NORTH WEST UNIVERSITY

Limitation of human rights under the South African constitutional jurisprudence: an analysis of the tension between general and special limitation clauses

By

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DECLARATION

I declare that this dissertation for the degree of Master of Laws at the North West University hereby submitted has not previously been submitted by me for a degree at this or any other University, that it my own work in design and execution and that all material contained herein has been duly acknowledged.

HOOLO 'NYANE (20978901)

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"The Bible contains the mind of God, the state of man, the way of salvation, the doom of sinners, and the happiness of believers. Its doctrines are holy, its precepts are binding, its histories are true and its decisions are immutable. It is the traveler's map, the pilgrim's staff, the pilot's compass, the soldier's sword, and the Christian's charter. Here paradise is restored. Heaven opened and gates of hell disclosed". Gideon International

It is in the light of the above quote that I wish to register my indebtedness to the Almighty God for the infallible guidance He gave me through out the course of this work. I have really come to understand that the Bible contains the mind of God and the way of salvation.

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DEDICATION

To my mother, 'M'e 'Mamothamo 'Nyane,

My late father, Ntate Ramothamo 'Nyane

My late sisters who had unquenchable passion to see me acquire university education,

'Mankalimeng 'Nyane,

Tebello 'Nyane

'Malikotsi 'Nyane

DECLARATION BY SUPERVISOR

I here recommend that the dissertation by No. 20978901, HB 'Nyane, entitled Limitation of human rights under the South African constitutional jurisprudence: an analysis of the tension between general and special limitation clauses, for the degree of Master of Laws be accepted for examination.

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Prof. MLM. MBAO

SUPERVISOR

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TABLE OF ABBRIVIATIONS

1.	BCLR	Butterworths Constitutional Law Reports
2.	BYIL	British Yearbook of International Law
3.	CCSA	Constitutional Court of South Africa
4.	ESCR	Economic Social and Cultural Rights
5.	SA	South African Law Reports
6.	SAJHR	South African Journal of Human Rights
7.	SALJ	South African Law Journal
8.	Stell LR	Stellenbosch Law Review
9.	THRHR	Tydskrif vanddi HedendaagseRomeinsHollandse Reg

ABSTRACT

The South African Interim Constitution of 1993 brought about what has been termed a 'paradigmatic shift' not only on constitutional law, but on the entire structure of public law. It heralded a new order based on the supremacy of the Constitution thereby ending the era of a malignant system of public law whose 'chief strut' was the theory of parliamentary sovereignty. The new order, for the first time in the constitutional history of the country, introduced a systematic Bill of Rights duly entrenched in the Constitution. The Constitution does not absolutely protect the rights of everyone but it also provides for the means of limiting such rights.

In limiting the human rights as enshrined in the Bill of Rights, South Africa has opted for a hybrid style of rights limitation. There is a general limitation clause embodied under section 36 of the Constitution. Alongside this general limitation, there are other special limitations inbuilt within some of the rights in Constitution. This dualism has given rise to a jurisprudential problem of the relationship between section 36 and these internal limitations.

Thus, the purpose of this study is to analyse this tension that exists between section 36 and the special limitations. The analysis takes both historical and comparative perspectives from other jurisdictions whose human rights jurisprudence has been influential on the development of indigenous jurisprudence in South Africa. In the final analysis, it is argued that the problem can be avoided by allocation of proper tasks during the application of the two-stage approach to human rights limitation. Secondly, it is recommended herein that the tension can also be avoided by giving a proper interpretation to section 36. If this is followed, it would be realized that section 36 does not really have meaningful application to those rights that have adequate internal limitations, including socio-economic rights.

CHAPTER 1: INTRODUCTION TO THE STUDY

1.0 Introduction

Ever since the advent of the fashionable notion of human rights after the ashes of the Second World War[1], it has always been philosophically acknowledged that human rights are not and cannot be unlimited. This notion, within the human rights discourse, has been easily embodied within the expression that 'human rights are not absolute'[2]. This truism is justifiable today than ever in the historical evolution of international human rights law. In fact, the limitation of human rights is, when carefully managed, the most appropriate safety valve for the smooth development of human rights jurisprudence. The reasons why human rights have to be limited are innumerable and vary from one jurisdiction to the other. However there are those justifications that have been recurrent in most

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[1] See Shaw, MN.; International Law. 4th ed. Cambridge, Cambridge University Press, 1997 at pages 196-205 for the detailed account of the phases of development of international human rights law.

[2] This notion permeated even the drafting of the International Bill of Rights, viz, The Universal Declaration of Human Rights GA Res 217A(111), December 10, 1948 , International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), December 16, 1966, *entered into force* March 23, 1976, Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), December 16, 1966, *entered into force* March 23, 1976. Second Optional Protocol to the International Covenant on Civil and Political Rights .Aiming at the Abolition of the Death Penalty, G.A. res. 44/128, (1989), *entered into force* July 11, 1991. The International Covenant on Economic, Social and Cultural Rights 1966. It is now a necessary style in almost all of the post-modern human rights instruments be they international, regional or national.

jurisdictions namely, public order and security, public interest, rights of others *et cetera*[3].

Despite this general consensus around the need to limit human rights, countries and regions have opted for varying styles of human rights limitation and this, to a very large extent, has fragmented the unitary development of the human rights jurisprudence across the globe. There are basically four styles of human rights limitation that have been adopted by various human rights regimes. Those are specific or inbuilt limitations[4], general limitation clauses, mixture of specific and general limitation[5] and judicial or doctrinal limitation[6].

South Africa has deliberately opted for a mixture of the general and specific styles of limiting human rights. Section 36 of the 1996 constitution provides for the generic limitation of human rights. There are also specific limitations for some of the human rights. Although there is this double-pronged style of limitation in the Republic, the courts have largely relied, almost at the expense of specific limitations, on the 'general limitation clause'. As hereunder demonstrated, the South African human rights jurisprudence has not been able to conclusively resolve the tension that exists in the operation between the specific limitations and the general limitation clause (section 36).

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[3] Rautenbach, IM, and Malherbe, EF.; Constitutional Law, 3rd ed, Durban, Butterworths, 1999, at 345-346.

[4] Under this notion individual freedoms and human rights have their own internal qualifications.

[5] This is the situation whereby the Bill of Rights has a general limitation clause and at the specific limitations for each or some of the rights. South Africa, Germany and Canada are located in this genus.

[6] This is the regime in which the Bill of Rights does not have any limitation clause. The limitation of human rights is left to the Judiciary .The typical example in point is the United States Bill of Rights.

1.1 Statement of the Problem

The problem with the limitation of human rights under the South African scheme stems from the bifurcated or dual nature of the limitation. As aforesaid, South Africa has a very comprehensive human rights scheme. However, with this system of double-limitation, unlike in other aspects of human rights, there seems to be no consistency and coherence. Whilst section 36 provides the standard way of limiting human rights in the Bill of Rights, there are other human rights that have got their own internal limitations[7]. Now, the predominant question therefore is, what is the relationship between the specific and general limitation clause? This question may be unfolded even further. Do they apply simultaneously as and when the situation arises? Does the specific limitation qualify the general limitation? Does the general limitation clause have any application where the specific limitation clause applies?[8]

This represents the epicentre of the problem of dual limitation. The situation becomes even more complex when the same questions will have to be extended to socio-economic rights. Socio-economic rights are part of the Bill of Rights to which section 36 applies generally. This is so notwithstanding the fact that even in the historical development of these two generations of rights[9], they have always been treated separately. Socio-economic rights have distinguished

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[7] See ss 9(2), 15(3), (22), 23(5), 25(2), 26,27, 29 and 30.
[8] Rautenbach and Malherbe op cit (n 3) at 357.
[9] The first generation of rights is civil and political rights and the second generation is socio-economic rights. This classification depends on which class of rights was accepted first in the international human rights jurisprudence.

features by nature. Despite the fact that they are part of the indivisible and interdependent Bill of Rights in the constitution, these rights have got their own standard of limitation, different from that provided by section 36. The commonly accepted standard is the 'availability of resources'. This is the predominant limitation common to almost all of the socio-economic rights. Therefore in the like manner this scenario precipitates the similar problem with the other rights with internal limitations. The issue then will still be whether a shortage of available resources constitutes a justifiable reason for limiting the rights under section 36. In a nutshell, the problem of correlation between specific limitation and general limitation clause becomes more pronounced as it relates to socio-economic rights.

1.2 Purpose of the Study

The purpose of this study is to critically analyze the tension that seems to exist between the application of specific limitations and the general limitation clause in the South African human rights jurisprudence. In the final analysis, the study hopes to suggest a more workable approach to be used by the courts of law when confronted with the task of applying the general limitation clause to the right that already has its own internal limitation.

1.3 Significance of the Study

The study intends to contribute to the current jurisprudential search for a workable approach towards the correlation between the general limitation clause and the specific limitations internally inbuilt within some of the rights that form part of the Bill of Rights. As hereunder demonstrated by the survey of the existing literature, this problem is not only academic but even the current trends of emerging jurisprudence of the Constitutional Court bear testimony to the fact that even the courts of law have not yet found a consistent and workable approach towards this problem. Thus, this study aims not only to contribute to the on-going academic discourse but it also hopes to assist the courts of law when dealing with this bifurcated situation.

1.4 LITERATURE REVIEW

1.4.1 The scheme of limitation under the constitution

The point of departure for this study is the tension that exists in situations where section 36 of the Constitution is applicable to the rights that already have their own internal limitations. Section 36 provides only two requirements for the justifiable limitation of human rights: (a) a law of general application that is (b) reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The section goes further to provide a list of factors, that is not exhaustive , to be considered when considering the justifiability of the limitation. Alongside section 36 exist other rights that have their own limitations

such as section 9(2) intended to allow for affirmative action, Section 15(3) allowing legislation dealing with marriages and personal and family law, section 22 permitting legislation to regulate the practice of profession or trade, section 23 allowing regulation of labour relations and the socio economic rights embodied in sections 25, 26, 27, 29 and 30.

None of these sections in their text, except section 25, refer to their relationship with section 36. Instead some of them like section 25 provide for their own parallel style of limitation. Section 36(2) provides that rights may be limited only in terms of section 36(1) 'or any other provision of the constitution'. Very little guidance is provided by the entire scheme of section 36 as to how it operates where there already exist limitations, some of which are even more comprehensive than it is.

1.4.2 Judicial Approach

The courts of law have, almost invariably, used a 'two-staged approach' where there is alleged infringement of the right[10]. This is the stage that distinguishes the consideration of the ambit of the right from that of the limitation. What the courts of law will normally do is to establish whether there has been an infringement of the right protected by the Bill of Rights. The second stage

[10] For the detailed account of this approach see Cheadle, MH, Davis, DM, and Haysom, NRC.; South African Constitutional Law: The Bill of Rights. 2nd Ed Durban, Butterworths, 1996, at p 30-34. also Devenish, GE.; A Commentary on the South African Bill of Rights, Durban, Butterworths, 1999 at pages 541.

inquires whether an act or omission that caused the infringement can be allowed in terms of section 36[11].

The problem with this approach is that in its classic formulation, it does not take account of the unique features displayed by the rights that have their internal limitations. This approach as it has its roots from the section 1 of the Canadian Charter of Human Rights[12], does not have the special limitation clause at its heart. The consistent manner in which this approach has been used does not take sufficient stock of the special limitation clause. Instead what the courts normally do is to confuse the rights analysis with the limitation analysis. In the end it is vague as to whether special limitations are part of the rights analysis or the limitation analysis[13]. Woolman[14] conveniently argues that,

> The general theoretical desiderata of elegance, consistency and simplicity would seem to suggest that the internal limitations within various rights provide aids in determining the contents of the right in question. According to this account, internal limitations specify the values which animate the right and serve to delineate the sphere of protected activity. The internal limitations are thereby assimilated into the first stage of our two stages of analysis.

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[11] See the decisions in S v. Zuma and Others 1995(2) SA 642, S v. Makwanyane 1995(3) SA 391and Ferreira v. Levin NO and Others 1996(1) SA 984.
[12] Canadian Charter of Rights and Freedoms Schedule B to the Constitution Act of 1982 .
[13] See the reasoning in Coetzee v Government of South Africa 1995(4) SA 631(CC).
[14] Stuart Woolman 'Limitation' in Chaskalson M et al (eds) Constitutional Law of South Africa (Revised Service 5, 1999). Juta page 12.

This approach clearly misplaces the internal limitations and ultimately deprives them of their original intent. However inbuilt the internal limitations may be, they are still limitations for all intents and purposes, and they must be analysed as such[15].

1.4.3 Three-tiered Approach

This approach was expounded in the case of S v. Lawrence[16]. The essence of this approach is that the analysis involves three levels of scrutiny; namely, rights analysis, internal limitation analysis and the general limitation analysis. The first stage will be the definition and demarcation of the right, secondly when the right and infringement are established the burden shifts to the state to make a showing by using the internal limitation. If the state fails on the second stage of using the internal limitation properly, the state will then move to the third stage of utilizing the justification under the general limitation clause.

Certain conclusions can be deduced from the utilization of a three-tier approach: First, at least it attempts the simultaneous use of both the general and special limitation. However, it is doubtful whether that is still in accord with the spirit of section 36, more so because it would seem that at the second stage of this approach, the general limitation clause may be rendered inapplicable by the application of the special limitation. Secondly, this method seems to be unfair

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[15] Woolman, S,; "Riding the Push-me-Pull-you: Constructing a Test that Reconciles the Conflicting Interests that Animate the Limitation Clause" (1994) 10 SAJHR 60.
[16] 1997 (4) SA 1176.

because it gives the state two opportunities of making the showing to justify the limitation.

In the final analysis, the three-tiered approach does not provide a workable approach for the co-existence of the internal limitations and the general limitation clause.

1.4.4 Limitation of socio-economic rights

In the cases that have been before the Constitutional Court, the Court never made reference to the general limitation clause. In the case of Government of the Republic of South Africa v. Grootboom[17], the Court found that the state's housing programme fell short of the requirement of section 26(2) of the Constitution. The Court confined its inquiry to the internal limitation clause inbuilt within the right by subsection 2. Like other socio-economic rights the limitation provides that 'the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.' Johan de Waal *et al*[18] have argued that 'one reason for leaving section 36 out of the account lies in the difficulty of applying the "two-stage" analysis of a right and justification for the limitation of the right...' The authors ultimately argue that since the test of reasonableness is the cornerstone of both section 36 and the internal limitation of socio-economic rights, there is no need for the application of section 36. If this position adopted by these authors is taken to its logical conclusion it would mean

[17] 2000(11)BCLR 1169.
[18] Johan de Waal et al The Bill of Rights Handbook. 4th ed, Lansdowne, Juta 2001 at 451.

that section 36 is generally not applicable to socio-economic rights that already have their own internal limitation of 'reasonable legislative and other measures, within its available resources, to achieve progressive realization of the right'. The accuracy of this approach is doubtful as it will be unnecessarily depriving section 36 of its rightful generality as the embodiment of the theory of rights limitation in a democratic South Africa[19].

In the final analysis, it is apparent therefore that the existing literature has got gaps insofar as the correlative application of the section 36 and various other rights with internal limitations is concerned[20]. Therefore this does not only create inconsistency in the development oh human rights jurisprudence, but it also causes incoherence in the manner in which the courts deal with the limitation of human rights. This therefore calls for a further analysis on how the special limitation of socio-economic rights can correlate with the general limitation clause.

1.5 Research Methodology

The methodology to be used in this study is the qualitative method. Under this method the existing material is analyzed so as conclude on the quality of the trends and/or *status quo* generally. In this endeavor the author relies on library

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[19] See Minister of Health v. Treatment Action Campaign 2002(5) SA 721CC), Khosa v. Minister of Social Development 2004 (6) BCLR 569.

[20] Bilchitz, D,; "Towards a Reasonable Approach to the Minimum Core: Laying the Foundation for Future Socio-Economic Rights Jurisprudence" (2003) 19 SAJHR 1, Also Bilchitz, D.; "Giving Socio-economic Rights Teeth: The Minimum Core and its Importance" (2002) 118 SALJ 484, Iles, K.; "Limiting Socio-Economic Rights: Beyond The Internal Limitation" (2004) 20 SAJHR 84.

materials such as Law Reports, Books and Articles in Journals. The more primary materials such as the Reports of the Technical Committee on Fundamental Rights will also be used to search for the more natural intent of the drafters. Thus, the justification for this methodology is that the study intends to analyse the quality of trends and state of affairs as opposed to the quantitative analysis of the variables.

1.6 Scope of the Study

As it has always been clear from the onset, that this study is confined to the limitation of rights under the South African constitutional jurisprudence. However, the comparative analysis will be of vital significance towards the purpose of this study. Thus, in order to accomplish a well-rounded analysis of the trends, a comparative analysis will be undertaken with those jurisdictions which demonstrate similar patterns with South Africa.

The study is therefore divided into six related chapters. The first chapter is the introduction. This is the chapter that generally outlines the background of the study. The demarcated problem that forms the reason for this study is stated in this chapter. The second chapter sketches the background of the South African human rights jurisprudence. The purpose of this chapter is to study the epochal development of the South African human rights regime so as to create the picture of how the limitation of human rights changed with the various phases of constitutional development in the Republic. The third chapter is dedicated

specifically to the analysis of limitation of rights. This chapter analyses the viability of the bifurcated nature of human rights limitation under the South African Constitution. The approaches and theories of human rights limitation are analyzed under this chapter. The fourth chapter is the limitation of socio-economic rights under the South African Constitution. As aforesaid, the limitation of socio-economic rights displays unique features. The object of this chapter is to accommodate the socio-economic rights towards the ultimate approach to be suggested to operationalise the relationship between the internal limitations and the general limitation clause.

The fifth chapter provides some perspectives from comparable jurisdictions. The South African human rights structure owes its origin largely to Germany and Canada. Thus, the limitation of rights under these jurisdictions will be studied. On top of these two countries, the antique jurisprudence of the United States of America will be studied to learn the unique lessons therefrom. The sixth chapter contains our conclusions and recommendations.

CHAPTER 2: HISTORICAL PERSPECTIVE TO THE SOUTH AFRICAN HUMAN RIGHTS JURISPRUDENCE

2.0 Introduction

South Africa experienced various phases in her constitutional development which invariably influenced the development of human rights law in the country after the advent of the new constitutional order. This chapter evaluates these historical epochs and how the concept of human rights featured under such dispensations. This chapter serves as the 'springboard' for the succeeding chapters of this study. The ultimate objective of the entire study is to resolve the tension that seems to exist today as between the two approaches that have been adopted to limit human rights under the South African constitutional jurisprudence. This chapter seeks to contribute to the attainment of such objective by tracing how South Africa has faired with human rights since unionization, 1909 hitherto.

The chapter is organized in such a way that each constitutional dispensation in the history of the Republic is sketched and evaluated as to its impact on human rights and human rights limitation. The chapter is divided into four major sections. The first section evaluates the South African human rights jurisprudence under the Union Constitution of 1909 and the impact of the Statute of Westminster. The second section deals with the 1961 and 1983 constitutional dispensations

respectively. The third section features a perspective on how the doctrine of parliamentary sovereignty affected the development of human rights jurisprudence in South Africa. The fourth section evaluates the impact of the introduction of the constitutional state which stretches from the transitional period to the current constitutional setup.

2.1 The Union Constitution and the Statute of Westminster

2.1.1 Colonial Era

The enactment by the British parliament of the South African Act[21] on the 31 May 1909 brought about several implications on the South African human rights terrain. There are few characteristic features of the Act which merit attention hereof. This Act was enacted by the British Parliament to 'unionize' the British colonies of the Cape of Good Hope, Natal, the 'Boer Republics' of Transvaal and the Orange Free State[22]. The Union Constitution was wanting in several components of the standard constitutions which are preconditions for the smooth development of human rights. The Act did not embody the doctrine of constitutional supremacy. Perhaps it would be very unlikely for a British Act of parliament to embody the notion of constitutional supremacy. Instead the Act

[21] South African Act, 9 Edward VII, 1909.
[22] Ibid the preamble.

provided in no uncertain terms that the legislative power of the Union was vested in the parliament[23].

Whilst the Act did not specifically refer to the doctrine of parliamentary sovereignty, and whereas the sovereignty of the Union parliament was still doubted[24], the courts of law interpreted section 19 together with section 59 as embodying sovereignty of the Union parliament[25]. As a creature of the British Parliament, it was said to be sovereign. According to the Cape Provincial Division in the case of Ndlwana v. Hofmeyer[26]

> Parliament's will, therefore, as expressed in an Act of parliament cannot now in this country, as it cannot in England, be questioned by court of law whose function it is to enforce that will, not to question it.

The absence of constitutional supremacy particularly in a country plagued by racial divides like South Africa of that time was the greatest deficiency under the Union constitution. The rights of the subjects were seriously imperiled by the tyrannical nature of the Union parliament[27].

One other notable deficiency of the Union Constitution is that it ushered in a constitutional jurisprudence devoid of judicial review. It would be very difficult, if

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[23] See section 19 of the Act. See also Section 59 .
[24] Jenning, I.; Constitutional Law of Commonwealth, Oxford, Clarendon Press 1957 at 344
[25] In the case of R v. Ndobe 1930 AD 484 AT P 493 de Villiers CJ (as he then was) said 'under section 59 of the South Africa Act, Parliament has full powers to make law for peace, order and good governance of the Union...'
[26] 1937 AD 229 at 235.
[27] Currie, I.; et al. The New Constitutional and Administrative Law: Vol. 1 Constitutional Law. Cape Town Juta 2002 at 50 said, 'doctrine of parliamentary supremacy gave the apartheid legislature free reign in its attack on the basic principles of equality and human dignity inherent in the common law'.

not impossible, under the Union Constitution, to talk of the human rights limitation as a fully developed notion.

However, although the constitution did not embody a Bill of Rights, there were other sections in the constitution which arguably provided for a scintilla of rights and an attempt was made in the constitution to protect them through constitutional entrenchment. Section 35 provided for the right to vote although in very ambiguous terms. However, the rights of black people were still not aptly protected by the constitution. These rights could be limited by an Act of parliament passed through a special procedure prescribed in the Constitution. Section 137 provided for the equality of languages, English and Dutch (Afrikaans). Indeed this was a very poor strategy to protect the freedom of languages. The section recognized the parity of these two languages at the exclusion of the myriad of African languages. These sections unlike other sections which could be amended or repealed as and when parliament so wished, were specifically protected by a special procedure. According to section 152,

> No Bill embodying such repeal or alteration shall be passed unless such is passed by the joint sitting of two chambers of parliament on its third reading.

The Appellate Division in the celebrated case of Harris v. Minister of Interior[28] construed these sections as human rights sections. According to Centlivres CJ, (as he then was);

> It is clear from ss 35, 137 and 152 of the constitution that certain rights are conferred on individuals and that these rights cannot be abolished or restricted unless the procedure prescribed by s 152 is followed. In construing these sections it is important to bear in mind that these sections contain constitutional guarantees creating rights in individuals.

It would seem that this *dictum* is the authority for the proposition that although the Union Constitution was wanting in human rights jurisprudence, it provided for certain rights, however minimally, to be amended through a special procedure.

Having therefore sketched the situation under the Union Constitution it is worthwhile to evaluate the impact of the Statute of Westminster[29]. The Statute of Westminster was a negotiated settlement between the British Parliament and the Dominions and it had very little, if ever, contribution to the development of human rights in South Africa. The essence of the Statute was to minimize the control of the British legislature over the Dominions. The implication of such objective was realized by repealing the Colonial Laws Validity Act[30]. This Act provided for the consistency between British and Dominions laws. If the laws

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[28] 1952 (4) SA 769.
[29] Statute of Westminster was passed in 1931 by the British Parliament to give the Dominions some autonomy in their legislative affairs.
[30] Colonial Laws Validity Act of 1865.

promulgated by the Dominions were contrary to laws enacted by the imperial Parliament at Westminster, those of the Dominions would be of no effect.[31] While the expectation would be that the strict rules of parliamentary sovereignty would be relaxed, the Union parliament was very quick to pass the Status of the Union Act,[32] which reinforced the doctrine of parliamentary sovereignty. Thereafter the British Parliament could no longer legislate directly for the Union. Thus, it may be safely argued that the Statute of Westminster in South Africa never advanced the cause of human rights at all.

However the poor human rights regime under the 1909 constitution should never be understood as suggesting that there was no human rights protection in South Africa. The only point made herein is that there were no constitutionally protected human rights under the constitution[33]. Human rights protection was a left to the common law and in a very weak manner, to statutory law. Under the common law, the rights that enjoyed adequate protection were the private rights. The judicial approach to this protection was enunciated by Innes, CJ,; (as he then was) as thus,

> If any man's rights or personal liberty or property are threatened, whether by government or by private individual, the courts are open for this protection and behind the courts is ranged the full power of the state to ensure the enforcement of their decrees[34].

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[31] Ibid the preamble and ss 2, 3 and 5 thereof.
[32] Status of the Union Act 1934 (Act 69 of 1934). Section 2 provided that 'The Parliament of the Union shall be sovereign legislative power in and over the Union…'
[33] Carpenter G. Introduction to South African Constitutional Law ,Durban, Butterworths. 1987
[34] Krohn v. The Minister of Defence 1915 AD 191 at 197.

Whilst the judicial protection of private rights may not have been doubted, the protection of what could be termed civil and political rights was very poorly guaranteed. They were hugely vulnerable to statutory inroads which were not to be tested by any judicial review.

It is under the colonial era that the country started recording the poorest human rights situation. It could be recalled that the passing of draconian racial laws, most of which encroached on the human rights, particularly the rights of black people, emerged at that time. It was started with the introduction of the Black Land Act of 1913[35]. Under this Act land was identified and reserved for occupation by black people[36]. The situation was later to be perpetuated by the Development and Trust Land Act of 1936[37]. This Act, like its predecessor, introduced the notion of trust land for black people.

2.1.2 The Apartheid System

Although the seeds of segregation and discrimination against black people had long started with the process of colonialism, the advent of apartheid regime in 1948[38] systematized that oppression. The barrage of pernicious legislation, which was otherwise interwoven, started to be passed to enforce the segregation

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[35] Act 27 of 1913.
[36] See the detailed analysis van der Walt AJ, 'Land Reform in South Africa since 1990 – an Overview' (1995) 10 SAPR/PL 1.
[37] Act 18 of 1936.
[38] Apartheid as a system was introduced by the National Party as it came to power in 1948.

and alienation of black people. In 1949, the regime passed one of the most immoral laws, the Prohibition of Mixed Marriages Act[39], which prohibited marriages between white people and people of other races. The apartheid government further passed the Population Registration Act in 1950[40]. The apartheid regime arguable left the deepest scar in the human rights history of the RepublicofSouthAfrica[41].

2.1.3 Limitation of human rights under the Union Constitution

Whilst it has always been admitted that human rights cannot be absolute, there was however no systematic constitutional arrangement for the limitation of rights under the Union Constitution. The common law simply developed its own means of protecting human rights, particularly private rights. The state used several avenues by which to severely limit the rights. During the times of war the state would suspend certain rights under the principle of *salus rei publicae suprema*

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[39] Act No 55 of 1949; See also the Immorality Amendment Act, Act No 21 of 1950; amended in 1957 (Act 23) which Prohibited adultery, attempted adultery or related immoral acts (extra-marital sex) between white and black people.

[40] Act 30 of 1950; Other notorious apartheid laws which were passed in the 1950s include: Group Areas Act No 41 of 1950, Bantu Building Workers Act No 27 of 1951, Prevention of Illegal Squatting Act No 52 of 1951, Bantu Authorities Act No 68 of 1951, Natives Laws Amendment Act of 1952, Natives (Abolition of Passes and Co-ordination of Documents) Act No 67 of 1952, Native Labour (Settlement of Disputes) Act of 1953, Bantu Education Act No 47 of 1953, Reservation of Separate Amenities Act No 49 of 1953, Extension of University Education Act 45 of 1959.

[41] For the lucid discussion of impact of apartheid regime on the human rights jurisprudence in the in South Africa see Sedumedi, JS. The Acceptance of International Human Rights Norms in the South African Legal System(2000). Unpublished Doctoral Thesis. University of North West.

lex[42]. The other means used to limit rights were public safety legislation[43], defence[44], police and many others.[45]

In the final analysis the point made here is that leaving the protection of human rights to the common law without entrenching them in a Bill of Rights was to expose them to all sorts of, even undemocratic, limitations. The failure of the 1909 Constitution to entrench the Bill of Rights was the glaring defect of the Union Constitution, let alone the comprehensive limitation of the same.

2.2 Human Rights Regime Under the Republican Constitution, 1961

Despite its unambiguous intention to sever allegiance with the British Crown, the 1961 Constitution[46] brought very little to the development of human rights as created by the Union Constitution. Although the Republican Constitution brought about major political changes to the country[47], the constitutional dispensation substantially remained almost the same. The salient features of the Union Constitution that had a direct bearing on human rights landscape remained unaltered under the Republican Constitution. The doctrine of parliamentary

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[42] Carpenter supra at 105. see also the dictum of Bistow J in Exparte Kotzee 1914 TPD 564 at 370 where he said, ' in as much as martial law is a constitutional weapon which has arisen in England, English authorities are conclusive as to what the extent and nature of martial law is *salus rei publicae suprema lex*. '

[43] Public Safety Act of 1953.

[44] Defence Act 44 of 1957.

[45] The political rights were limited by statutes such as Suppression of Communism Act 44 of 1950, Public Safety Act 3 of 1953, Official Secrets Act 16 of 1956, and Unlawful Organizations Act 34 of 1960.

[46] Act 32 of 1961.

[47] The analysis of the political dynamics of the constitutional change of 1961 or any other time is beyond the scope of this study. As it was said, this study particularly this chapter, is specifically concerned with the trends in the development of human rights jurisprudence from one constitutional dispensation to the other.

sovereignty was one of the major remnants of the Union Constitution which survived the constitutional change. While the doctrine under the Union Constitution was implied under sections 19 and 59 thereof, the Republican Constitution categorically provided for it. Section 59 thereof provided that,

> (1) (i) Parliament shall be the sovereign legislative authority in and over the Republic, and shall have full power to make laws for the peace, order and good government of the Republic.
> (ii)...
> (2) No court of law shall be competent to inquire into or pronounce upon the validity of any Act passed by the Parliament.

Those bold constitutional measures to entrench the supremacy of parliament and the direct exclusion of judicial review were the greatest blows to the viable development of human rights discourse in the Republic. It suppressed even the little outlet for the human rights as might have been created through the *Harris* cases[48] of 1950s. This section reversed all the gains that were brought about by these cases to the development of human rights jurisprudence.

One other notable aspect of the Union Constitution which still remained unaltered by the new constitution was the absence of an entrenched Bill of Rights except for the vague recognition of the equality of English and Dutch as the official languages.[49] It is rather surprising because the constitution conferred 'equal

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[48] Harris v. Minister of Interior 1952 (2) SA 428 (A) and Minister interior v. Harris 1952 (4) SA.(A) See also Carpenter supra at 219.

[49] Section 108 (1) provided, 'English and Afrikaans shall be the official languages of the Republic and shall be treated on footing of equality, and possess and enjoy equal rights and privileges.' For the detailed study of this ouster clause, see Davidson. 'The History of Judicial Oversight of

freedom, rights and privileges' to the languages as opposed to human beings that commanded those languages. The whole scheme of the constitution was in a deliberate denial of human rights, particularly for black people.

To conclude, it can be argued that the human rights picture created by the Union Constitution remained virtually unaltered by the Republican Constitution. Instead the Republican Constitution made matters even worse by minimizing the number of retrenchments in the constitution and by unambiguously excluding the common law doctrine of judicial review which had been confirmed by the *Harris* cases[50].

2.3 The position under the 1983 Constitution

In 1983, South Africa adopted a 'new' Constitution[51] with the intention of expanding the political and social base of the parliament. It would seem that the philosophy behind the 1983 Constitution was indicative of the country's pathway to a constitutional democracy. This philosophy is discernible from Heunis, the then Minister of Constitutional Development and Planning who provided that 'Whites will no longer be able to decide for other groups in South Africa.'[52] According to Heunis this philosophy was underpinned by three components.

Legislative and Executive Action in South Africa'. (1985) 8 Harvard J. of Law and Public Policy 687.

[50] Parliament had reacted to the outcome of the Harris cases by enacting the South African Amendment Act 1 of 1958 which provided that, 'no court of law shall be competent to enquire into or pronounce upon the validity of any law passed by the Parliament'.

[51] Republic of South Africa Constitution Act 110 of 1983.

[52] Huenis JC. See House of Assembly Debates of 2 February 1983 Col 212.

> First, domination by one group over another must be eliminated and every group must be given an effective say in matters which affect it. Secondly, the self-determination of every group in matters pertaining to that group alone must be ensured; and thirdly, co-responsibility must be achieved in matters of common interest.

These intents, which are otherwise noble, of the 1983 Constitution regarding human rights were to be reflected in the preamble thereof. The preamble cherished some of the national goals, namely 'Christian values with recognition and protection of freedom of faith and worship, independence of the judiciary and equality of all under the law, the respect and protection of human dignity, life and liberty'[53]. Directly against these noble goals of the constitution, the substantive provisions of the constitution provided the contrary. Virtually none of them embodied even a single goal set in the constitution. The central constitutional scheme of the 1961 Constitution was yet unaltered.

Although the preamble envisaged a human rights project, no such Bill of Rights could be ascertained from the substantive provisions of the constitution. The same applied with respect to the independence of the judiciary. Notwithstanding the settled intention in the preamble to the constitution to guarantee the independence of the judiciary, section 34(3) provided that, 'no court of law shall be competent to inquire into or pronounce upon the validity of an Act of Parliament'. Perhaps this section would be inevitable particularly in the

[53] See Preamble to the Republic of South Africa Constitution, 1983 supra.
See also Rudolph and Mureinik.E, 'Constitutional and Administrative Law.' Annual Survey of SA Law 1983 p1

constitutional scheme centred on the doctrine of the sovereignty of parliament. Exclusion of judicial review is the main thrust of the parliamentary sovereignty[54]. The normal means of excluding the judicial review was by way of 'ouster clauses'.[55] The ouster clauses in the apartheid legal regime were mainly used in security legislation. For instance section 29 of the Internal Security Act[56] provided that;

> No court of law shall have jurisdiction to pronounce on any action taken in terms of this section, or to order the release of any person detained in terms of the provisions of this section.

This section was the subject matter of litigation in the case of Hurley v. Minister of Law and Order[57]. In this case, a detainee had been arrested in terms of section 29 of the Internal Security Act. The section empowered the arresting officer to have 'reason to believe' that the detainee had committed an offence inimical to state security. The section also excluded the jurisdiction of the courts. The applicants challenged their arrest and detention without trial on the ground that the officer did not have reason to believe that the detainee committed the offence as he was a pacifist. The court used the doctrine of *ultra vires* to find in favour of the applicants because it upheld the applicants argument that an action

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[54] See the cases of Schermbrucker Klinndi NO 1965(4) SA 606; Barday v. Passport Control Officer 1967(2) SA 346.
[55] See Hoexter C. Administrative Law in South Africa. Cape Town, Juta 2007 at 522
[56] Act 74 of 1982.
[57] 1985 (4) SA 709 (D).

which was *ultra vires* was not in terms of the section. This attitude of the court *a quo* was confirmed by the Appellate Division on appeal[58].

In the light of the foregoing therefore, it can be safely argued that the continuity of parliamentary sovereignty and the exclusion of judicial review created by the Union Constitutional dispensation remained unbroken by the 1983 constitution. Although the ideal of the protection of human rights was proclaimed in the preamble, no serious attempt was made by the Constitution itself to entrench the human rights jurisprudence. The development of human rights was still left to the common law.

2.4 Implications of Parliamentary Sovereignty on the Development of South African Human Rights Jurisprudence

As demonstrated by the foregoing analysis, the doctrine of parliamentary sovereignty haunted the South African jurisprudence for almost half a century. Thus, it is worthwhile to consider the nature of this doctrine and how it was able to become the major hurdle against the realization of human rights in South Africa.

2.4.1 Origins of the Doctrine

The doctrine is admittedly of British origin and was consequently transplanted to most of the English Dominions. In South Africa, as demonstrated above, it was

[58] Minister of Law and Order v. Hurley 1986 (3) SA 568(A)

formally received in 1909. It would seem that the way the doctrine faired in South Africa was diametrically different from its original philosophy in England. Thus, the study of the philosophy of the doctrine and how it was departed from in South Africa is instructive.

The British doctrine of parliamentary sovereignty has stood the test of time because it is based on the human rights oriented history. Parliamentary sovereignty or legislative supremacy[59], as it is sometimes called, is the central tenet of the British constitutional jurisprudence. It is the legacy of the British parliamentary practice which arose out of the conflict between the Crown and Parliament[60]. It would seem that the conflict between the Crown and the House of Commons over the prerogative power of the former has been there since time immemorial.

However the formal introduction of doctrine into the British constitutional jurisprudence was after the 'glorious revolution' of 1688. This revolution brought about the downfall of James II of England and James VII of Scotland. After the downfall, the British and Scottish Parliament respectively restored the monarchy and laid out terms on which they were to operate. In England the post-

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[59] The British writers have increasingly refrained from the use of 'sovereignty' as opposed to 'supremacy' because they argue that the doctrine of sovereignty in the theory of municipal law is rather confusing. The doctrine is fashionably referred to as parliamentary or legislative supremacy in England. See Hood Phillips and Paul Jackson.; Constitutional and Administrative Law. 7th ed. London. Sweet and Maxwell at 41.

[60] Aihe, D.; Cases and Materials on Constitutional Law. Oxford, Oxford University Press 1983 p 25.

revolutionary parliament approved the Bill of Rights[61] whose main essence was to dispose off the Crown's prerogative power of suspending laws and dispensing with the laws. The Bill of Rights therefore marked the victory of parliament over the Crown to govern by prerogative[62].

2.4.2 The Meaning and Practical Implications of the Doctrine of Parliamentary Sovereignty

The development of this doctrine has always been associated with the apt definition of Albert Dicey. Dicey, explained the British Parliament as having 'the right to make or unmake any law whatever' and that no person or body is recognized by the law of England as having the right to override or set aside the legislation of parliament.[63] However there is overwhelming evidence that Dicey's explanation is too general. There is authority to the effect that parliamentary sovereignty in England was limited in one way or the other by human rights. The judicial attitude in England has always borne testimony to this assertion.

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[61] Bill of Rights of 1688. The Scottish Parliament enacted Claim of Rights of 1689. it was modeled on the Bill of rights.

[62] See Bradley A.W and Ewing K.D 12th ed. Constitutional and Administrative Law. Harlow, England. Longman Publishers 1997 at p 15, For practical implications the doctrine of Crown Prerogative see the case of Burmah Oil Co. v. Lord Advocate 1965 AC 141. For recent exposition see the case of Burmah Oil Co. v. Bank of England 1980 AC 1090 where the House of Lords held that although the Crown's claim to immunity was not conclusive, but on the special facts of the case the court refused to order production of certain documents which were withheld under the claim of Crown immunity.

[63] Dicey AV (Wade EC. Ed). The Introduction to the Law of the Constitution. 10th Ed London. Macmillan Publishers 1959.

The *dictum* of Coke CJ in Dr Bonham's Case[64], is the authority to this effect. The learned Chief Justice said,

> In many cases the common law will control the Acts of parliament and sometimes adjudged them to be utterly void for when an Act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such Act to be void.

Even Dicey himself elsewhere argued that the British parliament could in one way or the other be limited by human rights. The British parliament could not legislate against the wishes of the people or against, in Dicey's words, 'the sentiment prevailing among the distinct majority of the citizens of a given country'[65]. Other means by which the British Parliament was restrained included the restrictive interpretation of what constitutes an Act of parliament. Parliament 'can only be said to be sovereign when acting in certain way prescribed by law'[66]. This principle was upheld in the case of Pickin v. British Railways Board.[67]

Therefore it can be argued that the sovereignty of parliament in England represented the sovereignty of the people and as such, the philosophical basis that guided the doctrine was the will of the people is sovereign not the parliament *per se*. de Waal et al argue that in its jurisdiction of origin, Britain- parliamentary sovereignty can be justified by the fact that parliament is the representative

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[64] (1610) 8 CO Rep. at 1136 (as quoted in Bradley and Ewing op cit at 64).
[65] As quoted by Craig, P.; "Dicey: Unitary, Self-Correcting Democracy and Public Law' (1990) 106 Law Quarterly Review 105 at 111.
[66] Bradley and Ewing op cit (n 62) at 70.
[67] 1974 AC 765.

branch of the state. 'It derives its power from and is accountable for its actions to the electorate, the body of citizens who elected it'[68].

2.4.3 Abuse of Parliamentary Sovereignty in South Africa

As demonstrated above, the doctrine of Parliamentary sovereignty in South Africa deviated from its original philosophy. The classic formulation of how the doctrine was misused in South Africa is to be taken from the dictum of Stratford ACJ (as he then was) in the case of Sachs v. Minister of Justice.[69] The court said,

> Arguments are sometimes advanced which do seem to me to ignore the plain principle 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 the courts of law to enforce its will.

This is the extreme perspective that could be taken by the judiciary under the regime of parliamentary sovereignty. However, this jurisprudence espoused by Stratford, CJ,; was latter to manifest in the succeeding decision of Ndlwana v. Hofmeyer [70]. *In casu,* the applicant was a 'native' who at the time of the enactment of the Representation of Natives Act of 1936[71] was registered as a voter in a constituency in the Cape. Under the Act, the registration officer

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[68] De Waal J *et al* The Bill of Rights Handbook. 4th ed. Cape Town. Juta 2001 at p 2.
[69] 1934 AD 229.
[70] Ndlwana v. Hofmeyer supra at 237.
[71] Act 12 of 1936.

removed his name from the list and included it in the special list provided by the Act. The applicant challenged the validity of the Act. He alleged that the Act was *ultra vires* the Union Constitution because it was not passed in the manner provided by section 35 of the Union Constitution.

Notwithstanding the fact that the Act was challenged on the ground of procedural impropriety[72], Stratford, CJ.; was not prepared to abandon the jurisprudence he championed in the *Sachs* case. Whilst he conceded that an Act of parliament deprived people of their section 35 guarantees, he nevertheless held that,

> An Act of parliament in the case of a sovereign law-making body proves itself by mere production of the printed form, published by the authority. It is obviously senseless to speak of an Act of parliament as invalid.[73]

As demonstrated above, the approach taken by the South African judiciary on the doctrine differed materially from the way the doctrine applied in its jurisdiction of origin, England. Hence this argument that in South Africa the doctrine was abused. Despite the fact that the legislative measure deprived people of their fundamental rights, it had not been passed by three constituent elements of the parliament, namely, the King, Senate and the House of Assembly. This was a serious flaw which could have rendered the Act of parliament void. In the case of

[72] It was almost trite law under the regimes of parliamentary sovereignty that whilst the substance of the Act of parliament cannot be inquired into by the court, the court however declared an Act of parliament invalid on the basis of procedural impropriety.
[73] At 236.

James v. Commonwealth of Australia[74], Lord Wright, in delivering the judgment of the Privy Council, opined that 'the established courts of justice when a question arises in regard to the constitution whether the prescribed limits have been exceeded must of necessity determine that question'. This is the salutary principle of parliamentary sovereignty[75].

However a rather different approach was to be adopted under the leadership of Chief Justice Centlivres in 1950s. This was the time when there was heated tension between the legislature and the judiciary about the extent of each other's competences. The tension started in 1952 in the case of Harris v. Minister of Interior. The appellant in this case was challenging the validity of an Act of parliament[76] for having deprived them of one of their most fundamental rights, the right to franchise. The Act provided for the separate representation of 'Europeans and Non-Europeans'. The appellants' contention was that the Act was not passed according to the procedure prescribed by the provisions of the Union Constitution[77] as the Act was passed bicamerally and not jointly by the two chambers of parliament. The Appellate Division was unanimous that since the Act was not passed according to the procedure prescribed by the constitution, the Act was invalid.[78]

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[74] 1936 AC 578 at 613.
[75] For the jurisprudential theory of this doctrine see Allot P. 'The Theory of the British Constitution' in Gross, H. and Harrison, R.(eds).; Jurisprudence: Cambridge Essays. Oxford. Clarendon Press. 1992 at 173.
[76] Representation of Voters Act 46 of 1951.
[77] See sections 35 and 152 of the Union Constitution, 1909.
[78] The Court in this case unequivocally overruled its decision in the *Hofmeyer* case as the two cases were similar in all material respects.

The drama of the court and parliament did not end there. In an attempt to assert its sovereignty, the parliament passed what was called the High Court of Parliament Act.[79] The Act created what was purportedly called the High Court of Parliament. This High Court was given supervisory powers over the Appellate Division of the Supreme Court of South Africa. The essence of the Act was that if the Appellate Division declared an Act of parliament inoperative, such a declaration was subject to review by the High Court of Parliament[80], whose decision was final.

This could be the clearest example of how the doctrine was abused in South Africa. Parliament could even go to the extreme of consolidating itself into a court of law. That notwithstanding, the successful appellants in the first *Harris* case challenged the Act in the second *Harris* case[81]. Their challenge was based on the ground of procedural impropriety. They alleged that the Act was passed bicamerally and not unicamerally as provided for by the constitution. In this second case the court did not only set aside the Act on the grounds of procedural impropriety, it went further to inquire into the substance of the Act. On the substance of the Act Centlivres CJ said;

> In construing these sections, it is important to bear in mind that these sections confer on individuals the right to call on the legislature or executive action which offend against these sections.

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[79] Act 35 of 1953.
[80] Ibid ss 1,2 and 3.
[81] Minister of Interior v. Harris supra at n 28.

The court advanced the cause of human rights jurisprudence by the realizing that the sections of the constitution in issue were *sui generis* – they embodied constitutional guarantees creating rights in individuals.

It is discernible from the perspective adopted by the court that the judicial approach in South Africa was making attempts to follow the classic principles of the doctrine of parliamentary sovereignty as they obtained in England. The courts were trying to balance the doctrine of parliamentary sovereignty with the notion of human rights and 'public sentiment', which under the classic principles constituted limitation on the parliamentary legislative power. Although the 1950s is characterized as the period of 'constitutional crisis[82]' by some of the South African writers, it is herein characterized as the period of the 'short-lived victory for human rights jurisprudence'. It is so characterized because the parliamentary objective that was aborted in the second *Harris* case was later to be reinvented by categorically excluding the power of judicial review in the 1961 Republican Constitution. The country's development of human rights reverted to the *status quo ante.*

2.5 Breakaway with Parliamentary Sovereignty

As demonstrated above, the doctrine of parliamentary sovereignty has been at the centre stage, not only of the constitutional development but also of the

[82] Currie I. et al supra at p 46-47.

human rights jurisprudence since unionization in 1909[83]. The manifestations and implications of this theory were very repugnant to the development of constitutionalism in South Africa. It was only in 1993 when a deliberate and conscious decision was made by the country to make a breakaway with the past constitutional order.

This break with the past was heralded by the adoption of the interim constitution in 1993[84]. The Interim Constitution was by nature interim and only transitional. It was intended to 'bridge'[85] the gap between the old order characterized by parliamentary sovereignty and a future constitutional state[86]. The clear intention of the Interim Constitution to replace parliamentary sovereignty with constitutional supremacy was underpinned by section 4 of that Constitution. The supremacy clause declared, for the first time in the contemporary history of this country that the Constitution is the supreme law. Any law inconsistent with it would be void *ab initio*. For this reason, the Interim Constitution has been labeled as not only transitional but also revolutionary[87].

But most importantly for this study, it ushered-in a comprehensive Bill of Rights for the first time in history of human rights development in the country. The

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[83] Van der Vyver, 'Parliamentary Sovereignty, fundamental freedoms and Bill of Rights' 1982 99 SALJ 557.
[84] Act 200 of 1993 (hereinafter referred to as Interim Constitution).
[85] ibid the Preamble and the Postamble.
[86] See AZAPO v. The President of the Republic of South Africa 1996 (4) SA 671 for the articulated judicial approach to this transitional period.
[87] See AZAPO Ibid at para 1.

Constitution also provided for the systemic way of limiting human rights.[88] As Devenish[89] rightly pointed out,

> The crucial adjudication on the content and justifiable limitation of rights is always an important issue in any legal and political system based on supremacy of the constitution, it constitutes the very essence of the jurisprudence.

The accuracy of this quote need not be re-emphasized. The limitation of human rights constitutes the heart of human rights jurisprudence. It is only through the limitation of human rights that we are going to be able to assess the country's commitment to protect, advance and promote human rights. Therefore a breakaway from the constitutional order whose overall scheme was tailor-made to deny human rights is a radical departure towards human rights protection. The interim Constitution came with it the general scheme of the Constitution that created the environment suitable for human rights.

The essence of the new legal order and its relation to the limitation of human rights was propounded by Ackerman J. in the case of S v. Makwanyane[90].

> The detailed enumeration of the description in s 33(1) IC of the criteria which must be met before the legislature can limit a right entrenched in chapter 3 of the interim constitution emphasizes the importance in our constitutional state of the reason and justification when the rights are sought to be curtailed.

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[88] Section 33.
[89] Devenish, G.; "An Examination and Critique of Limitation of Rights Provision of the Bill of Rights contained in the Interim Constitution" 1995 SAPR/PL 131 at 132.
[90] S v. Makwanyane supra at para 156.

This idea that the new constitution established the different legal order in material respects was jurisprudentially welcome by the courts during the transitional period.[91]

2.6 The Era of Constitutional Democracy

As provided by the preamble to the interim Constitution, the final Constitution was adopted on 18 May 1996.[92] For the purpose of this study, the final Constitution is not materially different from the interim constitution. It still has a chapter on human rights and limitation of human rights. The Constitution also entrenches the main constitutional doctrines that are preconditions for the modern constitutional protection of human rights[93].

Rautenbach and Malherbe, observe that the Bill of Rights influences virtually all branches of the law. The coming into operation of an entrenched Bill of Rights has probably been the most far-reaching step in respect of human rights undertaken by the country.[94] Thus the final Constitution of 1996 can be characterized as having heralded the overarching notion of constitutional democracy. This notion is a prerequisite for the healthy development of human rights jurisprudence[95].

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[91] See Executive Council of Western Cape Legislature v. President of the Republic of South Africa 1995 (4) SA 877 (CC).
[92] Constitution f the Republic of South Africa Act 108 of 1996.
[93] Section 7 (1) provides that human rights are the cornerstone of South African democracy.
[94] Rautenbach an Malherbe supra at p 84.
[95] Doctors for Life International v. The Speaker of the National Assembly and Others 2006 6) SA 416 see also King and Others v. Attorneys Fidelity Fund Board of Control and Another 2006(1) SA 474, (SCA) Matatiele Municipality and Others v. The President of the Republic of South Africa

2.7 Summary

From the forgoing discussion, it is evident that the doctrine of parliamentary sovereignty has dominated the South African constitutional jurisprudence since unionization in 1909 until the introduction of the interim constitution in 1993. It would seem that the quest for the protection of human rights was the reason for the strife and ultimately the victory of parliament over the prerogative power of the King in England. Against this very background of the coexistence between human rights and the doctrine of parliamentary sovereignty in England, its jurisdiction of origin, those two variables became mutually exclusive in South Africa.

The pre-1993 constitutional dispensation was not only characterized by the institutionalized and systematic denial of human rights but there was also an undeveloped human rights jurisprudence. The doctrine of parliamentary sovereignty has been proven in South Africa to be directly antagonistic to human rights. Prior to 1993, the courts seem to have held that the doctrine of parliamentary sovereignty so high so much that its implications in South Africa were unparalleled by any system of parliamentary sovereignty in the world.

Except for the short-live victory during the constitutional crisis of 1950s, the judiciary was virtually excluded from reviewing Acts of Parliament[96]. Human

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and Others 2006(5) BCLR 622 (CC) Minister of Health and Another v. New Clicks South Africa 2006 (5) BCLR 622 (CC).

[96] For the role of the judiciary in the pre-1993 see Cameron "Legal Chauvinism, Executive-mindedness of Justice LC Steyn's impact upon South African Law". (1984) 99 SALJ 38, Wacks,

rights protection was left to the underdeveloped principles of the common law which almost invariably were vulnerable to statutory inroads. The emergence of the constitutional state in 1993 brought a paradigmatic shift in the jurisprudential theory in South Africa.[97] According to Devenish;

> A metamorphosis has occurred that introduces the jurisprudence of constitutionalism and everything that it entails, parliamentary sovereignty and its concomitant executive aggrandizement are now part of our defunct and little lamented constitutional and political history[98].

For the purpose of this study therefore, the pre-1993 dispensation can be given the following characteristics. First, it was a system characterized by parliamentary sovereignty which gave a 'free ride' on the deliberately institutionalized denial of human rights. Second, there was no systematic jurisprudence of human rights as there was no Bill of Rights. Human rights protection was left to the whims of the parliament and sometimes the executive which often introduced undemocratic limitations.

The post-1993 constitutional revolution introduced two fundamental innovations to the history of human rights in South Africa. First, the doctrine of parliamentary sovereignty was replaced by the doctrine of constitutional supremacy. It is through the doctrine of constitutional supremacy that the courts of law are able to test the validity of Acts of parliament. Secondly, there is the Bill of Rights and a

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"Judges and Justice" (1984) 101 SALJ, Nicolson, "Ideology and the South African Judicial Process-Lessons of the Past" 1992 (8) SAJHR 50.

[97] See the case of Matiso v. Commanding Officer Port Elizabeth Prison 1994 (3) BCLR 80 (SEC).

[98] Devenish, G;. Commentary on the South African Bill of Rights, supra at 10.

systematic commitment by the constitution to uphold the values of dignity, equality and freedom.

To conclude, it would seem therefore that human rights jurisprudence in South Africa received constitutional recognition in 1994. This is to develop such jurisprudence so as to enable it to attain its ideals. The declared objective of this chapter was to sketch the historical perspective of the South African human rights jurisprudence. By thus doing, this chapter is the precursor to the succeeding chapters which will be geared towards specifically analyzing the limitation of rights under a democratic South Africa. The immediately succeeding chapter analyses how the current constitutional set-up has been able to systematize the limitation of human rights.

CHAPTER 3: LIMITATION OF HUMAN RIGHTS UNDER THE SOUTH AFRICAN CONSTITUTION

3.0 Introduction

Having sketched the historical perspective of the human rights jurisprudence in South Africa in the last chapter, it is fitting therefore to analyze how the current constitutional structure has featured the concept of human rights limitation. The objective of this chapter is to analyze the scheme of human rights limitation in the South African constitutional jurisprudence and how the courts of law have contributed in the development of such jurisprudence. The analysis of the tension between the special and general limitation clauses adopted by the South African human rights jurisprudence is the epicentre of this chapter. In that course, the scope of this chapter will not extend to the same problem as it relates to socio-economic rights because that has been specifically dedicated to the immediately succeeding chapter in this study [99].

In this chapter much emphasis is placed on how section 36 of the Constitution relates to the limitations of rights in the Constitution other than socio-economic rights. The chapter consists of basically four sections which are inter-related. The first section traverses the concept of human rights limitation. In this section, an attempt is made to place the idea of human rights limitations within the larger philosophical framework of the notion of human rights. Having done so, the second section sketches the scheme of provisions in the Constitution of South

[99] See Chapter 4 of this Study.

Africa that embodies the limitation of human rights. The last but one section is the analysis of the problem as it relates to certain rights in the Constitution which have internal limitations. A case study is made with respect to the rights to equality, property and freedom of expression. The ultimate section is the summary of the chapter.

3.1 The Concept of Human Rights Limitation

Ever since the systematic recognition of human rights under international law and comparative jurisprudence, it has always been accepted that human rights are not and can not be absolute[100]. In fact, if human rights were to be absolute the very purpose of their existence would be defeated. The current trends of human rights limitation, both at international level and municipal law arguably developed out of Article 29(2) of the Universal Declaration of Human Rights 1948 which was the first international instrument to systematize the protection of human rights under international law. The Article provides that ;

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by the law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

[100] Kiss, AC., 'Permissible Limitations on Rights' in Henkin L, (ed) The International Bill of Rights at 281; also Higgins, 'Derogation under Human Rights Treaties '1976/77 XLVVIII BYIL 281.

The Article lays the guidelines by which the notion of human rights on the one hand and limitation on the other can be balanced. The balance has not been an easy exercise for most jurisdictions. Higgins argues that the predominant limitation of human rights should be the individual's duty to the community to which he is part.[101]

It is clear from the foregoing that the purpose of human rights limitation as a concept is to balance the rights of an individual and those of others with whom they live as a community .Those community norms that seem to usually impose limitations on the individuals freedom are morality, the rights of others, security, public order and other general social interests[102].

3.2 General Principles Guiding Limitation of Rights

The development of the principles and guidelines on human rights limitation has been the work of international law than municipal law. These guidelines assist in the interpretation and application of international norms as applied to certain laws to test whether they are not in conflict with human rights[103].

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[101] Ibid 283.

[102] Libenberg, in Chaskalson, M.; *at al* supra at 12.5 argues that there is fourfold purpose of limitation clause. First, it is reminder that rights are not absolute. Second, that the limitation must be justified by its compliance with the constitutional clauses. Thirdly, it serves as the balancing mechanism between competing values and fourthly, that a limitation clause represents an attempt to solve the problem of judicial review.

[103] For the detailed elucidation of these principles and guidelines see ANC (Border Branch) v. Chairman of Council of State, Ciskei 1992 (4) SA 434 at 447-448.

The general rule is that rights must be interpreted generously or purposively rather than legalistically. According to this principle, interpretation of human rights must be geared towards giving individuals their rights other than to refuse them. The English Court of Appeal, in the case of Minister of Home Affairs (Bermuda) v Fish, when interpreting chapter 1 of the Bermuda Constitution Order of 1968, held that

> ...these antecedents and the form of chapter 1 itself, call for generous interpretation avoiding what has been called the austerity of tabulated legalism suitable to give to individuals the full measure of the fundamental rights and freedoms referred to[104].

The second principle which has received international acceptance is that the provisions allowing for restrictions or limitations of rights must be narrowly and strictly construed. This is premised on the idea that the protection of human rights is a rule and human rights limitation is a mere exception to the rule. This principle received the sanction of the European Court of Human Rights in the case of Klass and Others v Federal Republic of Germany[105]. At para 48 at p21 of the judgment, the court held that,

> ...the cardinal issue arising under article 8 in the present case is whether the interference so found is justified by the terms of Para 2 of the article. This paragraph since it provides for an exception to a right guaranteed by the convention is to be narrowly interpreted.

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[104] 1980 AC 319 at 328.
[105] 5029/71; See also De Ville, J.; "Interpretation of the General Limitation Clause in the Chapter on Human Rights". SAPL 1994 (4) 287.

This principle of strict interpretation guides towards interpreting in favour of the right in issue[106]. These are the basic principles which have been developed at international law. They have been received differently by the different states[107]. However, the essential principles are retained across many jurisdictions[108].

3.3 The Scheme of Human Rights Limitation under South African Constitutional Jurisprudence

Countries and various human rights regimes have adopted different approaches to the limitation of human rights. As pointed out earlier, there are basically four styles of human rights limitation that have been adopted by various human rights regimes.

The first approach is by way of a general limitation clause applicable to all human rights. Germany and Canada are renowned for this kind of approach. At international level, the Universal Declaration of Human Rights is the only human rights instrument that concentrates limitations of rights and freedoms in a single Article.

The second style is by way of specific or inbuilt limitations. This is the situation whereby the limitations are scattered with the specific provisions. Although these

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[106] See Handyside v. United Kingdom, European Court of Human Rights Report 5493/72 at 21 para 43.

[107] For instance the South African Human Rights Jurisprudence has received most of these Principles. See De Ville J, op cit at 287.

[108] In 1994 a set of Principles known as Siracuse Principles were drawn by experts to guide the interpretation of International Covenant on Civil and Political Rights. These Principles are summarized by Erasmus E, "Limitation and Suspension" in Van Wyk *et al* op cit at 644. For the full text see Siracuse Principles (1985) 7 Human Rights Quarterly 1-88 .

limitations may be virtually the same but they are provided for under each provision. The argument which has been put in support of this approach is that it provides the maximum protection of human rights. As opposed to general limitation which is said to reflect the large and the ill-determined scope of the provision, the special limitation is said to be specific and easier to ascertain[109]. Almost all the international instruments that came after the Universal Declaration of Human Rights have followed the special limitation approach[110]. The third approach which so far is cherished only by the United States is the doctrinal approach[111].

Of all these approaches, South Africa has opted for an hybrid approach .This means that the Constitution provides for both a general and special limitation clauses. Perhaps the idea was to derive advantages from each approach. However it would seem that it this very hybrid nature of limitation of human rights under the South Africa constitutional jurisprudence which is causing operational problems.

Section 36 of the Constitution serves as a general limitation clause for the entire Bill of Rights. The section provides for two requirements for the limitation of human rights namely: (a) the general application that is (b) reasonable and

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[109] Kiss op cit at 291.
[110] Kiss op cit at 292.
[111] This is the type of limitation in which the constitution does not provide for any limitation. The Courts of law impose judicial limitation on the rights. For instance, the First Amendment to the US Constitution provides that, 'Congress shall make no law ...abridging the freedom of speech'. The courts of law shall determine the scope and the justifiable limitation of rights.

justifiable in an open and democratic society based on human dignity. The section provides further that the list of factors relevant to determine the justifiability of the limitation[112]. The precursor of section 36 is section 33 of the Interim Constitution[113]. According to the manner in which this section is couched, it would seem that it applies generally to the Bill of Rights. However, subsection (2) recognizes the possibility of limitation by other provisions of the Constitution[114]. Alongside section 36 exist other rights that have their own internal limitation such as section 9(2) intended to allow for affirmative action, section 15(3) allowing legislation dealing with marriages and personal and family law, section 22 permitting legislation to regulate the practice of professions or trades, section 23 allowing regulation of labor relations, section 16 on freedom of expression and socio-economic rights embodied in sections 25, 26, 27, 29 and 30.

It would seem that most of these sections in their text do not make a specific reference to their relationship with section 36. They provide for their own internal limitation. An attempt is made by section 36(2) to harmonize the relationship by providing that rights may be limited only in terms of section 36(1) 'or any other provision of the Constitution'. Subsection (2) is ambiguous as it may lead to two,

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[112] s(36)(1) (a) The nature of the right.
(b) The importance of the purpose of the limitation.
© The nature and extent of the limitation .
(d) Relation between the limitation and its purpose.
(e) less restrictive means to achieve the same of the purpcse .

[113] Act 200 of 1993. The only major difference is that the latter required that in addition to being reasonable, the limitation was also required to be necessary and would not negate the essential essence of the right in question.

[114] The subsection provides that 'Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

sometimes conflicting interpretations. The first interpretation may be that section 36 recognizes two ways of limitation. One other way may be by means of subsection (1) and the other under subsection (2). Under subsection (2) it means that rights may also be limited by other rights in the Constitution. If this first interpretation is followed to its logical conclusions, it would mean that section 36 does not apply to sections with internal limitations. This approach might lead to a manifest absurdity and thus defeat the very purpose of section 36. Section 36(1) provides for very comprehensive criteria for limitation of human rights which is not available in any other right in the Constitution even if it has an internal limitation. This criterion does not only accord with the generally accepted principles of human rights limitation, but it also complies with the general principle that rights must be interpreted in such a way as to give individuals a measure of protection.

The second interpretation which is equally problematic is to interpret section 36 as applying across the board without any exception to the rights in the Bill of Rights. This is the approach that will immediately cause tension between section 36 as the general limitation clause and those limitations contained specifically within the texts of some of the rights in the Bill of Rights. The immediately succeeding section hereof is an analysis of the judicial approach to this problem.

3.4 The Nature of the Problem and Judicial Approach

The main problem, which is at the heart of this study, is that the courts of law have not developed a comprehensive and coherent approach as to how special limitations and the general limitation should coexist in practice. Basically three questions remain unanswered by the current jurisprudential trends. The first question is, should the two types of human rights limitation apply cumulatively? Secondly, do the specific limitation clauses qualify the general limitation clause? Thirdly, does the general limitation clause have any application where a specific limitation clause applies? Hereunder is the discussion of the various approaches that have been developed by the courts to deal with the limitation of human rights.

3.4.1 The Two Stage Approach

The South African courts have adopted the Canadian jurisprudence on the limitation of human rights[115]. The courts have adopted what is called 'two-stage approach'. At the centre of this approach is the separation of the rights analysis from the limitation analysis. The approach first found its way into the South African jurisprudence through the case of S v. Zuma[116]. The brief facts of this case were that the accused challenged the constitutionality of s 217(1)(b)(ii) of

[115] See the case of R v. Oaks 1986 26 DLR.
[116] 1995 (2) SA 242; In the latter case of Ferreira v. Levin 1996 (1) SA 984 at para 44 the court said, 'The test for determining whether provisions of the Act are invalid because they are inconsistent with the guaranteed rights involves two stages'.

the Criminal Procedure Act of 1959. The accused contended that the section was in conflict with section 25 of the Interim Constitution which provided for the right to a fair trial. The section under challenge placed the burden of proving the confession made before a magistrate on the accused person. The Court held that;

> Fundamental rights analysis under the Interim Constitution Chap 3, calls for a two stage approach, first, has there been a contravention of a guaranteed right? If so, is it justified under the limitation clause?

The manner in which this approach has been operationalised in South Africa is that it separates inquiry into two stages. The first stage is intended to determine whether the right or freedom in question has been infringed. The courts use the interpretation methods to demarcate the ambit of the right. At this stage, the burden of proof rests with the applicant. The second stage is the limitation analysis. After the applicant has successfully established the infringement of the right, the party invoking the limitation clause then bears the burden of demonstrating that the curtailment of the right is consonant with the limitation clause[117]. The two stage approach does not seem to be giving a lot of problems when applied to the rights in the Constitution that are without internal limitations. The approach was in fact applied successfully in the case of S v. Makwanyane[118], where the Court was concerned with the constitutionality of the death penalty.

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[117] Davis et al op cit at 306.
[118] S v. Makwanyane supra at n 11.

However it would seem that the courts are far from being clear as to how the two stage approach applies with regards to special limitations. It would seem that two arguably conflicting approaches have been taken by the courts. The first approach is to regard an internal limitation as a mere internal modifier of the right. If this approach is taken, it would mean that the internal limitation clause is considered at the first stage of the two-stage analysis. This approach was taken by the court in the case of S v. Lawrence[119]. In this case, the court considered an argument that the provisions of the Liquor Act[120] were unconstitutional violations of the right to free economic activity. The regulations made under the Act restricted the selling of liquor by holders of grocer's wine licenses. This included supermarkets and other food retailers. They were prohibited from selling wine on Sundays, Christmases and Good Fridays. The Court had to determine the scope of s 26 of the Interim Constitution and its reconciliation with the general limitation clause. Due to its direct relevance to this discussion this section will be quoted *verbatim.*

> S26 (1) Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory.
> (2) Subsection (1) shall not preclude measures designed to promote the protection or improvement of the quality of life...

According to the approach taken by the Court, the two subsections of section 26 had to be read together in order to determine the content and scope of this right. The Court held that 'reading s 26 in this way would also give effect to the

[119] 1997 (4) SA 1176.
[120] Act 27 of 1989.

provisions of section 33'[121]. This approach, it is submitted, is fundamentally problematic. The Court does not seem to distinguish between the internal modifiers and the internal limitations. The former are sometimes called demarcations. They are mere textual qualifications of rights. They are usually used to help the courts interpret the right properly and determine the scope of such right[122]. Therefore, in the two stage approach internal modifiers correctly fall under the rights analysis. The internal limitation, of which section 26(2) is one such, is limitation and does not and should not form part of the rights analysis. According to Currie and de Waal;

> Any form of limitation analysis, whether in terms of the criteria laid down in s 36 or in terms of the special criteria attached to some rights, assumes that the infringement has been proved.[123]

The failure by the Court to make this distinction as it was the case in *Lawrence,* unduly puts a heavier burden of proof on the person who alleges the violation of the right. This could be too much for the applicant who is supposed to have made a showing at the stage of right analysis. This is more so because the practical implications of the two stage approach affect the aspects of the onus of proof. The party alleging the infringement must prove such. When he/she has

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[121] S v. Lawrance op cit n 112 at para 29; see also the decision in Yunic Ltd v. Minister of Trade and Industry 1995 (11) BCLR 1455 (T).
[122] Carpenter, G,; "Internal Modifiers and other Qualifications in the Bill of Rights-Some Problems of Interpretation" 1995 (10) SAPR/PL 260.
[123] Currie I and de Waal J supra at 164-165.

successfully done so, the onus then shifts to the party alleging the justification[124]. Therefore, the decision of the Court in the *Lawrence* case will create a lot of problems because it treats internal limitations as part of the scope and content of the right.

The second approach which is discernible from the decisions of the Constitutional Court is that, unlike in the former approach where the internal limitations are treated as part of the scope of the right, the Court seems to treat internal limitations as limitations properly so called. However, it is far from being clear how the courts apply the two stage analysis to the internal limitations. According to Woolman[125],

> Proof that the Constitutional Court is aware of the appropriate division of tests between the two stages of analysis and struggles to fashion a coherent approach to fundamental rights limitation is evident from several decisions.

This problem is most glaring in the political rights cases[126]. In the case of New National Party of SA v. Government of the RSA[127], the Court was concerned with the right to vote. The provisions of the Electoral Act[128] provided that voters could only register on the voters roll and subsequently vote if they produced a bar-

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[124] See Van Vyver, "Limitation Provisions of the Bophuthatswana Bill of Rights" 1994 THRHR 42; Also du Plessis M. "A Note on the Application, Interpretation Limitation and Suspension Clauses in the South Africa's Transitional Bill of Rights" Stell LR 1994 (1) 86.
[125] Woolman 'Limitation' in Chaskalson et al supra at 12.6
[126] See for instance August and Another v. Electoral Commission 1999 (3) SA 1 (CC).
[127] 1999 4 BCLR.
[128] Act 73 of 1998.

coded identity document issued after 1996 or a temporary certificate. The challenge was that the practical effect of these requirements amounted to a violation of the right to vote. O'Regan, J, acknowledged that the structure of the South African Constitution generally reserves the questions of reasonableness and justifiability to the second stage of the limitation analysis where the litigant has shown that the right has been violated. The learned Judge said,

> However, there are rights which contain broad equitable defining characteristics such as right to free and fair elections, right to a fair trial and against discrimination. It seems to me therefore that inclusion of an equitable consideration at the threshold is not impermissible. In my view this is a case where the right is properly defined by reference to the concept of reasonableness and therefore reasonableness is relevant at the threshold stage[129].

By 'threshold stage' obviously the learned Judge refers to the first stage of the two-stage approach. The essence of the jurisprudence pioneered by the learned Judge is that the internal limitations, which are commonly couched with the concept of reasonableness, form part of the second stage which is the limitation analysis. That notwithstanding, the learned Judge argues that consideration of such questions in the first stage 'is not impermissible'. This is far from being clear. The two stage of analysis cannot, and should not share the same questions or considerations. It has been demonstrated above that this two stage approach has got practical implications. It carries along the question of onus which is very crucial in human rights litigation. It would seem therefore that if the

[129] Ad para 122.

two stages of analysis are to share the same questions and considerations, as Justice O'Regan suggests, the aspect of onus will be completely confused. If the courts will ask the questions of reasonableness and justifiability at the first stage of analysis, it would logically mean that the question of onus, which is the corner-stone of the two-stage approach, will be misplaced and consequently resulting in the unfairness to the other litigant.

Thus, it may be safely argued that the courts are still struggling to fashion or develop a coherent approach to human rights limitation in South Africa. In the immediately succeeding sections hereof, the human rights in the Bill of Rights which have internal limitations are analyzed. Case studies will be made with with reference to the rights to equality, the right to property and to freedom of expression.

3.4.2 Limitation of the Right to Equality

Section 9 of the Constitution provides for the right to equality. It is one of the rights in the Bill of Rights which have an internal limitation. The structure of the equality clause is more complex than that of other clauses with internal modifiers. The equality clause has the aspect of the affirmative action and an element of unfairness both of which require a thorough inquiry. Thus, it has been argued by other authors that

> In the case of the right to equality, it is very difficult to apply the usual two-stage analysis of a right and its limitation. Indeed, it is far from being clear whether s 36 has any meaningful application to s 9. This is because the s 9 rights are qualified by the similar criteria to those used to adjudicate the legitimacy of a limitation of rights in s 36[130].

This status quo is the one that has hitherto confused the formulation of a coherent equality jurisprudence. It is actually far from being clear from the decisions of the courts, as to how section 36 features in the equality jurisprudence. In most instances, the courts have taken a cumulative approach. The courts want to exhaust enquiry of the provisions of section 9 at the threshold stage – first stage of enquiry. In so doing, they normally become so elaborate as to spill over, unaware, into the second stage of enquiry thus rendering s 36 superfluously. This assertion could be ascertained from the cases discussed hereunder. The first case in point is the case of the President of The Republic of South Africa v. Hugo[131].

The brief facts of this case were that the Presidential Act of 1994[132] provided for special remission of sentence for certain categories of prisoners, among them all mothers of minor children under the age of 12. The applicant in casu, a prisoner and single father with a son under the age of 12, applied for release from prison, averring that the he had been discriminated against unfairly on the ground of sex. The right was then claimable under section 8 of the Interim Constitution. However, for the purpose of this study there is no material difference with section

[130] Currie I, and de Waal J, supra 5th ed at 237-238.
[131] 1997 (4) SA 1 (CC).
[132] Act 17 of 1994.

9 of the 1996 Constitution. The majority judgment found that the impact of the discrimination on the fathers was not unfair. This finding was thereafter used by the Court to find the consideration of the role of the limitation clause under section 33 of the Interim Constitution unnecessary. This approach of the Court has received a trenchant criticism.[133] Albertyn and Goldblatt have argued, rightfully so, that the court confused the unfairness stage of the enquiry with the limitation clause. They have argued, for instance, that the criterion of the nature and purpose of the power sought to be exercised formed part of the justification stage not the threshold stage[134].

The approach taken by the court in *Hugo* case was later to be adopted and structured in the case of Harksen v. Lane[135]. In this case section 21(1) of the Insolvency Act of 1936[136] was under challenge. The section provided that on the sequestration of an insolvent spouse, the separate property of the solvent spouse in the Master of the High Court and thereafter in the trustee of the insolvent estate be treated as if it were the property of the insolvent spouse. The applicant averred that this provision of the Act violated the equality clause, section 8 of the Interim Constitution and was therefore unconstitutional. Goldstone J, for the majority, set out what he regarded as the proper approach to

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[133] See Carpenter, G.; "Equality and Non-Discrimination: Important Trilogy of Decisions" 2001 (64) THRHR 619; Also Cowen, S.; 'Can "Dignity" Guide South Africa's Equality Jurisprudence'? 2001 SAJHR 34.

[134] Albertyn and Goldblatt, B,; "Facing the Challenge or Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality". 1998 SAJHR 248; See also the previous argument in Albertyn and Kentridge "Introducing the Right to Equality in the Interim Constitution" 1994 SAJHR 149.

[135] 1997 11 BCLR 481 (CC).

[136] Act 24 of 1936.

the interpretation of the equality clause. The learned judge placed a great deal of reliance on the Constitutional Court's decisions in the case of *Hugo* and Van der Linde v. Prinsloo[137]. The formulation of the approach by the learned judge is worthy of quotation herein for it is very germane to this discussion. The approach was formulated as follows:

(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to discrimination? This requires a two stage analysis:

   (i) Firstly, does the differentiation amount to discrimination? If it is on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

   (ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation[138].

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[137] 1997 6 BCLR 759 (CC).
[138] Ibid at para 53.

Then the Court concluded the approach by holding that after the enquiry, if discrimination is found to be unfair, the determination will have to be made as to whether the provision or the conduct could be justified under the limitation clause. If this approach of the Court is followed to its logical conclusion, it would mean that an act, law or conduct which has been found to be unfair can find justification under the section 36(1) of the Constitution. It is very difficult to see how discrimination that has already been characterized as unfair discrimination can find justification under section 36(1)[139].

In the same case of *Harksen* , the Court enunciated extensively the factors which may be considered when determining the fairness or otherwise of the provision of law in issue. First, the court said the position of the complainants in society and whether they have suffered from the patterns of discrimination in the past and whether the discrimination is on the specified ground; secondly, the nature of the provision or power allegedly giving rise to the discrimination and its purpose. Here the court will assess the significance of it as a societal objective. Thirdly, the extent to which the discrimination has affected the rights or interests of complainants, and whether it has led to an impairment of their fundamental human dignity.

It would be abundantly clear that these factors are almost similar to the factors provided under section 36(1) to determine whether the law limiting the rights is reasonable and justifiable in an open and democratic society based on human

[139] Currie and de Waal, supra, 238.

dignity, equality and freedom. Section 36 mandates taking into account factors such as the nature of the right, the importance of the purpose, nature and extent of the limitation, the relation between limitation and its purpose and whether there are any less restrictive measures. So it is inconceivable how the court will repeat the consideration of the same factors both at the threshold stage which is the right analysis stage and at the second stage of analysis which is the limitation analysis. The approach in *Harksen* renders section 36 nugatory[140].

The second problem with the approach in *Harksen* case is that it affects the issue of onus. It would be recalled that in terms of the two-stage approach established by the courts on human rights litigation, the onus shifts in accordance with the stages. On the first stage where the content and scope of the right is in issue, the applicant bears the onus. On the second stage, the stage of justification, the burden shifts to the respondent to justify the limitation. As demonstrated above, this is a golden rule established over a long line of cases both in South Africa and Canada. But directly contrary to this approach, the court in *Harksen* coined a two-stage approach to equality jurisprudence which has the implications for the burden of proof. In terms of this newly established approach the applicant has the duty to establish discrimination while the responded bears the duty to prove on the balance of probabilities that the discrimination is not unfair.

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[140] See Carpenter, G.; "Equality and Non-Discrimination in the New South African Constitutional Order: The Saga Continues". 2002 (65) THRHR 37; Also Cowen, "Equality: The Majority of Legoland Jurisprudence" 1999 SALJ 398; Klaaren, "Non-Citizens and Constitutional Equality: Larbi-Ordam v. MEC for Education (North West)" 1998 SAJHR 286. See also the critique by Van de Walt and Botha, "Coming to Grips with the New Constitutional Order: Critical Comments on Harsen v. Lane NO" 1998 SAPL 17.

Thus, the equality jurisprudence is very much clouded with problems because it is not clear as to how the courts have been able to deal with that aspect of limitation. Even the cases that are decided on the equality clause are far from being consistent on how section 36 features in the section 9 analysis[141].

3.4.3 Relationship of the Property Clause with Section 36

The property clause in the Constitution, like the equality clause, is qualified by internal limitations and modifiers. Section 25(1) of the Constitution confers the right to property to individuals. Just like section 36, section 25(2) provides that 'property may be expropriated only in terms of a law of general application'. The section goes further to provide for the factors to be considered in determining the limitation of the right to property. It is worthy of note therefore that the criteria provided by section 25 for the justifiable limitation is similar to the criteria provided by section 36. Thus, it is also inconceivable how the law or conduct can be found to be unreasonable and unjustifiable under section 25(2) and yet be justifiable under section 36(1). These sections use similar criteria to test justifiability of the limitation.

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[141] This trend is discernible in the cases of Larbi-Ordam v. MEC (North West) 1997 12 BCLR 1655; Pretoria City Council v. Walker 1998 3 BCLR 237(Indirect discrimination based on race); National Coalition Gay and Lesbian Equality v. Minister of Justice 1998 12 BCLR 1517(Constitutionality of the crime of sodomy); National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs 2000 (2) SA 1 (CC) (Immigration permits for same-sex partners). Hoffman v. SAA 2001 (1) SA 1 (Where the policy of not employing HIV positive people was declared unfair.); Minister of Defense v. Potsane 2002 (1) SA (1).The close inspection of these cases provides that the Constitutional Court has not been able to feature section 36 coherently in the development of equality jurisprudence.

In the like manner, it cannot be ascertained how the now established two stage analysis can apply to section 25. As demonstrated with the equality clause, these rights with internal limitations do not only seem to render section 36 nugatory and superfluous, they also involve issues of the onus of proof. The case that demonstrates the difficulty of applying both the two stage analysis and section 36 to the property clause is FNB t/a Wesbank v. Commissioner, SARS[142] . The applicant in *casu* challenged the constitutionality of section 114 of The Customs and Excise Act. The section creates a statutory lien over the property of a defaulting taxpayer in favour of the South African Revenue Services. The lien extended beyond the taxpayer's own property. SARS was given power to detain and remove the property and sell it in execution of the tax debt. In this case, the court clearly set the approach to limitation of section 25. However, the court simply coined the guiding questions which were, it is submitted, not so helpful in determining the appropriate approach to the limitation of the property rights.

Thus, it is submitted that similar logical difficulty confronting the limitation of equality right and probably other rights with internal limitation applies *mutatis mutandis* to the property clause[143].

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[142] 2002 (4) SA 768 (CC).

[143] See the incoherence of approach taken by the courts in the following decisions regarding property rights and the limitation clause in s 36: Jan Van Rensburg NO. v. Minister van Handel en Hewerheid 1999(2) BCLR 204; Also the Director of Public Prosecutions, Cape of Good Hope v. Bathgate 2000 (2) SA 535; Metcash Trading Ltd v. Commissioner of SARS 2000 (3) BCLR 318.

3.4.4 Limitation of Freedom of Expression

Freedom of expression is one of the rights in the Bill of Rights that is textually qualified. However, there is some considerable controversy as to whether the textual qualification of the freedom of expression can properly be called an internal limitation or it is an 'internal demarcation.' Section 16(1) of the Constitution provides for the right to freedom of expression which includes: (a) freedom of the press and other media; (b) freedom to receive and impart information and ideas; (c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research. Section 16(2) qualifies the right by providing that the right to freedom of expression does not cover (a) propaganda for war; (b) incitement of imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. It is clear from the section therefore that subsection (2) is the qualification of the right that is provided for under subsection (1).

The issue therefore, as stated above, is whether such qualification is a limitation or a mere demarcation or modifier. Some other commentators have argued that subsection (2) is not an internal limitation to the right created under subsection (1) but a mere demarcation[144]. According to Currie and de Waal[145] internal

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[144] Van Der Walt. The Constitutional Property Clause , Cape Town, Juta 1997 at 73-4.
[145] Currie, I and de Waal, J.; The Bill of Rights Handbook .5th ed. Cape Town, Juta 2005 at 186-187.

modifiers[146] differ with internal limitations in that the former assist in defining the scope of the right much more precisely than is the case with other textually unqualified rights in the Bill of Rights. The learned authors identify the internally modified rights in the Constitution to include rights such as section 16 on the freedom of expression; section 17 which protects the right to assemble as long as the assembly takes place 'peacefully and unarmed'; section 31 which provides that the rights of cultural, religious and linguistic communities cannot be exercised in a manner that offends against other rights in the Constitution. The same applies with section 32 which provides that access to information can be exercised only when an individual requires the information to exercise or protect one's rights.

The definitional purpose of the internal modifiers was confirmed by the court in the case of Islamic Unity Convention v. Independent Broadcasting Authority[147] . In *casu,* the Court considered the constitutionality of a provision in the Code of Conduct for broadcasting service which prohibited broadcasting of material 'which is likely to prejudice ...relations between the sections of the population. The Constitutional Court held that,

> The categories of expression enumerated in section 16(2) are not to be regarded as constitutionally protected speech. Section 16(2) therefore defines the boundaries beyond which the freedom of expression does not extend. In that sense the subsection is definitional'.[148]

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[146] Internal modifiers and demarcations are used interchangeable herein as most textbooks treat them as synonymous.
[147] 2002 (4) SA 44 (CC).
[148] Ibid at para 12.

The rationale for the exclusion, according to the Court, is that the categories of speech excluded from constitutional protection have the potential to impinge on the freedom of others. The Court said, 'our constitution is founded on the principle of dignity, equal worth and freedom, and these objectives should be given effect to'.[149] It is clear from the dictum that the Constitutional Court is of the view that section 16 (2), and probably other internally modified rights, are part of the definition of the rights not limitation[150].

However, there are other commentators who argue that section 16(2) is neither a modifier nor an aid to determine the content of the right but it is a limitation of the right[151]. This view, though, seems to run contrary to the way the courts have treated these qualifications. This view will also be enigmatic to the two-stage approach in its simplest form. This is because the internal modifiers, like the one in section 16(2), demarcate the scope of the right. They do not necessarily limit the right. The limitation of the right assumes the breach of the constitutionally protected right and justifies that breach, which is not the case with internal modifiers. The incidences covered by section 16(2) are clearly not part of the freedom of expression. Thus, no issue of the limitation or justification can arise

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[149] Ibid at para 13.
[150] See also Pimstone, G.; Hate Speech, the Constitution and Conduct of Elections, Johannesburg. Konrad-Adenauer Stifting 1999 at 10.
[151] Johansson, J.; "A Critical View of the Constitutional Hate Speech Protection" 1994 (10) SAJHR 394; see also Msaule, PR.; The Constitutional Protection of Freedom of Speech and the Prohibition of Hate Speech in South Africa (unpublished LLM Dissertation) University of North-West, 2004 at 61.

when they are considered. Only the question of definition arises when internal modifiers are in issue.

In this context therefore, section 36 will normally apply smoothly to section 16 and other internally modified rights without a necessary tension like is the case with other internally limited rights. Even the Constitutional Court, as demonstrated above, does not seem to be having a problem with the application of section 36 to the internally modified rights.

3.6 Summary

It is apparent from the foregoing discussion that there is an established tension between the limitations inbuilt within some of the rights and the general limitation clause as embodied in section 36. This tension, it would seem, manifests itself in basically two forms. First, it becomes clear during the application of the two-stage analysis which approach is well established in human rights litigation. The problem, as demonstrated above, is the place of internal limitations in the two stage analysis. The problem is even more exacerbated by the extensive manner in which some of these rights are detailed and thus affecting the shift of the onus in the process of investigating the mere scope of the right.

The second problem is that the very factors of consideration for limitation of human rights that are enumerated under section 36 in some of these rights will

not have a meaningful application on the rights that already have internal limitations.

CHAPTER 4: LIMITATION OF SOCIO-ECONOMIC RIGHTS

4.0 Introduction

In the preceding chapter, an attempt has been made to expose the tension that exists between the special limitations and the general limitation embodied under section 36. The scope of the analysis was purposefully limited to civil and political rights in the Bill of Rights as opposed to socio-economic rights, the reason being that the latter have come to demonstrate unique features. Thus, the tension seems to heighten as it relates to the limitation of socio-economic rights.

Therefore, it remains the purpose of this chapter to investigate the limitation of socio-economic rights under the South African constitutional jurisprudence and how the courts of law have approached the subject-matter. The chapter is divided into three major sections. The first section is the survey of how socio-economic rights – as a special generation of human rights – evolved at international law. The idea is to trace the unique nature of socio-economic rights. It is under this section that the international jurisprudence on these rights, which has come to influence the South African nascent jurisprudence on this matter, is investigated.. The second section is an evaluation of the South African constitutional scheme as regards socio-economic rights. The jurisprudence that has thus far evolved from the Constitutional Court's application of these rights is also analysed under this section. The third, and the last, section specifically

analyses the problem of limitation of socio-economic rights under our constitutional setup.

4.1 NATURE AND EVOLUTION OF SOCIO-ECONOMIC RIGHTS AT INTERNATIONAL LEVEL

4.1.1 Background

The notion of socio-economic rights is fairly new in the human rights discourse; hence they are sometimes referred to as 'second generation rights'[152]. They received international recognition after the civil and political rights, sometimes called first generation rights. Civil and political rights, by and large, owe their existence to the English scholar, John Locke[153]. The Lockean approach[154] which came to characterize the nature of civil and political rights even today had three fundamental features which render these rights to be less problematic. Those predominant characteristics of civil and political rights are; first, they entitle citizens to freedom from undue interference by the state, secondly rights are defined in the negative terms by preventing the state from interfering with

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[152] This classification is normally associated with Vasak K, (former Director of the Division of Human Rights and Peace of UNESCO) see Vasak K, A Thirty Year Struggle – The Efforts to Give Force of Law to the Universal Declaration of Human Rights, UNESCO Courie (November 1977) p29.

[153] Roederar C. and Mollendorf .; Jurisprudence, Juta, 2004 at 41-47, see also the treatises of the scholars such as Hobbes T. Leviathan (1651) ed CB McPherson, 1968, Locke J. Two Treatises of Government , 1690(Ed P. Laslett) 1998.

[154] According to De Viliers, the Lockean approach is a *laissez fair* approach because it imposes the negative obligation on the state. De Viliers B. 'Socio-Economic Rights'. In Van Wyk D, et al (eds) ,Rights and Constitutionalism: The New South African Legal Order, New York. Oxford University Press 1994,

individual rights and thirdly the state is not under any duty to take positive steps to enhance these rights.

Civil and political rights at international level are protected under the International Covenant on Civil and Political Rights, 1966[155]. However acclaimed and pervasive the Covenant might have been in revitalizing the international human rights jurisprudence, it was soon to become clear that recognition of civil and political rights alone could not be the panacea of all social and economic ills of the people. Thus the Lockean *laissez-faire* approach that only imposes negative obligations on the state is gradually becoming inadequate. According to De Villiers,

> The traditional laissez-fair approach cannot solve the critical problems of illiteracy, education, unemployment, housing shortages and starvation. The state consequently has a moral political obligation to take steps...[156]

Secondly, as it has always been the philosophy of Universal Declaration of Human Rights of 1948[157], it was later to be discovered that the distinction between these two generations of human rights is only artificial. They are indivisible and interdependent[158]. The aforementioned criticism against the bifurcated structure of international human rights jurisprudence was the point of departure for the recognition of socio-economic rights through the celebrated

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[155] International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), December 16, 1966, *entered into force* March 23, 1976.
[156] De Villiers supra 604.
[157] The Universal Declaration of Human Rights GA Res. 217A(111), December 10, 1948
[158] The Proclamation of Teheran, 1968.

International Covenant on Economic, Social and Cultural Rights, 1966.[159] The Covenant recognized the following rights which were not covered by the preceding Covenant: just and favourable conditions of employment[160]; equal pay for equal work[161]; safe working conditions[162]; social security[163]; protection of the family[164] and others such as health and housing.

In this context of general acceptance of socio economic rights at international level, other international and regional instruments emerged that cherish the ideal of socio-economic rights protection. In Europe, the European Social Charter of 1961 sought to include socio-economic rights in the European human rights system.[165] In Africa, the African Charter on Human and Peoples Rights was adopted in 1981[166]. The Charter adopted the rather unique approach towards human rights protection. It consciously protected socio-economic rights with civil and political rights on the basis of universality. There are other international instruments that embody social and economic rights[167].

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[159] The International Covenant on Economic, Social and Cultural Rights adopted in 1966 by General Assembly Res. 2200(XX1).
[160] Ibid Art 6 .
[161] Ibid Art 7.
[162] Ibid Art 79(a).
[163] Ibid Art 9.
[164] Ibid Art 10.
[165] See Berenstein, "Economic and Social Rights: Their Inclusion in the European Convention on Human Rights" 1981 Human Rights LJ 266.
[166] African Charter was adopted on the 27th Day of June the year of our Lord 1981 at Nairobi, Kenya by the African Heads of States under the auspices of the now defunct Organization of African Unity (OAU).
[167] See the International Convention Relating to the Status of Refugees, 1951. and ILO Convention No 117 Concerning Social Policy (Basic Aims and Standards) 1962 art 4(d) and arts 16, 19(4) and art 2 read with 5(2), International Convention on the Elimination of All Forma of Racial Discrimination of 1966, International Convention on the Protection of Migrant Workers and Their Families, 1990. For the enumeration of other Resolutions and Declarations that reflect the similar trend see Devenish, G.; A Commentary on the South African Bill of Rights. Durban, Butterworths, 1999 at 360.

In a nutshell, the picture herein created is that civil and political rights are rather less troublesome. But most importantly they impose mainly negative obligations on states while social and political rights impose both negative and positive obligations. According to Bilchittz, the distinction between negative and positive obligation is that,

> A negative obligation consists in having a duty not to interfere with the ability of someone to do something he is entitled to do; a positive obligation on the other hand, requires one to act in a particular way to provide something for someone.[168]

These are the basic features of these two generations of human rights that make them slightly different from each other. In the simplest, civil and political rights require the minimum of just respect from the government while their counterparts require the government to take positive steps[169].

4.1.2 Jurisprudence of the UN Committee on Economic, Social and Cultural Rights

The UN Committee on Economic, Social and Cultural Rights has played a crucial role in formulating the jurisprudence around the nature of state obligations under the International Covenant on Economic, Social and Cultural Rights. This

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[168] Bilchitz, D,; "Towards a Reasonable Approach to Minimum Core: Laying the Foundations for Future Socio Economic Rights Jurisprudence".(2003)19 SAJHR 1

[169] For the detailed treatise on the Nature of Obligations see Eide, A,; "Economic, Social and Cultural Rights as Human Rights" in Eide A, and Krause, C,; (eds). Economic, Social and Cultural Rights: A Textbook, Martinus Nijhoff, 1995. See also Steiner H, and Alston, P.; International Human Rights in Context: Law, Politics and Morals. 2nd Oxford University Press 2000, who identifies at leas five obligations on the state namely, respect the rights, create institutional machinery essential to realize the rights, protection of rights, provide goods and services to satisfy rights and promote rights through education et cetera. Section 7(2) of the South African Constitution reduces these into four obligations namely, 'respect, protect, promote and fulfil'.

jurisprudence is particularly important to South Africa because of section 39 of the Constitution which obliges the courts to consider international law when interpreting the Bill of Rights.[170] The Committee has taken the trouble to interpret the nature of states' obligations under the Covenant particularly regarding Article 2 thereof which provides that each state party is obliged to promote socio-economic rights in the Covenant subject to,

> '... the maximum of its available resources, with a view to achieving progressively the full realization of the rights by all appropriate means, including particularly the adoption of legislative measures.

The South African structure of socio-economic rights was heavily influenced by this Article[171]. However, the immediately glaring difference between the two is that whilst the South Africa Bill of Rights uses the criterion of 'reasonableness' of the legislative and other means, the Covenant uses the test of the 'appropriateness' of the means to be adopted by the states to realize these obligations.

The Committee has done this through what are called General Comments[172]. In its General Comment 3, the Committee has described the nature of states

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[170] Section 39(1)(b) of Republic of South Africa Constitution, Act 108 of 1996.
[171] See Liebenburg, 'Socio-Economic Rights', in Chaskalson et al (eds) Constitutional Law of South Africa. (1996: 3 Rev 1998) 41-44. See also Bilchits, Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance 2002 118 SALJ 484 See also the Judgment of Chaskalson P. in the case of S v. Makwanyane 1995 (3) SA 391(CC).
[172] For his comments visit www.unhchr.ch/tbs/doc.nsf and www.wits.ac.za/humanrts/econ. These Comments of the Committee on the nature and scope of obligations of the state as far as Socio-

obligation under Article 2 in the following manner. First, the requirement of the progressive realization of human rights does not absolve the state from taking those steps immediately. The state has the onus to show the progressive realization of human rights. Secondly, the phrase 'appropriate steps' gives the state the latitude of discretion.

However, states are obliged to justify their choice of measures. Thirdly, the Committee coined the idea of a 'minimum core'. According to this theory, the scarcity of resources does not absolve the state of its obligation to meet at least the minimum or essential levels of each right. Fourthly, the notion of progressive realization does not mean procrastination or postponement of the obligations to a later unspecified time in future[173]. According to the Committee, Article 2 of the Covenant is foundational to the understanding of all rights contained in the Covenant.

Economic rights are concerned are generally based on the Limburg Principles on the Implementation of International Covenant on Economic Social and Cultural Rights, 1986.
See also Maastricht Guidelines on Violation of Economic, Social and cultural Rights of 1997.

[173] See Van Wyk et al (eds) supra at 437-8.

4.2 Socio-Economic Rights Under the South African Constitution

4.2. 1 Constitutional Scheme

Amidst the jurisprudential debate that characterized the constitutional drafting in South Africa[174], the country took a deliberate and conscious decision to include socio-economic rights in its Bill of Rights in an indivisible manner with civil and political rights. The Constitution provides for a diverse range of socio-economic rights including the rights of access to land[175]; right of access to adequate housing[176]; right to have access to health care services, including reproductive health care, sufficient food and water, and social security[177]; right of every child to basic nutrition, shelter and social services[178]; right to basic education[179]; right of an arrested, detained or accused to have adequate accommodation, nutrition, reading material and medical treatment[180]. Although the constitutional draftsmanship in South Africa was so ambitious as to include socio-economic rights in the Constitution, the founding fathers have always been wary of the fact that there are still distinguishing features between socio-economic rights on the

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[174] For the jurisprudential debate that preceded the constitution drafting see contributions of Haysom.; "Constitutionalism, Majoritarian Democracy and Socio-Economic Rights". 1992 (8) SAJHR 451, Mureinik,E.; "Beyond a Charter of Luxuries: Economic Rights in the Constitution" 1992 South African Journal on Human Rights 464., Davis D, 'The Case Against the Inclusion of Socio-Economic Rights' 1992 (8) SAJ HR 474.
[175] S 25(5).
[176] S 26.
[177] S 27.
[178] S 28.
[179] S 29.
[180] S 35 (2)(e).

one hand and civil and political rights on the other hand[181]. Socio-economic rights in the South African Constitution are characterized by the same limitation that, 'the state must take reasonable legislative and other measures within its available resources to achieve the progressive realization of each of these rights'.

4.2.2 Emerging Jurisprudence of the Constitutional Court on Socio-Economic Rights.

As earlier demonstrated, the UN Committee on Economic, Social and Cultural Rights has developed the jurisprudential framework of the nature of states parties obligation under Article 2 of the Covenant. The centre of such jurisprudence is that resource scarcity does not absolve a state of the 'minimum core obligation'. This requires the state to fulfil the essential levels of each right.

4.2.3 Nature of Obligations imposed by the Constitution

South African Constitutional Court has developed the socio-economic rights jurisprudence whose main thrust is the standards of reasonableness[182]. Although in the majority of its decisions on this matter the Court seems to be ready to enforce socio-economic rights, the Court seems to be placing much emphasis on the reasonableness of the measures taken by the state and the availability of resources as the main test of enforceability of these rights. This approach was

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[181] Ian, C.; and De Waal ,J.; supra at 566

[182] This is apparently because the Constitution enjoins the state to take 'reasonable measure' slightly different 'appropriate measure' employed by the Covenant.

first taken by the Court in the case of Soobramoney v. Minister of Health (Kwazulu Natal)[183] . In this case the appellant suffered from an irreversibly chronic renal failure. His life could be prolonged by means of regular renal dialysis. A state hospital was not able to provide for him with the ongoing dialysis treatment. The appellant challenged the state to give him the ongoing dialysis on the basis of the 'right not to refused emergency medical treatment' under section 27(3) and 'right to life' under section 11. The mainstay of the government's argument was that the state did not have sufficient resources. After an extensive analysis of the state's budget, Chaskalson P held that,

> Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled. This is the context within which section 27 must be construed[184].

The Court in this case was more influenced by the reasonableness of the measure and availability of resources test. The similar jurisprudence, although with a different outcome, was later to be used in the case of Government of the Republic of South Africa v. Grootboom[185]. The respondents were living in the informal settlements earmarked for low-cost housing. Due to their exposure to unbearable weather conditions they left the place and erected shack on the nearby open space. The owner of that land applied and obtained an eviction order against them. The respondents in turn sheltered on a nearby sports field

[183] Supra at note 1.
[184] Ibid para 11.
[185] Supra at note 1.

where they were prone to, once again, the severe conditions of weather. They then applied urgently to the High Court that they be, inter alia, provided with adequate housing by the state in terms of section 26(1) and (2) of the Constitution. The High Court rejected the respondents (applicants in the court a quo) case on section 26 but accepted infringement of section 28. The matter was taken to the Constitutional Court on appeal.

The central question in the Constitutional Court was the nature and scope of the obligation to take reasonable and legislative measures to realize socio-economic rights. The Constitutional Court clarified what constitutes 'reasonableness' for the purpose of realizing socio-economic rights. The court applied the test as thus,

> Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislative measure is not enough. The state is obliged to achieve the intended result, and legislative measures will have to be supported by appropriate well-directed policies... these policies and programmes must be reasonable both in their conception and their implementation'[186].

. Commenting on the difficulty of applying the 'minimum core theory' to the case, Yacoob, J.; said,

> There are difficult questions relating to the definition of the minimum core in the context of the right to have access to adequate housing in particular whether the minimum core obligation should be defined generally or with regard to specific groups of people....the *real question in terms of our*

[186] Ibid at para 42.

constitution is whether the measures taken by the state to realize the right afforded by section 26 are reasonable. (emphasis supplied)

In the case of Minister of Health and others Ot v. Treatment Action Campaign and Others[187], the government made neverapine available in the public sector only, at a small number of research and training sites in the country. The appellants challenged the government to accelerate its programme to provide neverapine beyond research and training sites. The Court held that the government policy was an inflexible one that denied mothers and their newly borne children at public hospitals and clinics outside the research and training sites, the opportunity of receiving a single dose of neverapine.

The jurisprudence of the Constitutional Court which was almost perfected in the decisions in *Grootboom* and *TAC* was later to be applied in the recent decision of Khosa v. Minister of Social Development.[188] In this case, the question was whether permanent residents were entitled to social grants, under the Social Assistance Act[189]. These grants had previously been reserved solely for citizens. The applicants challenged the constitutionality of the Act on that basis that it is discriminatory against the non-citizens. In upholding the appeal, the Court followed the previous decisions.

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[187] Supra n 1.
[188] Supra n 1.
[189] Act 59 of 1992.

In a nutshell the essence of the jurisprudence currently emerging from the Constitutional Court is that the ultimate question in the enforceability of socio-economic rights is whether the measures taken are reasonable and whether resources are available. However, according to Theunis Roux, the three cases of *Soobramoney, Grootboom* and *TAC* demonstrate what can be called 'tactical adjudication' by the Constitutional Court[190]. The concept provides that the Constitutional Court has not been doctrinally consistent in its approach to socio-economic rights. Referring to the approach of the Constitutional Court in these three cases Roux convincingly argues that, 'the CCSA once again eschewed the kind of conceptual test that would have been required to meet these demands in favour of a single, overarching review standard for reasonableness'[191]. The Constitutional Court has put so much credence on the standards of reasonableness so much that the content of these rights has featured very little in its adjudicative approach[192].

4.3 The Methodological Problem of Socio- Economic Rights Limitation

The limitation of socio-economic rights seems to be compounding the problem that already confronts the limitation of human rights under our human rights

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[190] Theunis, R.; "Legitimating Transformation: Political Resource Allocation on the South African Constitutional Court" (2003) 10 Democratization 92. See also the exposition of Davis, M.; "Adjudicating the Socio-economic Rights in the South African Constitution: Towards Deference Lite?" 2006 (22) SAJHR 301-327.

[191] Ibid at 310.

[192] See Bilchitz, D.; "Giving Socio-economic Rights Teeth: The Minimum Core and its Importance" (2002) 118 SALJ 484; See also Pieterse, M.; "Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience" Human Rights Quarterly 2004 (26) at 882.

jurisprudence. Although socio-economic rights, for all intents and purposes, are part of the Bill of Rights, they exhibit special features as demonstrated above. They are not only special because they are carry positive obligations[193], but they are also unique in that their internal limitations differ materially from other types of internal limitations in the Bill of Rights. They impose a special obligation on the state to 'take reasonable legislative and other measures within its available resources to achieve the progressive realization' of these rights[194]. This uniqueness of socio-economic rights has been acknowledged by the Constitutional Court as discernible from the dictum of Mokgoro J in the *Khosa* case. The learned judge said,

> This Court has dealt with socio-economic rights on four occasions. What is clear from these cases is that section 27(1) and section 27 (2) cannot be viewed as separate or discrete rights creating entitlements and obligations independently of one another. Section 27(2) exists as an internal limitation on the content of section 27(1) and the ambit of the section 27(1) can therefore not be determined without reference to the reasonableness of the measures adopted to fulfil the obligation towards those entitled to the right in section 27(1)[195].

The court is clearly having the understanding that socio-economic are internally limited. However, it is not clearly discernible from the approach of the Constitutional Court as to how the internal limitations of socio-economic rights, as distinguished from other internal limitations, relate to section 36 of the

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[193] Section 7(2) creates an obligation on the state to respect, protect, promote and fulfil the rights in the Bill of Rights. The latter three have been said to impose positive obligations on the state, hence relevant to socio-economic rights.
[194] The main sections embodying these rights are 24, 25, 26, 27 of the Constitution.
[195] Khosa note 19 at para 43.

Constitution. The approach adopted by the Court gives at least two methodological problems as regards the relationship of these internal limitations with the general limitation clause. The first problem is whether the reasonableness test adopted by the Court as the cornerstone of socio-economic rights is different form the reasonableness test which is the bedrock of the limitation enquiry under section 36. The second, and most disturbing problem, is the relationship of the limitation enquiry of socio-economic rights with the well established two-stage approach to limitation of human rights generally. The remainder of this chapter is therefore dedicated to the analysis of these problems.

4.4 The Problem with Standard of Reasonableness

The crisp question which is confronting our jurisprudence today is whether the standard of reasonableness required for the purpose of socio-economic rights is different from the standard of reasonableness required to limit human rights generally. The two alternative routes may exist at this juncture. The first might be that reasonableness for the purposes of socio-economic rights is different from reasonableness for the purposes of section 36. If this interpretation is followed, it would mean that section 36 is nugatory in the socio-economic rights limitation analysis.

The second interpretation might be that reasonableness in the socio-economic rights analysis is not different from reasonableness standard embodied under

section 36. This interpretation might therefore mean that section 36 is not relevant to socio-economic rights. In fact this latter approach seems to have been the understanding of the Constitutional Court prior to the case of *Khosa.* In the cases that came before *Khosa,* the Constitutional Court, although it made the extensive use of reasonableness, never made any mention of section 36 criterion of human rights limitation. The Court only investigated the reasonableness of the state measures after which it did not bother to launch any investigation as to whether such a measure could be justifiable under section 36. Perhaps the understanding of the Court was that there are no two different standards of reasonableness both under the internal limitations and the general limitations. This could be gleaned from the dictum of the court in the Grootboom case. The court said

> Reasonableness must also be understood in the context of the Bill of Rights as a whole. The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic needs.[196]

This dictum is indicative of the earlier Court's willingness to create the fragmented standard of reasonableness for several purposes in the Bill of Rights. However, it was not long until the Court was to renege from this attitude. In the *Khosa* case, the issue of section 36 featured although in a vague manner. The Court did not decisively pronounce on the matter but the dilemma of the Court was apparent. According to Mokgoro J ,

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[196] Grootboom note 19 at para 44.

> There is a difficulty in applying section 36 of the Constitution to the socio-economic rights entrenched in sections 26 and 27 of the Constitution. Section 26 and 27 contain internal limitations which qualify the rights. The state's obligation in respect of these rights goes no further than to take "reasonable legislative and other measures within its available resources to achieve the progressive realization" of the rights. If a legislative measure taken by the state to meet this obligation fails to pass the requirement of reasonableness for the purpose of sections 26 and 27, section 36 can only have relevance if what is "reasonable" for the purpose of that section is different to what is "reasonable" for the purposes of section 26 and 27[197].

Of course the Court never decided the matter because Mokgoro J, argued that even if the Court could assume that a different threshold of reasonableness is called for in section 26 and 27 than was the case in section 36, the Court was still satisfied in any way that the exclusion of permanent residents from the scheme of social assistance was neither reasonable nor justifiable within the meaning of section 36.[198] This reasoning of the Court is very problematic. It sounds like a contradiction in terms. The problem with this reasoning is that it is declarative of the Court's uncertainty as to the role of section 36 in the limitations of socio-economic rights, and yet it is a judge's attitude that the government scheme in issue 'is neither reasonable nor justifiable within the meaning of section 36'[199]. The difficulty arises when the Court is able to pronounce on the unjustifiability of the scheme under section 36 while it refrained from deciding the question of two different thresholds of 'reasonableness'.

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[197] Khosa note 19 at para 83.
[198] Ibit at para 84.
[199] Ibid at para 84.

Another attempt to apply section 36 to the socio-economic rights, albeit by the High Court, was in the case of Residents of Bon Vista Mansions v Southern Metropolitan Council[200]. The applicants were the residents of one block in Hillbrow. The municipality disconnected their water supply to their buildings. They in turn approached the Court on an urgent basis to seek an order in terms of section 27 of the Constitution compelling the respondents to restore the water supply pending the finalization of the application. The Court granted the order on the basis that the respondent abridged the applicants' rights under section 27(1). The Court made an attempt to undertake the justificatory analysis, although not directly[201].

In the final analysis, it is apparent from the foregoing discussions that the problem confronting our jurisprudence on the subject-matter is whether section 36 of the Constitution has any meaningful role in the limitation of socio-economic rights.

4.5 Application of the Two-Stage Approach

Perhaps another methodological problem is whether the well-established two-tier approach is relevant in the limitation of socio-economic rights[202]. As it was

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[200] 2002 (6) BCLR 625 (W).
[201] For the detailed analysis of this case see Pieterse, M.; "Towards a Useful Role for s 36 of the Constitution in Socia. Rights Cases. Residents of Bon Vister Mansions v. Southern Metropolitan Council" 2003 (120) SALJ 41.
[202] See Chapter 2 of this study for the detailed analysis of how two-stage approach came to be so established in the South African human rights jurisprudence.

demonstrated earlier, this approach seems to be not so helpful in the investigation of the rights with internal limitations. The two-stage approach, for all what it is, assumes the clear demarcation between the right and the right's limitation. But with the human rights qualified with internal limitations, there is a glaring divergence of opinion, both judicial and academic, as to whether internal limitations are part of the rights analysis or limitation analysis. The same problem is still attendant to socio-economic rights limitation analysis. The two-stage approach would therefore not factor that well where there exists, as is the case with socio-economic rights, a problem of distinction between a right and a limitation. This problem is also apparent from the dictum of Mokgoro J in the *Khosa* when saying,

> Section 27(2) exists as an internal limitation on the content of section 27(1) and the ambit of the section 27(1) right can therefore not be determined without referring to the reasonableness of the measures adopted to fulfil the obligation towards those entitled to the right in section 27(1)[203].

As earlier demonstrated elsewhere in this study[204], a distinction between a right and a limitation of a right is as important to those rights with internal limitations as is the case with any other right in the Bill of Rights. This distinction is important in two main respects. First, it facilitates a proper analysis which will leave the issues of the content of the right to the first stage of rights analysis while the issues of

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[203] Khosa note 19
[204] Chapter 3

justification, reasonableness, proportionality and others are left to the limitation analysis stage. This approach simplifies the work of the court.

Secondly, the approach is fair to the parties in that it places the burden of proof on the appropriate party. For instance, during the right analysis stage, the party which alleges infringement will bear the burden of proving the same. If the duty was successfully discharged, the burden then shifts to the party that alleges justification to make a showing. This is the essence of two-stage approach. Perhaps the problem with two-stage approach is that it was formulated on the basis of the general limitation clause only. Hence it is so difficult to extend its application to the rights with internal limitation clauses.

Thus, although some authors still insist that the two-stage approach still has relevance in socio-economic rights discourse[205], it is very difficult to see how the approach will feature in the analysis of sections 26 and 27, or any other rights with internal limitation for that matter. Currie and de Waal (2005) argue that one of the criteria for justifying the limitation of rights under the general limitation clause – reasonableness – has been included in the demarcation of these rights. The learned authors argue therefore that,

> Applying the limitation clause to an infringement of the positive aspects of socio-economic rights would therefore put the court in the self-defeating position of arguing the

[205] See Iles K. supra at 463. Also see Libenberg, S.; "South Africa's Evolving Jurisprudence on Socio-Ecomic Rights: An effective tool in challenging poverty". 2002(6) *Law, Democracy and Development* 159 see particularly at 177.

reasonableness of a measure that has already been found to lack reasonableness[206].

It is therefore highly doubtful whether the two-stage approach would be of any meaningful help when dealing with the socio-economic rights.

4.5 Summary

The declared objective of this chapter was to investigate the extent to which the tension between the general limitation clause and internal limitations affect the socio-economic rights discourse. Several problems have been identified herein. First, it is obvious from the jurisprudence emerging from the Constitutional Court that the Court adamantly prefers the test of reasonableness to the UNESCR Committee's theory of the 'minimum core'. However, despite the Court's insistence on reasonableness as the cornerstone of socio-economic rights, the Court is facing a dilemma. It does not seem to be able to distinguish reasonableness for the purpose of section 36 – general limitation clause from reasonableness for the purpose of the appropriateness of the measures in terms of sections 26 and 27. It is also clear from the discussion herein that the conventional two-stage approach may not be so applicable to the limitation of socio-economic rights as is the case with other rights without the internal demarcations.

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[206] Currie I, and de Waal J. supra at 595.

CHAPTER 5: COMPARATIVE PERSPECTIVES

5.0 Introduction

In the preceding chapters of this study, more effort was spent on analyzing the dynamics of human rights limitation in South Africa without necessarily invoking comparative constitutional law. Thus, it remains the purpose of this chapter to take a comparative perspective of how human rights are limited in other selected jurisdictions. The idea is to learn from those jurisdictions, which have been very influential in the drafting processes of the South African Constitution, how they have structured their human rights limitation. The selected countries for the purpose of these comparative perspectives are Canada and Germany. This is because of the undeniable debt our human rights jurisprudence owes to these countries[207].

The chapter is demarcated into three major components. The first component is the justification for this comparative perspective. It is under this section that the principles and methodologies underpinning comparative studies are enunciated. The selection of Canada and Germany is justified under this section of the study. The second component is an analysis of the human rights limitation under the Canadian constitutional jurisprudence. The third part is an analysis of Germany perspective.

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[207] Woolman, S.; "Limitation" in Chaskalson P *et al* op cit. at 12-6; See also the acknowledged of this reality by the South African courts in the cases of Qoleni v. Minister of Law and Order 1994 (3) SA 625;S v. Majavu 1994 (4)SA 269 ; Kauesa v. Minister of Home Affairs 1995 (1) SA 51.

5.1 Justification of the Comparative Perspective

The need for a comparative perspective when dealing with constitutional jurisprudence is imposed on the courts and academics by two constitutional imperatives. First, section 39 of the Constitution mandates and/or encourages such an undertaking. Secondly, the currently emerging general principles of comparative constitutional law are increasingly pressing on constitutional lawyers from any jurisdiction to have regard to constitutional developments in other countries. These two imperatives are discussed immediately below.

5.1.1 The Behests of Section 39

Section 39 imposes an obligation on any forum - it being courts of law, tribunals or even an intellectual exercise to consider comparative constitutional law when dealing with human rights. The section provides:

> 39(1) When interpreting the Bill of Rights, a court, tribunal or forum
> (a) ...
> (b) Must consider international law
> (c) May consider foreign law

Thus, it is apparent from the forgoing that comparative perspective under the South African human rights jurisprudence is a constitutional imperative. In the

light of this particular understanding, not only the courts of law[208] but even academics[209] in South African have extensively made use of comparative constitutional law to nourish the nascent indigenous jurisprudence. During the early development of the South African constitutional jurisprudence, the Constitutional Court made the remarkable use of 'foreign law' more than 'international law'. This was acknowledged by the Court in the case of Sanderson v Attorney General, Eastern Cape[210]. The Court appreciated that,

> Comparative research is generally valuable and is all the more so when dealing with the problems new to our jurisprudence but well developed in mature democracies. Both the interim and the final constitutions, moreover, indicate that comparative research is either mandatory or advisable ...[211]

However, the Constitutional Court when invoking foreign law has always been careful not to blindly follow the dictates of the comparative research even when it is not so relevant to the unique South African situation. This is in keeping with the cautionary remark made by the court in the *Sanderson* case when saying, '...the use of foreign precedent requires circumspection and acknowledgement that transplants require (sic) careful management'.[212]

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[208] See the cases of S v Makwanyane 1995(3) SA ; S v. Zuma 1995 (2) SA. These were some of the inaugural decisions of the Constitutional Court in 1995.
[209] See Van Wyk *et al*(eds) Rights and Constitutionalism supra.
[210] 1998 (2) SA (CC).
[211] Ibid at para 12.
[212] Ibid at para 13; See also the *dictum* of Kriegler J in the case of Bernstein v. Bester NNO 1996 (2) SA, when warning against 'the frequent and ... often facile resort to foreign authorities ... and the blithe adoption of alien concepts and inapposite precedents.' At paras 811H – 812B.

It becomes apparent therefore that the South African courts have acknowledged the need for comparative perspective as imposed by section 39, albeit with a great deal of caution.

5.1.2 Emerging Trends from Comparative Constitutional Jurisprudence

As demonstrated earlier, apart from the obligation imposed by section 39, the South African courts cannot disregard the value of the currently emerging trends on the value of comparative jurisprudence. The field of constitutional law is now routinely heralded as the 'emerging and cutting-edge'.[213] Various jurisdictions are resorting to comparative constitutional law for various reasons. Venter argues that the value of comparative jurisprudence is the promotion of scientific knowledge; improvement of legislation; assistance of judicial interpretation and the development of the very international or supranational law[214]. Comparative jurisprudence is also valuable for several other reasons. Kommers argues that,

> Comparison enhances our power of discernment by enjoining us to differentiate the accidental, particularistic, or autobiographical elements of constitutions from their more general, inclusive, or universalistic components.[215]

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[213] Goldsworthy, J.; (ed) Interpreting Constitutions: A Comparative Perspective Study. Oxford University Press. Oxford 2006 at 20.
[214] Venter, F.; Constitutional Comparison. Cape Town. Juta. 1999 at 36.
[215] Kosmers D 'German Constitutional Law' in Jackson, V. and Tushnet, M.; (eds) Defining the Field of Comparative Constitutional Law. Connecticut Praeger. WestPort 2002 at 62.

5.2 Approaches to Constitutional Comparison

Venter argues that there may be several approaches used in a comparative study. The first approach could be the *empirical description*. This is the approach whereby the researcher on the comparative perspective analyses the various constitutional systems and their structures. This approach is relevant where the countries under study have more commonalities. The comparison of, for instance, former British colonies could be analyzed using this model because most of them belong to one legal family – the common law.

Another approach is the *historical exposition.* Under this model, the history of systems under study is regarded as indispensable in the comparative exercise. History normally provides not only the context but also the purpose in the constitutional interpretative exercise. The third approach, which is most relevant for this study is the *thematic comparison.* This approach facilitates information and knowledge of the various themes that cut across the constitutional systems under study.

For our purpose here, the limitation of human rights is the theme under study. The aim here is to observe how the 'theme' features in the constitutional systems that have been chosen for this study.

5.3 Rationale for Choosing Canada and Germany

The selection of Canada and Germany in this study is not without purpose. It is generally admitted, both by the courts and academics, that the bifurcated structure of the South African Bill of Rights is the reflection of the hefty borrowing that is owed to the constitutions of Canada and Germany[216]. Each of these jurisdictions has got a special contribution to the limitation of human rights under the South African constitutional law. The general limitation clause, which was section 33 under the Interim Constitution, is largely the legacy of the Canadian Human Rights Charter to the South African Bill of Rights. In like manner, the specific limitations that are found in some of the provisions of the Constitution are a direct debt to German constitutional law.

Against this backdrop therefore, it is fitting to observe how each of these countries - constitutionally mature as they are – have developed their constitutional jurisprudences on the question of limitation of human rights and whether there can be any lesson to be learned from them.

5. 3.1 Limitation of Human Rights in Canada

The Canadian Charter[217] has a general limitation clause. Under section 1, the Charter provides that,

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[216] Du Plessis and Corder H, Understanding South African Transitional Bill of Rights, Cape Town. Juta 1994 at 47.

[217] Canadian Charter of Human Rights and Freedoms; Schedule B to the Constitution Act of 1982.

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

This section has been extensively developed by the courts in Canada. The South African constitutional jurisprudence came to benefit a lot from the way the courts in Canada have developed the 'Charter jurisprudence'. In fact according to some authors, the South African Human Rights limitation model was largely drawn from the Canadian Charter[218]. It has been agued that, 'accordingly, the most useful comparative sources for understanding the operation of the general limitation clause is to be found in the Canadian jurisprudence'[219].

Due to the 'freestanding' nature of the limitation clause, the Canadian courts have developed the approach to human rights limitation into two stages[220]. The first stage of this approach is to investigate separately on the content and scope of the right and whether the right has been abridged. The second stage inquires whether the restriction of the right is saved by the limitation clause[221]. The watershed decision which has not only influenced the detailed structure of

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[218] Davis, D.; and Cheadle *et al* op cit at 305.
[219]. See de Villiers, W.; "Are the Canadian Charter and Charter Jurisprudence Suitable Sources of Reference for Human Rights and Particularly Criminal Procedure and Evidence Rights in South Africa" 2001 (64) THRHR 349.
[220] This approach has since been received in the South African jurisprudence. However the courts in South African seem to be struggling, as demonstrated in the previous chapters, with the allocation of tasks during this application of this approach.
[221] William, R.; "Assessing the competing values in Definition of Charter Rights and Freedoms" in Beautin and Ratushny (eds.). The Canadian Charter of Rights and Freedoms 2nd Ed, Toronto Carswell, Toronto 1989 at 127.

section 36 – the general limitation clause in the South African Constitution – but which has been mostly used by the South African court is the case of R v. Oaks[222] In this case, an accused person was charged with possession of drugs for the purpose of trafficking. The prosecution relied on section 8 of the Narcotic Control Act which provided that if an accused was in possession of a narcotic, it was presumed that he was in possession for the purpose of trafficking. The accused challenged the constitutionality of section 8 on the ground that the presumption violated the presumption of innocence contained in section 1(d) of the Charter. In expounding on the principle of proportionality, the court held that,

> Two requirements must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the legislative objective which the limitation is designed to promote must be of sufficient importance to warrant overriding a constitutional right. It must bear a pressing and substantial concern[223].

The finding of the court, in the final analysis, was that the presumption created by the Act was not proportionate to the limitation of the right. The court found that it would be irrational to infer that a person had intention to traffic on the basis of being in possession of a small quantity of narcotics.

Another Canadian decision which has been very influential on the human rights jurisprudence in South Africa is the case of Reference re Public Service Employee Relations Act, Labour Relations and Police Officers Collective

[222] [1986] 1 SCR 103.
[223] Ibid at 110.

Bargaining Act.[224] In this case the question was whether the Charter gave constitutional protection to the right of a trade union to strike as an incident of collective bargaining. The applicants had alleged that the relevant legislation infringed their freedom of association as embodied under section 2(d) of the Charter. The court carefully distinguished the two stages that were involved in the human rights limitation clause. The court found that the interpretation of the Charter proceeds in two stages; the first defines the right and the other determines whether the proposed restriction of the right is permissible.

A closer inspection of the Canadian human rights jurisprudence indicates that although the Canadian general limitation clause is not as detailed as that of South Africa, but the drafting of the South African clause borrowed heavily from the Charter jurisprudence as expanded by the courts. The factors of proportionality as embodied in section 33 of the Interim Constitution, and later section 36 of the final Constitution, are traceable to the *Oaks* case. Another jurisprudential aspect learned from the Charter jurisprudence is the notion of the two-stage approach to rights limitation. Therefore the Canadian Charter and the South African Bill of Rights limitation clauses bear two fundamental similarities. First, both of them have limitation clauses that that are freestanding and apply generally to the rights enshrined in the constitution. Second, the notion of 'justifiable in an open and democratic society', which is embodied under section 36 of the South African Bill of Rights, is directly borrowed from the Charter as demonstrated above. This notion is very critical in undertaking the proportionality

[224] [1995] 16 DLR (4th) 359

test as could be discerned from the dictum of the Constitutional Court in the Case of S v Makwanyane. The court said,

> The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of the competing values, and ultimately an assessment based on the proportionality. This is implicit in the provisions of section 33(1) (IC)[225]

However the two instruments – the Charter and the South African Bill of Rights – differ in two material respects. First, the Canadian Charter does not have special limitations inbuilt within individual rights whereas the South African Bill of Rights does. Secondly, the Canadian Charter does not enshrine socio-economic rights plainly justifiable as they occur under the South African constitutional law. As demonstrated in the former parts of this study[226], these two unique features of the South African Bill of Rights are arguably the most jurisprudentially troublesome components of the Bill of Rights.

5.3.2 Limitation of Human Rights under the Germany's Basic Law

As earlier alluded to, the South African structure of human rights limitation is a hybrid. It has special clauses and a general limitation clause. The general limitation clause is traceable to the Canadian Charter. There is therefore not much of the problem, as demonstrated earlier, in the application of the limitation clause to the rights unencumbered with internal limitations. It would seem that

[225] S v. Makwanyane op cit at para 104.
[226] See Chapter 3 hereof.

while the general limitation of human rights approach is of Canadian origin, the specific limitation approach is the influence of the German Basic law. The German Bill of Rights does not have a general limitation clause[227]. Individual rights in the German Bill of Rights have their own internal limitations. Apart from influencing South African on the style of specific limitation of human rights, it has been argued that the German jurisprudence has been very influential in drafting of section 33 of the Interim Constitution.[228] The German Basic law made two glaring contributions to the Interim Constitution limitation clause, namely the 'law of general application' and 'may not negate the essential content of the right'[229].
A study of the cases decided by the German Federal Constitutional Court demonstrates that the two-stage approach as it is applied in Canada is not so developed in Germany[230]. However, the Federal Constitutional Court does not necessarily include the restriction of rights in the interpretation process of the right. The scope of the right is determined separately from the permissibility or otherwise of the limitation[231].

Thus, it becomes apparent that South Africa will have to consider the German jurisprudence when grappling, as it is now, with the problems of human rights

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[227] See Woolman, S.; op cit at 12-7. See also the lucid comparison De Waal, J.; "Comparative Analysis of the Provisions of the German Origin in the Interim Bill of Rights" 1995 (11) SAJHR 50; See also Wolf, L.; and Wolf, J. "A Comparison between German and the and South African Limitation Provisions" 1996 SALJ 267.
[228] Du Plessis and Corder op cit at 26.
[229] This latter aspect of the essential content was omitted when drafting section 36 of the Constitution.
[230] See the cases of Mephiso Case 30 BVerfGE 173 (1971); Investment Aid Case BVerfGE 7 (1954).
[231] Komers, D.; The Constitutional Jurisprudence of the Federal Republic of Germany. Durham Dutz University Press. 1989 at 227.

limitation. It would seem that the German human rights jurisprudence has been equally imperative in the drafting of the South African Bill of Rights.

5.4 Summary

This chapter investigated the limitation of human rights in the two selected countries with the aim of drawing some important lessons from those jurisdictions. It is clear, therefore, from the foregoing discussion that South African indigenous human rights jurisprudence can still take some lessons from those jurisdictions. This chapter demonstrated that a need for comparative perspective is not only imposed by section 39 of the Constitution but it is also an imperative imposed by the general principles of comparative constitutional law.
As the limitation of rights under the South African Constitution is dual in nature – specific and general – the Constitutional Court will have to develop the approach that reflects this dualism. The exercise in some cases of applying section 36 as a general clause to all rights in the constitution, even those with internal limitation, has proved to be futile. At best, it renders section 36 nugatory or creates unnecessary confusion and tension between the specific limitation clauses and section 36 as the general limitation clause.

The following is a concluding chapter. It maps the conclusions that have been drawn from the entire study and the recommendations on the suggested approach to the current tension between these two types of limitation. This

chapter, indeed, becomes very relevant in the succeeding chapter because some of the recommendations are drawn from the comparative perspectives.

CHAPTER 6: CONCLUSIONS AND RECOMMENDATIONS

6.0 Introduction

The central aim of this study has been to analyze the tension between the special limitation clauses and the general limitation clause as embodied under section 36 of the Constitution[232]. Thus, the purpose of this chapter, as the caption suggests, is to present the conclusions and recommendations of the study. It sums up the major findings of the study and suggests, by way of recommendations, the reforms necessary in our Bill of Rights.

The chapter is subdivided into two major components. The first section presents the conclusions and findings of the study. The second part presents the recommendations as to how the tension can be dealt with.

6.1 Conclusions

It is axiomatic from the foregoing chapters that during the dark days of apartheid, the South African Constitution[233] did not have an entrenched Bill of Rights, not to mention a systematic approach to the limitation of human rights. Human rights were poorly protected under the common law. There was therefore a very blurred

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[232] See Chapter 1 of this study.

[233] Reference here is made to the South African Constitutions of 1909, 1961 and 1983. Notwithstanding the formal introduction of Apartheid only in 1948, the 1909 Constitution is included in this rubric because it is the one that saw the seeds of segregation and denial.

distinction between private rights and human rights as a branch of public law. Historically, South African, constitutional law, it would seem, has not been so much concerned with the enforcement of human rights. In that constitutional setup – where the constitution does not embrace a justiciable Bill of Rights – it became very easy for the government authorities to trample upon the rights of individual citizens without any supervision from the courts of law. The government in turn passed a barrage of legislation that blatantly violated human rights[234]. These laws could not be tested against the Constitution as the very constitution was, to a great extent, an integral part of the system of segregation and separate development. The Constitution ensured this by embedding the adapted British constitutional doctrine of parliamentary sovereignty. This doctrine, as analyzed elsewhere in this study[235], did a lot to stifle the courts of law in their 'inherent' responsibility of limiting and controlling the exercise of public power.

The constitutional dispensation of the colonial and apartheid systems were only ended in 1993 with the introduction of the 1993 Constitution. Bill of Rights, for the first time in the constitutional history of the Republic, was introduced as an integral part of the Constitution. The Constitution also made an attempt to provide for a systematic approach to the limitation of human rights. The Constitution adopted a bifurcated approach to the limitation of human rights.

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[234] These laws were carefully analyzed under chapter 2 of this study. In fact the scheme of apartheid was interconnected so much that there was one commonality that characterized all the apartheid law – the discrimination the people of colour, especially black people.
[235] See Chapter 2.

Whilst there was a general limitation clause[236], there were also other rights in the Constitution which were internally limited. The adoption of the final Constitution in 1996 did not bring about major differences so far as the approach to limitation of human rights was concerned.

The major problem with this approach adopted by the Constitution, the analysis of which has been the central theme of this study, is that it has always not been clear how the general limitation clause was intended to co-exist with the special limitations. The problem is exacerbated even further by the fact that the standards set-out by section 36, in the case of the 1996, seems to be similar to the standards built-in within the internally demarcated rights. The standard of reasonableness, for instance, seems to be common to all forms of limitation in the Constitution. Individual rights such as the right to equality, property and freedom of expression seem to have their own standards of reasonableness.

The same problem recurs when dealing with socio-economic rights. These rights, by their very nature, exhibit special features because they impose positive obligations on the state. The state is required, under these rights, to take reasonable measures within its resource capacity to fulfil these rights. The jurisprudence that has been developed by the Constitutional Court is that the concept of 'reasonableness' is very decisive when investigating whether the state has fulfilled its obligations under the Constitution. The finding of this study is that the Constitutional Court has been developing the socio-economic rights

[236] See section 33 of the Interim Constitution, Act 200 of 1993

jurisprudence parallel to that of section 36. Thus, the result is that section 36 ultimately becomes nugatory to, not only socio-economic rights but even, other internally demarcated rights in the Constitution.

A further finding is that the Constitutional Court has been developing jurisprudence of section 36 predominantly on the basis of the Canadian-based two-stage approach. This approach, by its very nature, separates the investigation of the abridgement of the rights from the investigation of the justifiability of the limitation of the right. It is worth mentioning that Canada, where this approach was borrowed, does not have the internal limitation clauses. Section 1 of the Canadian Charter of Rights and Freedoms is the sole limitation clause in the Charter. It therefore applies generally across all the Charter Rights.

In South Africa, the problem is that section 36 is not the sole limitation clause in the Constitution. Therefore the two-stage approach in South Africa seems to be failing to yield the results it would under one regime of limitation clause. Consequently, the Constitutional Court is struggling to feature the two-stage approach when dealing with the rights that have internal limitations.

6. 2 Recommendations

The recommendations herein are divided into two major subdivisions. The first recommended section is based on the separation of the limitation of human

rights jurisprudence. The second one is the recommended application of the two-stage approach.

6.2.1 Parallel Approach to Rights Limitation

As it has been noted above, it is the finding of this study that the tension between the special limitation and the general limitation clause will persist as long as the intention is to squeeze special limitation clause within the two-stage approach. Woolman[237] suggests that a third stage must be introduced to the two-stage approach. This approach, it is submitted, will have two fundamental flaws. Firstly, it will elevate the general limitation clause above other internally demarcated limitations. Section 36, as the general limitation clause, cannot in any way be said to be a higher limitation clause. If the approach suggested by Woolman was to be adopted, it would mean that section 36 will be the final justification stage after the state has failed to justify its action or inaction under the internal limitation clause.

Thus, it is suggested herein that to avoid diminishing the otherwise important role of the internal limitations, the Constitutional Court should develop a parallel approach to the limitation of human rights. This would mean that section 36 will be applicable to those rights without limitation clauses. It would seem that this approach is not inconsistent with section 36 itself. Section 36(2) provides that

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[237] Woolman S, 'Limitation' in Chaskalson et al at 12.6.

'Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

It is recommended therefore that subsection (1) be used during the implementation of the unencumbered rights only. Internally limited rights should be taken to have been sufficiently limited. Otherwise section 36(1) will be superfluous to the internally limited rights[238]. This is buttressed even further by the fact that in Germany and Canada, where South Africa borrowed much of its human rights jurisprudence[239], these two approaches to the limitation of human rights do not exist. Germany uses special limitation clauses and Canada uses a general limitation. Therefore it means South African has adopted a hybrid of these systems.

6.2.2 Development of the Two-stage Approach

The two-stage approach, with its principles, is still appropriate for South African constitutional jurisprudence. However, the Constitutional Court will have to carefully allocate tasks when applying this approach. A survey of the decisions of the Constitutional Court bears testimony to the fact that the Court is still not consistent in the manner in which this approach is applied. The conventional understanding of the principles of this model is that the first stage is the stage of

[238] The possibility of this interpretation is hinted by Iles, K.; "A Fresh Look at Limitation: Unpacking Section 36" SAJHR 2007(23) 68. Iles argues that 'although the Constitutional Court has held every limitation is subject to section 36, it is also not clear from the structure of section 36 that this section is capable of applying to all rights the rights in the Bill of Rights'.
[239] See the comparative perspective at chapter 5.

the interpretation of the right and the second stage is the consideration of the justifiability of the limitation of the right. Whilst the Constitutional Court reflects this attitude in other cases, in the case of August and others v. Electoral Commission[240], O'Regan J said, 'it seems to me therefore that inclusion of an equitable consideration at threshold stage is not impermissible'[241]. This is a remarkable deviation from the established principles of this model. These two stages cannot, and should not, share considerations because they involve the question of the onus of proof which will be gravely confused should these two stages be made to share considerations.

Thus, while we recommend that the two stage approach should continue to be used in human right litigation, the Constitutional Court will have to be careful not to confuse the allocation of tasks during the application of this model.

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[240] Supra n 119.
[241] Ibid at para 127.

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