presidency and eroding public trust in the processes of democratic government.

Such a strategy by an organ of state does not conform to the positive duty imposed on organs of state to place all available and relevant information before the courts.[235] Furthermore, it makes a mockery of the candour and openness constitutionally required from organs of state when engaging in litigation.[236] The state litigant did not behave as the model litigant. It paid lip service to the constitutional obligation of honesty and professional and ethical behaviour that is required of an organ of state when litigating.[237] The punitive cost orders granted against the executive did not in any way ensure that it fulfilled its constitutional obligations. It shows that there is a pressing need for rules or guidelines to ensure that the state litigant fulfils its constitutional obligations.

In the similar examples of strategic litigation referred to above, all but one of the applicants were successful in holding organs of state accountable.

In the *Helen Suzman Foundation* case, the court was loath to interfere with the issue of the privacy of the members of the JSC. In *Magidimisi*, the court was unimpressed with the conduct of the respondents. However, the court still refused to find the respondents guilty of contempt of court. The court issued an order highlighting the constitutional duties the respondents had to adhere to. But the *Constitution* is forward-looking in its application.[238] Comprehensive and enforceable guidelines to regulate the conduct of the state litigant are needed to pre-empt the violation of constitutional obligations. In *Meadow Glenn*, the court was of the opinion that the facts of the case were of a nature that allowed the parties to reach a just conclusion by themselves. The Court therefore

---

235 Du Plessis, Penfold and Brickhill *Constitutional Litigation* 4.
236 *Matatiele Municipality v President of the Republic of South Africa* 2006 (5) SA 47 (CC) para 107.
237 Section 195(1) of the *Constitution*.
238 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 42.

ordered the parties to the litigation to come to a suitable arrangement between themselves.

All these cases highlight the procedural hurdles that the courts experience when they attempt to hold state legal representatives, state instructing agents and organs of state constitutionally accountable. The legal battle for the release of the Khampepe-Moseneke Report, as well as the similar examples of strategic litigation cited, effectively illustrates that enforceable guidelines are needed to ensure that lawyers acting for an organ of state, as well as the instructing agents of the organ of state, comply with constitutional obligations imposed upon the state.[239]

5.5 Theoretical approaches to ethics in litigation

In section 2.8.3 and section 5.4 it was argued that a punitive costs orders granted against the executive do not in any way ensure that it will fulfil its constitutional obligations. Therefore, enforceable guidelines are needed to ensure that lawyers acting for an organ of state and the instructing agents for the organ of state comply with constitutional obligations. Holding legal representatives accountable to the court and their client is an issue of legal ethics. The question is, however, whether existing ethical legal principles can hold state legal representatives and their instructing agents to account. Can legal ethics ensure that the state litigant acts like the model litigant?

It is trite that an attorney has a duty to obey a client's instructions. This duty is, however, not absolute. It is subject to an overriding obligation to the court. This can be described as follows: Firstly, counsel represents the client and is therefore an agent for the client.[240] Secondly, counsel is an officer of the court and is under a duty to assist the judiciary in the administration of justice.

The expression "duty to the court" means that the practitioner owes a duty to the larger community, which has a vested public interest in the proper administration of

---

239 Such guidelines are discussed in the final chapter of this work.

240 Gani 2004 *Advocate* 41 and *Cape Society v Vorster* 1949 (3) SA 421 (C) para 425.

justice.[241] The court, in enforcing this duty, is then acting as a guardian of the due administration of justice. The implication of this ethical obligation is that the aim of legal proceedings should not be to get the best result for a client at any cost; the aim should be to get the best results within the legal and ethical framework imposed on the legal practitioner as a member of an honourable profession and as an officer of court.[242] The duty owed to the court by legal practitioners can be described as follows:[243]

> No instructions of a client, no degree of concern for the client's interest, can override the duty which a practitioner owes to the court.

However, the duty owed to a client by the legal practitioner is also constrained by other considerations. Therefore, an attorney should refuse to comply with instructions requiring him or her to do something unlawful or unethical, or would involve a breach of a statutory duty, a rule of professional conduct or practice, a court order, a duty to the court or an undertaking given by the attorney.[244] Courts exercise supervisory powers over the conduct of attorneys, not only in order to discipline and punish errant practitioners, but also, and more important, in order to protect the public.[245]

5.5.1 Institutions and sources that regulate the conduct of attorneys and advocates

In terms of section 7(1) of the *Admission of Advocates Act*,[246] the Court may suspend any person from practice, or order that the name of any person be struck off the roll, if it is satisfied that he or she is not a fit and proper person to continue to practise as an advocate.

In terms of section 22(1)(d) of the *Attorneys Act*,[247] an attorney may be struck from the roll or suspended from practice if he or she, in the discretion of the court, is not a fit and proper person to continue to practise as an attorney.

---

241 Hoffmann *Lewis and Kyrou's Handy hints* 27.
242 Hoffmann *Lewis and Kyrou's Handy hints* 27-28.
243 *Kyle v Legal Practitioners' Complaints Committee* (1999) 21 WAR 56 para 58.
244 Hoffmann *Lewis and Kyrou's Handy hints* 23.
245 *Law Society of the Cape of Good Hope v Budricks* 2003 (2) SA 11 (SCA) 2003 (2) SA para 16(e)
246 74 of 1964.
247 53 of 1979; disciplinary proceedings against attorneys are still regulated by s 71 of the *Attorneys Act* 53 of 1979 at this time, pending the commencement of the *Legal Practice Act* 28 of 2014.

In *Die Prokureursorde van Die Oranje-Vrystaat v Schoeman*,[248] Steyn J said the following:

> 'n Hof sal sekerlik nie ligtelik die skrapping van 'n praktisyn se naam van die rol waarop dit verskyn beveel nie, maar behoort nie te huiwer om dit te doen in gevalle waar die omstandighede dit verg nie. Daar moet ongetwyfeld gekyk word na die oortreder as persoon, en die omstandighede wat hom as individu aankleef moet sorgvuldig oorweeg word, maar daar moet ook verder gekyk word, en breër belange – dié van die betrokke Orde, van die gemeenskap en van die regsbedeling – moet ook in ag geneem en oorweeg word. Daarbenewens moet die houding van 'n oortreder se beroepsgenote wat deur middel van die Orde of beherende liggaam waarvan hy lid is aan die Hof meegedeel word, ook in ag geneem word. En waar so 'n Orde meen dat die besondere oortreder nie langer as lid daarvan deug nie, en verhoed moet word om die betrokke professie verder te beoefen, moet ernstige aandag aan daardie sienswyse geskenk word. Maar 'n Hof is nie daaraan gebonde nie en is verplig om sy eie oordeel op al die relevante bewysmateriaal en feite te vel en daarvolgens te handel.

In *Prokureursorde, Transvaal v Van der Merwe*[249] the Court argued that:

> Deur die pleging van 'n ernstige misdaad soos onwettige diamanthandel het die respondent karaktereienskappe tentoongestel wat nie strook met die standaard van eerbaarheid en integriteit wat van 'n prokureur verwag word nie. Sodanige gedrag ontneem die vertroue van die Howe, die algemene publiek en van die persone wat met die regspleging te doen het, en bring onherroeplike skade aan die professie mee. Die optrede van die respondent val binne die kader van oortredings of misdade wat van so 'n ernstige aard is dat so 'n oortreder nie verder as 'n prokureur behoort te praktiseer nie aangesien hy nie meer in 'n vertrouensposisie in enige Hof kan optree nie. Die Prokureursorde kan sulke optrede nie duld nie en moet ter beskerming van die professie, die regspleging en die publiek streng optree om te verseker dat die professionele kodes in die toekoms gehandhaaf sal word. Die respondent het hom skuldig gemaak aan onprofessionele en/of oneerbare en/of onbetaamlike gedrag en sy naam moet gevolglik van die rol van prokureurs verwyder word. Die gedrag en optrede van die respondent soos uiteengesit in hierdie eedsverklaring en aanhangsels, kan nie by 'n lid van dié eerbare professie waarvan hy 'n lid is geduld word nie.

In *Machumela v Santam Insurance*,[250] the failure to comply with the requirement of the Rules of Court was not due to any fault of the appellant himself but to a fault and the inexperience on the part of a professional assistant in the office of his attorney of record at the seat of the trial court.[251] The Court held that as no blame attached to the appellant himself in connection with the failure to comply with the Rules of Court, his attorney was at fault. The Court stated that justice required that a special order as to

---

248 1977 (4) SA 588 (O) 602(h).
249 1985 (2) SA 208 (T) 209(i)-(j).
250 CO LTD 1977 (1) SA 660 (A).
251 663(h).

the costs be made. Therefore, the party and party costs of the proceedings had to be paid to the respondent by the attorney of record for the appellant *de bonis propriis*.[252] The appellant's attorney was also not entitled to recover any of the costs in respect of the application from the appellant.

It is clear that the courts, as the moral authority of the legal professions, have the power to regulate and discipline members of the professions. In the case of a legal practitioner misleading the court or misusing the court process to gain advantage for his client, a punitive cost order against the client or even an order *de bonis propriis* to punish the errant practitioner will usually be sufficient. In cases of extreme misconduct, the courts will also not hesitate to remove the practitioners concerned from the roll of practising attorneys or advocates. However, as was shown in section 5.4.8 above, a punitive cost order against the instructing agent for an organ of state and the state legal representative is not effective. The tax paying public pay for their blunders. This is a matter of concern. Fuller states that the lawyer's role imposes on him a "trusteeship for the integrity of those fundamental processes of government and self-government upon which the successful functioning of our society depends".[253] This is especially true for state legal representatives and their instructing agents, who ought to act diligently in a manner that gives effect to constitutionally imposed duties. Therefore, it is imperative that the state lawyer's role, and the responsibilities of the instructing agent for the organ of state, be identified and clearly defined. This would allow the courts to hold the instructing agent and the state legal representative responsible for any abuse of the legal and court process.

5.5.2 Lawyer's duties to court

The analysis in section 2.8 in chapter 2 above has shown that the *Constitution* places a range of positive duties on organs of state. Organs of state must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness

---

252 6649(c).
253 Fuller and Winston 1978 *Harvard Law Review* 384.

of the courts.[254] The duty that is imposed on organs of state in order to ensure the effectiveness of the courts, which duty includes a positive obligation to place before the courts relevant and material evidence.[255] Furthermore, public administration must be governed by the democratic values and principles enshrined in the *Constitution*, including the principles of professional ethics, impartiality, openness, accountability and participation.[256]

The courts have indicated that the commencement, defence and conduct of litigation by the government or government departments constitutes the exercise of public power.[257] As such, state litigation is subject to the same scrutiny as any other exercise of public power. Therefore, state litigation should comply with the principle of legality and the rule of law.

An attorney is subject to a code of ethics, has a duty to the court to conduct him- or herself in a proper manner and has a responsibility to act honestly and openly towards his or her colleagues.[258] Both professions (advocates and attorneys) have strict ethical rules aimed at preventing their members from becoming parties to the deception of the court.[259]

In *Brenner's Service Station and Garage (Pty) Ltd v Milne*,[260] the Court held that attorneys should not allow themselves to descend to the level of manipulating the court's procedures so that their true purpose is frustrated. The true function of the courts in this regard is to try disputes between litigants who have real grievances and so to see to it that justice is done. Attorneys who manipulate the court system in an effort to secure the best outcomes for their clients would be guilty of malpractice.

---

254 Section 165(4) of the *Constitution.*
255 Du Plessis, Penfold and Brickhill *Constitutional Litigation* 4.
256 Section 195(1) of the *Constitution.*
257 Du Plessis, Penfold and Brickhill *Constitutional Litigation* 3.
258 *Magistrate Pangarker v Botha* 2015 (1) SA 503 (SCA) para 38.
259 *Kekana v Society of Advocates of South Afric*a 1998 (4) SA 649 (SCA) 649(f); ethical rules for advocates are found in the Uniform Rules of Professional Conduct of the General Council of the Bar of South Africa, available at http://www.sabar.co.za/rules-of-ethics.html accessed February 2016; and for attorneys in the Rules for the Attorneys' Profession, published in *Government Gazette* No. 39740 of 26 February 2016, which came into operation on 1 March 2016.
260 1983 (4) SA 233 (W) para 240A.

In *S v Malumo*,[261] the Court acknowledged that there was a duty between attorney and client, but reminded the appearing counsel that although she had a duty to act towards the best interest of her client, she was an officer of the court in the first place. This meant that she had to assist the court to finalise the inordinately prolonged trial as soon as circumstances allowed it.

In *Khunou v M Fihrer & Son (Pty) Ltd*,[262] the Court argued that the rules of civil procedure exist in order to enable courts to perform a duty with which the orderly functioning of society is interwoven. The Rules of Court are designed not only to allow litigants to come to grips, as expeditiously and as inexpensively as possible, with the real issues between them, but also to ensure that the courts dispense justice uniformly and fairly, and that the true issues before the court are clarified and tried in a just manner.

The Court stated that the necessarily flexible Rules of Court leave opportunity for unscrupulous litigants and those who would wish to delay or deny justice to manipulate the courts' procedures so that their true purpose is frustrated.[263] The Court further pointed out that the Court's officers, including and especially its attorneys, have a sacred duty. In terms of this duty, legal practitioners should not allow the administration of justice to fall into disrepute. When attorneys do not measure up to this standard, a court will mark its disapproval either by an appropriate order as to costs against the defaulting practitioner or by referring the matter to the relevant Law Society for disciplinary action.

In *Li Kui Yu v Superintendent of Labourers*,[264] the Court considered it a serious offence to interfere with the administration of justice by taking an action that is bound to prevent a court from granting a remedy. The courts have held that a legal practitioner who misleads the court would be guilty of unprofessional conduct and so would a legal

---

261 *S v Malumo (In Re Ndala)* 2014 (3) NR 690 (HC) para 11.
262 1982 (3) SA 353 (W) page 355(f)-(h).
263 Page 356(a)-(c).
264 1906 TS 181 page 194.

practitioner be who lies to another legal practitioner to frustrate the Rules of Court.[265] Attorneys should therefore ensure that the Rules serve their true purpose, not only through their own actions, but also by preventing their clients from using the Rules in a manner which would frustrate the true purpose of the Rules.

The legal practitioner also has a duty to inform the court of any legal issues relevant to the matter before the court. In *Toto v Special Investigating Unit;*[266] the Court held as follows:

> It is trite that it is the duty of a litigating party's legal representative to inform the court of any matter which is material to the issues before court and of which he is aware. This Court should always be able to accept and act on the assurance of a legal representative in any matter it hears and, in order to deserve this trust, legal representatives must act with the utmost good faith towards the Court. A legal representative who appears in court is not a mere agent for his client, but has a duty towards the Judiciary to ensure the efficient and fair administration of justice. The proper administration of justice could not easily survive if the professions were not scrupulous of their dealings with the Court.

The ethical duty a practitioner has towards the court is critical to ensuring the fair and efficient administration of justice. Therefore, the legal practitioner should act with the utmost good faith towards the court and the courts should be able to rely on an assurance given by a practitioner in relation to any issue.[267] Furthermore, the legal practitioner is obliged to inform the court of any matter which is material to the issues before the court and of which he or she is aware.[268]

The same legal duty towards the court exists when the instructing agency is an organ of state. In *S v Shaggie*,[269] this was described as follows:

> Then there is the question of due compliance by the state, of its obligation to comply with the practice directives of this court. The state's written argument was, as could be expected in the light of the appellant's non-argument, quite brief. The only references to the record were to the judgment of the court below. In spite of this the state said that we had to read all 4 000 pages of the record. This is unacceptable. The state has a duty towards the court to ease its workload and not to bog it down.

---

265 *Disciplinary Committee for Legal Practitioners v Murorua* 2012 (2) NR 481 (HC) paras 33 and 34.
266 2001 (1) SA 673 (E) (2000 (5) BCLR 553) para 683(a)–(f).
267 Gani 2004 *Advocate* 41.
268 *Schoeman v Thompson* 1927 WLD 282 para 283.
269 *S v Staggie* 2012 (2) SACR 311 (SCA) para 23.

The instructing agents of state and the state legal representatives therefore also have a legal duty towards the courts.

The state further has the duty not to frustrate the courts in their enforcement of constitutional rights.[270] In this matter, the conduct of the MEC and her department, though falling short of contempt, had veered towards thwarting the relief sought by the Board. The Court described the conduct of the MEC as follows:

> The MEC, in her responses to the opposition by the board, appeared indignant and played the victim. She adopted this attitude while acting in flagrant disregard of constitutional norms. She attempted to turn turpitude into rectitude.

The Court stated that a costs order *de bonis propriis* was justified in such circumstances. The Court further held that it was time for courts seriously to consider holding officials who behave in such a high-handed manner personally liable for costs incurred. The courts therefore recognises that when an organ of state is the instructing agent, a cost order *de bonis propriis* might be an appropriate order to hold a state official accountable to the *Constitution.*

In *Permanent Secretary Department of Welfare, Eastern Cape Provincial Government v Ngxuza*,[271] the Court described the legal strategy of the provincial government as follows: "The applicants did so by recourse to every stratagem and device and obstruction, every legal argument and non-argument that it thought lay to hand."

The Court held that the strategy employed by the government spoke of contempt for people and process that does not befit an organ of government under our constitutional dispensation.[272] The Court held that the province's approach to the proceedings was contradictory, cynical, expedient and obstructionist. It conducted the case as though it was at war with its own citizens. This was completely at odds with the duty of legal

---

270 *Gauteng Gambling Board v MEC for Economic Development, Gauteng* 2013 (5) SA 24 (SCA) paras G(41)–(43) and (48).

271 2001 (4) SA 1184 SCA para 17.

272 Para 19.

practitioners, as officers of the court, where they serve the interests of justice itself by acting as a bulwark against the admission of fabricated evidence.[273]

The preservation of professional ethics have been left almost entirely in the hands of individual practitioners; absolute personal integrity and scrupulous honesty are therefore demanded of each of them.[274]

The analysis in section 2.8.3 in chapter 2 has shown that organs of state and their legal representatives frequently misuse the court process and often fail to comply with constitutionally imposed positive duties, and that flouting of positive constitutional duties by state litigants and their legal representatives persists, which places an undue constitutional limitation on strategic litigation.

This strategy employed by some state officials constitutionally limits the positive application of strategic litigation and restrains the realisation of constitutional rights. The analysis in chapter 2 further concluded that the current practice of curing vexatious proceedings with a punitive cost order is not effective when the state, "clutching the unlimited public purse", is the offending party.[275] Adverse cost orders against the state punish the innocent taxpayer. It is clear that the current court rules and practice directives of the Law Societies and Council of the Bar do not allow the courts to fulfil its role as *custos morum* of the profession.[276]

It follows that there is a need in South African law of civil procedure for a set of guidelines or principles with which the government litigant must comply. This would allow the courts to serve the interest of the public and the professions by holding state legal representatives and their instructing agents accountable to constitutional obligations.

5.6 Conclusion

---

273 *Kekana v Society of Advocates of South Africa* 1998 (4) SA 649 (SCA) 655(i).

274 *Kekana* 656(a).

275 *Fose v Minister of Safety and Security* 1997 (3) SA 789 (CC) para 87.

276 In *General Council of the Bar v Matthys* 2002 (5) SA 1 (ECD) paras 4-6, the Court described the inherent right of the courts to control and discipline practitioners who practice within its jurisdiction as a duty exercised in the interest of the public and the profession.

The case studies above show that strategic litigation is to an extent limited when the state is a party to the proceedings. These limitations do not flow from the *Constitution* or legal norms but rather from procedural and practical considerations that are in some instances imposed by the courts.

Case studies 2 and 3 show that the constitutional limitations to strategic litigation against the state can be clarified by subscribing to a wider approach to judicial review, as was argued in chapter 3 of this work. Should the courts subscribe to the principle of justification in judicial review, the values inherent in the *Constitution* can be realised. The principle of acknowledgement would allow for the values of justification, openness, equality and participation to be considered during adjudication. This calls for a rejection of the theory of deference in adjudication, which is currently applied by the courts.

The *Walker* case study and the similar examples of strategic litigation referred to in that section also show the tension between rationality and formal justice, on the one hand, and substantive justice, on the other. However, non-compliance with the rationality principle and formal justice can be justified by relying on the principle of reciprocity that flows from the underlying value system in the *Constitution*, as was argued in chapter 4. Should the courts recognise that the underlying value system of the *Constitution* and, therefore, the principle of reciprocity are applicable to the judge as well as litigants, substantive justice can be realised.

The case study in section 5.4 shows that punitive cost orders are not effective in forcing an organ of state that is a party to litigation to adhere to constitutional obligations. The state with its unlimited public purse is not prevented from misusing the litigation process to protect individuals from political embarrassment. It is clear that existing procedural norms and remedies of court are not effective in preventing abuse of the legal process by organs of state.

Section 5.5 shows that current norms governing the conduct of legal representatives of the state as a party to litigation are not effective in ensuring impeccable ethical conduct. Even though there are legal obligations imposed on state legal representatives, these are not enough to ensure that organs of state comply with

constitutionally imposed duties. Therefore, clearly defined and enforceable guidelines are needed to hold legal representatives of the state as well as their instructing agents constitutionally accountable.

Chapter 6: Conclusions

6.1 Introduction

Chapters 2 to 4 of this study have shown that, in practice, strategic litigation is constitutionally limited when the state is party to the proceedings. These limitations do not flow from the *Constitution* or legal norms but rather from procedural and practical considerations that are, in some instances, imposed by the courts themselves. These practical considerations flow from incorrect interpretation and application of the *Constitution.* This often leads to a situation in which constitutional duties imposed on organs of state when litigating are ignored or incorrectly discharged by the state litigants.

Section 6.2 of this Chapter examines the constitutional limitations identified in the study. The discussion shows that practical measures can remove procedural limitations to strategic litigation. However, the failure by organs of state to fulfil their constitutional duties requires a new approach in South African civil procedure and constitutional law.

Section 6.3 investigates the model litigant obligation as applied in Australian law and considers whether these Australian guidelines can be successfully applied in South African law. The possible application of the model in South Africa, including the introduction and regulation of the guidelines, is investigated.

6.2 Constitutional limitations to strategic litigation

The analysis in chapter 2 showed that there are numerous advantages to strategic litigation and that the judiciary has important institutional advantages in the tasks it assumes in strategic litigation. However, the judiciary also has the duty, responsibility and authority to hold organs of state constitutionally accountable. Primary advantages of strategic litigation include holding organs of state accountable to the *Constitution*, righting constitutional wrongs and exposing corruption. These are essential for the protection of the individual litigating against the state, but also for the protection of the *Constitution* and the South African constitutional state. Secondary advantages may

occur even when the litigation itself has not been successful. This includes the publicity generated by the litigation, which in itself is a powerful motivator to hold organs of state accountable to the *Constitution.* A well-organised civil society in South Africa makes its voice heard and engages in strategic litigation with the aim of protecting the *Constitution.*

The procedural rules governing strategic litigation are well-established in South Africa with a wide range of constitutional remedies available to assist the courts in righting a constitutional wrong. However, the analysis shows that the courts are at times unable to hold organs of state to account when they flout constitutionally imposed positive duties and misuse the mechanisms of the law. When organs of state ignore positively imposed constitutional duties, it places unwarranted constitutional limitations on the possible achievements of strategic litigation.

The analysis in chapter 3 has shown that strategic litigation can serve as an effective check to prevent the abuse of powers in the context of the doctrine of the separation of powers. The main objective of the doctrine of the separation of powers is to prevent the abuse of power by any one branch of government. However, another aim of the doctrine is to prevent the overconcentration of power in a single institution or individual. In the South African constitutional context, the lack of effective checks and balances between the executive and legislative branches and the resulting political power concentration have opened the door to political activism through strategic litigation to counterbalance the power of the executive. Although the lack of effective checks and balances to curb the power of the executive is a cause for concern, it shows that South Africa is still in the process of moving away from a government system based on parliamentary supremacy into a constitutional dispensation. The courts can assist in this transition by addressing the issue of the overconcentration of power in public bodies, something the courts have largely neglected since the certification of the 1996 *Constitution.*

The courts have the right and duty to intervene to prevent the violation of the *Constitution.* However, intervention by the courts in cases of constitutional violation

could be obstructed if the courts persist with a standard for judicial review based on deference to other organs of state. This means that the courts defer to an organ of state even when that organ is guilty of a constitutional violation. Such deference places an undue constitutional limitation on strategic litigation. What is necessary is a standard for judicial review based on a policy of non-discrimination, openness, justification, accountability and participation, and the founding values of the *Constitution.* Davis articulated a culture of justification for judicial review.[1] This culture takes into account the democratic prerogative of the elected arms of government to fashion and implement public policy within the framework of the *Constitution.* It accepts that the role of judicial review is to foster a culture of democracy, and that the judiciary's point of departure should be that it operates in a governmental system based on the doctrine of the separation of powers. The approach of a culture of justification as proposed by Davis finds the correct balance for judicial review in both an objective interpretation of constitutional provisions and the values inherent to the *Constitution* and the doctrine of the separation of powers. Judicial review requiring openness, justification, accountability and participation could assist the courts to hold the state litigant to a different standard than the private litigant. The notion of equality before the law and the right to equal benefit and protection of the law can then be realised.[2] The powerful position of the state litigant, with access to more resources, money and legal representatives than the ordinary private litigant, can then be balanced with the right to equal enjoyment of the law and with the right to participation that the private litigant also should enjoy. The principle of openness can be realised by requiring that the state litigant places all relevant information at its disposal before the court. The principles of justification and accountability can be realised by ensuring that the state only litigates when it is in the public interest to do so or when the litigation is needed to vindicate the *Constitution*. Then, if the state litigant subscribes to these values, the state litigant would be the model litigant.

---

1 Section 3.5.3.
2 Section 9 of the *Constitution*.

The analysis in chapter 4 highlights the essential role that judges play in strategic litigation. It is of the utmost importance for judges to be independent and impartial in litigation against organs of state. The process of appointing judges in South Africa is well-balanced, but the composition of the JSC and the resultant overconcentration of executive power in the JSC are a cause for concern. The appointment of judges currently invites arbitrariness, as it allows executive interference in the judicial appointment process. The appointment of judges oriented towards the ideology of a certain political party creates the possibility that such judges will have an interest in the outcome of a case in which such party is a party to the proceedings. This relates directly to strategic litigation, in which judicial impartiality would hardly be possible when an organ of state or a political party is a party to the litigation. Excessive executive influence in the JSC has the potential of placing constitutional limitations on strategic litigation when an organ of the state is a party to the litigation. An executive-minded judiciary or a judiciary that is perceived to be executive-minded may have a "chilling effect" on strategic litigation against the state. The appointment of non-partisan, non-political and appropriately qualified judges is therefore essential.

It is widely accepted that the Constitutional Court plays a prominent role in the South African political landscape, the law and politics being inescapably linked. However, judges must interpret the *Constitution* fairly and consistently and remain free from undue political influence. This can be ensured if the courts address the issue of the overconcentration of political power in public bodies such as the JSC.

The analysis in chapter 4 further showed that judges cannot be absolutely impartial. Judges are human beings with their own predilections, preconceptions and personal views. However, the often vague and undefined values ingrained in the *Constitution* lend themselves, by their nature, to a degree of subjective interpretation. The interpretation of the *Constitution* by the courts, including the interpretation of the undefined rights and values, is critically important in strategic litigation.

It is critical that subjective interpretation is not based on the concealed and capricious pre-conceived political, moral or religious notions of the judge. This is especially true in

what are referred to as “hard cases”, where an objective way of reaching a judgment based on the accepted sources of law is problematic. Hard cases sometimes require subjective interpretation from the judge, imposing on the judge his or her own moral, religious or political belief. However, judges are assumed to be people of conscience and intellectual discipline, capable of judging a particular controversy fairly based on the details of that case only. Furthermore, legal tradition (in the form of community expectations), the legal training of the judge and the traditions of the bench, the advocates' bars and the different law societies condition a judge to be fair and just in adjudication.

Nevertheless, a judge must recognise the introspective view that comes into play when adjudicating. This requires a judge to consider his or her conscience and own moral position, the facts and evidence of the case, the litigants and the constitutional rights and values at stake, and then to make sure that his private and individual moral presumptions do not cloud the judgment. This introspection acknowledges that inherent personal views may influence the judgment of the court, which gives rise to a theory of acknowledgement that allows judges to frame subjective predispositions into the court’s reasoning. Such an articulation of the influence of substantive reasoning would be more preferable than a bland denial of subjective predispositions and an absence of justification. The theory of acknowledgment provides legitimacy and objectivity to the judgment by exposing the subjective interpretational element to criticism. Then political judging is not the problem; it becomes a problem when it is not recognised and acknowledged as such. The theory also removes the possibility that the political leanings of the judge might constitutionally limit strategic litigation when the state is a party to the litigation. This provides rationality and objectivity by justifying the court’s decision and opening the decision for public scrutiny and rational criticism.

Justice as a principle in adjudication plays a prominent part in the social ordering of a community and consists of two aspects, namely formal and substantive justice. The prime goal for the enlightened state must be securing and preserving optimal fairness and justice for all. The South African state is founded upon values. These values lend moral conviction and validity to legal norms. Therefore, the values of dignity, equality,

fairness and justice should be the norm in constitutional interpretation and adjudication. There is an underlying moral value system in the *Constitution* that should inform all legal norms, as well as the *Constitution* itself. This moral value system is based on the principles of fairness and justice, which can be realised by subscribing to the ethical norm of reciprocity: treating others as you want them to treat you. The concepts of self-worth and dignity require individuals to display respect for the identities of others that differ from their own, and this is reciprocated by the other. Reciprocity is therefore integrated in the very core of the text of the *Constitution.* Reciprocity is based on mutual respect and requires that no individual seek to impose an individual vision on others. The principle of reciprocity facilitates the right to participation by preventing the arbitrary imposition of the personal view of the judge. This means that where meaning is given to undefined constitutional values the judge must acknowledge the inner self and articulate the reasoning process that gave rise to the decision of the court for public scrutiny. Reciprocity allows the judge to adhere to the constitutional commitment to justice, which includes treating litigants equally, thereby bestowing dignity and self-worth on the litigant and fostering a culture of justice, openness, justification and participation in adjudication.

The case studies in chapter 5 show that existing court remedies are not effective in forcing organs of state to meet constitutional obligations when it is a party to litigation. Punitive cost orders do not prevent state organs from misusing the litigation process to protect politically connected individuals or to safeguard organs of state from political embarrassment. It is therefore clear that existing procedural norms and remedies are not effective in preventing abuse of the legal process by organs of state. Furthermore, it is clear that current legal ethical norms are not enough to hold state legal representatives, their instructing agents or organs of state accountable to the courts and the *Constitution.* Organs of state are constitutionally accountable, but do not always conform to the obligations that are imposed on them by the *Constitution.* This places undue constitutional limitations on strategic litigation. After all, organs of state holding the unlimited public purse and public resources are powerful litigants. The situation is exacerbated when the organ of state does not discharge its positive constitutional duties and does not abide by the rules of civil procedure.

Therefore, clearly defined and enforceable guidelines are needed to hold legal representatives of the state and their instructing agents constitutionally accountable. The need for the regulation of public sector lawyers is recognised by these lawyers themselves, or at least by some of them. During the inaugural annual Government Law Conference held in 2012, Advocate Wolmarans, Chief State Law Adviser in the Office of the Premier of KwaZulu-Natal, confirmed that –[3]

> [l]awyers working for government were not just public servants, but remained officers of the court and should strive to maintain freedom, independence, integrity, impartiality and non-partisanship. Public sector lawyers serving the executive and the legislature must guard against being overly "executive-minded" in their approach.

According to Wolmarans, employers of public sector lawyers must recognise that the roles and responsibilities of public sector lawyers as lawyers supersede those as public sector employees. He continued by stating:

> As public sector lawyers, we must firstly, and always, serve and uphold the values and principles of constitutionalism and the rule of law in providing professional and non-partisan legal services and legal advice to government. We must ensure that we understand and apply these principles at all times.

Also speaking at the above-mentioned conference, Advocate Dibetso-Bodibe said that government, being the biggest litigant, wielded "financial muscle" against citizens when engaging in litigation.[4] She continued by saying public sector attorneys sometimes did not realise that they were litigating against the community that pays taxes, and that, therefore, they should spend taxpayers' money wisely. Tellingly she added, "We should be model litigants and behave as such". She also stated that bad cases should not be pursued unnecessarily. This she articulated as follows:

> We should not litigate for the sake of litigating. Do not use delaying tactics when litigating and avoid personality-driven cases. Fight fairly. Every matter does not necessarily require a court order. If you can settle at the earliest point in time, then do that. Do not institute and/or pursue appeals unless the state believes that there exists a reasonable prospect for success.

---

3 The speech was published in Kriel 2013 *DEREBUS* 115.

4 The speech was published in Kriel 2013 *DEREBUS* 116.

When litigation is inevitable, said Dibetso-Bodibe, the state litigant must –[5]

(a) act consistently in handling claims;

(b) deal with claims promptly;

(c) focus on the core issues involved;

(d) ensure all relevant documents are presented to the courts;

(e) keep costs to a minimum;

(f) pay legitimate claims without litigation, including making partial settlements or interim payments where liability has been established; and

(g) manage litigation in a timely manner.

She concluded by stating that the public legal sector should be transformed to provide legal services of the highest standard to protect and safeguard the interests of the state and to promote access to justice for all. The transformation envisaged by Dibetso-Bodibe can be realised by subscribing to the model litigant obligation

6.3 The model litigant obligation

According to the Rule of Law Institute of Australia, the model litigant rules, or model litigant obligations, are guidelines on how a government body ought to behave before, during and after litigation with another government body, a private company or an individual.[6] In Australia, the Commonwealth and Australian states all have a common-law responsibility to act as a model litigant.[7] This responsibility applies in all areas of the law and all stages of the trial, whether the state is plaintiff or defendant. The obligation

---

5 Kriel 2013 *DEREBUS* 117.

6 *Model Litigant Rules*, Rule of Law Institute of Australia http://www.ruleoflaw.org.au/priorities/model-litigant-rules/ accessed February 2016.

7 Lee The State as model litigant Victorian Government Solicitor's Office Lunchtime Seminar Series 2006 available at Institute of Australia http://www.ruleoflaw.org.au/priorities/model-litigant-rules/ accessed February 2016.

is not viewed as a handicap to the state, but rather as a way in which to assess the state's conduct to ensure that the highest standard of propriety and ethics are met.

6.3.1 The model litigant obligation as applied in Australia

In Australia, governments of the Commonwealth and some states and territories have introduced policy guidelines to ensure that the state act fairly in litigation against its citizens.[8] The obligation to adhere to those standards is commonly referred to as the obligation to act as a model litigant and emanates from the executive and the judicial branches. Chami states that the obligation to act as a model litigant extends beyond merely obeying the law and abiding by the ethical obligations that apply to legal practitioners. The ethical obligations provide for minimum standards of conduct, whereas the model litigant obligation involves striving for aspirational standards of the highest character.[9]

In order to improve and maintain standards in litigation, the State of Victoria has introduced policies in the form of guidelines to ensure that the state complies with the obligation to act as a model litigant.[10] These guidelines oblige on the State of Victoria, its departments and agencies to behave as a model litigant in the conduct of litigation. The obligations require that the State of Victoria, its departments and agencies –

(a) act fairly in handling claims and litigation brought by or against the state or an agency;

(b) act consistently in the handling of claims and litigation;

(c) deal with claims promptly and not cause unnecessary delay;

(e) make an early assessment of –

---

8 Chami 2010 AIAL Forum 47. New South Wales, Victoria, Queensland and the Australian Capital Territory have each introduced their own model litigant policies in the form of guidelines, which apply to the provision of legal services in matters involving the agencies of those respective jurisdictions.

9 Chami 2010 AIAL Forum 48

10 Guidelines on the State of Victoria's obligation to act as a model litigant http://www.opp.vic.gov.au/wps/wcm/connect/18c9ac00404a14a4abfafbf5f2791d4a/15_Application_of_model_litigant_guidelines.pdf?MOD=AJPERES accessed November 2015.

(i) the state's prospects of success in legal proceedings; and

(ii) the state's potential liability in claims against the state;

(f) pay legitimate claims without litigation, including making partial settlements of claims or interim payments, where it is clear that liability is at least as much as the amount paid;

(g) consider seeking to avoid and limit the scope of legal proceedings by taking such steps, if any, as are reasonable having regard to the nature of the dispute, to resolve the dispute by agreement, including participating in appropriate dispute resolution (ADR) processes or settlement negotiations;

(h) where it is not possible to avoid litigation, keep the costs of litigation to a minimum, including by –

(i) not requiring the other party to prove a matter which the state or the agency knows to be true;

(ii) not contesting liability if the state or the agency believes that the main dispute is about quantum;

(iii) taking such steps, if any, as are reasonable to resolve such matters as may be resolved by agreement and to clarify and narrow the remaining issues in dispute;

(iv) monitoring the progress of the litigation and, where appropriate, attempting to resolve the litigation, including by settlement offers, offers of compromise and ADR;

(i) when participating in ADR or settlement negotiations, ensure that as far as practicable the representatives of the state or the agency –

(i) have authority to settle the matter to facilitate appropriate and timely resolution; and

(ii) participate fully and effectively;

(j) do not rely on technical arguments unless the state's or the agency's interests would be prejudiced by the failure to comply with a particular requirement;

(k) do not take advantage of a claimant who lacks the resources to litigate a legitimate claim;

(l) do not undertake and pursue appeals unless the state or the agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest; and

(m) consider apologising where the state or the agency is aware that it or its representatives have acted wrongfully or improperly.

The obligation applies to litigation (including before courts, tribunals and inquiries, and in arbitration and other alternative dispute resolution processes) involving organs of state, as well as Ministers and officers where the state provides a full indemnity in respect of an action for damages brought against them personally. The obligation extends beyond obeying the law and abiding by ethical obligations that apply to legal practitioners. The model litigant obligation involves striving for aspirational standards of the highest character.[11]

There are a number of cases where the model litigant obligation was considered by Australian courts. In *Morely & Ors v Australian Securities and Investments Commission*,[12] the Court held that, because the Australian Securities and Investments Commission (ASIC) effectively acted as a prosecutor in civil penalty cases, it was under an obligation to act fairly, analogous to the duty owed by prosecutors in criminal proceedings.[13] The Court further held that the government agency has no legitimate

11 Chami *AIAL Forum* 48.
12 [2010] NSWCA 331.
13 Para 705.

private interest of the kind, which often arises in civil litigation. It acts, and acts only, in the public interest as identified in the regulatory regime.[14]

In *R v Martens*,[15] the applicant claimed that material evidence vital to his case was withheld or not adequately investigated. After he was convicted, his wife obtained the evidence. The Queensland Court of Appeal found that the conviction was unreasonable and not supported by evidence and his conviction was quashed. The Court described the conduct of the government agencies as follows:[16]

> It is a poor reflection upon the two organisations that one should have failed to find them, and denied their existence, and the other object to their use in the reference on the ground that the petitioner should have obtained them earlier.

In *Deputy Commissioner of Taxation v Clear Blue Developments Pty Ltd*,[17] the Commissioner of Taxation sought an order for costs, which the Court refused to grant. The Court held as follows:[18]

> I do not propose to award professional costs to the Deputy Commissioner. Indeed, so to do would be to reward work which is not of a standard to be expected of a person to be a solicitor on the record for a person to whom the model litigant obligations adhere.

Australian courts therefore recognise the model litigant obligation and uses it to great effect when an organ of state misuse the court process or do not act in the public interest.

According to Lee, ensuring compliance with the model litigant obligation is primarily the responsibility of the organ of state which initiated the litigation. In addition, lawyers engaged in such litigation will need to act in accordance with the obligation and assist their client to do so. Lee continues that the obligation does not prevent the state and its organs from acting firmly to protect their interests. It does not preclude all legitimate

---

14 Para 716.
15 [2009] QCA 351.
16 Para 170.
17 (No 2) [2010] FCA 1124.
18 Para 48.

steps being taken to pursue claims by the state and its organs and testing or defending claims against them.[19]

The Office of Legal Services Coordination (OLSC), in the Attorney-General's department, assists the Attorney-General in relation to his responsibilities regarding legal services to the Commonwealth[20] by providing guidance notes and performing educational functions. The OLSC also investigates alleged breaches of the Directions. Breaches are brought to the attention of the Office by way of self-reporting by government agencies, judicial comments, media reports or complaints made directly to the OLSC. The *Legal Services Directions* 2005 (LSD), in which the Commonwealth government's Model Litigant Rules are set out, state that the model litigant obligation arises from the responsibility of the Attorney-General for the maintenance of proper standards in litigation.[21]

The guidelines are meant to be integral to the rule of law, because of the substantial imbalance of power in litigation with organs of state. This imbalance of power occurs because of the access to substantial resources that organs of state enjoy. These resources and powers include the power to investigate matters, the statutory powers to compel people to provide information to organs of state and, in some instances, more experience and specialist expertise in dealing with complex and contentious legal matters.

The model litigant obligation is therefore essential for two reasons: firstly, to hold the state litigant accountable to the public and the *Constitution* and ensuring that they act in the public interest and according to the *Constitution* and the law; and, secondly, to restructure the imbalance of power between the state litigant and the private citizen to

---

19 Lee *The State as model litigant* Victorian Government Solicitor's Office Lunchtime Seminar Series 2006 available at Institute of Australia http://www.ruleoflaw.org.au/priorities/model-litigant-rules/ accessed February 2016.

20 *Judiciary Amendment Bill* 1998, Chapter 8.

21 Section 4.2 of the LSD available at https://www.legislation.gov.au/Details/F2006L00320 accessed March 2016.

effect to the notion of equality as expressed in section 9 of the South African *Constitution.*[22]

6.3.2 Justifications for the obligation

6.3.2.1 Justification in Australia

In *Melbourne Steamship Co Ltd v Moorehead*,[23] the Court had the following to say when the state relied on a technical point of pleading:

> I am sometimes inclined to think that in some parts – not all – of the Commonwealth the old fashioned, traditional and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary, is either not known or thought out of date. I should be glad to think that I am mistaken.

In *Hughes Aircraft Systems International v Airservices Australia*,[24] the Court held as follows:

> There is, I consider, much to be said for the view that, having no legitimate private interest in the performance of its functions, a public body (including a state owned company) should be required as of course to act fairly towards those with whom it deals, at least in so far as this is consistent with its obligation to serve the public interest (or interests) for which it has been created.

According to Lee, the model litigant obligation is important because of the following:[25]

> The model litigant rules are very important because they are all about fair play, about how government should conduct its litigation, about ensuring that the public has good reason to trust its public officials and the way its public officials and lawyers conduct litigation affecting rights of its own citizens. The Government must not abuse its power. It must not act arbitrarily or capriciously.

The duty of a public body to serve the public interest and to act fairly towards those it serves is therefore recognised as a positive duty in Australia. In *P & C Cantarella*,[26] the

---

22 Section 9(1) of the *Constitution* provides that everyone is equal before the law and has the right to equal protection and benefit of the law.

23 (1912) 15 CLR 333 para 342.

24 (1997) 76 FCR 151 para 196.

25 Lee *The State as model litigant* Victorian Government Solicitor's Office Lunchtime Seminar Series 2006 available at Institute of Australia http://www.ruleoflaw.org.au/priorities/model-litigant-rules/ accessed March 2016.

26 [1973] 2 *NSWLR* 366 page 383.

Court held that that the model litigant obligation extends from the executive's obligations to justice as part of the rule of law:

> The duty of the executive branch of government is to ascertain the law and obey it. If there is any difficulty in ascertaining what the law is, as applicable to the particular case, it is open to the executive to approach the court, or afford the citizen the opportunity of approaching the court, to clarify the matter. Where the matter is before the court it is the duty of the executive to assist the court to arrive at the proper and just result.

The duty of an organ of state to act fairly towards the public is a powerful motivator for the model litigant obligation. However, there is also a more controversial justification in play. Chami states that in order to do justice, the imbalance in power and resources between government and private litigants requires that government litigants act in a manner which is more restrained than that expected of their opponents.[27]

This refers to the "standard of fair play to be observed by the Crown in dealing with subjects".[28] Therefore, the model litigant obligation exists to level the playing field between the state litigant, with the powerful public resources behind it, and the private litigant, whose resources might be constrained and nowhere near the resources of the state.

According to Appleby, the government is a repeat player in the justice system with a large amount of resources at its disposal, and government lawyers often have a higher public profile. Therefore, the government is said to enjoy a number of advantages, including greater expertise and access to specialist knowledge in relation to substantive law and court processes.[29]

6.3.2.2 Justification in South Africa

The analysis in section 2.8.2 in chapter 2 showed that the *Constitution* imposes positive duties on organs of state when they engage in litigation. The duty to ensure the

---

27 Chami 2010 *AIAL Forum* 49.
28 *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 342.
29 Appleby 2014 *UNSW Law Journal* 98.

effectiveness of the courts puts a positive obligation on the organs of state to place relevant and material evidence before the courts.[30]

In South Africa, the primary source expressing the need for the model litigant obligation is judicial pronouncement. This was articulated in *Matatiele Municipality v President of the Republic of South Africa*,[31] as follows:

> In this respect, the Constitution requires candour on the part of government. What is involved is not simply a matter of showing courtesy to the public and to the courts, desirable though that always is. It is a question of maintaining respect for the constitutional injunction that our democratic government be accountable, responsive and open.

The Court further held that there is a strong need for government to provide an explanation for the introduction of legislation. The foundational values of the rule of law and of accountable government do not exist in discreet categories; they overlap and reinforce each other.[32] Openness of government promotes both the rationality that the rule of law requires and the accountability that multi-party democracy demands. It is therefore clear that the decision by an organ of state to litigate needs to be rationally justified.

Public administration should be governed by the democratic values and principles enshrined in the *Constitution*, including the following principles:[33]

(a) A high standard of professional ethics must be promoted and maintained.

(b) Efficient, economic and effective use of resources must be promoted.

(c) Public administration must be accountable.

(d) Transparency must be fostered by providing the public with timely, accessible and accurate information.

---

30 Du Plessis, Penfold and Brickhill *Constitutional Litigation* 4.
31 2006 (5) SA 47 (CC) para 107.
32 Para 110.
33 Section 195(1) of the *Constitution.*

The principles contained in section 195(1) apply to the administration in every sphere of government, organs of state and public enterprises,[34] which means the principles apply when an organ of state acts as litigant in the courts as well.

Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.[35] Organs of state, as part of government, therefore have an obligation to assist the judiciary in achieving justice. Organs of state should lead by example when engaging in litigation; they should act as the "model litigant".

It is important to realise – and it is recognised by the South African public sector lawyers quoted above – that public sector lawyers derive their authority from the *Constitution.* As such, their conduct should satisfy the positive duties imposed on the state. Furthermore, they appear on behalf of state officials who are responsible and accountable to the public, the very people against whom they litigate. The main duty of public officials, and in particular the public sector lawyers, should be to enhance the South African *Constitution* and the law. Furthermore, organs of state have no legitimate private or self-interest of their own separate from the public interest they are constitutionally bound to serve.[36] Therefore, an organ of state should only take a decision to litigate when the litigation would vindicate the *Constitution* and serve the public interest.

6.4 Application of the model litigant obligation in South Africa

6.4.1 To whom should the model apply?

As was shown in section 5.5 of chapter 5, the courts are more than able to fulfil their role as *custos morum* of the legal professions when private legal representatives or their clients ignore or misuse the court process. The threat of an order of cost *de bonis propriis* against the errant private legal representative or a punitve cost order against a vexatious private litigant provides sufficient protection for the court process.

---

34 Section 195(2) of the *Constitution.*
35 Section 165(4) of the *Constitution.*
36 *Hughes Aircraft v Airservices Australia* (1997) 76 FCR para 151.

Furthermore, court rules and legislation provide protection against the misuse of the court process by overzealous private litigants.

The *Vexatious Proceedings Act*[37] may be used when a person has persistently and without legal ground instituted legal proceedings against the same or different persons. In terms of section 2(1)(b) of the Act, the court may order that no legal proceedings be instituted by such a person without leave of the court. The purpose of the Act is to put a stop to the persistent and ungrounded institution of legal proceedings. The Act does so by allowing a court to screen a person who has persistently and without any reasonable ground instituted legal proceedings in any court. This screening mechanism protects two important interests, namely the interests of the victims of the vexatious litigant who have been repeatedly subjected to the costs, harassment and embarrassment of unmeritorious litigation, and the public interest that the functioning of the courts and the administration of justice proceed unimpeded by the clog of groundless proceedings.[38]

For the Act to be applied there are a number of prerequisites. The application to have a person declared a vexatious litigant can be instituted by the state attorney or by a person acting under his or her authority or by a person against whom legal proceedings have been instituted or are being contemplated.[39] Furthermore, a declaration is only competent when a person has "persistently and without reasonable ground instituted legal proceedings" in a division of the High Court or a magistrate's court. This does not apply to an organ of state.

As far as procedural remedies are concerned, an edict of perpetual silence is a remedy designed to put one who threatens legal action on terms to proceed with the action or else to be subjected to an edict of perpetual silence.[40] Therefore, the edict involves the court telling the defendant to bring his claim within a set time, or to abandon it.

---

37 3 of 1956.
38 *Beinash v Ernst & Young* 1999 (2) SA 116 (CC)
39 Section 2(1)(a) and (b) of the Act.
40 *Body Corporate - Montpark Drakens v Smuts* (22380/05) 2006 ZAGPHC 38.

There is ample protection for the court and court process when a private litigant or legal representative abuses the process.

6.4.2 Structure of the proposed model in South Africa

The guidelines are not meant to replace or supersede the *Constitution* or current legal ethical and court rules. The guidelines should be drawn up in simple and unpretentious language to give guidance to the state legal representative, the state instructing agent and the organ of state about the positive constitutional duties they must comply with when engaging in litigation. The proposed structure of the model in South Africa is based on the model that is is in the State of Victoria in Australia.

In terms of the proposed model, organs of state, their legal representatives and instructing agents are required –

(a) to ensure that the instructing agent of the organ of state understands the constitutional obligations placed on the state before embarking on litigation;

(b) to act fairly in handling claims and litigation brought by or against the organ of state;

(c) to act consistently in the handling of claims and litigation;

(d) to deal with claims promptly and not cause unnecessary delay;

(e) to make an early assessment of –

  (i) the state's prospects of success in legal proceedings;

  (ii) the state's potential liability in claims against the state; and

  (iii) pay legitimate claims without litigation, including making partial settlements of claims or interim payments, where it is clear that liability is at least as much as the amount paid;

(f) to consider seeking to avoid and limit the scope of legal proceedings by taking such steps, if any, as are reasonable, having regard to the nature of the dispute,

to resolve the dispute by agreement, including participating in alternative dispute resolution (ADR) processes or settlement negotiations;

(g) when it is not possible to avoid litigation, to ensure that the agent of the organ of state instructing the state legal representative does so in writing and clearly identifies him- or herself in the instructions, and that such written instructions are made available to the court if it so requests;

(h) when it is not possible to avoid litigation, to keep the costs of litigation to a minimum, including by –

(i) not requiring the other party to prove a matter the state or the organ of state knows to be true;

(ii) not contesting liability if the state or the organ of state believes that the main dispute is about quantum;

(iii) taking such steps, if any, as are reasonable to resolve such matters as may be resolved by agreement and to clarify and narrow the remaining issues in dispute;

(iv) monitoring the progress of the litigation and, where appropriate, attempting to resolve the litigation, including by settlement offers, offers of compromise and ADR;

(v) placing all relevant evidence available to the litigating official or department before the court to allow the proceedings to come to a just conclusion; and

(vi) not relying on technical arguments unless the state's or the agency's interests would be prejudiced by the failure to comply with a particular requirement;

(i) not to take advantage of a claimant who lacks the resources to litigate a legitimate claim;

(j) not to undertake and pursue appeals, unless the organ of state believes that it has reasonable prospects of success or the appeal is otherwise justified in the public interest; and

(k) to consider apologising when the organ of state becomes aware that it or its representatives have acted wrongfully or improperly.

The guidelines require nine positive and three negative forms of behaviours from the state litigant. The positive behaviours required from the state litigant are to ensure that constitutional obligations are fulfilled, to act fairly, to act consistently, to act promptly and to make an early assessment of the merits of the case, and, in addition, to give written instructions before commencing litigation, which instructions should be made available to the court at its request, to keep costs to a minimum, to have the necessary authority to settle the case and to place all relevant evidence available to the state litigant before the court.

The negative requirements are not to rely on technical arguments, not to take advantage of a claimant who lacks resources to pursue a valid claim, and not to appeal a decision unless there is the reasonable prospect of success.

The guidelines aim to ensure that the state legal representative, the instructing agent and the organ of state act honestly, ethically and in accordance with court rules, the law and the *Constitution.* The guidelines do not preclude the organ of state from engaging in litigation when it has to protect valid public interests, especially in relation to sensitive information that must be protected in the interest of national security, and neither do the guidelines preclude the organ of state from striving to win its case and seeking and enforcing cost orders.

These guidelines can be introduced by the legislature as amendments to court rules. The guidelines can also be introduced by the Constitutional Court in terms of section 173 of the *Constitution*, which provides that the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process. Guidelines compelling organs of state to act

morally in litigation would fall within the scope of the courts' regulating their own processes.

Section 165(4) of the *Constitution* provides that organs of state, through legislative and other measures, *must* assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts. The language implies an enforceable standard. Ensuring compliance with the guidelines should primarily be the responsibility of the state legal representative and the organ of state for which he or she appears. The guidelines can also be enforced by the courts in awarding cost *de bonis propriis* against an offending legal representative or instructing agent of the state. The guidelines will ensure that the state instructing agent is readily identifiable, should the conduct of the official warrant a punitive cost order. In the case of serious misconduct by the state legal representative, the courts can order the Law Society of South Africa or General Council of the Bar to investigate the conduct of the offending legal representative. Penalties can include suspension and even removal from the roll of practising attorneys or advocates.

The Legal Practice Council, which is envisaged in Chapter 2 of the *Legal Practice Act*,[41] can also develop or draft the guidelines. In terms of the Act, the proposed Council will have the powers to develop norms and standards to guide the conduct of legal practitioners, candidate legal practitioners and the legal profession.[42]

It is submitted that should guidelines of this nature be adopted in South Africa, they would significantly reduce the volume of unwarranted government litigation before the courts. State legal representatives and their instructing agents would have clear guidelines on when the state may litigate and what obligations the state has to meet to act morally and legally when litigating. The model litigant obligation could also assist in realising substantive justice as argued in section 4.5.2 in chapter 4. When the playing field is levelled by the moral litigant obligation, the private litigant can compete with the state litigant on an equal footing, thereby allowing for constitutional violations to be

41 28 of 2014.
42 Section 6(b)(i) of the Act.

rectified and substantive justice to be realised. It is proposed that the courts adopt the model litigant obligation, as currently in operation in Australian federal and state law, as guidelines to ensure that the state adhere to its constitutional obligations and duties.

In Chapter 1, the question was asked what the constitutional limits to strategic litigation involving the state are. The *Constitution*, correctly interpreted, applied and enforced, provides for ample protection against organs of state misusing the courts and the litigation process. Section 165 of the *Constitution* provides for an independent judiciary and states emphatically that no person or organ of state may interfere with the functioning of the courts and that organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.[43] Furthermore, section 9 of the *Constitution* provides for equality before the law and the right to equal protection and benefit of the law. Section 195 of the *Constitution* requires ethical conduct by an organ of state when it engages in litigation. However, these limitations imposed on the state litigant are often ignored or incorrectly applied by state legal representatives, their instructing agents and the courts owing to the lack of effective and enforceable guidelines setting out the constitutional duties of organs of state when litigating. The model litigant obligation or guidelines can provide sufficient protection for the individual or organisation litigating against an organ of state, thereby removing unconstitutional limitations to strategic litigation.

---

[43] Section 165(3) and (4) of the *Constitution.*

BIBLIOGRAPHY

Literature

Ackermann 2004 *New Zealand LR*

Ackermann LWH "The legal nature of the South African constitutional revolution" 2004 *New Zealand LR* 4 633-646

Adelman 1994 *Journal of Law and Society*

Adelman S "Accountability and Administrative Law in South Africa's Transition to Democracy" *Journal of Law and Society* Vol. 21 No. 3 1994 317-328

Akkas 2004 *Bond Law Review*

Akkas SA "Appointment of Judges: A Key Issue of Judicial Independence" *Bond Law Review* Vol 16 2 Article 8 2004 200-210

Alarie and Green 2009 *Osgoode Hall Law Journal*

Alarie B and Green B "Policy preference change and appointments to the Supreme Court of Canada" *Osgoode Hall Law Journal* 47.1 2009 1-46

Amit 2011 *SAJHR*

Amit R "Winning isn't everything: Courts, context, and the barriers to effecting change through public interest litigation" *SAJHR* 27 2011 8-38

Anderson 1990 *Stan. L. Rev.*

Anderson DL "Note, when restraint requires activism: Partisan gerrymandering and the status quo ante" *Stan. L. Rev.* 42 1990 1549-1559

Anderson 1993 *Third World Legal Studies*

Anderson MR "Litigation and Activism: The Bhopal Case" *Third World Legal Studies* Vol. 12 Article 11 1993 177-187

Andrews 2006 *Osgoode Hall Law Journal*

Andrews PE "The South African Judicial Appointments Process" *Osgoode Hall Law Journal* Volume 44 Number 3 2006 565-572

Appleby 2014 *UNSW Law Journal*

Appleby G "The government as litigant" *UNSW Law Journal* Vol 37(1) 2014 94-124

Barkin 1990 *U. Miami L. Rev.*

Barkin JM "The Hohfeldian approach to law and semiotics" 44 *U. Miami L. Rev*. 1119 1990 1119-1142

Barry 2014 *TSAR*

Barry GN "Impeachment on the Highveld: the dismissal of Chief Justice Kotzé by President Paul Kruger on 16 February 1898" *TSAR* 4 2014

Bax and Van der Tang 1993 "Theses on control"

Bax C and Van der Tang G "Theses on control in Constitutional Law" in Zoethout et al *Control in Constitutional Law* (Kluwer Academic Publishers 1993)

Baxter 1984 *Administrative Law*

Baxter *Administrative Law* (Juta 1984)

Bilchitz and Williams 2012 *SAJHR*

Bilchitz D and Williams A 2012 "Religion and the public sphere: Towards a model that positively recognises diversity" 28 *SAJHR* 146 2012 146-175

Bishop 2008 "Remedies"

Bishop M "Remedies" in Woolman S, Michael Bishop M, and Brickhill J (eds) *Constitutional Law of South Africa* 2nd (Juta 2008)

Blackstone 1765 *Commentaries*

Blackstone W *Commentaries on the laws of England* Book IV (Oxford Clarendon Press 1765)

Bluntschli 2000 *The Theory of the State*

Bluntschli JK *The Theory of the State* (Batoche Books 2000)

Bork 1990 *The Tempting of America*

Bork RH *The Tempting of America: The Political Seduction of the Law* (New York The Free Press 1990)

Bosman and Hosten 1979 *Inleiding tot die Suid-Afrikaanse reg en regsleer*

Bosman F and Hosten WJ *Inleiding tot die Suid-Afrikaanse reg en regsleer* (Butterworth 1979)

Botein 1952 *Trial judge*

Botein B *Trial judge* (Simon and Schuster Inc. New York 1952)

Botha, Van der Walt and Van der Walt 2003 *Rights and Democracy*

Botha H, Van der Walt AJ and Van der Walt CJ *Rights and Democracy in a Transformative Constitution* (African Sun Media 2003)

Boyer 1999 *New Yorker*

Boyer PJ "Big Guns" *New Yorker* May 17 1999

Brownlie 2012 *Basic Documents*

Brownlie I *Basic Documents in International Law* 6th ed (Oxford University Press 2012)

Busky 2000 *Democratic Socialism*

Busky DF *Democratic Socialism: A Global Survey* (Greenwood Publishing 2000)

Cameron 1987 "Legal Standing and the Emergency"

Cameron C "Legal Standing and the Emergency" in Haysom and Mangan (eds) Emergency Law Johannesburg *Centre for Applied Legal Studies* 1987

Cappelletti 985 *Catholic University Law Review*

Cappelletti M "Repudiating Montesquieu? The expansion and legitimacy of Constitutional Justice" *Catholic University Law Review* Volume 35 Issue 1 1985 1-32

Cardozo 1946 *The nature of the judicial process*

Cardozo BN *The nature of the judicial process* 13th Printing (Yale University Press 1946)

Carroll 2002 *Constitutional and Administrative law*

Carroll A *Constitutional and Administrative law* (Harlew Longman 2002)

Chami 2010 *AIAL Forum*

Chami Z "The obligation to act as a model litigant" *AIAL Forum* 64 2010 47-59

Chaskalson 2000 *SAJHR*

Chaskalson A "The Third Bram Fischer Memorial Lecture: Human dignity as a foundational value of our constitutional order" *SAJHR* (16) 193 2000 193-205

Chayes 1976 *Harvard Law Review*

Chayes A "The role of the judge in Public Law Litigation" *Harvard Law Review* Vol 89 No 7 1976 1281-1316

Choudhry 2009 *Constitutional Court Review*

Choudhry S "He had a mandate: The South African Constitutional Court and the African National Congress in a dominant party democracy" *Constitutional Court Review* 2 2009 1-86

Connaghan 2003 *University of Miami Law Review*

Connaghan J "Schlag in Wonderland" *University of Miami Law Review* 543 2003 543-571

Cooper-Stephenson 1990 *Charter Damages Claims*

Cooper-Stephenson K *Charter Damages Claims* (Carswell Toronto 1990)

Corder 1988 *Essays On Law*

Corder H (ed) Essays On Law and Social Practice in South Africa (Juta 1988)

Corder 2004 *Legal Studies*

Corder H "Judicial authority in a changing South Africa" *Legal Studies* Volume 24 Issue 1-2 2004 253-274

Corder 1992 *SALJ*

Corder H "Lessons from (North) America (Beware the 'legalization of politics' and the 'political seduction of the Law')" 109 *SALJ* 204 1992 204-224

Corder 1984 *Judges*

Corder H *Judges at work* (Juta 1984)

Craig 1994 *Administrative Law*

Craig P *Administrative Law* 3rd ed (London Sweet and Maxwell 1994)

Currie and De Waal 2001 *The new constitutional and administrative law*

Currie I and De Waal J *The new constitutional and administrative law* Volume 1 (Juta & Company 2001)

Currie and De Waal 2005 *The Bill of Rights Handbook*

Currie I and De Waal J *The Bill of Rights Handbook* 5th ed (Juta 2005)

Dahl 1957 *J. Pub. L.*

Dahl RA "Decision-making in a democracy: The Supreme Court as a national policy-maker" 6 *J. Pub. L.* 279 1957 279-295

Damaska 1998 *Yale Law School Faculty Scholarship Series*

Damaska MR "Truth in adjudication" *Yale Law School Faculty Scholarship Series* Paper 1575 1998 289-308

Davies 2006 *SAJHR*

Davies DM "Adjudicating the Socio-Economic Rights in the South African Constitution: Towards 'Deference Lite'?" *SAJHR* 22 301 2006 301-327

Davis et al *Fundamental Rights*

Davis D et al *Fundamental Rights in the Constitution* 1st ed (Juta 1997)

Davis 2006 *Acta Juridica*

Davis DM "To Defer and then When? Administrative Law and Constitutional Democracy" *Acta Juridica: Comparing Administrative Justice across the Commonwealth* 2006 23-41

De Beer and Vettori 2007 *PELJ*

De Beer RJ and Vettori S "The enforcement of socio-economic rights" *PELJ* (10)3 2007 2-26

De Klerk 2010 *PELJ*

De Klerk FW "Future perspective on constitutional stability" *PELJ* (13)2 2010 2-13

De Vos and Freedman 2014 *South African Constitutional Law*

De Vos P and Freedman W *South African Constitutional Law in Context* (Oxford University Press 2014)

De Vries 2006 *Politeia*

De Vries ID "Courts: The weakest link in the democratic system in South Africa: A power perspective" *Politeia* Vol 25 No1 2006 41-56

Dean 1986 *SAJHR*

Dean WHB "Our Administrative Law – A dismal science" *SAJHR* 2 1986 164-176

Denvir 1975 *N.C. L. Rev.*

Denvir J "Towards a political theory of public interest litigation" *N.C. L. Rev*. 54 1975-1976 1133-1160

Devenish 2003 *THRHR*

Devenish GE "The doctrine of separation of powers with special reference to events in South Africa and Zimbabwe" *THRHR* 2003 84-99

Devenish 1998 *A Commentary*

Devenish GE *A Commentary on the South African Constitution* (Butterworths Durban 1998)

Dicey 1959 *Introduction to the Study of the Law*

Dicey AV *Introduction to the Study of the Law of the Constitution* 10th ed (Macmillan Press London 1959)

Du Plessis 2005 *PELJ*

Du Plessis L "Learned Staatsrecht from the heartland of the Rechtsstaat" *PELJ* (8)1 2005 77-106

Du Plessis, Penfold and Brickhill 2013 *Constitutional Litigation*

Du Plessis M, Penfold G and Brickhill J *Constitutional Litigation* (Juta 2013)

Dworkin 1977 *Taking Rights Seriously*

Dworkin R *Taking Rights Seriously* (Harvard University Press 1977)

Dworkin 2008 *Is Democracy Possible Here?*

Dworkin R *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press 2008)

Dyzenhaus 1998 *SAJHR*

Dyzenhaus D "Law as Justification: Etienne Mureinik's conception of legal culture" *SAJHR* 14 1998 11-37

Dyzenhaus 1998 *Judging the judges*

Dyzenhaus D *Judging the judges, judging ourselves: Truth, reconciliation and the apartheid legal order* (Oxford: Hart Publishing 1998)

Ellmann 2009 *Constitutional Court Review*

Ellmann S "Making the path of the Law" *Constitutional Court Review* 2 2009 97-143

Ewing *The Modern Law Review*

Ewing KD "The Human Rights Act and Parliamentary democracy" *The Modern Law Review* Vol 62 Issue 1 2003 79-99

Fallon 1984 *N.Y.U. L. Rev.*

Fallon RH "Of justiciability, remedies, and public law litigation: notes on the jurisprudence of Lyons" 59 *N.Y.U. L. Rev.* 1 1984 1-75

Faure and Lane 1996 *Designing new political institutions*

Faure M and Lane J *South Africa: Designing new political institutions* (Sage Publications 1996)

Fernandez-Armesro 1999 *Truth: A History and a guide*

Fernandez-Armesro F *Truth: A History and a guide for the perplexed* (St. Martin's Press New York 1999)

Figgis and Laurence 1990 *Lord Acton*

Figgis JN and Laurence RV *Lord Acton in letter to Bishop Mandell Creighton April 5 1887* published in Historical Essays and Studies (London: Macmillan 1990)

Friedman 2006 *New York University Law and Economics Working Papers*

Friedman B "The Politics of Judicial Review" *New York University Law and Economics Working Papers* Paper 45 2006 257-337

Fuller and Winston 1978 *Harvard Law Review*

Fuller LL and Winston KI "The forms and limits of adjudication" *Harvard Law Review* Vol. 92 No. 2 1978 353-409

Gani 2004 *Advocate*

Gani H "Aspects of practice" *Advocate* April 2004 40-41

Gildenhuys and Knipe 2000 *The Organisation of Government*

Gildenhuys JSH and Knipe A *The Organisation of Government* (Van Schaik 2000)

Giliomee, Myburgh and Schlemmer 2001 *Democratization*

Giliomee H, Myburgh J & Schlemmer L "Dominant party rule, opposition parties and minorities in South Africa" *Democratization* 2001 161-182

Goodsell 2007 *BYU J. Pub. L.*

Goodsell T "Constitution, custom, and creed: Balancing human rights concerns with cultural and religious freedom in today's South Africa" 21 *BYU J. Pub. L*. 109 2007 111-154

Govindjee *et al* 2009 *Introduction to Human Rights*

Govindjee A *et al Introduction to Human Rights Law* (LexisNexis 2009)

Guest 1997 *Ronald Dworkin*

Guest S *Ronald Dworkin* 2nd ed (Edinburgh University Press 1997)

Guthrie 1967 *The Greek Philosophers*

Guthrie WKC *The Greek Philosophers from Thales to Aristotle* (London Methuen 1967)

Hamilton, Madison and Jay 1968 *The Federalist*

Hamilton A, Madison J and Jay J *The Federalist Papers* (Toronto Bantam Books. 1982)

Harcourt 1996 *Harvard Human Rights Journal*

Harcourt BE "Mature adjudication: Interpretive choice in recent death penalty cases" 9 *Harvard Human Rights Journal* 1996 266-268

Harms 2009 *PELJ*

Harms LTC "Judging under a Bill Of Rights" *PELJ* (12)3 2009 2-20

Hart 1961 *The concept of law*

Hart HLA *The concept of law* 2nd ed (Clarendon Press 1961)

Hart 1994 *The concept of law*

Hart HLA *The concept of law* 2nd ed (Clarendon Law Series 1994)

Hertogh and Halliday 2004 *Judicial review*

Hertogh M and Halliday S *Judicial review and bureaucratic impact in future research* (Cambridge University Press 2004)

Hiemstra 2005 *Trilingual Legal Dictionary*

Hiemstra *Trilingual Legal Dictionary* 6th ed (Juta 2005)

Hoexter 2000 *SALJ*

Hoexter C "The future of judicial review in South African administrative law" *SALJ* 117 484 2000 484-519

Hoexter 2012 *Administrative Law*

Hoexter C *Administrative Law in South Africa* 2nd ed (Juta 2012)

Hoexter and Olivier 2014 *The judiciary in South Africa*

Hoexter C and Olivier M *The judiciary in South Africa* (Juta and Company Ltd 2014)

Hoffmann 2011 *Lewis and Kyrou's Handy hints*

Hoffmann IM *Lewis and Kyrou's Handy hints on legal practice* 3rd ed (LexisNexis 2011)

Hohfeld 1913 *Yale L.J.*

Hohfeld WN "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" 23 Yale L.J. 16 1913 16-59

Hulme and Pete 2012 *PELJ*

Hulme D and Pete SA "Vox populi? Vox humbug! – Rising tension between the South African executive and judiciary considered in historical context – Part one" *PELJ* (15) 5 2012 16-43

Hulme and Pete 2012 *PELJ*

Hulme D and Pete SA "Vox populi? Vox humbug! – Rising tension between the South African executive and judiciary considered in historical context – Part two" *PELJ* (15) 5 2012 45-67

Jackson and Tushnet 2006 *Comparative Constitutional Law*

Jackson VC and Tushnet M *Comparative Constitutional Law* 2nd ed (Foundation Press 2006)

Jaffe 1968 *U. Pa. L. Rev.*

Jaffe LJ "The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff" 116 *U. Pa. L. Rev.* 1968 1033-1047

Jones 2002 *Regent University Law Review*

Jones G "Proper judicial activism" *Regent University Law Review* Vol 14 2002 141-179

Jowell and Oliver 2007 *The Changing Constitution*

Jowell J and Oliver D *The Changing Constitution* 6th ed (Oxford 2007)

Kalven and Rosenfield 1941 *University of Chicago Law Review*

Kalven H Jr and Rosenfield M "The contemporary function of class suit" *University of Chicago Law Review* 684 1941 684-721

Kelbrick 2010 *Civil Procedure*

Kelbrick R *Civil Procedure in South Africa* (Kluwer Law International 2010)

Kende 2003 *CHAP. L. REV.*

Kende MS "The South African Constitutional Court's embrace of socio-economic rights: A comparative perspective" 6 *CHAP. L. REV.* 137 160 2003 137-160

Kennedy 1986 *Journal of Legal Education*

Kennedy D "Freedom and constraint in adjudication: A critical phenomenology" *Journal of Legal Education* 1986 518-562

Klare 1998 *SAJHR*

Klare KE "Legal culture and transformative constitutionalism" 14 *SAJHR* 1998 146-188

Klug 2000 *Constituting democracy*

Klug H *Constituting democracy: Law, globalism and South Africa's political reconstruction* (Cambridge University Press 2000)

Koopmans 2003 *Courts and Political Institutions*

Koopmans T *Courts and Political Institutions: A Comparative View* (Cambridge University Press 2003)

Kriel 2013 *DEREBUS*

Kriel K "Public sector lawyers – lawyers first, public sector employees second" *DEREBUS* 12 2013

Labuschagne 2004 *Politeia*

Labuschagne P "State instability in South Africa: a matter of an organic state trapped within constitutional state?" *Politeia* Vol 30 No 2 2011 4-24

Labuschagne 2011 *Politeia*

Labuschagne P "The doctrine of separation of powers and its application in South Africa" *Politeia* Vol 23 No 3 2004 84-102

Labuschagne 2007 *'n Funksionele en strukturele ontleding*

Labuschagne PAH *'n Funksionele en strukturele ontleding van die 1993- en 1996-Grondwet met spesiale verwysing na die Trias Politica-Leerstuk* Doctoral Thesis UNISA (unpublished) 2007

Laing and Wilcox 2014 *The natural law reader*

Laing J and Wilcox R *The natural law reader* (Wiley Blackwell 2014)

Landman 2000 *Judge's Forum Advocate First Term*

Landman A "Impeaching the judges: South Africa's copybook" *Judge's Forum Advocate First Term* 2000 43-44

Langa 2006 *Stell LR*

Langa P "Transformative constitutionalism" *Stell LR* 3 2006 351-360

Le Roux 2009 "Six (individually-named) notes"

Le Roux W "Six (individually-named) notes on the counter-aesthetics of refusal" in Karin van Marle *Refusal, transition and post-apartheid law* (African Sun Media 2009)

Leighninger 2009 *Cape*

Leighninger M Democracy, Growing Up The Shifts That Reshaped Local Politics and Foreshadowed the 2008 Presidential Election *Cape* 5 2009 1-16

Lenta 2004 *SAJHR*

Lenta P "Democracy, Rights Disagreements and Judicial Review" 20 *SAJHR* 1/20 2004 1-31

Liebenberg and Quinot 2012 *Law and poverty*

Liebenberg S and Quinot G *Law and poverty: Perspectives from South Africa and beyond* (Juta 2012)

Little 2001 *Conn. L. Rev.*

Little MA "A Most dangerous indiscretion: The legal, economic, and political legacy of the Governments' tobacco litigation" 33 *Conn. L. Rev.* 1143 2000-2001 1143-1205

Loubser and Midgley 2009 *The Law of Delict*

Loubser M and Midgley R *The Law of Delict in South Africa* (Cape Town Oxford University Press 2009)

Malan 2014 *PELJ*

Malan K "Reassessing judicial independence and impartiality against the backdrop of judicial appointments in South Africa" *PELJ* (17)5 2014 1965-2040

Malherbe and Van Eck 2009 *TSAR*

Malherbe R and Van Eck M "The state's failure to comply with its constitutional duties and its impact on democracy" *TSAR* 2 2009 209-223

Marnewick 2007 *Litigation skills*

Marnewick CG *Litigation skills for South African Lawyers* 2 ed (LexisNexis Butterworths 2007)

Mbazira 2009 *Constitutional Court Review*

Mbazira C "The role of transboundary dialogue: A response to Stephen Ellmann" *Constitutional Court Review* 2 2009

Mbazira 2007 *Enforcing the economic, social and cultural rights in the South African Constitution*

Mbazira C *Enforcing the economic, social and cultural rights in the South African Constitution as justiciable individual rights: the role of judicial remedies* Doctoral Thesis (unpublished) University of the Western Cape 2007

McGregor 2014 *SA Merc LJ*

McGregor M "Blowing the whistle? The future of affirmative action in South Africa" (Part 1) 26 *SA Merc LJ* 60 2014 60-92

McLean 2009 *Constitutional deference*

McLean K *Constitutional deference, courts and socio-economic rights in South Africa PULP* 2009

Michelman 2008 "Constitutional supremacy"

Michelman FI "Constitutional supremacy and appellate jurisdiction in South Africa" in Woolman S, Roux T and Bishop M *Constitutional Law of South Africa* 2nd ed (Juta 2008)

Michelman 2008 "The rule of law"

Michelman FI "The rule of law, legality and the supremacy of the Constitution" in Woolman S, Roux T and Bishop M *Constitutional Law of South Africa* 2nd ed (Juta 2008)

Mnyongani 2012 *Stellenbosch Law Review*

Mnyongani FD "Duties of a lawyer in a multicultural society: A customary law perspective?" *Stellenbosch Law Review* 352 2012 352-369

Mojapelo 2013 *The doctrine of separation of powers*

Mojapelo PM *The doctrine of separation of powers (a South African perspective)* Paper delivered at the Middle Temple South Africa Conference Advocate 2013

Molot 2003 *Yale Law Journal*

Molot JT "An old judicial role for a new litigation era" *Yale Law Journal* Vol. 113 27 2003 27-118

Montesquieu 1748 *The Spirit of the laws*

Montesquieu *The Spirit of the laws* (The Federalist Papers 1748)

Motala and Ramaphosa 2002 *Constitutional Law*

Motala Z and Ramaphosa C *Constitutional Law: Analysis and Cases* (Oxford 2002)

Mureinik 1994 *SAJHR*

Mureinik AA "Bridge to Where? Introducing the Interim Bill of Rights" *SAJHR* 10 31 1994 31-48

Mureinik 1986 *SALJ*

Mureinik E "Administrative Law in South Africa" *SALJ* 103 615 1986 615-645

Mureinik 1988 "Dworkin and apartheid"

Mureinik E "Dworkin and apartheid" in Corder H (ed) *Essays on Law and Social Practice* (Juta 1988)

Nishihara 2001 *PELJ*

Nishihara H "The significance of constitutional values" *PELJ* (4)1 2001 1-16

Nordht 2001 *DJCIL*

Nordht R "Group actions in Sweden: Reflections on the purpose of civil litigation, the need for reforms, and a forthcoming proposal" 11 *DJCIL* 381 2001 381-404

O'Regan 2008 "On the reach of the Constitution"

O'Regan K "On the reach of the Constitution and the nature of constitutional jurisdiction: A reply to Frank Michelman" in Woolman S and Bishop M (eds) *Constitutional Conversations* (PULP 2008)

O'Regan 2005 *PELJ*

O'Regan K "Checks and balances reflections on the development of the doctrine of separation of powers under the South African Constitution" *PELJ* (8)1 2005 120-150

Okpaluba and Osode 2010 *Government liability*

Okpaluba C and Osode PC *Government liability* (Juta 2010)

Olmstead 1990 *History of Religion*

Olmstead CE *History of Religion in the United States* Prentice-Hall Englewood Cliffs N.J. 1990

Oseko 2011 *Judicial independence in Kenya*

Oseko JO *Judicial independence in Kenya: constitutional challenges and opportunities for reform* Doctoral Thesis (unpublished) University of Leicester 2011

Pennock and Smith 1964 *Political science*

Pennock JR and Smith DG *Political science: An introduction* (New York: Macmillan 1964)

Peté *et al* 2011 *Civil Procedure*

Peté *et al Civil Procedure: a Practical Guide* 2nd ed (Oxford 2011)

Pieterse 2004 *SAJHR*

Pieterse M "Coming to terms with the judicial enforcement of socio-economic rights" *SAJHR* 20 3 2004 418-447

Plasket 2009 *Annals of the American Academy of Political and Social Science*

Plasket C "South Africa (a country report entitled Representative Standing in South African Law" *Annals of the American Academy of Political and Social Science* 256 (2009)

Posner 1990 *The problems of jurisprudence*

Posner RA *The problems of jurisprudence* (Harvard University Press 1990)

Pretorius 2010 *SAJHR*

Pretorius JL "Fairness in transformation: A critique of the Constitutional Court's affirmative action jurisprudence" *SAJHR* 536 2010 536-570

Radbruch 2006 *Oxford Journal of Legal Studies*

Radbruch GR "Five minutes of legal philosophy (1945)" *Oxford Journal of Legal Studies* Vol 26 no 1 2006 13-15

Ranchod 2007 *Policy: Issues & Actors*

Ranchod K "State-civil society relations in South Africa: some lessons from engagement" *Policy: Issues & Actors* Volume 20 no 7 2007 1-23

Rautenbach and Malherbe 1996 *Constitutional Law*

Rautenbach IM and Malherbe EFJ *Constitutional Law* 2nd ed (Butterworths 1996)

Roach 1995 *Constitutional Remedies in Canada*

Roach KW *Constitutional Remedies in Canada* (Ontario Canada Law Book Inc 1995)

Roskin 2015 *e-Study Guide for: Political Science*

Roskin MG *e-Study Guide for: Political Science: An Introduction* Chapter 3: Political ideologies Content 13th ed (Technologies Inc Publications 2015)

Roux 2002 *Forum Constitutionnel*

Roux T "Understanding Grootboom — A response to Cass R Sunstein" *Forum Constitutionnel* 12:2 2002 41-51

Roux 2013 *The politics of principle*

Roux T *The politics of principle* (Cambridge University Press 2013)

Scheuerman 1993 *Oregon Law Review*

Scheuerman KE "Rethinking judicial elections" *Oregon Law Review* 72 459 1993 459-485

Schmitt 1927 *The Concept of the Political*

Schmitt C The Concept of the Political Chapter 7 in *Crisis of Parliamentary Democracy* (Rutgers University Press 1927)

Schokman, Creasey and Mohen 2012 *Short guide: Strategic litigation*

Schokman B, Creasey D and Mohen P *Short guide: Strategic litigation and its role in promoting and protecting human rights* (Advocates for International Development 2012)

Shapiro 1981 *Courts: A comparative and political analysis*

Shapiro M *Courts: A comparative and political analysis* (The University of Chicago Press 1981)

Southall 2014 *Africa Spectrum*

Southall R "Threats to Constitutionalism by Liberation Movements in Southern Africa" 2014 *Africa Spectrum* 79-99

Sunstein 2001 *Constitutional Forum*

Sunstein CR "Social and economic rights? Lessons from South Africa" *Constitutional Forum* 11:4 2001 123-132

Sweet 2003 *Faculty Scholarship Series*

Sweet AS "Why Europe rejected American judicial review - and why it may not matter" *Faculty Scholarship Series* Paper 1297 2003 2744-2780

Tacitus 1894 *Germania*

Tacitus *Germania* Aberdeen Translated into English by K. B. Townshend (University Press 1894)

Thornton 1996 *Legislative Drafting*

Thornton GC *Legislative Drafting* 4th edition (Butterworths 1996)

Tobias 2008 *U. Rich. Rev*

Tobias C "Reconsidering Virginia's judicial selection" 43 *U. Rich. Rev.* 37 2008 37-49

Turley *HARV. J. ON LEGIS*

Turley JA "Crisis of faith: Tobacco and the Madisonian democracy" *HARV. J. ON LEGIS* 37 2000 433-482

Unknown 2008 *Mail & Guardian*

Unknown "ANC meets forum over Merafong demarcation" *Mail & Guardian* 25 Jun 2008

Van der Vyver 2000 *Emory Int'l L. Rev.*

Van der Vyver "State-sponsored proselytization: A South African experience" 14 *Emory Int'l L. Rev.* 779 815 2000 797-848

Van der Westhuizen 2008 *AHRLJ*

Van der Westhuizen J "A few reflections on the role of courts, government, the legal profession, universities, the media and civil society in a constitutional democracy" *AHRLJ* 8 2008 251-272

Van Doren 1986 *SALJ*

Van Doren JW "Critical Legal Studies and South Africa" *SALJ* 106 1986 648-661

Van Heerden, Govindjee and Holness 2014 *Speculum Juris*

Van Heerden A, Govindjee A and Holness D "The constitutionality of statutory limitation to the right of access to information held by the state in South Africa" *Speculum Juris* (1) 2014 27-54

Van Marle 2010 *SALJ*

Van Marle K "Jurisprudence, friendship and the university as heterogeneous public space" 127 *SALJ* 628 2010 628-645

Van Zyl 2009 *PELJ*

Van Zyl D "The judiciary as a bastion of the legal order in challenging times" *PELJ* (12)2 2009 2-13

Vanderbilt 1953 *Nw. U.L. Rev.*

Vanderbilt AT "The essentials of a sound judicial system" 48 *Nw. U.L. Rev.* 1 1953 1-15

Venter 2007 *Speculum Juris*

Venter F "Judges, politics and the separation of powers" *Speculum Juris* (1) 2007 60-74

Venter 2003 *PELJ*

Venter F "Politics, socio-economic issues and culture in constitutional adjudication" *PELJ* (6)2 2003 129-166

Venter 2012 *McGill Law Journal*

Venter F "South Africa: A Diceyan Rechtsstaat?" *McGill Law Journal / Revue de droit de McGill* Vol 57 no 4 2012 727-747

Venter 2005 *ZaöRV*

Venter F "The Politics of Constitutional Adjudication" *ZaöRV* 65 2005 129-166

Venter 2001 *PELJ*

Venter F "Utilizing constitutional values in constitutional comparison" *PELJ* (4)1 2001 1-22

Venter 2015 *Constitutionalism and religion*

Venter F *Constitutionalism and religion* (Edward Elgar Publishing 2015)

Vick 2002 *Texas International Law Journal*

Vick DW "The Human Rights Act and the British Constitution" *Texas International Law Journal* Volume 3 2002 329-372

Volcansek 2007 *Fordham Urb. L.J.*

Volcansek ML "Appointing judges the European way" *Fordham Urb. L.J.* Vol XXXIV 2007 363-385

Wade and Bradley 1985 *Constitutional and Administrative law*

Wade ECS and Bradley AW *Constitutional and Administrative law* 10th ed (Longman 1985)

Weerda 1960 *Calvin*

Weerda J *Calvin Evangelisches Soziallexikon* 3rd ed (Stuttgart col. 210 1960)

Wesson 2004 *SAJHR*

Wesson M "Grootboom and beyond: Reassessing the socioeconomic jurisprudence of the South African Constitutional Court" 20 *SAJHR* 2004 284-308

Whitman 1980 *Mich Law Review*

Whitman CB "Constitutional Torts" *Mich Law Review* 79 1980 5-71

Wolf 1946 *Tradition*

Wolf HJ "The origin of judicial litigation among the Greeks" *Tradition* Vol 4 1946 31-87

Woolman 2008 "Application"

Woolman S "Application" in Woolman S, Roux T and Bishop M (eds) *Constitutional Law of South Africa* 2nd ed (Juta 2008)

Woolman and Bishop 2008 *Constitutional Conversations*

Woolman S and Bishop M (eds) *Constitutional Conversations* (PULP 2008)

Woolman, Roux and Bishop 2008 *Constitutional Law*

Woolman S, Roux T and Bishop M (eds) *Constitutional Law of South Africa* 2nd ed (Juta 2008)

Woolman 2007 *SALJ*

Woolman S "The amazing, vanishing Bill of Rights" *SALJ* Vol 124 4 2007 762-794

Woolman 2007 *The selfless Constitution*

Woolman SC *The selfless Constitution: Experimentation & flourishing as the foundations of South Africa's basic law* Doctoral Thesis (Unpublished) University of Pretoria 2007

Case law

South Africa

Abahlali baseMjondolo Movement SA v Premier of the Province of KwaZulu-Natal 2010 (2) BCLR 99 (CC)

Abdi v Minister of Home Affairs (734/10) [2011] ZASCA 2 (2011)

Adbro Investment Company Limited v Minister of the Interior 1961 (3) 283 (T)

*Administrator, Transvaal, and Others v Zenzile and Oth*ers 1991 (1) SA 21 (A)

Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC)

AS v Minister of Home Affairs (SGHC) unreported case no 101/2010 (12 January 2010)

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223

August and Another v Electoral Commission and Others 1999 (3) SA 1 (CC)

Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others 1996 (4) SA 671 (CC)

Bacela v MEC for Welfare, Eastern Cape Provincial Government 1998 1 All SA 525 (E)

Bakamundo v Minister of Home Affairs (SGHC) unreported case no 17271/2009 (12 May 2009)

Bannatyne v Bannatyne (Commission for Gender Equality, as amicus curiae) 2003 (2) SA 363 (CC)

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490 (CC)

Beinash v Ernst & Young 1999 (2) SA 116 (CC)

Body Corporate - Montpark Drakens v Smuts (22380/05) 2006 ZAGPHC 38

Bosman v Bredell 1932 CPD 385

Brenner's Service Station and Garage (Pty) Ltd v Milne and Another 1983 (4) SA 233 (W)

Bushula and others v Permanent Secretary, Department of Welfare, Eastern Cape and Another 2000 (2) SA 849 (E)

Cape Society v Vorster 1949 (3) SA 421 (C)

Carmichele v Minster of Safety and Security and Another 2003 (2) SA 656 (CC)

Centre for Child Law and Others v Minister of Basic Education and Others 2013 (3) SA 183 (ECG)

Children's Institute v Presiding Officer, Children's Court, Krugersdorp, and Others 2013 (2) SA 620 (CC)

*Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Other*s 2013 (2) SA 213 (SCA)

Chirwa v Transnet Limited and Others (2008) 29 ILJ 73 (CC)

Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC)

City Council of Pretoria v Walker 1998 (3) BCLR 257 (17 February 1998)

City of Cape Town v South African National Roads Agency Ltd and Others 2015 (3) SA 386 (SCA)

City of Johannesburg v Rand Properties (Pty) Ltd 2006 6 BCLR 728 (W)

Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer Port Elizabeth Prison and Others 1995 (4) SA 631 (22 September 1995)

Committee for Justice and Liberty v National Energy Board (1976) 68 DLR (3d) 716

Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others 2000 (3) SA 936 (CC)

De Lange v Smuts 1998 3 SA 785 (CC)

De Vos and Another v Minister of Constitutional Development and Others; Snyders and Another v Minister of Constitutional Development and Others Case No 4502/10; Case No 5825/14 WC 2015

Democratic Alliance v Ethekwini Municipality 2012 (2) SA 151 (SCA)

Democratic Alliance v President of the Republic of South Africa 2010 ZAGPPHC 194

Democratic Alliance v South African Broadcasting Corporation Ltd and Others 2015 (1) SA 551 (WCC)

Disciplinary Committee for Legal Practitioners v Murorua and Another 2012 (2) NR 481 (HC)

Doctors for Life International v Speaker of the National Assembly and Others 2006 (6) SA 416 (CC)

DS v RM 2015 (3) SA 424 (WCC)

Du Plessis v De Klerk 1996 3 SA 850 (CC)

East London Local Transitional Council v MEC of Health, Eastern Cape 2001 3 SA 1133 (CK)

East Zulu Motors (Pty) v Empangeni/Ngwlezane Transitional Local Council and Others 1998 (2) SA 61 (CC)

Eveleth v Minister of Home Affairs & Another 2004 (11) BCLR 1223 (T)

Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another 2002 (4) SA 613 (CC)

Ex parte Minister of Social Development 2006 5 BCLR 604 (CC)

Ex parte Nell 1963 (1) SA 754 (A)

Executive Council, Western Cape Legislature v President of the Republic of South Africa 1995 (4) SA 877 (CC)

Executors of McCorkindale v Bok 1884 1 SAR 202

Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC)

Faircape Property Developers (Pty) Ltd v Premier, Western Cape 2002 6 SA 180 (C)

Federation of Governing Bodies of South African Schools (Gauteng) v MEC for Education Gauteng 2002 1 SA 660 (T)

Fedsure Life Assurance & others v Greater Johannesburg Transitional Metropolitan Council and Others Case 1999 (1) SA 374

Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC)

First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance 2002 (7) BCLR 702 (16 May 2002)

Fose v Minister of Safety and Security 1997 (3) SA 786 (CC)

Freedom Under Law v National Director of Public Prosecutions and Others [2013] 4 All SA 657 (GNP)

Gaertner and Others v Minister of Finance and Others 2013 (4) SA 87 (WCC)

Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng 2013 (5) SA 24 (SCA)

General Council of the Bar v Matthys 2002 (5) SA 1 (ECD)

Giant Concerts CC v Minister of Local Government, Housing and Traditional Affairs, KwaZulu-Natal and Others 2011 (4) SA 164 (KZP)

Giant Concerts CC v Rinaldo Investments and Others 2013 (3) BCLR CC

Gory v Kolver NO and Others 2007 (4) SA 97 (CC)

Governing Body of Mikro Primary School v Western Cape Minister of Education 2005 2 All SA 37 (C)

Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC)

Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board 1950 (2) SA 420 (A)

Gundwana v Steko Development CC and Others 2011 (3) SA 608 (CC)

Hailulu v Anti-Corruption Commission and Others 2011 (1) NR 363 (HC)

Harris v Minister of the Interior 1952 (4) SA 769 (A)

Head of Department of Education: Free State Province v Welkom High School 2014 (12) SA (CC)

Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo 2010 (2) SA 415 (CC)

Helen Suzman Foundation v Judicial Service Commission 2015 (2) SA 498 (WCC)

Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others 2015 (1) BCLR 1 (CC)

Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council and Others 2002 (6) SA 66 T

Hoffmann v South African Airways 2001 (1) SA 1 (CC)

Hugh Glenister v President of the Republic of South Africa 2011 (3) SA 347 (CC)

In re: Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 CC

Independent Electoral Commission v Langeberg Municipality 2001 (3) SA 925 (CC)

Institute for Democracy in South Africa v African National Congress 2005 (5) SA 39 (CC)

Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others 2001 (1) SA 545 (CC)

Islamic Unity Convention v Independent Broadcasting Authority and Others 2002 (4) SA 294 (CC)

Jacobs en 'n Ander v Waks en Andere 1992 (1) SA 521 (A)

Jaga v Dönges, N.O. and Another 1950 (4) SA 653 (A)

Jayiya v MEC for Welfare, Eastern Cape 2004 2 SA 611 (SCA)

Johannesburg Consolidated Investment Co Ltd v Johannesburg Town Council 1903 TS 111

Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others 2010 (6) SA 182 (CC)

JT Publishing v Minister of Safety and Security 1997 (3) SA 514 CC

Judicial Service Commission and Another v Cape Bar Council and Another 2012 (11) BCLR 1239 (SCA)

Justice Alliance of South Africa v President of the Republic of South Africa 2011 (5) SA 388 (CC)

K v Minister of Safety and Security 2005 6 SA 419 (CC)

Kate v MEC for Department of Welfare, Eastern Cape 2005 1 SA 141 (SE)

Kekana v Society of Advocates of South Africa 1998 (4) SA 649 (SCA)

Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others 2004 6 SA 505 (CC)

Khumalo and Others v Holomisa 2002 (5) SA 401 (CC)

Khunou and Others v M Fihrerand & Son (Pty) Ltd and Others 1982 (3) SA 353 (W)

Krygkor Pensioenfonds v Smith 1993 (3) SA 459 (A)

Kyle v Legal Practitioners' Complaints Committee (1999) 21 WAR 56

Laerskool Middelburg v Departementshoof Mpumalanga Departement van Onderwys 2003 4 SA 160 (T)

Law Society of the Cape of Good Hope v Budricks 2003 (2) SA 11 (SCA) 2003 (2) SA

Lawyers for Human Rights v Minister of Home Affairs 2004 (4) SA 125 CC

Le Roux and Others v Dey 2011 (3) SA 274 (CC)

Li Kui Yu v Superintendent of Labourers 1906 TS 181

Lombard v Minister van Verdediging 2002 3 SA 242 (T)

Logbro Properties CC v Bedderson NO 2003 (2) SA 460 (SCA)

Lord v Allison (1986) 3 BCLR (2d) 300 (SC)

M & G Media Ltd v President of the Republic of South Africa 2013 (3) SA 591 (GNP)

M & G Limited and Another v President of the Republic of South Africa and Others [2010] ZAGPPHC 43 Case No 1242/09 4 June 2010 (unreported)

Machumela v Santam Insurance CO LTD 1977 (1) SA 660 (A)

Magidimisi v Premier of the Eastern Cape 2006 JOL 17274 (CK)

Magistrate Pangarker v Botha and Another 2015 (1) SA 503 (SCA)

Mahambehlala v MEC for Welfare, Eastern Cape 2002 1 SA 342 (SE)

Makwickana v Ethekwini Municipality and Others 2015 (3) SA 165 (KZD) C 2015 (3) SA

Matatiele Municipality and Others v President of the Republic of South Africa and Others 2006 (5) SA 47 (CC)

Maritzburg College v CR Dlamini NO case no 2089/2004 (NPD) (not reported)

Marlboro Crisis Committee and others v City of Johannesburg 2012 ZAGPJHC 187

Masiya v Director of Public Prosecutions 2007 (5) SA 30 (CC)

Mateis v Ngwathe Plaaslike Munisipaliteit 2003 4 SA 361 (SCA)

Matiso v Minister of Defence 2005 6 SA 267 (Tkh)

Mbanga v MEC for Welfare Eastern Cape 2001 8 BCLR 821 (SE)

Meadow Glen Home Owners Association and Others v City of Tshwane Metropolitan Municipality and Another 2015 1 All SA 299 (SCA)

MEC for Education: KwaZulu Natal v Pillay 2008(1) SA 474 (CC)

MEC for the Department of Welfare v Kate 2006 (4) SA 478 (SCA)

MEC for Social Development Eastern Cape, Head of the Department of Social Development Eastern Cape and Minister of Justice v Magidimisi case no 2180/04 (SECLD) (not reported)

Merafong Demarcation Forum v President of the Republic of South Africa 2008 (5) SA 171 (CC)

Minister for Justice and Constitutional Development v Nyathi and Others 2010 (4) BCLR 293 (CC)

Minister of Defence v Potsane and Another; Legal Soldier (Pty) Ltd and Others v Minister of Defence and Others 2002 (1) SA 1 (CC)

Minister of Education v Harris 2001 11 BCLR 1157 (CC)

Minister of Education, Western Cape and Another v Beauvallon Secondary School and Others 2015 (2) SA 154 (SCA)

Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another 2003 (6) SA 407 (SCA)

Minister of Health v Brückner 2007 5 BLLR 418 (LAC)

Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others 2006 (8) BCLR 872 (CC)

Minister of Health and Others v Treatment Action Campaign (No 2) 2002 5 SA 721 (CC)

Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others 2005 (3) SA 280 (CC)

Minister of Home Affairs and Others v Somali Association of South Africa Eastern Cape (SASA EC) and Another (831/2013) [2015] ZASCA 35 (25 March 2015)

Minister of Justice and Constitutional Development and Others v The Southern Africa Litigation Centre 2016 (1) SACR 161 (GP)

Minister of Safety and Security v De Lima 2005 (5) SA 575 (SCA)

Minister of Safety and Security v Hamilton 2004 (2) SA 216 (SCA)

Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA)

Minister of the Interior and Another v Harris and Others 1952 (4) SA 769 (A)

Mistry v Interim National Medical and Dental Council of South Africa and Others 1997 (7) BCLR 933 (D)

Mistry v Interim National Medical and Dental Council of South Africa 1998 7 BCLR 880 (CC)

Mjeni v Minister of Health and Welfare, Eastern Cape 2000 4 SA 446 (TKH)

Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd 3 All SA 169 (SCA) 2004

Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening) 2001 (3) SA 893 (CC)

Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development intervening (Women's Legal Centre as amicus curiae) 2001 (4) SA 491 (CC)

Molaudzi v S 2015 (2) SACR 341 (CC)

Motswagae v Rustenburg Local Municipality (1413/2009) [2011] ZANWHC 61 (15 September 2011)

Motswagae and Others v Rustenburg Local Municipality and Another 2013 (3) BCLR 271 (CC)

Mpofu v MEC for Welfare and Population Development, Gauteng case no 99/2848 (W) (not reported)

Mukaddam v Pioneer Foods (Pty) Ltd and Others 2013 (5) SA 89 (CC)

Myburgh Park Langebaan (Pty) Ltd v Langebaan Municipality 2001 (4) SA 1144 (C)

N v Government of Republic of South Africa 2006 6 SA 575 (D)

Nabal v Bok 1883 1 SAR 60

NAPTOSA and Others v Minister of Education Western, Western Cape Government and Others 2001 (2) SA 112 (C)

National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 1996 (1) SA 984 (CC)

National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 1999 (3) BCLR 280 (C)

*National Coalition for Gay & Lesbian Equality v Minister of Home Aff*airs 2000 1 BCLR 39 (CC)

National Director of Public Prosecutions v Freedom Under Law 2014 (2) SACR 107 (SCA)

National Director of Public Prosecution v Zuma 2009 2 SA 277 SCA

National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others 2003 (3) SA 1 (CC)

Ndevu v MEC for Welfare, Eastern Cape case no 597/2002 (SECLD) (not reported)

New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang and Another NNO; Pharmaceutical Society of South Africa and Others v Minister of Health and Others 2005 (2) SA 530 (C)

New National Party of South Africa v Government of the Republic of South Africa and Others 1999 (3) SA 191 (CC)

Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape 2001 2 SA 609 (E)

Nyathi v MEC for Department of Health, Gauteng and Another [2008] ZACC 8

Nyathi v MEC for the Gauteng Department of Health & Another 2008 (5) SA 94 (CC)

Oostelike Gauteng Diensteraad v Transvaal Munisipale Pensioenfonds en Ander 1997 (8) BCLR 1066 T

Paulsen and Another v Slip Knot Investments 777 (Pty) Limited [2015] ZACC 5

Permanent Secretary Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others 2001 (4) SA 1184 (SCA)

Pharmaceutical Manufacturers Association of SA and Another in Re: The Ex Parte Application of The President of The Republic of South Africa and Others 2000 (2) SA 674 (CC)

Pheko and Others v Ekurhuleni Metropolitan Municipality 2012 (2) SA 598 (CC)

Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division and Others 2003 (3) SA 345 (CC)

Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC)

Premier, KwaZulu-Natal, and Others v President of the Republic of South Africa and Others 1996 (1) SA 769 (CC); 1995 (12) BCLR 1561 (CC)

Premier of Mpumalanga v Executive Committee of State-aided Schools, Eastern Transvaal 1999 (2) SA 91 (CC)

President of the Republic of South Africa and Others v M & G Media Limited Case CCT 03/11 [2011] ZACC 32

President of the Republic of South Africa and Others v M & G Media Ltd 2011 (2) SA 1 (SCA)

President of the Republic of South Africa and Others v M & G Media Ltd 2012 (2) SA 50 (CC)

President of the RSA and Others v M & G Media LTD 2015 (1) SA 92 (SCA)

President of the Republic of South Africa v South African Rugby Football Union 1999 4 SA 147 (CC)

Prinsloo v Van der Linde and Another 1997 (3) SA 1012 (CC)

Prokureursorde, Transvaal v Van der Merwe 1985 (2) SA 208 (T)

Prokureursorde van Die Oranje-Vrystaat v Schoeman 1977 (4) SA 588 (O)

Qozeleni v Minister of Law and Order 1994(1) BCLC 75 (E)

Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 359 (CC)

Rangani v Superintendent-General, Department of Health and Welfare, Northern Province 1999 (4) SA 385 (T)

Rates Action Group v City of Cape Town 2004 12 BCLR 1328 (C)

Rinaldo Investments (Pty) Ltd v Giant Concerts CC and Others [2012] 3 All SA 57 (SCA)

Reuters Group PLC v Viljoen NO and Others 2001 (2) SACR 519 (C)

S v Acheson 1991 (2) SA 805 (Nm HC)

S v Bhulwana; S v Gwadiso 1995 (2) SACR 748 (CC)

S v Boesak 2001 (1) SA 912 (CC)

S v Makwanyane and Another 1995 (3) SA 391 (CC)

S v Malumo and Others (In Re Ndala) 2014 (3) NR 690 (HC)

S v Mamabolo 2001 (3) SA 409 (CC)

S v Manamela and Another (Director-General of Justice intervening) 2000 (3) SA 1 (CC)

S v Mhlungu and Others 1995 (3) SA 867 (CC)

S v Ntuli 1996 (1) BCLR 141 (CC)

S v Staggie 2012 (2) SACR 311 (SCA)

S v Van Niekerk 1972 3 SA 706 (A)

S v Zuma and Others 1995 (2) SA 642 (CC)

SA Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development and Others, and Another Application 2015 (2) SA 430 (WCC)

Sanderson v Attorney-General, Eastern Cape 1998 (2) SA 38 (CC)

Schoeman v Thompson 1927 WLD 282

Schoonbee v MEC for Education, Mpumalanga 2002 4 SA 877 (T)

Shaik v The State (1) [2006] SCA 134 (RSA)

Somyani v MEC for Welfare, Eastern Cape case no 1144/01 (SECLD) (not reported)

Soobramoney v Minister of Health (Kwazulu-Natal) 1998 (1) SA 765 (CC)

South African Association of Personal Injury Lawyers v Heath 2001 (1) BCLR 77 (CC)

S*outh African Commercial Catering and Allied Workers Union v Irvin and Johnson Ltd* 2000 (3) SA 705 (CC)

South African Liquor Traders Association v Chairperson, Gauteng Liquor Board 2006 8 BCLR 901 (CC)

South African National Defence Force Union v Minister of Defence 1999 (3) BCLR 321 T

South African Defence Force Union v Minister of Defence 1999 (4) SA 469 (CC)

South African Police Service v Solidarity OBO Barnard 2014 (6) SA 123 (CC)

Sparks v Sparks 1998 (4) SA 714 (W)

Steenkamp v Provincial Tender Board of the Easter Cape 2007 (3) BCLR 280 (CC)

Steyn v The State 2001 (1) SA 1146 (CC)

Speaker of the National Assembly v De Lille 1999 4 All SA 241 (A)

Suid-Afrikaanse Onderwysunie v Departementshoof, Departement van Onderwys, Vrystaat 2001 3 SA 100 (O)

The Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Others v Ngxuza and Others 2001 (4) SA 1184 (SCA)

Thebus and Another v S 2003 (6) SA 505 (CC)

Theewaterskloof Holdings (Pty) Ltd, Glaser Afdeling v Jacobsen en Andere 2002 (3) SA 401 (LCC)

Thiagraj Soobramoney v Minister of Health: Province of KwaZulu-Natal D&CLD 5846/97, 21 August 1997 (unreported)

Total Computer Services (Pty) Ltd v Municipal Mayor, Potchefstroom Local Municipality and Others 2008 (4) SA 346 (T)

Toto v Special Investigating Unit and Others 2001 (1) SA 673 (E) (2000 (5) BCLR 553)

York Timbers Ltd v Minister of Water Affairs and Forestry and Another 2003 (4) SA 477 (T)

Transvaal Agricultural Union v Minister of Land Affairs 1997 (2) SA 621 (CC)

Transvaal Agricultural Union v The Minisiter of Land Affairs and the Commission of Restitution of Land Rights 1996 (12) BCLR 1573 (CC)

Trustees, Biowatch Trust v Registrar: Genetic Resources, and Others 2005 (4) SA 111 (T)

Trustees in the Insolvent Estate of Theodore Doms v Bok NO 1887 2 SAR 189

United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others intervening; Institute for Democracy in South Africa and Another as Amici Curiae) (2) 2003 (1) SA 495 (CC)

Van Der Merwe and Another v Taylor NO and Others 2008 (1) SA 1 (CC)

Van Deventer v National Director of Public Prosecutions NO (64268/2013) [2015] ZAGPPHC 550 (7 August 2015)

Van Eeden v Minister of Safety and Security 2003 1 SA 389 (SCA)

Van Niekerk v Pretoria City Council 1997 (3) SA 839 (T)

Van Rooyen v The State Case CCT 21/01 2002 (CC)

Van Straaten v President of the Republic of South Africa and Others 2009 (3) SA 457 (CC)

Veeron Rambali v Ethekwini Municipality and Others case no. 11162/09 (KZD) (unreported)

Vulindlela Furniture Manufacturers (Pty) Ltd v MEC Department for Education and Culture, Eastern Cape 1998 4 SA 908 (TK)

Vumazonke v MEC for Social Development, Eastern Cape 2005 6 SA 229 (SE)

Walker v Stadsraad van Pretoria 1997 (4) SA 189 (T)

Whittaker v Roos and Another 1911 TS 1092 at 1102

Xiayua v Minister of Home Affairs case number 39412/06 (T) (not reported)

York Timbers Ltd v Minister of Water Affairs and Forestry 2003 4 SA 477 (T)

Zimbabwe Exiles Forum v Minister of Home Affairs [2011] ZAGPPHV 29

Zantsi v Council of State, Ciskei and Others 1995 (4) SA 615 (CC)

Zondi v Member of the Executive Council for Traditional and Local Government Affairs and Others 2004 (5) BCLR 547 (N)

Zondi v MEC, Traditional and Local Government Affairs and Others 2005 (4) BCLR 347 (CC)

Australia

Deputy Commissioner of Taxation v Clear Blue Developments Pty Ltd (No 2) [2010] FCA 1124

Hughes Aircraft Systems International v Airservices Australia (1997) 76 FCR 151

Melbourne Steamship Co Ltd v Moorehead (1912) 15 CLR 333

Morely & Ors v Australian Securities and Investments Commission [2010] NSWCA 331

P & C Cantarella [1973] 2 NSWLR 366

R v Martens [2009] QCA 351

Canada

Brown v British Columbia (Minister of Health) (1990) 48 CRR 137

Collin v Lussier (1983) 6 CRR 89

Manitoba Provincial Judges Assn. v Manitoba (Minister of Justice) 1997 3 SCR 3

Nelles v Ontario 60 DLR (4th) 609 1989 (SCC)

Patenaude v Roy 123 DLR (4th) 78 (1994) (Que CA)

R v S (R.D.) (1997) 118 CCC (3d) 353

R v Big M Drug Mart Ltd (1985)18 DLR (4th) 321

R v Mills (1986) 29 DLR (4th) 161

Reference re: Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re: Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island; R. v. Campbell; R. v. Ekmecic; R. v. Wickman; Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice) 1997 3 S.C.R. 3. 123

Saskatchewan Human Rights Commission v Kodellas (1989) 60 DLR (4th) 143

Schachter v Canada (1991) 93 DLR (4th) 1, [1992] 2 SCR 679

Vespoli v The Queen 12 CRR 185 1984 (Fed CA)

Vorvis v ICBC 58 DLR (4th) 193 1989 (SCC)

Namibia

Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others 2013 (2) NR 390 (HC)

Vaatz: In re Schweiger v Gamikaub (Pty) Ltd 2006 (1) NR 161 (HC)

United Kingdom

Bremer Vulcan Schiffbau und Maschinenfabrik v South India Shipping Corp [1981] 1 All ER 289

Kuljer v EU Council (no 2) [2002] 1 WLR 1941

Minister of Home Affairs v Fisher (1980) AC 319(PC)

R v Home Secretary, Ex Fire Brigades Union 1995 2 513

Taylor and Another v Lawrence and Another [2002] 2 All ER 353

Taylor and Another v Lawrence and Another [2002] 2 All ER 353

United States of America

Arizonians for Official English v Arizona 520 US 43 1997

Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics 403 US 388, 390-1, 409 (1971)

Brown v Leyds (1897) 4 Off Rep 17

Carey v Piphus 435 US 247 (1978)

Carlson v Green 446 US 14, 28, 28 n 1 (1980)

Citizens United v Federal Election Commission 130 S. Ct. 876 (2010)

Davis v Passman 442 US 228 (1979)

Marbury v. Madison 5 U.S. 137 1803

Milliken v Bradley 433 US 267 (1977)

Monroe v Pape 365 US 167 1961

Newport v Facts Concerts Inc 453 US 247, 271 (1981)

Republican Party of Minnesota v White 536 U.S. 765 (2002)

United States v Lee 106 US 196 223 (1882)

United States v Morgan 313 U.S. 409 (1941)

Uricich v Kolesar 54 Ohio App 309 7 N.E. 2d 413

Youngstown Sheet & Tube Co v Sawyer 343 US 579 610 (1951)

Legislation

South Africa

Admission of Advocates Act 74 of 1964

Aliens Control Act 96 of 1991

Attorneys Act 53 of 1979

Businesses Act 71 of 1991

Constitutional Court Complementary Act 13 of 1995

Constitution of the Republic of South Africa, 1996

Constitution of the Republic of South Africa Act 200 of 1993

Constitution Twelfth Amendment Act of 2005

Constitution Seventeenth Amendment Act of 2012

Cross-boundary Municipalities Laws Repeal and Related Matters Act 23 of 2005

Customs and Excise Act 91 of 1964

Defence Act 44 of 1957

Disaster Management Act 57 of 2002

Electoral Act 73 of 1998

Electoral Laws Amendment Act 34 of 2003

Genetically Modified Organisms Act 15 of 1997

Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002

Independent Broadcasting Authority Act 153 of 1993

Informal Trading By-law (KwaZulu-Natal), 2014

Intergovernmental Relations Framework Act 13 of 2005

Intestate Succession Act 81 of 1987

Judicial Matters Second Amendment Act 122 of 1998

Judicial Service Commission Act 9 of 1994

Judicial Service Commission Amendment Act 20 of 2008

Labour Relations Act 66 of 1995

Legal Practice Act 28 of 2014

Local Authorities Ordinance Act 25 of 1974

Local Government Transition Act 209 of 1993

Magistrates' Courts Act 32 of 1944

Magistrates Act 90 of 1993

Medicines and Related Substances Act 101 of 1965

Medicines and Related Substances Control Amendment Act 90 of 1997

National Prosecuting Authority Act 32 of 1998

Pound Ordinance (Kwazulu-Natal) 32 of 1947

Promotion of Access to Information Act 2 of 2000

Promotion of Administrative Justice Act 3 of 2000

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

Publications Act 42 of 1974

Republic of South Africa Constitution Act 32 of 1961

Separate Representation of Voters Act 46 of 1951

South Africa Act, 1909

South African Medicines and Medical Devices Regulatory Authority Act 132 of 1998

South African National Roads Agency Limited and National Roads Act 7 of 1998

Social Assistance Act 59 of 1992

State Liability Act 20 of 1957

Superior Courts Act 10 of 2013

Supreme Court Act 59 of 1959

Thekwini Municipality: Informal Trading By-law 2014

Vexatious Proceedings Act 3 of 1956

Austria

Republican Constitution, 1920

Australia

The Commonwealth of Australia Constitution Act 1900

Canada

Constitution Act, 1867

Constitution Act, 1982

Canadian Charter of Rights and Freedoms, Part 1 of the *Constitution Act* 1982

Minnesota's Code of Judicial Conduct Canon 5(A)(3)(d)(i)

Quebec Charter of Human Rights and Freedoms, 1975

Supreme Court Act R.S.C. 1985

France

Constitution of France, 1958

India

Constitution of India, 1950

Kenya

Constitution of Kenya, 1969

Constitution of Kenya, 2010

Namibia

Constitution of Namibia, 1990

Republic of Ireland

Constitution of Ireland, 1937

Seychelles

Constitution of the Seychelles, 1983

Solomon Islands

Constitution of the Solomon Islands, 1978

Sweden

Swedish Code of Judicial Procedure, 1942 (SFS 1942:740)

United Kingdom

Constitutional Reform Act, 2005

Human Rights Act, 1998

United States of America

Civil Rights Act (USA) 17 Stat. 13 1871

Federal Tort Claims Act (United Stes of America) 28 U.S.C. 2680(h)

Zimbabwe

General Laws Amendment Act 2 of 2002

Zimbabwean Electoral Act, 1992

Zimbabwean Electoral Act (Modification) Notice, 2002

Zimbabwean Electoral (Amendment) Regulations, 2002

International instruments

Bangalore Principles of Judicial Conduct (2001) as revised at The Hague (2002)

Basic Principles on the Independence of the Judiciary, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985

European Convention for the Protection of Human Rights and Fundamental Freedoms November 4 1950 213 U.N.T.S 221

Government publications

Code of Judicial Conduct, adopted in terms of section 12 of the *Judicial Service Commission Act* 9 of 1994, published *in Government Gazette* No. 35802 of 18 October 2012

Constitution Seventeenth Amendment Act of 2012; *Government Gazette* No. 36128 2013

eThekwini Municipality: Informal Trading By-law 2014; Provincial Gazette for KwaZulu-Natal No. 1173, Municipal Notice No. 70 of 27 June 2014

Judicial Complaints Procedure Regulations; GN R1240 in *Government Gazette* No. 19309 of 1 October 1998

Regulations for Judicial Officers in the Lower Courts, 1993, GN R361 in *Government Gazette* No. 15524 of 11 March 1994

Regulations Regarding Grants, Social Relief of Distress and Financial Awards in Terms of the Social Assistance Act, 1992, promulgated under Government Notice R.373 in Government Gazette No. 17016 of 1 March 1996

Rules for the Attorneys' Profession , *Government Gazette* No. 39740 of 26 February 2016

Constitutional Court Rules; GN R1675 in *Government Gazette* No. 25726 of 31 October 2003

Internet sources

ABA *Commission on Separation of Powers and Judicial Independence* 1996 http://www.abanet.org/govaffairs/judiciary/report.html

African Human Security Review *African Commitments to civil society engagement: A review of eight Nepad countries* http://www.africanreview.org/docs/papers/civsoc.pdf

American Bar Association Judicial selection: *The Process of Choosing Judges* http://www.americanbar.org/content/dam/aba/migrated/JusticeCenter/Justice/PublicDocuments/judicial_selection_roadmap.authcheckdam.pdf

American Judicature Society *Judicial Selection in the States: Appellate and General Jurisdiction Courts* 2013 https://web.archive.org/web/20141208194400/http://www.judicialselection.us/uploads/documents/Judicial_Selection_Charts_1196376173077.pdf

American Judicature Society *Merit Selection: The Best Way to Choose the Best Judges* 2014 http://web.archive.org/web/20141002185322/http://www.judicialselection.com/uploads/documents/ms_descrip_1185462202120.pdf

Black's Law Dictionary Online Legal Dictionary http://thelawdictionary.org/reasonable/

Burgh House Principles, Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals: Burgh House Principles http://www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf

Canadian Bar Association *Federal judicial appointment process* 2005 Page d'accueil: http://cba.org/abc

Canadian Judicial Council: *Commentaries on Judicial Conduct* (1991) https://www.cjcccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf

Chaskalson 2012 www.timeslive.co.za

Cheung Wai-lam *The Process of Appointment of Judges in Some Foreign Countries: The United States* Research and Library Services Division Legislative Council Secretariat www.legco.gov.hk/yr00.../erp01.pdf

Chief Justice Mogoeng Mogoeng addressing the Association of Regional Magistrates of Southern Africa's Litigator: https://litigator.co.za/hands-off-judiciary-warns-chief-justice

Christopher F *Plymouth Colony Legal Structure* Histarch.uiuc.edu.

Clark County Board of Freeholders *Partisan or Nonpartisan Elections* 2013-2014 http://www.clark.wa.gov/freeholders/documents/BOF_Partisan_TopicBrief.pdf

De Vos P *What do we talk about when we talk about "transformation"?* Constitutionally Speaking (27 July 2009) http://constitutionallyspeaking.co.za/category/transformation/page/6/

De Vos P *On the appointment of a Chief Justice* Constitutionally Speaking (29 July 2011) http://constitutionallyspeaking.co.za/

De Vos P *Justice Mogoeng: An unwise decision* Constitutionally Speaking (16 August 2011) http://constitutionallyspeaking.co.za/

Department of International Relations and Cooperation: *Statement of the South African Government on the Elections in Zimbabwe* http://www.dirco.gov.za/docs/2002/zimb0313a.htm dated 13 March 2002

Dugard J *Closing the doors of justice?* The South African Constitutional Court's approach to direct access Open Democracy 25 May 2015 https://www.opendemocracy.net/openglobalrights/jackie-dugard/closing-doors-of-justice-south-african-constitutional-court%E2%80%99s-approac

Gordon A and Bruce D *Transformation and the independence of the judiciary in South Africa* Centre for the Study of Violence and Reconciliation: Project on Justice and Transition 2007 www.csvr.org.za.

Guidelines on the State of Victoria's obligation to act as a model litigant http://www.opp.vic.gov.au/wps/wcm/connect/18c9ac00404a14a4abfafbf5f2791d4a/15_Application_of_model_litigant_guidelines.pdf?MOD=AJPERES

Haferkamp HP Enzyklopädie zur Rechtsphilosophie IVR (Deutsche Sektion) und Deutsche Gesellschaft für Philosophie http://www.enzyklopaedie-rechtsphilosophie.net/inhalts

Harlan JM *Flast v Cohen: dissent* http://en.wikisource.org/wiki/Flast_v._Cohen

JSC *Criteria for Judicial Appointment* 2010 http://www.justice.gov.za/saiawj/saiawj-jsc-criteria.pdf.

Legal Information Institute Legal Dictionary: *The doctrine of vagueness* https://www.law.cornell.edu/wex/vagueness_doctrine

MacKay R *Appointments to the Supreme Court of Canada* Parliament of Canada Library of Parliament Research Publications http://www.parl.gc.ca/Content/LOP/ResearchPublications/2011-65-e.htm

Miller Center Commission No. 7 *Report of the Commission on the Selection of Federal Judges* 1996 http://www.millercenter.virginia.edu

Model Litigant Rules Rule of Law Institute of Australia http://www.ruleoflaw.org.au/priorities/model-litigant-rules/

Olson W *A de facto fourth branch of Government* July 4 1999 at Olson W A de facto fourth branch of Government July 4 1999, at July 1999 archives www.overlawyered.com

Reinsch R *The equality of self-government v egalitarianism* 2013 http://www.libertylawsite.org/2013/02/19/the-equality-of-self-government-v-egalitarianism/

Rickard C The South African Judicial Services Commission Paper from the Conference on Judicial Reform: *Function, Appointment and Structure* Centre for Public Law University of Cambridge 2003 University of Cambridge **Error! Hyperlink reference not valid.**

Sachs response to interview questions at the JSC
http://www.constitutionalcourt.org.za/site/judges/transcripts/albertlouissachs.html

Savela A (ed) Quality Project of the Courts in the Jurisdiction of the Court of Appeal of Rovaniemi, Finland *Evaluation of the quality of adjudication in courts of law: Principles and proposed Quality Benchmarks* (2006) http://www.courtexcellence.com/~/media/Microsites/Files/ICCE/QualityBenchmarksFinlandDetailed.ashx

Segall EJ *The Court: A talk with Judge Richard Posner* The New York Review of Books http://www.nybooks.com/articles/archives/2011/sep/29/court-talk-judge-richard-posner/ 2011 accessed November 2015

Seventh Miller Center Commission Report of the Commission on the Selection of Federal Judges 1994 http://www.millercenter.virginia.edu

The Federalist Society for Law and Public Policy Studies *The Case for Judicial Appointments: Appointment (Executive or Legislative)* https://www.fed-soc.org/publications/detail/the-case-for-judicial-appointments

The Local Government Handbook
http://www.localgovernment.co.za/locals/view/63/merafong-city-local-municipality

The Millennium Development Goals of South Africa 2015
http://www.parliament.gov.za/content/MDG%20Report2011_Web.pdf

The Judicial Branch https://www.whitehouse.gov/1600/judicial-branch

Umrabulo Special Edition African National Congress NGC discussion 2015
http://www.anc.org.za/docs/umrabulo/2015/ngc_disc_docsy.pdf

Uniform Rules of Professional Conduct of the General Council of the Bar of South Africa available at http://www.sabar.co.za/rules-of-ethics.html

Weinrib LE *Appointing judges: Philosophy, politics and practice* Ontario Law Reform Commission http://www.law-lib.utoronto.ca/conferences/judiciary/readings/judges.pdf