

Judicial discretion and the enforcement of fundamental rights by
the Constitutional Court of South Africa

Dissertation submitted in fulfilment of the requirements for the degree
Master of Laws at the Mafikeng Campus of the North-West University

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CANDIDATE'S DECLARATION

I, John Macharia Mukuna, hereby declare that this dissertation is original and has never been presented in any other institution. I further declare that any secondary information has been duly acknowledged in this dissertation.

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DECLARATION BY SUPERVISOR

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May 2008.

DEDICATION

This dissertation is dedicated to my wife, Elizabeth and our children, Salome, Kenneth and Samuel for their love, support and encouragement in my life especially during the programme. I also dedicate it to my parents for their struggle and inspiration for my general well-being.

ACKNOWLEDGEMENTS

I am highly indebted to my supervisor, Prof M.L.M. Mba, for his invaluable guidance, comments, compassion and constructive criticism throughout this study. Under his able advice, understanding and academic support, I was able to better understand the law relevant to the study. His good command of the law also made it possible for me to come across important scholarly material.

I also wish to thank Prof Theunis Roux, introduced to me by Prof Mba, for allowing me to cite his articles on the Constitutional Court of South Africa. The articles illuminated my path as I endeavoured to understand the jurisprudence of the Constitutional Court.

I also highly appreciate the support of Mr. Nkonde of the Law Section of the North-West University, Mafikeng Campus Library.

My wife Elizabeth was all along very supportive and understanding and I am so thankful. Above all, I wish to thank God for his grace and mercy which saw me through this study.

LIST OF ABBREVIATIONS

AC	Appeal Cases
ACHPR	African Charter on Human and Peoples' Rights.
AD	Appellate Division
AG	Attorney General
All ER	All England Law Reports
BCLR	Butterworth Constitutional Law Reports
CCSA	Constitutional Court of South Africa
CAP	Chapter
CC	Constitutional Court
CJ	Chief Justice
ICJ	International Commission of Jurists
J	Judge
NCOP	National Council of Provinces
SCA	Supreme Court of Appeal
SA	South Africa
SAHR	South African Human Rights Commission
SCR	Supreme Court Reports
UDHR	Universal Declaration of Human Rights
UNCECR	United Nations Committee on Economic, Social and Cultural Rights
U S	United States of America

Glossary

Absolution	-	also known as interpretivism. The reading of a constitution as a set of rules; applying a strict construction to a constitution.
Amicus curiae	-	a friend of the court; a party without a particular personal interest in the matter before the court but is permitted to address the court on law or evidence.
Amnesty	-	an act that pardons a large group of individuals.
Bill of Rights	-	a document of high constitutional standing, which sets out people's rights.
Capital punishment-		death penalty
Capital offence	-	a crime punishable by death.
Certification	-	when a court exercises jurisdiction to make decision on certain novel questions of law.
Certiorari	-	when a higher court exercises jurisdiction to direct a lower court to send up the record in a particular case.
Clemency	-	Moderation by the executive authority of the severity of punishment previously imposed.
Common Law	-	Judge - made law found in judicial decisions.

Constitution	-	the supreme law of a country which describes the political, judicial and legislative structures of country.
Constitutional Court	-	a court established for the purpose of determining disputes of a constitutional nature or declaring the constitutionality of law or conduct.
Declaratory relief	-	a court's judgment which states a person's entitlement to certain legal rights.
Judicial activism	-	active or forceful involvement by the courts in law-making.
Judicial discretion	-	when the courts have the power to make a particular choice out of two or more possible choices.
Judicial restraint	-	a theory which discourages judges from imposing their philosophical or political positions on a matter.
Judgment	-	the official decision of a court.
Judicial power	-	the authority to decide cases and disputes.
Judicial Minimalism	-	a middle ground between judicial activism and judicial restraint; a moderate viewpoint.
Judicial Review	-	the power of the courts to determine the constitutionality of legislative or executive acts.
Jurisprudence	-	the philosophy of Law or science of law.
Justiciability	-	a dispute which is determinable by a court.

Majoritarian doctrine	-	deferring to the legislature which is elected on a majority basis, matters pertaining to the validity of legislative action.
Mandamus	-	a court order directing a public official to perform some non-discretionary act associated with his or her office.
Moot	-	no longer a live controversy.
Original intent	-	the intent of the framers either of the original constitution or amendment thereof.
Packing the court	-	appointing sufficient new members to the court with the aim of changing policy.
Parliamentary sovereignty	-	parliament can make or unmake any law whatsoever and cannot be challenged in court.
Political question doctrine	-	when superior courts recuse themselves from deciding cases and controversy which the courts decide not proper or equipped to decide.
Ripeness	-	a principle that excludes the courts from hearing cases prematurely.
Separation of powers	-	power should not be concentrated but diffused among from the legislative, the executive and the judiciary.

Statutory interpretation - attempting to read or give meaning to a statute.

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Number	Year	Short title.
	1909	South Africa Act.
55	1949	Prohibition of Mixed Marriages Act.
21	1950	Immorality Amendment Act.
30	1950	Population Registration Act.
41	1950	The Group Areas Act.
44	1950	Suppression of Communism Act.
46	1951	Separate Representation of Voters Act.
52	1951	Prevention of Illegal Squatting Act.
68	1951	Black Authorities Act.
35	1952	High Court of Parliament Act.
67	1952	Blacks (Abolition of Passes and Co-ordination of Documents) Act.
47	1953	Bantu Education Act.
48	1953	Black Labour (Settlement of Disputes Act).
49	1953	Reservation of Separate Amenities Act.
1	1958	South Africa Amendment Act.
45	1959	Extension of University Education Act.
32	1961	South Africa Act.

83	1967	Terrorism Act.
10	1983	South Africa Act.
200	1993	Constitution of the Republic of South Africa Act.
66	1995	Labour Relations Act.
92	1996	Choice on Termination of Pregnancy Act.
108	1996	Constitution of the Republic of South Africa.
21	1998	Prevention of Organised Crimes Act.
122	1998	Judicial Matters Second Amendment Act.
3	2000	Promotion of Administrative Justice Act.
4	2000	Promotion of Equality and Prevention of Unfair Discrimination Act.
34	2001	Constitution of the Republic of South Africa Amendment Act.

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Botswana Constitution 1996.

Canadian Constitution Act, 1982.

Citizenship Act No. 25 of 1982 (Botswana).

Constitution of India.

Constitution of Namibia.

War Damages Act, 1965 (Britain).

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ABSTRACT

This dissertation analyses the concept of judicial discretion in relation to the enforcement of fundamental rights by the Constitutional Court of South Africa, the highest court in South Africa in terms of constitutional litigation. It first examines the main philosophical postulates surrounding the concept of judicial discretion. To demonstrate the important role played by the courts in the enjoyment of fundamental rights, the manner in which the courts, especially the Appellate Division of the Supreme Court, exercised discretion during the apartheid era is explained. The study then illustrates the importance of fundamental rights in the “new” South African constitutional dispensation.

The main thrust of this dissertation is that the courts have been vested with much power in the interpretation and application of fundamental rights. The result is that enjoyment of these rights is removed from the purview of the Constitution and relegated to the judges. This position is demonstrated by an examination of various provisions in the Bill of Rights which expressly or impliedly vest the courts with broad discretionary power. The extent of discretion entrusted to the South African courts becomes clearer in a comparative analysis of the constitutions of Namibia, India, Canada and the Federal Republic of Germany, countries with comparable and justiciable Bills of Rights. The study then analyses important decisions by the Constitutional Court of South Africa and the extent of the power granted to this court by the Constitution becomes apparent. The study concludes by identifying areas in the

Bill of Rights which need to be reformed with a view to limiting or minimizing the influence of the Constitutional Court and other interpreters in fundamental human rights disputes. Examination of the law is as at August 2008.

CHAPTER ONE: INTRODUCTION

1: Background to the Study

1.1: Judicial Discretion

The degree and magnitude of the controversies surrounding the concept of judicial discretion is perhaps best illustrated by the Hart-Dworkin debates. Hart's view is that a judge only has discretion in hard cases otherwise sufficient rules exist for the determination of a dispute.¹ Unlike Hart, Dworkin's philosophy, it is submitted, is hard to compress into one common position and this is examined in chapter two of this study. Regarding the view that a judge has discretion, Dworkin argues that that cannot be so because always, there are rules in the society to enable the judge decide a dispute in accordance with the society's existing principles but never is there a situation for the judge to create the rule as that would amount to giving a new rule retrospective force.²

To Hart therefore, discretion exists but to a limited extent. As for Dworkin's view, the concept of discretion is inevitable, it is submitted, as long as society does not and indeed cannot, have a single hard and fixed principle and rule to guide the judge when no law exists.³ For the realists and members of the Critical Legal Studies Movement, there is no doubt that judges have discretion

¹ H. L. A. Hart, *The Concept of Law*, Oxford: Clarendon Press 1994 p 272.

² Ronald Dworkin, *Taking Rights Seriously*, London: Duckworth, 1977 p 81.

³ Joseph Raz, "Legal Principles and the Limit of Law," in Marshall Cohen's *Ronald Dworkin and Contemporary Jurisprudence*, New Jersey: Rowman and Allanheld: 1983 p 75.

as law is not what is in the statute books, rather it is what judges say it is.⁴ From the foregoing, judicial discretion, which is the central theme of this study therefore does exist, which, as Burns and Beukes put it, means that there is a choice “between two or more possible options.”⁵

1.2: Fundamental Rights in South Africa

The period before the current constitutional order in South Africa was principally characterised by a legal order which had no respect for fundamental rights for the black majority and meaningful protection of human rights by the courts was impossible.⁶ One of the most classic illustrations of previous constitutional and legal dispensation in South Africa is aptly captured by the *dictum* of Mahomed DP, in *AZAPO v President of the Republic of South Africa*,⁷ who said in part that:

For decades, South African history has been dominated by a deep conflict between minority, which reserved for itself all control over the political instruments of the state and a majority who sought to resist that domination. Fundamental human rights became a major casualty of this conflict as laws designed to counter the effectiveness of such resistance met the resistance of those punished by their denial.⁸

⁴ Michael M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence*, 7th Ed London: Sweet and Maxwell, 2001 p 821.

⁵ Yvonne Burns and Margaret Beukes, *Administrative Law Under the 1996 Constitution*, 3rd ed .Durban: Juta and Co. 2006 p 355.

⁶ Iain Currie and Johan de Waal, *The Bill of Rights Handbook*, 5th Ed, Cape Town Shumani Printers, 2005 p 2.

⁷ *AZAPO v President of the Republic of South Africa* 1996 (4) S A 67 I (C C).

⁸ *AZAPO*, *ibid* para 1.

In addition to the above factors which truly caused a difficult past, the courts were denied a testing right under the Westminster principle of parliamentary sovereignty, a principle which denies the courts jurisdiction or the right to question the legitimacy of the will of parliament expressed through legislation.⁹ This amounts to exhausting the jurisdiction of the courts irrespective of the morality or reasonableness of legislation.

Also contributing to a truly difficult past was the enactment of several laws which took away basic rights of the majority of South Africans.¹⁰ This was indeed so tragic, especially when seen against the courts' denial of a testing right, which had gained constitutional entrenchment.¹¹ Many judges were eager to side with the executive at the expense of people's enjoyment of fundamental rights. This sometimes happened notwithstanding the availability of an interpretation that would not have done violence to the legislation and at the same time upholding basic human rights.¹²

The actual place of fundamental rights in the pre-constitutionalism period is best understood by the description in the preamble to the 1993 and 1996 constitutions and by the postamble to the 1993 constitution. The preamble to the 1993 constitution referred to a new order with "equality between men and

⁹ A.V. Dicey, Introduction to the Law of the Constitution, 10th Ed, New York: Macmillan Press, 1968 p xxiv.

¹⁰ A number of these legislations are examined in 3.3 of Chapter 3 of this study, some of which include the Terrorism Act 83 of 1967 and Internal Security Act 74 of 1982.

¹¹ See for instance, s.59 of Republic of South Africa Constitution Act 32 of 1961.

¹² International Commission of Jurists (ICJ) South Africa: Human Rights and the Rule of Law, London: Printer Publishers 1988 p 110.

women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms.” The postamble to the interim constitution recalls the injustices of the past and that the constitution was adopted as the supreme law “to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.”

The postamble to the 1993 constitution contained certain values and purposes of the Constitution some of which include being a “bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights.” It provided further that “it lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.”

Rights otherwise unknown to the majority were introduced. Truly, this was a legal revolution.¹³ Some of the rights are the so called first generation rights.¹⁴ These include the right to life, equality, dignity and freedom.¹⁵ Excitingly, for the first time in South Africa, socio-economic rights, the so called second generation rights, were enshrined in the Constitution.¹⁶ These include the

¹³ Dennis et al, *Democracy and Constitutionalism: The Role of Constitutional Interpretation*, in Van Wyk, *Rights and Constitutionalism*, Cape Town: Juta and Co. 1995 p 1.

¹⁴ Currie and de Waal, note 6 above p 567.

¹⁵ Sections 9-12 and 4.3.1 in chapter 4 below.

¹⁶ Currie and de Waal, note 14 above.

rights of access to housing and medical care.¹⁷ The enjoyment of these rights is however mainly subject to the limitation clause.¹⁸ Also restricting rights are provisions which nevertheless restrict the enjoyment of the rights, referred to as demarcation of rights.¹⁹ Apart from these limitations to enjoyment of fundamental rights, any person claiming their infringement can approach the courts for an appropriate relief, thus underlining their justiciability.²⁰

1.3: The Constitutional Court

The 1993 constitution introduced a new court in the hierarchical structure of South African courts, the Constitutional Court of South Africa which is also contained in the 1996 Constitution.²¹ The interim constitution described the Constitutional Court as the Court of final instance over all matters relating to the interpretation, protection and enforcement of the constitution including actual or threatened violation of fundamental rights.²² The final Constitution, on the other hand, provides that the Constitutional Court is the highest court in all constitutional matters with both original and appellate jurisdiction.²³ Due to the constitutional importance of this court, this study attempts to explore the role that judicial discretion by the Constitutional Court has played in fundamental rights litigation and thus the title “Judicial discretion and the

¹⁷ Sections 26 and 27 and 4.3.2 in Chapter 4 below.

¹⁸ Section 36.

¹⁹ Currie and de Waal, note 6 above p 186-187.

²⁰ Section 38.

²¹ Sections 98(1) of 1993 Constitution and 166(a) of 1996 Constitution.

²² Section 98(2).

²³ Section 167(6 (a)(b)).

enforcement of fundamental rights by the Constitutional Court of South Africa.”

1.4: Statement of the Research Problem

Upon a close scrutiny of the post-apartheid South African constitutions, the extent to which the courts, in particular the Constitutional Court, have been vested with wide discretion in the interpretation and enforcement of fundamental rights becomes evident. With broad discretion vested on the courts, the determination and enjoyment of fundamental rights is, by analogy, mainly dependent on the discretion of the interpreter of the Constitution.

Hoexter observes that “discretionary power has not always had a good name.”²⁴ The Constitutional Court has on several occasions expressed its displeasure with unconstrained discretionary powers as they pose danger to enjoyment of fundamental rights.²⁵ For this reason and in so far as the enjoyment of rights is concerned, it matters little, it is submitted, whether the wide discretion is vested on administrative officials or on the courts. A court of law, with respect, may take away a person’s right with equal measure as an administrative official if the discretion is unfettered.

The argument of this dissertation is that unchecked judicial discretion is not a progressive step towards a full or reasonable determination of the content of

²⁴ Cora Hoexter, Administrative Law in South Africa, Cape Town: Juta and Co.2007 p 45.

²⁵ See for instance, *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 54.

these rights. The past speaks for itself. South African legal history is awash with decisions where judicial discretion was applied as a tool for suppressing basic rights.²⁶ The commitment that South Africa has towards fundamental rights ought not to be pegged to the courts. The main thrust of this study is that rights should exist under the rule of law but not under the rule of discretion. They should not be wholly dependent on judicial review. Certainty, or at a minimum reasonable certainty, is of the essence in a fundamental area as fundamental rights for the new South Africa.

The doctrine of parliamentary sovereignty was replaced by the principle of constitutionalism in the 1993 and 1996 constitutions.²⁷ Constitutionalism means that government “should derive its powers from a written constitution and that its power should be limited to those set out in the constitution.”²⁸ The effect of this is that the courts now have a testing right granted by the Constitution.²⁹ Any law or act inconsistent with the Constitution is void and unenforceable.³⁰ That testing right, it is submitted, could be a bar for enjoyment of rights if not restrained.

Undoubtedly, the era of constitutionalism which includes an enforceable Bill of Rights is no mean achievement in a country with a past as difficult as South

²⁶ For an analysis of some of the most important cases, see 3.4 of chapter 3 below.

²⁷ See s 4 of the 1993 Constitution and s 2 of the 1996 Constitution.

²⁸ Currie and de Waal, note 6 above p 18.

²⁹ Currie and de Waal, *ibid* p 3.

³⁰ Section 2 of the Constitution provides that law or conduct inconsistent with the Constitution is invalid, and the obligations imposed on it must be fulfilled.

Africa. Although this development is phenomenal, the 1993 interim constitution vested too much discretion on the courts, especially the Constitutional Court of South Africa in fundamental rights questions.

The 1996 Constitution did not address this problem and the courts or the interpreter of the Bill of Rights is granted a broad discretion and latitude in the interpretation and enforcement of fundamental rights. The result of such a wide discretion in the constitutional text is that since the Constitutional Court is the final arbiter in constitutional litigation, in this study fundamental rights disputes, the court's wide discretion creates uncertainty as to the law.

It is not being suggested in this study that the outcome of any litigation is certain, or that, unlike the positivists, there are easy cases.³¹ However, the text gives too much room to the courts such that the judges sometimes arrive at shockingly different but constitutionally and legally valid outcomes in a matter whose interpretation appears not in doubt on the basis of available law.³²

Limitation of rights is, for instance based on "law of general application" as long as the limitation is reasonable and justifiable in an "open and democratic society based on human dignity, equality and freedom."³³ A limitation clause as wide as this provides a judge who is not ready to enforce fundamental rights

³¹ Hart, note 1 above.

³² For instance *S v. Mhlungu and Others* 1995 (3) SA 86 7 (C C). This aspect is examined in chapter five of this study.

³³ Section 36(1).

with the necessary weapon to deny the enjoyment of rights as such phraseology has no generally agreed meaning. The situation is not made any better when the court is given power to include its own forms of limiting rights.³⁴

The courts have also been granted considerable discretion in the interpretation of the Bill of Rights. The most discretionary words are for instance that in interpreting the Bill of Rights, a court “shall promote the values which underlie an open and democratic society based on freedom and equality.”³⁵ Such general provisions invite a variety of judicial interpretations some of which can be, and indeed have been irreconcilable and are diametrically opposed.

This study’s central theme is not about an exploration of the usefulness or otherwise of judicial discretion. Much as this is relevant and indeed mentioned in this study, the main concern is that when the courts have too much constitutionally vested discretion, ascertainment of fundamental rights generally ceases being what the Constitution provides but what the interpreter desires the Constitution to mean. It therefore becomes important for the future of South African human rights jurisprudence, to explore the manner in which the exercise of discretion by the Constitutional Court has determined the enjoyment or otherwise of fundamental rights.

³⁴ Section 36 and 4.4.1 of chapter 4 of this study.

³⁵ Section 39(1)(a).

1.5: Rationale of and Justification for the Study

When interpreting or enforcing a constitutional provision or any other law, a judge exercises discretion.³⁶ Judicial discretion is unavoidable because parliament or any other law making body cannot completely anticipate every eventuality.³⁷ Indeed, the same case applies to discretion in general because, as the Constitutional Court of South Africa has said, “discretion plays a crucial role in any legal system.”³⁸ To elaborate on this positive aspect of discretion, this study examines some instances when discretion has been useful for the enjoyment of rights. However, when the breadth of discretion is substantial and uncontrolled, the noble intention of the particular law granting the discretion may be compromised.

The point of departure in this study is that the Constitution has placed a lot of power and burden on the Constitutional Court in the determination of fundamental rights litigation. The Bill of Rights largely contains uncertainties and vagueness which require the attention of the relevant stakeholders. Further, vesting broad discretion on those mandated to interpret fundamental rights provisions complicates the possibility of developing a stable and reliable jurisprudence in this all-important area of law.

³⁶Steven J. Cleveland, “Judicial Discretion and Statutory Interpretation, 57 *Oklahoma Law Review* 31(2004) in <http://adams.law.ou.edu/olr/articles/vol57/cleveland57.1.pdf> (accessed on 15 June 2007)

³⁷ Cleveland, *ibid.*

³⁸ *Dawood*, note 25 above para 53.

Legislative reforms are called for to address these weighty anomalies in this important area of the law so as to limit the express discretionary powers of the interpreter of fundamental rights. It is intended by this study that the legislature and other stakeholders will examine the Constitution with a view to controlling the powers of the interpreter of the Bill of Rights as provided for by the interpretation clause in section 39 of the Constitution. As it stands now, the interpretation clause provides much judicial discretion than clear statements of the law on constitutional interpretation. Of particular importance are directions or guidelines on how interpreters are supposed to approach their mandate of developing common and customary law. Some consistency is positive to the law. The risk of not doing so is that there is real possibility of having identical or similar rights litigants in different cases finding themselves being pulled in different directions by different interpreters or by the same interpreter at a later time.

For the sake of making rights truly justiciable, the broad discretion enjoyed by the interpreter in the granting of remedies ought to be addressed by the stakeholders. For instance, the actual value of a declaratory relief unaccompanied by compensatory or such other suitable and effective relief is questionable when rights have, without doubt, been violated. It is equally important for the interpreter's discretion contained in words such as "may", "including" and "consider" to be taken away as they create more confusion in fundamental rights law.

Of greater importance, it is submitted, is taming the power of the interpreter in the limitation of enjoyment of fundamental rights. Rights are not true rights if the prime law of the country subjects their enjoyment not only to the limitations contained in section 36 or elsewhere but also to other factors only within the knowledge of the interpreter.³⁹ The list should be closed by the Constitution.

1.6: Methodology and Collection of Data

This study examines judicial discretion and enforcement of fundamental rights by the Constitutional Court of South Africa. To achieve this, the proposed research will be qualitative based, more specifically content analysis or interpretative study. So as to appreciate the historical foundation of the subject, previous South African constitutions will be cited and analysed so as to attempt to ascertain the actual historical importance of fundamental rights in the Constitution.

The approach to be adopted in this historical review and analysis is to identify the position of fundamental rights in the pre-1993 legal dispensation. Equally important is a consideration of selected crucial decisions on fundamental rights prior to the inception of the principle of constitutionalism by the 1993

³⁹ Section 36 uses the word “including.” See chapter 4 below.

constitution. This will assist in appreciation of past difficulties in the area of fundamental rights.

Of importance in looking at the legal position of fundamental rights during the past legal order are factors which greatly influenced the courts' decisions. Perhaps some of the most important factors are the doctrine of parliamentary sovereignty and apartheid legislations with a combined lethal effect of taking away basic rights of the majority.

Selected provisions of the Bill of Rights will be examined so as to highlight the importance of fundamental guarantees in the new dispensation. Also to be examined selectively is the manner in which the text has granted the courts discretion so as to investigate the actual extent of this discretion. In attempting to illustrate the extent of discretion granted to the courts in South Africa, a brief comparative study of constitutions of India, Namibia, Canada and Germany is made.

The Constitutional Court's exercise of discretion in the enforcement of fundamental rights is the main focus of the study. In matters constitutional, no authority supersedes this Court, thereby justifying this choice as opposed to other superior courts which have jurisdiction to determine constitutional questions. Further, and as Roux observes, the Constitutional Court has over the years developed a tradition or culture of making reasoned and elaborate

judgments.⁴⁰ There is sufficient material by the Court to enable a reasonable examination and analysis of the manner in which the Court has exercised its discretion.

Books, articles in journals of international repute for instance the South African Journal on Human Rights, South African Law Journal and Yale Law Journal were of immense assistance. Unpublished materials from seminars and workshops also came in handy. The internet was also a useful source of information. In particular, without the internet, it would not have been possible to access recent unreported decisions of the Constitutional Court.

A number of South African scholars have written extensively on various aspects of South African constitutional Law under the new legal order. This has provided invaluable contribution to this study. These scholars include Motala and Ramaphosa;⁴¹ Devenish;⁴² Currie and de Waal;⁴³ Van Wyk;⁴⁴ Chaskalson et al;⁴⁵ Hoexter;⁴⁶ Mubangizi;⁴⁷ Roux⁴⁸ and Bilchitz⁴⁹.

⁴⁰Theunix Roux, "Tactical Adjudication: How the Constitutional Court of South Africa Survived its First Decade", paper presented at conference on Law, Nation-building and Transformation, University of Kwazulu-Natal February 2007 p 2.

⁴¹ Ziyad Motala and Cyril Ramaphosa, Constitutional Law, Cape Town: Oxford University Press, 2001.

⁴² Ge Devenish, A Commentary on South African Bill of Rights, Durban: Butterworths, 1999.

⁴³ Currie and de Waal note 6 above.

⁴⁴ Van Wyk, note 13 above.

⁴⁵ Chaskalson et al, Constitutional Law of South Africa, Kenwyn: Juta, 1996.

⁴⁶ Hoexter, note 24 above.

⁴⁷ John C. Mubangizi, The Protection of Human Rights in South Africa: A Legal and Practical Guide, Lansowne: Juta, 2004.

⁴⁸ See for instance, Theunix Roux, "Principle and Pragmatism on the Constitutional Court of South Africa," paper presented at the International Association of Constitutional Law Roundtable on Writing and Reading Constitutions: Commemorating 60th Anniversary of the Constitution of Japan, Yokohama, 23-24 November 2007. Also see note 40 above.

A review of their works reveals a general agreement that the enjoyment of fundamental rights in South Africa is no longer a preserve for a few. Rather, these rights apply to all South Africans as evidenced by their being embedded in, and made justiciable by, the Constitution which is the supreme law of the land. These works are important scholarly material on fundamental rights law. However, none has pursued an argument similar to that contained in this study. They have not addressed fundamental rights from a perspective of discretion vested on the courts by the 1993 and 1996 constitutions. None has also addressed the question of the Constitutional Court's exercise of discretion in fundamental rights disputes. Motala and Ramaphosa, for instance raise the issue of inconsistencies in some of the Court's decisions but the blame is not squarely placed at the door of post-apartheid constitution's discretion vested on the Constitutional Court. The works are a good source of general academic knowledge on constitutional and fundamental rights law.

Studies by Roux and Bilchitz address specific constitutional issues. Bilchitz's main concern is that the Court has not laid down a minimum core for the state in socio-economic rights and scathingly attacks the Court for using reasonableness as the test.⁴⁹ He does not analyse decisions on socio-economic rights from a dimension of the unfettered power given to the Court unlike in this study. On the other hand, Roux, perhaps one of the foremost scholars of

⁴⁹ See for instance David Bilchitz, "Giving Socio-economic Rights Teeth: The Minimum Core and Its Import," (2002) 119 South African Law Journal p 484.

⁵⁰ See Bilchitz *ibid* p 496.

the Constitutional Court, examines the Court's main and usually irreconcilable fundamental rights decisions from the perspective of the Court fighting for survival, recognition and legitimacy.⁵¹ Roux's approach, like that of the other scholars mentioned above, is undoubtedly different from the approach in this study: examining the exercise of the Constitutional Court's judicial discretion in fundamental rights from a background of unlimited power given by the post-apartheid constitutions.

1.7: Scope and Limitation of the Study

The study carried a combination of important factors quite close to the determination of the crucial question of judicial discretion in the enjoyment and enforcement of fundamental rights in by the Constitutional Court. It was not possible to make a waterproof analysis of all the issues relevant to the study. The main reason is the large number of decisions examined in the old and new legal order. For instance, the Court had as at 19 February 2008 determined 299 cases.⁵² Most of these decisions, it is submitted, should have some relevance to this study at least because they relate to the jurisdiction of the Court and by implication the exercise of discretion as argued in chapter five.

⁵¹ Generally see Roux note 48 above specifically part 4.

⁵² Constitutional Court's records as contained in <http://www.saflii.org/za/cases/ZACC/> (Accessed on 19 February 2008).

Since the intention of the study is to demonstrate the inconsistencies of the Constitutional Court's decisions due to, it is argued, the textual discretion in the Constitution, time could only permit a discussion of a few of these decisions. It is hoped that the selected cases, some of which are landmark decisions under the new constitutional dispensation, demonstrate the scale of judicial power vested on the Court.

The power to interpret and determine constitutional disputes is not the preserve of the Constitutional Court alone.⁵³ For this reason, the manner in which other courts have dealt with the matter would have shed more light on the extent and role of judicial power in South African fundamental rights litigation and perhaps make a comparative analysis of the exercise of discretion between these courts and the Constitutional Court especially in matters reaching the Court from the other courts. That was not possible due to time constraints and the depth of such an exercise.

The Bill of Rights is contained in sections seven to thirty nine of the Constitution. Only a few of these provisions were analysed in determining the question of textual discretion. It would be inappropriate therefore to suggest that an exhaustive enquiry of these provisions was undertaken. In addition, the Constitutional Court was introduced by the 1993 constitution but due to the short life span of that constitution, it was not found useful to make a thorough

⁵³ Section 38 of the Constitution vests constitutional disputes in competent courts.

enquiry of the aspects of discretion and decisions under that interim constitution. Most of the Court's decisions examined relate to the 1996 Constitution.

1.8: Outline of Chapters

This study comprises six chapters. Chapter one lays out the background of the study, rationale of and justification for the study, research methodology and limitations of the study. Chapter two discusses the concept of legal discretion from a philosophical perspective, uses and problems associated with judicial discretion. Chapter three examines the main factors which contributed to denial of fundamental rights for the majority before the new legal order. These factors are: the doctrine of parliamentary sovereignty, the exercise of judicial discretion and statutes which were specifically enacted to restrict or abolish the enjoyment of basic rights by the majority. Chapter four discusses fundamental rights under the new constitutional dispensation and illustrates the extent of judicial discretion vested in the Constitutional Court and other courts by the Constitution. Chapter five is devoted to the Constitutional Court. The features of the Court are examined and most importantly how the Court has exercised its discretion in fundamental rights disputes. Chapter six contains conclusion and recommendations of the study.

CHAPTER TWO

THE CONCEPT OF JUDICIAL DISCRETION

2: Introduction

This chapter examines the various philosophical postulations on the term “judicial discretion.” Judicial discretion is one area in legal philosophy that has, for a long time, attracted much attention from jurists, academics and practitioners among others. In the last couple of decades or years, great intellectual efforts have been made in attempts to explore and explain this controversial subject.

Some of the great works that have addressed this subject in its various forms have been by Hart: *The Concept of Law*⁵⁴ and *Essays in Jurisprudence and Legal Philosophy*;⁵⁵ Dworkin: *Taking Rights Seriously*⁵⁶ and *Law's Empire*;⁵⁷ Bork: *The Tempting of America: The Political Seduction of the Law*⁵⁸ and Cardozo: *The Nature of the Judicial Process*,⁵⁹ among others examined in this chapter. Notwithstanding the admirable intellectual weight behind these works, not a single one of these works has exhausted all the facets of judicial discretion, which is testimony to the difficulty, controversy and depth surrounding this area of law.

⁵⁴ Hart, note 1 above.

⁵⁵ H. L. A. Hart, *Essays in Jurisprudence and Philosophy*, Oxford: Clarendon Press 1983.

⁵⁶ Dworkin note 2 above.

⁵⁷ Ronald Dworkin, *Law's Empire*, Cambridge, M.A: Harvard University Press 1986.

⁵⁸ Robert H. Bork, *The Tempting of America: A Political Seduction of the Law*, New York: The Free Press, 1990.

⁵⁹ Benjamin N. Cardozo, *The Nature of the Judicial Process*, New Haven: Yale University Press, 1921 in www.constitution.org/cmt/cardozo/jud_proc.htm (accessed 26 October 2007).

There is no doubt that the concept of judicial discretion will continue to attract great debates now and in the future. This is derived from the attention this concept has recently, and currently is receiving from jurists in various jurisdictions. At home, the matter is also as lively as some of the Constitutional Court's judgments to be examined later demonstrate. In addition, legal philosophers and human rights lawyers in South Africa have made great contributions in textbooks and learned commentaries. A number of these articles are examined in this study, for instance by Roux.⁶⁰

While this study is not about an in-depth study of the diverse philosophical propositions or reconciling such propositions with regard to the various jurisprudential theories on legal discretion, a glimpse of the main theories of legal philosophy behind the term "judicial discretion" is necessary. The intention is not to engage these theories of law frontally, but to get a skeletal aspect of each in so far as the concept of judicial discretion is concerned after which some central issues relating to judicial discretion will be considered in the rest of the chapter.

2.1: Some Legal Theories on Judicial Discretion

The importance of the concept of legal discretion in judicial process can be derived from the diverse theories that attempt to explore and explain the

⁶⁰ Roux, note 40 above.

various factors to be considered in this area. There are several theories, which have been developed over time some of which are a reflection of the social, political and economic factors surrounding the proponents of such theories.

It is not suggested that this part of the study will exhaust all theories that exist on judicial discretion. However and as mentioned above, it is an attempt to establish some legal and philosophical foundation of the entire study. What this part of this chapter briefly considers are the main theories on judicial discretion as postulated by the positivists, who generally see law as rules.⁶¹ American legal realists claim that in so far as law requires interpretation, legal rules alone are not determinate. In the result, factors other than rules come into consideration and therefore law is what judges say it is.⁶²

Also to be briefly examined is the Critical Legal Studies Movement, which is not about analytical jurisprudence but “a contribution to social and political theory.”⁶³ Readily inviting controversy and criticism, members of this movement, despite lacking a single coherent legal theory like the positivists believe that law is not about rules at all but it is “politics dressed in a different garb and in the last analysis is nothing more than an expression of the interests of the power hierarchy.”⁶⁴

⁶¹ Wayne Morrison, Jurisprudence from the Greeks to Post-Modernism, London: Cavendish Publishing Ltd, 1997 p 5.

⁶² Mark C. Murphy, Philosophy of Law: The Fundamentals, Malden MA: Blackwell, 2007 p 201.

⁶³ Dennis Patterson, A Comparison to Philosophy of Law and Legal Theory, Oxford: Blackwell 1996 p 281.

⁶⁴ Bernard Schwartz, Main Currents in American Legal Thought, Durham, N.C: Carolina Academic Press,

In addressing the concept of judicial discretion, one of the positivists who has given this area of legal theory most attention, Hart, argues that “there will always be certain legally unregulated cases in which on some point, no decision either way is dictated by the law and the law is accordingly, partly indeterminate or incomplete.”⁶⁵ In such cases, the judge should not withdraw from the case. When Mr. Justice Tatting of the hypothetical case of the Speluncean Explorers failed to know how to proceed with the trial, which was based on new or grey areas in the law, he withdrew.⁶⁶ According to the positivists, the judge must, in such cases, exercise his or her discretion and in so doing formulate rules or principles on which basis a decision is arrived at.

The positivists’ argument is not that a judge has got absolute discretion in every case. Such an assumption would imply that a judge can whimsically or arbitrarily arrive at any decision he or she deems necessary. Instead, positivists argue that in the discharge of his or her responsibilities, a judge would once in a while come across a case with the phenomenon of legal indeterminacy where the law “runs out.”⁶⁷

One such case where the law run out was in the English case of *Donoghue v Stevenson*.⁶⁸ The House of Lords was in this case faced for the first time with the question of whether a consumer who sustained injuries out of a

1993 p 607.

⁶⁵ Hart, note 1 above.

⁶⁶ James Allan, *The Speluncean Case: Making Jurisprudence Seriously Enjoyable*, Chichester: Barry Rose Law, 1998 p 43.

⁶⁷ Murphy, note 62 above p 75.

⁶⁸ *Donoghue v Stevenson* 1932 [A C] 562.

manufacturer's negligence could succeed against the manufacturer in the absence of a contractual relationship between the two parties. Lord Atkin formulated the neighbour principle to provide an answer not available before.⁶⁹ As discussed in Chapter Three, the same judge, though dissenting, formulated the principle of reasonableness in the case of *Liversidge v Anderson*⁷⁰ which had not at the time received much judicial thought.

It is trite that the principle of reasonableness is a cornerstone of any civilized legal system. As mentioned above, the positivists do not suggest that a judge has discretion all the time. In most cases, the judge has clear rules to apply, that is the rules' application is determinate unlike in a situation where no rules exist.⁷¹ Other than in these cases where the law runs out, it seems as if the positivists do not see a judge exercising discretion in any other way. For instance, they do not indicate whether a judge who chooses one available rule as opposed to another rule available to him in equal measure is exercising discretion. The concept of legal choice, one would argue, is not given serious attention by the positivists.

Directly opposed to Hart's view of judicial discretion is Dworkin. A little more attention will be given to the views of Dworkin in that in his works, he is opposed to any view or theory the effect of which is that the courts do have

⁶⁹ *Donoghue*, *ibid* at 580.

⁷⁰ *Liversidge v Anderson* 1941 [3] All ER 338.

⁷¹ Murphy, note 62 above p 76.

discretion. In hard cases, Dworkin argues that a judge never has discretion to create law and it is upon him or her to discover what the rights of the parties are.⁷² Where rules do not exist, principles or policies abound from which a judge determines a case.

Dworkin's main attack of positivists like Hart is that by saying a judge has discretion in hard cases, it is suggestive of a right which existed before the conduct which now entitles one of the parties to win the case and in reality the judge has "legislated new rights, and then applied them retrospectively to the case at hand."⁷³ If rules exist, Dworkin says that a judge has weak discretion and where there are no standards set by an authority, what he calls hard cases, a judge has strong discretion.

Dworkin writes that:

But if the case at hand is a hard case, when no settled rule dictates a decision either way, then it might seem that a proper decision could be generated by either policy or principle. Consider for example, the problem of the recent Steel case. The defendant's employees had broken an electrical cable belonging to a power company that had supplied power to the plaintiff, and the plaintiff's factory was shut down while the cable was repaired. The court had to decide whether to allow the plaintiff recovery for economic loss following negligent damage to someone else's property. It might have proceeded to its

⁷² Dworkin, note 2 above p 81.

⁷³ Dworkin, *ibid* p 81.

decision by asking either whether a firm in the position of the plaintiff had a right to a recovery, which is a matter of principle, or whether it would be economically wise to distribute liability for accidents in the way the plaintiff suggested, which is a matter of policy.⁷⁴

An interesting and formidable argument of Dworkin's theory of judicial discretion in an attempt to explain what happens when rules come to an end is illustrated in *Donoghue v Stevenson*.⁷⁵ In explaining Dworkin's theory, Guest writes that Lord Atkin did not ask who, in law, ought to be my neighbour but he asked whom; in law is my neighbour, "because always there is the background matrix of law from which the judges and lawyers draw their argument."⁷⁶ A judge, even in hard cases, has an obligation to make a decision based on principle for protection of rights and which recognizes a society's morals.⁷⁷

The assumption that Dworkin makes is that the community has agreed or substantially agreed values, moral standards and principles and the responsibility of the judge is to apply them when faced with hard cases not governed by rules established by authority.⁷⁸ That is the main problem with this theory. It is indisputable that no society has norms, values and principles of morality that are of uniform application. That being so, a judge, in hard cases, would have to determine how to resolve the dispute between the parties

⁷⁴ Dworkin, *ibid* p 84.

⁷⁵ *Donoghue*, note 68 above.

⁷⁶ Stephen Guest, *Ronald Dworkin*, Edinburgh: Edinburgh University Press, 1992 p 172.

⁷⁷ Sara Smollet, "Philosophy of Law: Dworkin and Judicial discretion," <http://www.yellowpigs.net/philosophy/dworkin> (accessed 7 June 2007).

⁷⁸ Jeffrie G. Murphy and Jules L Coleman, *The Philosophy of Law: An Introduction to Jurisprudence*, Boulder: Westview Press 1989 p 46.

and as long as he is not obligated to go in one direction only in the determination of policy or principle, then he or she is in the thick of judicial choice.

In criticizing Dworkin's theory, Raz argues that the only way in which there would be no exercise of discretion by the courts is when a legal system has a rule that if the courts are called upon to decide a dispute which the law does not make provision for a clearly stipulated correct solution, the courts "ought to refuse to render judgment, but few, if any, legal systems in fact contain such a rule."⁷⁹ He further argues that most legal systems have at least three sources of judicial discretion, which are vagueness, weight and laws of discretion.⁸⁰

Raz sees vagueness as a source of judicial discretion because inherent in principles as described by Dworkin is vagueness of what the principles actually are, and this is compounded by a vague language which is common in the law itself. The law does not also determine the importance or weight of parallel or conflicting principles such that the court has to decide which of the two, at least, principles has to apply.⁸¹ Further, he says that laws are formulated in such a way that the courts are granted outright discretion, not only on with regard to weight to be given to the legal principles available and therefore

⁷⁹ Raz, note 3 above p 75.

⁸⁰ Raz, *ibid.*

⁸¹ Raz, *ibid.*

elect one or the other, but also about considerations which are not expressly stipulated.⁸²

A good example is when legislations and they are a couple of them, including the South African Constitution as examined in chapter four of this study, provide for certain substantive matters or processes and then says “or as the court may deem fit, expedient or necessary” or “including” or such other words. This is what Raz calls “laws of discretion.”⁸³ He however observes that the courts are not supposed to act arbitrarily even when there is no restriction on their discretion, by, for instance “tossing of a coin as this amounts to violation of a legal duty.”⁸⁴

The concept of judicial discretion is, it seems, more readily accepted by Dworkin when he concedes that in interpreting the law, the courts have to look for the best fitting and just answer for the determination of the dispute.⁸⁵ This is exactly what Raz is saying above when he talks of weight of principles as a source of judicial discretion. In trying to get the best answer, Dworkin says that the approach becomes complicated and there are “layers and currents of meaning.”⁸⁶ He further observes that the judge must:

⁸² Raz, *ibid.*

⁸³ Raz, *ibid.*

⁸⁴ Raz, *ibid.*

⁸⁵ Dworkin, note 57 p 229.

⁸⁶ Dworkin, *ibid* p 230.

Accept that in finally choosing one interpretation over another of a much contested line of precedents, perhaps after demanding thought and shifting conviction, he is developing his working conception of law in one rather than another direction.⁸⁷

American Realism is a school of legal philosophy, which does not believe that law is all about rules and principles.⁸⁸ They claim that legal adjudication is subjective in nature and cannot be divorced from moral, political, economic and social beliefs or inclinations of a judge. The judges, according to the realists, were used to propagate industrial and commercial ideals so as to facilitate the new economic transformation. They would, for instance interpret legislations in a manner that would promote commerce and further “adopt such a construction as shall most subserve the solid interests of this growing country.”⁸⁹

The realists claim that all or nearly all judicial decisions are discretionary.⁹⁰ They do not equate the judge with a legislator but they observe that some rules must be formulated by judges in superior courts so as to deal with hard cases. Such rules-making power, they argue, is seen in the doctrine of stare decisis.⁹¹ To the realists, “law is what the judges decide.”⁹² The American

⁸⁷ Dworkin, *ibid* p 258.

⁸⁸ Joel Feinberg and Hyman Gross, *Philosophy of Law*, Belmont: Wadsworth, 1991 p 47.

⁸⁹ Law Encyclopedia, *Legal Realism*, Oxford University Press: [http://www.answers.com/legal % 20 realism](http://www.answers.com/legal%20realism), (accessed 15 June 2007).

⁹⁰ Murphy, note 62 p 76.

⁹¹ Murphy, *ibid* p 198.

⁹² R. W. M. Dias, *Jurisprudence*, 2nd London: Butterworths, 1964 p 470.

realist “pursues an empirical and pragmatic approach to law, replacing natural law idealism and positivist formalism with a more sociological focus on the law in action.”⁹³

Oliver Wendell Holmes, the foremost judge and a realist, says that all that a “bad man” approaching the courts does want to know is “what the Massachusetts or English courts are likely to do in fact. I am much of his mind. “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”⁹⁴ This means that to the realists, the law is no more than what the judge says it is. Their argument can be deduced to mean that the judge has absolute discretion and is not under any law. In exercising judicial discretion, a judge is influenced by extra-legal factors which “include social background, personal preferences and convictions and political beliefs and commitments.”⁹⁵

The Critical Legal Studies Movement is in particular premises an extension of American realism. “In one sense, it is a continuation of the Realists project, but its objectives are much wider.”⁹⁶ The wider objective of this movement is evident from its forceful view of a judge's role, legal training and law as rules or principles among other issues. Their argument is that rules are always in

⁹³ David Johnson and Steve Pete, Jurisprudence, Durban: Butterworths 2001 p 159.

⁹⁴ Oliver Wendell Holmes, Jr. “The Path of the Law,” (1897) 10 Harvard Law Review 457-478. Available at http://www.constitution.org/lrev/owh/path_law.htm p 2. (Accessed on 30 April 2008).

⁹⁵ Johnson and Pete, note 93 p 160.

⁹⁶ Michael M.D.A. Freeman, Lloyd's Introduction to Jurisprudence, 6th Ed London: Sweet and Maxwell, 1994 p 935.

conflict and uncertain. There is always an opposing rule available to a judge, for example caveat emptor i.e. buyer beware, is contradicted by the principle that it is the state's duty to come to the aid of a weaker party so as to avoid exploitation and it's therefore impossible to know which of the two principles a judge would prefer.⁹⁷

The above view might not sound so controversial particularly to a realist. The most controversial view, and where they are could be wrong in so far as they purport to state a general proposition, is that judges play with rules so as to further the interests of the class they belong to. "The goal is to show that the conscious or unconscious motive of the judge is to further some particular interest, whether of the judge himself or of a group with whom he identified."⁹⁸

Fish says that Roberto Unger has been described as the prophet, if not the messiah, of the Critical Legal Studies Movement.⁹⁹ Fish observes that Unger sees judicial history as oppressive and a mystery which can only come to an end if replaced by people of larger sympathies who "exist in a relationship of reciprocal support that renders the machinery of legal culture obsolete."¹⁰⁰ They also believe that a judge is never neutral and objective and thinking that

⁹⁷ J.G. Riddall Jurisprudence, 2nd Ed London: Butterworths 1999 p 258.

⁹⁸ Riddall *ibid* p 259.

⁹⁹ Stanley Fish, "Dennis Martinez and the Uses of Theory," 1996 Yale Law Journal (1987) 1773 at 1781

¹⁰⁰ Fish *ibid*.

he or she can derive solutions from reasoning is an illusion.¹⁰¹ Roux attacks this view and observes that:

The great failing of CLS, of course, as a purportedly empirical project, was its pre-commitment to discovering the role of ideology in adjudication. Rather than hypothesizing the liberal legal proposition that ideology is relevant to adjudication only at the margins, and then seeking to disprove it, CLS set out to make a positive case for ideological adjudication by the not very scientific method of piling up examples.¹⁰²

The way law schools have taught law over the years is not spared from the wrath of the movement. "Not only are students conned into believing that the law emerges from a rigorous analytical procedure called legal reasoning, but also, and even more serious, students are bullied into accepting that a distinction exists between law and policy..."¹⁰³ To the members of this movement, law is all about what a judge says and in the exercise of that discretion, a judge is influenced by his or her political views because "law is politics."¹⁰⁴ To them it is difficult to imagine any rule requiring judicial interpretation which is so determinate that hardly is there a rule which requires a determinate judicial interpretation without reference to extra-legal factors. Law is therefore nothing but judicial discretion.

¹⁰¹ Riddall note 97 above p 259.

¹⁰² Roux note 40 above p 6.

¹⁰³ Riddall note 97 above p 264.

¹⁰⁴ Freeman note 96 above p 936.

Under natural law theory, there are laws that are inherent in nature, and enacted laws should therefore correspond as closely as possible and laws outside of the natural law are an unjust law and not a true law and that there should be a moral basis for any law, thus one “should live according to nature.”¹⁰⁵

Even assuming that that was so, natural law does not exclude judicial discretion in that in any community, there are no indisputable contents of what is morally upright and what is not, because

Law exists against a background of moral disagreement, for if people generally agreed about what morality required then there would not be much reason to substitute law for the direct moral decision-making of citizens and officials alike.¹⁰⁶

Courts have to be called upon to adjudicate on which version of morality is more acceptable than the other and this, purely, is judicial discretion.

From the brief analysis of various views on legal discretion, it may be seen that none excludes the fact that in adjudication of a dispute, a judge has some discretion. Strict positivists admit that in hard cases, a judge has to make law to resolve the dispute. Dworkin claims that in cases where rules do not exist, other factors come into play. A judge has to resort to principles and values

¹⁰⁵ George Whitecross Paton, *A Textbook of Jurisprudence*, 4th Ed, Oxford: Clarendon Press 1972 p 101.

¹⁰⁶ Larry Alexander and Frederick Shauer, “Law’s Limited Domain Confronts Morality’s Universal Empire” <http://www.wm.edu/law/ibr/documents/shauer/Alexander.pdf> (accessed on 10 September 2007).

existing in the society. This implies that the judge has ample discretion in such matters as these principles and values are largely uncertain. Further, there could be harder cases where the society has no principles on which a judge could base his or her decision. In such cases, whatever the judge's conscience is becomes the law. Dworkin acknowledges that law is not necessarily what is contained in the statute books because sometimes the statutes are silent and further, a strict interpretation would in certain situations be counter to the "real" statute.¹⁰⁷ Without doubt, this view by Dworkin demonstrates his acceptance of judicial discretion as interpretation of statutes is not a uniform process.

On the other side of rules and principles are the realists and the Critical Legal Studies Movement. To both schools of thought, the concept of judicial discretion is all that the law is about, since law is inherently indeterminate. Natural law does not also exclude the concept of judicial discretion in that even in good and acceptable moral values, one has to choose between any conflicting two.

2.2: The Role of Judicial Discretion in the Legal System

Having seen that judicial discretion exists irrespective of one's school of thought, we can now see what its meaning is, thus:

When we speak of "judicial discretion" or of "discretion" in general, we can mean one or both of two things--that

¹⁰⁷ Dworkin, note 57 above pp 16-17.

the individual exercising discretion is using judgment and discernment according to some standard, or that the individual has the power to make that decision, that the choice is up to him.¹⁰⁸

From the above definition the legal concept of discretion implies that whether rules are written or not, a judge can arrive at any finding as long as it is legally justifiable. Whenever discretion is exercised, a decision cannot be unlawful and the worst that would happen is for it to be reversed on appeal. The reason is that discretion “represents normative judgments about which reasonable men may differ.”¹⁰⁹ As Lord Hailsham of St Marylebone, L.C said in *re W (An Infant)*,¹¹⁰ “two reasonable parents can perfectly come to the opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable.”¹¹¹

De Smith sees discretion as a situation in which the decision maker has more than one lawful choice to make and therefore there is “no uniquely right answer to his problem.”¹¹² Judicial discretion plays an important role in any legal system. “Discretion is a vital tool in society aiding the individualisation of justice and no society has existed in which discretion has been absent.”¹¹³

¹⁰⁸ Russell L. Caplan, “Professor Dworkin’s Jurisprudence,” (1997) 22 American Journal of Jurisprudence 118 p 119.

¹⁰⁹ Caplan, *ibid* p 120.

¹¹⁰ *In re W (an Infant)* 1971[AC] 682.

¹¹¹ *An Infant*, *ibid* at p 700.

¹¹² S.A. De Smith, Judicial Review of Administrative Action, 4th Ed, London: Sweet and Maxwell, 1980 p 278.

¹¹³ Paul P. Craig, Administrative Law, 5th Ed, London: Sweet and Maxwell, 2003 p 536.

The main problem with discretion is when too much of it is vested in any individual or body, because, as Lord Denning observes, “trouble is that an official who is the possessor of power often does not realize when he is abusing it.”¹¹⁴ When a judge has to determine a matter not governed by the existing law, he or she should not run away because the law has “run out.”¹¹⁵ The judge should possess the boldness of developing rules for the determination of the matter. That becomes possible because inherent in the discipline of law is the concept of discretion.

When faced with cases that represent new challenges in the law, some judges have a bold spirit and take advantage of the opportunity, exercise his or her discretion and develop the law as opposed to being timorous. He or she does not run away from the challenge in the hard case. When faced with an opportunity to reform the law, some judges take full advantage of their inherent discretion in such cases and proceed to reform the law. A judge may also depart from settled law “because he considers it to be unsatisfactory.”¹¹⁶

The above factors amount to judicial activism, which “is the opposite of judicial restraint.”¹¹⁷ In demonstrating that the courts’ hands should not be tied by some outdated law or principle, Lord Denning writes that courts should not wait on parliament to provide new remedies because “our representatives

¹¹⁴ Lord Denning, *The Hamlyn Lectures: Freedom Under the Law*, London: Stevens and Sons, 1949 p 100

¹¹⁵ Murphy note 62 above p 75.

¹¹⁶ H.T. Gibbs, “Judicial Activism and Judicial Restraint: Where Does the Balance Lie?”, available at <http://www.gtcentre.unsw.edu.au/publications/papers/docs/2004/59/HarryGibbs.doc> (accessed on 12 September 2007).

¹¹⁷ Gibbs, *ibid.*

there cannot control the day to day activities of the state; nor can they award damages.”¹¹⁸

On the other hand, timorous souls fail to appropriately exercise discretion and find themselves helpless in hard cases. In *Candler v Crane, Christmas and Co.*,¹¹⁹ Asquith L. J, admitted that the law was not logical and neither was he defending it and he said “clearly it is not—but I am merely recording what I think it is. If that relegates me to the company of ‘timorous souls’, I must face the consequence with such fortitude as I can command.”¹²⁰ In agreeing that judges have such discretion Hart says that a time may come when there is no law to “dictate any decision as the correct one, and to decide cases. Where this is so, the judge must exercise his law-making powers.”¹²¹

Most of the new hard cases are seen in the courts’ exercise of their inherent powers in judicial review of the actions of the executive or legislature. In some of these cases, the use of judges’ discretion has had very positive impact in jurisprudence and development of the law due to the boldness of judges. One such case where judicial discretion was seen in a manner not seen before in the United States of America and which, without doubt is one of the leading cases in judicial activism in the Anglo-American jurisdictions is the case of *Marbury v Madison*.¹²²

¹¹⁸ Denning, note 114 above p 126.

¹¹⁹ *Candler v Crane Christmas and Co.* [1951] All ER 432.

¹²⁰ *Candler* ibid at 442.

¹²¹ Hart, note 1 above p 273.

¹²² *Marbury v Madison* Cranch (5 U.S) 13 7: 1803.

In this case, the Federal Constitution of the U S stated that it was supreme (it still is) but was silent on who should declare a legislation or other law as not constitutional. The court decided that “it is, emphatically the province and duty of the judicial department, to say what the law is...”¹²³ Emphatically, the case placed the court’s position as a check in controlling any form of law that exceeded constitutional provisions.

It is now beyond doubt that the courts in the exercise of their discretion possess substantial influence in the lives of the people. This is not what one of the founders of the United States of America, Alexander Hamilton, had in mind when he said that:

The judiciary has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may be said to have neither force nor will.¹²⁴

Courts in emerging democracies have also embraced the concept of judicial power and discretion in hard cases. In the Botswana case of *Attorney General v Dow*,¹²⁵ the constitution was silent on whether it was the supreme law of the land. In an action originating from a discriminatory provision of the Citizenship Act No. 25 of 1982 (repealed), the respondent argued that the said provision was unconstitutional as it contravened her fundamental right in the 1966

¹²³ *Marbury*, ibid p 177.

¹²⁴ Alexander Hamilton, “Federalist Papers No. 78,” 1788: http://www.marksquotes.com/Founding_Fathers/Hamilton (accessed on 10 October 2007).

¹²⁵ *Attorney General v Dow* [1992] BLR 119.

Botswana constitution not to be discriminated against. In declaring the supremacy of the constitution, the Court of Appeal said:

A written Constitution is the legislation or compact, which establishes the State itself. It paints in broad strokes on a large canvass the institutions of that State; allocating powers, defining relationships between such institutions and the people within the jurisdiction of the State, and between the people themselves...The existence and powers of the institutions of state, therefore, depends on its terms...No institution can claim to be above the Constitution; no person can make any such claim.¹²⁶

In the South African context, major decisions have been made by the Constitutional Court which illustrate the doctrines of judicial activism and judicial self-restraint in the exercise of their discretion and this is the main focus of chapter five of this study. Some of the cases in this area of the law are *Minister of Health and others v Treatment Action Campaign and others*¹²⁷ and *Government of the Republic of South Africa v Grootboom*.¹²⁸

Whilst most of the decisions by the Constitutional Court are about the interpretation of discretionary words and phrases in the Constitution, the Court has recently demonstrated that it cannot shy away from reading into the Constitution fundamental principles of law. The recent case of *Billy Lesedi*

¹²⁶ Dow, *ibid* at 129 per Amissah. J-P.

¹²⁷ *Minister of Health and others v Treatment Action Campaign and Others* 2002 (5) SA 721.

¹²⁸ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

*Masetlha v The President of the Republic of South Africa and Another*¹²⁹ is a classic case in the exercise of judicial discretion. Section 209(2) of the Constitution is silent on whether the President has the power to dismiss the head of an intelligence service. The only express power given to the President is power to appoint. The main issue in this case was whether the President is constitutionally empowered to dismiss. The Court said:

The power to dismiss is necessary in order to exercise the power to appoint... the power to dismiss is an essential corollary of the power to appoint and the power to dismiss must be read into section 209(2) of the Constitution.¹³⁰

The Court did not refer the question of the President's power to dismiss to the legislature.

Another justification for judicial discretion is that parliament cannot enact legislations to govern every aspect of human activity or inactivity.¹³¹ For this reason, the courts use their discretion to do what parliament fails to do by adopting a broad interpretation of legislation with a view to resolving the disputes before them. Interpretation of legislation is a discretionary exercise as there are no fixed and firm rules of general application. "Thus, for example, legislation may prohibit, without exception, the willful killing of another, entrusting the judiciary with discretion to identify exceptions, like self-

¹²⁹ *Billy Lekeledi Masetlha v The President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC).

¹³⁰ *Masetlha*, *ibid* para 68.

¹³¹ Cleveland, note 36 above.

defense, that existed at common law at the time of the statute's enactment."¹³²

The courts' exercise of discretion is useful in getting a meaning from an ambiguous legislation. The legislature impliedly entrusts the judiciary with the discretion of identifying the correct meaning by removing ambiguity. Some writers call this judicialisation of politics where "courts and judges come to make or increasingly to dominate making of public policies."¹³³

The extent of the courts' discretion in interpreting legislation is well captured by Lord Denning who wrote about a client who approached his lawyer with a view to enabling him derive a meaning of a statute. He said that the lawyer would say that he could not be sure as it was the judge to determine, but even then, the matter could go on appeal, and finally to the House of Lords, which could reverse the matter by three to two, "that is the uncertainty of statutory interpretation."¹³⁴

Sometimes the legislature may, in one legislation, intentionally craft it in such a way that it pleases or addresses the interests of various diverse groups, thus maintaining a sense of sobriety. The courts' interpretive discretion therefore

¹³² Cleveland, *ibid.*

¹³³ Neal Tate and Torbjorn Vallinder, The Global Expansion of Judicial Power, New York: New York University Press 1995 p 28.

¹³⁴ Lord Denning, The Closing Chapter, London: Butterworths, 1983 p 94.

assists the legislature to hide behind the ambiguous legislation. Cleveland opines that:

Legislative ambiguity reaches its peak when a statute is so elegantly crafted that it credibly supports multiple inconsistent interpretations by legislators and judges. Legislators with opposing views can then claim that they have prevailed in the legislative arena, and, as long as courts continue to issue conflicting interpretations, these competing claims of legislative victory remain credible.¹³⁵

A judge's appointment is a major political decision in most parts of the world. While appointing a judge of the U S Supreme Court, the president considers factors such as the political and ideological beliefs of a judge, whether the judge will make the president more popular among influential groups, whether he or she is a loyal member of the president's party, whether he or she favours presidential programs and whether his or her constitutional construction is acceptable to the president.¹³⁶ In appointing Justices Powell and Rehnquist, President Nixon described them as "judicial conservative— his kind of justice— as one who does not twist or bend the constitution in order to perpetuate his political and social views."¹³⁷ Of course the president was wrong as Chief Justice Rehnquist proved to be a moderate judge who never shied away from

¹³⁵ Cleveland, note 36 above p 39.

¹³⁶ Henry J. Abraham, The Judicial Process: An Introductory Analysis of the Courts of the United States, England and France, 7th Ed, New York: Oxford University Press 1998 p 70.

¹³⁷ John Hart Ely, "The Wages of Crying Wolf," (1972-73) 82 Yale Law Journal 920 p 944.

disagreeing with the executive and has been involved in the ideological transformation of the U S Supreme Court.¹³⁸

In apartheid South Africa, the executive used to the pack courts with apartheid-friendly judges.¹³⁹ The intention was to perpetuate the apartheid system with their decisions. In taking into account extra-legal matters in a judge's appointment, the appointing authority's hope is that the judge will use his or her powers and discretion to propagate, enforce or even strengthen the policies created by the appointing authority. If the policies are good and promote the welfare of the state and its subjects, then the powers and discretion that a judge wields are justified and necessary as they play a vital role in the protection of public good.

If the appointing authority's policies are oppressive, disregard fundamental rights and the judge opts to see the law as it is, oppression is experienced in the hands of the courts. Some aspects of this view are discussed in the next chapter, which examines the exercise of judicial discretion during the period of parliamentary sovereignty in South Africa. The extent to which a judge is influenced by matters not necessarily legal in the course of his or her work is well described by Cardozo who, to quote at length, writes that:

I have spoken of the forces of which judges avowedly avail
to shape the form and content of their judgments. Even

¹³⁸ G. Allan Tarr, Constitutional Politics in the States: Contemporary Controversies and Historical Patterns, London: Greenwood Press 1996 p 74.

¹³⁹ Stephen Ellmann, In a Time of Trouble: Law and Liberty in South Africa's State of Emergency, Oxford: Clarendon Press, 1992 p13.

this force is seldom fully in consciousness. They lie so near the surface, however, that their existence and influence are not likely to be disclaimed...Deep below consciousness are other forces, the likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge... There has been a certain lack of candor in much of the discussion of the theme, or rather perhaps in the refusal to discuss it, as if judges must lose respect and confidence by the reminder that they are subject to human limitation...The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by.¹⁴⁰

Judicial discretion is a necessary weapon in controlling the excesses of those given power to make decisions. Such decisions should only be made within the ambit of the relevant law, else they be set aside for being unlawful. The main ground developed by the courts over time for rescinding such decisions is unreasonableness, which Lord Green says "is frequently used as a general description of the things that must not be done".¹⁴¹ In such cases, the final arbiter of whether the decision or conduct is reasonable is the court. Lord Denning observes that even if a minister says that he or she has been given

¹⁴⁰ Cardozo note 59 above p 45.

¹⁴¹ *Associated Provincial Picture Houses Ltd-v- Wednesbury Corporation* [1947] 2 All ER 680 at 682.

unfettered discretion by the courts, “decisions which held that exercise of power could not be questioned are no longer valid.”¹⁴²

In determining whether the conduct complained of is reasonable, care must be taken not to confuse this with the correctness of the law or policy. Ducat writes that:

A judgment of reasonableness is not to be confused with an opinion about the wisdom or desirability of a law. In no sense is it a question of whether the legislative branch enacted the best policy.¹⁴³

It should be observed, however, that “reasonableness review has unavoidable substantive implications.”¹⁴⁴ Even then, the courts should ensure that they do not become decision makers by taking over the responsibilities of the administrator. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*¹⁴⁵, the Constitutional Court noted that a court should give “due weight to findings of fact and policy decisions made by those with special expertise and experience in the field.”¹⁴⁶

Finally, judicial discretion is useful in the determination of the Madisonian question or dilemma. This dilemma is based on majority rule principle where the majority through their representatives in the law-making body makes

¹⁴² Denning, note 114 above p 323.

¹⁴³ Craig R. Ducat, *Constitutional Interpretation*, 6th Ed. Minneapolis: West Publishing Co 1996 p 108.

¹⁴⁴ Currie and de Waal note 6 above p 677.

¹⁴⁵ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490.

¹⁴⁶ *Bato Star Fishing* ibid para 48.

decisions, which are binding on all, including the minority. Its source is the U S Supreme Court's decision in *Marbury v Madison*¹⁴⁷ which firmly asserted the court's testing right. Robert Bork is the author of this doctrine.¹⁴⁸ He says that the problem for constitutional law has been, and will always be, the Madisonian dilemma which arises from the Madisonian system. This system:

Allows majorities to rule in wide areas of life simply because they are majorities, but which also holds that individuals have some freedoms that must be exempt from majority control. The dilemma is that neither the majority nor the minority can be trusted to define the proper spheres of democratic authority and individual liberty. The first would court tyranny by the majority; the second tyranny by the minority.¹⁴⁹

The argument by Bork is that the courts have the responsibility to balance between majority power and minority freedom but in doing this, they must "also be scrupulous to deny the majority's legitimate right to govern."¹⁵⁰ The answer to the Madisonian question is nothing but the exercise of judicial discretion.

From the above analysis, it becomes apparent that judicial discretion is useful or relevant to a legal system. On this basis, courts exercise a lot of power in the lives of people, especially on their fundamental rights. Sometimes, this

¹⁴⁷ *Marbury*, note 122 above.

¹⁴⁸ Ducat, note 143 above p E I.

¹⁴⁹ Robert H. Bork, "The Constitution, Constitutional Intent, and Economic Rights" (1986) 23 *San Diego Law Review* 823 at 824 cited in Ducat note 140 above p E I.

¹⁵⁰ Bork, *ibid*.

discretion determines the direction in which important national decisions should be made. However, not every exercise of this discretion is always acceptable.

The following last part of this chapter examines some general jurisprudential problems associated with judicial discretion. The power and influence of the courts is aptly captured by the words of President Roosevelt in his address to the U S Congress on December 8 1908. Cardozo cites Roosevelt's words as follows:

The chief lawmakers in our country may be, and often are, the judges, because they are the final seats of authority. Every time they interpret contract, property, vested rights, due process of law, liberty, they necessarily enact into law parts of a system of social philosophy; and as such interpretation is fundamental, they give direction to all law-making. The decisions of the courts on economic and social questions depend upon their economic and social philosophy; and for peaceful progress of our people during the twentieth century we shall owe most to those judges who hold to a twentieth century economic and social philosophy and not to a long outgrown philosophy, which was itself a product of primitive economic conditions.¹⁵¹

¹⁵¹ 43 *Congressional Reports* as cited in Cardozo, note 59 above p 45.

2.3: Some Problems with Judicial Discretion

The concept of judicial discretion, much as it plays a vital role in the legal system as seen above, is not free from attack. Some of the reasons against the exercise of judicial discretion are examined in this part. Serious jurisprudential issues are created when the court exercises its discretion, especially interpretive discretion. The most common problem or disadvantage of judicial discretion is abuse. Just as judges annul administrative decisions which amount to abuse of discretion, so can judges also abuse their discretion.

Men are not angels and that they “are about as good as they are going to be and, since no angels are available to rule, we need checks and balances.”¹⁵² Some judges extend their latitude and use their power in ignorance of established, certain and acceptable principles of law. Power not subject to general laws is dangerous and amounts to anarchy and dictatorship.¹⁵³

As judges wield power to interpret legislation, to some, anything is a matter of what he or she says and a judge with such an interpretive freedom “is unable to ground his or her claim of obedience on virtue, but the authoritativeness proceeds from institutional power alone.”¹⁵⁴ Illustration on how judicial discretion has been exercised by the Constitutional Court of South Africa is the

¹⁵² William J. Quirk and R Randall Bridwell, Judicial Dictatorship, New Brunswick: Transaction Publishers, 1995 p 1.

¹⁵³ Quirk and Bridwell *ibid* p10.

¹⁵⁴ Ziyad Motala, “The Constitution is not anything the Judges Want it to be: The Mhlungu decision and The Need for Disciplining Rules,” (1998) 115 South African Law Journal 141 p 154.

main discussion of this study. For now, it is desirable to examine a few relevant decisions from American and British jurisdictions which have a tradition of judicial independence so as to briefly view the concept of judicial discretion from their experience.

One of the most important cases in demonstrating abuse of judicial discretion is *Roe v Wade*.¹⁵⁵ Here, the majority in the Supreme Court redefined the meaning of the word “privacy” so as to cover abortions at certain times of a woman’s pregnancy. The court indeed imposed its choice on policy instead of asserting what the electorate through their elected representatives had said. Such a judge “becomes a law student who marks his own examination papers.”¹⁵⁶

The two judges who, in *Roe* delivered a dissenting opinion, saw no reason whatsoever as to why the majority interpreted the constitution the way they did. In his dissenting judgment, Mr. Justice White noted:

I find nothing in the language or history of the Constitution to support the Court’s judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes.¹⁵⁷

¹⁵⁵ *Roe v Wade* 410 U.S 113 (1973).

¹⁵⁶ David Robertson, *Judicial Discretion in the House of Lords*, Oxford: Oxford University Press 1998 p 108.

¹⁵⁷ *Roe*, note 155 above pp 195-196.

Mr. Justice Rehnquist, also dissenting, complained, among other reasons, that the court nullified the entire legislation at issue; yet its task was to consider the relevant provisions in accordance with the interpretation it had arrived at.¹⁵⁸ An unconstitutional legislation should only be nullified to the extent of its constitutional invalidity. What the dissenting judges were saying is that the majority of the court were involved in an outright law-making exercise.

In *Scott v Scott*,¹⁵⁹ a judge allowed the hearing of an uncontested divorce action in camera contrary to established common law principles. In an attempt to clarify the contents of the court order to her relatives and acquaintance, the petitioner, who was alleging that the respondent was impotent, sent transcripts of the proceedings to them. This was interpreted as contempt of the court necessitating contempt proceedings against the petitioner and her lawyer. On appeal to the House of Lords, Lord Shaw of Dunfermline observed that:

To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundation of freedom from the rock to the sand.¹⁶⁰

What the noble Lord was saying is that fundamental rights were so vital that giving the courts too much discretion in their enjoyment and enforcement could, sometimes, be dangerous. For instance, if judges have too much

¹⁵⁸ *Roe*, *ibid* at p 200.

¹⁵⁹ *Scott v Scott* [1913] A C 417.

¹⁶⁰ *Scott*, *ibid* at p 477.

discretion in granting of a remedy, this is an area where discretion can be easily abused. Injunction (interdict), certiorari, prohibition and mandamus are discretionary remedies and a court may decline to grant them notwithstanding that an act is unlawful.¹⁶¹

In the South African Bill of Rights context, the judges have been vested with unfettered authority in the award of remedies. Section 38 of the Constitution leaves the granting of a remedy for an infringement or threatened infringement of the rights in the Bill of Rights by empowering the courts to grant “appropriate relief.” This aspect of judicial exercise of discretion is examined in chapter three of this study.

Some judges, for reasons only known to them, fail to exercise their wide discretion for promotion and enforcement of justice more so fundamental rights by failing to take advantage of the open-ended nature of words in a statute or constitution. This means that they use their legal discretion to fetter their discretion in enforcement of rights. In South Africa, the Constitutional Court has on several occasions come to the rescue of litigants whose fundamental rights have been taken away by a lower court’s restrictive interpretation of legislation.¹⁶² A restrictive interpretation amounts to abuse of

¹⁶¹ H. R. Wade and C F Forsyth, *Administrative Law*, 8th Ed Oxford: University Press 2000 p 688.

¹⁶² See for instance *National Education Health and Allied Workers Union v University of Cape Town (NEWAHU)*, 2003 (3) SA 1 (CC) and Chapter 4 of this study.

discretion because the wide discretion is “no doubt given to promote the ends of justice.”¹⁶³

In speaking against a judge fettering his or her own discretion, Lord Denning said in the case of *Ward v James*¹⁶⁴ that “courts should not create rigid rules such that a judge cannot depart.”¹⁶⁵ Judicial discretion can be attacked for being counter-majoritarian that is, going against the principle of a democracy where people’s representatives are mandated to make laws. Judges should not play any legislative function because it “offends the democratic ideal that community should be governed by elected officials answerable to the electorate.”¹⁶⁶

In attacking the role of the courts as law making bodies as seen in the above cases, Dworkin objects by criticizing what he calls “judicial originality.” His proposition is that:

The community should be governed by men and women who are elected by and responsible to the majority. Since judges are, for the most part, not elected, and since they are not, in practice, responsible to the electorate in the way legislators are, it seems to compromise that proposition when judges make law. The second argues that if a judge makes law and applies it retroactively in the case before him, then the losing party will be punished, not because he violated some duty he had, but

¹⁶³ *R v Shambuka* 1995 (1) S A 31 at 333 E.

¹⁶⁴ *Ward v James* [1966] Q B 273.

¹⁶⁵ *Ward*, *ibid* at 295.

¹⁶⁶ Freeman, note 4 above p 1391 referring to Dworkin and “Hard Cases.”

rather a new duty created after the event. These two arguments combine to support the traditional ideal that adjudication should be as unoriginal as possible.¹⁶⁷

In attempting to explain that the courts should not engage in legislative escapades, Bork observes as follows:

When we speak of 'law', we ordinarily refer to a rule that we have no right to change except through prescribed procedures. That statement assumes that the rule has a meaning independent of our own desires. Otherwise there would be no need to agree on procedures for changing the rule...It is a necessary implication of the prescribed procedures that neither statute nor Constitution should be changed by judges. Though that has been done often enough, it is in no sense proper.¹⁶⁸

2.4: Limiting Abuse of Judicial Discretion

Having seen that abuse of legal discretion is real, it is necessary to see the various approaches designed to minimize or limit its abuse. The doctrine of separation of powers is naturally the starting point. This doctrine defines the role of each of the three arms of the state, the executive, legislature and the judiciary.¹⁶⁹ However, a strict application of the doctrine is not possible but generally, it must be seen to be present in a democracy because "the accumulation of all powers, legislative, executive, and judiciary in the same hands, whether of one, a few, or many, and whether hereditary, self-

¹⁶⁷ Ronald Dworkin, "Hard Cases," Harvard Law Review (1974-75) 88: 1057 p 1061.

¹⁶⁸ Bork, note 58 above p 55.

¹⁶⁹ Richard Bellamy, The Rule of Law and Separation of Powers, 2nd Series, Burmingham: Aldershot, Hants 2005 p 253.

appointed, or elective, may justly be pronounced the very definition of tyranny.”¹⁷⁰ This doctrine is present in modern constitutions either expressly or by implication.¹⁷¹ The judge-made doctrine of *stare decisis* and *per incuriam* rule is also useful in limiting the discretion of lower courts to decide cases as they wish.

In the U S, Professor Sustain has coined the term “judicial minimalism” as a middle ground between conservative originalism and liberal judicial activism, thus promoting minimalism as a moderate political theory. Sustain writes that most of the recent academic attention in constitutional law has ignored the actual process of constitutional interpretation, which is that “the judicial mind naturally gravitates from abstractions and toward close encounters with particular cases.”¹⁷²

The judiciary is itself alive to the fact that it can and does sometimes abuse legal discretion. In addition, courts are aware that they do not always possess the knowledge or expertise that govern peoples’ lives and therefore tactfully escape from deciding certain issues.¹⁷³ Therefore, they opt, sometimes, not to

¹⁷⁰ Arther T. Vanderbilt, The Doctrine of Separation of Powers and Its Present Day Significance, University of Nebraska: Nebraska Press 1953 p 4.

¹⁷¹ In South Africa, the doctrine of Separation of Powers is not expressly mentioned in the Constitution but it is apparent from the various roles placed on the Executive, the Legislature and the Judiciary. The Courts have recognised this doctrine for instance in *South Africa Association of Personal Injury Lawyers v Heath* 2001 (1) S A 883 (CC).

¹⁷² Cass R. Sustein, One Case at a Time: Judicial Minimalism on the Supreme Court, Harvard: University Press, xi as cited by Neil S. Siegel in “A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar,” (2005) 103 Michigan Law Review 1951 p 1954, available at [http://eprints.law.duke.edu/archive/00001259/01/103_Mich._L.Rev._1951_\(2005\).pdf](http://eprints.law.duke.edu/archive/00001259/01/103_Mich._L.Rev._1951_(2005).pdf) (accessed 12 September 2007).

¹⁷³ Roux, note 40 above p 27.

interfere with decisions made either by the executive, the legislature or other law-making body. The combination of these factors is judicial self-restraint, which Chief Justice John Roberts of the U S Supreme Court says is what “confines judges to their proper constitutional responsibilities.”¹⁷⁴

The extent to which many judges, if not all, are aware that they are restrained by the law in the course of dispensing justice is well illustrated by the remarks of Montesquieu and Justice Marshall as cited by Cardozo. He writes:

The judges of the nation, says Montesquieu, are only the mouths that pronounce words of the law, inanimate beings, who can moderate neither its force nor its rigor. So Marshall, in *Osborne v. Bank of the United States*, 9 Wheat. 738, 866: The judicial department “has no will or power in any case.... Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or in other words to the will of the law.”¹⁷⁵

Another argument in favour of judicial restraint is that due to the complexities in some disputes that come before the courts, the issues are “simply beyond the institutional capacity of courts to resolve.”¹⁷⁶ In the context of South Africa’s Constitutional Court, the Court has, in certain cases, restrained itself from dealing with issues it considers beyond its capacity. This is addressed in

¹⁷⁴ Wikipedia, “Judicial Activism,” the Free Encyclopedia. Available at: http://en.wikipedia.org/wiki/wiki/Judicial_activism (accessed on 29 August 2007).

¹⁷⁵ Cardozo, note 59 above p 45.

¹⁷⁶ Ducat, note 143 above p E. 9.

chapter five of the study which examines the manner in which the court has exercised its discretion in selected ground-breaking human rights cases.

There is direct conflict between judicial activism and judicial self-restraint. As already examined above, the former has its advantages in any legal system but it is necessary that some self-made restrictions be in place to limit chaos in the legal process. In attempting to strike a balance between the two, Lord Reid noted in *Myers v Director of Public Prosecutions*¹⁷⁷ that:

The common law must be developed to meet changing economic conditions and habits of thought, and I would not be deterred by expressions of opinion in this House in the old cases. But there are limits to what we can do or should do. If we are to extend the law, it must be by the development and application of fundamental principles. We cannot introduce arbitrary conditions or limitations: that must be left to legislation.¹⁷⁸

Courts apply various self-imposed techniques to avoid interfering with what they think is not their role. They use their discretion in declining to hear some matters by for instance, stating that the court has no jurisdiction, that the case raises an issue which is not justiciable or for reasons of public policy, it is not the court's business to interfere.¹⁷⁹ In the U K, for instance, matters which the courts may not intrude in for being non-justiciable include prerogative powers on making of treaties, defence of the kingdom, prerogative of mercy, the

¹⁷⁷ *Myers v Director of Public Prosecutions* 1965 AC 1001.

¹⁷⁸ *Myers*, *ibid* p 1021.

¹⁷⁹ Brigid Hadfield, *Judicial Discretion: A Thematic Approach*, Dublin: Gill and Macmillan 1995 p 235.

award of honours, dissolution of parliament and appointment of government ministers.¹⁸⁰

The Constitutional Court of South Africa has applied some of these reasons in the determination of fundamental rights cases which are the subject of chapter five. What that chapter demonstrates is that it is actually not whether the Court is equipped enough to determine some decisions but rather whether it is willing to exercise its interpretive discretion one way or the other. This is the case in social-economic rights litigation.¹⁸¹ The need to control abuse of judicial discretion is most necessary in constitutional adjudication because of the sacrosanct nature of the constitution. Some judges are aware of how important it is to restrain themselves in the interpretation of the constitution. Judicial discretion wrongly exercised undermines the rule of law that is so central to a democracy.”¹⁸²

In *President of the Republic of South Africa and Others v South African Rugby Football Union (SARFU) and Others*¹⁸³, the Constitutional Court said that that care must be taken in giving an order compelling the President to give evidence in court and the judiciary must be sensitive to the status of the head of state and the integrity of the executive.¹⁸⁴

¹⁸⁰ Hadfield, *ibid*.

¹⁸¹ See for instance *TAC* note 127 above.

¹⁸² Ducat, note 143 above p 94.

¹⁸³ *President of the Republic of South Africa and Others v South African Rugby Football Union (SARFU) and Others* 2000 (1) SA 1 (CC).

¹⁸⁴ *SARFU* *ibid* at para 243.

If it is too late to make a decision, the Constitutional Court generally restrains itself from making a decision as there is no live controversy between the parties. If the case is moot, then a court should avoid entertaining abstract questions of law not related to a legal dispute.¹⁸⁵ On the other hand, the concept of ripeness, also a creation of the courts, restrains the courts from premature adjudication.¹⁸⁶ In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*,¹⁸⁷ Ackerman J noted that although the concept of ripeness is not clearly defined, the general principle is that constitutional questions should be avoided whenever the dispute can be determined on the relevant law.¹⁸⁸

The manner in which the courts in general restrain themselves from exercising discretion is summarised in *Ashwander v Tennessee Valley Authority*.¹⁸⁹ Mr. Justice Louis Brandeis laid down some rules to restrain the courts in constitutional interpretation. The rule of avoidance, as stated in this case, is that where a dispute may be determined in a way that evades constitutional adjudication, the court should avoid the question.

The judge observed that the court should not: (1) determine the constitutionality of legislation in non-adversary proceedings; (2) anticipate a question of constitutional law; (3) formulate a rule of constitutional law

¹⁸⁵ See for instance, *Dormehl v Minister of Justice* 2000 (2) SA 987(CC) paras 7-9.

¹⁸⁶ Currie and de Waal, note 6 above p 92.

¹⁸⁷ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC).

¹⁸⁸ *National Coalition*, ibid at para 21.

¹⁸⁹ *Ashwander v Tennessee Valley Authority* 297 U.S 288 (1936).

broader than needed; (4) rule on constitutionality if there is another ground for deciding the case; (5) determine a statute's validity unless the person complaining has been injured by it; (6) invalidate a statute at the instance of persons who have taken advantage of its benefits; and, (7) the court will always ascertain whether any reasonable interpretation of a statute will allow it to avoid the constitutional issue.¹⁹⁰

In addition to the above considerations, sometimes the courts do not find it desirable to interfere with some decisions which are based on the wisdom of those in politics. Courts, under the political question doctrine, avoid the political issues or questions by stating that the issues are not in the court's domain. In *Baker v Carr*,¹⁹¹ the U S Supreme Court noted that:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political question...¹⁹²

¹⁹⁰ *Ashwander*, ibid at 346 – 348.

¹⁹¹ *Baker v Carr* 369 US 186 (1962).

¹⁹² *Baker*, ibid para 72.

The law, and in particular the constitution, is not what the judges want it to mean.¹⁹³ This means that the judiciary is aware that its discretion in interpretation of the law is not unlimited. Correct as this may be, the most effective approach of limiting judicial abuse of discretion in constitutional matters is not to leave it to the courts to create self-restraining rules.

Much as the judiciary is aware that its interpretive powers are limited, that should not be the answer to restraining judicial power in constitutional litigation or interpretation. The answer, it is submitted, is for a constitution, and in particular fundamental rights provisions in such a constitution, to avoid giving judges too much latitude in the interpretation and enforcement of constitutional rights. That is not the case under the Constitution of South Africa. Although this is one of the issues discussed in chapter five, it is appropriate to observe here that with regard to the political question discussed above, the Constitutional Court has not unequivocally laid down the jurisprudence on how disputes of a political nature ought to be determined by the courts.

In *SARFU*,¹⁹⁴ the Constitutional Court said that it has exclusive jurisdiction “in a number of crucial political areas.”¹⁹⁵ That is the opposite of what it said in *Ferreira v Levin NO and Others*,¹⁹⁶ that “whether or not there should be

¹⁹³ Motala, note 154 above 110.

¹⁹⁴ *SARFU*, note 183 above .

¹⁹⁵ *SARFU*, *ibid* para 72.

¹⁹⁶ *Ferreira v Levin NO and Others* 1996 (1) SA 984 (CC).

regulation and redistribution is essentially a political question which falls within the domain of the legislature and not the Court.”¹⁹⁷ These inconsistencies primarily emanate from the wide textual discretion given to the courts by the Constitution. The rights of people, their interpretation and manner of enforcement should be sufficiently certain from the constitution or other written law. Indeed, “there are grave objections to giving the courts discretion to decide whether governmental action is lawful or unlawful...the citizen is entitled to live under the rule of law not the rule of discretion.”¹⁹⁸

2.5: Summary

In this chapter, the concept of judicial discretion has been examined at various levels. The jurisprudential aspect of judicial discretion has been examined briefly and it is apparent from the analysis that judicial discretion does exist. The role of judicial discretion in the legal process has also been examined especially the concept of judicial activism. It has been seen that judicial discretion plays an important part in the entire legal system. Lastly, efforts that the judiciary has evolved so as to limit abuse of its discretion have been briefly examined. This arises from a self awareness by the courts that abuse of judicial discretion is as real as abuse of any other category of discretion.

The next chapter addresses the exercise of judicial discretion in apartheid South Africa. The intention is to demonstrate that judicial discretion was, and

¹⁹⁷ *Ferreira*, *ibid* para 180.

¹⁹⁸ *Bugg v DPP (DC)* 1993 QB 473 at 499.

still is, a major factor in fundamental rights litigation. In tandem with the exercise of discretion by the courts in this period are factors which contributed to the state of human rights at the time, in particular apartheid legislations.

CHAPTER THREE

FUNDAMENTAL RIGHTS: THE PAINFUL PAST

3: Introduction

The various aspects of the concept of judicial discretion have been examined in the previous chapter. In particular, it has been established, it is hoped, that irrespective of the school of thought one belongs to, judicial discretion does exist. This is so even for Dworkin who, early in his illustrious academic life, strongly resisted the existence of judicial discretion.

This chapter examines important factors which greatly affected the enjoyment of fundamental human rights in South Africa prior to the new constitutional dispensation. The intention is to set the stage for an examination of the various aspects of fundamental human rights which is the focus of this study. A proper appreciation of the current position of fundamental human rights in South Africa would be incomplete, it is submitted, without an examination of the legal position under the old legal regime. Most importantly, it is necessary for this study to examine the manner in which the courts, in the old legal order, exercised their discretion with a view to illustrating the extent of the power the judiciary had, and still has, in the determination of whether human rights are enjoyed.

A discussion of the position of fundamental rights and the manner in which the courts, in the past, exercised their discretion is very central to this study. This is because one cannot fully appreciate the importance of the subject of fundamental rights as contained in the South African Constitution unless regard is had to the past. As observed by Holmes, “the history of what the law has been is necessary to the knowledge of what the law is.”¹⁹⁹ Secondly, it assists in gauging whether the Constitutional Court, in the exercise of its wide textual discretion as illustrated in the next chapter, has a good grasp of the circumstances that altogether form the difficult past, especially the manner in which the courts exercised their discretion.

The Constitution itself is cognisant of the past which was indeed a difficult one. The preamble uses words such as “injustices of our past”, “South Africa belongs to all,” “divisions of the past,” “establish a society based on democratic values, social justice and fundamental human rights,” and “every citizen is equally protected by the law,” among other words intended to illustrate a new fundamental shift from the past. In looking at the past, three major factors will be considered, namely:

1. Parliamentary Sovereignty.
2. Statutory violation of fundamental rights.
3. The courts’ exercise of discretion against fundamental rights.

¹⁹⁹ O. Wendell Holmes, Jr, *The Common Law*, 2000, Online Reader: Gutenberg Literary Foundation <http://www.gutenberg.org/catalog/world/readfile?pageno at p 23>. Accessed on 29 November 2007.

It is not being stated or implied here that the above three factors are the only ones relevant in considering the past. However, for the purposes of this study, they are the ones that have been considered quite necessary. Thereafter, the manner in which the Constitution has vested the courts with discretion is examined and thereafter the manner in which the Constitutional Court of South Africa has exercised its discretion in the last 13 years of its existence.

3. 1: Parliamentary Sovereignty

3.1.1: The Period Before 1910

Under the English political and constitutional system, parliament is the principal law making institution and it is composed of three bodies: the Queen, the House of Lords and the House of Commons.²⁰⁰ The principle of parliamentary sovereignty was firmly established after the collapse of efforts by some judges, especially Chief Justice Coke, to make the common law superior to parliament.²⁰¹ In the famous statement in *Dr Bonham's case*,²⁰² Sir Edward Coke observed as follows regarding supremacy of the common law:

It appears in our books, that in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void; for when an Act of Parliament is against common right and reason, or

²⁰⁰ Dicey, note 9 above p 36.

²⁰¹ Sir Ivor Jennings, *The Law and the Constitution*, 5th Ed, London: Hoddere Stoughton 1979 p 324.

²⁰² *Dr. Bonham's case* (1610) 8 Co. REP 114a.

repugnant or impossible to be performed, the common law will control it, and adjudge such Act to be void.²⁰³

Coke's statement, which would nowadays be termed judicial review, was not well received by the King and he was called upon to recant his statement, which he refused. Instead, he tried to explain his theory but it was not convincing enough so he was dismissed.²⁰⁴

The strong words of Sir Edward Coke were echoed by some judges, one of whom was Chief Justice Hobart who noted in *City of London v Wood*²⁰⁵ that:

It is a very reasonable and true saying, that if an Act of Parliament should ordain that the same person should be party and Judge...it would be a void Act of Parliament.²⁰⁶

Coke's views that Acts of Parliament contrary to the common law and reason were void did not become an established principle of English law.²⁰⁷ After the Glorious Revolution, "Judges gradually accepted Parliamentary rule, and during the course of the eighteenth century, the principle of its legislative supremacy became firmly established."²⁰⁸

Although the statement by Coke was rejected in England, it however became influential in the development of American jurisprudence and the principle of

²⁰³ *Dr. Bonham*, *ibid* at 118a.

²⁰⁴ Jennings, note 201 above p 324.

²⁰⁵ *City of London v Wood* 12 Mod. 669.

²⁰⁶ *Wood*, *ibid* at 687.

²⁰⁷ John Dugard, *Human Rights and the South African Legal Order*, New Jersey: Princeton University Press 1978 p 14

²⁰⁸ Eric Barendt, *An Introduction to Constitutional Law*, Oxford: University Press 1998 at p 87.

judicial review in *Marbury v Madison*²⁰⁹ is a result of Coke's *dictum* being accepted in the U S where it was developed and was applied to the full.²¹⁰ In England, the concept of judicial review did not become an established principle of British constitutionalism. Roscoe Pound observes that the legislature 'thought of itself as sovereign and conceived that, no matter what the terms of the fundamental law under which it sat, the courts had but to ascertain and give effect to its will.'²¹¹ Dicey explains that parliament "can do everything but make a woman a man, and a man a woman."²¹²

Dicey further observes that the doctrine of parliamentary sovereignty has three components, namely that parliament has the right to make or unmake any law whatever, no person or body is recognized by the law of England as having a right to override or set aside the legislation of parliament and the right or power of parliament extends to every part of the Queen's dominions.²¹³

English courts' acceptance of sovereignty of Parliament is well captured in *Madzimbamuto v Lardner-Burke*²¹⁴ where Lord Reid observed:

It is often said that it would be unconstitutional for the Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly

²⁰⁹ *Marbury*, note 122 above.

²¹⁰ Dugard, note 207 above p 16.

²¹¹ Roscoe Pound, *The Spirit of the Common Law*, Boston: Marshall Jones Company 1921 at p 63.

²¹² Dicey, note 9 above p 43.

²¹³ Dicey, *ibid* pp xxiv – xxv.

²¹⁴ *Madzimbamuto v Lardner-Burke* [1969] IAC 645.

improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them, the courts would not hold the Act of Parliament invalid.²¹⁵

Parliament's power is not restricted by any one, not even the courts. This is derived from its response after the House of Lord's decision in *Burmah Oil Co. v Lord Advocate*.²¹⁶ In this case, the House of Lords awarded compensation to be paid for the destruction of oil installations by Britain in the Rangoon during wartime. After this decision, The War Damage Act 1965 was passed to nullify the effect of the decision. The decision by parliament illustrates how even the judiciary is subordinate to parliament.²¹⁷ It was immaterial that the enactment had a retrospective effect, taking away what the highest court had granted.

The leading South African authority on the constitutional position prior to Union status up to Republican status is Dugard. Indeed, prominent authors have acknowledged this position.²¹⁸ This part of this study has also benefited from Dugard's work for the period under review.

When the British occupied the Cape in 1806, the concept of parliamentary sovereignty was established. It was adopted and practised in the British

²¹⁵ *Madzimbamuto*, ibid at 723.

²¹⁶ *Burmah Oil Co. v Lord Advocate* [1946] 2 ALL ER 348.

²¹⁷ Hilaire Barnett, Constitutional and Administrative Law, 2nd Ed, London: Cavendish Publishing 1998 p 225.

²¹⁸ See for instance Chaskalson et al note 45 above at p 2-1; Currie and de Waal note 6 above p 2 footnote 3.

colonies of Cape and Natal.²¹⁹ The Orange Free State (O F S) was under the Dutch emigrants and its 1854 constitution embodied the principle of constitutionalism influenced by that of the U S.²²⁰ The constitution of the Orange Free State contained some fundamental rights guarantees, for instance “equality before the law, peaceful assembly and right to property.”²²¹ The constitution did not contain provisions for judicial review but it was accepted as inherent in the constitution.²²²

The Transvaal, known as the South African Republic was, like the Orange Free State, under the Dutch emigrants. However, the principle of constitutionalism was not as developed as in the Orange Free State. Its constitution was racist, confusing and had provisions not truly constitutional.²²³ It was also not clear whether parliament was superior to the constitution.²²⁴ The confusing nature of Transvaal’s constitution, in particular whether parliament was supreme to the constitution and whether the court had a right to test the validity of legislation was temporarily settled by Kotze, C. J. in *Brown v Leyds N.O.*²²⁵ in which the court decided that parliament was under the constitution. He noted that:

We are not, however justified in concluding from this that the Volksraad, as the highest authority, is, in the sense of the absolute power, about the Grondwet, but rather and indeed, that the portion of sovereign power entrusted to

²¹⁹ Dugard, note 207 above p 18.

²²⁰ Dugard, *ibid* .

²²¹ Dugard, *ibid* .

²²² Dugard, *ibid* p 19.

²²³ Dugard, *ibid*.

²²⁴ Dugard, *ibid*.

²²⁵ Kotze, C. J. in *Brown v Leyds N.O* (1897) 4 off. Rep. 17.

the Volksraad by the people shall be exercised under and in accordance with the terms of the authority or mandate as expressed in the constitution. Were this not so, the agent or mandatory would have the greater power than the principal, a position which cannot for a moment be entertained.”²²⁶

The High Court asserted its right of judicial review and this was greatly influenced by the American experience, in particular *Marbury v Madison*.²²⁷ Specifically, Koetze C.J cited Mr. Justice Marshall’s bold comment that the Court must be government of laws and not of men.²²⁸ The Court settled any doubts of its testing power in the Transvaal. It further ruled that laws must be constitutional and that the power to construe the constitution “is a judicial power.”²²⁹

The Court’s view that it had a testing power was not welcome by the executive. President Kruger introduced legislation that denied the judiciary’s testing power and to dismiss any judge who failed to pledge that he would not exercise “the so called testing right.”²³⁰ Eventually, Justice Kotze was dismissed and a new chief justice appointed.²³¹ The dismissal, intended to

²²⁶ *Brown*, ibid at 26.

²²⁷ *Marbury*, note 122 above.

²²⁸ *Brown*, note 225 above at 24.

²²⁹ *Brown*, ibid at 27.

²³⁰ Dugard, note 207 above p 21.

²³¹ J. W. Gordon, “The Judicial Crisis in the Transvaal,” (1898) 14 *Law Quarterly Review*: 343 at p 365.

reassert parliamentary sovereignty, occurred notwithstanding Kruger's assertion that the "court is free as it were as a fish is free to swim in a net."²³² He called the testing right a principle of the devil introduced into paradise so as to test God's word. Judges were warned not to follow the devil as Chief Justice Kotze had done.²³³

3.1.2: The Union: 1910-1961.

After the Anglo-Boer war of 1899-1902, the British government was anxious to see the establishment of "a strong economic unit which would be part of the British Empire and which would foster reconciliation between whites of English and Afrikaans descent."²³⁴

One of the main reasons for a union as opposed to a federation was to enable the creation of a centralized government so as to attempt to solve the diverse problems in each of the colonies.²³⁵ The British colonies of Cape of Good Hope and Natal and the Boer Republics of Orange Free State and Transvaal merged to become the Union of South Africa. The constitution provided that the King of England would, with the advice of the Privy Council, declare:

The colonies of the Cape of Good Hope, Natal, the Transvaal and the Orange River Colony, hereinafter called the colonies, shall be united in a legislative Union under

²³² Gordon, *ibid* p 350.

²³³ Dugard, note 207 above p 24.

²³⁴ Boule et al, Constitutional and Administrative Law: Basic Principles, Kenwyn: Juta and Co 1989 p 123.

²³⁵ Donovan Marais, South Africa Constitutional Development: A Multi-disciplinary Approach, Rev Ed, Pretoria: Southern Publishers, 1991 p 156.

one government under the name of the Union of South Africa.²³⁶

The union became effective on 31 March, 1910.²³⁷ Section 59 of the union constitution stated that “Parliament shall have the power to make laws for peace, order and good government of the union.” It is not unequivocal, from this provision that parliament was not subject to judicial review. This provision, however, is more in favour of parliamentary sovereignty than judicial review of parliamentary action. The concept of parliamentary sovereignty was influenced by the British jurisprudence and by most of the delegates to the constitutional talks, most of whom were lawyers trained in the “Blackstone-Dicey tradition of parliamentary supremacy.”²³⁸

The unequivocal denial of the courts’ testing right under the union constitution created room for some judges to assert that the courts had a right to determine the validity of legislative action. Generally though, the doctrine of parliamentary supremacy was embraced “with a vengeance.”²³⁹ Five decisions would demonstrate the extent of judicial discretion in statutory interpretation, especially in fundamental rights litigation, during the period of parliamentary sovereignty. The decisions were *R v Ndobe*;²⁴⁰ *Sachs v Minister of Justice*;²⁴¹

²³⁶ Section 4 of the South Africa Act, 1909.

²³⁷ Preamble to South Africa Act, 1909.

²³⁸ Dugard, note 207 above p 26.

²³⁹ Ellmann, note 139 above p 12.

²⁴⁰ *R v Ndobe* 1930 AD 484.

²⁴¹ *Sachs v Minister of Justice* 1934 AD 11.

*Ndlwana v Hofmeyr N.O.*²⁴² *Harris v Minister of the Interior and Another*²⁴³ and *Minister of the Interior v Harris*,²⁴⁴ all of which affected fundamental rights of the individual.

In *Ndobe*, The Black Administration Act 38 of 1927 negatively affected the appellant's franchise in Act 14 of 1887. Section 35 of the constitution of South Africa Act 1909 provided that for a person to be disqualified from being registered as a voter in the Province of the Cape of Good Hope by reason of his race and colour only, the Bill had to be agreed to by at least two-thirds of the total number of members of both Houses. In a unanimous judgment, the Appellate Division of the Supreme Court held that the constitution provided in section 35 the manner in which a person could be disqualified from registration as a voter, and Act 38 of 1927 contained a clause offending against section 35. The Court ruled that it:

Would have to assume that the clause was *ultra vires*, in the absence of some indication in the Act or proof *aliunde* that such clause was passed in contemplation of the section.²⁴⁵

On the contention that the Court was powerless in questioning legislation, it noted that that was "a contention with which we cannot agree."²⁴⁶

²⁴² *Ndlwana v Hofmeyr N.O* 1937 AD 229.

²⁴³ *Harris v Minister of the Interior* 1952 (2) SA 428 A.

²⁴⁴ *Minister of the Interior v Harris* 1952 (4) SA 769 A.

²⁴⁵ *Ndobe*, note 240 above at 497 per De Villiers, C.J.

²⁴⁶ *Ndobe*, *ibid* at 497.

Notwithstanding the constitutional provision, the Court in very clear terms stated that it had the testing power and right.

Four years after the appellate court's demonstration of its judicial power in *Ndobe*, its boldness was again put to the test in *Sachs*. This decision was another example of how a judge could opt to exercise his or her interpretive discretion to either uphold basic rights of an individual or to deny their enjoyment, irrespective of statutory provisions. Under section 1(12) of the Riotous Assemblies and Criminal Law Amendment Act of 1914, as amended by Act 19 of 1930, the minister could demand, by notice, a person to vacate an area when the minister was satisfied that the person was promoting feelings of hostility between the inhabitants of the union.

The same statute gave an accused person a right to be furnished with reasons for the notice. The appellant demanded to be supplied with reasons that he had to vacate the areas mentioned by the minister in the notice. The Minister declined to provide such reasons on public policy grounds against which the appellant moved to the Supreme Court and then to the appellate court. After finding that the list of documents provided by the minister were supposed to be disclosed, Tindall, J ruled that "under the authorities, it is practically impossible for us, under the present circumstances at any rate, to go behind the minister's decision."²⁴⁷

²⁴⁷ *Sachs*, note 241 above at 21.

Stratford, A.C.J., was more enthusiastic and emphatic in demonstrating that the court had no testing power even in the face of abuse of fundamental rights.

He observed that:

Once we are satisfied on a construction of the Act, that it gives to the Minister an unfettered discretion, it is no function of a Court to curtail its scope in the least degree, indeed it would be quite improper to do so. The above observation is, perhaps so trite that it needs no statement, yet in cases before the Courts when the exercise of a statutory discretion is challenged, arguments are sometimes advanced which do seem 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 courts of law to enforce its will.²⁴⁸

In *Ndlwana*, a similar issue as in *Ndobe* about the constitutionality of a legislation disenfranchising an individual arose. This time, the legislation in question was the Representation of Bantus Act 12 of 1936. A preliminary question was raised on the Court's power to "pronounce upon the validity of an Act of Parliament duly promulgated and printed and published by proper authority".²⁴⁹ In dealing with the question, the Court said that an Act of Parliament, as in England could not be questioned by a court of law. The function of the Court is to enforce the will of parliament and "it is obviously senseless to speak of an Act of a Sovereign law-making body as *ultra*

²⁴⁸ *Sachs*, ibid at 36-37.

²⁴⁹ *Ndlwana*, note 242 above at 236.

vires...there can be no exceeding of power when that power is limitless.”²⁵⁰ It is respectfully submitted that these were strong and unnecessary words especially when touching on the liberty of an individual.

Both *Harris* decisions are landmark judgments on the exercise of judicial discretion in upholding individual liberty and a reminder that the courts could exercise the testing power, albeit not expressly so. In *Harris v The Minister of the Interior*,²⁵¹ the issue before the Court was the constitutionality of the Separate Representation of Voters Act 46 of 1951. The legislation provided for the separate representation of European and non-European voters in the province of the Cape of Good Hope. It was passed by the House of Assembly and the Senate sitting separately and assented to by the Governor-General.

The appellants unsuccessfully applied to the Cape Provincial Division *inter alia* for an order declaring void Act 46 of 1951 as it was inconsistent with sections 35 and 152 of the constitution of South Africa Act 1909 as amended by section 44 of Act 12 of 1936. The appellants were qualified to vote in the province of the Cape of Good Hope. Section 35(2) provided that “no person (other than a Native as so defined) who at the passing of any such law is registered as a voter in any province shall be removed from the register by reason only, of any disqualification based on race or colour.” Section 152 required any repeal or

²⁵⁰ *Ndlwana*, *ibid* per Stratford, A.C.J.

²⁵¹ *Harris*, note 243 above.

alteration of the enactment on a joint sitting of the two Houses of Parliament and two-thirds majority at the third reading.

Also to be decided by the Appellate Division was whether *Ndlwana* was good law by saying that a court could not question anything said by Parliament. In allowing the appeals and departing from *Ndlwana*, Centlivres, C. J. boldly ruled that:

This Court is competent to enquire whether, regard being had to the provisions of sec.35, an Act of Parliament has been validly passed. To hold otherwise would mean that courts of law would be powerless to protect the rights of individuals which were specially protected in the constitution of this country.²⁵²

Dugard observes that government could not master the support for a two-thirds majority at joint meeting of both houses.²⁵³ The government response to *Harris* was to pass, by the ordinary bicameral method, the High Court of Parliament Act of 1952. Section 2 of the statute subjected to be reviewed by the parliament itself, as the High Court of Parliament, any decision of the Appellate Division which declared as invalid any parliamentary enactment. The same Harris brothers successfully challenged the constitutionality of this

²⁵² *Harris*, ibid at 470 D.

²⁵³ Dugard, note 207 above p 31.

statute at the Cape High Court.²⁵⁴ The Minister appealed to the Appellate Division in *Minister of the Interior v Harris and Another*.²⁵⁵

The Appellate Division had to determine the question whether the “court” established by the High Court of Parliament was a court as envisaged by section 152, together with sections 35 and 137. These sections conferred certain rights on an individual, who had the right to call on judicial power to help him resist any legislative or executive action which offended against these sections.²⁵⁶ The main difficulty was that the individual could not approach the courts for a remedy. Centlivres, C.J., boldly observed that:

When, therefore, one looks at the substance of the matter, the so called ‘High Court of Parliament’ is not a Court of law but is simply Parliament functioning under another name.²⁵⁷

Earlier in the judgment, the Chief Justice had observed that constitutional guarantees are enforceable and had to have a remedy as “the remedy is, indeed, part and parcel of the right, *ubi jus, ibi remedium*.”²⁵⁸ Schreiner, J. A., noted that “the Constitution makes no express provision for the determination of questions of validity or invalidity and must be taken to have left such determination to the courts of law of the land.”²⁵⁹ These major

²⁵⁴ *Harris v Minister of the Interior and another* 1952 (4) SA 153 (C).

²⁵⁵ *Minister of the Interior v Harris and another* note 244 above.

²⁵⁶ *Minister of the Interior* note 244 above at 779E.

²⁵⁷ *Minister of the Interior*, *ibid* at 784 D.

²⁵⁸ *Minister of the Interior*, *ibid* at 787 H.

²⁵⁹ *Minister of the Interior*, *ibid* at 787 F.

decisions showed great and courageous exercise of judicial discretion in upholding fundamental rights by way of interpretation of legislation. They aptly described what most believe is the role of a judge when faced with laws infringing basic rights. Such a judge:

Would have been one who both faithfully fulfilled his or her oath of office to carry out apartheid law, yet did so in a way calculated to undermine and nullify it, or at least to mitigate the cruelty of its impact on its victims. That is, a conscientious judge operates within and to some degree authentically, accepts legal constraint, yet acts strategically to accomplish freedom and social justice.²⁶⁰

Writing about this difficult past in South Africa, Hellmann quite forcefully argues that it was possible for justice to prevail, notwithstanding the prevailing law. He notes that “the jurist has at his command a full rack of instruments of torture, called the rules of interpretation, enabling him to force the silent law into speech.”²⁶¹ This is what the courts in both *Harris* cases must have had in mind.

So as to ensure that the courts were not impeding the executive’s commitment to a truly sovereign parliament, the Appellate Division was expanded and packed.²⁶² Going by the big number of decisions which did not favour fundamental rights, to a large extent the packing of the Appellate Division

²⁶⁰ Karl E. Klare, “Legal Culture and Transformative Constitutionalism”, (1998) 14 South African Journal of Human Rights 148.

²⁶¹ Hellmann, note 139 above p 26.

²⁶² Hellmann, *ibid* p 13.

produced the desired results for the executive. This is unlike what President Harry Truman observed about the U S Supreme Court. He noted that:

Packing the Supreme Court simply can't be done...I've tried it and it won't work...Whenever you put a man on the Supreme Court, he ceases to be your friend. I'm sure of that.²⁶³

*Collins v Minister of the Interior*²⁶⁴ was decided after the expansion and packing of the Appellate Division.²⁶⁵ The appellant, a coloured, argued that his constitutional voting rights guaranteed in Sections 35 and 115 of the South Africa Act 1909 had been taken away by the South Africa Amendment Act 9 of 1956. By a majority of ten, Schreiner, J. A dissenting, the Appellate Division dismissed his appeal. Centlivres, C.J., he who was bold and fearless in *Harris* ruled that:

If a legislature has a plenary power to legislate on a particular matter, no question can arise as to the validity of any legislation on that matter and such legislation is valid whatever the real purpose of that legislation is.²⁶⁶

In addition to the packing of the courts and sometimes a lack of a consistent adherence to basic principles of justice by the courts as seen in the two remarks by Centlivres, C.J., above, the executive ensured the passing of South Africa Constitution Amendment Act 1 of 1958.

²⁶³ President Harry Truman as cited in M.M. Corbett: "Human Rights: The Road Ahead," (1979) 96 South Africa Law Journal 195 p 199.

²⁶⁴ *Collins v Minister of the Interior* 1957 (1) SA 552 A.

²⁶⁵ Dugard, note 207 above p 32.

²⁶⁶ *Collins*, note 264 above at 565 C.

The statute made it clear that the courts had no testing right, unlike in the case of section 59 of South Africa Act, 1909. South Africa Amendment Act 1 of 1958 provided that “no court of law shall be competent to inquire into or to pronounce upon the validity of any law passed by Parliament...”

3.1.3: Republican Constitutions: 1961 and 1983.

South Africa became a republic by virtue of Republic of South Africa Constitution Act 32 of 1961. The concept of parliamentary supremacy received forceful constitutional basis than before. Section 59 of this Act provided that:

- (1) Parliament shall have 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.
- (2) No court of law shall be competent to enquire into or to pronounce upon the validity of any Act passed by Parliament, other than an Act which repeals or amends or purports to appeal or amend the provisions of section one hundred and eight and one hundred and eighteen.

The principle of parliamentary sovereignty operates on a majoritarian basis and one of its tenets is “the legal dependence of the Judiciary on the legislature, and the absence of any substantive legislative testing.”²⁶⁷ Having unequivocally

²⁶⁷ L.J. Boule, Constitutional Reform and Apartheid: Legitimacy, Consociationalism and Control in South

denied the courts testing jurisdiction, the courts were again used under the 1961 republican constitution to perpetuate the interests of a few as opposed to the rights of the majority.

The general view of the courts towards the 1961 constitution's parliamentary sovereignty and acknowledgment that they had no testing right is aptly represented by the words of Botha, J.A, in *Scherbrucker v Klindt, N.O* ²⁶⁸ who ruled that:

No Court has power to order anything to be done which would be in conflict with an Act of Parliament. It follows that no Court can issue any order or process the effect of which would be to require or authorise an interference in any manner whatsoever with the kind of detention prescribed by sec. 1, or which would be likely to defeat the purpose of that section.²⁶⁹

The courts testing power was again emphatically ousted by the coming into force of Republic of South Africa Constitution Act 110 of 1983. Section 34(3) of the 1983 constitution provided that no court of law had the competence to inquire into or pronounce upon the validity of a legislative enactment. The express ouster of the testing right in the constitution did not deter some judges from using skills and techniques of interpretation and exercise of discretion in favour of judicial review. In such cases, judges did not deny the validity of

Africa, New York: St Martins Press 1984 p 75.

²⁶⁸ *Scherbrucker v Klindt, N O* 1965 (4) S A 606 A.

²⁶⁹ *Scherbrucker*, *ibid* at 619 C.

parliamentary sovereignty. Rather, they went around the ouster clause ingeniously but at the same time claiming parliamentary supremacy.²⁷⁰

Enforcement of fundamental rights by the courts is largely dependent on the social, legal and political environment existing at any given moment.²⁷¹ However, some courts will adopt an interpretation of the law which is intended to uphold fundamental rights, notwithstanding that on a plain reading of the law, such rights do not exist. It is a question of choosing between protecting the human rights or maintaining the *status quo*. That was true of judges in South Africa at the time under consideration.

In making its choice, Basson writes that the judiciary is faced with a dilemma: whether to enforce common law principles of just and fair treatment of individuals or to maintain the *status quo* as it is manifested in legislation.²⁷² The argument is that the court has a choice to make.²⁷³ If the court chooses to respect fundamental rights, it has to adopt an interpretation of the law which leans towards the goal it intends to achieve.

Such was the choice to be made by the court in *Minister of Law and Order v Hurley and Another*.²⁷⁴ Section 29(6) of the Internal Security Act 74 of 1982 provided that “no Court of law shall have jurisdiction to pronounce upon the

²⁷⁰ Hellmann, note 139 above p 55.

²⁷¹ I.M. Rautenbac, “Menseregte – aktes: ’n verge lykende Oorsig,” in J Van Der Westhuizen and H P Viljoen, *A Bill of Rights for South Africa*, Durban: Butterworths 1988 p 35.

²⁷² D.A. Basson, *Die regbank en ’n menseregtehandves* in Westhuizen and Viljoen *ibid* p 63.

²⁷³ D.A. Basson, *ibid* p 63.

²⁷⁴ *Minister of Law and Order v Hurley and Another* 1986 (3) SA 568 A.

validity of any action taken in terms of the provisions of this section.” Section 29 of the Internal Security Act was “a fearsome tool indeed for the state, for it allowed indefinite *incommunicado* detention and interrogation.”²⁷⁵ Section 29(1) of that statute was to the effect that any commissioned officer of or above the rank of Lieutenant-Colonel could, without warrant, arrest any person *if he had reason to believe* that such a person had committed or intended to commit an offence under the legislation or withholding from the South African Police any information relating to the commission of an offence under the enactment.

The Appellate Division had to determine the effect of the ouster clause in section 29(6) and the meaning of the words reason to believe in section 29(1) of Act 74 of 1982. In a truly bold judgment in which the Court’s testing of legislative action was under the test, the Court, among other strong pronouncements noted that:

It is well recognised rule in the interpretation of statutes, it has been stated by this Court, ‘that the curtailment of the powers of a Court of law is, in the absence of an express or clear implication to the contrary, not to be presumed... the Court will therefore closely examine any provision which appears to curtail or oust the jurisdiction of courts of law.’ Having considered the provisions of section 29(6), despite its wide terms, does not preclude the Court from inquiring into the question whether an

²⁷⁵ Hellmann, note 139 above p 28.

officer who arrested or caused the arrest of a person in reliance on the provisions of section 29(1) had reasonable grounds for entertaining a belief as required by section 29(1).²⁷⁶

Earlier in the judgment, the Chief Justice had ruled that the legislature must have intended that grounds must meet the reasonableness test for arrest and detention to be valid.²⁷⁷ Despite the boldness of some judges as demonstrated in this judgment, the written law was that the courts had no testing power. This left a victim of abuse of basic rights dependent on the discretion of a judge, a risky situation at the time and indeed at any other time, including now, when a new constitutional dispensation is in force. For instance, *Minister of Law and Order v Dempsey*²⁷⁸ was decided by the Appellate Division the same year and after *Hurley*. Hefer, J.A stated that:

The only question of fact with which the Court is concerned is whether the Minister was satisfied. Once the jurisdictional fact is proved by showing that the functionary in fact formed the required opinion, the arrest is brought within the ambit of the enabling legislation, and it is justified.²⁷⁹

Contrast these remarks with the reasonableness test in *Hurley* and it becomes clear how much discretion judges have in the determination of people's rights.

²⁷⁶ *Hurley*, note 274 above at 584 A-B.

²⁷⁷ *Hurley*, *ibid* at 578 C.

²⁷⁸ *Minister of Law and Order v Dempsey* 1988 (3) SA 19 A.

²⁷⁹ *Dempsey*, *ibid* at 38 F.

The main problem with the adoption of the English concept of parliamentary sovereignty is that unlike in England where the doctrine was subjected to the rule of law doctrine, it was rejected by South Africa government.²⁸⁰ According to Dicey, the rule of law is a principle that is comprised of three factors; namely, the absence of arbitrary power, limitation of wide discretionary authority and equality before the law.²⁸¹

The National Party's support for the British parliamentary system was overwhelming but they could not blend this with the rule of law. Dugard writes that:

A.V. Dicey would have blushed to hear the accolades bestowed upon his affirmation of parliamentary system, though he might have wondered at the absence of any reference to his views on the Rule of Law.²⁸²

The courts in South Africa generally refused to exercise their discretion to imply the rule of law in legislative enactments. This was a major factor in the erosion of fundamental rights until the interim constitution came into force in 1994.

²⁸⁰ Dugard, note 207 above p 37.

²⁸¹ Gordon Tullock, The Blackstone Commentaries, No.1. The Case against the Common Law, Durham North Carolina: Carolina Academic Press 1997 p 7.

²⁸² Dugard, note 207 above p 33.

3.2: Legislative Limitation of Fundamental Rights

The harsh effects of the principle of parliamentary sovereignty were worsened by legislative denial of fundamental rights of the majority. After the National Party came into power in 1948, it enacted laws that physically segregated the various South African races and denied some of them, in particular blacks, the enjoyment of basic human rights and fundamental freedoms. Koetze' describes the human rights situation in the old legal order "as an overwhelming problem" but predictably observes that the monopoly of power "by a single racial group could not persist."²⁸³

Responding to arguments that South Africa had incorporated in its 1983 constitution almost all the rights in the United Nations Declaration of Human Rights, Justice Leon boldly explained the pathetic human rights situation as follows:

But what of our statute law? What of legislation which sanctions racial discrimination, which vests a part of the population with a monopoly of political power and its fruits, and which affects in no small measure the civil liberties of all? What of detention without trial? And without a Bill of Rights judicial review is necessarily restricted and limited.²⁸⁴

²⁸³ G. P. C. Koetze', "Menseregte: Suid-Afrika se dilemma," in Westhuizen and Viljoen note 271 above p 6.

²⁸⁴ Justice R. N. Leon, "A Bill of Rights for South Africa: Address Delivered at the Annual General Meeting of Lawyers for Human Rights," (1986) 2 South African Journal of Human Rights 60 p 65.

The above picture was contained in various pieces of legislation and it is appropriate at this stage to mention some that so forcefully took away human rights. The statutes have to be read together with a constitution that had ousted the courts' testing right.

The statutes were:

- (i) The Prohibition of Mixed Marriages Act 55 of 1949 which prohibited Intermarriages with whites.
- (ii) The Immorality Amendment Act 21 of 1950 as amended by Act 23 of 1957 which prohibited adultery or attempted adultery between whites and people of other races.
- (iii) The Population Registration Act 30 of 1950 which required registration of every citizen of the country as White, Coloured or Bantu.
- (iv) The Group Areas Act 41 of 1950 which created different residential areas for different races.
- (v) The Suppression of Communism Act 44 of 1950 which outlawed communism and banned the Communist Party of South Africa.
- (vi) The Separate Representation of Voters Act 46 of 1951 which removed coloureds in the Cape from the common voters roll.
- (vii) The Prevention of Illegal Squatting Act 52 of 1951 which empowered the Minister to remove blacks from public land and to create resettlement camps for them.
- (viii) The Black Authorities Act 68 of 1951 which created homelands for the

blacks and registered authorities.

(ix) The Blacks (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952 which introduced permits to enable blacks leave rural areas.

(x) The Bantu Education Act 47 of 1953 which was intended to establish education system suitable for blacks.

(xi) The Black Labour (Settlement of Disputes Act) Act 48 of 1953 which prohibited strike action by black workers.

(xii) The Reservation of Separate Amenities Act 49 of 1953 which enforced segregation in all public places so as to eliminate contact between whites and people of other races.

(xii) The Extension of University Education Act 45 of 1959 which prohibited black students from attending White Universities.

(xiii) The Terrorism Act 83 of 1967 which provided for indefinite detention without trial.

(xiv) The Internal Security Act 74 of 1982 which in general took away peoples' basic freedoms under the guise of national security and stability.

In the 1950s, a strong wave of freedom struggle was sweeping across Africa, including South Africa. The apartheid government's response was to develop a scheme to grant franchise rights to Africans in certain designated areas under the Self-Government Act 46 of 1959, with the aim of balkanization of South

Africa.²⁸⁵ However, a Bill of Rights applicable to all South Africans was inconceivable because it was incompatible with the law in force as seen above. A Bill of Rights could only come into existence upon “abolition of the apartheid legal order and the repeal of many provisions of the Internal Security Act 74 of 1982.”²⁸⁶

3.3: The Courts’ Exercise of Discretion against Fundamental Rights

While it needs no emphasis that, in general, there was a blatant abuse of fundamental rights under the umbrella of the 1961 and 1983 constitutions, enjoyment of these rights was greatly curtailed by the enthusiasm of some judges who unnecessarily adopted an exercise of discretion that was executive minded even though they “had a choice to rather protect individual rights and freedoms.”²⁸⁷

Dugard argues that even in the face of apartheid laws, judges could have applied Roman-Dutch law which had a natural law foundation as seen in the 1854 Orange Free State constitution which had some traces of rights under natural law.²⁸⁸

²⁸⁵ Chaskalson, note 45 above p 2-10.

²⁸⁶ John Dugard, “Changing Attitudes Towards a Bill of Rights in South Africa,” in Westhuizen and Viljoen note 271 above p 32.

²⁸⁷ Dugard, note 207 above p 29.

²⁸⁸ Dugard, note 286 above p 32.

The courts in general delivered executive minded decisions wherever a conflict between the liberty of an individual and government authority occurred despite having a choice to protect people's rights.²⁸⁹

Basic common law presumptions, which favoured the enjoyment of rights, were ignored by most of the judges.²⁹⁰ For instance, the presumption of personal freedom was not applied when the release of detainees was sought and indeed, the Appellate Division had told the courts "not to do so."²⁹¹ The courts did not also comment about police torture of accused persons or detainees and even when the statute was silent on reading materials being provided to detainees, some judges treated these as luxuries which detainees were not entitled to.²⁹² The most affected court, according to Schoombee, was the Appellate Division which "approached governmental action impinging upon basic human rights 'in a spirit of compliance rather than of independent scrutiny.'"²⁹³

The general timidity of judges to exercise their discretion and uphold fundamental rights, sometimes in this endeavour assisting in the abuse of these rights, was justified by some judges who said that their role was to declare what the law is, not to make it.²⁹⁴ This contention is irrespective of the fact that the judges were:

²⁸⁹ Basson, note 272 above p 63.

²⁹⁰ ICJ, note 12 p 110.

²⁹¹ ICJ, *ibid* p111.

²⁹² ICJ, *ibid*.

²⁹³ Hannes Schoombee, "An Important Human Rights Decision in Namibia," 1986(2) South African Journal on Human Rights 74.

²⁹⁴ ICJ, note 12 above p 109.

Free to interpret legislation (as distinct from reviewing it) in the light of common law rules of interpretation which embraces presumptions in favour of liberty and equality. Administrative powers can be reviewed in accordance with the principles of natural justice, and test it by common-law standards of reasonableness and certainty.²⁹⁵

The courts were also ready to reject application of international human rights law even when they would have adopted an interpretive discretion of human rights law favourable to enjoyment of rights. In *S v Werner*,²⁹⁶ the Court held that South Africa's ratification of the United Nation's Charter did not imply that its provisions had to be taken into account in the interpretation of Group Areas Act 41 of 1950.

In addition, the courts' demonstrated the exercise of interpretive discretion that was openly and uninvitedly against the enjoyment of human rights. In *Loza v Police Station Commander, Durbanville*,²⁹⁷ the Appellate Division extended the appellant's detention without warrant and being held incommunicado for over 90 days notwithstanding the statutory maximum. In *R v Sisulu*,²⁹⁸ the same Court defined the words "and includes, in particular, any doctrine of scheme" in section 1(1) of the Suppression of Communism Act 44 of 1950, to include the appellant's acts not expressly covered by the legislation.

²⁹⁵ ICJ, *ibid* p110.

²⁹⁶ *S v Werner* 1981 (1) SA 187 A.

²⁹⁷ *Loza v Police Station Commander, Durbanville*, 1964 (2) SA 545 A.

²⁹⁸ *R v Sisulu* 1953 (3) SA 276 A.

Perhaps *Rossouw v Sachs*²⁹⁹ should cap the manner in which many judges were eager to use their discretion in denial of basic human rights. In this crusade, some sarcastic words were sometimes used against victims of abuse of rights. In this case, Act 37 of 1963 entitled the appellant, a detainee, to receive reading matter and writing material. The Appellate Division went to great lengths and put a lot of effort in attempting to determine the intention of parliament and in reversing the Supreme Court's judgment which had upheld the rights of the accused person under the Act. Ogilvie Thomson, J.A., ruled that:

But after meticulous scrutiny of the language of section 17 in the light of the circumstances whereunder it was enacted and of the general policy and object of the section, *I have to come to the conclusion that it was not the intention of Parliament that detainees should as of right be permitted to relieve the tedium of their detention with reading matter or writing material.*³⁰⁰
(Emphasis mine).

The above judgment illustrates the extent to which many judges could go so as to ensure a continued denial of fundamental human rights. Such judges were not as keen to see the enjoyment of rights, especially for the black majority. They should have heard the words of Lord Denning who, in emphasizing the importance of fundamental rights said a long time ago that "if Counsel had an

²⁹⁹ *Rossouw v Sachs* 1962 (2) SA 545 A.

³⁰⁰ *Roussow*, *ibid* at 565 A-B.

application which concerned the liberty of the subject, the judge would put all other matters aside and hear it.”³⁰¹

3.4: Summary

Three of the most important factors which contributed to the painful situation of fundamental rights in the past have been discussed. These are the doctrine of parliamentary sovereignty, statutes which ignored or took away even basic rights anchored in the common law and finally, the manner in which most of the courts were unwilling to exercise their interpretive discretion in a rights-friendly approach. It has been demonstrated how vital a role judicial discretion plays in the enjoyment or denial of fundamental human rights, sometimes irrespective of the clear and unambiguous words in the law.

From the analysis above, it is evident why the postamble to the 1993 constitution and the preamble to the 1996 Constitution use words forceful and evocative enough and intended to erase as much as possible of this past. These indeed are the strongest words indicative of the country’s commitment to a shift from the painful past to a future founded on hope and equality for all.

The next chapter is devoted to an examination of the Bill of Rights. Some of the most important categories of rights are discussed so as to explain how the new dispensation is truly a break from the past. A textual examination of the

³⁰¹ Denning, note 114 above p 3.

Bill of Rights is also made so as to determine the extent to which the courts, and in this study the Constitutional Court, have been vested with discretion in the determination of fundamental rights disputes. A brief comparative study of the constitutions of Namibia, India, Germany and Canada is undertaken so as to endeavour to ascertain the magnitude and extent of the discretion vested on the Constitutional Court in comparison to the other three jurisdictions which also have an equally justiciable Bill of Rights.

CHAPTER FOUR

SELECTED CONTENT AND TEXTUAL DISCRETION IN THE BILL OF RIGHTS

4: Introduction

As discussed in chapter three, one of the three main factors which contributed to the erosion or absence of fundamental rights in South Africa of the past were statutes enacted in a manner which took away the basic rights for the majority. In this chapter, the opposite of the past in form of a Bill of Rights is discussed in various perspectives. First is the application of the Bill of Rights. Second, selected categories of fundamental rights are examined. The intention is to demonstrate the commitment of the new South Africa to the enjoyment of basic human rights and fundamental freedoms. These rights are civil and political, socio-economic and cultural and the right to just administrative action.

Third, the Constitution and in particular the Bill of Rights is examined from a perspective of attempting to determine the actual ambit or breadth of discretion vested on the Constitutional Court. Finally, a brief comparative study of the constitutions of Namibia, India Canada and Germany is made in a further effort of attempting to determine the extent of discretion in the Constitution.

When any legislation places so much discretion in the courts, one of the obvious risks is that certainty as to what the law is cannot be achieved. It is very important that laws, in particular those meant to address past injustices, be certain or sufficiently certain so as to minimise the chances for abuse of power and discretion. It is, as illustrated in chapter one, undeniable that there are certain benefits in discretionary power but this is no justification for vesting the courts with undoubtedly wide discretion especially in matters as fundamental as the protection and enjoyment of human rights. Indeed, the importance of certainty is captured in the case of *Trade Fairs and Promotions (Pty) Ltd v Thompson*³⁰² in which the Court said that “it is often more important that the law should be certain than it should be ideally perfect.”³⁰³

When one studies the Bill of Rights of the post-apartheid constitutions, it becomes clear that the drafters of these constitutions had a clear intention of encompassing all categories of fundamental rights. This is probably so due to the need for addressing the painful past as discussed in the previous chapter and to define all factors that constitute fundamental rights so as to achieve a certain degree of certainty.

The importance of fundamental rights in South Africa is demonstrated by various factors, which include the following, among others. First, these rights have received constitutional significance and recognition. The Constitution is

³⁰² *Trade Fairs and Promotions (Pty) Ltd v Thompson* 1984 (4) SA 177 (W).

³⁰³ *Trade Fairs*, ibid at 187.

the supreme law of the republic and any law or conduct inconsistent with the Constitution is invalid. Parliament is no longer sovereign and the Constitution “therefore creates a new Grundnorm.”³⁰⁴ The principle of constitutionalism marks a true departure from the previous constitutional and political culture adopted from Westminster as discussed in chapter three.

Secondly, the justiciability of all constitutional rights is contained in various provisions of the Constitution one of which is that the obligations it stipulates must be fulfilled.³⁰⁵ In addition, any infringement or threatened infringement of fundamental rights entitles the aggrieved party to approach the courts for relief.³⁰⁶

Thirdly, the procedure to be adopted for the amendment of the values contained in section 1 of the Constitution is very rigid.³⁰⁷ Such a Bill must be passed by the National Assembly with a supporting vote of at least two thirds of its members and the National Council of Provinces, with a supporting vote of at least six provinces. The values, which are the democratic pillars of South Africa are: the concept and practice of human dignity; the achievement of equality and the advancement of human rights and freedoms; non-racism and non-sexism; supremacy of the Constitution and the rule of law; universal adult suffrage; a national common voters roll; regular elections and a multi-party

³⁰⁴ Devenish, note 42 above p 11.

³⁰⁵ Section 2.

³⁰⁶ Section 38.

³⁰⁷ Section 74(2).

system of democratic government to ensure accountability, responsiveness and openness.³⁰⁸

As Devenish observes, the fundamental rights provisions are not merely in existence to test the validity of statutory enactments, rather the

Compendium of values contained in it will be all-persuasive in all spheres of life regulated by the law and administrative agencies, and will be a measure against which all law and conduct is tested.³⁰⁹

Categories of rights that have constitutional protection subject to the prescribed limitations are contained in chapter 3 of the Interim Constitution and Chapter 2 of the Final Constitution. In this section of the study, fundamental rights will be considered only from the perspective of the final Constitution (the Constitution) as it is the law in force. The various Bill of Rights issues in this chapter appear in this order: To whom the rights apply; content of selected Bill of Rights provisions; selected textual discretion and a comparative study of textual discretion.

4.1: Application of the Bill of Rights

Before the various categories of rights in the Constitution are enumerated, it is necessary to determine to whom these rights apply. With regard to natural

³⁰⁸ Section 1.

³⁰⁹ Devenish, note 42 above p 8.

persons, enjoyment of fundamental rights is dependent on whether a particular natural person is in a category of persons who qualify for their enjoyment. For instance, citizen rights are vested on citizens; political rights on citizens; children's rights are conferred on minors and trade unions rights on persons in contracts of employment. Non-citizens are also entitled to these rights as long as they are not specifically denied since "an alien is surely a person in the ordinary sense of the term and is therefore entitled to the protection afforded persons under both due process and equal protection clauses."³¹⁰

The Bill of Rights is not applicable outside of South Africa even to the citizens of South Africa. In *Kaunda v President of the Republic of South Africa*,³¹¹ the applicants sought an order seeking assurances from the governments of Zimbabwe and Equatorial Guinea that they would not face a death penalty for alleged charges in Zimbabwe that they had plotted to stage a coup in Equatorial Guinea. The Constitutional Court dismissed the application and emphasized that the rights in the Bill of Rights only applied to people in South Africa and have no territorial application beyond South Africa.³¹²

The debate as to whether fundamental rights apply to a juristic person was settled by the Constitutional Court in *re Certification of the Constitution of the Republic of South Africa, 1996*.³¹³ The reasoning behind the decision is that the Constitution, which provides that a provision in the Bill of Rights binds a

³¹⁰ Devenish, *ibid* p 21.

³¹¹ *Kaunda v President of the Republic of South Africa* 2004 (10) BCLR 100 9 (CC).

³¹² *Kaunda*, *ibid* para 36.

³¹³ *In re Certification of the Constitution of the Republic of South Africa, 1996* (4) SA 744 (CC).

natural or a juristic person and a provision of the Bill of Rights, may be applicable to a natural or a juristic person. Chaskalson argues that since the Constitution “employs primarily the term ‘persons’ and does not use the term ‘individuals’, interpretative space exists for juristic persons to benefit from at least some fundamental rights.”³¹⁴

Apart from those rights which automatically apply to both natural and juristic persons, especially property acquisition rights, a juristic person may be unable to enforce rights meant for a natural person, for instance cruel and unusual punishment or a right of worship under freedom of religion. However, if certain legislation is unconstitutional, a juristic person may apply the Constitution as a defence, much as the envisaged right is not intended for the juristic person.

In the Canadian case of *R v Big M Drug Mart Ltd*,³¹⁵ section 4 of the Lord’s Day Act provided that it was unlawful to conduct business or to sell or offer for sale any goods on the Lord’s Day. One of the questions before the Canadian Supreme Court was whether this provision contravened section 1 of the Canadian Charter of Rights and Freedoms especially the freedom of religion. The court found that the provision was unconstitutional. The unconstitutionality of the legislation became a “defence to a criminal charge of trading in violation of the Lord’s Day Act.”³¹⁶

³¹⁴ Chaskalson, note 45 above p 10-4.

³¹⁵ *R v Big M Drug Mart Ltd* [1985] ISCR 295 as cited in Currie and de Waal note 6 above p 338.

³¹⁶ Devenish, note 42 above p 23.

Of considerable importance under the interim constitution was whether fundamental rights applied vertically, horizontally or both.³¹⁷ Vertical application of rights as described in a constitutional text is the traditional purpose of having an enforceable Bill of Rights. The idea is to protect an individual from abuse of power and basic rights by the state, which is all powerful. The Constitutional Court in the controversial decision of *Du Plessis v De Klerk*³¹⁸ held that fundamental rights in chapter three of the repealed interim constitution did not have a horizontal application, that is, they could be invoked against an organ of government but not by one private litigant against another.³¹⁹ The court however held that in private litigation, any litigant could contend unconstitutionality of a statute relied on by the other party.³²⁰ A litigant could also attack a governmental act or omission as in contravention of fundamental rights in any dispute against the government.³²¹

In *Baloro and Others v University of Bophuthatswana and Others*,³²² the question to be determined by the High Court was whether fundamental rights in the interim constitution applied to the respondents. The dispute involved the constitutionality of a moratorium by the first respondent on the promotion of expatriate staff. The applicants' argument was that the decision was an infringement of the equality clause in section 8 of the interim constitution.

³¹⁷ Currie and de Waal note 6 above p 23.

³¹⁸ *Du Plessis v De Klerk* 1996 (3) SA 850 (C C).

³¹⁹ *Du Plessis*, *ibid* at 879 para A.

³²⁰ *Du Plessis*, *ibid* at para B.

³²¹ *Du Plessis*, *ibid*.

³²² *Baloro and Others v University of Bophuthatswana and Others* 1995 (4) SA 197.

The court held that these rights were of horizontal application and as Mbaio argues about this case, this interpretation was the right one specifically because the interim constitution was a “momentous document providing a vital bridge between the past scarred by apartheid and a new one, a non-racial, nonsexist democratic society anchored on freedom and equality.”³²³ The argument seems to suggest that the new dispensation could not fully be realised if fundamental rights were not of horizontal application as well.

The correctness of the above interpretation and argument in favour of a horizontal application of fundamental rights was fortified by the 1996 Constitution. Fundamental rights provisions in the Bill of Rights now apply both vertically and horizontally. Section 8(1) provides that the Bill of Rights “applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.” Section 8(2) states that the Bill of Rights “binds a natural or a juristic person, if and to the same extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.” By using the words “all law”, the Constitution is restating its supremacy and therefore any form of law, private or public has to be constitutional, specifically in relation to fundamental rights.

If there is a conflict between two provisions of the Bill of Rights as it applies between private a person, that is horizontally, the interpreter should

³²³M.L.M. Mbaio, “The Province of the South African Bill of Rights Determined and Re-determined: A Comment on the case of *Baloro and Others v University of Bophuthatswana*,” (1996) 113 South African Law Journal 33 .

determine which right supersedes the other. For instance, the doctrine of freedom of contract has constitutional protection. The same applies to a right not to be discriminated against. The question to be answered by the interpreter is whether a contracting party can exercise without restrictions this constitutional right of freedom of contract and decline to contract with certain persons. This grants the interpreter considerable discretion as the Constitution has no hierarchical structure of rights such that one would without controversy be preferred to another.³²⁴

To minimise the number of cases unnecessarily pursuing constitutional issues, the Constitutional Court has held in several cases one of which is *Nel v Re Roux NO and Another*³²⁵ that courts should not rush to determine that constitutional questions exist. It is upon the parties to justify why a matter is said to have constitutional questions. The courts should also not determine constitutional questions for academic purposes. A right must exist or must have matured for its constitutional validity to be tested.

The categories of persons who can obtain a remedy for breach or threatened breach of a fundamental right in the Constitution has revolutionised the common law doctrine of *locus standi*. At common law, one is not entitled to question the legality of conduct which does not affect him directly or in which he has no direct proprietary interest. In the case of *Jacobs v Waks*,³²⁶ the court

³²⁴ Devenish, note 42 above p 27.

³²⁵ *Nel v Re Roux NO and Another* 1996 (4) BCLR 592 (CC).

³²⁶ *Jacobs v Waks*, 1992 (1) SA 52 (A).

said that the general requirement of *locus standi* is that “someone who seeks relief must have a sufficient interest in the subject-matter of the litigation to persuade the court that his claim should be adjudicated.”³²⁷

Regarding the enforcement of fundamental rights, the Constitution provides that a court may be approached by anyone acting in their own interest; anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of a group or class of persons; anyone acting in the public interest and an association acting in the interest of its members.³²⁸ This is a major legal shift and it underlines the constitutional significance of fundamental rights by enlarging the common law definition of *locus standi* as it applies to such rights.

4.2: Content of Selected Provisions of the Bill of Rights

Most categories of rights contained in international human rights instruments are captured in chapter 2 of the Constitution, termed the Bill of Rights. This is a further illustration of the importance of fundamental rights in South Africa’s new legal and democratic dispensation. It has been said that the Bill of Rights is “the envy of many.”³²⁹ The reason for this envy, probably, is the comprehensive manner in which all aspects of human rights are captured in the Bill of Rights.

³²⁷ Mubangizi note 47 above p 7 citing *Jacobs* ibid at 533 J-534 B, from the Translation in the 1992 Annual Survey p 565.

³²⁸ Section 38.

³²⁹ Justice Pius N. Langa, “The Challenge of Change.” Address delivered by Hon Justice Pius N Langa, Deputy President of the Constitutional Court on the occasion of his inauguration as Chancellor of the University of Natal on 28 October 1998, *South African Law Journal* (1999) 116 p 153 at 157.

No rights are absolute and it has been said that a person's right to swing their arm ends where the other person's nose begins.³³⁰ For this reason, fundamental rights provisions are limited in enjoyment by section 36 of the Constitution and in some cases by the relevant section itself, also called demarcation of rights.³³¹ The enjoyment of the various categories of fundamental rights should therefore be seen from the perspective of these limitations. It is necessary that selected constitutional provisions on fundamental rights be briefly examined before an attempt to illustrate textual discretion in the enforcement and enjoyment of fundamental rights is made. The selected fundamental rights categories are:

- (i) civil and political rights;
- (ii) social, economic and cultural rights; and
- (iii) the right to just administrative action.

The selection is based on the significance of these rights in a modern South Africa, their importance to any person, the excitement they create in view of the difficult past, their international significance and restrictions in the scope of this study. It would, without doubt, be wrong to imply that the other rights are any less important. This study is not about how effective and dream-come-true the enjoyment of fundamental rights has been in South Africa. Rather, the intention is to demonstrate the constitutional significance of fundamental

³³⁰ Kathryn English and Adam Stapleton, The Human Rights Handbook, Kenwyn: Juta: 1997 p 1.

³³¹ Currie and de Waal note 6 above p 186.

rights with the result that the enjoyment and enforcement of these rights should not be unnecessarily subjected to the wishes or with respect, the whims, of the interpreter of these provisions in the exercise of discretion.

4.2.1: Civil and Political Rights

a) Equality

The bedrock of the legal and political regime of apartheid was inequality.³³² As discussed in chapter three of this study, the apartheid system promoted inequality. Currie and de Waal observe that this was meant to address scarce resources for the development of the whites “at the expense of the rest of South African society.”³³³ For this reason, both the interim and final constitutions have placed great emphasis on the principle of equality. The preamble to the interim constitution states that:

There is a need to create a new order in which all South Africans will be entitled to a common South Africa citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms.

The postamble to this constitution also emphasizes the importance of equality by referring to “a future founded on the recognition of human rights,

³³² Currie and de Waal, *ibid* p 231.

³³³ Currie and de Waal, *ibid*.

democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.”

The founding provisions of the Constitution provide for among other values, achievement of equality. When interpreting the Bill of Rights, the courts are instructed “to promote the values that underlie an open and democratic society based on equality and freedom.”³³⁴ The importance of equality under the law was described in *Nyamakazi v President of Bophuthatswana*³³⁵ as a “universal moral law and, if contained in a constitution, supplies a moral norm for the operation of the government, which must be implemented with uncompromising fidelity to its ideals.”³³⁶

Equality is contained in section 9 of the Constitution. All persons are deemed equal before the law. Such equality includes “the full and equal enjoyment of all rights and freedoms.”³³⁷ The state and persons are prohibited from unfairly discriminating on grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, belief, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. The courts are vested with the discretion to determine whether discrimination is acceptable or fair or not.³³⁸

³³⁴ Section 39(1)(a).

³³⁵ *Nyamakazi v President of Bophuthatswana* 1994 (1) BCLR 92.

³³⁶ *Nyamakazi*, ibid at 126 C-D.

³³⁷ Section 9(2).

³³⁸ Section 9(3).

*Motala v University of Natal*³³⁹ illustrates a situation when discrimination was held to be fair in terms of section 8(1) and (2) of the interim constitution. In this case, an Indian student was refused entry into the university's medical school due to the number of positions available for Indian students as opposed to more positions reserved for Africans. The Court observed that although Indians were also victims of the apartheid education policies, they were not as disadvantaged as blacks and efforts to seal the discrepancy would not be a contravention of the constitution.³⁴⁰

The right to equality before the law has two dimensions: formal and substantive equality. The former is about individuals being treated alike, in the same manner.³⁴¹ Substantive equality on the other hand is equality of outcome and the law may permit positive inequality of treatment so as to "treat unalikes unlike in proportion to their unlikeness."³⁴² An example is a disabled pupil, who would not be equally treated like the other pupils in the same school if he or she does not receive special treatment relevant to the existing physical challenges.³⁴³ In this regard, the Constitutional Court in *President Republic of South Africa v Hugo*³⁴⁴ expressed the need for the Court to develop

³³⁹ *Motala v University of Natal* 1995 (3) BCLR 374 D.

³⁴⁰ *Motala*, *ibid* at 383.

³⁴¹ Currie and de Waal, note 6 above p 232.

³⁴² Titia Loenen, "The Equality Clause in the South African Constitution: Some Remarks from a Comparative Perspective," (1997) 13 *South African Journal on Human Rights*, 401 p 405.

³⁴³ Loenen *ibid* p 405.

³⁴⁴ *President Republic of South Africa v Hugo* 1997 (4) SA 1 (CC).

an unfair jurisprudence which does not insist on “identical treatment in all circumstances.”³⁴⁵

To give effect to the equality of everyone before the law, section 9(4) of the Constitution provides for the enactment of national legislation to promote equality and to prevent or prohibit unfair discrimination. It is on this basis that the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 was enacted, a statute that has been described as “an extremely ambitious piece of legislation.”³⁴⁶ The main aim of this statute is the eradication of social and economic inequalities in view of a past which was characterized by pain and suffering for the great majority of South Africans.³⁴⁷

Under the new constitutional dispensation, sometimes one comes across individuals, reputable corporations and institutions that have policies or processes which, surprisingly, unfairly discriminate against certain categories of people. The wrath of the Constitutional Court has not spared such practices. In *Larbi-Odam v Member of the Executive Council for Education (North-West Province)*,³⁴⁸ one of the main issues for determination by the Constitutional Court was the constitutionality of a regulation which prohibited the appointment of a person as an educator in a state school in a permanent capacity unless he or she was a South African citizen. The appellant alleged

³⁴⁵ *Hugo*, ibid para 41.

³⁴⁶ Currie and de Waal, note 6 above p 267.

³⁴⁷ Preamble to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

³⁴⁸ *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* 1998 (1) SA 745 (CC).

that the provision was discriminatory against permanent residents of South Africa and was inconsistent with section 8(2) of the interim constitution. In allowing the appeal, the Constitutional Court saw little sense “to permit people to stay in a country, but then to exclude them from a job they are qualified to perform.”³⁴⁹

Attempts to reverse the gains made by the new constitutional dispensation have no boundaries. In *Hoffmann v South African Airways*,³⁵⁰ the appellant was a person living with the Human Immunodeficiency Virus (HIV). He was refused employment as a cabin attendant by the respondent solely on the ground of his HIV status. In declaring the conduct of the respondent unconstitutional, the Constitutional Court said that the prevailing prejudice against HIV positive people amounts to stigmatisation which is an assault on their dignity.³⁵¹ The constitutional right of the appellant “cannot be determined by ill-informed perception of persons with HIV, nor can it be dictated by the policies of other airlines not subject to our Constitution.”³⁵²

Perhaps the strongest indication of the Constitutional Court’s position on unfair discrimination was in *National Coalition for Gay and Lesbian Equality v Minister of Justice*,³⁵³ a case in which the Court declared unconstitutional

³⁴⁹ *Larbi-Odam*, ibid para 24.

³⁵⁰ *Hoffmann v South African Airways* 2001 (1) SA 1 (CC).

³⁵¹ *Hoffmann*, ibid para 28.

³⁵² *Hoffmann*, ibid para 36.

³⁵³ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).

provisions of the Aliens Control Act 96 of 1991 for discriminating against gays and lesbians on the basis of their sexual orientation. The Court observed that:

The message is that gay and lesbians lack inherent humanity to have their families and family lives in such same-sex relationships respected or protected. It serves in addition to perpetuate and reinforce existing prejudices and stereotypes. The impact constitutes a crass, blunt, cruel and serious invasion of their dignity.³⁵⁴

b) Life

The right to life is guaranteed under section 11 of the Constitution, “the shortest and simplest provision in the entire Constitution.”³⁵⁵ It provides that ‘everyone has the right to life.’ There is no qualification of this right whatsoever. Indeed, it is one of the non-derogable rights but it is, like any other provision, subject to the limitation clause in section 36 of the Constitution. The importance of this right was adequately illustrated in *S v Makwanyane and Another*³⁵⁶, which described it as “the most important of all human rights and the source of all personal rights.”³⁵⁷ Inherent in this right are complex issues, which are yet to appear in the Constitutional Court, for instance abortion and euthanasia.³⁵⁸ These are contentious moral and personal rights issues all over the world and beyond the scope of this study.

³⁵⁴ *National Coalition*, ibid para 54.

³⁵⁵ Devenish, note 42 above p 94.

³⁵⁶ *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

³⁵⁷ *Makwanyane*, ibid at 451 D per Chaskalson, P.

³⁵⁸ Devenish, note 42 above p 97.

c) Freedom of Expression

This freedom is contained in section 16 of the Constitution. Mubangizi argues that freedom of expression has constitutional protection because it is essential for a democratic government and it is both an instrument of truth and personal fulfilment.³⁵⁹ Notwithstanding the constitutional importance of this right, the courts, as the guardians of justice, guard themselves against contemptuous attacks in the name of freedom of expression. In *S v Mamabolo*,³⁶⁰ the Constitutional Court said that this freedom “does not mean that attacks, however scurrilous, can and with impunity be made on the judiciary as an institution or on individual judicial officers.”³⁶¹

Freedom of expression does not extend to propaganda for war; incitement of imminent violence; or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.³⁶² The courts exercise substantial discretion when dealing with these limitations to freedom of expression. In *Holomisa v Argus Newspapers Ltd*,³⁶³ Cameron J had to deal with the defendant’s exception in an action for damages brought by the plaintiff. The plaintiff had alleged that the defendant’s newspaper, the *Star*, had defamed him by claiming that he was involved in a plot to kill whites in the Northern Natal region. The plan allegedly included the assassination of a top South African official in the Transvaal. The action by the plaintiff described

³⁵⁹ Mubangizi, note 47 above p 87.

³⁶⁰ *S v Mamabolo* 2001 (3) SA 409 (CC).

³⁶¹ *Mamabolo*, ibid para 32.

³⁶² Section 16(2)(c).

³⁶³ *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W).

him as the Deputy Minister of the Department of Environmental Affairs of the Republic of South Africa.

In allowing the exception which was based on section 15 of the interim constitution, the High Court demonstrated its commitment to freedom of expression by stating that “there can therefore be no doubt that the defamation, even if proved untrue, engages constitutional protection.”³⁶⁴ Cameron J however observed that journalists do not enjoy “special constitutional immunity beyond that accorded ordinary citizens.”³⁶⁵

The Supreme Court of Appeal in *National Media Ltd and Others v Bogohsi*,³⁶⁶ a case decided after *Holomisa*, had an opportunity to further develop, or at least fully explain the constitutional protection of the press and media freedom. Surprisingly, it failed to do so. The main constitutional issue before the Supreme Court of Appeal was strict liability of newspaper owners, publishers, editors and printers as laid down by the Court in *Pakendorf en Andere v De Flemming*.³⁶⁷ The Court found that its decision in *Pakendorf* was wrong. The disturbing aspect in *Bogoshi*, it is submitted, is that the Court did not decide the case on the basis of the Constitution. It said that its finding was founded on the common law.³⁶⁸ That seems to be the trouble with this decision. It is difficult to explain why the Court did not deal with the matter in terms of the

³⁶⁴ *Holomisa*, ibid at 610 G.

³⁶⁵ *Holomisa*, ibid at 610 C.

³⁶⁶ *National Media Ltd and Others v Bogohsi* 1998 (4) SA 1196.

³⁶⁷ *Pakendorf en Andere v De Flemming* 1982 (3) SA 146 A.

³⁶⁸ *Bogoshi*, note 366 above p 1216 E-F.

Constitution. This amounts, it is submitted, to wrongful exercise of discretion, notwithstanding that the outcome was right.

c) Procedural Rights of Arrested, Detained and Accused Persons

In *McNabb v United States*,³⁶⁹ it was observed that the “history of liberty has largely been the observance of procedural safeguards.”³⁷⁰ The right of fair procedure is also known as due process.³⁷¹ Section 35 of the Constitution contains very elaborate procedural rights for arrested, detained or accused persons. Some of these include the right to remain silent, to be informed of the detention, to be brought before a court as soon as reasonably possible, a right to a fair trial and not to be compelled to make any incriminating confession or admission. At common law, a confession has to be voluntary which was described in *S v Zuma and Others*³⁷² as:

Not a fortuitous but an integral and essential part of the right to remain silent after arrest, the right not to be compelled to make a confession, and the right not to be compellable against oneself.³⁷³

The Constitutional Court has jealously guarded the rights contained in section 35 of the Constitution. This approach, it is submitted, arises from serious injustices caused to those in the custody of the police during the previous legal

³⁶⁹ *McNabb v United States* 318 US 332 (1943).

³⁷⁰ *McNabb*, *ibid* at 332.

³⁷¹ Devenish, note 42 above p 501.

³⁷² *S v Zuma and Others* 1995 (2) SA 642 (CC).

³⁷³ *Zuma*, *ibid* at 659 G.

dispensation as examined in chapter two of this study. In *S v Thebus*,³⁷⁴ the Constitutional Court emphasised the right to pre-trial silence which “ousts any compulsion to speak. It is therefore vital that an accused person is protected from self-incrimination during detention and police interrogation.”³⁷⁵ In *AG (Transvaal) v Shabalala*,³⁷⁶ the Constitutional Court held that the case of *R v Steyn*³⁷⁷ could not stand the constitutional test of a fair trial insofar as it provided for a total denial of access to the accused person of *all* documents in a police docket in all circumstances. The accused person’s claim can be defeated on other grounds but not on the “blanket docket privilege” laid down in *Steyn*.³⁷⁸

4.2.2: Social, Economic and Cultural rights

As opposed to the traditional civil and political rights, social, economic and cultural rights are a category of rights “recent in origin.”³⁷⁹ Substantial amount of controversy arises when enforcement of some of these rights is in question. In such cases, the courts have a wide interpretative jurisdiction and this is discussed in the next chapter. Some of the rights and their enforcement by the courts are examined below.

³⁷⁴ *S v Thebus* 2003 (6) SA 505.

³⁷⁵ *Thebus*, ibid at para 55.

³⁷⁶ *A G (Transvaal) v Shabalala* 1996 (1) SA 725 (CC).

³⁷⁷ *R v Steyn* 1954 (1) SA 342 A.

³⁷⁸ *Shabalala*, note 376 above para 72.

³⁷⁹ Mubangizi, note 47 above p 9.

(a) Fair Labour Practices

Fair labour relations are one of the guarantees contained in section 23 of the Constitution. In addition, the Labour Relations Act 66 of 1995 (LRA) was enacted to give effect to the right to fair labour practices in terms of section 23(1) of the Constitution.

In *NEWAHU*³⁸⁰ the main issue for determination by the Constitutional Court was whether the Labour Appeal Court's interpretation of section 197 of the Labour Relations Act was an infringement of section 23(1) of the Constitution.³⁸¹ Ngcobo J with whom the rest of the Court concurred, said that the statute "gives content to section 23 of the Constitution and must therefore be construed and applied consistently with that purpose."³⁸² He further held that protection of workers against loss of employment should contain both substantive and procedural fairness.³⁸³

The role of the courts in pursuit of ensuring that fair labour practices are observed by the Commissioner under the Labour Relations Act was recently explained by the Constitutional Court in *Sidumo and Congress of South African Trade Unions v Rustenburg Platinum Mines Ltd and Others*³⁸⁴ Navsa AJ held that the test is whether the decision reached by the commissioner is one that a

³⁸⁰ *NEWAHU*, note 162 above.

³⁸¹ *NEWAHU*, *ibid* para 13.

³⁸² *NEWAHU*, *ibid* para 14.

³⁸³ *NEWAHU*, *ibid* para 62.

³⁸⁴ *Sidumo and Congress of South African Trade Unions v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC).

reasonable decision-maker could not reach and “applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.”³⁸⁵

(b) Non-deprivation of Property

Section 25(1) of the Constitution provides that “no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.”

One of the ways in which a person may lawfully be deprived of property is in terms of the Prevention of Organised Crime Act 121 of 1998 (POCA). Under this legislation, property may be forfeited to the state on the basis that such property is an instrumentality of an offence. The Constitutional Court has on several occasions been called upon to give effect to 25(1).

One of such cases is the recent decision of *Mohunram and Another v National Director of Public Prosecutions and Another (Law Review Project Amicus Curiae)*.³⁸⁶ An order declaring immovable property as forfeited to the state was made under POCA on the ground that the property was an instrumentality of an offence under the KwaZulu-Natal Gambling Act 10 of 1996. In overturning the Supreme Court of Appeal’s decision which had upheld the decision of the High Court in favour of the forfeiture, the Constitutional Court ruled:

³⁸⁵ *Sidumo*, ibid para 110.

³⁸⁶ *Mohunram and Another v National Director of Public Prosecutions and Another (Law Review Project Amicus Curiae)* 2007 (4) SA 222 (CC).

In each case therefore, care needs to be taken to ensure that the purpose of deterrence that the legislation serves does not produce a disproportionate impact on the owner of the forfeited property...In this respect, the extent to which the forfeiture manifestly is directed towards preventive organized crime will be highly relevant.³⁸⁷

The Court held that forfeiture had disproportionate impact on the owner of the forfeited property.

(c) Access to Adequate Housing

Section 26(1) of the Constitution provides that “everyone has the right to have access to adequate housing.” To enable the enjoyment of this right, section 26(2) provides that legislative measures must be taken for a progressive realization of this right.

The case of *Government of the Republic of South Africa v Grootboom*³⁸⁸ is one of the most important decisions in the jurisprudence of the Constitutional Court. The Court laid to rest any doubts that social-economic guarantees in the Constitution are enforceable against the state. In declaring the justiciability of social-economic rights, the Court noted as follows:

The right of access to adequate housing is entrenched because we value human beings and want to ensure they are afforded their basic human needs. A society must seek

³⁸⁷ *Mohunram*, ibid para 146 .

³⁸⁸ *Grootboom*, note 128 above.

to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality.³⁸⁹

(d) Cultural, Religious and Linguistic Rights

These guarantees are contained in section 31. Persons and members belonging to a cultural, religious or linguistic community have rights to enjoy their language and culture. The enforceability of this right was recently restated by the Constitutional Court in *MEC for Kwazulu Natal and Others v Pillay*³⁹⁰. The Court held that the refusal by the school to grant exemption to the respondent's daughter to wear a nose stud, an established Hindu practice, was unfair discrimination under the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

4.2.3: The Right to Just Administrative Action.

In view of the difficult past experienced by the majority of South Africans as examined in chapter two of this study, the framers of the Constitution found it necessary to constitutionalise the common law concept of judicial review. Indeed, fundamental rights enjoyment would be incomplete or non-existent if the courts are not given a testing right. As discussed in chapter two, in the past, the courts' common law jurisdiction to review the exercise of executive

³⁸⁹ *Grootboom*, *ibid* para 44.

³⁹⁰ *MEC for Kwazulu Natal and Others v Pillay* 2008 (1) SA 474.

discretion was taken away by the executive and generally, the courts were not inclined to exercise their common law jurisdiction.³⁹¹

Section 33(1) of the Constitution states that “everyone has the right to administrative action that is lawful, reasonable and procedurally fair.” To give effect to this right, section 33(2) makes it mandatory for the enactment of national legislation. For this reason parliament enacted the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

The decision of the Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa: in re: ex parte President of the Republic of South Africa*³⁹² settled the law with regard to the constitutionalisation of the common law judicial review. The Court said:

The common law principles that previously provided the grounds for judicial review of public power has been subsumed under the Constitution, and in so far as they might continue to be relevant to judicial review, they gain their force from the Constitution.³⁹³

It should be observed that what has received constitutional recognition and force is the courts’ jurisdiction to test the lawfulness of the exercise of public

³⁹¹ Currie and de Waal, note 6 above p 642.

³⁹² *Pharmaceutical Manufacturers Association of South Africa: in re: ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).

³⁹³ *Pharmaceutical*, ibid at para 33.

power.³⁹⁴ The common law principles of judicial review “remain relevant to the conduct of private entities when not exercising statutory or public powers.”³⁹⁵

The Promotion of Administrative Justice Act has been applied in several cases by the Constitutional Court, one of which is *Bato Star*³⁹⁶. The Court, however, decided that the common law should continue to play an important role in the interpretation of the statute.³⁹⁷ The question of whether the statute was applicable to presidential exercise of executive authority came before the Constitutional Court in *Masetlha*. In demonstrating respect of the doctrine of separation of powers, the Court held that presidential decisions “which constitute the exercise of executive powers and functions under section 85(2) (e) of the Constitution are not clearly susceptible to administrative review under the tenets of PAJA even if they otherwise constitute administrative action.”³⁹⁸

Most of the rights in the above classification of fundamental rights largely form the basis upon which it is demonstrated how the courts have exercised their discretion which is contained in chapter five. It should be emphasized that other types of rights are just as important, at least from a constitutional perspective although they have not been considered above. Those rights include children’s rights; prohibition of slavery, servitude and forced labour;

³⁹⁴ *Pharmaceutical*, ibid at 698 para G.

³⁹⁵ Currie and de Waal, note 6 above p 645.

³⁹⁶ *Bato Star*, note 145 above.

³⁹⁷ *Bato Star*, ibid para 22.

³⁹⁸ *Masetlha*, note 129 above para 116.

right to privacy; freedom of movement and residence; right of assembly, demonstration, picket and petition; citizenship; freedom of religion, belief and opinion; access to information and access to courts.

4.3: Textual Discretion in Selected Provisions of the Bill of Rights

The main focus of this study is to illustrate how the Constitution has vested in the courts, specifically the Constitutional Court, with wide discretion in fundamental rights issues. This section of the study will show how the Bill of Rights in the Constitution gives an interpreter of fundamental rights provisions a lot of discretion in the enjoyment of these rights. Such discretion is certainly dangerous as it places fundamental rights litigants more in the hands of the interpreter than in the hands of the Constitution.

The above position does not substantially align with section 7(1) of the Constitution which provides that the Bill of Rights is a cornerstone of democracy in South Africa and it enshrines the rights of all people in South Africa and affirms the democratic values of human dignity, equality and freedom. The wide discretion given to the interpreter subjects these rights to the will of the interpreter. The Constitution has placed so much faith in the courts as examined below.

4.3.1: Express Discretionary Words and Phrases

The Constitution provides that in applying a provision of the Bill of Rights, a court must apply, or *if necessary develop* the common law.³⁹⁹ In developing the common law, a court *may develop rules* of common law to *limit* the right, as long as the limitation is in terms of section 36(1).⁴⁰⁰ Subjecting common law limitation rules created by the courts to section 36(1) increases judicial discretion because as shown later, the section also grants the courts discretion to determine how enjoyment of rights can be limited.

It is therefore apparent that the Constitution gives the courts a blank cheque to determine when the common law should be developed. Secondly, the courts are given the power of developing rules that should govern the application, by the courts, of the common law that they develop. It is submitted that this is wide discretion especially where the common law developed by courts, and the rules, relate to fundamental human rights. In the first place, what amounts to “the common law” is difficult to ascertain.⁴⁰¹ Developing it becomes a more uncertain undertaking. In such a situation of legal uncertainty, confusion has to arise as different superior courts, as the main interpreters of the Constitution, exercise this broad discretion.

³⁹⁹ Section 8(3)(a).

⁴⁰⁰ Section 8(3)(b).

⁴⁰¹ L.W. Hackermann: “Constitutional Comparativism in South Africa,” (123) 2006 South African Law Journal p 497 at 499.

Certainly, litigants in these courts are, insofar as the common law is concerned, largely dependent on the courts' discretion. In this regard and as examined below in a comparative study, such magnitude of discretion is not vested in the courts by the constitutions of India, Namibia, Canada and Germany.

One of the most important rights in the Constitution is equality before the law. This includes the full and equal enjoyment of all rights and freedoms. To guarantee the enjoyment of this right, no person or the state may unfairly discriminate directly or indirectly against anyone on one or more grounds *including* race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, social orientation, age, disability, religion, conscience, belief, culture, language and birth.⁴⁰²

The Promotion of Equality and Prevention of Unfair discrimination Act 4 of 2000 amplifies section 9(5) of the Constitution, the equality clause. Whereas section 9 of the Constitution prohibits unfair discrimination by the state on certain grounds for instance race, gender, ethnic or social origin, the legislation contains more grounds.

Section 1(1) xxii (a) and (b) of the Equality Act defines prohibited grounds for discrimination which include gender, race and colour while paragraph (b)

⁴⁰² Section 9(3)(4).

contains what has been described as “analogous grounds for discrimination.”⁴⁰³

In terms of this paragraph, this is discrimination which causes or perpetuates systematic disadvantage; undermines human dignity; or adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on a prohibited ground.

The statute also introduces the concept of rebuttable presumption of unfair discrimination in section 13(2) (a) and (b). Discrimination on a prohibited ground is unfair unless the respondent proves that the discrimination is fair. This presumption also applies to discrimination on comparable grounds as defined above. There is no doubt that both the Constitution and the equality legislation are intended to address one of the crucial pillars of apartheid, inequality. The interpreter of this law is however vested with substantial discretion, in the determination of what else, other than the stated grounds, amounts to unfair discrimination. Further, the interpreter also has the discretion to determine whether discrimination is on grounds comparable to prohibited grounds.

The word “including” is also found in the limitation of rights clause. Enforcement of rights may be limited for reasons clearly stated in section 36 of the Constitution but this is not all. They are mere examples of when rights may be limited because the court is given the discretion to come up with other

⁴⁰³ Currie and de Waal, note 6 above p 269.

reasons to limit the enjoyment of rights. This comes about due to the word “including” right before the grounds that would justify the limitation of rights. It is respectfully submitted that a modern constitution should not enshrine fundamental rights guarantees only to subject their enjoyment to limitations which a judge may formulate.

An equal amount of discretion is given to the courts in the determination of the remedy to be granted in the event of threatened or real infringement of rights. The Constitution provides that the court may grant “*appropriate relief, including* a declaration of rights.”⁴⁰⁴ It is not the Constitution, but the judge, that decides which remedy is appropriate in a matter as important as fundamental rights. The same case applies to factors that may be taken into account in determining the amount of compensation arising from deprivation of property. The word “including” comes before the circumstances to be taken into account, which shows that the circumstances adumbrated therein are not exhaustive but illustrative.

Section 20 of the interim constitution provided that “every citizen shall have the right to enter, remain in and leave the Republic, and no citizen shall without justification be deprived of his or her citizenship.” It is obvious that the enjoyment of this right was dependent on the interpretation of the words “without justification” which gave the courts substantial discretion. Perhaps in an attempt to address this apparent anomaly, the drafters of the final

⁴⁰⁴ Section 38.

Constitution had a shorter version contained in section 20 that “no citizen may be deprived of citizenship.” The word “may” is not mandatory but discretionary. There is no difference between the previous and current provision in that the court may deprive a person of his or her citizenship as the discretion permits.

The word “may” is also used in determining whether foreign law is applicable in the interpretation of the Bill of Rights.⁴⁰⁵ It is therefore upon a judge to choose whether to apply foreign law. Such discretion is unnecessary as it creates conflicts and uncertainty in judicial opinions in fundamental rights disputes.

4.3.2: Interpretive Discretion Due to Textual Ambiguity or Vacuum.

Apart from constitutional provisions which grant express discretion to the courts as cited above, the Constitution contains fundamental rights provisions which do not have an objective meaning, are outright ambiguous or readily invite the court to adopt any interpretation it deems appropriate.⁴⁰⁶ The court is thus given very wide interpretive latitude, which places a fundamental rights litigant at the mercy of the courts in so far as enjoyment of his or her rights is concerned. A few of such provisions are discussed here. Although the limitation clause, section 36, contains some words whose exact meaning is difficult to ascertain, the section is discussed separately due to its importance.

⁴⁰⁵ Section 39(1).

⁴⁰⁶ Pierre De Vos, “A Bridge too Far? History as context in Interpretation of The South African Constitution”, (2001) 17 South African Journal of Human Rights p 2.

Broad textual discretion is also granted to the courts in the determination of complex issues relating to right to life in section 11 of the Constitution. For instance, the provision does not exempt those who kill in self-defense. Certainly, the law of general application, it is submitted, would have to apply in such cases in terms of the limitation clause, section 36. However, as argued in chapter five of this study, it is not clear from the Constitutional Court what exactly amounts to “law of general application.”

As to whether the protection in section 11 applies to the unborn “person,” as the majority in *Roe v Wade*⁴⁰⁷ decided, is yet to come before the Constitutional Court as a substantive constitutional question for determination. The constitutionality of the Choice on Termination of Pregnancy Act 92 of 1996 came before the High Court in *Christian Lawyers’ Association of South Africa v Minister of Health*.⁴⁰⁸ Although the Court ruled that the word ‘everyone’ in section 11 does not include a foetus, Currie and de Waal’s view is that the issue is not that simple. The question of whether the state has a duty to protect developing human life ought also to be answered.⁴⁰⁹

It is also not clear whether a terminally ill person whose constitutional right to dignity is eroded can opt not to enjoy the right to life any longer. Euthanasia is a complex moral and legal issue in many jurisdictions. Many views have been

⁴⁰⁷ *Roe*, note 155 above.

⁴⁰⁸ *Christian Lawyers’ Association of South Africa v Minister of Health* 1998 (4) SA 1113 (T).

⁴⁰⁹ Currie and de Waal note 6 above p 288.

expressed in this subject, one of which is by Chaskalson who opines that “the killing of someone to relieve their suffering may be a reasonable and justifiable limitation on the right to life.”⁴¹⁰ In the absence of legislation, euthanasia is, without doubt, an area of law in which South African courts will continue to exercise broad discretion especially in view of section 11 of the Constitution.

The constitutional validity of the blanket right of using deadly force in arresting a suspect contained in section 49(2) (replaced) of the Criminal Procedure Act 51 of 1977 came before the Constitutional Court in *S v Walters and another*.⁴¹¹ The Court ruled that use of lethal force could only be justified on the well established grounds of self-defence or defence of another person. The section was declared invalid.⁴¹²

The legislature responded to this judgment by replacing the offending section with a new section 49(2) contained in section 7 of the Judicial Matters Second Amendment Act 122 of 1998. Under that section, an arrestor, before applying lethal force, “must believe on reasonable grounds” that the suspect is, among other reasons, likely to cause death or grievous harm to himself, the arrestor or any other person. The discretion of the courts, and this is substantial, would be in the determination of whether the grounds were reasonable, and if such grounds necessitated the use of deadly force.

⁴¹⁰ Chaskalson, note 45 above p 15-7.

⁴¹¹ *S v Walters and another* 2002 (4) SA 613 (CC).

⁴¹² *Walters* ibid para 77.

The right to freedom of expression does not extend to propaganda for war, incitement of imminent violence or advocacy of hatred that is based on race, ethnicity, gender, or religion and which constitutes incitement to cause harm.⁴¹³ Since the constitution does not define these terms, the judge has ample discretion in their interpretation. It is not in doubt that the Constitution is supreme but room exists for different meanings to be given to these words by different judges.

A judge's social, political, racial, religious or intellectual background may have substantial contribution in determining whether to entirely or partially limit the enjoyment of this right. Such non-legal influencing factors are called by scholars, "the inarticulate premise," which does not appear on the surface. One of the reasons for burying it is the fact that "ultimate assumptions touch us so deeply that we cannot talk about them in a dispassionate manner".⁴¹⁴ This, it is argued, gives credence to Holme's immortal phrase that "the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."⁴¹⁵

Writing on the inarticulate premise, Holmes argues that judges rarely mention such non-legal considerations and those factors "are the unconscious result of

⁴¹³ Section 16(2) (a) – (c).

⁴¹⁴ Francis G. Wilson: "The Scholar and the Inarticulate Premise", <http://links.jstor.org/sici?sici>. (Accessed on 20 November 2007).

⁴¹⁵ Holmes, note 94 above p 6.

instinctive preferences and inarticulate convictions”.⁴¹⁶ When the Constitution vests the courts with express discretion on freedom of expression guarantee, the courts are given unlimited authority to determine the enjoyment of this right and the non-legal factors, perhaps a judge’s deep commitment to media and press freedom, will generally play a big role in the enjoyment of this right. For this reason, it is submitted that while *Holomisa* stands for a good exercise of discretion in the application of constitutional provisions to press freedom, the same cannot be said of *Bogoshi*.

The right of access to adequate housing is dependent on a judge finding whether the state has taken “reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.”⁴¹⁷ The exercise of discretion by the Constitutional Court on this right and others is the subject of the next chapter where a thorough exposition of the Court’s jurisprudence is presented. The enjoyment of this right is removed by the Constitution from its purview and relegated to what a judge deems as reasonable measures by the state on the basis of available resources.

The extent of discretion in the enjoyment of this fundamental right, particularly taking into account poverty levels of some citizens is surprising. It might not need so much convincing by the state for some judges to rule that the state has taken reasonable housing measures.

⁴¹⁶ Holmes, note 199 above p 23.

⁴¹⁷ Section 26(2).

A similar degree of discretion is vested on the courts in the enjoyment of the right to health care, food, water and social security.⁴¹⁸ Such enjoyment depends on what a judge decides as reasonable measures taken by the state within its available resources towards the enforcement of this right. The courts in both of these social rights are given the discretion of doing the balancing act, which is substantial discretion.

The Constitution also vests the courts with wide discretion in certain instances by being silent or not clear. For instance, sections 72 and 118 of the Constitution provide for public involvement in law-making and other processes by the National Council of Provinces (NCOP) and provincial legislatures respectively. Such involvement of the public in legislative agenda of the NCOP of course becomes a fundamental right and laws passed without public participation can be challenged as unconstitutional.⁴¹⁹

The Constitution leaves it to the judge to determine what constitutes public involvement and the quantitative elements of such participation. These were the main issues in the recent case of *Doctors for Life International v Speaker of the National Assembly and Others*.⁴²⁰ This case illustrates how the courts are mandated by the Constitution to be involved in law-making, a phenomenon which is certainly counter-majoritarian. The Constitutional Court made the law

⁴¹⁸ Section 27(2).

⁴¹⁹ Section 72(2).

⁴²⁰ *Doctors for Life International v Speaker of the National Assembly and Others*. 2006 (6) SA 416 (CC).

on the mechanics of public involvement. It said that factors such as public education, information, road shows, radio programs and regional workshops should be present.⁴²¹ The constitutional or legislative lacuna in this important area of fundamental rights was filled by the Court in the exercise of discretion.

The jurisprudence of the Constitutional Court seems to be that where the people, under the law, have to be involved in decisions which affect them in one way or the other, such rights cannot be taken away by any institution of the state. That is the message the Court sent in *Matatiele Municipality and Others v President of the Republic of South Africa and Others (2)*⁴²². The main issue was the constitutionality of the Twelfth Amendment Act of 2005. The applicants' contention was that the amendment was unconstitutional as it effectively re-demarcated Matatiele municipality and removed it from Kwazulu-Natal into the Eastern Cape.

Section 74(8) of the Constitution requires compliance with section 118(1) (a), that is, the provinces should afford their communities affected by the alteration of the provincial boundaries a fair opportunity to make representations as to why their province should not consent to the alteration of their boundary. In allowing the application, the Court said that "to uphold the government's submission would therefore be contrary to the conception of our democracy, which contemplates an additional and more direct role for the

⁴²¹ *Doctors for Life*, ibid para131-136.

⁴²² *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2007 (6) SA 477 (CC).

people of the provinces in the functioning of their provincial legislatures than simply through the electoral process.”⁴²³

In this category of discretion also is section 209 of the Constitution. This section is silent on whether the head of an intelligence service appointed by the national president in terms of section 209(1) can be dismissed by the president as there is no provision to cater for such eventuality. The Constitutional Court therefore had to wrestle with the matter, and, again, made the law in the exercise of its broad discretion in the case of *Masetlha*.⁴²⁴

To be considered in *Masetlha* as well was whether termination of applicant’s employment by the president without an opportunity to be heard was an executive or administrative decision for purposes of determining whether the decision was subject to judicial review under PAJA. Again in filling the textual vacuum, the court held that “the power to dismiss is an essential corollary of the power to appoint and the power to dismiss must be read into section 209(2) of the Constitution...”⁴²⁵

The executive decision was held not to be subject to PAJA but it “may not be exercised in bad faith, arbitrarily or irrationally.”⁴²⁶ From these two cases, it is quite apparent that the role of the Constitutional Court specifically in

⁴²³ *Matatiele*, ibid para 63.

⁴²⁴ *Masetlha*, note 129 above.

⁴²⁵ *Masetlha*, ibid para 68.

⁴²⁶ *Masetlha*, ibid para 23.

fundamental rights litigation is much more than being an arbiter of disputes, it also has law-making powers.

In interpreting the Bill of Rights, the interpreter “must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.”⁴²⁷ These values are not generally agreed upon and as the next chapter shows, they sometimes attract diametrically different interpretations. The reason is that in the course of exercising the wide discretion inherent in such phrases, the courts are permitted to engage in a value-based method of interpretation in the course of addressing philosophical and political tensions. Indeed, the scope of the right is the prerogative of the judiciary in an effort to align with the new paradigmatic shift inherent in a value-based interpretation.⁴²⁸

4.4: Limitation of Rights Clause

It would appear that the most substantial amount of textual discretion in favour of the courts is in the limitation of rights clause, section 36 of the Constitution. This provision has given the courts the power of including other factors in limiting the enjoyment of rights because of the word “including” before the factors which may limit the enjoyment of fundamental rights. Section 36(1) states that:

⁴²⁷ Section 39(1)(a).

⁴²⁸ Devenish, note 42 above p 619.

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

It is quite apparent that the above five constitutional factors for limitation of rights vest the judge with considerable degree of discretion. In addition to the inexhaustive list of factors due to the word “including”, the judge determines all the five factors to be taken into account in the determination of whether the enjoyment of a right is to be limited. In some jurisdictions as examined below, limitation of rights is not subjected to factors whose actual determination is a judge. On the contrary, such limitation has to be clearly stipulated in some law.

In *S v Manawela (Director General of Justice Intervening)*,⁴²⁹ the Constitutional Court impliedly acknowledged its wide discretion in factors which limit the enjoyment of rights by saying that “the five factors expressly

⁴²⁹ *S v Manawela (Director General of Justice Intervening)* 2000 (3) SA 1 (CC).

itemised in s 36 are not presented as an exhaustive list.”⁴³⁰ Without doubt, this discretion is too wide more so as it relates to restraining the enjoyment of fundamental rights which the majority of South Africans had no opportunity to enjoy prior to 27 April 1994 when the 1993 constitution came into force. Indeed by such amount of discretion, it is, as Dworkin observes although in a different context, much in dispute “what particular rights citizens have.”⁴³¹

The other great difficulty in the limitation clause is words whose exact meaning is difficult to understand. In determining the limiting factors, a judge has to consider “law of general application,” whatever a judge says it means, because the Constitution itself has not defined what the term means. It is not being suggested that the Constitution should define each and every word or phrase. However, as the law of general application is the main law to be considered in limitation of rights in the Bill of Rights which the Constitution calls the cornerstone of democracy, then the meaning of such an important term should not have been left to the courts.

It is therefore possible for enjoyment of rights to be denied in an attempt to construe what the term means. The Constitutional Court has not authoritatively laid down the exact meaning of “law of general application.”⁴³² This creates confusion, at least in other superior courts mandated to interpret the Constitution and which look upon the Constitutional Court for precedent and

⁴³⁰ *Manawela*, ibid at para 32.

⁴³¹ Dworkin, note 2 above p 184.

⁴³² Currie and de Waal, note 6 above p 169.

guidance. For instance, in *Hugo*,⁴³³ though the majority did not attempt to address this aspect of the limitation clause, Mokgoro J and Kriegler J had different interpretations of the phrase.⁴³⁴

It has been argued that the limitation clause has to a large extent been drawn from the Canadian Charter of Rights.⁴³⁵ This could be so but as demonstrated below in a comparative study, the Canadian Charter of Rights does not give the courts as much discretion in limitation of fundamental rights. It is quite a complex task for the courts to determine how limitation of rights is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.⁴³⁶ The courts are therefore involved in deciding for everyone what is reasonable and justifiable. An open and democratic society in the Constitution has been described as a “way of capturing the idea of a republic of reasons.”⁴³⁷ This is surely a complex task bestowed on the courts.

The judge is the determining factor of whether public policies and other conduct are justified and this is an immense power. Didcott J observed in *Makwanyane* that value judgments create differences in opinion and such judgments “can easily become entangled with or be influenced by one’s own moral attitude and feelings.”⁴³⁸ Limitation of rights is an exercise in the

⁴³³ *Hugo*, note 344 above.

⁴³⁴ *Hugo*, *ibid* para 76 and 102.

⁴³⁵ Devenish, note 42 above p 546.

⁴³⁶ Denise Meyerson, *Rights Limited*, Western Cape: Juta 1997 p 1.

⁴³⁷ Meyerson, *ibid* p 3.

⁴³⁸ *Makwanyane*, note 356 above para 177.

balancing of interests under the proportionality test laid by the court in *Makwanyane*.⁴³⁹ This is purely a prerogative of the courts under the Constitution.

4.5: Textual Discretion: A Comparative Study

The concept of judicial discretion is very central to any legal system. As submitted in chapter one, parliament or any other lawmaker cannot foresee every eventuality and legislate accordingly. When the courts are called upon to determine disputes, the whole task is largely an exercise of discretion. The concern of this study is the wide discretion granted to the courts, especially by a country's fundamental law. It has been seen above how the Constitution of South Africa has vested the courts with wide discretion in fundamental rights matters. This brief part of the study shows how some modern constitutions with justifiable fundamental rights provisions have not vested the courts with as much textual and interpretative discretion as is the case in the Republic of South Africa. I now turn to these comparative jurisdictions.

4.5.1: The Constitution of the Republic of Namibia

Chapter 3 of the Namibian constitution is about fundamental human rights and freedoms. Regarding personal liberty, this constitution provides that no person shall be deprived of personal liberty "except according to procedures of

⁴³⁹ *Makwanyane*, *ibid* para 104.

established law.”⁴⁴⁰ The judge’s latitude and discretion is therefore much less than in the South African Constitution. One reason is that discretionary words such as “may” or “including” are not part of the Namibian Constitution.

The enjoyment of fundamental freedoms in the Namibian constitution is “subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the rights and freedoms...”⁴⁴¹ To illustrate how much the restrictions on the enjoyment of fundamental rights must be law-based as opposed to judge-based, Article 22 on the limitation clause in the Namibian constitution provides as follows:

Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this Chapter is authorized, any law providing for such limitation shall:

- (a) be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular person.
- (b) specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitations is claimed to rest.

As seen above, the limitation clause of the Namibian constitution does not contain as much space for judges to exercise their discretion as the South African Constitution in limitation of basic freedoms. The Namibian

⁴⁴⁰ Article 7.

⁴⁴¹ Article 21(2).

constitution's limitation of rights is based on law but not on absolute, or near absolute discretion of the interpreter.

4.5.2: The Canadian Constitution Act, 1982

The Canadian Charter of Rights and Freedoms contained in the above legislation does not have discretionary words for instance “may” or “including” in its fundamental rights guarantees. It however contains broad-based values such as the South African Constitution. For instance, the enjoyment of rights is subject to “reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”⁴⁴² Chaskalson observes that due to the similarities in the Canadian Charter of Rights and Freedoms and the South African Bill of Rights, “earlier constitutional cases in South Africa were too quick to recognise the similarity.”⁴⁴³

In the Canadian Charter, most of the limitations are subjected to some law. As an example, mobility rights are subject to *any laws or practices of general application* in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence and *any laws* providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.⁴⁴⁴

⁴⁴² Section 1 of the Canadian Charter of Rights and Freedoms.

⁴⁴³ Chaskalson, note 45 above p 11-5. See also Devenish note 434 above.

⁴⁴⁴ Section 6(3)(b).

Ambiguous phrases in the South African Constitution, for instance, the state taking “reasonable measures” within available resources” do not appear in the Canadian Charter. The Charter has, however, been attacked for being vague and ambiguous. Writing on the Charter, Knopff and Morton observe that the ambiguity and vagueness have occasioned “serious battles” over their proper interpretation and the courtroom is the main place where these battles take place.⁴⁴⁵ They further observe that “the courts now make substantive policy in areas that used to be the exclusive preserve of legislature.” If this is true of the Canadian courts, then the South African courts will continue to determine, and indeed have determined, many battles arising from wider constitutional discretion they enjoy than the Canadian courts.

4.5.3: Constitution of India

Part III of the Indian constitution headed “Fundamental Rights” is the equivalent of South Africa’s Bill of Rights. This part of the Indian constitution does not give the courts as much discretion in that words are not as general or ambiguous as in the South African Bill of Rights. For example, section 32(2) provides that the Indian Supreme Court shall have the power to issue direction or orders or writs, including in the nature of *habeas corpus*, *mandamus*, prohibition, *qua warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by the Bill of Rights.

⁴⁴⁵ Rainer Knopff and F. L. Morton, “Canada’s Court Party,” in Anthony A. Peacock’s: Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation and Theory, Ontario. Oxford University Press 1996 p 65.

It is clear that the drafters of the Indian Constitution had endeavoured to guide the courts in terms of the constitutional remedies available for infringement of fundamental rights. This is quite in contrast to the South African Bill of Rights, which provides that the court may grant appropriate relief.

The constitution of India also emphatically states that the limitation of a fundamental right must be based on some law. It defines “law” as including any “Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law.”⁴⁴⁶ Limitation of rights in the South African Bill of Rights is largely a matter of judicial discretion as discussed earlier in this chapter.

4.5.4: Basic Law of the Republic of Germany

The German constitution, like the Indian Constitution, subjects any limitation of rights to the law. Personal freedoms are contained in Article 2. Article 2(2) states that “every person has the right to life and physical integrity. The freedom of the person is inviolable. These rights may only be interfered with on the basis of *a law*.” Outdoor assemblies may only be restricted by or pursuant to a law.⁴⁴⁷ Article 19 is on restriction of basic rights. Rights may be restricted “by or pursuant to a law, such law must apply generally and not

⁴⁴⁶ Section 13(3).

⁴⁴⁷ Article 8(2).

merely to a single case. Furthermore, the law must specify the basic right affected and the constitutional provision in which it appears.”⁴⁴⁸

A lawful limitation of a right under the Basic Law of Germany or any other law may be an internal or specific limitation. Regarding the former, for instance, the Federal Electoral Act of Germany requires that candidates for federal elections be elected by a meeting of the members, or a representative group of such a meeting or the permanent representative of such a meeting.⁴⁴⁹ Specific limitation on the other hand has been described by Roux as “a balancing act whereby the public interest is taken into consideration.”⁴⁵⁰

One of the obvious consequences of a general limitation clause is that it grants the interpreter of the right in question broad discretion. It is therefore indisputable that the interpreter of the South African limitation clause in the Bill of Rights is vested with much wider powers unlike under Germanic constitution where the law is the main source of limitation. This greatly curtails the powers of the interpreter. The restrictive application of judicial discretion in Germany, albeit not in the manner discussed here, seems to have been acknowledged by the Constitutional Court in *Makwanyane*⁴⁵¹ where Chaskalson P noted that the Federal Constitutional Court of Germany allows a

⁴⁴⁸ Article 19(1).

⁴⁴⁹ See Article 21(1); Stuart Woolman, “Freedom of Association,” in Chaskalson et al note 45 above p 22-8

⁴⁵⁰ Theuni Roux in Van der Walt’s “The Constitutional Property”, Book Review, (1998) 14 South African Journal on Human Rights p 482 at 485.

⁴⁵¹ *Makwanyane*, note 356 above.

limitation of the enjoyment of rights if there are conflicting rights, to protect the rights of other persons or community interests, has to have valid reasons and be materially proportionate to the right in question.⁴⁵²

4.6: Summary

This chapter has examined several aspects of fundamental rights in the Constitution. Some of the important rights have been analysed so as to underline the justiciability and actual place of fundamental rights in the new legal order. Also examined is the extent of discretion vested on the courts. It is clear, it is submitted, that the constitutional text has vested the courts with broad discretion and this becomes clearer when other constitutions with similar rights are examined as illustrated in this chapter.

The next chapter is devoted to an examination of the Constitutional Court. To be considered first are the main constitutional features of the Constitutional Court. Then, and most importantly, is the manner in which the Court has applied its wide discretion, which it is argued, is the main determinant for the enjoyment or otherwise of fundamental rights. The judgments do not generally manifest a particular or coherent interpretive or philosophical pattern in fundamental rights litigation which this study attributes to the magnitude of judicial power vested on the court by the Constitution.

⁴⁵² *Makwanyane*, ibid para 108.

CHAPTER FIVE

ENJOYMENT OF FUNDAMENTAL HUMAN RIGHTS: CONFLICTING VOICES FROM THE CONSTITUTIONAL COURT

5: Introduction

The extent to which the Constitution has vested the courts with discretion in the protection and promotion of human rights has been examined in the previous chapter. That chapter has illustrated that the Constitution has placed on the courts; specifically the Constitutional Court as the final Court in constitutional disputes, with wide discretion in the protection of human rights.

This chapter is largely an extension of the previous chapter. It is devoted to an examination of how the Court has, in three areas of fundamental importance to South African human rights jurisprudence, applied its discretion. It is not possible, due to the large material involved, to examine all the approaches the court has adopted in human rights litigation since its inception. However, the selected areas illustrate, convincingly it is hoped, that the Court, due to the wide textual discretion, has failed to create a reasonably certain fundamental rights jurisprudence for the new South Africa. To be borne in mind in this examination is the purpose of this study which is the extent of judicial power enjoyed by the Court as granted by the post-apartheid constitutions as opposed to the correctness or otherwise of the Court's decisions.

First for consideration is the Court's interpretation of the Bill of Rights. Nothing is more important, it is submitted, than an examination in this study, though not exhaustive by any means, of how the Court has approached interpretation of the Bill of Rights. The reason is that interpretation is the main business of the Court and it determines whether and to what extent, rights will be enjoyed. It is instructive to note that the 1993 constitution did not, and the 1996 Constitution does not refer to "application", but rather "interpretation" of the Bill of Rights. This in itself is an important indicator of great judicial power. Second for consideration is the Court's approach to socio-economic rights, specifically housing and health.

Arising from the broad discretion examined earlier, it has become impossible for the Constitutional Court to develop a human rights jurisprudence that is certain, clear, stable or sound. An implied acknowledgment of the magnitude of this discretion is illustrated by the words of Chaskalson P in *Makwanyane*. He aptly described the extent of the Court's discretion derived from section 9 of the 1993 constitution, the right to life clause, whose exact equivalent is section 11 of the 1996 Constitution. He observed:

It would no doubt have been better if the framers of the Constitution had stated specifically, either that the death sentence is not a competent penalty, or that it is permissible in circumstances sanctioned by law. This, however, was not done and it has been left to this Court

to *decide* whether the penalty is consistent with the provisions of the Constitution.⁴⁵³ (Emphasis mine).

What Chaskalson P is in effect calling for, it is submitted, is a clearer provision, or a Bill of Rights for that matter, which does not vest the Court with as much discretion as in this case. Before an analysis of the selected application of textual discretion on fundamental rights provisions by the Constitutional Court is made, it is necessary to briefly mention important features of the Court. This is relevant as a foundation for a discussion on the Court.

5.1: The Constitutional Court of South Africa

The Constitutional Court is an institution established for the first time in South Africa by the 1993 constitution.⁴⁵⁴ Under this constitution, the Court was headed by a president appointed by the head of state in consultation with the cabinet and after consultation with the Chief Justice.⁴⁵⁵ The Court has a total of eleven judges including its president.⁴⁵⁶ The national president had the power to appoint four of the judges from the Supreme Court in consultation with the cabinet and the Chief Justice.⁴⁵⁷ The other six judges were appointed by the national president after consultation with the cabinet and the president

⁴⁵³ *Makwanyane*, note 356 above para 5.

⁴⁵⁴ Section 98(1).

⁴⁵⁵ Section 97(2) (a).

⁴⁵⁶ Section 99(3)-(4).

⁴⁵⁷ Section 99(3).

of the Court.⁴⁵⁸ The appointment of the six judges had to be on the recommendations of the Judicial Service Commission.⁴⁵⁹ The core responsibility of the Court was to determine, as the Court of final instance, all matters relating to the interpretation, protection and enforcement of all constitutional provisions.⁴⁶⁰ A decision of the Court is binding on all persons, all legislative, executive and judicial organs of state.⁴⁶¹

Under the 1996 Constitution, the Constitutional Court is listed first in the court structure.⁴⁶² One of the important changes made is that the involvement of the executive in the appointment of judges of the Court was minimised in that the role of the cabinet in this important process came to an end. Now, the national president appoints the Chief Justice and Deputy Chief Justice of the Court after consulting the Judicial Service Commission and leaders of parties represented in the National Assembly.⁴⁶³

The other nine judges of the Court are appointed by the national president after consulting the Chief Justice of the Court and the leaders of parties represented in the National Assembly.⁴⁶⁴ The Court's jurisdiction in terms of being the final arbiter in all constitutional matters was maintained.⁴⁶⁵ The

⁴⁵⁸ Section 99(4).

⁴⁵⁹ Section 99(5).

⁴⁶⁰ Section 98(2).

⁴⁶¹ Section 98(4).

⁴⁶² Section 166(a).

⁴⁶³ Section 174(3).

⁴⁶⁴ Section 174(4) (as amended by the Constitution of the Republic of South Africa Act 34 of 2001).

⁴⁶⁵ Section 167(3)(a).

Court's important position in the post-apartheid legal order was re-affirmed by the final Constitution.

When the apartheid regime came to an end with the promulgation of the interim constitution, one of the main concerns expressed by some scholars on the Constitutional Court was the suitability of some judges who had served during the era of parliamentary sovereignty to decide on constitutional matters. Some were described as “unsuited to decide on constitutional issues.”⁴⁶⁶ The fear was that since most of them had readily failed to apply any interpretive techniques to restrain the powers of the executive under apartheid, their readiness for the new legal order was in doubt. For instance, Mr. Justice Didcott, a former judge of the Constitutional Court said in *Nxasana v Minister of Justice and Another*.⁴⁶⁷

Under a Constitution like ours, Parliament is Sovereign...Our courts are constitutionally powerless to legislate or to veto legislation. They can only interpret, and then implement it, in accordance with the interpretation of it.⁴⁶⁸

However, these fears have been allayed over the entire life of the Court. The judges of the Court have not, for one moment, hesitated to live to their constitutional responsibility of ensuring that the Constitution's rightful place in the new order is well understood and respected by all. They have time and

⁴⁶⁶ Jeremy Sarkin, “The Political Role of the Constitutional Court of South Africa,” (1997) 14 [South African Law Journal](#) 134 at p 136.

⁴⁶⁷ *Nxasana v Minister of Justice and Another* 1976 3 S A 745 (D).

⁴⁶⁸ *Nxasana*, decision ibid at 747 G.

again declared that they are the guardians of this sacrosanct document.⁴⁶⁹ However, it has been argued that their appointment, being a political one, plays an important role “in determining the decisions that will emanate from that Court.”⁴⁷⁰ This view, however, goes beyond the scope of this study.

5.2: The Application of Textual Discretion by the Constitutional Court

This part of the study examines the manner in which the Constitutional Court has exercised its discretion vested by the Constitution in the three selected areas mentioned above. The intention is to demonstrate that due to the magnitude of discretion given by the Constitution, it is a difficult task, nay impossible, to ascertain from the judgments of the Court the actual position of human rights jurisprudence in South Africa.

5.2.1: Constitutional Interpretation

5.2.1.1: A General Overview

Interpretation of a constitution, as the supreme law, is certainly the most important function of the courts. This becomes a more important exercise when a constitution contains a justiciable Bill of Rights. The reason is that “a statement of fundamental rights is significantly different from an ordinary statute.”⁴⁷¹ For this reason, it has correctly been noted that the provisions of a

⁴⁶⁹ See for instance Chaskalson, P in *Pharmaceutical* note 391 above at 699F

⁴⁷⁰ Sarkin, note 466 above.

⁴⁷¹ Nihal Jayawickrama, The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence, Cambridge: University Press, 2002 p 159.

constitution should not be read “like a last will and testament lest it be one.”⁴⁷²

Citing Alexander Hamilton’s “The Federalist Paper No. 78,” Mbeki observes that interpretation of a constitution is different from interpretation of ordinary legislation in that whereas a constitution represents the intention of a people, a statute represents the intention of legislators who are the people’s agents.⁴⁷³ This statement, a non-interpretivist approach, is a clear testimony of the controversial task of constitutional interpretation. The interpretivist would, of course, be opposed to the President’s approach to constitutional interpretation.

The complex nature of interpreting a constitution, especially fundamental rights provisions, was not lost on the drafters of the 1993 constitution. For this reason, they crafted a section purely devoted to, among other things, guide the courts on how the Constitution should be interpreted.⁴⁷⁴ The importance of this exercise is also emphasized by a similar provision in the 1996 Constitution.⁴⁷⁵

Since the Constitutional Court is the final authority in constitutional matters, the manner in which it has interpreted the Bill of Rights is at the heart of this

⁴⁷² *Hunter v Southam Supreme Court of Canada* (1994) 2 SCR 145 cited in Jayawickrama ibid p162 fn 15.

⁴⁷³ Thabo Mbeki, President of South Africa, “Address at the National Judges Symposium,” (2003) 120 South African Law Journal 652 at 654.

⁴⁷⁴ Section 35.

⁴⁷⁵ Section 39.

study as it is the strongest demonstration of the exercise of discretion by the court. A thorough analysis of the jurisprudence behind constitutional interpretation is beyond the scope of this study.⁴⁷⁶ However, a few comments should be made so as to try to understand the basis of some of the reasoning, arguments or rhetoric of the Court.

According to Ducat interpretation is about the “justification, standards and methods by which courts exercise the power of judicial review.”⁴⁷⁷ The power and the discretion that the courts have in interpretation of constitutions and other legal material are illustrated by Cover who argues that in the understanding of a text by a judge “somebody loses his freedom, his property, his children, even his life. Therefore legal interpretation takes place in a field of pain and death.”⁴⁷⁸ Of course by legal interpretation, someone may gain all these. It is therefore beyond doubt that a lot of discretion is exercised by the courts when interpreting a constitution.

Legal interpretation is one area of law which has elicited great controversies and debate especially among legal philosophers. This is illustrated, for instance, by Posner who observes that there are “no ‘logically’ correct

⁴⁷⁶ For an analysis which substantially discusses Dworkin and Hart Theories in the context of modern South African constitutional experience, please see Murray Wesson and Max Du Plessis, “Hart, Dworkin And The Nature of (South African) Legal Theory”, (2006) 123 South African Law Journal 700.

⁴⁷⁷ Ducat note 143 above p 93.

⁴⁷⁸ Robert M. Cover, “Violence and the Word,” (1986) 95 Yale Law Journal 1601.

interpretations; interpretation is not a logical process”.⁴⁷⁹ He further notes, interestingly, that someone is driven further from interpretation the more they think about it and that the “boundaries of interpretation are too elastic.”⁴⁸⁰

The manner in which judges on the same bench interpret a constitutional provision differently renders credence to Posner’s view of elasticity of interpretation and therefore judicial discretion. In order to check judges’ freedom in interpretation, Fiss proposes the creation of disciplining rules or theories of interpretation and an interpretive community “which recognizes these rules as authoritative.”⁴⁸¹ The idea is to restrain the interpreter so that decisions are not made in terms of the “subjective preferences of the judges.”⁴⁸²

The legal community has evolved canons of construction. Posner opines that these canons are just a list of relevant considerations to be borne in mind which establish “presumptions based on substantive policy, for resolving indeterminate statutory cases.”⁴⁸³ The interesting thing is that they “pull in opposite directions.”⁴⁸⁴ For purposes of this study, a brief mention of these approaches to constitutional interpretation will suffice.

⁴⁷⁹ Richard A. Posner, *The Problems of Jurisprudence*, London: Harvard University Press 1990 p 460.

⁴⁸⁰ Posner, *ibid* p 271.

⁴⁸¹ Owen Fiss, “Objectivity and Interpretation,” 1982 *Stanford Law Review* 739 p 744.

⁴⁸² Motala and Ramaphosa, note 41 above p 15.

⁴⁸³ Posner, note 479 above p 280.

⁴⁸⁴ Posner, *ibid*.

Under the plain meaning or literal rule, the words of the constitution are taken at “face value and are to be given their ordinary, accepted meaning.”⁴⁸⁵ However, what is plain to one person could be confusing to another, the determining factor seems to be the interpretive community one belongs to. To illustrate the difficulty of a plain interpretation, Posner says that “to the botanist, a tomato is a fruit, but so are peas and beans, and to the ordinary folk, these are all vegetables because they are not eaten for dessert.”⁴⁸⁶ In addition to the difficulty created by diversity in the meaning of words is interpreting ambiguity in legislation which complicates a plain interpretation.⁴⁸⁷

The intention of the framers accords respect to the drafters of the constitution and the constitution is interpreted to give effect to what the framers intended.⁴⁸⁸ On the other hand, a strict construction of the constitution enables a reading of the constitution literally such that “government is permitted to do nothing more than is explicitly stated in the document.”⁴⁸⁹

A contextual interpretation gives words a meaning depending on the context or background in which they are used.⁴⁹⁰ Reference to dictionary definitions is not

⁴⁸⁵ Ducat, note 143 above p 95.

⁴⁸⁶ Posner, note 479 above p 263.

⁴⁸⁷ Posner, *ibid* p 264.

⁴⁸⁸ Ducat, note 143 above p 95.

⁴⁸⁹ Ducat, *ibid*.

⁴⁹⁰ Currie and de Waal, note 6 above p 153.

useful and “colourless words must derive their meaning from their context.”⁴⁹¹ Some of the important factors to be considered in a contextual interpretation are the history behind the relevant provision which include political and drafting history.⁴⁹²

From the perspective of judicial discretion, it would appear that the method of constitutional interpretation that gives the courts the widest discretion and therefore most judicial power in the form of judicial activism is a pragmatic interpretation of the constitution. This permits, it is submitted, the courts to interpret the constitution without much restraint in the sense that the courts are engaged in the open-ended and controversial “social science research.”⁴⁹³ According to Roux, principle, under pragmatism, is compromised and judges consider the effects of every case and then “tailor their decision to promote the interests of the community.”⁴⁹⁴ Fish observes that:

As a fully situated member of an interpretive community, you ‘naturally’ look at the objects of the community’s concerns with eyes already informed by the community’s imperatives, urgencies and goals. Therefore, it is the goal of your community to derive single lines of direction.⁴⁹⁵

⁴⁹¹ Per Kriegler, J in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 170.

⁴⁹² Currie and de Waal, note 6 above p 153-154.

⁴⁹³ Posner, note 479 above p 309.

⁴⁹⁴ Roux, note 48 above p 16.

⁴⁹⁵ Stanley Fish, “Don’t Know Much About the Middle Ages: Posner on Law and Literature”, (1988) 97 *Yale Law Journal* 777 at p 786.

With little or no doubt then, pragmatism renders certainty of constitutional rights, and for the purposes of this study fundamental rights, purely the province of the judiciary such that the express provisions of a constitution are relegated to the background. A purposive and generous interpretation discussed below, are examples of a pragmatic interpretation of a constitution.

In the context of interpretation of the South African Bill of Rights, pragmatism has, by implication, received constitutional force. The Constitution provides that the interpreter “must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.”⁴⁹⁶ These values are listed in the Bill of Rights.⁴⁹⁷ However, their actual meaning and the extent to which the courts will strive in deriving a meaning is not generally agreed upon. It might be no more than a fishing expedition. That is why, it is submitted, that pragmatism grants the courts a wider discretion than the other methods of interpretation.

The magnitude of judicial discretion in a pragmatic interpretation of the constitution is illustrated in *Baloro*⁴⁹⁸. The judge noted as follows in connection with a value-based interpretation of the Bill of Rights as contained in Section 35 of the 1993 South African constitution, its equivalent being section 39 of the 1996 Constitution:

⁴⁹⁶ Section 39(1).

⁴⁹⁷ Section 7(1).

⁴⁹⁸ *Baloro*, note 322 above.

The activity of Judges will not only be contained to the interpretation of existing laws, but they will be obliged to engage in the more creative activity of generating new laws in terms of Section 35, which gives the Courts in South Africa a greater and extensive power than the Courts in the United States.⁴⁹⁹

What the learned judge seems to be saying is that the courts have been mandated by the Constitution to be actively and expressly involved in the process of law making. Such a proposition, it is submitted, is inconsistent with the foundation and relevance of separation of powers. In addition, it is counter-majoritarian. It must be observed, however, that the opinion of the judge has constitutional basis in that the power of the courts to make law, albeit impliedly, originates from the Constitution. That is why the thrust of this study is that the courts have been vested with wide discretion in fundamental rights disputes.

From the foregoing, it is apparent that constitutional interpretation is one area of law in which the courts have a reasonable degree of discretion. It is now appropriate to examine the Constitutional Court's approach towards the interpretation of fundamental rights provisions.

⁴⁹⁹ *Baloro*, ibid at p 244 D.

5.2.1.2: The Constitutional Court's Approach

An examination of the Court's approach to the interpretation of the fundamental rights provisions, as demonstrated below, does not demonstrate a coherent pattern or method. This makes the jurisprudence in this important area of constitutional law reasonably uncertain. The main cause of this uncertainty, it is submitted, is the degree of discretion that the Court enjoys as examined in the previous chapter. Since its inception, the Court has not developed a form of consistency and conflicting precedents are not uncommon.

The extent of the Constitutional Court's powers when dealing with legislation said to be unconstitutional seems also unsettled. In the case of *S v Lawrence*,⁵⁰⁰ the appellants approached the Constitutional Court for enforcement of their rights under section 26 of the interim constitution. They requested the Court to "amend" legislation regulating liquor in the country so as to make provisions for a grocer's, wine, beer and cider licence among other players. The Court refused the appeal to insert words in the Liquor Act. However the Court made the following statement about its power in dealing with unconstitutional legislation:

A Court can strike down legislation that is unconstitutional and can sever or read down provisions of legislation that are inconsistent with the Constitution because they are overboard. It may have to fashion orders to give effect to

⁵⁰⁰ *S v Lawrence* 1997 (4) SA 1176 (CC).

the rights protected by the Constitution, *but what it can not do is legislate*.⁵⁰¹ (Emphasis mine).

The above position by the Constitutional Court that it cannot legislate is inconsistent with its decision in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*.⁵⁰² The main issue for the Court's determination was the constitutionality of Aliens Control Act. The statute granted spouses of South Africans a right to an immigration permit, a benefit not made available to people who were not married or those who could not marry as they were same-sex life partners. This was contrary to section 9(3) of the Constitution.

In upholding the provisions of the Constitution, the Court engaged in a legislative exercise and "read in" the offending section 25(5) of the legislation. In doing this, the Court was guided by the need for appropriate relief.⁵⁰³ The Court read in, after the word "spouse" in the section, the words "or partner, in a permanent same-sex life partnership."⁵⁰⁴ Without doubt, this approach by the Constitutional Court is a clear demonstration of its ability to fully utilize the broad discretion vested by the Constitution. However, in the process of exercising this discretion, uncertainties in South African human rights law cannot be avoided.

⁵⁰¹ *Lawrence*, *ibid* para 80.

⁵⁰² *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC).

⁵⁰³ *National Coalition*, *ibid* para 70.

⁵⁰⁴ *National Coalition*, *ibid* para 97.

Post-apartheid South African constitutions call for a value-based-method of constitutional interpretation.⁵⁰⁵ As seen in *Baloro*, a value-based approach is seen by some judges as vesting in them express law making jurisdiction. The main difficulty created by a value-based interpretation of the constitution is that the language in the text may not be as meaningful or relevant since the interpreter has to be engaged in the task of determining and enforcing these values.⁵⁰⁶ A conflict therefore exists between language and values, and it is upon the court, based on the discretion accorded to it, to determine what the rights are.

The importance and respect of language in the interpretation of the Bill of Rights was emphatically laid down by the Constitutional Court early in its life in *S v Zuma*.⁵⁰⁷ In that case, one of the main issues was the constitutionality of section 217 (1)(b)(ii) of the Criminal Procedure Act 51 of 1977. The effect of this provision was to shift the burden of proof that a confession recorded by a magistrate was not freely and voluntarily made to the accused person. This was declared by the Court as in conflict with the due process clause in the 1993 constitution specifically section 25(3)(c) about the presumption of innocence. The Court applied the words of Lord Wilberforce in *Minister of Home Affairs (Bermuda) v Fisher*⁵⁰⁸ where His Lordship emphasized the need to respect the

⁵⁰⁵ See sections 35 and 39 of 1993 and 1996 Constitutions respectively.

⁵⁰⁶ Meyerson, note 436 above.

⁵⁰⁷ *S v Zuma* 1995 (2) SA 642 (CC).

⁵⁰⁸ *Minister of Home Affairs (Bermuda) v Fisher* [1979] 3 All ER 21.

language in a constitution as a legal instrument.⁵⁰⁹ The Court, in a unanimous judgment, noted:

We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the law giver is ignored in favour of a general resort to 'values' the result is not interpretation but divination.⁵¹⁰

The Court could not, it is submitted, have stated the supremacy of plain and unambiguous language over a value-based approach, which is discretion-filled, in better words. This unequivocal and clear approach by the Court to the interpretation of the Bill of Rights came to the test in *S v Mhlungu*.⁵¹¹ This case is a classic illustration of the magnitude of discretion and power that the post-independent constitutions have vested in the Constitutional Court. The main issue the Constitutional Court had to deal with was whether a person whose trial began before the commencement of the 1993 constitution enjoyed the right to fair-trial protections guaranteed in the interim constitution. The relevant section of that constitution provided that:

All proceedings which immediately before the commencement of this Constitution were pending before any court of law, including any tribunal or reviewing authority established by or under law, exercising jurisdiction in accordance with the law then in force, shall be dealt with as if this Constitution had not been passed: Provided that if an appeal in such proceedings is

⁵⁰⁹ *Fisher*, *ibid* at p 2 (d).

⁵¹⁰ *Zuma*, note 507 above para 18.

⁵¹¹ *Mhlungu*, note 32 above.

noted or review proceedings with regard thereto are instituted after such commencement such proceedings shall be brought before the court having jurisdiction under this Constitution.⁵¹²

The language and intention of the constitution was clear; that proceedings commenced before it came into force would be governed by the law existing at the time of their commencement. In abandoning the literal approach in *Zuma* in favour of a generous approach that would enable the realization of the constitutional values, the majority of the Court were of the view that a literal interpretation would not help in the enforcement of the spirit and tenor of the constitution, mainly to usher in an era of rights which was “a ringing and decisive break with a past which perpetrated inequality and irrational discrimination...”⁵¹³ The minority favored an application of the clear words of the Constitution, arguing that a generous interpretation of the constitution was limited by the language of the constitution.⁵¹⁴

The approach by the majority in this case has been described by Motala as “legal nihilism.”⁵¹⁵ He also argues, quite controversially, that the majority approach is supportive of the view that “legal discourse is simply judges doing what their political and moral values command...”⁵¹⁶ A nihilist has been described as an interpreter who sees the text as presenting him with limitless

⁵¹² Section 241(8) of 1993 Constitution.

⁵¹³ *Mhlungu*, note 32 above para 8.

⁵¹⁴ *Mhlungu*, *ibid* page para 78.

⁵¹⁵ Motala, note 41 above p 24.

⁵¹⁶ Motala, note 154 above 1 p 154.

interpretive opportunities, and in the process of such selection he “will invariably express his own values.”⁵¹⁷ Other scholars counter Motala’s argument by calling upon academics to embrace a legal culture which best promotes constitutional values in view of the difficult past.⁵¹⁸

The Constitutional Court’s adoption of a purposive and generous approach to interpretation of the Bill of Rights in *Mhlungu* did not last long. It was without any explanation abandoned by the Court in *Zantsi v Council of State, Ciskei*⁵¹⁹ in favour of a textual construction of the constitution. The applicant’s argument was that having failed to institute proceedings against unlawful dismissal within six months in terms of s 71 of Defence Act 17 of 1986 (Ciskei), his claim was still sustainable as that provision was against the Ciskei Bill of Rights and new 1993 South African Bill of Rights.

In terms of s 8(1) of the 1993 constitution, every person had the right to equality before the law and its equal protection. The Constitutional Court, without any elaboration, poured cold water on a generous and purposive interpretation of the Bill of Rights adopted by the court *a quo*, specifically Heath J who had laboured greatly in laying down the governing principles for such an interpretation.⁵²⁰ It is, from the foregoing, quite evident that the

⁵¹⁷ Fiss, note 481 above p 741.

⁵¹⁸ See for instance Dennis M. Davis, “The Need For Disciplining Rules: A Reply to Ziyad Motala.” (1999) 116 *South African Law Journal* 157 p 161.

⁵¹⁹ *Zantsi v Council of State, Ciskei* 1995 (4) SA 615 (CC).

⁵²⁰ *Zantsi v Chairman, Council of State of Ciskei* 1995 (2) SA 543 (Ck) at 554.

interpretive discretion emanating from the post-apartheid Bills of Rights has led to an inconsistent jurisprudence on the interpretation of the Bill of Rights.

Apart from the discretion exercised by the Court in choosing the approach or method of constitutional interpretation as seen above, the Court also exercises wide discretion in determining whether or not to apply international and foreign law in its interpretation. The actual place and role of international and foreign human rights jurisprudence in South Africa is not clear. The reason, it is argued, is due to the discretion given to the courts by the Constitution.

The courts, under the 1996 Constitution, “must consider” international law.⁵²¹ The word “consider” seems not to require the judge to apply international law. Rather it is upon him or her to determine the relevance or otherwise of the law in question. The 1993 constitution provided for “regard to public international law.”⁵²² This phrase is permissive. It is not in doubt therefore that these discretionary phrases in the two constitutions have played a significant role in the confusing jurisprudence in this area.

Two conflicting decisions will illustrate, it is hoped, the Constitutional Court’s conflicting positions. The decision of the Court in *Makwanyane* is a *locus classicus* of international law on the death sentence. Chaskalson P noted that international perspectives on the death sentence were valuable because they

⁵²¹ Section 39(1)(b) of the 1996 Constitution.

⁵²² Section 35(1).

“show how Courts of other jurisdictions have dealt with this vexed issue.”⁵²³ Of particular importance to the case was the relevance of International Covenant on Civil and Political Rights (ICCPR) and European Convention on Human Rights (ECHR).⁵²⁴

The main caveat in having regard to international law is that it should be, as Mokgoro J put it, in “furtherance of the values that underlie an open and democratic society.”⁵²⁵ According to Motala, this decision is supportive of the “‘monoistic’ view of international law which considers international law and national law as one integrated legal system.”⁵²⁶

In *Azapo*, the main issue was whether section 20(7) of the Promotion of National Unity and Reconciliation Act 34 of 1995 was in violation of section 22 of the 1993 constitution. The statute in that section provides for amnesty, both against criminal and civil liability, for wrongs committed prior to the new constitutional dispensation. On the other hand, section 22 of the constitution provided for a “right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum.”

Approaching the courts is without doubt the foremost remedy. What the statute does is to shut the doors of the courts of justice to victims of human

⁵²³ *Makwanyane*, note 356 above para 34.

⁵²⁴ *Makwanyane*, *ibid* para 63-69.

⁵²⁵ *Makwanyane*, *ibid* para 304.

⁵²⁶ Motala and Ramaphosa, note 41 above p 37.

rights abuses by granting of an amnesty to those who violated their rights. Under international law, a remedy is provided for victims of human rights violations⁵²⁷. Indeed, the Court in *Azapo* observed that that position has both international and municipal law support as an amnesty erodes the rights of those whose rights have been violated.⁵²⁸ The Court however decided that “International Conventions and treaties do not become part of the municipal law of our country ... until they are incorporated into the municipal law by legislative enactment.”⁵²⁹ The maxim *ubi ius ubi remedium* had, in this context, constitutional recognition yet it was taken away by the Act.

While *Makwanyane* considered and applied international and foreign law relevant to South Africa, *Azapo* did not. For this reason, *Azapo* has been criticised as it treats domestic and international law as separate under the theory of dualism which is inconsistent with developments in international law after the Second World War, “that domestic law cannot override the protection of fundamental human rights.”⁵³⁰

Azapo also demonstrates the Court’s unfettered powers in granting a remedy to a successful litigant.⁵³¹ The Constitution does not guide the courts in this regard and it is indisputable that in all disputes, the litigants are at the mercy of the Court. It is due to this judicial power, it is submitted, that the

⁵²⁷ See for instance Article 8 of Universal Declaration of Human Rights.

⁵²⁸ *Azapo*, note 7 above para 9.

⁵²⁹ *Azapo*, *ibid* para 26.

⁵³⁰ Motala and Ramaphosa, note 41 above p 37.

⁵³¹ See 4.3.1 of chapter four above and section 38 of the 1996 Constitution.

Constitutional Court in *Minister of Home Affairs and another v Fourie and Another*⁵³² found that same-sex relationships are constitutional but declined to give immediate effect to that finding such that enjoyment of the fundamental right in question was surprisingly postponed until parliament amended the law. In her dissent on the issue of a remedy, O'Regan J said that the separation of powers doctrine should not be a bar to the awarding of appropriate relief "that is just and equitable to litigants who successfully raise a constitutional complaint."⁵³³

*Fose v Minister of Safety and Security*⁵³⁴ further illustrates the confusing jurisprudence on remedies which is continuing to emerge from the Constitutional Court. The Court refused to grant constitutional damages in respect of the applicant's arrest and torture at the hands of the police. This decision is inconsistent with the need for effective remedies as emphasised by the Court on several occasions, one of which was in *National Coalition for Gay and Lesbian Equality v Minister of Justice*⁵³⁵ where anti-sodomy laws were struck out for their unconstitutionality.

⁵³² *Minister of Home Affairs and another v Fourie and another* 2006 (3) BCLR 355 (CC).

⁵³³ *Fourie*, ibid at para 170.

⁵³⁴ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).

⁵³⁵ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).

5.3: Socio-economic Rights

5.3.1: Housing

Socio-economic rights are said to belong to the so called “second generation” rights as opposed to civil and political rights classified as “first generation” rights.⁵³⁶ While the wisdom of including justiciable first generation rights in constitutions can never be in doubt, the same does not seem to be the case with socio-economic rights. The doctrine of separation of powers runs counter to socio-economic rights in that the courts would have “to direct the way in which the government distributes the state’s resources.”⁵³⁷ It is also said that a “Bill of Rights is a shield and not a sword.”⁵³⁸ Polycentric considerations also weigh heavily against justiciable second generation rights.⁵³⁹ Such arguments in addition to the international perspectives of these rights, important as they are, are however beyond the scope of this study.

The justiciability of socio-economic rights has been said by the Constitutional Court to be, at a minimum, protection from improper invasion.⁵⁴⁰ The position has commendably progressed from the minimum negative to positive obligations on the state. The focus of this aspect of the study is however to illustrate the magnitude of judicial power exercised by the Constitutional Court in the enjoyment of these rights.

⁵³⁶ Pierre De Vos “Pious Wishes or Directly Enforceable Human Rights: Social and Economic Rights in South Africa’s 1996 Constitution.” (1997) 13 South African Journal on Human Rights 67.

⁵³⁷ Currie and de Waal, note 6 above p 569.

⁵³⁸ Vos, note 536 above p 69.

⁵³⁹ Lon Fuller, “The Forms and Limits of Adjudication,” (1978) 92 Harvard Law Review 353 p 394.

⁵⁴⁰ *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para 78.

In *Grootboom*⁵⁴¹ the respondents were rendered homeless after being evicted from their informal homes and decided to illegally move into and occupy someone's land.⁵⁴² In re-affirming that socio-economic rights are justiciable, the Constitutional Court ruled that these rights do not merely exist on paper and further that the courts have an obligation of enforcing them.⁵⁴³

The above position was emphatically restated by the Constitutional Court in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others*.⁵⁴⁴ In this case, the City of Johannesburg had obtained an order for the eviction of the applicants from buildings considered unsafe. The Court ruled that the Council had an obligation to, not only obtain a court order for eviction, but also engage meaningfully with the applicants before their eviction.⁵⁴⁵ In demonstrating the justiciability of right to housing, the Court ruled that "people in need of housing are not, and must not be regarded as a disempowered mass."⁵⁴⁶

The Court declared unconstitutional section 12(6) of the National Building Regulations and Building Standards Act 103 Of 1977.⁵⁴⁷ That section provided

⁵⁴¹ *Grootboom*, note 128 above.

⁵⁴² *Grootboom*, ibid para 2-3.

⁵⁴³ *Grootboom*, ibid para 20.

⁵⁴⁴ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (5) BCLR 475 (CC).

⁵⁴⁵ *Occupiers of 51 Olivia Road* ibid paras 9-23.

⁵⁴⁶ *Occupiers of 51 Olivia Road* ibid para 20.

⁵⁴⁷ *Occupiers of 51 Olivia Road* ibid para 49.

for criminal sanction against anybody in violation of an administrative order to vacate a building. That was inconsistent with section 26(3) of the Constitution which provides for a court order to be obtained before anyone is evicted from their home or their home demolished. The Court, in the exercise of its wide discretion in law making, read-in a proviso to section 12(6) that punishment would only follow after an eviction order has been issued by court and duly served, but people continue to occupy the property.⁵⁴⁸

The importance of *Grootboom* is that it was the first case in which it became clear that socio-economic rights “have an enormous potential to affect the lives of those most economically disadvantaged and vulnerable within our society.”⁵⁴⁹ Further, the decision is said to be “a ground-breaking decision on the socio-economic rights in the 1996 Constitution.”⁵⁵⁰

As the enforceability of these rights was not in doubt, the main issue for the determination of the Court was whether the state had to meet a certain minimum standard in the realisation of the right of access to adequate housing in terms of section 26 of the Constitution. Section 26(1) seems, it is submitted, to guarantee access to adequate housing by stating that “everyone has the right to have access to adequate housing.” The state, in terms of section 26(2) is obligated, for the enjoyment of this right, to ensure that it takes

⁵⁴⁸ *Occupiers of 51 Olivia Road* ibid para 54

⁵⁴⁹ Bilchitz, note 49 above p 484.

⁵⁵⁰ Currie and de Waal, note 6 above p 576.

“reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.”

The Court found that in terms of the United Nations Committee on Economic, Social and Cultural Rights (UNCECR) Comments, every state party is bound to fulfil certain minimum core standards for the satisfaction of these rights.⁵⁵¹ Instead of applying this aspect of international law, the Court was of the view that “the real question in terms of our Constitution is whether the measures taken by the state to realize the right afforded by section 26 are reasonable.”⁵⁵² The outcome was that the Court overturned the High Court’s mandatory order which, *inter alia* ruled that “tents, portable latrines and regular supply of water (albeit transported) would constitute the bare minimum.”⁵⁵³ It replaced this order with a less effective declaratory order of which it denied itself a supervisory role and instead delegated this role to the South African Human Rights Commission.⁵⁵⁴

The court, it is submitted, rejected the minimum core argument due to the broad discretion given to it by section 26(2). It is what the Court declares as reasonable legislative and other measures by the state which carry the day. Biltchiz correctly observes that “at present reasonableness seems to stand in

⁵⁵¹ *Grootboom*, note 128 above para 29.

⁵⁵² *Grootboom*, *ibid* para 33.

⁵⁵³ *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277(C) at 293 A.

⁵⁵⁴ Biltchiz, note 49 above p 500.

for whatever the Court regards as desirable features of state policy.”⁵⁵⁵ The right of access to adequate housing, like many others in the Bill of Rights, has been removed from constitutional determinacy to the whims of the judiciary.

It is interesting, and it is submitted an illustration of the massive power of the Court, that the concept of minimum core has been, albeit impliedly, accepted by the Court in civil and political rights claims yet it has rejected such a standard for socio-economic rights. The argument in favour of the minimum core seems to be that rights, whether in the Constitution or in ordinary legislation, ought to be “retrievable.”⁵⁵⁶

In *August and another v Electoral Commission and Others*,⁵⁵⁷ Sachs J, without saying it, laid a minimum core for the right to vote as promulgation of a date for elections, secrecy of the ballot and having in place a machinery to manage the process.⁵⁵⁸ In *Bernstein and others v Bester N.O and Others*,⁵⁵⁹ the Court outlined examples of wrongful intrusion of privacy as entry into a private residence, reading of private documents, listening in to private conversations among others.⁵⁶⁰

⁵⁵⁵ David Biltchiz, “Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-economic Rights Jurisprudence”, (2003) 19 South African Journal on Human Rights 1 p 10.

⁵⁵⁶ Lucy A. Williams, “Issues and Challenges in Addressing Poverty and Legal Rights: A Comparative United States/South Africa Analysis,”(2005) 21 South African Law Journal 436 p 452.

⁵⁵⁷ *August and another v Electoral Commission and others*, 1999 (3) SA 1 (CC).

⁵⁵⁸ *August*, ibid para 16.

⁵⁵⁹ *Bernstein and others v Bester NO and others* 1996 (2) SA 751 (CC).

⁵⁶⁰ *Bernstein*, ibid at para 67.

Doctors for Life is probably the most forceful decision that the Court has delivered to prove its capability and discretion of coming up with a standard that would be used as the gauge for testing the state's minimum or full compliance with the various rights in the Bill of Rights and the Constitution as a whole. In what appears like some form of legislation, the Court developed what, surely, must be the minimum essential contents for public involvement in the legislative and other processes agenda for the NCOP in terms of section 72(1)(a) of the Constitution. The Court listed some of the items to determine public involvement as including road shows, public education and regional workshops.⁵⁶¹

Four years after the decision in *Grootboom*, the Constitutional Court was faced with another case of the homeless in *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd*⁵⁶². In this case, several hundreds of people illegally occupied a portion of a private farm. When the owner of the land obtained an eviction order, the number of illegal occupants had grown to over 30 000. The state failed to put in place a mechanism for the enforcement of the order, thereby infringing Modderklip's constitutional rights as contained in sections 1(c) and 34 of the Constitution. In substantially upholding the decision of the Supreme Court of Appeal, the Constitutional Court ordered that

⁵⁶¹ *Doctors for Life*, note 420 above para 131-136.

⁵⁶² *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC).

the residents were entitled to occupy the land “until alternative land has been made available to them by the state or the provincial or local authority.”⁵⁶³

Notwithstanding the similarities with *Grootboom* on the housing crisis in South Africa, the suffering of the residents in both cases, place and importance of *Grootboom* in socio-economic rights jurisprudence in South Africa, the voice of the Court in *Grootboom* was inaudible in *Modderklip*. That historical decision was relegated to a mere footnote.⁵⁶⁴ Of course, the Court is constitutionally not bound by its decisions. However, it had an opportunity of explaining why a declaratory order on the obligations of the state as in *Grootboom*, where the residents’ living conditions were more inhuman, was inadequate in *Modderklip*.

It is submitted that properly distinguishing *Grootboom* is not an easy task and that could have been the reason why the decision did not receive serious consideration from the Court. The minimum obligation the Court imposed on the state in *Modderklip* was to look for alternative land, while there was no minimum prescription in *Grootboom*.

5.3.2: Health

The right to have access to health care services, including emergency medical treatment, is provided for in section 27 of the Constitution. The discretion of the courts is based on section 27(2). Under this section, the courts must make a

⁵⁶³ *Modderklip*, Ibid para 68.

⁵⁶⁴ *Modderklip*, ibid footnote 50.

determination whether the state, as with housing right, has taken reasonable measures within its available resources to achieve the progressive realisation of this right, among other related rights in this section. Two major decisions in this category of socio-economic rights will illustrate that the discretion on the Constitutional Court is the main determining factor for the enjoyment of this right.

The first decision is *Soobramoney v Minister of Health (KwaZulu-Natal)*⁵⁶⁵. The facts were simple.⁵⁶⁶ In 1996, the appellant suffered irreversible failure of his kidneys. By the time the matter came before the Constitutional Court, he was in the final stages of chronic renal failure. Regular renal dialysis was the only means for prolonging his life. The local public hospital could only provide the treatment to a limited number of patients. The hospital's available resources could not cope with the demand for this treatment. It could only give automatic access to patients suffering from acute renal failure. Those suffering from chronic renal failure, like the appellant, could not get automatic admission to the renal programme. The Court had to decide on whether the appellant's rights were enforceable.

One of the key issues for determination was availability of resources. The Court found, as a fact, that the Department of Health in KwaZulu-Natal did not have sufficient funds and that "resources are stretched in all renal clinics throughout

⁵⁶⁵ *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC).

⁵⁶⁶ *Soobramoney*, ibid paras 1-3.

the land.”⁵⁶⁷ A substantial amount of the health budget would be spent “if all the persons in South Africa who suffer from chronic renal failure were to be provided with dialysis treatment.”⁵⁶⁸ The Court cited with approval the case of *R v Cambridge Health Authority, ex parte B*⁵⁶⁹ where the English Court of Appeal noted that it was not in a position to determine how the state’s resources should be applied.⁵⁷⁰

The Constitutional Court, in effect, was declaring that it had no power to make a finding which would interfere with the state’s budgetary programme. It dismissed the appeal but not without some advice to the state: embark on an aggressive education campaign to inform the citizens generally about the causes of renal failure, associated illnesses and suitable diet.⁵⁷¹

The second decision for consideration is *Minister of Health and Others v Treatment Action Campaign and Others (TAC)*.⁵⁷² The decision demonstrates that the Constitutional Court has the constitutional power and legitimacy to make an order with far-reaching budgetary and policy consequences for the state and great social impact throughout the Republic. The Court had to make a decision on national availability of Nevirapine to pregnant mothers, so as to

⁵⁶⁷ *Soobramoney*, *ibid* para 24.

⁵⁶⁸ *Soobramoney*, *ibid* para 28.

⁵⁶⁹ *R v Cambridge Health Authority, ex parte B* [1995]2 All ER 129(CA).

⁵⁷⁰ *Cambridge Health*, *ibid* at 137 d-g.

⁵⁷¹ *Soobramoney* note 565 above para 49.

⁵⁷² *TAC*, note 127 above.

greatly reduce the risk of transmission of HIV and AIDS from mother-to-child at birth but the drug was only available in selected research sites.⁵⁷³

The national significance of this case is based on HIV and AIDS being said to be “‘an incomprehensible calamity’ and ‘the most important challenge facing South Africa since the birth of our new democracy.’”⁵⁷⁴ The impact of a finding against the state was felt even before the decision itself, with the Minister of Health reportedly saying that she would disobey the decision of the Court if it was not in her favour.⁵⁷⁵ The Minister “was almost immediately forced to retract this statement.”⁵⁷⁶

As in *Soobramoney*, the main issue in *TAC* was the enforceability of the right of access to health care services in section 27(1) of the Constitution. The state’s appeal was based on its lack of capacity to provide a full package available throughout the public sector.⁵⁷⁷ There were budgetary constraints and a shortage of trained counsellors and counseling facilities for pregnant women.⁵⁷⁸ The Court noted that it knew that throughout the country, health services were overextended.⁵⁷⁹ For these reasons, the state sought, at most, a declaratory

⁵⁷³ *TAC*, *ibid* para 9-17.

⁵⁷⁴ *TAC*, *ibid* para 1.

⁵⁷⁵ Mark Heywood, “Preventing Mother-to-child HIV Transmission in South Africa: Background, Strategies and Outcomes of the Treatment Action Campaign’s case against the Minister of Health,” (2003) 19 *South African Journal on Human Rights* 278 p 308.

⁵⁷⁶ Roux, note 48 above p 37.

⁵⁷⁷ *TAC*, note 127 above para 66.

⁵⁷⁸ *TAC*, *ibid* para 54.

⁵⁷⁹ *TAC*, *ibid* para 93.

order as the making of policy was the responsibility of the executive in terms of the doctrine of separation of powers.⁵⁸⁰

One has to recall that the state's arguments had the support of the Court's precedent. In *Grootboom*, the Court reversed the High Court's mandatory order against the state for a declaration and in *Soobramoney*, it could not interfere with the budgetary programme. The Court admitted that socio-economic rights cause massive problems to government but "it is an obligation imposed on the state by the Constitution."⁵⁸¹

The Court in *TAC* dismissed the state's contention that it wanted to "develop and monitor its human and material resources nationwide for delivery of a comprehensive package of testing and counseling..."⁵⁸² This did not persuade the Court. The main issue, as the Court saw it, was that the drug was available. The logistical and financial ability of the state as to the drug's administration was not material. The predominant issues of availability of resources and separation of powers were not relevant and the state had to discharge its obligation imposed on it by section 27(1).

5.4: Summary

The main discussion in this chapter is the approach adopted by the Constitutional Court in the interpretation of the Bill of Rights and in the

⁵⁸⁰ *TAC*, *ibid* para 96-97.

⁵⁸¹ *TAC*, *ibid* para 94.

⁵⁸² *TAC*, *ibid* para 105.

determination of enjoyment and enforcement of fundamental human rights. Having discussed and concluded in the previous chapter that the Court has immense judicial power pursuant to the constitutional text, this chapter has demonstrated that the approach to be adopted by the Court regarding interpretation of the Bill of Rights is purely a discretionary matter, with the result that the Court's decisions are not, and will hardly be consistent in this respect.

In one case, the Court will emphasise the importance of the written word as it is. In another similar case, the word is immaterial. Similarly, the Court in one case is not ready to interfere with the manner the state has chosen to use its limited resources but not so in another case with similar budgetary constraints. The enjoyment and enforcement of fundamental human rights is substantially dependent on the route that the Constitutional Court chooses to take from the many availed by the text in form of the broad discretion, and power, vested on it by the Constitution.

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

6: Introduction

This chapter presents a summary of the whole study. In addition, it provides a conclusion of the study and makes recommendations to the various stakeholders in the constitutionally important subject of the enjoyment and promotion of fundamental human rights. This is examined from the perspective of judicial power of the courts specifically the Constitutional Court.

6.1: Summary of the Study

In addition to the introductory chapter, chapter two discusses the concept of legal discretion. Various philosophical positions are examined in particular the debate between Hart and Dworkin. Also discussed are the positions of the realists and members of the Critical Legal Studies Movement. It was argued, in the analysis, that none of these positions disregards the existence of judicial discretion. This opened an examination of the other aspects of judicial discretion, namely uses and a critique of judicial discretion.

Chapter three investigated the main causes of a difficult and painful South African past in terms of basic rights and freedoms. The three main factors considered are parliamentary sovereignty, the exercise of judicial discretion in particular by the Appellate Division and statutes specifically passed to deny the enjoyment of these rights. It became clear, it is hoped, that the manner in

which the courts elect to exercise their interpretive discretion irrespective of the plain words in legislation played a major role in the denial or enjoyment of these rights. A good number of these rights existed under the common law.

To illustrate the importance of and justiciability of fundamental human rights under the liberated South African legal order, a few categories of these rights were examined in chapter four. Also discussed in this chapter is the extent of discretion vested by the Constitution on the courts. This chapter demonstrated the broad magnitude of power vested on the Constitutional Court and other interpreters by the Constitution. To further prove that the courts are undoubtedly granted broad discretion, a brief comparative study of the constitutions of Namibia, Canada, India and Germany was made.

Having established that judicial discretion plays an important role in determining the enjoyment or denial of fundamental rights and after illustrating that the courts have been vested with wide discretion by the Bill of Rights, the study had to examine the features of the Constitutional Court and the exercise of discretion by the court in two areas, namely interpretation of the Constitution and socio-economic rights. These issues were discussed in chapter five. It became clear in that chapter, it is hoped, that due to the magnitude of discretion on the Constitutional Court, the Court has the power to arrive at an outcome of its choice, and lawfully so, sometimes contradicting

established interpretive and fundamental rights principles laid down by the Constitutional Court itself.⁵⁸³

6.2: Summary

One of the most important features of the new constitutional dispensation ushered by the 1993 interim constitution and enhanced by the 1996 Constitution is the fall of the Westminster doctrine of parliamentary sovereignty and its place taken by the doctrine of constitutional supremacy. Under the new constitutional order, the courts' testing right is entrenched in the Constitution. Such a right on the courts equips them with the power of not only pronouncing the law as promulgated by the legislature, but also the legitimacy of restraining the executive from creating or implementing policies that infringe on basic human rights and freedoms. For this reason, the President of Israel's Supreme Court observes that, a judge's responsibility, unlike what Charles Louis De Montesquieu says, is not simply being a mouthpiece of the legislator because "there are tough cases in which the judge must activate judicial discretion."⁵⁸⁴

⁵⁸³ See for instance *Mhlungu* note 32 above; *Makwanyane*, note 356 above and 5.2 of chapter five of this study.

⁵⁸⁴ Aharon Barrak, *The Judge in a Democratic Society* (Hebrew), Haifa University Press 2004 p 20, as cited by Jonathan Adiri in "Counter Terror Warfare: The Judicial Front Confronting the 'Democratic Dilemma.'" <http://www.instituteforccounterterrorism.org/var/119/39739-Jonathan%20Adiri.pdf> p 20 (Accessed on 28 February 2008).

In view of the painful South African past, the Bill of Rights is certainly one of the major developments of the new legal order. As discussed in chapter three, it has been argued that the Bill of Rights has heavily borrowed from the Canadian Charter of Rights.⁵⁸⁵ That notwithstanding, it was argued in the same chapter that the Charter does not grant the courts as much discretion as the South African Bill of Rights. Even though the Charter does not vest the courts with as much discretion, it is crafted in such general terms, as the South African Bill of Rights, that the power of the courts has been said to be disturbing. Greene observes that:

The era of the Canadian Charter of Rights and Freedoms, beginning as it did in 1982, has inspired great academic comments on the role of the judiciary in a democracy. *The reason is that the Charter has made judicial discretion more publicly visible, and for the first time to any significant extent, generally troubling.*⁵⁸⁶ (Emphasis mine).

If Greene's above statement about the Charter be correct, and having illustrated in this study that the Charter does not vest the courts with as much textual freedom as the Bill of Rights, then the discretion on the Constitutional Court of South Africa ought to be more troubling. The breadth and width of the discretion vested on the Court is evident in its powerful position in the political sphere and in people's lives as demonstrated in the cases of *Mhlungu*,⁵⁸⁷

⁵⁸⁵ Devenish, note 435 above.

⁵⁸⁶ Ian Greene et al, Excerpts from "Final Appeal: Decision-making in Canadian Courts of Appeal," <http://www.yorku.ca/greene/apex.htm>. (Accessed on 28 February 2008).

⁵⁸⁷ *Mhlungu*, note 32 above.

Makwanyane,⁵⁸⁸ *Masetlha*,⁵⁸⁹ *Doctors for Life*,⁵⁹⁰ *Grootboom*,⁵⁹¹ *TAC*,⁵⁹² and *Soobramoney*⁵⁹³ among others discussed in chapter five.

The history of the Constitutional Court as examined in chapter five is a demonstration of judicial power of significant degree. The reason, it was argued, is due to the textual discretion vested on the Court. The result is that enjoyment of fundamental human rights in the new South Africa is dependent on the manner in which the Court elects to exercise its broad discretion which, it is submitted, is a fairly troubling experience. It is evident, as the cases bear witness, that it is difficult to locate South African fundamental human rights law. The Court's power is not only reserved to hard cases like *Masetlha* where the Constitution was, and still is, quiet about the president's power to dismiss but also in direct discretion contained in words like "may", "reasonable" and "including."

6.3: Recommendations

This study has examined the importance of judicial discretion and fundamental rights in the new South African legal dispensation. The background is the denial of the enjoyment of fundamental rights in the apartheid era combined with the general timidity of the courts to question the legislature. Sometimes, the

⁵⁸⁸ *Makwanyane*, note 356 above.

⁵⁸⁹ *Masetlha*, note 129 above.

⁵⁹⁰ *Doctors for Life*, note 420 above.

⁵⁹¹ *Grootboom*, note 128 above.

⁵⁹² *TAC*, note 127 above.

⁵⁹³ *Soobramoney*, note 565 above.

courts were also unnecessarily enthusiastic in siding with the legislature even when this was prejudicial to the enjoyment of rights. It has also been illustrated that the Constitutional Court has been vested by the Constitution with so much trust in the enjoyment of fundamental rights. Cases decided by the Court have illustrated the breadth and width of the Court's judicial power which for all practical purposes, leaves a litigant of fundamental rights at the mercy of the powerful hands of the Court. The following is suggested for attention by the stakeholders.

6.3.1: To the Legislature

With a view to making the Constitution the sacrosanct source of fundamental rights that it is supposed to be as opposed to the existing position of unfettered powers of the Constitutional Court, constitutional reforms are necessary so as to limit the Court's discretion. Words which vest the Court with express or implied discretion as examined in chapter four of this study should be removed and replaced with words or phraseology that deny the courts as much discretion so as to have a reasonable certainty of what these fundamental rights actually are. It would be necessary to consider the actual value of words like "may," "reasonable," "appropriate relief," and "including" especially in view of the experience at the hands of the courts in the past. The courts' power in limitation of rights contained in section 36 ought, it is submitted, to be curtailed so as not to subject the enjoyment of rights to judicial discretion.

6.3.2: To other stakeholders

Defects in the law are not always unearthed by the legislature. It may require concerted efforts of the main stakeholders for the legislature to address important issues in society as a whole or for certain interest groups. In this particular study, what comes into mind is the South African Human Rights Commission (SAHRC). One of the objectives of the SAHRC is educating and training on human rights.⁵⁹⁴ Considering the findings of this study that the Constitutional Court and other interpreters generally have unfettered discretion in the enjoyment of fundamental rights, the SAHRC's task of educating and training on human rights becomes an uphill one. What, for instance, the SAHRC would tell South Africans are their actual rights to medical care or housing in the absence of a minimum core in the Constitution is difficult to guess as this is left to the courts. The SAHRC may not as well educate on what, with reasonable certainty, curtails the enjoyment of these rights in view of the courts' unlimited power to limit their enjoyment. For this reason, the SAHRC should be at the forefront in exerting pressure on the legislature to address the magnitude of judicial discretion in the Bill of Rights.

The Constitutional Court and other courts may in their judgments also voice their concern about the broad discretion vested on them and demonstrate the need for the legislature to act. This could come out more forcefully than in

⁵⁹⁴ South African Human Rights Commission, available at http://www.sahrc.org.za/sahrc_cms/publish/cat_index_33.shtml (Accessed on 10 March 2008).

Makwanyane where the president of the Constitutional Court impliedly acknowledged its broad discretion by lamenting that the framers of the Constitution did not unambiguously lay down the law on death penalty.⁵⁹⁵

The commitment of scholars and legal practitioners in writing and commenting on the magnitude of judicial discretion in the Bill of Rights would also contribute significantly in placing in the public domain the constitutional reforms envisaged in this study. This is more important when one considers the value that the courts attach to scholarly work. In *Bogoshi*, Hefer J A said that he had read as much as he possibly could of the textbooks and articles which appeared in the journals over the years.⁵⁹⁶ For this reason, comments by scholars on the wide magnitude of judicial discretion in our Bill of Rights would, hopefully, attract the attention of the courts, especially the Constitutional Court, and probably find their way to the legislature. Substantial scholarly work is available on the need for minimum core in socio-economic rights but little or nothing exists which specifically addresses the wide judicial discretion the Constitution vests on the Constitutional Court of South Africa.

It is hoped that this study has made a modest contribution to the on-going debate about the “proper” role and the place of the judiciary, more particularly the Constitutional Court, in our new democratic dispensation.

⁵⁹⁵ See *Makwanyane*, note 356 above para 5.

⁵⁹⁶ *Bogoshi*, note 366 above at 1218 I.

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