

## Chapter 4 Jurisdiction

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(1) The Constitutional Court consists of the Chief Justice of South Africa, the Deputy Chief Justice and nine other judges.

(2) A matter before the Constitutional Court must be heard by at least eight judges.

(3) The Constitutional Court —

- (a) is the highest court in all constitutional matters;
- (b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and
- (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.

(4) Only the constitutional Court may —

- (a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;
- (b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;
- (c) decide applications envisaged in section 80 or 122;
- (d) decide on the constitutionality of any amendment to the Constitution;
- (e) decide that Parliament or the President has failed to fulfil a constitutional obligation; or
- (f) certify a provincial constitution in terms of section 144.

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

(6) National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court —

- (a) to bring a matter directly to the Constitutional Court; or
- (b) to appeal directly to the Constitutional Court from any other court.

(7) A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution.

## **172 Powers of courts in constitutional matters**

(1) When deciding a constitutional matter within its power, a court —

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

(2)(a) The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

(b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.

(c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.

(d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.

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## 4.1 Introduction\*

The issue of jurisdiction is obviously of importance to the person initiating litigation: to which court should she address her claim? But jurisdiction is equally important for the court itself since it forms the basis for the court's power to grant or to refuse the relief sought. If a court declines jurisdiction, then the application will be dismissed without reaching the merits of the case — and without the court granting the relief sought, even if the applicant would otherwise have been entitled to it. To use what is still a relevant definition in South African law: jurisdiction means 'the power vested in a court by law to adjudicate upon, determine and dispose of a matter'.<sup>1</sup>

The framework for the jurisdiction of courts in South Africa is set out in Chapter 8 of the Final Constitution,<sup>2</sup> more specifically, in FC ss 167, 168, 169, 170 and 172. According to these provisions, jurisdiction in constitutional matters is shared between the Constitutional Court and other courts, such as the Supreme Court of Appeal and the High Courts. The crucial provision is FC s 167(3)(b), which provides that the Constitutional Court 'may decide only constitutional matters, and issues connected with decisions on constitutional matters'. This provision links the Constitutional Court's jurisdiction to the term 'constitutional matter', which in turn clearly indicates that the Constitutional Court was conceived as a court of limited rather than plenary jurisdiction.

If the Constitutional Court's jurisdiction had covered every possible matter, then a chapter on the jurisdiction of the Court would not have had much relevance. The inclusion of the term 'constitutional matter', however, means that prospective applicants to the Constitutional Court need to determine whether their case falls within the Court's jurisdiction and accordingly whether the Court will hear the case at all. A proper appreciation for the Constitutional Court's jurisdiction is therefore the first criterion of success in any matter brought to the Court. Whether seeking leave to appeal or approaching the Court directly, parties are required, in addition to establishing the substantive merits of their case, to establish its constitutional dimension.<sup>3</sup> It is for this reason that this chapter is the first in a series of chapters in this work dealing with different aspects of constitutional litigation.

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1 *Ewing McDonald & Co Ltd v M&M Products* 1991 (1) SA 252 (A), 256G.

2 Constitution of the Republic of South Africa, 1996 (hereafter 'the Final Constitution' or 'FC').

Once the Constitutional Court assumes jurisdiction, the applicant faces the possibility that the Constitutional Court may not hear the matter because it is not in the interests of justice for it to do so. Only if this question is answered in

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the affirmative will the Court consider whether the other procedural preconditions for deciding the case have been met.<sup>4</sup> The Court may thereafter deal with questions of standing, ripeness and mootness,<sup>5</sup> and the possible participation of *amici curiae*.<sup>6</sup>

When the Constitutional Court was established by the Interim Constitution of 1993<sup>7</sup> the intention was not to replace the Appellate Division (as the Supreme Court of Appeal was then known), but to supplement it with a specialized new institution whose powers would be limited to adjudicating issues arising under the Final Constitution. The reason for this was political: it was felt that judges who had been appointed under apartheid should not be the custodians of the new democracy. The Appellate Division, and indeed the judiciary generally, were regarded as indelibly tainted by apartheid, and thus not well suited to hear cases brought under the new Constitution.<sup>8</sup> On the other hand, the Appellate Division and the Constitutional Court were placed on the same hierarchical level, and neither court could hear appeals from the other. The Final Constitution changed this arrangement, giving to the other courts, including the Supreme Court of Appeal, jurisdiction in constitutional matters, while leaving the final word to the Constitutional Court.

To clarify the different roles that the High Courts, the Supreme Court of Appeal and the Constitutional Court would play, the framers of both the Interim and the Final Constitutions decided not to make the jurisdiction of the Constitutional Court

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3 See Carole Lewis 'Reaching the Pinnacle: Principles, Policies and People for a Single Apex Court in South Africa' (2005) 21 *SAJHR* 509, 519.

4 See Kate Hofmeyer 'Rules and Procedure in Constitutional Matters' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 5.

5 See Cheryl Loots 'Standing, Ripeness and Mootness' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 7.

6 See Geoff Budlender 'Amicus Curiae' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 8.

7 Constitution of the Republic of South Africa, 1993 (Interim Constitution).

8 See Johann van der Westhuizen 'The Protection of Human Rights and a Constitutional Court for South Africa: Some Questions and Ideas, with Reference to the German Experience' (1991) 24 *De Jure* 1, 5-6; Patric Mzolisi Mtshaulana 'The History and Role of the Constitutional Court of South Africa' in Penelope Andrews & Stephen Ellmann (eds) *The Post-Apartheid Constitutions* (2001) 535; Lewis (supra) at 10; Arthur Chaskalson 'Constitutional Courts and Supreme Courts — A Comparative Analysis with Particular Reference to the South African Experience' in Ingolf Pernice, Juliane Kokott & Cheryl Saunders (eds) *The Future of the European Judicial System in a Comparative Perspective* (2006) 97, 100.

discretionary, but to limit it in a substantial way. In the Interim Constitution this was achieved through a provision that the Constitutional Court should have jurisdiction in the Republic as the court of final instance over all matters relating to the 'interpretation, protection and enforcement of the provisions of this Constitution' (IC s 98(2)). In the Final Constitution, this limitation is contained in FC s 167(3)(b), which provides that the Constitutional Court may decide only 'constitutional matters'.

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This jurisdictional limitation distinguishes the South African Constitutional Court from supreme courts in most other countries with a common-law tradition, where court proceedings typically progress to a single judicial body, irrespective of whether the country has a supreme-law Constitution with a fully fledged Bill of Rights (like the USA, Canada, India or Ireland), a supreme-law constitution with some (express or implied) constitutional rights (like Australia), or a Bill of Rights that gives the courts the power to declare legislation incompatible with a particular right or rights, but not the power to strike down legislation (like New Zealand or the UK). Instead, the prototype for a separate court with limited constitutional jurisdiction was the German Federal Constitutional Court,<sup>9</sup> whose influence on the South African model may be attributed to these two countries' shared history of totalitarianism, and the concomitant desire to make a clean break with the past.<sup>10</sup>

A decision to establish a specialist constitutional court is invariably contested. During the drafting of the 1949 German Constitution, the choice between a separate Constitutional Court and a single Supreme Court was very controversial.<sup>11</sup> Eventually, the proposal for a separate Constitutional Court carried the day, at least in part because it was felt that the quality of the ordinary courts' jurisprudence, based as it was on 'pure law' adjudication, would be compromised if they became involved in the more 'political' cases that a Constitutional Court would have to decide.<sup>12</sup> In South Africa, too, the Law Commission and the judiciary

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9 The idea of such a separate court is not a German invention, but was first used in Austria in 1920. Hans Kelsen, who later became internationally famous for his writings in international law and legal theory, was very influential in the establishment of the specialized Austrian Constitutional Court. For a historic overview and international comparison, see Georg Schmitz 'The Constitutional Court of the Republic of Austria 1918-1920' (2003) 16 *Ratio Juris* 240; Stanley L Paulson 'Constitutional Review in the United States and Austria: Notes on the Beginnings' (2003) 16 *Ratio Juris* 223. After the end of the Second World War, other European countries with a civil law tradition have also set up separate Constitutional Courts, notably Austria (in reviving the earlier tradition) and Italy. Others followed after breaking away from authoritarian rule (Spain, 1978 and Portugal, 1982). More Constitutional Courts in Europe have been set up after the end of the Cold War in middle and eastern European states, such as Poland and Hungary. The latter drew heavily on the German experience. See Wojciech Sadurski *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (2005).

10 On 'the Bundesverfassungsgerichtm' see Penuell Maduna 'Judicial Review and Protection of Human Rights Under a New Constitutional Order for South Africa' (1989) 21 *Columbia Human Rights Law Review* 73, 83; Marius Wiechers 'Regional Government in the New South Africa: The Role of Courts' (1991) 54 *THRHR* 618, 619-21; Johann van der Westhuizen 'The Protection of Human Rights and a Constitutional Court for South Africa: Some Questions and Ideas, with Reference to the German experience' (1991) 24 *De Jure* 1; Kader Asmal 'Constitutional Courts — a Comparative Survey' 1991 *CILSA* 315, 320; Johan Kruger 'A Constitutional Court for South Africa' (1993) 6(1) *Consultus* 13, 17-18.

11 The first drafting conference, the 'Herrenchiemsee Convent' (August 1948), could not reach agreement on this matter and left the decision 'explicitly' open. Eventually, the drafting body of the Grundgesetz, the so-called 'Parliamentary Council' (*Parlamentarischer Rat*), agreed in December 1948 to create a separate Constitutional Court.

expressed deep scepticism about the introduction of a separate Constitutional Court,<sup>13</sup> but the desire for a new institutional beginning proved to be too strong.

The decision to create a new Constitutional Court inevitably entails a decision about which matters the new court should be able to hear. The fundamental policy choice here is between enumerating a list of the disputes the Constitutional Court may decide and introducing an umbrella term to encompass all possible disputes. Obviously, South Africa (at least in the Final Constitution) opted for the latter choice: the Constitutional Court may decide only 'constitutional matters'.<sup>14</sup> As long as the Constitutional Court's jurisdiction is defined through that phrase, there is a need to distinguish between constitutional and non-constitutional matters. This chapter will therefore focus on the jurisdiction of the Constitutional Court in terms of that phrase and how it has sought to define its jurisdiction in relation to it.

## 4.2 The conceptual framework for constitutional jurisdiction in South Africa

Before analyzing the constitutional provisions on jurisdiction and how the Constitutional Court has applied and interpreted them, it is useful briefly to set out how the jurisdiction of the Constitutional Court relates to its overall functioning, and how it connects to related concepts such as the standard of review the Court applies, the merits of the case and any access enquiry.

### (a) Jurisdiction and the institutional function of the Constitutional Court

The jurisdiction of the Constitutional Court reflects, as it should, the function that the Court performs under the Final Constitution.

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12 For documentation on the drafting history of the Grundgesetz, see (1951) 1 *Jahrbuch des öffentlichen Rechts (Neue Folge)* 669-72; and for commentary on the drafting history, see Hans-Peter Schneider (ed) *Das Grundgesetz — Dokumentation seiner Entstehung* Vol 23/1 (1999). For an English account of the establishment of the German Federal Constitutional Court, see Martin Borowski 'The Beginnings of Germany's Federal Constitutional Court' (2003) 16 *Ratio Juris* 155.

13 South African Law Commission *Project 58: Group and Human Rights — Working Paper 25* (1989) 445. Cf Michael McGregor Corbett, *Memorandum Submitted on Behalf of the Judiciary of South Africa on the Chapter on the Administration of Justice in the Draft Interim Constitution*, to the Technical Committee on Fundamental Rights of the Multi-Party Negotiation Process, 3rd September 1993. See also South African Law Commission, *Project 77 — Report on Constitutional Models* (1992) Vol III at paras 22.218-22.230 (A special 'constitutional chamber' of the Appellate Division could serve as the Constitutional Court.)

14 The jurisdiction of most other Constitutional Courts seems to be defined by enumerating the types of disputes they are empowered to adjudicate. That is, for example, the situation in Spain (see art 161 of the Constitution of Spain (1978)), Poland (see art 188 of the Constitution of Poland (1997)) and Germany (see art 93 of the German Basic Law (1949)). In early drafts of the German Grundgesetz, it was suggested that the Federal Constitutional Court should have jurisdiction in 'constitutional disputes' between federal organs of state. This phrase was later abandoned, because it was seen to be too unspecified and, it was argued, would only require the Court to decide 'political questions'. This is why in the Grundgesetz today the disputes falling within the jurisdiction of the Federal Constitutional Court are each specified and not collated under a single heading. See Grundgesetz in 1 (1951) *Jahrbuch des öffentlichen Rechts (Neue Folge)* 669-72 (On the drafting history).

The South African Constitutional Court is a court with all-encompassing, procedural and substantive review powers with regard to all law and conduct, including the conduct of all branches of government and (to a certain extent) of natural

and juristic persons as well. This description is, in a nutshell, the essence of constitutional review: the judicial control and limitation of public and (certain forms of) private power by reference to the supreme law. The status of the Constitutional Court is thus similar to the Supreme Courts of the USA and Canada, to almost every court that calls itself a 'Constitutional Court' worldwide, and to international courts such as the European Court of Human Rights and the European Court of Justice. Its comprehensive review powers distinguish the Constitutional Court of South Africa from the House of Lords in the UK, where Parliament is supreme and statutes may not be struck down for inconsistency with the Human Rights Act, and the Conseil Constitutionnel in France, which may only review statutes *before* they enter into force.

The institutional function of the Constitutional Court is reflected in FC ss 172(5) and 167(5). These provisions deal with the validity of presidential conduct and Acts of Parliament. The status of the Constitutional Court as an institution on an equal footing with the other branches of government is reflected in the provisions on exclusive jurisdiction in FC s 167(4). And the Constitutional Court's superior role with regard to other courts is provided for in its competence to determine whether a matter is a constitutional matter (or whether an issue is connected with a decision on a constitutional matter) in FC s 167(3)(c).

In addition to relying on these express provisions, the Constitutional Court has been careful to safeguard its review powers even where the constitutional text is silent. Thus, in *Pharmaceutical Manufacturers*, the Court made it clear that the Final Constitution sets the review standard for executive and administrative action,<sup>15</sup> and, in *Carmichele*, the Court showed that it would supervise other courts' interpretation and application of the ordinary law in terms of the Final Constitution.<sup>16</sup> These decisions, as argued below, have significant consequences for the Constitutional Court's jurisdiction.

The jurisdiction of the Constitutional Court is not determined only by the *scope* of its review powers, but also by the *standard* of review it applies. It is in this connection that the 'political question doctrine' becomes relevant, a term that in the United States has been used to describe a form of judicial restraint amounting to a refusal to assume jurisdiction in certain cases.<sup>17</sup>

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15 *Pharmaceutical Manufacturers Association of SA in re: the Ex Parte Application of the President of the RSA & Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC).

16 *Carmichele v Minister of Safety and Security & Another* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC).

17 It is beyond the scope of this chapter to provide a comprehensive insight into the history and status of this doctrine. For leading contributions, see Louis Henkin 'Is There a 'Political Question' Doctrine?' (1976) 85 *Yale LJ* 597; Mark Tushnet 'Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine' (2002) 80 *N Car LR* 1203. See also Sanele Sibanda & Sebastian Seedorf 'Separation of Powers' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 12 at § 12.3(d)(ii)(aa).

The Constitutional Court is first and foremost a court of law. It is incorporated in the court structure (FC s 166(a)) as the first-mentioned court in the judicial branch of government, underling its superior role. Of the Constitutional Court judges, at least four must at all times be persons who were judges at the time they were appointed to the Constitutional Court (FC s 174(5)). By means of this rule, the Final Constitution intends to ensure that not only legal, but also distinctively judicial experience is reflected in the Court's jurisprudence. Equally, from the emphasis placed on the status of the Constitutional Court as a court, it follows that the Constitutional Court may decide only legal disputes. It is not expected or empowered to decide political or moral disputes.

These principles have been outlined by the Constitutional Court on several occasions. In the *First Certification Judgment*,<sup>18</sup> the Court clarified its function:

First and foremost it must be emphasised that the Court has a judicial and not a political mandate. Its function is clearly spelt out in [IC s 71(2)]: to certify whether all the provisions of the [draft text of the Final Constitution] comply with the [constitutional principles]. That is a judicial function, a legal exercise. Admittedly a constitution, by its very nature, deals with the extent, limitations and exercise of political power as also with the relationship between political entities and with the relationship between the state and persons. But this Court has no power, no mandate and no right to express any view on the political choices made by the [Constitutional Assembly] in drafting the [Final Constitution], save to the extent that such choices may be relevant either to compliance or non-compliance with the [constitutional principles]. Subject to that qualification, the wisdom or otherwise of any provision of the [Final Constitution] is not this Court's business.<sup>19</sup>

This finding was later confirmed in another context:

This case is not about the merits or demerits of the provisions of the disputed legislation. That is a political question and is of no concern to this Court. What has to be decided is not whether the disputed provisions are appropriate or inappropriate, but whether they are constitutional or unconstitutional.<sup>20</sup>

This dictum emphasizes the distinction between a political and a judicial role, not with regard to the subject matter of a dispute, but with regard to the review standard — the normative yardstick that is and needs to be applied. Political expediency is irrelevant in the judicial decision-making process. Instead, the Court, in applying the Constitution as the sole review standard, determines the constitutional framework for political decision-making.

A distinction between the subject matter of a case and the applicable review standard is essential because constitutional law is inevitably about the social and political order of a country and its society. To expect a constitutional order to be

18 *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC).

19 *First Certification Judgment* (supra) at para 27.

20 *United Democratic Movement v President of the Republic of South Africa & Others* (2) 2003 (1) SA 495 (CC), 2002 (11) BCLR (CC) at para 11.

pure and separate from political developments is an illusion, and to hope that a Constitutional Court will 'stay out of politics' is futile. In Germany, the Bundesverfassungsgericht, in 1952 (the first year of operation of the Court), published a memorandum on its status, in which it proclaimed its institutional independence from the Department of Justice.<sup>21</sup> In this memorandum, the Court defined its distinctive role with reference to its institutional function in the political process: it had to deal with 'political legal disputes' and 'political law', meaning disputes in which political decisions are the subject of judicial assessment, measured against existing legal norms.<sup>22</sup> In this way, the Bundesverfassungsgericht adopted the view that one cannot separate legal from political questions by reference to subject matter since questions of constitutional law are inherently political.

A similar view has been adopted by the South African Constitutional Court. In holding in *Doctors for Life* that the decision whether Parliament has fulfilled its obligation to facilitate public involvement in the legislative process is 'pre-eminently a "crucial political" question', it did not draw the conclusion that it was prevented from reviewing that question. Instead, it held that it would have exclusive jurisdiction in the matter.<sup>23</sup> The fact that a decision has political implications does not prevent the Court from making a decision, but only requires the Court to apply a *legal* standard in making the decision.<sup>24</sup> In other words, the Constitutional Court is not asked to make political decisions, it is asked to ensure that political decisions comply with the (at times limited) standards the Final Constitution sets.

The same is true for the role of Constitutional Court judges. Their decisions will in many cases have political implications. They imply value and moral judgements. The judges are not asked to ignore the political and moral consequences of their decisions — quite the opposite. The judges are required to base their decisions on the Final Constitution and make pronouncements on the Final Constitution's values and moral choices — not on values they may hold themselves.

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OS 06-08, ch4-p9

The Constitutional Court is a court of law with a distinctive political function. That neither detracts from its status as a court, nor denies or downplays the political role it plays.

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21 *Die Stellung des Bundesverfassungsgerichts*, Denkschrift des Bundesverfassungsgerichts vom 27. Juni 1952, in: 6 (1957) *Jahrbuch des öffentlichen Rechts (Neue Folge)* 144-48.

22 'Die Verfassungsgerichtsbarkeit hat es mit einer besonderen Art von Rechtsstreitigkeiten zu tun, nämlich den 'politischen' Rechtsstreitigkeiten. Unter politischen Rechtsstreitigkeiten sind dabei solche Rechtsstreitigkeiten zu verstehen, bei denen über politisches Recht gestritten wird und das Politische selbst an Hand der bestehenden Normen zum Gegenstand der richterlichen Beurteilung gemacht wird.' Ibid at 144-45.

23 *Doctors for Life International v The Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC) at para 21.

24 From the Constitutional Court's decisions on socio-economic rights is it clear that the Court will not refrain from striking down government decisions just because they have a policy basis. Instead, the Court has made clear that it will test policy decisions of the executive against the Final Constitution. See *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC); *Grootboom v Government of the Republic of South Africa & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC); *Minister of Health & Others v Treatment Action Campaign & Others* (2) 2002 (5) SA 721 (CC), 2002 (10) BCLR 1075 (CC).

The Final Constitution stands as a symbol for the transformation of society from might to right. Against that background, the Constitutional Court has to place the 'right' — the constitutional imperatives and obligations — in the centre of its dispute-resolution processes. Might is a factor the Court has to take into account when it imposes different obligations on the parties: the state possesses its conceptually infinite resources and its monopoly on the legitimate use of force, while the individual litigant often has very limited resources and a much higher degree of vulnerability. The Court may also adopt different standards of review: these different standards allow parties greater latitude with regard to the constitutionality of their conduct. Such differences in the standard of review may, in effect, lead to greater 'might' in certain circumstances. But might as such is no basis for the Court's ruling; it can only be collateral to a holding based on a legal finding. A party (or even both parties to a dispute) may approach the Court to get an answer to the question of what it may do or may not do according to the law. And the Court is asked to give an answer only with regard to that legal yardstick. As long as the Court's answer is based on constitutional criteria, it fulfils its mandate as a court of law with special constitutional jurisdiction.

The second important institutional function of the Constitutional Court is to promote the transformative agenda of the Final Constitution. The Interim Constitution and the Final Constitution were adopted not as an embodiment of the social status quo, but with an almost revolutionary purpose: to provide a historic bridge between the past of a deeply divided society and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans.<sup>25</sup> This purpose distinguishes the South African Constitution from other constitutions:

In some countries, the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.<sup>26</sup>

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This purpose of the Final Constitution has a direct impact on the functioning of the Constitutional Court:

The Constitutional Court occupies a special place in this new constitutional order. It was established as part of that order as a new court with no links to the past, to be the highest court in respect of all constitutional matters, and as such, the guardian of our Constitution.<sup>27</sup>

Thus, it was not only that old-order judges could not be relied upon to give effect to the fundamental rights enshrined in the new Interim Constitution. The new

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25 See the clause on National Unity and Reconciliation in the Interim Constitution.

26 *S v Makwanyane & Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 262 (per Mahomed J).

27 *Pharmaceutical Manufacturers* (supra) at para 55.

Constitutional Court was also entrusted with an active role in shaping the entire legal system and bringing it into line with the new Constitutions.

The Constitutional Court's transformative function has a jurisdictional dimension as well. It is against this backdrop that the Constitutional Court has been eager to take on a supervisory role with regard to the rest of the judiciary. The Court most often relies FC s 39(2) in discharging this function. But if the main focus of the Constitutional Court is to ensure that the law in general develops and is practised in line with the Final Constitution, then it follows that the Court should not be burdened with cases in which no constitutional guidance needs to be given. To be the guardian of the Final Constitution is in itself a formidable task. There is no need to engage the Court in litigation where the Final Constitution is not implicated and where there is thus nothing to guard. As I argue below, this is an important consideration when deciding what constitutes a constitutional matter.

### **(b) The merits of a case and the dividing line between jurisdiction and access to the Constitutional Court**

In several judgments, the Constitutional Court has clearly distinguished between the 'threshold enquiry'<sup>28</sup> into its jurisdiction and the question of whether it is in the interests of justice for it to hear the case.<sup>29</sup> In *Ingledeu v The Financial Services Board*, the Constitutional Court articulated this distinction in a way that came close to a checklist:<sup>30</sup> 'Leave to appeal will be granted if, firstly, the application raises a constitutional matter and secondly, it is in the interests of justice to grant leave to appeal.'<sup>31</sup>

An even stricter distinction has to be made between issues of jurisdiction and the interests of justice, on the one hand, and the merits of the case, on the other. The enquiry into jurisdiction is exhausted once a court has established that it is the competent forum to deal with the matter — not when it decides that the

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claim has merit. Earlier findings in this regard see a distinction between jurisdiction and the merits of the case as a matter of practicality: to avoid lengthy discussions of the legal arguments when the claim may in any case fail on jurisdictional grounds.<sup>32</sup> Later, the Court adopted a more categorical approach. In *Fredericks & Others v MEC for Education and Training, Eastern Cape & Others*, O'Regan J, writing for a unanimous court, simply stated: 'Whether the applicants' claim has merit or not can

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28 *Fraser v ABSA Bank Limited* 2007 (3) SA 484 (CC), 2007 (3) BCLR 219 (CC) at para 35.

29 See *National Education Health & Allied Workers Union v University of Cape Town & Others* 2003 (3) SA 1 (CC), 2003 (2) BCLR 154 (CC) ('NEHAWU') at paras 13, 25.

30 2003 (4) SA 584 (CC), 2003 (8) BCLR 825 (CC).

31 *Ibid* at para 13.

32 See *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 1999 (2) SA 14 (CC), 1999 (2) BCLR 175 (CC) (*SARFU I*) at para 21 ('The record and judgment [of the High Court] in this matter run to some thousands of pages and it is important that the question of the proper forum should be determined before the record and detailed arguments on the merits are prepared'.)

have no bearing on whether their claim raises a constitutional matter.<sup>133</sup> In *Fraser v ABSA Bank Limited*, the Court confirmed that '[t]he acknowledgement by this Court that an issue is a constitutional matter . . . does not have to result in a finding on the merits of the matter in favour of the applicant who raised it.<sup>134</sup> In another case, Langa CJ held that it was 'axiomatic' that the substantive merits of a claim cannot determine whether a court has jurisdiction to hear it.<sup>135</sup>

However, this 'axiomatic' distinction has not been followed in every case. In at least two judgments, the Court held that there were doubts whether the case raised a constitutional matter, but nevertheless approached the matter as if a constitutional issue were involved, showing that the Court will at times simply assume jurisdiction to allow it to deal with the merits: '[W]e prefer not to express an opinion on the question whether this case raises a constitutional matter but will assume, without deciding, that the matter does raise a constitutional issue.<sup>136</sup>

The Court does not only on occasion skip the first leg of its enquiry so that it is not barred from dealing with the merits. Sometimes, the distinction between jurisdiction, the interests of justice and the merits of a claim is somewhat blurred. In two of the very few cases thus far in which the Constitutional Court has *explicitly* declined jurisdiction — *S v Boesak*<sup>37</sup> and *Phoebus Apollo Aviation v Minister of Safety and Security*<sup>38</sup>— the Court engaged fairly extensively with the merits of the case before eventually coming to the conclusion that no constitutional matter was

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33 2002 (2) SA 693 (CC), 2002 (2) BCLR 113 (CC) at para 11.

34 2007 (3) SA 484 (CC), 2007 (3) BCLR 219 (CC) at para 40; see also, *Fredericks & Others v MEC for Education and Training, Eastern Cape & Another* 2002 (2) SA 693 (CC), 2002 (2) BCLR 113 (CC) at para 11 ('whether the applicants' claim has merit or not can have no bearing on whether their claim raises a constitutional matter'); *Minister of Safety and Security v Luiters* 2007 (2) SA 106 (CC), 2007 (3) BCLR 287 (CC) at para 21 ('When determining whether an argument raises a constitutional issue, the Court is not strictly concerned with whether the argument will ultimately be successful'.)

35 Langa CJ in a separate concurring judgment in *Chirwa v Transnet Limited & Others* 2008 (4) SA 367 (CC), 2008 (3) BCLR 251 (CC) at para 155.

36 *Van der Merwe & Another v Taylor NO & Others* 2008 (1) SA 1 (CC), 2007 (11) BCLR 1167 (CC) at para 106. Also see *Mphahlele v First National Bank of South Africa Ltd.* 1999 (2) SA 667 (CC), 1999 (3) BCLR 253 (CC) at para 7.

37 2001 (1) SA 912 (CC), 2001 (1) BCLR 36 (CC).

38 2003 (2) SA 34 (CC), 2003 (1) BCLR 14 (CC).

raised.<sup>39</sup> In *Boesak*, the Court held that the right to remain silent in terms of FC s 35(1)(a) is not impaired when a trial court draws negative inferences from the fact that the accused fails to challenge evidence that is brought against him.<sup>40</sup> In so doing, the Court stated quite explicitly that 'the evaluation of the evidence by the Supreme Court of Appeal did not breach the applicant's constitutional right to silence'.<sup>41</sup> The *Boesak* Court may have had good arguments for that conclusion, but it cannot be denied that the statement touches on the substantive merits of the claim.

The difference between a court's examination of its jurisdiction and the merits is that the former involves the definition of the subject matter of the case — a delineation of the questions the court is asked to decide (whether of fact or law) — while the merits comprise the answers the court gives to those questions. In *Boesak*, the Constitutional Court answered the question whether the claimant's right to silence had been breached. It did so in the negative, but nevertheless as a result of a substantive analysis, not merely as an exercise in deciding whether it was competent to conduct such an analysis. If the Constitutional Court had wanted to stay within the jurisdictional stage of the enquiry it should have said that the questions the claimant raised did not involve a constitutional matter, not that the answers did not.

The *Boesak* Court went on to state that the applicant could not successfully challenge his conviction for theft on the basis that this violated his right not to be deprived of freedom without just cause (FC s 12(1)(a)) because such a conviction constitutes just cause for depriving a person of personal freedom.<sup>42</sup> Here again, while the Court delivered a (convincing) interpretation of the Final Constitution, this gloss on the text did not resolve a jurisdictional question. It went to the very heart of the dispute. At some stage, the Court seems to have lost track of what it was doing: although the Court dismissed all the complaints raised by the applicant on the basis that they were 'without merit', the conclusion it drew was that the applicant did not raise 'a constitutional matter . . . over which this Court has jurisdiction'.<sup>43</sup>

In *Phoebus Apollo Aviation* the Court's engagement with the merits was not as explicit as in *Boesak*. Here, the applicant had tried to hold the Minister concerned vicariously liable for the theft of money by three dishonest policemen, acting

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39 See *Van Vuuren v S* 2005 (7) BCLR 639 (CC) (Court declined jurisdiction by simply applying its holding in *Boesak*.) In several other cases, the Constitutional Court found that one or some of the issues raised are outside its jurisdiction. See *Shabalala & Others v Attorney-General, Transvaal, & Others* 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC) at para 8; *Occupiers of 51 Olivia Road, Berea Township & Others v City of Johannesburg & Others* 2008 (3) SA 208 (CC), 2008 (5) BCLR 475 (CC) at para 6 ('I would suggest that the standard for deciding whether or not to consider applications for leave to appeal should also apply when we are to decide whether to consider particular issues in an application for leave to appeal.')

40 *Boesak* (supra) at paras 23-29.

41 *Ibid* at para 29.

42 *Ibid* at para 38.

43 *Ibid* at paras 39-40.

under their assumed authority as police officers. The applicant asked the court to develop the common law in terms of FC s 39(2) and also invoked other sections of the Final Constitution in support of its case. The Court explicitly declined jurisdiction because the application of the common-law doctrine of vicarious liability had to be regarded as a merely factual matter, and because 'no convincing argument' had been advanced to establish why the common law should be developed so as to accommodate the claim.<sup>44</sup>

That may well have been so, but the Court's reasoning itself engages the merits of the case. The finding that the applicant's arguments were not convincing entails an assessment of these arguments in terms of the Constitution and therefore falls squarely within the Constitutional Court's constitutional mandate. The Court might — and indeed should — have assumed jurisdiction to decide the matter with reference to its responsibility to ensure that the development of the common law takes place in accordance with FC s 39(2), and thereafter found that both the doctrine and its application by the lower courts were in line with the Bill of Rights. For this reason I agree with Frank Michelman's comment elsewhere in this treatise that the Court's dismissal of the case for lack of jurisdiction was hardly an irresistible dictate of strict logic.<sup>45</sup>

It can be argued that the Constitutional Court decision to decline jurisdiction is equally confusing in a third case: *Van der Walt v Metcash Trading Limited*.<sup>46</sup> Here, the Court was faced with a litigant who lost his claim in the Supreme Court of Appeal even though, one day later, a different panel of the same court came to the opposite conclusion in a case identical to the first. Understandably, the losing litigant tried to rectify this seemingly unjust outcome by appealing to the Constitutional Court. The Court dismissed the application.

At no point in *Metcash* does the Court actually accept or refuse jurisdiction. Goldstone J, writing for the majority, holds that the question to be decided is whether the fact that the Supreme Court of Appeal came to different conclusions in two identical cases was 'unconstitutional'.<sup>47</sup> In answering this question, he interprets FC s 34 (access to courts) and FC s 9 (equality), and concludes that there is 'no merit in the reliance upon section 34 of the Constitution' and that 'section 9(1) of the Constitution has not been violated'.<sup>48</sup> This line of reasoning strongly suggests that the Court assumed jurisdiction and dismissed the case on its merits.

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Halfway through the judgment, however, Goldstone J, almost by way of parenthesis, states that the difference in outcome between the two cases does not

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44 *Phoebus Apollo Aviation* (supra) at para 6.

45 Frank Michelman 'The Rule of Law, Legality and Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 11 at § 11.2(b)(i).

46 2002 (4) SA 317 (CC), 2002 (5) BCLR 454 (CC).

47 *Ibid* at para 11.

48 *Ibid* at paras 14, 25, respectively.

raise a 'constitutional question'.<sup>49</sup> At another point, he states that decisions of the Supreme Court of Appeal enjoy finality only in 'non-constitutional matters'.<sup>50</sup> But nowhere in the majority judgment does the Court explicitly reject jurisdiction because the application does not raise a constitutional matter in terms of FC s 167(3). Rather, it is in the minority judgements that it becomes clear that lack of jurisdiction was apparently the basis for the majority decision. Madala J thus dissents on the grounds that the majority judgment on the basis that '[t]he disparate orders of the SCA themselves raise the constitutional matter'.<sup>51</sup> He is also the only judge in the matter to sustain the conceptual distinction between jurisdiction and the merits of the case: 'It seems that this Court is duty-bound to enquire whether the disparate outcomes raise a constitutional matter. We must *then* decide whether this outcome is unconstitutional or not.'<sup>52</sup>

Madala J's careful observations about the need to distinguish between jurisdiction and constitutionality notwithstanding, the inevitable conclusion to be drawn from the decisions in *Metcash*, *Boesak* and *Phoebus Apollo* is that a case may sometimes simply be too weak on the merits to engage the Constitutional Court's jurisdiction. At this point we need to return to the distinction between jurisdiction and the Court's consideration of whether it is in the interests of justice to grant leave to appeal. The Court's occasional engagement with the merits of a case as a means to determine its jurisdiction is similar to the approach it has developed in this latter context.

It is settled law that a claim's prospects of success are an important factor in the Court's determination of whether it is in the interests of justice to grant leave to appeal.<sup>53</sup> The Court has used various criteria to assess this issue. It has said, for example, that an applicant would have to show that there are prospects that the Court would 'reverse or materially alter' the lower court's decision.<sup>54</sup> In criminal cases, the holding of the lower court must have been crucial for the conviction and not merely some point of law.<sup>55</sup> Assessing the prospects of success of a claim inevitably implies an assessment of whether the applicant potentially has a case. At the heart of the assessment, therefore, lies a more or less abstract engagement with the merits of the case.

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49 *Metcash* (supra) at para 14.

50 *Ibid* at para 8.

51 *Ibid* at para 63; also see Ngcobo J's statement at para 32 and Sachs J's reasoning at para 81.

52 *Ibid* at para 72 (my emphasis).

53 *Boesak* (supra) at para 12.

54 *Pennington & Another v S* 1997 (4) SA 1076 (CC), 1997 (10) BCLR 1413 (CC) at para 52, cited with approval in *Boesak* at para 12. The phrase 'reverse or materially alter the judgment' of the court a quo was also used in Rule 18(6)(a)(iii) of the 1998 Constitutional Court Rules, but is not part of the 2003 rules.

55 *S v Bierman* 2002 (5) SA 243 (CC), 2002 (10) BCLR 1078 (CC) at para 9.

In its early judgments, before the 1998 Constitutional Court Rules of Procedure came into force, the Court quite frankly admitted that the merits play a role in the assessment of a claim's prospects of success during the interests of justice enquiry. In *Pennington & Another v S*,<sup>56</sup> the Court (per Chaskalson CJ) held that '[the] procedure [of granting leave to appeal] requires a consideration of the merits of the appeal and is an exercise of the appellate jurisdiction vested in the Court'.<sup>57</sup> This consideration was justified, the Court stated, because:

'Leave to appeal' is . . . a requirement needed to 'protect' the process of this Court against abuse by appeals *which have no merit*, and it is in the 'interests of justice' that this requirement be imposed, for if appeals without merit were allowed against decisions of the Supreme Court of Appeal, justice would be delayed.<sup>58</sup>

Although the Court has said that it will not apply a full-blown test of constitutionality during the interests of justice stage of its enquiry (but rather inquire whether an appeal is 'viable'<sup>59</sup>), the reasonable prospects of success test is still applied. In *Pennington*, Chaskalson CJ not only laid out rules for the general procedure of appeals. He also dismissed the appeal 'in the light of the argument on the merits'.<sup>60</sup>

The Court has continued to use this approach in more recent judgements, albeit in a more subtle way. It still sometimes dismisses applications for leave to appeal because they 'have no prospects of success on the merits'<sup>61</sup> and continues to state that, in determining the interests of justice, 'each case is considered on its own merits'.<sup>62</sup> More often however, the Court proceeds directly to an in-depth examination of the applicable constitutional provision(s) and ordinary law, and only at the very end concludes that — because of its findings of substance — the application for leave to appeal should be granted or dismissed.<sup>63</sup>

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A perfect illustration of this structure of analysis appears in *Du Toit v Minister of Transport*. In *Du Toit*, the applicant challenged the amount of compensation awarded

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56 1997 (4) SA 1076 (CC), 1997 (10) BCLR 1413 (CC).

57 Ibid at para 27.

58 Ibid at para 26 (my emphasis). Against that background the court made the order that applications for leave to appeal will have to show prospects that the Constitutional Court 'will reverse or materially alter' the decision of the lower court.

59 See *Beyers v Elf Regters van die Gondwetlike Hof* 2002 (6) SA 630 (CC), 2002 (10) BCLR 1001 (CC) at para 11 ('Die betrokke hof loop nie 'n beslissing aangaande die deugde van die voorgenome appèl vooruit nie, maar kyk slegs of die appèl *lewensvatbaar* is. As daar maar net 'n redelike vooruitsig op sukses is, word verlof tot appèl toegestaan.')

60 *Pennington* (supra) at paras 28-44.

61 See *Xinwa & Others v Volkswagen of South Africa (Pty) Ltd* 2003 (4) SA 390 (CC), 2003 (6) BCLR 575 (CC) at para 17. In a similarly clear manner, the Constitutional Court rejected an application for leave to appeal in *Concerned Land Claimants Organisation of PE v PE Land and Community Restoration Association & Others*. 2007 (2) SA 531 (CC), 2007 (2) BCLR 111 (CC).

62 See *Union of Refugee Women & Others v Private Security Industry Regulatory Authority & Others* 2007 (4) SA 395 (CC), 2007 (4) BCLR 339 (CC) at para 21.

by the Supreme Court of Appeal for the expropriation of a quantity of gravel from his farm.<sup>64</sup> Mokgoro J, writing for the majority, treated the decision whether leave to appeal should be granted as a 'preliminary question' and decided it according to fairly abstract criteria, such as the importance of the subject matter of the dispute and the need to create certainty in the application of the Expropriation Act.<sup>65</sup> Mokgoro J thus dealt with the granting of leave to appeal *before* engaging with the merits — and eventually rejected the claim. Langa ACJ, in a dissenting judgment in which three judges concurred, dismissed the application for leave to appeal on the grounds that it bore no prospects of success.<sup>66</sup>

The majority and minority in *Du Toit* therefore reached the same conclusion, i.e. that the compensation paid for the expropriation of the gravel was just and equitable. But the way in which the minority judgment phrased this finding came close to a holding that the question whether a constitutional right had been violated was crucial to the interests of justice test and not only to the later enquiry into the merits:

Given that it is our conclusion that the compensation awarded was not inconsistent with the Constitution, the applicant had no prospects of success. The applicant did not point to any other considerations relevant to the interests of justice which would suggest the application should have been granted. In my view, therefore, the application for leave to appeal should have been dismissed on this basis.<sup>67</sup>

In addition, the minority judgment seemed to suggest that the appeal should fail because no constitutional matter had been raised:

If the compensation awarded by the Supreme Court of Appeal is just and equitable as contemplated by section 25(3) of the Constitution, then the applicant has no cause for constitutional complaint, no matter how the compensation was calculated in other courts. The applicant would accordingly have no prospects of obtaining relief in this Court.<sup>68</sup>

For reasons explained below, I am quite sympathetic to the minority view that the Constitutional Court should not hear a case when there is no contention that a constitutional standard (in this case that compensation should be just and equitable) has been 'notionally' violated. Typically, however, there *is* such a contention, and the Constitutional Court must therefore engage in a preliminary analysis of the merits. In

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63 See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC). Here Sachs J, writing for a unanimous Court, delivered a carefully balanced judgment on the constitutional relationship between FC s 25 (property rights) and FC s 26 (right to housing) and a City's duties towards informal settlers within the 'leave to appeal' enquiry. In *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd*, the Court likewise discussed the merits and only afterwards reached the conclusion that leave to appeal should be granted. 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC).

64 2006 (1) SA 297 (CC), 2005 (11) BCLR 1053 (CC).

65 Act 63 of 1975 (*ibid* at para 25).

66 *Ibid* at para 57.

67 *Ibid* at para 88.

68 *Ibid* at para 85.

many cases, the level of constitutional analysis used for this assessment (whether conducted at the jurisdiction or the interests of justice stage) amounts to no more than a qualified guess. It is also possible for the Constitutional Court to decide the prospects of success question without engaging

the merits at all: such occasions arise where the lower courts have divided over the matter in question.<sup>69</sup> But in many cases, as we have seen, the Court has engaged in a full assessment of the merits before either declining jurisdiction or refusing leave to appeal, and there is no reason to suspect that it will not continue to do so again in the future.

What this means is that the dividing line between jurisdiction and access is not as clear as the Constitutional Court has sometimes proclaimed it to be. Both stages of the constitutional enquiry serve a similar purpose, i.e. ensuring that the Court hears and decides only those cases that it should hear based on the function it performs in the judicial system and the constitutional system more generally. In both the enquiry into jurisdiction and the granting of leave to appeal, the Court fulfils its constitutionally mandated role of ensuring (a) that other courts are given an opportunity to contribute to the development of constitutional law doctrine and (b) that judicial resources are not wasted.

This chapter formally deals with jurisdiction. Since the access enquiry is complementary to the jurisdiction enquiry, however, the relation between these two stages is also addressed.

## 4.3 Jurisdiction

### (a) The threshold requirement of finding a 'constitutional matter'

The Constitutional Court is a specialized court since, according to s 167(3)(b), it may decide only constitutional matters and issues connected with decisions on constitutional matters. This description of the Court's jurisdiction, which the Court itself has called a 'definition',<sup>70</sup> makes the question whether a constitutional matter is raised as a 'threshold enquiry'<sup>71</sup> in every case.

The question of what constitutes a 'constitutional matter' has preoccupied the Constitutional Court and other courts in a considerable number of judgments. It has also been discussed in the academic literature. In the case law the question at stake is usually very specific, the more general question is whether an overarching definition, or comprehensive theory, of the jurisdiction of the Constitutional Court can be derived from the Final Constitution and the Court's judgments. Additionally, the question has been asked as to whether, in a constitutional system in which the Final Constitution is supreme and its values permeate every aspect of the law, the distinction between constitutional and non-constitutional matters can be sustained.<sup>72</sup>

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69 *NEHAWU* (supra) at para 26.

70 *Alexkor Limited v Richtersveld Community & Others* 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC) at para 21.

71 See *Fraser* (supra) at para 35. In *Boesak*, it is called a 'threshold requirement' *Boesak* (supra) at para 11.

### (i) Just labels: 'constitutional matter', 'constitutional issue', 'constitutional question'

In the Constitutional Court's jurisprudence, the terms 'constitutional issue', 'constitutional question' and 'constitutional nature' are used synonymously with 'constitutional matter'.<sup>73</sup> Some judgments have also used the terms 'constitutional issue of substance'<sup>74</sup> 'constitutional substratum',<sup>75</sup> and even 'jurisdictional matter'.<sup>76</sup>

To some extent, the proliferation of terms may be explained by the inexact wording of the Interim Constitution.<sup>77</sup> IC s 98(2) stated that the Constitutional Court should have jurisdiction over all '*matters* relating to the interpretation, protection and enforcement of the provisions of this Constitution' (my emphasis). However, in IC s 102(3) (dealing with referrals of cases from the Supreme Court to the Constitutional Court), the Interim Constitution used the phrase 'constitutional and other *issues*' (my emphasis), and went on to use 'constitutional issue' for the better part of that section.<sup>78</sup>

In the judgments of the Constitutional Court, all of the above terms are still common and no distinct meaning is attached to any of them. The Final Constitution itself avoids the linguistic confusion of its predecessor and sticks to the phrase 'constitutional matter', using 'issue' only in the term 'issues connected with decisions on constitutional matters' and in FC s 167(7), where a constitutional matter is said to include 'any issue involving the interpretation, protection or enforcement of the Constitution'. This suggests that the term 'issue' connotes something narrower than

72 See Carole Lewis 'Reaching the Pinnacle: Principles, Policies and People for a Single Apex court in South Africa' (2005) 21 *SAJHR* 509. See also Frank Michelman 'The Rule of Law, Legality and Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 11 at § 11.2.

73 See, eg, *K v Minister of Safety and Security* 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC) at para 12; *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at para 59; *Lane & Fey NNO v Dabelstein & Others* 2001 (2) SA 1187 (CC), 2001 (4) BCLR 312 (CC) at para 5; *Van Der Walt v Metcash Trading Limited* 2002 (4) SA 317 (CC), 2002 (5) BCLR 454 (CC) at paras 14, 81; *S v Thebus & Another* 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC) at para 9; *Fuel Retailers Association of Southern Africa v Director General Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province & Others* 2007 (6) SA 4 (CC), 2007 (10) BCLR 1059 (CC) at para 40; *Union of Refugee Women & Others v Private Security Industry Regulatory Authority & Others* 2007 (4) SA 395 (CC), 2007 (4) BCLR 339 (CC) at para 23.

74 *Minister of Public Works & Others v Kyalami Ridge Environmental Association & Others* 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC) at para 23.

75 *Phoebus Apollo Aviation* (supra) at para 3.

76 *Prophet v National Director of Public Prosecutions* 2007 (2) BCLR 140 (CC) at para 45.

77 Act 200 of 1993.

78 To complicate matters even further, IC s 102(12) introduced the notion of 'issues of constitutionality'.

'matter', but nothing appears to turn on this. In the course of this chapter, only the term 'constitutional matter' will accordingly be used.

## (ii) The Constitutional Court has not embraced any concept of 'constitutional matter'

How has the Constitutional Court itself approached the apparent contradiction that it has, on the one hand, a far-reaching transformative task and, on the other, only a limited jurisdiction to decide constitutional matters? To start with, it has

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identified the important connection that exists between any concept of its jurisdiction (following from its institutional imperatives) and the major criterion for triggering that jurisdiction, i.e. that the case should involve a 'constitutional matter'. The Constitutional Court has stated that it regards its jurisdiction as 'clearly . . . extensive'<sup>79</sup> and that it would be inappropriate to construe the term 'constitutional matter' narrowly.<sup>80</sup> The second statement follows logically from the first as it would be impossible for the Court to have jurisdiction in respect of a wide range of cases unless the term used to define its jurisdiction were interpreted in such a way as to cater to that wide range.

Apart from these statements, however, the Constitutional Court has thus far not provided an all-embracing definition or a principled understanding of the term 'constitutional matter'. Instead, the Court has decided on a largely *ad hoc* basis whether particular cases have involved constitutional matters or not. In *Boesak*, the Constitutional Court went so far to say that '[t]he Constitution offers no definition of a constitutional matter, or an issue connected with a decision on a constitutional matter. Section 167(3)(c) leaves that ultimately to the Constitutional Court to decide.'<sup>81</sup> This statement is true as a matter of the plain wording of the Constitution. There is indeed no section that offers a clear-cut definition in the style of 'a constitutional matter is a matter in which . . .'. The only reference to the meaning of the phrase 'constitutional matter' is in FC s 167(7), and here the phrase is non-exhaustively explained as *including* 'any issue involving the interpretation, protection or enforcement of the Constitution'.<sup>82</sup>

Rather than providing a definition, the Constitutional Court's preferred approach has been to compile lists of case categories or standard issues that it regards as involving constitutional matters. The first such list was drawn up in *Boesak* by Langa DP (as he then was):

If regard is had to the provisions of section 172(1)(a) and section 167(4)(a) of the Constitution, constitutional matters must include disputes as to whether any law or

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79 *S v Boesak* 2001 (1) SA 912 (CC), 2001 (1) BCLR 36 (CC) at para 14

80 *Fraser* (supra) at para 37

81 *Boesak* (supra) at para 13 (footnote omitted).

82 See *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa & Another* 2005 (4) SA 319, 2005 (3) BCLR 231 (CC) at para 19 (Court held that '[an] application [for leave to appeal] must raise a constitutional matter, *in other words* an issue which involves the interpretation, protection or enforcement of the Constitution' (my emphasis). This statement incorrectly elevates FC s 167(7) to the status of a definition.) Cf Iain Currie & Johan de Waal *The Bill of Rights Handbook* (5th ed, 2005) 103 (Treats FC s 167(7) as a definition).

conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of state. Under section 167(7), the interpretation, application and upholding of the Constitution are also constitutional matters. So too, under section 39(2), is the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights.<sup>83</sup>

In this passage, the Court identified four kinds of case that involve constitutional matters within the meaning of FC s 167(3). It did not, however, suggest that this list was comprehensive. Rather, the Court went on to say that it was neither necessary nor desirable to attempt to define the limits of its jurisdiction.<sup>84</sup> It is nevertheless noteworthy that the Court included only one area of exclusive jurisdiction (FC s 167(4)(a) — disputes between organs of state) of the six possible areas in FC s 167(4). The Court also significantly misquoted FC s 167(7) by substituting the terms '*application and upholding*' for '*protection or enforcement*'.

Six years after *Boesak*, in *Fraser v ABSA Bank Ltd*, the Court compiled a second list of cases that it said would necessarily involve a constitutional matter:

This Court has held that a constitutional matter is presented where a claim involves: (a) the interpretation, application or upholding of the Constitution itself, including issues concerning the status, powers or functions of an organ of state and disputes between organs of state; (b) the development of (or the failure to develop) the common law in accordance with the spirit, purport and objects of the Bill of Rights; (c) a statute that conflicts with a requirement or restriction imposed by the Constitution; (d) the interpretation of a statute in accordance with the spirit, purport and objects of the Bill of Rights (or the failure to do so); (e) the erroneous interpretation or application of legislation that has been enacted to give effect to a constitutional right or in compliance with the legislature's constitutional responsibilities; or (f) executive or administrative action that conflicts with a requirement or restriction imposed by the Constitution.<sup>85</sup>

Though more comprehensive than the *Boesak* list, the *Fraser* list is not exhaustive either. Nor, like its predecessor, does it purport to offer anything more than a provisional list of the type of cases in which the Court has assumed jurisdiction.

The Constitutional Court's reluctance to define the term 'constitutional matter' does not mean that it is not possible or useful to specify or at least describe the term for purposes of FC s 167(3). A principled understanding of the extent and limits of the Constitutional Court's jurisdiction can only strengthen the working relationship between Bloemfontein and Constitution Hill. In addition, litigants are entitled to know in advance whether it is more or less likely that they will be able to approach the Constitutional Court.

The rest of this chapter tries to provide such a principled understanding by starting with the *Fraser* list. It then expands upon this list on the basis of a functionalist reading of the Constitutional Court's role in the judicial system.

### **(iii) The Fraser list of case types in which the Constitutional Court has jurisdiction**

83 *Boesak* (supra) at para 14 (footnotes omitted).

84 *Boesak* (supra) at para 14.

85 2007 (3) SA 484 (CC), 2007 (3) BCLR 219 (CC) at para 38 (footnotes omitted).

It is immediately apparent that the list of case types the Constitutional Court compiled in its judgment in *Fraser* is fragmentary at best. As seen in the passage quoted above, the Court introduces its list with the statement that it 'has held that

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a constitutional matter is presented' whenever a claim involves one of six categories. A cursory glance at its record, however, reveals that the Constitutional Court has decided cases that do not fall into any of these categories (for example, the provincial certification judgments,<sup>86</sup> which involved the Court's exclusive jurisdiction under FC s 167(4)(f), and its various judgments on the constitutionality of constitutional amendments,<sup>87</sup> in which its jurisdiction was based on FC s 167(4)(d)).

The first category in the *Fraser* list (category (a): 'the interpretation, application or upholding of the Constitution itself, including issues concerning the status, powers or functions of an organ of state and disputes between organs of state') is a particularly odd example of legal systematization. Its origin is the predecessor list from the Court's judgment in *Boesak*. For no apparent reason, the *Fraser* Court collapses what were two categories in *Boesak* into one, making 'the interpretation, application or upholding of the Constitution itself' a general category into which 'issues concerning the status, powers or functions of an organ of state and disputes between organs of state' are made to fit. In restating the first part of this new, overarching category, the Court cites *Boesak*'s reference to FC s 167(7), but repeats its earlier error in misquoting the constitutional provision ('*protection or enforcement*' being once again replaced with '*application and upholding*'). Or perhaps the Court is not misquoting FC s 167(7) — but deliberately reinterpreting it. If so, we are not provided with any reasons for its decision.

The next problem with category (a) is that it is not entirely clear why the second part of this category — disputes between organs of state — is made a subset of the first part. Perhaps the Court wanted to say that every dispute between organs of state necessarily involves an exercise of constitutional interpretation, application or upholding. This would turn FC s 167(7) into an overarching category that covers other categories of constitutional matter. As I argue below, there are, indeed, good reasons for such an understanding of FC s 167(7). If this is what the *Fraser* Court wanted to say, however, then it is not clear why disputes between

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86 *Speaker of the KwaZulu-Natal Provincial Legislature, Ex Parte: In re Certification of the Constitution of the Province of KwaZulu-Natal*, 1996 1996 (4) SA 1098 (CC), 1996 (11) BCLR 1419 (CC); *Speaker of the Western Cape Provincial Legislature, Ex Parte: In re Certification of the Constitution of the Western Cape*, 1997 1997 (4) SA 795 (CC), 1997 (9) BCLR 1167 (CC) and *Speaker of the Western Cape Provincial Legislature, Ex Parte: In re Certification of the Amended Text of Constitution of the Western Cape*, 1997 1998 (1) SA 655 (CC), 1997 (12) BCLR 1653 (CC).

87 See *Matatiele Municipality & Others v President of the Republic of South Africa & Others* 2006 (5) SA 47 (CC), 2006 (5) BCLR 622 (CC) at para 34. *Matatiele* was decided just months before *Fraser*. See also *United Democratic Movement v President of the Republic of South Africa & Others (1)* 2003 (1) SA 488 (CC), 2002 (11) BCLR 1179 (CC) and *United Democratic Movement v President of the Republic of South Africa & Others (2)* 2003 (1) SA 495 (CC), 2002 (11) BCLR 1213 (CC); *African National Congress & Others v United Democratic Movement & Others (Krog & Others Intervening)* 2003 (1) SA 533 (CC), 2003 (1) BCLR 1 (CC). See also *African National Congress & Others v United Democratic Movement & Others* (supra) at para 13. Admittedly, of these judgments, only the last one explicitly mentions the Constitutional Court's exclusive jurisdiction and does so without reference to FC s 167(4)(d). Nevertheless, the Court in *Fraser* must have been well aware that its jurisdiction was not confined to FC s 167(4)(a).

organs of state in terms of FC s 167(4)(a) involve the 'interpretation, application or upholding' of the Final Constitution, but other categories of exclusive jurisdiction in FC s 167(4) do not engage 'interpretation, application or upholding' of the Final Constitution. There is also some sloppy citation here, because neither *Boesak* nor *Fraser* refers to the only case the Constitutional Court has thus far decided under FC s 167(4)(a): *Premier of the Western Cape v President of South Africa & Another*.<sup>88</sup>

Category (c) — cases involving 'a statute that conflicts with a requirement or restriction imposed by the Constitution' — is not supported by any case citations at all. We are therefore left wondering whether this category refers only to cases involving the confirmation of orders of invalidity, or whether it goes beyond FC s 167(5).

Even if the *Fraser* list and the Court's treatment of the jurisdictional issue in that case do not provide us with a comprehensive overview of cases in which the Constitutional Court has assumed jurisdiction, they do at least re-enforce the distinction between constitutional matters and non-constitutional matters. They also draw attention to the fact that we may be able to identify certain types of case in which the Constitutional Court will always have jurisdiction. However, the Court's case category approach is limited. Instead of compiling a list of cases over which the Court has assumed jurisdiction, it may be more instructive to start with the Constitution itself. Following this approach, three broad categories of constitutional matter suggest themselves:

- constitutional matters falling under the Court's exclusive jurisdiction;
- constitutional matters that are explicitly mentioned as falling under the Constitutional Court's concurrent jurisdiction; and
- other constitutional matters not explicitly mentioned in the Constitution.

### **(b) FC s 167(4): Constitutional matters falling under the Court's exclusive jurisdiction**

FC s 167(4) lists six different types of dispute in which the Constitutional Court enjoys exclusive jurisdiction.<sup>89</sup> All of these types of dispute must by implication involve a constitutional matter since it is inconceivable that the Constitutional Court could assume jurisdiction on one of the grounds listed in subparas (a)-(f) and at the same time decline jurisdiction for want of a constitutional matter. FC s 167(4) in this way serves two functions: it defines a core set of cases that constitute constitutional matters, and denies other courts the jurisdiction to hear such cases.

The six categories of case falling under the Constitutional Court's exclusive jurisdiction correspond to the Court's primary function as guardian and final interpreter of the Constitution, as outlined in § 4.2(a) above. All of the categories

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in FC s 167(4) have to do with disputes in which the other spheres of government are directly involved. In this way, the Constitutional Court is tasked with ensuring that the structural principles of the South African political system as envisaged in

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88 1999 (3) SA 657 (CC), 1999 (4) BCLR 382 (CC) at para 2.

89 Admittedly, the Constitutional Court's responsibility to certify provincial constitutions as set out in FC s 167(4)(f) does not relate to typical dispute resolution.

the Constitution are upheld. When it adjudicates in such conflicts it not only acts as a neutral arbiter. It also exercises a decidedly political function:

The Constitutional Court has been given the responsibility of being the ultimate guardian of the Constitution and its values. Section 167(4) thus confers exclusive jurisdiction to this Court in a number of crucial political areas which include the power to decide disputes between organs of state in the national and provincial sphere, to decide on the constitutionality of any parliamentary or provincial Bill, to decide on the constitutionality of any amendment to the Constitution and to decide whether Parliament or the President has failed to fulfil a constitutional obligation. . . . It follows that the drafters of the Constitution necessarily envisaged that this Court would be called upon to adjudicate finally in respect of issues which would inevitably have important political consequences.<sup>90</sup>

In adjudicating disputes within its exclusive jurisdiction the Constitutional Court fulfils its function as the political head of the judicial branch of government. In so doing, it assumes a status in the constitutional system equal to that of the other branches.

The exclusion of other courts from matters falling within this part of the Constitutional Court's jurisdiction is an exception to the general rule that the Constitution vests the judicial authority of South Africa in *all* courts (FC s 165(1)). It is also a deviation from the principle that a decision of a court of first instance should be subject to appeal. As the Constitutional Court has repeatedly pointed out, it is not generally desirable for a court to sit as a court of first and last instance,<sup>91</sup> and this should accordingly occur in exceptional circumstances only.<sup>92</sup> The notion that certain matters should fall within the exclusive jurisdiction of the Constitutional Court therefore has to be justified.

The first plausible justification for FC s 167(4) is that the provision for exclusive jurisdiction is a means to speed up the judicial process in certain cases. In the absence of hearings before other courts, the 'final word' on the meaning of the Final Constitution is inevitably delivered sooner. Since disputes between organs of state, branches of government and the executive and the legislature may interrupt the smooth functioning of the political system, it is appropriate that these disputes should be decided expeditiously in this way.

The second justification is based on less practical considerations: In its own way, the provision for exclusive jurisdiction serves the goal of separation of

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powers. In a constitutional state where judges can review everything the other branches of government do, the judiciary as an institution enjoys a high level of political influence. In the long term the other political actors have to accept this fact as a necessary part of a constitutional system that also serves their interests.<sup>93</sup> Although in a system of checks and balances all three branches of government in

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90 *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (CC) ('SARFU II') at paras 72-73.

91 See *Bruce & Another v Fleecytex Johannesburg CC & Others* 1998 (2) SA 1143 (CC), 1998 (4) BCLR 415 (CC) at paras 7-9.

92 See *Christian Education South Africa v Minister of Education* 1999 (2) SA 83 (CC), 1998 (12) BCLR 1449 (CC) at para 4; *Dormehl v Minister of Justice* 2000 (2) SA 987 (CC), 2000 (5) BCLR 471 (CC) at para 5.

principle control each other, the practical reality is that the judiciary does most of the controlling. There are more cases to be decided by judges than judges to be elected, and more administrative action to be reviewed than court budgets to be negotiated. Against this background, even in a system of comprehensive judicial review (of both government action and legislation), the judiciary's control function has to be exercised with a certain amount of diplomacy.

The Final Constitution entrusts the Constitutional Court with sufficient institutional power to act on the same level as the political branches of government. This is of particular importance in disputes where the political branches are directly involved as parties. Here, their constitutionally enshrined status and their function in the political system make it appropriate that the dispute be decided by an institution of equal importance and political weight. The relevant point is not so much the intrusion into another branch's territory (the review of legislation that is already in force is after all a much stronger intrusion into the political branches' domain than the adjudication of a dispute between organs of state). It is rather that there is a legitimate expectation on the part of the legislature and the executive about which institution and therefore which individuals are appropriate to deal with their disputes. This expectation is based more on perception than judicial capability. Nevertheless, the status of the judges that perform a particular function is important for the acceptance of their decisions by the other branches of government. A certain amount of diplomacy and what may be called 'institutional respect' is thus inherent in the concept of exclusive jurisdiction.

It is this 'institutional respect' that links the idea of exclusive jurisdiction to the separation of powers doctrine: a connection frequently referred to in judgments by the Constitutional Court.<sup>94</sup> This correlation is particularly visible in the Court's three decisions in *President of the Republic of South Africa & Others v South African Rugby Football Union & Others*.<sup>95</sup> The case dealt with the decision of the President

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to appoint a commission of enquiry into the affairs of organized rugby in South Africa. The High Court decided that some of the applicants' factual claims needed clarification and ordered the President to give oral evidence. On appeal, the Constitutional Court did not completely rule out the possibility that the President may be required by a court of law to give evidence in relation to the performance of his official duties. But it emphasized that such a decision would require special consideration:

[T]here is the public interest in ensuring that the dignity and status of the President is preserved and protected, that the efficiency of the executive is not impeded and that a

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- 93 For an argument about the way the Constitutional Court has developed its jurisprudence to ensure that its decisions are indeed respected by the government and Parliament, and to a lesser extent by the public, see Theunis Roux 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7 *International J of Constitutional Law* (forthcoming).
- 94 For an analysis of the Court's understanding of this issue, see Sanele Sibanda & Sebastian Seedorf 'Separation of Powers' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 12.
- 95 See *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 1999 (2) SA 14 (CC), 1999 (2) BCLR 175 (CC); *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (CC) and *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC).

robust and open discussion take place unhindered at meetings of the Cabinet when sensitive and important matters of policy are discussed. Careful consideration must therefore be given to a decision compelling the President to give evidence and such an order should not be made unless the interests of justice clearly demand that this be done. The judiciary must exercise appropriate restraint in such cases, sensitive to the status of the head of state and the integrity of the executive arm of government.<sup>96</sup>

In another part of the decision, the Constitutional Court considered the purpose of its exclusive jurisdiction:

The purpose of these provisions . . . is to preserve the comity between the judicial branch of government on the one hand and the legislative and executive branches of government on the other, by ensuring that only the highest court in constitutional matters intrudes into the domains of the principal legislative and executive organs of state.<sup>97</sup>

The Court later confirmed this reasoning in explaining why the Final Constitution granted it exclusive jurisdiction in all of the areas listed in FC s 167(4).<sup>98</sup>

The same considerations inform both the general notion of judicial restraint in terms of the separation of powers and the idea of exclusive jurisdiction: there is no substantial difference between a preservation of the 'dignity and status' of the President and the idea of 'comity' towards the legislative and executive branches of government. Through the doctrine of separation of powers, and in particular the Constitutional Court's invocation of it,<sup>99</sup> the courts show institutional respect for the other branches. In matters involving the Constitutional Court's exclusive jurisdiction, the Constitution ensures that the same institutional respect is maintained by preventing courts other than the Constitutional Court from hearing such cases.

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It is interesting to note that other constitutional democracies, too, subscribe to the idea that the highest court in the land should enjoy exclusive jurisdiction with regard to disputes in which other important political actors — such as the head of government, members of the national executive or the chairperson of the national parliament — are involved. The jurisdiction of the German Federal Constitutional Court, for example, is almost entirely exclusive. Article 93 of the German *Grundgesetz* enumerates seven types of dispute falling in its jurisdiction, six of which are exclusive, including 'disputes concerning the extent of the rights and duties of a supreme federal body or of other parties vested with rights of their own by this Basic Law' (art 93(1) No 1).<sup>100</sup> Only the category of 'Constitutional Complaints' (*Verfassungsbeschwerde*) according to arts 93(1) No 4a and 94(2) has a

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96 *SARFU III* (supra) at para 243.

97 See *SARFU I* (supra) at para 29. On the meaning of FC s 172(2), but endorsed more broadly in relation to 'provisions of the Constitution which confer exclusive jurisdiction upon [the Constitutional Court] to decide certain constitutional matters', see *President of the Republic of South Africa & Others v United Democratic Movement & Others*. 2003 (1) SA 472 (CC), 2002 (11) BCLR 1164 (CC) at para 20.

98 *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC) at para 23.

99 See Sanele Sibanda & Sebastian Seedorf 'Separation of Powers' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 12 at § 12.3(d)(ii)(aa); Roux 'Principle and Pragmatism' (supra).

quasi-appeal character, since a claimant may be required to exhaust all other legal remedies before filing a claim. In certain other proceedings, such as 'concrete norm control' (*konkrete Normenkontrolle*, art 100(1)), other courts must refer the matter to the Constitutional Court. Thus, another court is inserted between the plaintiff and the Constitutional Court, although only the Constitutional Court may decide on the constitutionality of acts of parliament.

The jurisdiction of the US Supreme Court is comprised of two types: original jurisdiction, in which the court acts as a court of first instance or as a trial court, and appellate jurisdiction. Article III Section 2 of the Constitution grants original jurisdiction to the US Supreme Court over cases affecting ambassadors, other public ministers and consuls, and those to which a state is party (in all other cases the US Supreme Court is granted appellate jurisdiction). While in most legal systems, original and exclusive jurisdiction for the highest court are the same thing, the US Supreme Court has held that Congress can give the lower federal courts concurrent jurisdiction even when the Constitution specifies that the Supreme Court should have original jurisdiction.<sup>101</sup> Effectively, the US Supreme Court only assumes exclusive jurisdiction in disputes between two or more states.<sup>102</sup>

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The Constitutional Court of South Africa has stated that the more important and complex the issues in a case, the more compelling the need for it to be assisted by the views of another court.<sup>103</sup> In matters involving its exclusive jurisdiction, however, the Court cannot enjoy the benefit and assistance of the views of other courts. In these cases, it is precisely the importance of the matters at stake for the overall constitutional structure that requires the Constitutional Court to be a court of first and last instance.

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100 According to s 63 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*) only these institutions are 'highest organs of the state' and have standing in disputes with the exclusive jurisdiction of the *Bundesverfassungsgericht* in terms of art 93(1) No. 1 of the Basic Law: The President of the Federal Republic of Germany, the Bundestag (Parliament), the Bundesrat (Federal Council of Provinces), the Federal Government and those parts of these organs that have been vested with own rights either in the Grundgesetz or in the rules and orders of the Bundestag or the Bundesrat. However, this limited provision has been extended by the *Bundesverfassungsgericht* to the Chancellor and every Minister of the Federal Government individually (BVerfGE 67, 100 ('*Flick-Untersuchungsausschuss*' ['*Flick-Parliamentary Commissions of Enquiry*'])), individual members, groups and caucuses of Parliament (BVerfGE 80, 188 ('*Wüppesahl*')) and political parties (BVerfGE 1, 208, 223 ('*7,5%-Sperrklausel*' ['*7,5%-minimum threshold*'])).

101 See *Ames v Kansas ex rel/Johnson* 111 US 449, 464 (1884).

102 The original jurisdiction of the Supreme Court is laid out by statute in 28 USC § 1251. The section provides that the Supreme Court shall have original *and* exclusive jurisdiction over all controversies between two or more States. In actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties, in all controversies between the United States and a State and in all actions or proceedings by a State against the citizens of another State or against aliens, the Supreme Court shall have only original *but not* exclusive jurisdiction. In these cases, the plaintiff has the option to initiate proceedings directly in the Supreme Court.

103 See *Mkontwana v Nelson Mandela Metropolitan Municipality & Another; Bissett & Others v Buffalo City Municipality & Others; Transfer Rights Action Campaign & Others v MEC, Local Government and Housing, Gauteng & Others (Kwazulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC), 2005 (2) BCLR 150 (CC) at para 11.

On several occasions, the South African Constitutional Court has been confronted with litigants who sought to bring their matter directly to it, bypassing the High Court and the Supreme Court of Appeal. The Constitutional Court has declined to hear most of these cases. Its grounds for rejecting these cases, however, have mostly been based on FC s 167(6)(a), i.e. on whether it was in the interests of justice for the Court to hear the matter as a court of first instance, and not on considerations related to its jurisdiction.<sup>104</sup> The basis of the Court's approach in this regard is that only in exceptional circumstances should direct access be granted, because in such cases it does not enjoy the benefits and the assistance of the views of other courts on the matter before it.<sup>105</sup>

A similar approach should be followed in understanding the Constitutional Court's exclusive jurisdiction in terms of FC s 167(4): Because exclusive jurisdiction is an exception to the general rule that the judicial authority vests in all courts, this category of cases should be narrowly construed.

### (i) Disputes between organs of state, FC s 167(4)(a)

Although 'organ of state' is a term defined in FC s 239, this category of exclusive jurisdiction is the one most open to interpretation. Even the Final Constitution's detailed definition still leaves ample room for differing views about what institutions qualify as organs of state.<sup>106</sup>

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One would expect that, since the definition in FC s 239 is rather broad, disputes between organs of state relying on the Court's exclusive jurisdiction under FC s 167(4)(a) would not be uncommon.<sup>107</sup> FC s 167(4)(a), however, includes two qualifiers limiting the scope of the Court's jurisdiction in this respect. First, it refers only to organs of state in the national or provincial sphere, thereby excluding from its ambit disputes between organs of state in the local government sphere.<sup>108</sup> The

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104 See, eg, *Mkontwana* (supra) at para 11 (Contains additional references.)

105 This approach has been criticized by Jackie Dugard. She argues that the Court's practice regarding direct access applications does not adequately facilitate the uptake of issues affecting the fundamental rights of poor people. In so doing, the Court has failed to live up to its transformative promise. Jackie Dugard 'Court of First Instance?: Towards a Pro-Poor Jurisdiction for the South African Constitutional Court' (2006) 22 *SAJHR* 261.

106 See Stu Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31, § 31.4(f) (On whether a department of state acts as an organ of state when entering into contracts or whether privatized formerly state-run entities qualify as organs of state.) One may also ask whether any functionary or institution exercising a public power or performing a public function in terms of the common law (as opposed to legislation) would qualify as an organ of state in terms of FC s 239.

107 However, the Constitutional Court has thus far decided only one case explicitly on the basis of this section: *Premier of the Western Cape v President of South Africa & Another* 1999 (3) SA 657 (CC), 1999 (4) BCLR 382 (CC). This case is discussed below. See *Executive Council Province of the Western Cape v Minister for Provincial Affairs; Executive Council KwaZulu-Natal v President of the Republic of South Africa* 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC) at para 10. (Court considered exclusive jurisdiction and held that it was unclear what it was characterized by: the identity of the parties to the dispute or the subject matter of the dispute. Eventually, these questions were left undecided because the right of the parties to come directly to the Constitutional Court was not put in issue and the Court was satisfied that the interests of justice required that leave to come directly to it be granted.)

second qualification is that the dispute between organs of state must concern their 'constitutional status, powers or functions'.

At first glance, the second qualification on the Court's jurisdiction under FC 167(4)(a) seems to be contradictory: Is the status of every organ of state not derived from the Constitution and do they not all exercise their powers and functions subject to the Final Constitution? In its leading judgment on this matter, *National Gambling Board v Premier of KwaZulu-Natal & Others*,<sup>109</sup> the Constitutional Court accepted this point, but held that, in the context of exclusive jurisdiction, it was necessary to go beyond the obvious. While the Court had no difficulty in asserting that the parties to the case<sup>110</sup> were indeed organs of state in terms of FC s 239, it was unsympathetic to the applicant's view that every power which is traceable to the Final Constitution is a 'constitutional power' within the meaning of FC 167(4)(a), and likewise that every issue of constitutional status or function, is an issue capable of founding the Court's exclusive jurisdiction under this subparagraph.<sup>111</sup> Certainly, the Court held, in a constitutional state all public power is derived from the Final Constitution.<sup>112</sup> But if the word 'constitutional' in FC s 167(4)(a) is understood only to repeat this basic principle, it would follow that every dispute between organs of state concerning their status, powers or functions would be a matter exclusively within the Constitutional Court's jurisdiction. This result, the Court implied, was not desirable, and the word 'constitutional' in the phrase 'constitutional status, powers or functions' would serve no

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purpose.<sup>113</sup> Rather, the subparagraph had to be narrowly construed so as to balance the need for the Court to hear certain matters as a court of first and last instance against the countervailing principle that, in general, it was better for it to have the benefit of other courts' views.

What then is the meaning of 'constitutional status, powers or functions' in FC s 167(4)(a)? The Constitutional Court in *National Gambling Board* found assistance in the definition of 'organ of state' in FC s 239:

In paragraph (b) of the definition of organ of state, a distinction is made between an institution or functionary 'exercising a power or performing a function in terms of the Constitution' and those doing so 'in terms of any legislation'. The word 'constitutional' in section 167(4)(a) encapsulates the same distinction: It refers to status, powers or

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108 See *National Gambling Board v Premier of KwaZulu Natal & Others* 2002 (2) SA 715 (CC), 2002 (2) BCLR 156 (CC) at para 20.

109 2002 (2) SA 715 (CC), 2002 (2) BCLR 156 (CC).

110 The National Gambling Board, the Minister of Trade and Industry, the Premier of KwaZulu-Natal and the KwaZulu-Natal Gambling Board.

111 *National Gambling Board* (supra) at para 23.

112 See *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC); *Pharmaceutical Manufacturers Association of SA in re: the Ex Parte Application of the President of the RSA & Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC). For a discussion of these judgments, see § 4.3(d)(ii).

113 *National Gambling Board* (supra) at para 23.

functions explicitly or by implication provided for in terms of the Constitution as opposed to those provided for in terms of any legislation. Put differently, the term 'constitutional status, powers or functions' in section 167(4)(a) means status, powers or functions derived directly from the Constitution.<sup>114</sup>

The Court here used a criterion that is consistent with the general principle that the ambit of its exclusive jurisdiction should be narrowly construed. Additionally, one can read a principle of proximity into the Court's reasoning: the closer the rights, or 'status, powers or functions' in question are to a constitutional provision, the more likely it is that they will trigger the Constitutional Court's exclusive jurisdiction. This principle characterizes the Court's exclusive jurisdiction as something that lies at the core of constitutional adjudication, and which is directly connected to its primary function as the guardian and final interpreter of the Constitution. The more important part of the Constitutional Court's approach in *National Gambling Board*, in other words, is not the (formal) criterion of absence of legislation, but the substantive criterion that the status, powers or functions in dispute should be *explicitly or by implication* provided for in the Constitution. Take for example legislation that prescribes the privileges and immunities of the National Assembly, Cabinet members and members of the Assembly, as contemplated in FC s 58(2). Is any dispute concerning these privileges automatically outside the scope of FC s 167(4)(a) because the privileges are based on legislation and not derived directly from the Constitution? Surely not. While keeping the exceptional nature of exclusive jurisdiction in mind, the Constitutional Court should determine whether the rights in question are genuinely founded on legislation or whether they are in fact, or by implication, provided by the Constitution. Such a substantive understanding of this part of its exclusive jurisdiction would give the Court the necessary discretion to avoid any over-interpretation of its mandate while at the same time taking into account the institutional respect due to the parties involved and the purpose of FC s 167(4)(a).

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In *National Gambling Board*, the Constitutional Court rejected the argument that the dispute involved these core constitutional issues, and held that it was a simple conflict between a national and a provincial Act that fell to be resolved in terms of FC ss 146, 148 and 150.<sup>115</sup> In its judgment, the Court emphasized that the dispute was about the effect of the legislation and not the power to make it.<sup>116</sup> This statement is quite revealing. It is clear that the Constitutional Court had in mind a standard situation with regard to the sort of dispute that would fall under FC s 167(4)(a), i.e. disputes about the respective legislative competence of the National Assembly and the provinces in terms of FC ss 44 and 104, and Schedules 4 and 5 of the Constitution.

This understanding of the purpose of FC s 167(4)(a) has much to recommend it. If the National Assembly passes legislation with regard to a matter falling within a functional area listed in Schedule 5 (exclusive provincial legislative competence) it can only do so by way of 'intervention' in terms of FC s 44(2). Whether the preconditions of FC s 44(2) are met is a matter of constitutional interpretation and thus any dispute over the National Assembly's power to pass such legislation would

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114 Ibid at para 24.

115 *National Gambling Board* (supra) at paras 25-26.

116 Ibid at para 26.

be a dispute about a power derived directly from the Constitution. The same argument would apply if a province legislated with regard to a matter which that was allegedly outside one of the functional areas listed in Schedule 4 or 5. Here, the allegation would be that the province had intruded on the exclusive legislative domain of the National Assembly, which is a power derived directly from the Final Constitution. Such a dispute would accordingly fall into the Constitutional Court's exclusive jurisdiction.

On the other hand, if both Parliament and the provincial legislatures are entitled to legislate on a particular matter — as was the case in *National Gambling Board*, which concerned 'Casinos, racing, gambling and wagering, excluding lotteries and sports pools' as provided for in Schedule 4 Part A of the Final Constitution — the question of which legislation should prevail would not depend on the status, powers or functions of Parliament or the province concerned. To be sure, the case would involve the interpretation of the Constitution, i.e. whether the conditions of FC s 146(2) or 146(3) had been met. But this would not be enough to bring the case within the Constitutional Court's exclusive jurisdiction since the powers of both Parliament and the provincial legislature to legislate on the matter would by definition not be in dispute. This reading is supported by the text of FC s 146(4) and FC s 150. These sections respectively refer to 'a court' and 'every court' and imply that disputes over matters of concurrent legislative competence are not exclusively for the Constitutional Court to decide.

The Constitutional Court's understanding of the constitutional status, powers and functions of organs of state is well illustrated by *Premier of the Western Cape v President of South Africa & Another*<sup>117</sup> — the only case the Court has thus far decided

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under FC s 167(4)(a). At first glance, the Court's conceptual engagement with the issue of jurisdiction in this case is rather feeble: Chaskalson P, writing for a unanimous Court, simply asserts the exclusive jurisdiction of the Constitutional Court to hear the matter without providing any reasons.<sup>118</sup> But, on a closer reading, the Court's decision is squarely in line with its more elaborate reasoning in *National Gambling Board* two and a half years later.

The dispute in *Premier of the Western Cape* concerned an amendment to the Public Service Act with repercussions for the way in which provinces were administered. Properly understood, the conflict between the national and provincial sphere was not about their respective legislative competences but about whether the national legislation at issue infringed the executive authority of the Western Cape, as set out in FC s 125. The precise question was whether Parliament had the competence to prescribe to provinces how to structure their respective administrations.<sup>119</sup> In answering this question, the Court held that FC s 197, which provides for a public service in South Africa, directly confers on Parliament the necessary power to regulate the structure of the public service, both for the national and the provincial sphere, and that no implied provincial executive power was infringed by the contested legislation.<sup>120</sup> In the Court's words:

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117 1999 (3) SA 657 (CC), 1999 (4) BCLR 382 (CC).

118 *Premier of the Western Cape v President of South Africa* (supra) at para 2.

119 *Ibid* at para 7.

[T]he competence concerning the structure and functioning of the public service is dealt with specifically in the Constitution, and was not left to be dealt with under the general legislative power conferred on parliament by section 44(1)(a).<sup>121</sup>

The second aspect of the Court's judgment in *Premier of the Western Cape* had to do with an alleged infringement of the principle of co-operative government in Chapter 3 of the Final Constitution. As it turned out, the Court largely rejected this contention, but for the purposes of this chapter the relevant question is whether any case between two organs of state (solely) based on an infringement of the principles of co-operative government in FC ss 40 and 41 will by definition concern the constitutional status, powers or functions of those organs of state in terms of FC s 167(4)(a).

The correct position, it is submitted, is that the exclusive jurisdiction of the Constitutional Court cannot be triggered simply by asserting that the principle of co-operative government has been violated. I offer four reasons for this conclusion. First, most parts of FC ss 40 and 41 do not refer to the constitutional powers, status or functions of organs of state.<sup>122</sup> Secondly, those parts that do

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refer to constitutional powers, do not *create* national or provincial powers but *presuppose* them. FC s 41(1)(g), for example, as the Court in *Premier of the Western Cape* remarked, is concerned with the way power is exercised, not with whether or not a power exists (which is determined by other provisions of the Final Constitution).<sup>123</sup> Thirdly, FC s 41(3) and (4) refer to 'a court' in relation to the resolution of intergovernmental disputes — not solely to the Constitutional Court. Not every dispute mentioned in FC s 41(3) and (4), therefore, is a dispute for purposes of FC s 167(4)(a).<sup>124</sup> If the Constitutional Assembly had intended this to be the case, it would have mentioned the Constitutional Court by name.<sup>125</sup> Finally, the provisions of FC Chapter 3 are framed in such a broad way, and encompass so many wide (and difficult to define) concepts, that virtually any dispute between different spheres of government could be framed as a violation of the principle of co-

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120 Ibid at para 44 (Constitutional Court stated that FC s 197(1) does not draw a distinction between provincial and national competences, and that Chapter 10 applies to all aspects of public administration in every sphere of government.)

121 Ibid at para 46.

122 It is in fact debatable whether large parts of Chapter 3 provide for legally binding norms at all. But see S Woolman, T Roux & B Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 14 (Several provisions that might have been thought to be non-justiciable have been used to dispose of matters — and in quite a few early case, it disposed of disputes between the state and private parties.)

123 *Premier of the Western Cape v President of South Africa* (supra) at para 57. Admittedly, on a plain-language reading, one can argue that the Constitutional Court enjoys exclusive jurisdiction when the exercise of a constitutional power is at stake as well as in cases where the existence of that power is the relevant issue. FC s 167(4)(a) does not distinguish between these two classes of cases.

124 That question was raised but left open in *Executive Council Province of the Western Cape v Minister for Provincial Affairs; Executive Council KwaZulu-Natal v President of the Republic of South Africa*. 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC) at para 10.

operative government. If every dispute concerning FC Chapter 3 were understood to be a dispute concerning a constitutional power, status or function, however, then every such dispute involving the provincial and the national sphere would fall under the exclusive jurisdiction of the Constitutional Court. This consequence the Constitutional Court expressly rejected in *National Gambling Board*.

It follows that intergovernmental disputes in which the Constitutional Court exercises exclusive jurisdiction should be limited to cases involving FC s 41(1)(e), (f) and (g).<sup>126</sup> Additionally, the Constitutional Court should follow a case-by-case approach, taking into account factors such as whether other aspects of the case also fall under FC s 167(4)(a), as was the case in *Premier of the Western Cape*. In that case, the Court emphasized that the functional and institutional integrity of the different spheres of government, as envisaged in FC s 41(1)(g), must be determined with due regard to the respective place of the national, provincial and local spheres in the constitutional order, their powers and functions under the Constitution, and the countervailing powers of other spheres of government.<sup>127</sup> The

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Court thereby understood the powers and functions referred to in FC Chapter 3 in the context of other powers or functions explicitly or by implication derived from the Final Constitution. A similar kind of connection between a FC Chapter 3 power or function and another constitutional power or function would have to be present in a co-operative government dispute before such a case could be decided by the Constitutional Court in terms of FC s 167(4)(a).

## **(ii) Constitutionality of Bills, FC s 167(4)(b)**

FC s 167(4)(b) confers on the Constitutional Court exclusive jurisdiction to decide the constitutionality of a bill, but only in 'the circumstances anticipated in section 79 or 121'. These circumstances ensure that judicial review of bills may only be initiated by a very limited group of persons for limited purposes.

### **(aa) Initiation of judicial review of a Bill**

In a constitutional order that adheres to the separation of powers, the legislative process on the national and the provincial level is the domain of Parliament or the provincial legislatures, as the case may be. Any judicial challenge to a statute in bill form is thus an intrusion into the domain of the people's democratically elected representatives and should, in the words of the Constitutional Court, be treated with caution:

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125 There is no provision in the South African Constitution similar to art 93 (1) No.3 of the German Grundgesetz. That provision of the Basic Law provides the Bundesverfassungsgericht with exclusive jurisdiction 'in the event of disagreements respecting the rights and duties of the Federation and the Länder [provinces]'.

126 Of course, this limitation does not apply when the challenge to another subsection of FC s 41 is brought under one of the other headings in FC s 167(4). For example, in *Matatiele I*, the Court considered an (ill-conceived) challenge in terms of FC s 41 on the basis of its exclusive jurisdiction in terms of FC s 167(4)(d), because the case involved a constitutional amendment. See *Matatiele Municipality & Others v President of the Republic of South Africa & Others* 2006 (5) SA 47 (CC), 2006 (5) BCLR 622 (CC) at paras 54-57.

127 *Premier of the Western Cape v President of South Africa* (supra) at para 58.

The legislature has a very special role to play in such a democracy — it is the law-maker consisting of the duly elected representatives of all of the people. With due regard to that role and mandate, it is drastic and far-reaching for any court, directly or indirectly, to suspend the commencement or operation of an Act of Parliament and especially one amending the Constitution, which is the supreme law.<sup>128</sup>

The Final Constitution, therefore,

contains clear and express provisions which preclude any court from considering the constitutionality of a bill save in the limited circumstances referred to in sections 79 and 121 of the Constitution, respectively.<sup>129</sup>

In its judgment in *Doctors for Life International v Speaker of the National Assembly & Others*,<sup>130</sup> the Constitutional Court repeated this point and emphasized the importance of an unobstructed legislative process:

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[Parliament] must be free to carry out its functions without interference. . . . The business of Parliament might well be stalled while the question of what relief should be granted is argued out in the courts. Indeed the parliamentary process would be paralysed if Parliament were to spend its time defending its legislative process in the courts. This would undermine one of the essential features of our democracy: the separation of powers.<sup>131</sup>

The separation of powers principle, the Constitutional Court continued, functions as a limitation on challenges to the parliamentary process and prevents the other branches of government<sup>132</sup> and everyone else from interfering with it — apart from certain constitutionally mandated exceptions. FC ss 79 and 121, as referred to in FC s 167(4)(b), define these constitutionally mandated exceptions. They limit the persons who may challenge a parliamentary or provincial bill to the President and the Premier of a province.

FC s 79 regulates one of the final stages in the process of national legislation.<sup>133</sup> Because legislating is the domain of Parliament, the executive can have no veto on laws that have been passed. Consequently, the Final Constitution imposes an

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128 *President of the Republic of South Africa & Others v United Democratic Movement & Others* 2003 (1) SA 472 (CC), 2002 (11) BCLR 1164 (CC) at para 25.

129 *Ibid* at para 26.

130 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC).

131 *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC) at para 36.

132 With regard to the judiciary, the Court on the one hand stressed that courts must be conscious of the vital limits on judicial authority while on the other hand made clear that Parliament is also bound by the Constitution and that it is up to the Constitutional Court to ensure that Parliament fulfils its constitutional obligations. *Doctors for Life* (supra) at paras 37, 38.

133 This process is regulated by FC s 81: A Bill becomes an Act of Parliament the moment the President assents to and signs it. This Act of Parliament must then be published in the Government Gazette and enters into force when published or on a date determined in terms of the Act. See Steven Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 17.

obligation on the President to assent to and sign a Bill into law. In so doing, he or she may raise neither political objections nor editorial concerns.<sup>134</sup> The only objection the President may raise, FC s 79 provides, is to the constitutionality of the Bill. In this case, the President must refer the Bill back to Parliament. If that process fails, and the Bill is again passed in a form that does not put an end to the dispute,<sup>135</sup> then — to avoid a stalemate — the President may refer the Bill to the Constitutional Court for a decision on its constitutionality (FC s 79(4)(b)).<sup>136</sup>

FC s 121 provides for basically the same arrangement in the provincial sphere: a Premier of a province has to assent to and sign a Bill passed by the provincial legislature or, if the Premier has reservations about the constitutionality of the Bill, refer it back to the legislature for reconsideration. If, after reconsideration, the Premier is still not convinced that the Bill complies with the Final Constitution, he or she must refer it to the Constitutional Court for a decision on its constitutionality.

By cross-referring to these provisions, FC s 167(4)(b) serves two purposes. First, it anticipates a specific conflict, i.e. a dispute between the President and Parliament (or the equivalent institutions at the provincial level) on the constitutionality of a Bill and ensures that this dispute is resolved in a swift manner by the only body that is institutionally capable of acting as a referee between these two constitutional organs. If the Constitutional Court decides that the contested provision indeed would violate the Constitution, then the dispute ends there. The Bill may not be signed into law and does not create unconstitutional obligations.<sup>137</sup> If, however, the Constitutional Court decides that the Bill is constitutional, then the President must assent to and sign it (FC s 79(5)).<sup>138</sup>

The second purpose served by FC s 167(4)(b) is that it prevents any judicial review of Bills except at the instance of the President or a provincial Premier. The Constitutional Court has emphasized that referral by the President is the decisive factor triggering its exclusive jurisdiction with regard to Bills. All other constitutional organs, political parties, civil society groups or individuals have to wait until the Bill is in force before approaching a court to get a ruling on its constitutionality.

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134 This set of circumstances is not totally hypothetical. See *In re: the Constitutionality of the Mpumalanga Petitions Bill, 2000* 2002 (1) SA 447 (CC), 2001 (11) BCLR 1126 (CC) at para 2 (Premier of the Mpumalanga Province when referring the Bill for reconsideration to the provincial legislature, besides raising constitutional concerns, recommended that certain typographical and grammatical errors be corrected.)

135 The Bill does not have to be passed again in the original draft version to engage this provision. The Bill may have been amended but the amendment may still not satisfy the constitutional concerns of the President. FC s 79(4) does not focus on the formal criterion of an unchanged passing, but on the substantive factor whether the President is of the opinion that his constitutional concerns have been addressed. See also *Ex parte the President of the Republic of South Africa In re: Constitutionality of the Liquor Bill 2000* (1) SA 732 (CC), 2000 (1) BCLR 1 (CC) at para 14.

136 The President is explicitly entitled to refer a Bill back to the National Assembly for reconsideration of the Bill's constitutionality and, eventually, to the Constitutional Court for a decision on the Bill's constitutionality. See FC ss 84(2)(b) and (c).

137 See *Liquor Bill* (supra) at para 18.

138 The premier of a province is similarly bound. FC s 121(3).

Consequently, all other courts are prohibited from exercising the exceptional 'power of abstract judicial review'<sup>139</sup> envisaged in FC s 167(4)(b).<sup>140</sup>

In *Doctors for Life*, an advocacy group challenged the constitutionality of four health-related statutes on the grounds that during the legislative process leading to the enactment of these statutes, the National Council of Provinces and the provincial legislatures had failed to comply with their constitutional obligation to facilitate public involvement. When the application was launched, all but one of the statutes had already been enacted. The applicants, however, challenged all four statutes, including the one that was still in Bill form.

The Constitutional Court held that the applicants could not base their complaint against the statute that was still in Bill form on FC s 167(4)(b):

[W]hile [section 167(4)(b)] confers exclusive jurisdiction on this Court to consider the constitutional validity of a national or provincial bill, this power is expressly limited to a challenge brought by the President or a Premier and in circumstances contemplated in section 79 or 121 of the Constitution. The provisions of these sections are too clear to admit of any other construction.<sup>141</sup>

To surmount this hurdle, the applicant tried to approach the Constitutional Court using FC s 167(4)(e), which grants the Constitutional Court exclusive jurisdiction to decide if the President or Parliament has failed to fulfil a constitutional obligation.<sup>142</sup> But the Court correctly rejected this argument, too. The only applicable provision with regard to Bills is FC s 167(4)(b), as it is a more specific provision than FC s 167(4)(e). All other access roads to any other court are, in effect, blocked for as long as the Bill is not signed. It is, as the Court pointed out, also not relevant whether the Bill is challenged for procedural or substantive reasons: even a complaint relating to a failure by Parliament to facilitate public involvement in its legislative processes (as was brought in *Doctors for Life*) will invariably require a court to consider the validity of the resulting bill. The purpose and the effect of litigation that is brought in relation

139 See *President of the Republic of South Africa & Others v United Democratic Movement & Others* 2003 (1) SA 472 (CC), 2002 (11) BCLR 1164 (CC) at para 26.

140 See *Ex parte the President of the Republic of South Africa In re: Constitutionality of the Liquor Bill* (supra) at paras 7-9. Cameron AJ's judgment provides an overview of similar procedures of pre-enactment constitutional scrutiny. Apparently, in the United States, the United Kingdom, Australia, New Zealand and Germany no comparable procedure exists. Similar referrals are, however, part of the constitutional law of Ireland, France, Canada and India. In Germany, however, it is established constitutional practice that the Federal President is entitled to withhold signature of a parliamentary Bill when he has constitutional concerns regarding the legislative procedure and, to a lesser extent, also with regard to substantive constitutional provisions (Article 82(1) of the Grundgesetz). On eight occasions, different Federal Presidents have since 1949 refused to sign a Bill. As there is no referral procedure, the Bundestag (Parliament) would have to apply to the Constitutional Court for an order compelling the President to sign the Bill within the procedure of a dispute between organs of state. Such a request has never occurred. Instead, Parliament has either reconsidered the Bill or, on one occasion, the Grundgesetz has been amended to accommodate the concerns. On the other hand, German Presidents have signed several Bills with publicly expressed reservations, which effectively invited challenges to the Act almost immediately after it entered into force. See, for example BVerfGE 106, 310 ('Zuwanderungsgesetz' ['Migration Act']) of 2002 and BVerfGE 115, 118 ('Luftsicherheitsgesetz' ['Aviation Security Act']) of 2006.

141 *Doctors for Life* (supra) at para 43.

142 This subsection is dealt with in more detail below.

to a Bill is therefore always to render the Bill passed by Parliament invalid — and it is exactly this kind of litigation that FC s 167(4)(b) seeks to preclude.<sup>143</sup>

The Constitutional Court's exclusive jurisdiction with regard to Bills and the entire referral procedure had a different focus under the Interim Constitution.<sup>144</sup> Under the Interim Constitution, concerns about the constitutionality of a Bill (or any of its provisions) were assumed to be part of a dispute between different political groups inside Parliament (or a provincial legislature). According to IC ss 98(2)(d) and 98(9), the Constitutional Court could decide a dispute over the

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constitutionality of any Bill only at the request of the Speaker of the National Assembly, the President of the Senate or the Speaker of a provincial legislature, and then only upon receipt by these persons of a petition by at least one third of all the members of the National Assembly, the Senate or the affected provincial legislature requiring them to do so. Thus, the rationale behind the Constitutional Court's exclusive jurisdiction was not the resolution of a dispute between two or more organs of state, but the protection of minority parties in the parliamentary process. Given the circumstances leading up to the enactment of the Interim Constitution, it may be assumed that the intention of the drafters, in addition to confining the various legislatures to the imperatives of the new constitutional order, was to give the political opposition in Parliament, the Senate (as it then was) and any provincial legislature an effective tool to stop the ruling party from enacting constitutionally problematic legislation. The protection of parliamentary minority parties is no longer part of the rationale behind the Constitutional Court's exclusive jurisdiction under FC s 167(4)(b). Under the Final Constitution, parliamentary minority groups may still approach the Constitutional Court and access its exclusive jurisdiction, but only after the Bill has been signed into law and have become an Act of Parliament. This procedure is set out in FC s 167(4)(c) read with FC s 80. I discuss its primary features below.

### **(bb) Scope of judicial review of a Bill**

Once a referral is made in accordance with either FC s 79 or FC 121, the Constitutional Court not only has exclusive jurisdiction to hear the case, but also has to decide the matter. A formally correct referral by the President or the Premier of a province, in other words, imposes an obligation on the Constitutional Court to decide on the constitutionality of the Bill to resolve the dispute. But the scope of the Court's review power is limited. In *Liquor Bill*, the Constitutional Court emphasized that it was not obliged to scrutinize the whole of a Bill in order to determine its constitutionality for purposes of FC s 79.<sup>145</sup> Rather, FC s 79(5) must be read as

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143 *Doctors for Life* (supra) at paras 44-56.

144 Cf *Speaker of the KwaZulu-Natal Provincial Legislature, Ex Parte: In re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995; Speaker of the KwaZulu-Natal Provincial Legislature, Ex Parte: In re Payment of Salaries, Allowances and Other Privileges to the Ingonyama Bill of 1995* 1996 (4) SA 653 (CC), 1996 (7) BCLR 903 (CC); *Speaker of the National Assembly, Ex Parte: In re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995* 1996 (3) SA 289 (CC), 1996 (4) BCLR 518 (CC); *Gauteng Provincial Legislature, Ex Parte: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC).

145 *Liquor Bill* (supra) at para 13. The Court goes on to say that FC s 79 does not entail a 'mini-certification' process (at para 16).

empowering the Court to make a decision regarding the Bill's constitutionality only in relation to the points raised in the President's reservations.<sup>146</sup> These reservations, however, and thus the focus of the Court's attention, may relate both to specific provisions and to the Bill as a whole.<sup>147</sup>

The scope of the Court's review powers in respect of Bills was further refined in *In re: The Constitutionality of the Mpumalanga Petitions Bill, 2000*.<sup>148</sup> Here, the Premier of the Mpumalanga Province's reservations included a concern not previously

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referred to the legislature, but which had been raised for the first time only in papers before the Court. The Court eventually declined jurisdiction in terms of FC s 167(4) (b), holding that such a referral by the Premier (or the President) is defective for non-compliance with the constitutional requirement that it should first be referred to the legislature for (re-)consideration of the Bill. The principle of respect for the democratically elected legislature and the value of an unobstructed legislative process, which underlie the rules about who may initiate the review of a Bill, are also decisive here:

The Court's function to adjudicate upon the Bill commences only after this political process [contemplated by FC s 121] has been exhausted and it is limited to a consideration of the Premier's reservations together with the responses of the parties represented in the legislature. The role of the legislature would be undermined if the Premier's reservations could be entertained by this Court without having been referred to the legislature for its consideration.<sup>149</sup>

In *Liquor Bill*, the Court had explicitly left open whether it may ever be appropriate for it, upon a presidential referral, to consider other provisions of the Bill which appear to be manifestly unconstitutional, but which were not included in the President's reservations.<sup>150</sup> In *Mpumalanga Petitions Bill*, the Court settled this question: In referral proceedings under FC ss 79 and 121, the Court held, no room exists for the Court to consider issues that have not been properly raised by the President or the Premier,<sup>151</sup> either — one may add — because the issue has not been raised earlier at all, or because it has not previously been referred to the legislature. This interpretation of the Court's function in terms of FC s 167(4)(b) appears correct. Nevertheless, it is doubtful whether the Court really would refrain from considering a provision in a Bill that was manifestly unconstitutional. One could imagine at the

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146 *Ibid* at para 14.

147 *Ibid* at paras 17-18.

148 2002 (1) SA 447 (CC), 2001 (11) BCLR 1126 (CC).

149 *Mpumalanga Petitions Bill* (supra) at para 9. FC s 79(2) provides similarly with regard to the President and a Parliamentary Bill.

150 *Liquor Bill* (supra) at para 15.

151 *Mpumalanga Petitions Bill* (supra) at para 13. Consequently, the Court requires that the document in terms of which the President or Premier conveys his or her reservations to Parliament or the provincial legislature ought to form part of the referral to the Constitutional Court under the provisions of FC ss 79 or 121.

very least the Court's bringing a patent constitutional defect in a Bill to the attention of the parties, even where that defect was not properly before it.

In *Gauteng School Education Bill*, the Court assumed jurisdiction and found the Bill to be in line with the Interim Constitution even though the Bill, after referral to the Court, had been passed and duly enacted (as the Gauteng School Education Act of 1995).<sup>152</sup> Although the disputed sections had not been put into operation at the time of the Court's decision, the Bill technically no longer existed, and the Constitutional Court could have decided that the case had become moot.<sup>153</sup> It

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did not do so, with Mahomed DP stressing that none of the parties had contended that the Court's exclusive jurisdiction was 'in any way ousted' because the Bill had since been enacted.<sup>154</sup> In *Doctors for Life*, the Constitutional Court confirmed this approach on more principled grounds. In this case, the Court held that it would follow the general rule in South African law that the crucial time for determining whether a court has jurisdiction is the time when the proceedings commenced.<sup>155</sup> Once a referral has been made or an application lodged, the Court will objectively assess whether the conditions for its jurisdiction have been fulfilled. The subjective intention of the parties cannot influence the Court's decision at this stage.<sup>156</sup>

It is in any case very likely that the President, having referred a case to the Constitutional Court in terms of FC s 79, would wait for the Court's decision before signing the Bill into law. But what if he does not? In *Doctors for Life*, the Court held that a lack of jurisdiction to entertain a challenge to a Bill could not be compensated for by the fact that the Court would later have jurisdiction to pronounce on the constitutional validity of the resultant Act.<sup>157</sup> This line of reasoning would probably not operate the other way, however. If the President, after the referral, signs the Bill, the Court no longer has to resolve a live dispute between the President and Parliament and, consequently, it should decline to hear the case as moot.<sup>158</sup> The exception to this rule, as *Gauteng School Education Bill* suggests, is that the Court

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152 *Gauteng Provincial Legislature, Ex Parte: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC).

153 Of course, the constitutionality of the provisions in dispute could have been challenged in another way and eventually the Constitutional Court would have had to decide the matter, anyway — but not in terms of its exclusive jurisdiction.

154 *Gauteng School Education Bill* (supra) at para 2.

155 *Doctors for Life* (supra) at para 57 referring to *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd* 1969 (2) SA 295 (A), 310D-E and *MV Snow Delta Serva Ship Ltd v Discount Tonnage Ltd* 2000 (4) SA 746 (SCA) at para 7.

156 *Doctors for Life* (supra) at para 9 (Constitutional Court states: 'the question whether this Court has exclusive jurisdiction in this matter is too important to be resolved by concession.' On a very narrow reading, the Court here only ruled on 'this matter'. But the principle of exclusive jurisdiction cannot generally depend on consent only. First, this would contradict the exceptional nature of the jurisdiction compared to the normal case of concurrent jurisdiction. Secondly, the Constitutional Court can always grant direct access in terms FC s 167(6)(a), and there is therefore no need for a wide conception of its exclusive jurisdiction.)

157 *Doctors for Life* (supra) at para 57.

might still be prepared to entertain the case if the contested provisions have not yet been put into operation.

Finally in this regard, a decision by the Constitutional Court under FC s 167(4)(b) that a Bill is constitutional does not in any way prevent further constitutional challenges to the statute after its enactment. Of course, *stare decisis* prevents re-litigation of issues that the Court has already determined in its analysis of the Bill.<sup>159</sup>

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### **(iii) Abstract review of Acts of Parliament and provincial Acts, FC s 167(4)(c)**

FC s 167(4)(c) grants the Constitutional Court exclusive jurisdiction in applications envisaged in FC ss 80 and 122. These are applications brought by members of the National Assembly or members of provincial legislatures for an order declaring that all or part of an Act of Parliament (or provincial Act, as the case may be) is unconstitutional. The Constitutional Court's jurisdiction in such applications starts where its jurisdiction in terms of FC s 167(4)(b) ends, ie, at the moment the President signs the Bill into law. As with FC s 167(4)(b), the Court's powers under FC s 167(4)(c) are powers of abstract review in relation to a particular kind of dispute. The procedure that triggers the Court's jurisdiction is not part of FC s 167(4)(c) itself, but is regulated by the Constitution's provisions on the national and provincial legislative process.

FC s 80 provides that, within 30 days of its signing into law, one third or more of the members of the National Assembly may apply to the Constitutional Court for an order declaring 'all or part of an Act of Parliament . . . unconstitutional'.<sup>160</sup> This provision balances the parliamentary majority's interest in legislating according to its political convictions against the parliamentary minority's interest in having any constitutional concerns with regard to a statute resolved in a timely manner. Members of the National Assembly may not stop a Bill from becoming an Act since this would contradict the basic principle of majority rule. On the other hand, they are given the right to initiate a process of abstract review to test the constitutionality of a provision or entire statute. This right may be regarded as an adjunct of the general principle, articulated in FC s 57(2)(b), that the rules and orders of the National Assembly must provide for participation by minority parties.

The primary function of Parliament as the democratically elected lawmaker does not only protect it from undue *outside* interference, as mentioned above.<sup>161</sup> Ngcobo J's remarks in *Doctors for Life* that the business of Parliament might be paralysed if Parliament were to spend its time defending its legislative process in the courts are also relevant here, where the threat of undue influence comes from the inside.<sup>162</sup>

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158 This reasoning applies, of course, *mutatis mutandis* to the provincial sphere in terms of FC s 121.

159 See *Liquor Bill* (supra) at para 20.

160 The following comments apply, unless otherwise indicated, *mutatis mutandis* to the equivalent procedure with regard to a provincial legislature in terms of FC s 122.

161 See FC s 167(4)(b) above.

162 Cf *Doctors for Life* (supra) at para 36.

This explains the relatively high proportion of members that is required for an application under FC s 80<sup>163</sup> and the strict 30-day time limit within which the application must be brought.<sup>164</sup> Parliament is required to take

constitutional constraints into account when drafting Bills. Had FC s 80 allowed a small number of minority members of Parliament to challenge the constitutionality of an Act at any time after its signing into law, the application process would have been turned into a political device for the parliamentary minority to continue a fight over a statute that had been lost in the ordinary legislative process.

Interestingly, FC s 80 does not specify that only those who voted against the Bill in Parliament may apply for its consideration by the Constitutional Court under FC s 80, or only those who raised constitutional concerns about the Bill in plenary session or in committee. Neither do the applicants have to belong to a single parliamentary caucus. In contrast to the situation where the President acts under FC s 79, members of Parliament acting under FC s 80 do not interfere from outside with the legislative process. They are part of it. This explains why the President's right of referral in FC s 167(4)(b) is a matter of last resort after the failure of a fairly elaborate internal dispute resolution process, whereas members of Parliament may apply to the Constitutional Court under FC s 167(4)(c) immediately after the Bill has been signed into law, without further consideration of the matter by Parliament.

The crucial date for the start of the 30-day time limit is the date on which the President signs the Act into law, not the date on which it takes effect, which may be some time later. The fact that the Act may not be in force at the time of the application does not affect the Constitutional Court's jurisdiction to hear the matter, as held in a different context in *Khosa*.<sup>165</sup> The holding in that case was based on FC s 172(2)(a), which does not distinguish between the courts' powers to invalidate statutory provisions that have been brought into force and those which have not.<sup>166</sup> In *Doctors for Life*, the Constitutional Court confirmed this holding in respect of entire statutes, on the grounds that FC s 80 and FC s 122 did not exhaust the circumstances in which Acts of Parliament that had not yet been brought into force could be challenged.<sup>167</sup> Indeed, there is nothing to prevent a member of the public from challenging a provision of an Act of Parliament during the 30-day window-period contemplated in FC s 80.<sup>168</sup>

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163 In the provincial sphere, the one-third requirement for the National Assembly is reduced to 20 per cent of the members of the provincial legislature (FC s 122).

164 The National Assembly currently consists of 400 members, of which 297 are members of the ruling party, the African National Congress (74.25 %). See Electoral Institute of Southern Africa 'South Africa: National Assembly floor-crossing outcome 2007' available at ([www.eisa.org.za](http://www.eisa.org.za)). Thus, not even all members of the National Assembly from other parties together reach the quorum of FC s 167(4)(c). This fact explains why so far there has been not a single application to the Constitutional Court in terms of this subsection.

165 *Khosa & Others v Minister of Social Development & Others; Mahlaule & Others v Minister of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC) at para 90.

166 *Khosa* (supra) at para 91.

167 *Doctors for Life* (supra) at paras 63-64.

FC s 80(3) provides for a special form of preliminary ruling in terms of which the Constitutional Court, while it is contemplating the constitutionality of an Act of Parliament under FC s 80, may order that all or part of the Act has no force. The Court may only make such an order if the interests of justice require it and the main application under FC s 80(1) has a reasonable prospect of success. Both these criteria are based on well-established principles that form part of the criteria for the granting of direct access under FC s 167(6). FC s 80(3) is nevertheless

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distinctive in treating the applicant's prospects of success and the interests of justice as separate criteria. Under FC s 167(6) the applicant's prospects of success form part of the interests-of-justice enquiry. This difference may be attributed to the fact that the 'prospects of success' criterion serves a special purpose under FC s 80(4) (as I discuss below). In respect of the enquiry whether an order of suspension in terms of FC s 80(3) should be granted, it has to be taken into account that Parliament has passed the Act in question and that the President has assented to it. In sum, the two organs of state responsible for legislation have already come to the conclusion that the statute is constitutionally sound. The test for purposes of FC s 80(3) should therefore be similar to that for the granting of an urgent application: namely, whether the applicant will suffer irreparable harm if the challenged provision remains in force and his or her challenge ultimately proves to be successful. The same test should apply in respect of challenges to provincial acts under FC s 122(3).

The final part of FC s 80(4) entitles the Court to order the applicant members of Parliament to pay the costs of the application in the event that it is unsuccessful and did not have a reasonable prospect of success. This subsection clearly has a punitive character. As mentioned above, even though members of Parliament are permitted to apply to the Constitutional Court for the abstract review of the constitutionality of an Act of Parliament, they may not do so simply to carry on a political dispute lost in the legislature. They may only do so in order to raise a genuine constitutional challenge to the Act. The threat of an adverse costs order is specifically mentioned so as to deter members of Parliament from making frivolous applications. The Rules of the Constitutional Court reinforce this provision by requiring applicants to support their application by providing an affidavit setting out the contentions on which they rely, including the statutory provision or provisions being challenged, the relevant provision or provisions of the Final Constitution relied upon, and the grounds upon which the respective provisions are deemed to be in conflict.<sup>169</sup>

On the other hand, it is in the interests of Parliament as a whole that its laws should be constitutional. If a sufficient proportion of members of the National Assembly are legitimately concerned about the constitutionality of a provision, they should not be penalized simply because the Constitutional Court ultimately upholds the provision. It is accordingly submitted that the second condition for the granting of a costs order — that the applicant should have no reasonable prospect of success — should be generously interpreted. This approach was followed in a slightly different setting by the Supreme Court of Appeal in *Gauteng Provincial Legislature v Kilian & Others*.<sup>170</sup>

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168 Ibid at 63-64.

169 Constitutional Court Rules 15(1) and 15(4) of 2003.

*Kilian* was decided under the Interim Constitution, which allowed members of Parliament to challenge the constitutionality of statutes when still in Bill form,

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with the application reaching the Constitutional Court by way of request by the Speaker of the National Assembly.<sup>171</sup> In such circumstances, the Supreme Court of Appeal held, applications by minority party members for the review of a statute were in the interests of the provincial legislature and its effective and efficient functioning. Indeed, such applications could be seen to be 'part and parcel of the legislative process'.<sup>172</sup> On the facts, the applicants had not acted in their personal capacity, and their action was not frivolous, vexatious or due to improper motives.<sup>173</sup> The Supreme Court of Appeal accordingly found that they should not be held liable for costs.

Under the Final Constitution this precise line of reasoning no longer applies. By the time of a challenge under FC s 80 or FC s 122, the Bill has been signed into law and the legislative process is conclusively over. Nevertheless, the basic principle that applicants who raise important issues of constitutional principle should not be penalized is still relevant. As held by Mahomed DP in *Gauteng School Education Bill*:

A litigant seeking to test the constitutionality of a statute usually seeks to ventilate an important issue of constitutional principle. Such persons should not be discouraged from doing so by the risk of having to pay the costs of their adversaries, if the Court takes a view which is different from the view taken by the petitioner. This, of course, does not mean that such litigants can be completely protected from that risk. The Court, in its discretion, might direct that they pay the costs of their adversaries if, for example, the grounds of attack on the impugned statute are frivolous or vexatious or they have acted from improper motives or there are other circumstances which make it in the interest of justice to direct that such costs should be paid by the losing party.<sup>174</sup>

This holding should be applied *mutatis mutandis* to costs orders in respect of applications under FC s 80. Save for frivolous, vexatious or improperly motivated applications, applicants must generally be understood to be acting as members of the National Assembly in the interests of ensuring that the statute in question complies with the Constitution.<sup>175</sup> Other factors the Court may legitimately

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consider are whether the constitutional concerns raised were discussed in Parliament and whether they were supported during public hearings.<sup>176</sup>

#### **(iv) Amendments to the Constitution, FC s 167(4)(d)**

170 2001 (2) SA 68 (SCA), 2001 (3) BCLR 253 (SCA).

171 According to IC ss 98(2)(d) and 98(9), the Constitutional Court would have to decide a dispute over the constitutionality of any Bill only at the request of the Speaker of the National Assembly, the President of the Senate or the Speaker of a provincial legislature, who should make such a request to the Court upon receipt of a petition by at least one-third of all the members of the National Assembly, the Senate or the affected provincial legislature requiring him or her to do so.

172 *Kilian* (supra) at para 29.

173 Ibid at para 24.

174 *Gauteng Provincial Legislature, Ex Parte: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* (supra) at para 36.

In terms of FC s 167(4)(d), only the Constitutional Court may review the constitutionality of an amendment to the Final Constitution.<sup>177</sup> Because other courts are prevented from declaring constitutional amendments invalid (neither FC s 172 nor the confirmation procedure of FC s 167(5) apply) litigants can approach the Constitutional Court directly. However, although the effect is the same, applications for access to the Court under FC s 167(4)(d) have a different basis to applications for direct access under FC s 167(6)(a). Direct access is typically granted only in exceptional circumstances because it requires the Constitutional Court to sit as a court of first and last instance in circumstances where other courts are capable of hearing the application. In applications based on FC s 167(4)(d), on the other hand, only the Constitutional Court is competent to hear the matter. Whether the Constitutional Court should be approached directly is therefore a function of the nature of the case, and in particular of whether the case consists of a linked challenge to ordinary legislation and to a constitutional amendment, or simply of a challenge to a constitutional amendment. In the former instance, it may be necessary first to approach the High Court in respect of the challenge to ordinary legislation, and then to proceed to the Constitutional Court (a) for an order confirming the High Court's order of invalidity (or appealing its failure to grant such an order) and (b) for an order of constitutional invalidity in respect of the constitutional amendment. This procedure was followed in *United Democratic Movement v President of the Republic of South Africa & Others (1)*,<sup>178</sup> where the applicants first initiated urgent proceedings in the High Court for review of the two pieces of ordinary legislation challenged, and then approached the Constitutional Court in respect of the legislative package (including constitutional amendments) lifting the ban on floor-crossing as a whole.

In *Matatiele Municipality & Others v President of the Republic of South Africa & Others*,<sup>179</sup> the applicants approached the Constitutional Court under FC s 167(4)(d) with regard to their challenge to the Constitution Twelfth Amendment Act and under FC s 167(6)(a) with regard to their challenge to the Cross-Boundary Municipalities Laws and Related Matters Act ('the Repeal Act').<sup>180</sup> In its two judgments in this case, the Constitutional Court drew a clear distinction between

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175 In coming to this conclusion, I respectfully disagree with Steven Budlender. Budlender is of the opinion that applications in terms of FC s 80 should not occur at the expense of the legislature. See Steven Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 17 at § 17.5(b). See also Adrian Friedman 'Costs' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 6, § 6.2(g) (Friedman also advocates a more flexible approach than Steven Budlender.)

176 The Constitutional Court's ordinary test for prospects of success takes into account whether earlier court decisions were divided over the constitutional matter. This part of the test is obviously not possible here, as the Constitutional Court has exclusive jurisdiction, but it shows that the existence of differing viewpoints on a matter may give rise to an impression of reasonable prospects of success.

177 The scope of challenges to constitutional amendments is limited. See Budlender (supra) at § 17.2(a) and § 17.3(g).

178 2003 (1) SA 488 (CC), 2002 (11) BCLR 1179 (CC).

179 2006 (5) SA 47 (CC), 2006 (5) BCLR 622 (CC) (*Matatiele I*); 2007 (1) BCLR 47 (CC) (*Matatiele II*).

180 Act 23 of 2005. See *Matatiele I* (supra) at para 33.

'normal' access applications and those where litigants approach the Court on the basis of its exclusive jurisdiction. Its first judgment briefly confirmed its exclusive jurisdiction in respect of the challenge to the constitutional amendment. It did not consider issues relevant to applications for direct access, such as the interests of justice.<sup>181</sup> In its second judgment, the question as to whether the applicants were entitled to approach the Court directly on the issue of the validity of the Repeal Act was considered only *after* it had dealt with the constitutionality of the Constitution Twelfth Amendment Act.<sup>182</sup> The Court granted direct access because of the interrelationship between the two Acts: it would have been unreasonable for the litigants to challenge one of the legislative components of a comprehensive package in a different forum.<sup>183</sup> The exclusive jurisdiction of the Constitutional Court in assessing a constitutional amendment therefore influences (if not determines) whether it is in the interests of justice in terms of FC s 167(6)(a) to grant access to the Court directly with a simultaneous challenge to another act of Parliament when both regulate the same subject matter.<sup>184</sup>

### **(v) Constitutional obligations of Parliament or the President, FC s 167(4)(e)**

FC s 167(4)(e) is the clearest example of an area of exclusive jurisdiction based on the principle of institutional respect.<sup>185</sup> Given the inevitably controversial nature of such disputes, it makes sense that only the highest Court in constitutional matters should be able to decide whether 'Parliament or the President has failed to fulfil a constitutional obligation'. But what does the term 'constitutional obligation' mean in this context? It surely cannot refer to these institutions' general duty to act in conformity with the Constitution, since such an interpretation would contradict FC s 172(2)(a), which empowers the High Court and the Supreme Court of Appeal to make orders concerning the constitutional validity of an Act of Parliament and any conduct of the President.<sup>186</sup>

181 *Matatiele I* (supra) at para 34.

182 *Ibid* at para 14 ('Ordinarily, the issue of direct access would be considered first, before considering the merits of the constitutional challenge. However, this issue relates to the Repeal Act only and does not affect the Twelfth Amendment. It will therefore be convenient to address the constitutional validity of the Twelfth Amendment first, followed by the question whether the applicants were entitled to approach this Court directly on the issue of the validity of the Repeal Act, and if so, whether the Repeal Act is constitutionally valid.')

183 See *Matatiele II* (supra) at para 105 ('Otherwise, the applicants would have been required to lodge a constitutional challenge relating to the Twelfth Amendment in this Court, which is the only court having jurisdiction in relation to the Twelfth Amendment, and lodge a separate challenge to the Repeal Act in the High Court. The result would be two applications in two different courts raising substantially the same issue.')

184 This approach is similar to the tack taken by the Court with regard to 'issues connected with decisions on constitutional matters'. See § 4.3(e) *infra*.

185 See § 4.3(b) *supra*.

186 *Doctors for Life* (supra) at paras 16-17.

In the first *SARFU* judgment, the Constitutional Court, referring to the need to reconcile FC s 167(4)(e) with FC s 172(2)(a), held that not all conduct of the President amounts to a constitutional obligation for purposes of FC s 167(4)(e), and that this provision should accordingly be given a narrow meaning.<sup>187</sup> The Court, however, declined to define the term 'fulfil a constitutional obligation', holding that its meaning would depend on 'the facts and the precise nature of the challenges to the conduct of the President'.<sup>188</sup> In *Doctors for Life*, the Court extended this holding to the alleged failure by Parliament to fulfil a constitutional obligation.<sup>189</sup>

In the absence of an overarching definition, the ambit of FC s 167(4)(e) must be discerned from the cases in which this provision has been considered. The first such case after *SARFU I* was the Supreme Court of Appeal's decision in *King & Others v Attorneys Fidelity Fund Board of Control & Another*.<sup>190</sup> In this case, the applicants challenged the validity of a statute on the grounds that Parliament had failed to fulfil its obligation in terms of FC s 59(1) to facilitate public involvement in its processes. The High Court had dismissed the claim on the grounds that there had been due compliance with this requirement. The Supreme Court of Appeal approached the matter on a different basis. Since the applicants had argued that a constitutional obligation had been breached, the Supreme Court of Appeal held, the crucial question was whether it had jurisdiction to grant an order of statutory invalidity in terms of FC s 172(2)(a), or whether the case fell to be decided exclusively by the Constitutional Court under FC s 167(4)(e).<sup>191</sup>

In answering this question, the Supreme Court of Appeal, like the Constitutional Court in *SARFU I*, did not offer a definition of 'constitutional obligation' for purposes of FC s 167(4)(e). Instead, it pointed out which constitutional provisions would *not* give rise to such an obligation, but nevertheless could justify the invalidation of a statute under FC 172(2)(a), if not adhered to. First, the Supreme Court of Appeal held, there are parts of the Constitution, like the Bill of Rights, which define 'the scope of Parliament's legislative authority'. Statutes that infringe these parts of the Constitution may be invalidated by the High Courts and the Supreme Court of Appeal under FC s 172(2)(a), subject to confirmation by the Constitutional Court.<sup>192</sup>

Secondly, the Supreme Court of Appeal held, the Constitution imposes certain procedural or 'manner and form' requirements that must be complied with for a statute to be valid.<sup>193</sup> Failure to comply with these procedural requirements would also not found the Constitutional Court's exclusive jurisdiction under FC s 167(4)(e):

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187 *SARFU I* (supra) at para 25.

188 *Ibid* at para 25.

189 *Doctors for Life* (supra) at para 20.

190 2006 (1) SA 474 (SCA), 2006 (4) BCLR 462 (SCA).

191 *King* (supra) at para 15.

192 *Ibid* at para 16.

193 *Ibid* at para 17.

Procedural requirements that are prerequisites to validity do not impose obligations. This is because constitutional limitations on legislative authority generally — albeit not invariably — derive from disabilities contained in rules that qualify the way in which the Legislature may act: and it is a mistake to confuse legal limitations that arise from procedural prerequisites and from other limitations of legislative power with those that derive from the imposition of duties. . . .<sup>194</sup>

This left, the Supreme Court of Appeal held, situations where 'Parliament so completely fails to fulfil the positive obligations the Constitution imposes on it that its purported legislative acts are invalid'.<sup>195</sup> Unlike a failure to comply with a manner and form provision, which was a purely 'formal question', an allegation that Parliament had failed to fulfil a positive obligation imposed on it by the Final Constitution was 'a crucial political question' of the sort that the Constitutional Court was uniquely qualified to decide.<sup>196</sup> As an example of this sort of obligation the Supreme Court of Appeal cited the constitutional obligation that 'Parliament function in accordance with the principles of accountability, responsiveness and openness' in FC s 1(d).<sup>197</sup> The National Assembly's duty under FC s 59(1) to 'facilitate public involvement' in its processes was part of a series of provisions giving effect to FC s 1(d), and an allegation that Parliament had failed to comply with this duty was accordingly the kind of 'extreme' case that the Final Constitution reserved for the Constitutional Court to decide.<sup>198</sup>

In its decision in *Doctors for Life*, the Constitutional Court endorsed the Supreme Court of Appeal's holding in *King* that disputes concerning the substantive or formal constitutional validity of a statute or conduct on the part of the President are not to be equated with disputes concerning a failure to fulfil a constitutional obligation.<sup>199</sup> The Constitutional Court was also generally supportive of the Supreme Court of Appeal's conclusion that the question whether Parliament has fulfilled its obligation to facilitate public involvement is a 'crucial political question' of the kind that the Constitutional Court was uniquely qualified to decide.<sup>200</sup> The Constitutional Court's justification for this conclusion, however, is somewhat different. The relevant distinction, Ngcobo J held, was between 'constitutional provisions that impose obligations that are readily ascertainable and are unlikely to give rise to disputes'

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194 *King* (supra) at para 17. The Supreme Court of Appeal then quotes with approval HLA Hart's distinction between 'legal duties' on the one hand and 'legal disabilities' and 'legal limits' on the other. The latter implies, not the presence of a duty, but the absence of legal power.

195 *Ibid* at para 19.

196 *Ibid* at paras 18 and 23.

197 *Ibid* at para 19.

198 *Ibid* at para 23.

199 *Doctors for Life* (supra) at paras 16-17. The judgment cites the duties in FC s 7(2) as an example of a (substantive) provision to which the state has to adhere, but which does not amount to a constitutional obligation in the sense of FC s 167(4)(e).

200 *Ibid* at para 21.

and 'those provisions which impose the primary obligation on Parliament to determine what is required of it'.<sup>201</sup> Decisions in

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respect of the former type of case involve purely formal criteria, whereas a decision in respect of the second type of case 'trenches on the autonomy of Parliament to regulate its own affairs and thus the principle of separation of powers'.<sup>202</sup> A dispute over an alleged failure on the part of Parliament to facilitate public involvement in its affairs was a case of the second type because the relevant sections of the Constitution (FC s 59(1) and s 72(1)) do not set a readily ascertainable standard, but leave it to Parliament to determine how best to facilitate public involvement in its affairs. The most important issue for the Constitutional Court in assuming exclusive jurisdiction in *Doctors for Life*, in other words, was not the degree to which Parliament had failed to fulfil its positive obligations,<sup>203</sup> but the fact that the case required the Court to substitute its view of how Parliament should regulate its processes for that of Parliament.

The ratio of the Constitutional Court's decision in *Doctors for Life* is accordingly that the Constitutional Court will have exclusive jurisdiction under FC s 167(4)(e) whenever the case involves a dispute over the content of the obligation imposed on Parliament or the President, in a situation where the Constitution can be understood as imposing the primary duty for developing the content of the obligation on Parliament or the President, as the case may be. This principle is obviously a fairly abstract one, and the dividing line between purely formal requirements and content-dependent requirements will need to be refined in future cases. As a general rule, however, the less specific the provisions in the Constitution are on what Parliament or the President must do, the more likely it is that the Court will assume exclusive jurisdiction under FC s 167(4)(e). Such an approach is also in line with the more general idea of shared responsibilities between the Constitutional Court and the other courts (with the Supreme Court of Appeal at their helm), i.e., that the Constitutional Court's function is to set abstract standards and not primarily to decide whether they have been applied.

#### **(vi) Certification of a provincial Constitution, FC s 167(4)(f)**

According to FC s 144, a provincial Constitution or an amendment to it does not become law until the Constitutional Court has certified that the provincial Constitution or amendment complies with the national Constitution.<sup>204</sup> Since FC s 167(4)(f) provides that only the Constitutional Court may exercise this certification function, it thus confers exclusive jurisdiction on the Court.

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201 Ibid at para 25.

202 *Doctors for Life* (supra) at para 26.

203 The Constitutional Court expressly rejects this part of the Supreme Court of Appeal's reasoning in *King*. See *Doctors for Life* (supra) at para 21, fn 16.

204 For a more in-depth analysis, see Stu Woolman 'Provincial Constitutions' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 21.

The certification of a provincial Constitution is a slightly odd facet of the Constitutional Court's jurisdiction. It requires the Court to perform an abstract review in the absence of a dispute. Admittedly, abstract review is also the subject matter of FC ss 167(4)(b) and (c). Under FC ss 167(4)(b) and (c), however, the abstract review arises out of a conflict either between the President/Premier and Parliament/provincial legislature (FC s 167(4)(b) read together with FC ss 79 and 121) or between a majority and minority of parliamentarians in the national or provincial sphere (FC s 167(4)(c) read together with FC ss 80 and 122). In assessing the constitutionality of a Bill or an Act of Parliament in these circumstances, the Constitutional Court simultaneously resolves the dispute that gave rise to the case. The certification process for a provincial Constitution does not depend on the existence of a dispute. A provincial Constitution may be hotly contested within a province, but that is not relevant to the constitutional enquiry: even if a draft Constitution enjoys unanimous support in the province, the Constitutional Court still has to certify it in order for it to become law.<sup>205</sup> Consequently, the purpose of this certification exercise is not dispute resolution, but simply achieving certainty in the law, i e, ensuring that a provincial Constitution complies with the national Constitution and thereby putting its constitutionality beyond doubt.<sup>206</sup>

The Constitutional Court must certify or decline to certify the text of a provincial Constitution in its entirety.<sup>207</sup> It can neither limit its 'certificate' to parts of the proposed Constitution, nor can it declare parts that are inconsistent with the national Constitution invalid. The Court may only point out where there are problems with a provision and, consequently, why it will not certify the text.

### **(vii) Interim relief in matters of exclusive jurisdiction**

Under the Interim Constitution, any High Court (then a division of the Supreme Court) had jurisdiction to grant an interim interdict in relation to matters exclusively within the jurisdiction of the Constitutional Court, even where such interdict or relief might have the effect of suspending (or otherwise interfering with) the application of an Act of Parliament (IC s 101(7)). The Final Constitution does not contain such a provision.

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At common law, a court's jurisdiction to entertain an application for interim relief depends upon whether it has jurisdiction to preserve or restore the status quo, as

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205 This set of circumstances was reflected in the proposed Constitution of KwaZulu-Natal: while the ANC and the national government of the day objected to the draft Constitution at the Constitutional Court, the draft was passed unanimously by the KwaZulu-Natal legislature. Nevertheless, the Constitutional Court correctly pointed out that this 'fact' could not in any way influence the performance of its certification function. *Speaker of the KwaZulu-Natal Provincial Legislature, Ex Parte: In re Certification of the Constitution of the Province of KwaZulu-Natal, 1996* 1996 (4) SA 1098 (CC), 1996 (11) BCLR 1419 (CC) at para 12. The amended draft of the Constitution of the Western Cape was also submitted without objection. See *Speaker of the Western Cape Provincial Legislature, Ex Parte: In re Certification of the Amended Text of Constitution of the Western Cape, 1997* 1998 (1) SA 655 (CC), 1997 (12) BCLR 1653 (CC) at para 2. Similarly, the Final Constitution was supported by 87% of the Constitutional Assembly — and yet met with objections during the certification process by some of the very parties that had voted for it.

206 *Certification of the Constitution of KwaZulu-Natal* (supra) at para 11.

207 *Ibid* at para 10.

this is the purpose of preliminary legal protection. It does not depend on whether a court has jurisdiction to decide the main dispute.<sup>208</sup>

On this basis, the Constitutional Court in *National Gambling Board* determined that a High Court will have jurisdiction to grant interim relief in matters of exclusive jurisdiction as long as the preliminary ruling does not involve a final determination of the rights of the parties and does not affect the final determination.<sup>209</sup> Additionally, an applicant for such relief must rely on manifest prejudice or prejudice that is established on the facts placed before the court.<sup>210</sup> The jurisdiction of the High Court is independent from the form or effect of the interim interdict applied for. On the other hand, the High Court must not engage in an in-depth analysis of the contested constitutional right, but instead determine only whether the applicant has a *prima facie* right to the relief which is sought in the Constitutional Court.<sup>211</sup>

In addition to this systemic consideration, functional considerations also point towards granting jurisdiction to High Courts in matters of urgency:

The Constitutional Court is not designed to act in matters of extreme urgency. It consists of eleven members and a quorum of the Court is eight of them. This Court is in recess for some months of each year and during those times its members disperse to their homes which, in some cases, are a considerable distance from the seat of the Court in Johannesburg . . . [and] it is not always possible to convene a quorum of the Court at very short notice during a recess.<sup>212</sup>

If it was only up to the Constitutional Court to grant interim relief in constitutional matters, even in matters of exclusive jurisdiction, there would be a great risk that a person might be left without the protection of the law.

Every category of exclusive jurisdiction has to be treated and interpreted separately to decide whether a High Court has the power to grant or refuse interim relief pending the decision of a matter exclusively within the Constitutional Court's jurisdiction.<sup>213</sup> FC s 167(4)(a) grants exclusive jurisdiction to the Constitutional Court to *decide* disputes between organs of state. Provided that it does not decide the dispute, a High Court has jurisdiction to grant interim relief pending the final determination of such a dispute.<sup>214</sup> In contrast, FC s 167(4)(b) leaves no room for interim relief with regard to Bills. As no court may, save as provided in FC ss 79 and 121, consider the constitutionality of a bill, no court may grant interim relief either. There would in any case be no proceedings in respect of

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208 *Airoadexpress v LRTB, Durban* 1986 (2) SA 663 (A).

209 *National Gambling Board* (supra) at para 50.

210 *President of the Republic of South Africa & Others v United Democratic Movement & Others* 2003 (1) SA 472 (CC), 2002 (11) BCLR 1164 (CC) at para 33.

211 *National Gambling Board* (supra) at para 52.

212 *President of the RSA v United Democratic Movement* (supra) at para 30.

213 *National Gambling Board* (supra) at para 51.

214 *Ibid* at para 53.

which such relief would be relevant.<sup>215</sup> In the nature of things, a Bill referred to the Constitutional Court for a decision on its constitutionality would not have been signed into law and would have no legal force. It follows that interim relief would not be necessary because no one would be left without protection of the law, as might be the case with an Act of Parliament.

The special application procedures of FC s 80 (national sphere) and FC s 122 (provincial sphere) that are referred to in FC s 167(4)(c) provide for a specific mechanism in matters of urgency (FC ss 80(3) and 122(3), respectively) that only the Constitutional Court may entertain.<sup>216</sup> Here, High Courts are prevented from granting interim relief.<sup>217</sup> In *President of the RSA v United Democratic Movement*, the Constitutional Court nevertheless left open the question whether a High Court could have jurisdiction to suspend an Act of Parliament — before or after publication — outside the special application procedure of FC s 80 (or FC s 122). It is conceivable that a High Court might grant such an order in exceptional cases.<sup>218</sup>

With regard to constitutional amendments and exclusive jurisdiction under FC s 167(4)(d), the Constitutional Court has held that, although a constitutional amendment does not usually have an immediate effect on persons or their rights, in exceptional cases interim relief may be granted by a High Court to prevent serious and irreparable prejudice, provided that in doing so the court *a quo* does not decide on the amendment's constitutionality. However, courts should take notice where a constitutional amendment has achieved the special support required by FC s 74, and should be careful not to thwart the will of the legislature, save in extreme cases.<sup>219</sup>

Should ordinary legislation fall within the High Court's jurisdiction in terms of FC s 172(2), the High Court may also grant an interim order pending its own decision, or, if the legislation is found unconstitutional, pending an application for confirmation by the Constitutional Court.<sup>220</sup> In *National Gambling Board*, the Constitutional Court explicitly left undecided whether a High Court would have jurisdiction to grant interim relief in circumstances where Parliament or the President had failed to fulfil a constitutional obligation (FC s 167(4)(e)). However, there is no reason why the general rule — avoidance of a decision and preservation of the status quo — should not apply here.

In any case, interim relief should only be granted where it is strictly necessary in the interests of justice. The Constitutional Court has held that the constitutional standard of FC s 80(3) should apply in other cases — at the very least in cases of

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215 *President of the RSA v United Democratic Movement* (supra) at para 26.

216 See above at § 4.3(b)(iii).

217 *National Gambling Board* (supra) at para 51.

218 *President of the RSA v United Democratic Movement* (supra) at para 27.

219 *Ibid* at paras 28-30.

220 *Ibid*.

exclusive jurisdiction. In determining 'the interests of justice', the High Court has to balance the interests of the person seeking interim relief against the interests of

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others who might be affected by the grant of such relief. Where the case involves the enactment of legislation, any interim relief should be strictly tailored so as not to interfere with the operation of that legislation. This proviso is germane to instances in which the legislation relates to a constitutional amendment.<sup>221</sup>

### **(c) Constitutional matters of concurrent jurisdiction explicitly mentioned in the Constitution**

In all constitutional matters not falling within the Constitutional Court's exclusive jurisdiction, the Court shares concurrent jurisdiction with other courts. However, the jurisdiction of the Constitutional Court is not completely congruent with that of other courts. It remains a specialized court. As outlined above, the Constitutional Court is a court of limited, rather than plenary jurisdiction, as embodied in the text of FC s 167(3)(b). Therefore, the Constitutional Court may decide only constitutional matters, and issues connected with decisions on constitutional matters.

The threshold question of what constitutes a 'constitutional matter' is not in play for matters of exclusive jurisdiction. The Court cannot decline jurisdiction by arguing that the matter is not 'constitutional' within the meaning of FC s 167(3). There is another subset of cases where the 'constitutional matter' enquiry is only nominally engaged. These are cases where the Final Constitution, although not granting the Constitutional Court exclusive jurisdiction, nevertheless assigns a special task to the Court. The Court can fulfil these tasks without much consideration of the constitutional nature of the case. The first class of cases under this subset are those cases in which the Constitutional Court has to confirm an order of invalidity of an Act of Parliament made by a lower court according to FC s 167(5). In this subsection, the Constitution says in plain language that 'the Constitutional Court . . . *must* confirm any order of invalidity' (emphasis added). The Court cannot decline jurisdiction here.<sup>222</sup> The second class of cases are those that involve 'the interpretation, protection or enforcement of the Constitution'. Such cases are constitutional matters by reason of FC s 167(7). A term like 'interpretation' is not self-explanatory, of course. Nevertheless, to find that a matter requires the interpretation of the Final Constitution and then to draw the conclusion that it involves a constitutional matter is an exercise different from an independent finding that a case involves a constitutional matter. The former enquiry is guided by the text of FC s 167(7), while the latter is a more open-ended exercise of finding a basis for the Constitutional Court's jurisdiction.

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### **(i) Confirmation of orders of statutory invalidity, FC s 167(5)**

FC s 167(5) must be read in conjunction with FC s 172(2)(a). Together, the two provisions set the scene for the judicial review of national and provincial statutes

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221 *President of the RSA v United Democratic Movement* (supra) at para 32.

222 *Cf Masiya v Director of Public Prosecutions, Pretoria & Another* (Centre for Applied Legal Studies & Another, *Amici Curiae*) 2007 (5) SA 30 (CC), 2007 (8) BCLR 827 at para 16 ('A declaration of constitutional invalidity raises a constitutional matter which in the ordinary course must be considered by this Court'.)

and conduct of the President. This defining feature of a constitutional state — that all three branches of government must adhere to the Constitution (and face invalidation of their acts if they do not) — was uncontroversial throughout the negotiation of both the Interim and the Final Constitutions.<sup>223</sup> It is today unequivocally enshrined in the supremacy clause (FC s 2) and, specifically with regard to the Bill of Rights, in the application clause (FC s 8(1)). It has also been confirmed by the courts.<sup>224</sup> As an almost inevitable consequence of this principle, the Final Constitution confers on the judiciary the power to review Acts of Parliament. According to FC s 172(1)(a), '[w]hen deciding a constitutional matter within its power a court — (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.'

This clause covers all statutory provisions enacted by Parliament. It does not extend to subordinate legislation (e.g. regulations and by-laws),<sup>225</sup> to conduct other than conduct of the President,<sup>226</sup> or to the common law.<sup>227</sup> In regard to these other forms of law and conduct, confirmation of a declaration of invalidity is not required and the High Court's finding is final — provided the parties do not appeal the case to the Constitutional Court. From the perspective of this chapter, the crucial question is which court has the power to make a (final) finding on the constitutionality of legislation.

Two features of South Africa's hybrid system determine the answer to this question: first, the fact that the task of declaring legislation invalid is not solely assigned to one court (as in the US or Germany); and, secondly, the fact that not all courts are equally competent to make a final decision, again provided that the decision is not appealed to a higher court (as in Japan).

As to the first point: not every court is competent to make orders concerning the constitutional validity of an Act of Parliament or a provincial Act. The courts that are competent to make such orders are the 'Supreme Court of Appeal, a

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223 The idea of a breaking away from the Westminster tradition of parliamentary sovereignty was a position shared or at least publicly advocated across the political spectrum in the early 1990s. See Albie Sachs *Protecting Human Rights in a New South Africa* (1990) 34-36; South African Law Commission *Project 58: Group and Human Rights — Interim Report* (1991) at para 1.31. For an even earlier view on this matter, see Marinus Wiechers 'The Fundamental Laws behind Our Constitution' in Ellison Kahn (ed) *Fiat Iustitia: Essays in Honour of Oliver Deneys Schreiner* (1983) 383 at 385.

224 *De Lille v Speaker of the National Assembly* 1998 (3) SA 430 (C) at para 25.

225 See *Dawood & Another v Minister of Home Affairs & Others; Shalabi & Another v Minister of Home Affairs & Others; Thomas & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) at para 11; *Booyesen & Others v Minister of Home Affairs & Another* 2001 (4) SA 485 (CC), 2001 (7) BCLR 645 (CC) at para 1; *Minister of Home Affairs v Liebenberg* 2002 (1) SA 33; 2001 (11) BCLR 1168 (CC) at para 9.

226 See *Van Rooyen & Others v State and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC) at para 8.

227 See *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at para 2.

High Court or a court of similar status' (FC s 172(2)(a)).<sup>228</sup> The Magistrates' Courts are explicitly excluded from any decision on the constitutional validity of these types of statutes (FC s 170). Courts 'of similar status' either to the Supreme Court of Appeal or to a High Court are the Labour Court (s 151(2) of the Labour Relations Act 66 of 1995), the Labour Appeal Court (s 167(3) of the Labour Relations Act 66 of 1995),<sup>229</sup> and the Land Claims Court (s 22(2)(a) of the Restitution of Land Rights Act 22 of 1994).<sup>230</sup>

As to the second point: FC s 172(2)(a) makes it clear that an order of constitutional invalidity has no force until it is confirmed by the Constitutional Court. Thus, a decision by a High Court or the Supreme Court of Appeal declaring an Act of Parliament or a provincial Act invalid has no force until the Constitutional Court has confirmed such an order.<sup>231</sup> Here, the Constitutional Court's power of

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228 This enumeration is congruent with the powers of these courts in constitutional matters in general. See FC s 168(3) for the Supreme Court of Appeal and FC s 169(a) for the High Courts. Even if the Supreme Court of Appeal is not the highest court in constitutional matters it may nevertheless decide them.

229 There is an ongoing dispute between the High Courts and the Labour Court with regard to their respective jurisdictions. They are especially at odds in cases where the state is the employer. See John Grogan *Workplace Law* (9th ed. 2007) 449-451, 455-458. This turf battle has no consequences for the powers of these courts in constitutional matters. A similar dispute on who had the final word in labour law matters between the Supreme Court of Appeal and the Labour Appeals Court was resolved in favour of the Supreme Court of Appeal in *NUMSA & Others v Fry's Metal (Pty) Ltd* (2005) 26 ILJ 689 (SCA). In constitutional matters, appeals from the Labour Appeals Court must generally first go to the Supreme Court of Appeal. See *NEHAWU* (supra) at paras 20-22.

230 Thus far, no order of constitutional invalidity has been made by any court other than a High Court or the Supreme Court of Appeal.

231 Under the Interim Constitution, only the Constitutional Court had jurisdiction over 'any enquiry into the constitutionality of any law, including an Act of Parliament' and no other court could make orders of statutory invalidity (IC ss 98(2)(c) and 98(3)). Under the Interim Constitution, the Constitutional Court was placed on the same hierarchical level as the Appellate Division of the Supreme Court and neither court could hear appeals from the other. When a local or provincial division of the Supreme Court held that a finding on the constitutionality of an Act of Parliament may be decisive for the case, it had to refer the matter in a complicated way to the Constitutional Court (IC s 102(1)). A similar procedure had to be followed by Magistrates' Courts (IC ss 103(3) and 103(4)). In essence, the procedures prescribed in the Interim Constitution contemplated that enquiries into the validity of Acts of Parliament should be raised formally in proceedings before the Supreme Court of Appeal or other courts. They were only to be referred to the Constitutional Court for its decision in circumstances where it would be appropriate to do so according to a decision by the Supreme Court. The Supreme Court, thus, could not make any decision with regard to Acts of Parliament, but acted as a gatekeeper to the Constitutional Court. It had to ensure that the hearing of cases was not disrupted by unnecessary applications to refer issues to the Constitutional Court. Cases were only referred after all the evidence necessary for such a decision had been placed on record so that the determination of a constitutional issue could be deemed decisive. After the amendment of the Interim Constitution in 1995 (IC s 101(7) added by s 3 of Act 44 of 1995), interim relief could be granted by the Supreme Court. Because of the complicated referral procedure, the Constitutional Court explained the correct approach in a number of cases: *S v Mhlungu* 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC); *Luitingh v Minister of Defence* 1996 (2) SA 909 (CC), 1996 (4) BCLR 581 (CC); *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC). It is most likely that the intricate referral procedure under the Interim Constitution was one of the reasons for changing the system in the Final Constitution to the current scheme where only an affirmative decision by a High Court that a statute is invalid has to be referred to the Constitutional Court. Other advantages of this procedure are that the High Courts may feel a greater responsibility for declarations of invalidity and that the Constitutional Court has the advantage of another court's view on the matter.

review is nearly exclusive, i e, it has the final word in any decision on statutory invalidity. This superior role follows from the purpose of FC s 172(2)(a), and, by extension, FC s 167(5):

[The Constitutional Court] has exclusive jurisdiction in respect of certain constitutional matters, and makes the final decision on those constitutional matters that are also within the jurisdiction of other courts. This is the context within which section 172(2) (a) . . . is concerned with the law making acts of the legislatures at the two highest levels [national and provincial], and the conduct of the President, who as head of state and head of the executive is the highest functionary within the state. . . . The apparent purpose of the section is to ensure that this Court, as the highest court in constitutional matters, should control declarations of constitutional invalidity made against the highest organs of state.<sup>232</sup>

This statement's emphasis on separation of powers is consistent with the Constitutional Court's understanding of FC s 167(4). Additionally, the Court's position that its superior role is constitutionally warranted by 'comity' towards the other branches of government has been emphasized, first with regard to FC s 172(2), and later with regard to exclusive jurisdiction in the strict sense.<sup>233</sup>

Rule 16 of the Constitutional Court Rules sets out the procedural requirements for a referral to confirm an order of constitutional invalidity of a statute.<sup>234</sup> Although the Constitutional Court's jurisdiction is triggered by an order of constitutional invalidity, in many cases parties themselves have applied to the Constitutional Court for a confirmation order.<sup>235</sup> As Kate Hofmeyer points out, an application is not necessary as the Constitutional Court receives the case 'automatically' (and will confirm or decline to confirm in due course). However, such a redundant procedure is permitted by FC s 172(2)(d) and can be strategically employed by parties to avoid a delay in the final decision caused, for example, by the other party's appealing to the Supreme Court of Appeal.<sup>236</sup>

## **(ii) Interpretation, protection or enforcement of the Constitution, FC s 167(7)**

FC s 167(7) offers a hint of what the Constitutional Assembly might have intended when it decided that the Constitutional Court should be a court with

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232 *Pharmaceutical Manufacturers Association of SA in re: the Ex Parte Application of the President of the RSA & Others* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at para 55-56.

233 See § 4.2(c) *supra*.

234 See, further, Kate Hofmeyer 'Rules and Procedure in Constitutional Matters' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 5, § 5.2(c).

235 See *Daniels v Campbell NO & Others* 2004 (5) SA 331 (CC), 2004 (7) BCLR 735 (CC) at para 14 (Constitutional Court pointed out that in these circumstances an application to the Constitutional Court does not require leave of the court making the declaration or the Constitutional Court itself.) But see *President Ordinary Court Martial & Others v Freedom of Expression Institute and Others* 1999 (4) SA 682 (CC), 1999 (11) BCLR 1219 (CC) at para 16 (Where a provision declared invalid by a High Court has subsequently been repealed by an Act of Parliament, the Constitutional Court has a discretion to decide whether or not it should deal with the matter.)

236 Hofmeyer (*supra*) at § 5.2(c).

jurisdiction limited to 'constitutional matters'. FC s 167(7) is the only subsection that offers something like an explanation of what makes up 'constitutional matters' and gives both the Constitutional Court and the legal community at large some indication of how to distinguish constitutional from non-constitutional matters.<sup>237</sup> One has to keep in mind that under the Interim Constitution the entire jurisdiction of the Constitutional Court was defined through this legal triad (of interpretation, protection and enforcement).<sup>238</sup> Under that Constitution, the Constitutional Court's jurisdiction was triggered by 'matter[s] relating to the interpretation, protection and enforcement of the provisions of [the Interim] Constitution', which encompassed all sorts of disputes and enquiries (some of them within the Court's exclusive jurisdiction), rather than the presence of a 'constitutional matter.'

It seems that the Constitutional Assembly believed that the phrase 'interpretation, protection and enforcement' might be too narrow and thus replaced it with 'constitutional matter'. At the same time, however, the Constitutional Assembly apparently did not want to drop this phrase altogether. Instead, it altered it from a term that comprehensively defined the Constitutional Court's jurisdiction to one that defined a group of related cases falling under the overall jurisdiction of the Court. The consequence of this revision is that, today, both the courts and legal scholars focus entirely on whether a case presents a 'constitutional matter', while FC s 167(7) enjoys no prominence (even to the extent of being misquoted by the Constitutional Court).<sup>239</sup>

Its origins notwithstanding, FC s 167(7) on its own has an indeterminate scope. It states that 'a constitutional matter *includes* any issue involving the interpretation,

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237 It has also been argued that FC s 167(7) serves to emphasize the supremacy of the Final Constitution by pronouncements of the Constitutional Court in the interpretation, protection and enforcement of the Final Constitution, in particular with regard to the Bill of Rights. See *De Lille v Speaker of the National Assembly* 1998 (3) SA 430 (C) at para 34.

238 IC s 98(2) of the Interim Constitution provided:

The Constitutional Court shall have jurisdiction in the Republic as the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of this Constitution, including —

- (a) any alleged violation or threatened violation of any fundamental right entrenched in Chapter 3;
- (b) any dispute over the constitutionality of any executive or administrative act or conduct or threatened executive or administrative act or conduct of any organ of state;
- (c) any enquiry into the constitutionality of any law, including an Act of Parliament, irrespective of whether such law was passed or made before or after the commencement of this Constitution;
- (d) any dispute over the constitutionality of any Bill before Parliament or a provincial legislature, subject to subsection (9);
- (e) any dispute of a constitutional nature between organs of state at any level of government;
- (f) the determination of questions whether any matter falls within its jurisdiction; and
- (g) the determination of any other matters as may be entrusted to it by this Constitution or any other law.

239 The Constitutional Court has misquoted FC s 167(7) in two cases. See *Boesak* (supra) at para 14; *Fraser* (supra) at para 38. See § 4.3(a)(ii) and (iii) supra.

protection or enforcement of the Constitution' (emphasis added). This phraseology implies that, at least conceptually, there may be a constitutional

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matter that does *not* involve the interpretation, protection or enforcement of the Final Constitution. Still, FC s 167(7) serves the very important purpose of guaranteeing at least a minimum standard for identifying cases that the Constitutional Court must deal with. Any enquiry by the Constitutional Court into whether it should assume or decline jurisdiction should therefore start with an enquiry into whether there is an issue in the case that involves the interpretation, protection or enforcement of the Constitution. If this question is answered in the affirmative, it is strictly speaking unnecessary to embark on a free-floating consideration of the constitutional nature of the case.

As we have seen, FC s 167(7) stipulates that constitutional matters include any 'issue' involving the interpretation, protection or enforcement of the Final Constitution. It is unlikely, however, that the distinction between 'matter' and 'issue' will prove significant: a constitutional 'matter' can be understood as the entire case, while an 'issue' is limited to one aspect of the case. This is simply an acknowledgment that legal disputes usually contain a bundle of different questions, factual and legal, all of them 'issues' for decision by a competent court. Against this background, FC s 167(7) provides that only one aspect of a case need involve the interpretation, protection or enforcement of the Constitution to trigger the jurisdiction of the Constitutional Court. Such a reading is consistent with the distinction between constitutional matters and 'issues connected with decisions on constitutional matters' in FC s 167(3)(b). The Constitutional Court may also decide other issues, which do not involve the interpretation, protection or enforcement of the Constitution and are — at least *prima facie* — not constitutional matters, if they are sufficiently connected with a decision on a constitutional matter.<sup>240</sup>

Splitting up FC 167(2) into its constituent parts, a constitutional matter is present, first, whenever there is an issue that involves the 'interpretation' of the Final Constitution. Much has been written on the interpretation of the Final Constitution in general and on the Bill of Rights in particular.<sup>241</sup> However, the purpose of this literature is predominantly to show how the Final Constitution should be interpreted. The Constitutional Court has on numerous occasions, beginning with its first decision, elaborated how it approaches the interpretation of the Final Constitution and what it takes into account when doing so.<sup>242</sup> All very

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important considerations — no doubt — but for the Constitutional Court to assume jurisdiction in terms of FC s 167(7), it is necessary to determine *when* it is

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240 See § 4.3(e) *infra*.

241 See Lourens du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 32.

242 See, eg, *S v Zuma & Others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) at para 17 (On purposive interpretation and its limits); *Bernstein & Others v Bester & Others NNO* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) at paras 59-64 (Reading down of statutes); *Coetzee v Government of the Republic of South Africa & Others*; *Matiso v The Commanding Officer, Port Elizabeth Prison & Others* 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC) at para 11 (Interpretation to promote values of the Bill of Rights applies to both the fundamental right and the evaluation of any limitation according to the criteria of the limitation clause).

interpreting the Final Constitution, not *how* it interprets it. One has to go a step back, so to speak.

A court interprets the Final Constitution when it gives meaning to one or more of its provisions. Interpretation involves the understanding, exposition, and application of a text in order to ascertain and give effect to the intention of its author.<sup>243</sup> While this is true across disciplines, in the legal field interpretation has a more specific purpose: to determine whether a specific situation falls within the scope of a provision, and whether a case is covered by a particular legal norm. The interpretation of a statute requires a norm to be transposed into a concrete situation.<sup>244</sup> Ultimately, courts are asked to interpret a legal provision, such as a clause in the Final Constitution, in order to establish whether law or conduct is inconsistent with that provision.<sup>245</sup> A matter, therefore, involves the 'interpretation' of the Final Constitution under FC s 167(7) when meaning must be given to one or more provisions of the Final Constitution (or to the Final Constitution as a whole) in order to determine the constitutionality of law or conduct.

Next, it is necessary to ask when a court 'protects' the Final Constitution and thus entertains a 'constitutional matter' in the second sense mentioned in FC s 167(7). One possible understanding of the term 'protection' may be found in FC s 7(2), the opening section of the Bill of Rights, which stipulates that the state must 'respect, protect, promote and fulfil the rights in the Bill of Rights'. However, the meaning of the different obligations FC s 7(2) imposes on the state is all but clear. The Constitutional Court usually does not distinguish between them, but rather uses them conjunctively to define the state's obligations in terms of the Bill of Rights.<sup>246</sup> In academic writing, it has been suggested that the phrase 'protect' in FC s 7(2) refers to the state's positive duty to give effect to the Bill of Rights.<sup>247</sup> If such a positive duty can be established, any nonfeasance has the same legal quality as the abuse of state power: both would be infringements of the Final Constitution.<sup>248</sup>

The problem with such an approach to FC s 167(7) is that it is difficult to imagine why the Constitutional Court should only have jurisdiction when the state has failed to perform a particular positive obligation in the Bill of Rights. Why

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243 Lourens du Plessis & Hugh Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 61.

244 Lourens du Plessis & Hugh Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 89; IG Rautenbach *General Provisions of the South African Bill of Rights* (1995) 17-18.

245 Iain Currie & Johan de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 145.

246 See, eg, *Carmichele v Minister of Safety and Security & Another* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC) at para 57.

247 See Lourens du Plessis 'The Bill of Rights in the Working Draft of the New Constitution — An Evaluation of Aspects of a Constitutional Text Sui Generis' (1996) 7 *Stell LR* 3. 8.

248 Such a case could involve socio-economic rights where the state has to take (reasonable) positive measures to achieve their progressive realization. See *Grootboom v Government of the Republic of South Africa & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) at para 38; *Minister of Health & Others v Treatment Action Campaign & Others* (2) 2002 (5) SA 721 (CC), 2002 (10) BCLR 1075 (CC) at para 39.

would the Final Constitution exclude the jurisdiction of the Constitutional Court when a right needs to be, say, respected or fulfilled? Additionally, 'protection' may very well include the obligation not to infringe the Final Constitution in a negative way. It is much more likely that the word 'protection' in FC s 167(7) was carried over from the Interim Constitution without the intention of confining it to the same meaning as 'protect' in FC s 7(2). It is submitted, therefore, that 'protection' in FC s 167(7) refers to cases where the safeguarding of the Final Constitution is at stake, regardless of whether negative or positive duties are implicated.

Finally, the 'enforcement' of the Final Constitution is an issue that is in some way incidental to its interpretation and protection. Enforcement overlaps partly with protection, as effective protection demands the enforcement of a legal provision. However, both interpretation and protection require a court to pronounce on what the Final Constitution says with regard to a specific situation. They involve inquiries into the meaning of the Final Constitution. 'Enforcement', on the other hand, is less concerned with the meaning of the constitutional text and more concerned with its practical implementation in the form of remedies. To fall within the meaning of 'enforcement', one would have to establish, first, that the Final Constitution demands certain (positive or negative) conduct from the state or an individual. Second, one would need to establish guidelines for effective compliance. Thus, a case would involve a constitutional matter according to FC s 167(7) if it involves an order that gives effect to the Final Constitution.

Of course, these definitions of 'interpretation', 'protection' and 'enforcement' are not meant to create discrete categories. One may argue that every process of 'interpreting' the Final Constitution also requires its 'protection', and vice versa. The point is not that these categories are mutually exclusive; the differences between them are merely matters of emphasis. The categories of FC s 167(7) may overlap, but they were all included in this subsection to emphasize the different ways by which the Final Constitution may be implicated.

Having said that, it is difficult to avoid the conclusion that every single one of the over 300 cases the Constitutional Court has thus far decided could be classified as involving either the 'interpretation', the 'protection' or the 'enforcement' of the Final Constitution. From this perspective, it is not obvious that there *really* is any room for constitutional matters outside of FC s 167(7). How, for example, could a court make a finding on the constitutionality of a Bill, an Act of Parliament, or even an amendment to the Final Constitution without interpreting the Final Constitution? Likewise, disputes between organs of state concerning their *constitutional* status, powers or functions will always demand some interpretation of the Final Constitution. Is a decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional at all possible without at least an implicit evaluation of what the constitutional text demands in the situation? The term 'constitutional matter' does not seem to include more than what is already

envisaged in FC s 167(7). To this extent, the framers of the Interim Constitution appear to have been quite forward-looking in their approach to the Constitutional Court's jurisdiction.

This being so, the next question is whether FC s 167(7) provides only retrospective justification for the assumption of jurisdiction in cases the Constitutional Court has already decided, or whether it can also help us to understand how the Court should decide future cases. Is it possible to use FC s

167(7) to decide that a case does *not* involve the interpretation, protection or enforcement of the Final Constitution, and therefore that the Court should not assume jurisdiction? Not in such a simple way. As argued below, the subsection is indeed capable of limiting the jurisdiction of the Constitutional Court, but this requires a specific functionalist understanding of the Court's jurisdiction and a specific definitional approach to FC s 167(7).<sup>249</sup> Before elaborating on this point, it is necessary to review the cases in which the Constitutional Court has assumed jurisdiction without express reliance on FC ss 167(4), 167(5) or 167(7), and also those cases where it has held that no constitutional matter is present.

#### **(d) Other constitutional matters of concurrent jurisdiction**

Thus far, the constitutional matters discussed have all been linked to FC ss 167(4), 167(5) or 167(7). In addition to cases in which its jurisdiction has been founded on these provisions, the Constitutional Court has held that it has jurisdiction in a number of other cases, all of which involve 'constitutional matters' in terms of FC s 167(3)(b). These cases can be grouped into several broad categories, all of which help to understand the Court's approach to its jurisdiction.

#### **(i) Interpretation of legislation and development of the common law or customary law in accordance with the spirit, purport and objects of the Bill of Rights, FC s 39(2)**

FC s 39(2) imposes duties on the judiciary in the normal process of adjudication. In a nutshell, courts have to take the Bill of Rights into account whatever they do.<sup>250</sup> This section requires the courts to live up to a constitutional standard when they interpret statutory provisions or develop the common law or customary law. The context in which FC s 39(2) applies is not the interpretation or application of the Final Constitution itself, but solely the application, interpretation and development of the *ordinary law*. The Final Constitution is not relevant in these cases because it is invoked directly. In fact, neither of the parties may have relied on the Final Constitution for their claim. Rather, the Final Constitution is relevant because it influences the ordinary law.

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FC s 39(2) is not merely a directive for courts to develop the common law and interpret legislation. Courts do this in any event. Instead, this section sets the standard according to which the common law needs to be developed and legislation interpreted. In short, FC s 39(2) imposes an obligation on every court, tribunal or forum to ensure that the ordinary law evolves in a specific direction, ie, in accordance with the Final Constitution. In *Carmichele*, the Constitutional Court stated:

[I]t is implicit in section 39(2) read with section 173 that where the common law as it stands is deficient in promoting the section 39(2) objectives, the courts are under a general obligation to develop it *appropriately*.<sup>251</sup>

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249 See § 4.3(h)(ii) *infra*.

250 For a detailed analysis of what FC s 39(2) requires the courts to do, see Stu Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31, § 31.4(e).

251 *Carmichele* (*supra*) at para 39 (emphasis added).

FC s 39(2) sets the same standard for the interpretation of legislation. Consequently, the Constitutional Court has followed a similar approach to statutory interpretation as it has to the development of the common law. Just as every court must apply the common law within the framework of the Final Constitution, every court has a duty to interpret statutes through 'the prism of the Bill of Rights'.<sup>252</sup> The obligations are the same:

[The Constitutional Court has held] that the obligation of courts to develop the common law, in the context of the section 39(2) objectives, is not purely discretionary but that the courts are under a general obligation to develop the common law appropriately where it is deficient, as it stands, in promoting the section 39(2) objectives. There is a like obligation on the courts, when interpreting any legislation . . . to promote those objectives.<sup>253</sup>

A constitutional matter arises where a court, tribunal or forum fails to interpret legislation or fails to develop the common law consistent with this constitutional standard. The obligation is both process- and outcome-based. As Frank Michelman rightly points out, the Constitutional Court's jurisdiction here derives from its oversight function in steering the course of the common law (and statutory law) in the direction mandated by the Final Constitution.<sup>254</sup> In this regard, it is not only FC s 39(2), but also provisions such as FC ss 8(3) and 173 (which guarantee the inherent power of, among others, the Constitutional Court to develop the common law) that take this steering function into account.

In pursuit of its oversight function, the Constitutional Court has allowed a significant number of cases to trigger its jurisdiction based on FC s 39(2). Although the Court has held that the obligations of FC s 39(2) are the same for both common and statutory law, it has nevertheless approached cases involving the common law differently from those involving only legislation.

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### **(aa) Cases involving the common law**

Not every case that involves the common law is automatically deemed to be a constitutional matter. Generally speaking, the Constitutional Court distinguishes between different challenges to the common law. Only some give rise to a constitutional matter.

First, similar to a challenge to statutory provisions, an applicant may challenge the constitutionality of a particular common-law rule. The Constitutional Court has held that the question of whether a distinct common-law rule is in conflict with the Final Constitution is indeed a constitutional matter which should properly be determined by the Court and that it, therefore, 'is entitled to decide' such a question.<sup>255</sup>

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252 *The Investigating Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Ltd & Others; In re Hyundai Motor Distributors (Pty) Ltd & Others v Smit NO & Others* 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC) at para 21.

253 *First National Bank (FNB) of SA t/a Wesbank v Commissioner for the South African Revenue Services & Another; First National Bank of SA t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) at para 31 and quoted with approval in *Fraser* (supra) at para 43.

254 Michelman (supra) at § 11.2(a).

Secondly, in *S v Boesak*, the Constitutional Court made clear that a court's failure to develop a common-law rule consistent with its obligation under FC s 39(2), or with some other right or principle of the Final Constitution, may give rise to a constitutional matter.<sup>256</sup> The Constitutional Court, however, has been careful to distinguish between the development of a common-law rule and its mere application in cases where there is no advancement of that rule. In one of its earlier cases, the Court clearly stated that the application of an ordinary common-law principle would generally *not* raise a constitutional matter:

What the correct application of the [common law principle of *stare decisis*] should have been in the proceedings . . . is, however, not a 'constitutional issue' which falls within the jurisdiction of this Court, in terms of the Constitution. The Supreme Court had jurisdiction to determine that question. It is simply the proper interpretation of a common law principle. It is not an issue which can properly be referred to this Court.<sup>257</sup>

In this passage, the Court draws a distinction between the review of a common-law rule, the application or interpretation of that rule, and the question of whether the rule needs to be developed. This distinction is also apparent in *Phoebus Apollo Aviation*:

It is not suggested that in determining the question of vicarious liability the Supreme Court of Appeal applied any principle which is inconsistent with the Constitution. Nor is there any suggestion that any such principle needs to be adapted or evolved to bring it into harmony with the spirit, purport or objects of the Bill of Rights. On the contrary, counsel for the appellant expressly conceded that the common law test for vicarious liability, as it stands, is consistent with the Constitution. . . . The thrust of the argument presented on behalf of the appellant was essentially that though the Supreme Court of Appeal has set the correct test, it had applied that test incorrectly — which is of course not ordinarily a constitutional issue. . . . It is not for [the Constitutional Court] to agree or disagree with the manner in which the SCA applied a constitutionally acceptable common law test to the facts of the present case.<sup>258</sup>

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Thus, FC s 39(2) may be invoked either when a common-law rule as it stands is inconsistent with the Bill of Rights *or* when it needs to be adapted or evolved to conform with the Final Constitution. It is important to note, however, that the jurisdiction of the Constitutional Court is triggered because the common law purportedly needs to be developed — not because this is in fact demanded by the Final Constitution, as this is a question going to the merits of the case. On this basis, the Court has assumed jurisdiction even when it later decided that the Final Constitution did not require development of the common-law rule at issue.<sup>259</sup>

In other cases, however, this neat distinction between the development and application of the common law has not been followed by the Constitutional Court. In

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255 *Shabalala & Others v Attorney-General, Transvaal, & Another* 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC) at para 9.

256 *Boesak* (supra) at para 15(b).

257 *Shabalala* (supra) at para 8.

258 *Phoebus Apollo Aviation* (supra) at para 9.

259 *Barkhuizen v Napier* 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC).

some instances, even the application of a legal rule may constitute a constitutional matter. In *Boesak*, the Court recognized the possibility, without citing an example, that the application of a rule could be inconsistent with some right or principle in the Final Constitution.<sup>260</sup> Not every application of a common-law rule raises a constitutional matter, but cases may exist in which even the simple application of a common-law rule (that is itself consistent with the Final Constitution) triggers constitutional jurisdiction. The case that best illustrates such a possibility is *K v Minister of Safety and Security*.<sup>261</sup> In *K*, the Constitutional Court found that a common-law rule may have a 'policy-laden character' and that it may be 'imbued with social policy and normative content'.<sup>262</sup> Therefore, the Court concluded, both the rule *and its application* need to be developed to accord more fully with the spirit, purport and objects of the Final Constitution.<sup>263</sup>

In the abstract, it is sound to hold that the application of policy-laden common-law rules has a constitutional dimension and is therefore subject to constitutional scrutiny. South African courts have long held that common-law rules include concepts that are open to policy considerations — such as 'public policy', 'boni mores' or 'reasonableness' — and courts have used these notions of fairness and justice to influence the formal structure of the law.<sup>264</sup> Courts could, in shaping the legal order, account for changing social attitudes without changing the structure of the existing common law by invoking such principles as '*contemporary boni mores* and the general sense of justice of the community'.<sup>265</sup> With the enactment of the Interim Constitution, the new Bill of Rights became the predominant

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guiding force for these open concepts.<sup>266</sup> Ackermann J's judgment in *Du Plessis v De Klerk*<sup>267</sup> emphasized this function of the Bill of Rights:

[T]he law can deal effectively with these challenges [of private discrimination] through the very process envisaged by section 35(3) [of the Interim Constitution], namely, the indirect radiating effect of the Chapter 3 rights on the post constitutional development in the common law and statute law of concepts such as public policy, the boni mores,

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260 *Boesak* (supra) at para 15.

261 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC).

262 *K* (supra) at para 22.

263 *Ibid* at para 23 (emphasis added).

264 See *Eastwood v Shepstone* 1902 TS 294; *Jajbhay v Cassim* 1939 AD 537; *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 (4) SA 874 (A); *Sasfin (Pty) Ltd. v Beukes* 1989 (1) SA 1 (A); *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA) 1204; *Amod v Multilateral Motor Vehicle Accident Fund* 1999 (4) SA 1319 (SCA) at para 21.

265 *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451 (A) at 462G (my emphasis).

266 Cf JA Ferreira & GM Robinson 'Reflections on the Boni Mores in the Light of Chapter Three of the 1993 Constitution' (1997) 60 *THRHR* 303, 307.

267 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC).

unlawfulness, reasonableness, fairness and the like. . . . The common law of this country has, in the past, proved to be flexible and adaptable, and I am confident that it can also meet this new constitutional mandate.<sup>268</sup>

The correlation between the Final Constitution and the common law (with its inherent notions of policy and open clauses) has become an accepted feature of South African Law.<sup>269</sup> As Davis J puts it:

Like the concept of *boni mores* in our law of delict, the concept of good faith is shaped by the legal convictions of the community. While Roman-Dutch law may well supply the conceptual apparatus for our law, the content with which concepts are filled depends on an examination of the legal conviction of the community . . . In short, the constitutional State which was introduced in 1994 mandates that all law should be congruent with the fundamental values of the Constitution. . . . In accordance with its constitutional mandate the courts of our constitutional community can employ the concept of *boni mores* to infuse our law of contract with this concept of *bona fides*.<sup>270</sup>

The problem with the Constitutional Court's decision in *K* is not the rationale of the finding but the inconsistency with which it treats the common-law rule at issue. The Court held that the rule (or rather set of rules in this case) on vicarious liability was so imbued with social policy that even its application raised a constitutional matter. Yet, in *Phoebus Apollo Aviation*, which involved the very same set of common-law rules, the Court declined jurisdiction. In *K*, the question as to whether an employer should be held vicariously liable for unlawful acts by its employees is treated as a policy issue that necessarily has a constitutional dimension whereas in *Phoebus Apollo* this question is treated as a mere application of an acceptable common-law test in which no constitutional issue is raised. No wonder the notion that there is any legally-relevant distinction between these two cases has been described as tenuous at best.<sup>271</sup>

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In *K*, the Constitutional Court tried to justify its decision by referring to the fact that in *Phoebus Apollo Aviation* the applicant had not argued that the common-law rule of vicarious liability needed reconsideration. In *K*, by contrast, the applicant had claimed that the common law should be developed so as to vindicate its constitutional rights.<sup>272</sup> In *K*, therefore, the 'sharp issue of the constitutionality of the common-law rule' was in issue.<sup>273</sup> This distinction, however, is not convincing: if 'courts are under a general obligation to develop the common law appropriately

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268 *Du Plessis v De Klerk* (supra) at para 110.

269 See, eg, *Carmichele* (supra) at paras 54-56; *Steenkamp v Provincial Tender Board of the Eastern Cape* 2007 (3) SA 121 (CC), 2007 (3) BCLR 300 (CC) at para 41; *Phumelela Gaming and Leisure Ltd v Gründlingh & Others* 2007 (6) SA 350 (CC), 2006 (8) BCLR 883 (CC) at para 31; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at para 17.

270 *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (K), 474J and 475F and cited with approval by the Supreme Court of Appeal in *Brisley v Drotosky* 2002 (4) SA 1 (SCA), 2002 (12) BCLR 1229 at para 69 and by the Constitutional Court in *Barkhuizen v Napier* 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC) at para 140 (per Sachs J).

271 See Carole Lewis 'Reaching the Pinnacle: Principles, Policies and People for a Single Apex Court in South Africa' (2005) 21 *SAJHR* 509, 518.

272 *K* (supra) at para 14.

where it is deficient, as it stands, in promoting the section 39(2) objectives<sup>274</sup> why should it be an applicant's responsibility to draw the court's attention to the possibility of a deficiency and the need for development? Instead, every court, tribunal or forum has to assess on its own whether a common-law rule that is put in issue and that does not support the claim (or the defence) needs to be developed according to the spirit, purport and objects of the Bill of Rights.<sup>275</sup> Indeed, the Constitutional Court has held that all courts operate under such an obligation.

Assuming the Constitutional Court decides to stick to its current approach, advocates who wish the Constitutional Court to hear their client's case would be well advised to argue that the application of the common-law rule in question involves a policy question informed by the values of the Final Constitution and that, in any case, the common law is never just applied but always developed.<sup>276</sup>

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This approach was followed in the third case that came before the Constitutional Court involving the common-law rules relating to vicarious liability: *Minister of Safety and Security v Luiters*.<sup>277</sup> In this case, an off-duty policeman had shot and wounded

273 Ibid at para 20. However, the *constitutionality* of the common law rule was *not* at issue. At no time does the Court genuinely test the common-law principle of vicarious liability against the Final Constitution, neither does it contemplate declaring it unconstitutional. Instead, the judgment is at pains to show that the common-law principle can perfectly accommodate the demands of the Bill of Rights. See *K* (supra) at para 44:

The objective element of the test [of vicarious liability in case of an intentional wrongful act of an employee] which relates to the connection between the deviant conduct and the employment, approached with the spirit, purport and objects of the Constitution in mind, is sufficiently flexible to incorporate not only constitutional norms, but other norms as well. It requires a court when applying it to articulate its reasoning for its conclusions as to whether there is a sufficient connection between the wrongful conduct and the employment or not. Thus developed, by the explicit recognition of the normative content of the objective stage of the test, its application should not offend the Bill of Rights or be at odds with our constitutional order.

This quote shows that the Court does not test the constitutionality of the principle. What it does, in fact, is indirect application of the Constitution through the interpretation of an open-ended phrase ('sufficient connection'), similar to the interpretation of phrases like '*boni mores*' or 'wrongfulness'. In the words of the Constitutional Court, one has to look 'at the principle of vicarious liability through the prism of section 39(2) of the Constitution'. Ibid at para 22.

274 *First National Bank (FNB) of SA t/a Wesbank v Commissioner for the South African Revenue Services & Another; First National Bank of SA t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) at para 31. See *Carmichele* (supra) at para 39.

275 Cf *Phumelela* (supra) at para 27 ('A court is required to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation, and when developing the common law or customary law. In this *no court* has a discretion' (my emphasis).)

276 A beautiful example is *Phumelela*. In the High Court and the Supreme Court of Appeal the applicant relied entirely on the law of delict, viz the delict of unlawful competition. When it appealed to the Constitutional Court it realized that it had to bring in the Final Constitution to make the case a constitutional matter. It thus started to argue that the Supreme Court of Appeal had failed to determine the wrongfulness of the conduct of the defendants by reference to FC s 39(2). It was submitted that, had the Supreme Court of Appeal developed the common law as it ought to have, it would have recognized the applicant's claim as a constitutionally protected interest (in this case in terms of the property clause).

277 2007 (2) SA 106 (CC), 2007 (3) BCLR 287 (CC).

several people he suspected of robbing his house. The Minister, faced with a claim for civil liability, asked for a variation of the test formulated in *K* to exclude police officers who were not on duty when they committed an offence. The Court rejected this submission and confirmed its holding in *K*. In so doing, it had little difficulty in assuming jurisdiction on the basis that the Minister had sought the development of the common law of vicarious liability under FC s 39(2) and thereby 'forced the Court to consider constitutional rights or values'.<sup>278</sup>

In other cases, the Constitutional Court has stated that it will leave the primary task of common-law development to the Supreme Court of Appeal.<sup>279</sup> Even when an applicant asserts that the common-law rule in question requires reconsideration in the light of the Final Constitution, such arguments must first be placed before the Supreme Court of Appeal before being raised in the Constitutional Court.<sup>280</sup> On the other hand, the Court has stated that, because all courts are under a duty to consider the Bill of Rights, even where the parties have not referred to it, a party's failure to raise a FC s 39(2) argument in the High Court or the Supreme Court of Appeal does not necessarily bar that party from accessing the Constitutional Court.<sup>281</sup> The Constitutional Court's statements about common-law development being the primary task of the Supreme Court of Appeal must therefore be treated with caution: the mere attribution of primary responsibility to the Supreme Court of Appeal does not alter the scope of the jurisdiction that the Constitutional Court reserves for itself. The net has been cast wide, and the only possible conclusion is that every application of the common law is potentially subject to appeal to the Constitutional Court.<sup>282</sup>

### **(bb) Cases involving legislation**

Where legislation is directly challenged as being in violation of the Final Constitution, the Constitutional Court's jurisdiction is founded on FC ss 167(5) and

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172(2)(a).<sup>283</sup> Where no direct challenge is made, the Court's jurisdiction may be founded on FC s 39(2). As the Constitutional Court put it in *NEHAWU*:

In relation to a statute a constitutional matter may arise either because the constitutionality of its interpretation or its application is in issue or because the

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278 *Luiters* (supra) at para 23. The Court did, however, reject jurisdiction on the first element of the *K* test — whether the policeman intended to act in the course and scope of employment — because this was a purely factual matter. Ibid at paras 14 and 28.

279 *Amod v Multilateral Motor Vehicle Accident Fund* 1998 (4) SA 753 (CC), 1998 (10) BCLR 1207 (CC) at para 33 ('The Supreme Court of Appeal has jurisdiction to develop the common law in all matters including constitutional matters. Because of the breadth of its jurisdiction and its expertise in the common law, its views as to whether the common law should or should not be developed in a 'constitutional matter' are of particular importance.')

280 *S v Bierman* 2002 (5) SA 243 (CC), 2002 (10) BCLR 1078 (CC) at para 7.

281 *Phumelela* (supra) at para 26.

282 Here I agree with Stu Woolman's conclusion that a sword of Damocles has been placed over High Courts and the SCA. Stu Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31, § 31.4(e)(ii)(bb).

constitutionality of the statute itself is in issue. A challenge to the manner in which the statute has been interpreted or applied does not require the litigant to challenge the constitutionality of the provision the construction of which is in issue.<sup>284</sup>

The Court's jurisdiction, in other words, is not limited to explicit challenges. If the issues in an application concern the interpretation of legislation in conformity with the Final Constitution, the case will involve a constitutional matter.<sup>285</sup> Because the interpretation of legislation in accordance with the Final Constitution is an obligation of every court, tribunal or forum, the Constitutional Court may find its jurisdiction on points of statutory interpretation raised by the courts *mero motu*. However, in most cases, the applicant will explicitly ask the Constitutional Court to review the interpretation of the statutory provision that was adopted by the lower court.

The interpretation of legislation in conformity with the Final Constitution lay at the heart of the *Fraser*. In *Fraser*, the applicant challenged a Supreme Court of Appeal ruling preventing him from accessing certain frozen assets in terms of s 26 of the Prevention of Organized Crime Act 121 of 1998 ('the POCA'). The *Fraser* Court held:

The question raised by this application is whether the Supreme Court of Appeal's interpretation of section 26 [of the POCA] has failed to promote the spirit, purport and objects of the Bill of Rights in terms of section 39(2) [of the Constitution]. This differs from an attack on an allegedly wrong factual finding or incorrect interpretation or application of the law, as in the cases referred to earlier. . . . A constitutional matter has thus been raised, and this Court accordingly has jurisdiction to hear the matter.<sup>286</sup>

The *Fraser* Court then went on to state some additional reasons in support of its competence to provide guidance on the interpretation of the POCA — not just the section relevant to the case but the whole statute. Though the POCA serves a legitimate purpose, the Court held, it could have potentially far-reaching and abusive effects, if not interpreted and applied in accordance with the rights and

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values protected in the Constitution. Moreover, it was (then) relatively new on the statute book, and thus there was not an abundance of jurisprudence to enlighten and guide its interpretation and application.<sup>287</sup>

The Constitutional Court's understanding of FC s 39(2) as a yardstick for constitutionally appropriate statutory interpretation or application, and common-law interpretation, application or development, has made such exercises constitutional matters in terms of FC s 167(3)(b) and has considerably expanded its jurisdiction. In

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283 There have been 'borderline cases' where a statutory provision has been challenged on the ground that it was, on a proper interpretation, in violation of the Final Constitution (jurisdiction of the Constitutional Court in terms of FC s 172(2)). However, the Constitutional Court (by a majority) held that the statute was not invalid as it was indeed open to an interpretation that brought the challenged wording in line with the Final Constitution (jurisdiction in terms of FC s 39(2)). See, eg, *Daniels v Campbell NO & Others* 2004 (5) SA 331 (CC), 2004 (7) BCLR 735 (CC).

284 *NEHAWU* (*supra*) at para 15.

285 *S v Shaik & Others* 2008 (2) SA 208 (CC), 2007 (12) BCLR 1360 (CC) at para 83.

286 *Fraser* (*supra*) at para 47.

287 *Fraser* (*supra*) at para 46.

addition to these cases, the Constitutional Court's jurisdiction in respect of the interpretation of legislation is also triggered when a court, in interpreting legislation, fails to have due regard to the demands of international law in terms of FC s 233.<sup>288</sup>

## (ii) Exercise of public power and administrative action

An important function of every Final Constitution is the restraint of executive and administrative power. Not only law, but also conduct may be challenged under the Final Constitution. In contrast to the legislature, the executive organs of state are not bound only by the Final Constitution. They are also bound by the ordinary law of the land, either in its statutory or in its common-law form. This is a central aspect of the doctrine of legality, which in itself is part of the rule of law.<sup>289</sup>

For purposes of this chapter, it is necessary to ask whether there is a difference between constraints on executive and administrative action by way of common law or statutory law, and constraints imposed directly by the Final Constitution. Is a constitutional matter raised only when there is a specific constitutional constraint on executive or administrative action or also where the constraint is based on the common law or a statute? The Constitutional Court has given a clear answer to this question. According to it, there are not two yardsticks for measuring the conduct of the executive and the administration, but only one — the Final Constitution. Consequently, it is the task of the judiciary to establish that all executive and administrative action complies both with the ordinary law and the Final Constitution. And it is the function of the Constitutional Court to

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ensure that the constitutional requirements in this regard have been duly observed, which, in turn, makes the review of any exercise of public power a constitutional matter in terms of FC s 167(3)(b).

The first case in which the Constitutional Court was asked to determine the scope of its jurisdiction to review executive action was *President of the Republic of South Africa & Another v Hugo*.<sup>290</sup> The case concerned a presidential decision to pardon certain categories of prisoners. It did not involve the testing of that decision against the common law, but only against the Constitution itself. The Court, however, wrote that the supremacy clause subjects all presidential action to the Constitution, that there is no room for prerogative powers outside the scope of judicial review, and that the exercise by the President of his powers is subject to review by courts of

288 *S v Basson* 2005 (1) SA 171 (CC), 2004 (6) BCLR 620 (CC) at para 100.

289 The principle of legal supremacy has been recognized in English law since medieval times. See William Searle Holdsworth *A History of English Law* vol 10 (1936) 647. Dicey emphasized this central aspect of the rule of law: '[The rule of law] means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even wide discretionary authority on the part of the government.' AV Dicey *Introduction to the Study of the Law of the Constitution* (9th Edition, 1939) Part II Ch. IV. See also Michelman (supra) at § 11.1(a). This aspect of the rule of law has always been part of South African law. See Ben Beinart 'The Rule of Law' 1962 *Acta Juridica* 99, 102. This feature of the rule of law also has a long tradition in continental Europe: it is embodied in the 'principe de legalité' as being part of the 'Etat légal' or 'Etat de droit' in the French tradition and the 'Legalitätsprinzip' as being part of the 'Rechtsstaat' in the German tradition. See Sabine Michalowski & Lorna Woods *German Constitutional Law — the Protection of Civil Liberties* (1999) Part 1, Section 2.2.3; David P Currie *The Constitution of the Federal Republic of Germany* (1994) 18-20.

290 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC).

appropriate jurisdiction.<sup>291</sup> In *Hugo* there could be no doubt that the Constitutional Court itself was the 'court of appropriate jurisdiction' because the Final Constitution authorised the presidential power in question (viz the power to pardon or relieve offenders in terms of IC s 82(1)(k)). But the idea that the Final Constitution also incorporates traditional rule of law concepts is first made visible in the separate judgment of Mokgoro J. Mokgoro J applies the doctrines of accessibility, precision and general applicability to enquire whether the challenged presidential decision could be justified under the limitations clause.<sup>292</sup>

The relationship between the Interim Constitution and common law and statutory limits was further set out in *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others*.<sup>293</sup> This case involved a challenge to a rate increase imposed by a local government structure on property owners. The applicants had challenged the rate increase on the grounds that it was ultra vires the powers conferred on local government by the applicable proclamation and ultra vires the sections of the Interim Constitution empowering local governments to levy rates, levies, fees, taxes and tariffs. When the case, which had started in the Johannesburg High Court, went on appeal, the Supreme Court of Appeal considered whether it had 'some kind of parallel jurisdiction with the Constitutional Court where the relevant attack is founded on common-law grounds',<sup>294</sup> but ultimately referred this question to the Constitutional Court in the following form:

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[W]hether or not the interim Constitution preserved for the predecessor of the Supreme Court of Appeal any residual or concurrent jurisdiction to adjudicate upon any attack made by the appellants on . . . administrative actions . . . on the grounds that such administrative actions fell to be set aside, reviewed or corrected at common law.<sup>295</sup>

The Constitutional Court, in its answer to this question, began by setting out the general relationship between constitutional and common law (with regard to the powers of local government):

[T]he powers, functions and structures of local government provided for in the Constitution will be supplemented by powers, functions and structures provided for in other laws made by a competent authority. There is no provision in the interim Constitution which expressly states that where a local government acts ultra vires its empowering statutes it acts unconstitutionally, but it seems that the proposition must be correct [because several provisions of the Constitution require a local government to act consistently with both the Constitution and an Act of Parliament or an applicable

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291 See *Hugo* (*supra*) at paras 8, 12, 13, 28. See also *SARFU III* (*supra*) at para 148.

292 *Hugo* (*supra*) at para 102 (per Mokgoro J).

293 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC).

294 *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1998 (2) SA 1115 (SCA) at 1124B, 1998 (6) BCLR 671, 678 (SCA). This assertion was made despite the fact that under the general scheme of the Interim Constitution the respective jurisdictions of the Constitutional Court and the Appellate Division of the Supreme Court mutually excluded each other: The Constitutional Court had jurisdiction only in constitutional issues while the Appellate Division had jurisdiction only in non-constitutional issues. IC s 101(5).

295 Order No 1(b) of the Supreme Court of Appeal judgment. *Fedsure* (*supra*) at para 20.

provincial law]. . . . These provisions imply that a local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition — it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law — to the extent at least that it expresses this principle of legality — is generally understood to be a fundamental principle of constitutional law.<sup>296</sup>

Because unlawful acts are in breach of the principle of legality, which is part of the rule of law, which, in turn, is part of constitutional law, the Court in effect held, every unlawful act by a local government body is in itself a breach of the Interim Constitution.<sup>297</sup> This holding had an immediate jurisdictional consequence:

There is of course no doubt that the common law principles of ultra vires remain under the new constitutional order. However, they are underpinned (and supplemented where necessary) by a constitutional principle of legality. In relation to 'administrative action' the principle of legality is enshrined in section 24(a) [of the interim Constitution]. In relation to legislation and to executive acts that do not constitute 'administrative action', the principle of legality is necessarily implicit in the Constitution. *Therefore, the question whether the various local governments acted intra vires in this case remains a constitutional question.*<sup>298</sup>

The consequence of this holding was that the Constitutional Court reserved jurisdiction in these matters for itself.<sup>299</sup> Under the Interim Constitution, with its provision for two separate jurisdictional spheres headed by the Constitutional Court and the Appellate Division of the Supreme Court (as the Supreme Court of Appeal was then known), this conclusion deprived the Appellate Division of

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jurisdiction to review executive conduct and administrative action. Even the Constitutional Court regarded this outcome as 'unsatisfactory', as courts would be denied the benefit of the experience and expertise of the Appellate Division in administrative-law matters.<sup>300</sup> However, *Fedsure* was decided in October 1998, almost two years after the coming into force of the Final Constitution. The practical effect of *Fedsure* was therefore temporary only.<sup>301</sup> Under the Final Constitution, the *Fedsure* holding does not deprive the Supreme Court of Appeal of jurisdiction to review executive conduct and administrative action, but simply asserts the Constitutional Court's power to have the final word on these matters.

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296 *Fedsure* (supra) at paras 54-56 (footnotes omitted). At another point in the judgment, the Court emphasizes that the principle of legality is at least fundamental to the Interim Constitution, while leaving the question open whether any constitutional dimension of the rule of law has greater content than the principle of legality (at para 58).

297 *SARFU III* confirmed this holding with regard to acts by the President. *SARFU III* (supra) at para 148.

298 *Fedsure* (supra) at para 59 (my emphasis).

299 *Ibid* at para 105.

300 *Fedsure* (supra) at para 106.

301 To rectify its own finding, the Constitutional Court eventually held that it would be in the interests of justice that, in respect of constitutional issues under the Interim Constitution that may come before the Supreme Court of Appeal, it should exercise the jurisdiction conferred upon it over constitutional matters in terms of the Final Constitution. See *Fedsure* (supra) at para 113.

The Constitutional Court's approach to the judicial review of administrative action and executive conduct in *Hugo* and *Fedsure* was confirmed in *Pharmaceutical Manufacturers Association of SA in re: the Ex Parte Application of the President of the RSA & Others*.<sup>302</sup> This decision has featured prominently in academic writing on the Constitutional Court's jurisdiction.<sup>303</sup> *Pharmaceutical Manufacturer* involved a presidential decision to bring an Act of Parliament into force that was found to be ultra vires the provisions of the Act in question by a full bench of the High Court.<sup>304</sup> The Constitutional Court began its judgment by clarifying that, although *Fedsure* was decided under the Interim Constitution, it was applicable to the exercise of public power under the Final Constitution.<sup>305</sup> In fact, the proposition that the principle of legality was foundational to the Final Constitution had become even easier to assert: the rule of law and the principle of constitutional supremacy are expressly listed as founding values in FC s 1(c). On this basis, the Constitutional Court confirmed the key holding of *Fedsure* in the following terms:

The exercise of all public power must comply with the Constitution which is the supreme law, and the doctrine of legality which is part of that law. The question whether the President acted intra vires or ultra vires in bringing the Act into force when he did, is accordingly a constitutional matter. The finding that he acted ultra vires is a finding that he acted in a manner that was inconsistent with the Constitution.<sup>306</sup>

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On a narrow reading, one could argue that this statement is confined to presidential acts, as was the case in *Hugo*. The President's powers are after all defined by the Final Constitution, and therefore the exercise of these powers is subject to review for constitutionality on this basis. This narrow construction was the view taken by the Supreme Court of Appeal in *Container Logistics* — a judgment handed down after the Constitutional Court's decision in *Fedsure*.<sup>307</sup> In *Container Logistics*, the Supreme Court of Appeal tried to distinguish between judicial review under the Final Constitution and judicial review under the common law. It held that 'constitutional review' would be concerned only with the *constitutional* legality of executive or administrative action, the question in each case being whether the action was or

302 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC).

303 See Iain Currie & Johan de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 103-104; Michelman (supra) at §§ 11.1(b) and 11.3(b).

304 See *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa & Others* 1999 (4) SA 788 (T). The case reached the Constitutional Court in a rather odd way. The finding of the High Court that the President had acted *ultra vires* in bringing the Act into force did not rely on the Final Constitution. In fact, the High Court explicitly stated that '[n]one of those powers which are conferred upon the President by the Constitution are in issue in the present case'. Ibid at 796F. Nevertheless, the Constitutional Court was asked to confirm that order as one of 'constitutional invalidity' with regard to conduct of the President in terms of FC s 172(2)(a). The Court was thus asked to give its opinion on an order that was not made.

305 *Pharmaceutical Manufacturers* (supra) at para 17.

306 Ibid at para 20.

307 *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd; Commissioner of Customs and Excise v Rennie's Group Ltd t/a Renfreight* 1999 (3) SA 771 (SCA), 1999 (8) BCLR 833 (SCA). For a more in-depth analysis of the case, see Michelman (supra) at § 11.3(b).

was not consistent with the Constitution.<sup>308</sup> Common-law review, on the other hand, would assess whether executive or administrative action was in accordance with the empowering statute and the requirements of natural justice.<sup>309</sup> Whenever the Final Constitution does not explicitly set the standard for executive or administrative action, the Supreme Court of Appeal seems to contend that the matter is purely one of common law and, consequently, not a constitutional matter. In *Fraser*, the Constitutional Court seemed to support such a distinction when it held — with explicit reference to *Hugo* and *Pharmaceutical Manufacturers* — that a claim has to involve executive or administrative action that conflicts with a requirement or restriction imposed by the Final Constitution.<sup>310</sup>

But such a narrow understanding of constitutional imperatives in relation to executive and administrative action is neither supported by the Court's decision in *Pharmaceutical Manufacturers*, nor by other judgments on this topic. On the one hand, *Fedsure* was not about presidential conduct, but about a composite local government decision that required review both of legislative action and of administrative action.<sup>311</sup> On the other hand, the importance of the Constitutional Court's decision in *Pharmaceutical Manufacturers* is that it applies to any exercise of public power, without exception, and therefore goes beyond the review of presidential acts. The Final Constitution does *not* impose a specific category of review, limited to certain decision makers in the executive sphere or to a confined sphere of 'constitutional legality'. As the Constitutional Court emphasized in that case, there is only one standard of review:

The control of public power by the courts through judicial review is and always has been a constitutional matter. Prior to the adoption of the interim Constitution this control was exercised by the courts through the application of common law constitutional principles. Since the adoption of the interim Constitution such control has been regulated by the Constitution which contains express provisions dealing with these matters. The common

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law principles that previously provided the grounds for judicial review of public power have 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. In the judicial review of public power, the two are intertwined and do not constitute separate concepts.<sup>312</sup>

After holding that the entire common law is subject to the Constitution, the Court concludes:

What would have been ultra vires under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality. In this respect, at least, constitutional law and common law are intertwined and there can be no difference between them. . . . What would have been ultra vires under the common law by reason of a functionary exceeding a statutory power is

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308 *Container Logistics* (supra) at para 20.

309 Ibid.

310 *Fraser* (supra) at para 38 (my emphasis).

311 *Pharmaceutical Manufacturers* (supra) at para 27.

312 *Pharmaceutical Manufacturers* (supra) at para 33.

invalid under the Constitution according to the doctrine of legality. In this respect, at least, constitutional law and common law are intertwined and there can be no difference between them. . . . One of [the Constitutional Court's] duties is to determine finally whether public power has been exercised lawfully. It would be failing in its duty if it were to hold that an issue concerning the validity of the exercise of public power is beyond its jurisdiction.<sup>313</sup>

In consequence, every case involving the lawfulness of administrative or executive action, from the President to other organs of state, to authorities in the national or provincial sphere, to any regional or local administrative structure, automatically involves a constitutional matter in terms of FC s 167(3)(b).<sup>314</sup> Administrative or executive action in this sense includes law-making, such as regulations, by-laws and other forms of delegated legislation.<sup>315</sup>

The Constitutional Court's decision in *Pharmaceutical Manufacturers* has received a great deal of academic attention. Frank Michelman, in his chapter on the rule of law in this work, focuses on the consequences of the holding that the principle of

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legality as part of the rule of law is enshrined in the constitutional supremacy clause in FC s 2. He raises a number of relevant questions with regard to the Constitutional Court's jurisdiction in 'constitutional matters'. As I understand him, he asks whether, in a system of constitutional supremacy, a distinction between constitutional and non-constitutional matters is at all possible. This chapter will try to provide an answer to that question once all the different aspects of the Constitutional Court's approach to the term 'constitutional matters' have been outlined.

In relation to the Constitutional Court's understanding of violations of the principle of legality as constitutional matters, Michelman argues that the Court's decision to found the principle of legality on the Final Constitution itself makes the concept of constitutional matter meaningless.<sup>316</sup> According to Michelman, the principle of legality does not only require the executive and the legislative branches to act in

313 Ibid at paras 50 and 51.

314 In later cases the Constitutional Court has confirmed that several different authorities have to adhere to the principle of legality: The President (*SARFU III* (supra) at para 148; *Masetlha v President of the Republic of South Africa & Another* 2008 (1) SA 566 (CC), 2008 (1) BCLR 1 (CC) at para 78); ministers and other functionaries in national departments (*Affordable Medicines Trust & Others v Minister of Health of the Republic of South Africa & Another* 2006 (3) SA 247 (CC), 2005 (6) BCLR 529 (CC) at para 50; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others* 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) at para 22); the national government (*Minister of Public Works & Others v Kyalami Ridge Environmental Association & Others* 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC) at para 34); provincial departments (*Bel Porto School Governing Body & Others v Premier of the Western Cape Province & Another* 2002 (3) SA 265 (CC), 2002 (9) BCLR 891 (CC) per Mokgoro and Sachs JJ at para 40); the CCMA (*Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* 2008 (2) SA 24 (CC), 2008 (2) BCLR 158 (CC) at para 41, but see the dissenting judgement of Ngcobo J at para 163); municipalities (*City of Cape Town and the Minister of Provincial and Local Government v Robertson & Another* 2005 (2) SA 323 (CC), 2005 (3) BCLR 199 (CC) at para 61).

315 See *Affordable Medicines Trust* (supra) at para 108. For a detailed analysis of what constitutes administrative action (in particular with regard to FC s 33 and the Promotion of Administrative Justice Act 3 of 2000 (PAJA)) see Jonathan Klaaren & Glenn Penfold 'Just Administrative Action' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 63.

316 Michelman (supra) at § 11.2(b)(ii).

accordance with the law, but also so requires of the judiciary. This result, in turn, makes every appeal from a lower-court decision a constitutional matter, since an appeal necessarily involves a complaint that a judicial body made a legally wrong decision.

In my opinion, Michelman raises a valid point. However, his argument rests on an assumption which, although reasonable in the abstract, has no authority in South African law, ie that judges' decisions are subject to the principle of legality in the same way as administrative, executive and legislative conduct.<sup>317</sup> Neither in the (traditional) academic understanding of the principle of legality nor in the jurisprudence of the courts is there any indication that a mistaken legal finding by a court, either on the facts or the law, in itself constitutes an infringement of the principle of legality.

During the Apartheid era, the content of the rule of law was a highly contested issue. Some authors tried to argue that this concept included substantive guarantees, such as civil rights.<sup>318</sup> Others emphasized that the rule of law determined mainly the formal legal framework according to which justice was administered.<sup>319</sup> Despite these differences, there seems to have been agreement on the point that the rule of law included the proposition that a judge had to observe the law.<sup>320</sup> The emphasis in this regard, however, fell on the principle that the judiciary was independent and organized according to professional standards.<sup>321</sup> Nowhere was explicit reference made to the view that an erroneous decision in itself constituted a violation of the rule of law. Rather, the availability of an appeal structure to

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rectify such erroneous decisions was seen as essential to the rule of law. In contemporary academic writing, too, the rule of law is always exclusively discussed in relation to actions by organs of state, administrative officials and the various legislatures.<sup>322</sup>

In the jurisprudence of the Constitutional Court, the abstract question of whether the principle of legality applies to the judiciary has not been specifically addressed. Thus far, the Court has only applied the principle of legality to the executive branch of government (including the administration), Parliament and the provincial

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317 Of course, Frank Michelman is very much aware of the assumption on which this statement depends and admits that his view may not be the position of the Constitutional Court. See Michelman (supra) at § 11.2(b)(iii).

318 See Andrew Mathews 'The Rule of Law — A Reassessment' in Ellison Kahn (ed) *Fiat Iustitia: Essays in Honour of Oliver Deneys Schreiner* (1983) 294, 307.

319 See Ben Beinart 'The Rule of Law' 1962 *Acta Juridica* 99.

320 Beinart (supra) at 111; Andrew Mathews *State, Security and the Rule of Law* (1988) 27-30.

321 Beinart (supra) at 112-114.

322 See Iain Currie & Johan de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 10-13; George Devenish 'Constitutional Law' *The Law of South Africa* (2nd Edition, 2004) Volume 5, § 4.

legislatures.<sup>323</sup> The rule of law has on occasion also been invoked to guarantee fair procedures in courts. In this limited sense, the Constitutional Court has held that the judiciary is subject to the rule of law:

[I]n terms of section 1 of the Constitution, the rule of law is one of the founding values of our democratic state, and the judiciary is bound by it. The rule of law undoubtedly requires judges not to act arbitrarily and to be accountable.<sup>324</sup>

However, not every *procedural* shortcoming is remedied by reference to the rule of law and it certainly provides no remedy for substantive errors of law.<sup>325</sup> Material findings of lower courts that have been reversed by the Constitutional Court have not been reversed on the basis that they constituted an infringement of the principle of legality. They have instead been overturned on the basis that the court a quo misinterpreted some or other aspect of the Final Constitution.

The assumption that every 'unlawful' court decision should be treated like an unlawful official act is also hard to reconcile with the Constitutional Court's decisions in *Metcash* and *Boesak*. *Metcash*, it will be recalled, involved two contradictory Supreme Court of Appeal decisions on the same set of facts and law. As long as one assumes that there is only one legally correct answer to the same legal question, one of the Supreme Court of Appeal decisions must have been wrong, and thus 'unlawful'. The Constitutional Court, however, declined jurisdiction, holding that, 'even if the decision in the applicant's matter was wrong, and the contrary decision was correct, that would not provide a basis for the relief claimed by the applicant'.<sup>326</sup> In *Boesak*, the Constitutional Court was faced with an argument

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that the Supreme Court of Appeal had convicted the appellant on insufficient evidence. In its judgment, the Court did not say that the evidence was sufficient to establish guilt beyond reasonable doubt. It held that a mere allegation that an error of this kind had been made did not raise a constitutional matter.<sup>327</sup> To support its holding, the Court posited a counterfactual, arguing that, if it were to have jurisdiction in such cases, all criminal cases would be constitutional matters, and the distinction drawn in the Final Constitution between the jurisdiction of the Constitutional Court and that of the Supreme Court of Appeal would collapse.<sup>328</sup> It is

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323 With regard to Parliament, see *New National Party of South Africa v Government of the Republic of South Africa & Others* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) at para 24 (Arbitrary legislation is inconsistent with the rule of law).

324 *Mphahlele v First National Bank of South Africa Ltd* 1999 (2) SA 667 (CC), 1999 (3) BCLR 253 (CC) at para 12.

325 But see *Pharmaceutical Society of South Africa v Tshabalala-Msimang & Another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health & Another* 2005 (3) SA 238 (SCA); 2005 (6) BCLR 576 (SCA) at paras 38-39 (Supreme Court of Appeal found a delay on the part of a High Court in deciding an application for leave to appeal to be 'unreasonable' and quoted with approval an English judgment that found such a delay 'ultimately subversive of the rule of law'.)

326 *Metcash* (supra) at para 14.

327 See § 4.2(e)(i) infra.

328 *Boesak* (supra) at para 15.

clear from this judgment that the Constitutional Court wanted to preserve — at least in theory — a space for the Supreme Court of Appeal to have the final word in some cases.

This argument should not be understood as denying that the judiciary is bound by the rule of law to the extent that judges should follow the law and apply it correctly. This proposition follows clearly from FC s 8(1), which provides that the judiciary is bound by the Bill of Rights. The rule of law does not mean the rule of judges: every judicial officer must swear or solemnly affirm that he or she will administer justice 'in accordance with the Final Constitution *and the law*'.<sup>329</sup> It is not possible to infer from this, however, that erroneous decisions *per se* violate the principle of legality.

There is, finally, a procedural argument for treating court decisions and those by other branches of government differently. FC s 167(6)(a) provides that a person, 'when it is in the interests of justice and with leave of the Constitutional Court', may 'bring a matter directly to the Constitutional Court'. The word 'directly' here means that no other court need be involved in the matter. If a case that did *not* involve a constitutional matter were brought to the Constitutional Court in terms of this provision, the Court would not have jurisdiction to decide it. On Michelman's view, however, the same case would have to be treated differently if it were not brought to the Constitutional Court by way of direct access, but by way of appeal. Even if the case dealt purely with factual issues or the most standard, non-policy-imbued common-law principle, it would be turned into a constitutional matter the moment the lower court ruled on it. In order to found the Constitutional Court's jurisdiction on appeal, the losing party would simply need to contend that the case had been wrongly decided, and therefore that the principle of legality had been breached. Such an understanding of the Constitutional Court's jurisdiction is unpalatable for two reasons. First, either a case raises a constitutional matter at the outset or it does not. It cannot subsequently turn into a case that raises a constitutional matter, except, perhaps, where a constitutionally relevant procedural error in the lower courts occurs.<sup>330</sup> Secondly,

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on Michelman's approach, the parties have the power to determine whether a case involves a constitutional matter by their choice of procedure. If applicants apply for direct access in terms of FC s 167(6)(a), they run the risk that the Constitutional Court may reject their application for lack of jurisdiction. If, on the other hand, they approach the High Court first, they will either win their case or be entitled to appeal it to the Constitutional Court. The principle of legality would in this way have different implications depending on the procedure adopted. Such a possibility is not envisaged by the Final Constitution.<sup>331</sup>

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329 Item 6 of Schedule 2 of the Final Constitution (my emphasis). This argument was also used by Ngcobo J in a dissenting judgment in *Metcash*. *Metcash* (supra) at para 33.

330 See § 4.3(d)(iv) *infra*.

331 One comparison comes to mind, viz the approach the US Supreme Court took with regard to state action in *Shelley v Kramer* 334 US 1 (1948) that every court decision in itself constitutes state action sufficient to subject the challenged private action to constitutional scrutiny. This decision — which has apparently not been followed by the Supreme Court in later cases — effectively made state action a formal criterion and would have rendered the distinction between private and state action meaningless.

### (iii) Interpretation and application of legislation giving effect to the Final Constitution

The Constitutional Court might not have accepted the general proposition that it has the power to review every decision by a lower court simply on the basis that the decision might be wrong and therefore in violation of the rule of law. It has, however, adopted what amounts to this approach in a vast number of subject-specific areas, including labour law, administrative law, land rights, environmental law and broadcasting law. What all these areas have in common, as we shall see, is that every legal dispute falling in one of these areas will automatically involve a constitutional matter. It is hard not to see a flat contradiction between the Court's approach in this sub-set of cases and its floodgates-driven holding in *Boesak* that a finding of guilt in a criminal case does not per se give rise to a constitutional matter.<sup>332</sup> Why should the Constitutional Court be reluctant to review all criminal law cases but eager to review all labour law cases? Surely a sentence of imprisonment is about the strongest state interference with constitutional rights imaginable?<sup>333</sup> The answer, according to the Court, is that the areas of law in which it will automatically grant jurisdiction are all governed by statutes which were enacted to give content or effect to a constitutional right, or otherwise to meet the legislature's constitutional obligations.<sup>334</sup>

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The first case in which the Constitutional Court adopted this approach was *NEHAWU v University of Cape Town*. In *NEHAWU*, the Court was faced with an appeal against a judgment of the Labour Appeal Court ('LAC'). The LAC had (by majority decision) rejected a claim by the appellant (a union) that the outsourcing of certain services by the respondent (a university) constituted the transfer of a 'going concern' in terms of s 197 of the Labour Relations Act 66 of 1995 ('the LRA'). The union did not challenge the constitutionality of this provision as such, but contended that the interpretation of the provision by the LAC was inconsistent with the rights of employees to fair labour practices in terms of FC s 23(1), and that the LAC had therefore failed to promote the spirit, purport and objects of the Bill of Rights in terms of FC s 39(2).<sup>335</sup>

On the case as presented, the Court could have easily assumed jurisdiction on the basis of its supervisory powers under FC s 39(2).<sup>336</sup> But, instead, it took a different approach. Writing that it was not necessary to deal with FC s 39(2), the Court held:

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332 *Boesak* (supra) at para 15.

333 The Court acknowledged this argument in *S v Shaik*. It stated that a sentence involving imprisonment is a potentially drastic infringement of the right to freedom in FC s 12(1) and that a trial must be fair in terms of FC s 35(3). However, it would not hear appeals against sentences based on a trial court's alleged incorrect evaluation of facts. See *S v Shaik & Others* 2008 (2) SA 208 (CC), 2007 (12) BCLR 1360 (CC) at para 71. This holding is somewhat ambiguous: is the right to personal freedom in the context of sentencing only implicated when the trial was not fair? Could a wrong evaluation of facts possibly amount to an unfair trial and then raise a constitutional matter?

334 In criminal law matters, such a distinction seems to be largely arbitrary. The Criminal Procedure Act is, in a sense, constitutionally required. It would be impossible to arrest, try and imprison anyone *constitutionally* without an authorizing law.

335 *NEHAWU* (supra) at para 13.

The LRA was enacted 'to give effect to and regulate the fundamental rights conferred by section [23] of the Constitution.' In doing so the LRA gives content to section 23 of the Constitution and must therefore be construed and applied consistently with that purpose. Section 3(b) of the LRA underscores this by requiring that the provisions of the LRA must be interpreted 'in compliance with the Constitution'. Therefore the proper interpretation and application of the LRA will raise a constitutional issue.<sup>337</sup>

On the face of it, there seems to be no difference between this approach and the Court's approach to statutory interpretation in terms of FC s 39(2): in both cases the Court ensures that legislation is interpreted in accordance with the Bill of Rights. But FC s 39(2) takes as its starting point the individual case, and the specific interpretation given to the legislation by the lower court. In such cases, the Court has held that the mere application of the statute does not on its own raise a constitutional matter. Before assuming jurisdiction, the Court must consider whether the specific legal finding at issue transgressed the limits set by the Final Constitution. The *NEHAWU* Court, by contrast, took a shortcut. The starting point was not the interpretation exercise, but the legal norm. In emphasizing the constitutional foundation of the LRA, the Court effectively argued that the entire Act had a 'policy-laden character' and was 'imbued with social policy and normative content' — to use the terminology devised in relation to the development of the common law under FC s 39(2). On this approach, not only interpretations of the LRA that require consideration of the spirit, purport and object of the Bill of Rights are open to Constitutional Court review, but every case involving the interpretation of this statute.

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The respondent in *NEHAWU* pointed out that such an approach would mean that the Constitutional Court would have jurisdiction in all labour matters. The Court replied as follows:

If the effect of this requirement is that this Court will have jurisdiction in all labour matters that is a consequence of our constitutional democracy. The Constitution '. . . is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.' Our constitutional democracy envisages the development of a coherent system of law that is shaped by the Constitution.<sup>338</sup>

This statement is hard to reconcile with the idea of the Constitutional Court as a court of special and limited jurisdiction. The quote within the quote comes from paragraph 44 of *Pharmaceutical Manufacturers* and illuminates the point at issue in that case. By contrast, the issue in *NEHAWU* was not the constitutional control of 'the law', but the application of the law by the labour courts. In *Pharmaceutical Manufacturers*, the Court did not equate the constitutional control of the law with its application — it was the fact that the addressees of the law (administrative officials) were bound by both the (common) law and the Final Constitution that triggered constitutional review. The Court in *Pharmaceutical Manufacturers* was concerned to ensure that no administrative action should escape judicial review:

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336 See § 4.3(d)(i) supra.

337 *NEHAWU* (supra) at para 14.

338 *Ibid* at para 16.

Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution which defines the role of the courts, their powers in relation to other arms of government, and the constraints subject to which public power has to be exercised.<sup>339</sup>

This rationale is not applicable in labour law cases. Three different bodies (the Commission for Conciliation, Mediation and Arbitration, the Labour Court and the LAC) already exist to review employers' actions under the LRA. Nevertheless, the argument used in *Pharmaceutical Manufacturers* is turned in *NEHAWU* from an argument about the need for every exercise of public power to be subject to judicial review to something approximating the need for the Constitutional Court to have general jurisdiction. In so doing, the *NEHAWU* Court comes very close to Frank Michelman's understanding of the principle of legality: every (wrong) application of the ordinary (labour) law is a constitutional matter, because the yardstick for what is right and wrong in labour law is at base a constitutional one.

In *NEHAWU*, the Constitutional Court held that the case did not require it 'to go beyond the regulatory framework established by the LRA'.<sup>340</sup> If the case really fell entirely within the framework of the LRA, however, why did it raise a constitutional matter? According to the Court, the labour law question presented to it — the precise nature of a transfer of employment — had to be interpreted in

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accordance with the constitutional right to fair labour practices, which seeks to ensure the continuation of the relationship between the employer and the employee on terms that are fair to both.<sup>341</sup> There can be no quibble with this. But the Court should have made this point the trigger for its jurisdiction in this particular case. Such an approach would have been in line with its holding in *Boesak* that not every criminal case involves a constitutional matter, even though, of course, some interpretations of criminal law provisions have a constitutional dimension. The Constitutional Court's role when assuming jurisdiction in labour law matters should be to go beyond the LRA to see what the Final Constitution demands in the circumstances of the particular case.

Interestingly, one week after deciding *NEHAWU*, the Court delivered its decision in *National Union of Metalworkers of South Africa v Bader Bop Ltd*.<sup>342</sup> In *Bader Bop*, the Court adopted a more case-based approach to its jurisdiction in labour law matters. Here, the Court held that it was presented with a constitutional matter, not because the matter was a labour law matter, but because the applicants had argued that the interpretation of the LRA adopted by the majority of the LAC constituted an infringement of their constitutional right to strike, alternatively that the provisions concerned were unconstitutional.<sup>343</sup> The idea that the Court might have jurisdiction

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339 *Pharmaceutical Manufacturers* (supra) at para 45.

340 *NEHAWU* (supra) at para 17.

341 *NEHAWU* (supra) at paras 42-43.

342 2003 (3) SA 513 (CC), 2003 (2) BCLR 182 (CC).

343 *Bader Bop* (supra) at para 15.

just because the case involved the LRA played no role. Only Ngcobo J, in a separate concurring judgment, repeated the holding from *NEHAWU*.<sup>344</sup>

In *NEHAWU*, then, the Constitutional Court essentially declared itself to be the 'Labour Appeal Appeal Court'. The only constraint in this respect is that it must be in the interests of justice for it to hear appeals from the LAC. Because the main responsibility for overseeing the ongoing interpretation and application of the LRA lies with the Labour Court and the LAC, the Constitutional Court will be reluctant to hear appeals from the LAC unless they raise important issues of principle.<sup>345</sup> This is very similar to the Court's approach to the Supreme Court of Appeal's primary responsibility for development of the common law in *Bierman*.<sup>346</sup> In both instances, what prevents the Constitutional Court from taking every conceivable case is not its limited jurisdiction, but the interests of justice criterion.

Following the reasoning in *NEHAWU*, the Court has held that the interpretation and application of the following statutes give rise to a constitutional matter:

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- the Restitution of Land Rights Act 22 of 1994, which gives content to FC s 25(7);<sup>347</sup>
- the Promotion of Administrative Justice Act 3 of 2000, which gives effect to FC s 33;<sup>348</sup>
- the Broadcasting Act 4 of 1999 and the Independent Communications Authority of South Africa Act 13 of 2000, which give effect to FC s 192 (independent authority to regulate broadcasting in the public interest) and protect the fundamental right to freedom of expression;<sup>349</sup> and

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344 Ibid at para 51. Ngcobo J had, in fact, written the (unanimous) judgment in *NEHAWU*.

345 *NEHAWU* (supra) at paras 30-31.

346 *S v Bierman* 2002 (5) SA 243 (CC), 2002 (10) BCLR 1078 (CC).

347 See *Alexkor Limited v Richtersveld Community & Others* 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC) at para 23; *Department of Land Affairs & Others v Goedgelegen Tropical Fruit (Pty) Ltd* 2007 (6) SA 199 (CC), 2007 (10) BCLR 1027 at paras 30-31. These Constitutional Court judgments, on a narrow reading, limit that jurisdictional finding to s 2(1) of the Restitution of Land Rights Act: this subsection was 'enacted to give content to the section 25(7) constitutional right and to fulfil Parliament's obligations'. However, the preamble to the Restitution of Land Rights Act expressly states that the entire Act was enacted in respect of the constitutional provision for the restitution of a right in land to a person or community dispossessed under or for the purpose of furthering the objects of any racially based discriminatory law. Consequently, in *Mphela & Others v Haakdoornbult Boerdery CC & Others*, the Constitutional Court held that its jurisdiction also includes the application and interpretation of other sections of the Restitution of Land Rights Act. 2008 (4) SA 488 (CC), 2008 (7) BCLR 675 (CC) at para 24.

348 See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others* 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) at para 25. With *Bato Star*, administrative law has been entirely 'constitutionalized': the Constitutional Court has jurisdiction either because the PAJA has been applied or because the ruling in *Pharmaceutical Manufacturers* regarding administrative officials is applicable.

349 See *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa & Another* 2005 (4) SA 319 (CC), 2005 (3) BCLR 231 (CC) at para 20.

- the Environment Conservation Act 73 of 1989 and the National Environmental Management Act 107 of 1998, which give effect to FC s 24.<sup>350</sup>

Litigation under any of these statutes will involve a constitutional matter because they were all enacted to give content to a constitutional right or otherwise to meet the legislature's constitutional obligations. On the same grounds, the Court will likely also assume jurisdiction in cases that involve the Water Services Act 108 of 1997 and the Mineral and Petroleum Resources Development Act 28 of 2002,<sup>351</sup> the Promotion of Access to Information Act 2 of 2000,<sup>352</sup> the Promotion of

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Equality and Prevention of Unfair Discrimination Act 4 of 2000<sup>353</sup> and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.<sup>354</sup>

#### **(iv) Fair procedure in the judicial system**

In certain cases the Constitutional Court has held that it is not the subject matter, but rather an aspect of the lower court's handling of the case that gives it jurisdiction to review it.

Such an approach is perhaps best visible in *Mphahlele v FNB*. In this case, the Court found that courts are under a constitutional duty to give reasons for their decisions. Goldstone J (writing for a unanimous Court) held that the case raised a question of procedure. Whether that question in turn gave rise to a constitutional matter was open to doubt, but the Court was prepared to assume for purposes of its

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350 See *Fuel Retailers Association of Southern Africa v Director General Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province & Others* 2007 (6) SA 4 (CC), 2007 (10) BCLR 1059 (CC) at para 40; see also *MEC Department of Agriculture Conservation and Environment & Another v HTF Developers (Pty) Ltd.* 2008 (2) SA 319 (CC), 2008 (4) BCLR 417 (CC) at para 24. However, in *HTF Developers*, the Constitutional Court assumed jurisdiction on the basis of FC s 39(2) and because the ECA requires an interpretation that gives effect to the environmental right contained in the Final Constitution. *Ibid* at para 19.

351 They seem to have also been enacted to give effect to FC s 24(b)(iii).

352 That issue was partly considered in *Ingledeu v Financial Services Board: In Re Financial Services Board v van der Merwe & Another*. 2003 (4) SA 584 (CC); 2003 (8) BCLR 825 (CC). It was not decided as PAIA had not yet entered into force. But see *S v Basson* 2005 (1) SA 171 (CC), 2004 (6) BCLR 620 (CC) at para 90.

353 The first Constitutional Court case involving the Equality Act (sometimes referred to by its rather inelegant acronym 'PEPUDA') was decided in 2007. *MEC for Education: KwaZulu-Natal & Others v Pillay* 2008 (1) SA 474 (CC), 2008 (2) BCLR 99 (CC). Although the Constitutional Court asserted that the case raised a 'constitutional issue' and held that the Equality Act is 'clearly the legislation contemplated in section 9(4) and gives further content to the prohibition on unfair discrimination', the Court did not draw the conclusion that the former followed from the latter, as it did in *NEHAWU*. *Ibid* at paras 30 and 39.

354 According to the Constitutional Court, the Act provides 'legislative texture to guide the courts in determining the approach to eviction now required by section 26 (3) of the Constitution'. *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC) at para 24. See also *Occupiers of 51 Olivia Road, Berea Township & Others v City of Johannesburg & Others* 2008 (3) SA 208 (CC), 2008 (5) BCLR 475 (CC) at para 38, (Court saw no need to decide the question whether the Prevention of Illegal Eviction Act applied, or to expand on the relationship between FC s 26 and the Act).

decision that it did.<sup>355</sup> This may not be a very principled approach, but the case nevertheless shows that it is not only the subject matter of the case that can trigger constitutional review. Moreover, the Court explicitly denied that the original case in the High Court had raised a constitutional matter.<sup>356</sup> Hence, even if Goldstone J was not entirely convinced, the aspect of the case that made him treat it as a constitutional matter was solely the procedural question.

A number of other cases have centred on the recusal of decision-makers, both in court cases and also in quasi-judicial and administrative proceedings, due to alleged bias. The Court held that all of these cases involved constitutional matters.<sup>357</sup> The basis for the assumption of jurisdiction in these cases, however, has varied from case to case. In the *SARFU II*, the Constitutional Court held that a court that allowed a judge to hear a case despite a reasonable apprehension of bias would infringe FC s 34.<sup>358</sup> The Court also held that the impartial adjudication of

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disputes is 'a cornerstone of any fair and just legal system'.<sup>359</sup> This finding was later cited as a rationale for holding that judicial recusal is a constitutional matter.<sup>360</sup> Such an understanding indicates that, on occasion, the Constitutional Court sees the need for a more general power of intervention to guarantee the right to a fair procedure, based on a broad understanding of the spirit, purport and objects of the Bill of Rights.

In most cases involving procedural questions, however, constitutional jurisdiction flows from the fact that the court a quo failed to take account of a litigant's right of access to court in terms of FC s 34. In *New Clicks*, the High Court's failure to decide an application for leave to appeal in a timely manner was criticized on this basis.<sup>361</sup> In *Giddey*, the Court held that a lower court's order requiring a company in liquidation to furnish security for costs affected the company's right of access to court in terms of FC s 34.<sup>362</sup>

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355 *Mphahlele* (supra) at para 7.

356 *Ibid* at paras 7, 18-19.

357 *SARFU II* (supra); *South African Commercial Catering and Allied Workers Union & Another v Irvin & Johnson Ltd Seafood's Processing Division* 2000 (3) SA 705 (CC), 2000 (8) BCLR 886 (CC); *S v Basson* 2005 (1) SA 171 (CC), 2004 (6) BCLR 620 (CC).

358 See *SARFU II* (supra) at para 30. Additionally, the judge would act in breach of the requirements of FC s 165(2) and the prescribed oath of office.

359 *SARFU II* (supra) at para 35.

360 See *Basson* (supra) at para 21.

361 *Minister of Health & Another NO v New Clicks South Africa (Pty) Ltd & Others (Treatment Action Campaign and Another as Amicus Curiae)* 2006 (2) SA 311 (CC), 2006 (1) BCLR 1 (CC) at para 68.

362 *Giddey NO v Barnard* 2007 (5) SA 525 (CC), 2007 (2) BCLR 125 (CC) at para 4.

A broad range of procedural decisions fall into the Constitutional Court's jurisdiction because they relate to a fair criminal trial in terms of FC s 35(3). The Court has used that criterion of 'fairness' to review procedural decisions by trial courts in relation, for example, to the admission of evidence. The Court has emphasized that such decisions involve the exercise of discretion by the trial court based on all the circumstances of the particular case.<sup>363</sup> On appeal, the scope of review is limited:

The ordinary approach on appeal to the exercise of a discretion . . . is that the appellate court will not consider whether the decision reached by the court at first instance was correct, but will only interfere in limited circumstances; for example, if it is shown that the discretion has not been exercised judicially or has been exercised based on a wrong appreciation of the facts or wrong principles of law.<sup>364</sup>

In the exercise of such discretion, the trial court must have regard to what is fair in the circumstances, and this makes a challenge to its decision a constitutional matter in terms of FC s 167(3).<sup>365</sup>

Other cases suggest, however, that respect for the discretionary powers of trial courts will not be a barrier to review if the Constitutional Court really wants to hear the case. This point is well illustrated by *Dikoko v Mokhatla*.<sup>366</sup> The case concerned the defamation of one municipal official by another, and centred on

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the question of whether municipal councillors should enjoy some form of parliamentary immunity. The High Court had rejected such a notion and had awarded damages to the defamed official in the amount of R110 000. On appeal, the Constitutional Court rejected the applicant's arguments and confirmed the holding of the High Court denying him privilege. The matter did not end there, however, because in the course of the hearing the issue had been raised whether the amount of damages awarded was appropriate. On this point the Court was divided. Three judges found the amount too high and wanted to reduce it to R50 000. Seven judges found the amount to be reasonable, and one judge held that the question did not raise a constitutional matter and therefore declined to comment on the amount. In all three judgments the question whether the assessment of defamation damages is a constitutional matter in terms of FC s 167(3)(b) featured prominently.

Both the majority and the minority took the view that the extent of damages for defamation has implications for the balance between the right to dignity and free expression because overly excessive amounts of damages will deter free speech.<sup>367</sup> The majority, additionally, held that such an assessment would perhaps give rise to a constitutional matter because the remedy of sentimental damages (although located within the common law) would constitute 'appropriate relief' within the

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363 See *S v Dlamini*; *S v Dladla & Others*; *S v Joubert*; *S v Schietekat* 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC) at paras 97-98.

364 *Giddey* (supra) at para 19.

365 *Basson* (supra) at para 26.

366 2006 (6) SA 235 (CC), 2007 (1) BCLR (CC).

367 *Dikoko* (supra) at para 92 (majority judgment). *Ibid* at paras 53-54 (minority judgment).

meaning of FC s 38.<sup>368</sup> While Mokgoro J, writing for the minority, concluded that the Court was 'clearly seized' with a constitutional matter, the majority (per Moseneke DCJ) decided to leave this question open (although it saw 'a very strong argument to be made' for it), and simply assumed in favour of the applicant that a constitutional matter had indeed been raised.

The reasoning in both the majority and the minority judgments appears to be outcome-driven rather than principled. Just as the decision in *NEHAWU* means that every labour law matter falls within the jurisdiction of the Constitutional Court, *Dikoko* effectively subjects the entire law of defamation — now premised on the appropriate balance between the right to dignity and freedom of expression — to constitutional review. Such an approach is virtually bottomless. Almost every legal rule can be construed to strike a balance between two or more competing rights.<sup>369</sup> It is one thing, however, to say that courts must have regard to constitutional rights when applying the common law, another to say that the application of a common-law rule that is premised on the balance to be struck between two or more constitutional rights necessarily raises a constitutional matter. This makes nonsense of the attempt in FC s 39(2) to limit the application of the Constitution to instances of common-law development.

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The *Dikoko* Court's treatment of FC s 38 is more defensible. But if the Court really wanted to respect trial courts' discretionary powers, it should not have said that the assessment of defamation damages necessarily gives rise to a constitutional matter. Rather, it should have pointed out the circumstances in which such an assessment *may give rise* to one. As long as the Court simply substitutes its own view of the appropriate quantum of damages for that of the trial court, there is no difference between constitutional and non-constitutional matters. Any relief granted by a court must be 'appropriate'. A meaningful distinction is only drawn when the Court provides general criteria, which a lower court can apply.

This more principled approach was taken by the lone dissenter, Skweyiya J:

A judge calculating damages in a case where defamation has been proved is given a set of guidelines which he must work with in settling on the amount of damages. These guidelines take the form of a number of factors which may be considered when arriving at the appropriate quantum. There is no rigid test in that none of the factors are mandatory. The manner in which a judge chooses to apply the factors, the factors which he chooses to give weight to and other similar matters are matters left to his discretion.<sup>370</sup>

This is not to say that the Constitutional Court can never interfere with a lower court's assessment of the quantum of damages. It must do so, however, when it sees a shortcoming in the procedure followed, not in the outcome:

It is possible that in a future case an applicant will be able to show that as a result of the way in which the lower court judge evaluated the factors a constitutional right is

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368 Ibid at para 90.

369 Cf Stu Woolman 'Application' (supra) at Chapter 31, Appendix (Contends that not every legal dispute engages a constitutional right, and, it follows that not every legal dispute can be recast as a case concerning conflicting constitutional rights.)

370 *Dikoko* (supra) at para 133.

violated; or that the judge failed to infuse the values of the Constitution into the process whereby he settled on an amount of damages to be awarded.<sup>371</sup>

The general implications of this approach for the Constitutional Court's jurisdiction are explored below.<sup>372</sup>

### **(e) Issues connected with decisions on constitutional matters**

FC s 167(3)(b) does not only refer to constitutional matters but also to 'issues connected with decisions on constitutional matters'. As stated above, while a constitutional matter can be understood as comprising the entire case, an issue is just one aspect of the case.<sup>373</sup> Legal disputes usually contain a bundle of different factual and legal questions — all of them 'issues' for a competent court to decide — and at least one of these issues must implicate the Final Constitution for the case to raise a constitutional matter. Once jurisdiction is assumed on this basis, FC s 167(3)(b) grants the Court jurisdiction to decide every other issue, even if these other issues are not constitutional matters themselves — when considered

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in the abstract. The reasons for this rule are largely practical. As the Court has held: 'Were it to be otherwise, this Court's ability to fulfil its constitutional task of determining constitutional matters would be frustrated.'<sup>374</sup>

The Constitutional Court commented extensively on the scope and meaning of this part of its jurisdiction in *Richtersveld*. The *Richtersveld* Court was faced with several 'issues bearing on or related to establishing the existence of' the constitutional claims made by the applicants.<sup>375</sup> As these issues were preconditions for consideration of the constitutional matter, the Court examined the nature of the connection required between these issues and the constitutional matter for the issues to fall under its jurisdiction. The judgment starts with a literalist approach:

'Connected', defined variously by the Oxford English Dictionary as 'linked together' or 'joined together in order or sequence (as words or ideas)' or 'related, associated (in nature or idea)', is clearly a word of wide import, connoting a relationship between, amongst other things, ideas or concepts. It is not limited by any sense of immediacy or close relationship.<sup>376</sup>

The obvious but nevertheless important consequence of this holding is that issues connected with decisions on constitutional matters can only enlarge the jurisdiction of the Constitutional Court, but never establish it on their own. Any 'connection' requires (at least) two things between which the connection is made — and one of

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371 Ibid at para 135.

372 See § 4.3(h)(ii) infra.

373 See § 4.3(c)(ii) supra.

374 *Rail Commuters Action Group & Others v Transnet Ltd t/a Metrorail & Others* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC) at para 52.

375 *Richtersveld* (supra) at para 24.

376 Ibid at para 29.

these needs to be a valid and independent constitutional matter. In other words, a case always has to raise at least one proper constitutional matter before the Court may consider whether the case may also involve issues connected with decisions on that constitutional matter. There can be no jurisdiction in a case that has only issues connected with decisions on constitutional matters but no constitutional matter itself. The purpose of including issues connected with decisions on constitutional matters in FC s 167(3)(b) was to give the Court the power to decide (legal and factual) issues *within a case* in which it already has jurisdiction. The purpose of the provision was not to grant the Constitutional Court jurisdiction *in more cases*.

After establishing the wide scope of the word 'connected', the *Richtersveld* Court went on to scrutinize this reading in light of the purpose of FC s 167(3)(b):

This wide construction is consistent with the purpose of the provision. It is intended to extend the jurisdiction of this Court to matters that stand in a logical relationship to those matters that are primarily, or in the first instance, subject to the Court's jurisdiction. The underlying purpose is to avoid fettering, arbitrarily and artificially, the exercise of this Court's functioning when obliged to determine a constitutional matter. If any anterior matter, logically or otherwise, is capable of throwing light on or affecting the decision by this Court on the primary constitutional matter, then it would be artificial and arbitrary to

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exclude such consideration from the Court's evaluation of the primary constitutional matter. To state it more formally, when any *factum probandum* of a disputed issue is a constitutional matter, then any *factum probans*, bearing logically on the existence or otherwise of such *factum probandum*, is itself an issue 'connected with [a] decision[] on [a] constitutional matter[]'.<sup>377</sup>

The Court then confirmed this holding not only with regard to the purpose of the provision, but also with regard to broader policy considerations:

Whatever the precise meaning of the word 'connected' in the phrase 'issues connected with decisions on constitutional matters', it must include a relationship of dependence between a primary order on a constitutional matter and an ancillary order. What constitutes 'dependence' must be understood in a broad sense. There are important policy reasons for such an approach: if a party may not approach this Court for leave to appeal on these ancillary matters, this would give rise to a bifurcated appeal and confirmation procedure in which the appeal on the ancillary matters could not be resolved before this Court together with the confirmation application, but would have to be heard and resolved in separate proceedings before another court. This would obviously be a most undesirable state of affairs, undermining the achievement of finality for the parties and resulting in an unnecessary waste of judicial resources.<sup>378</sup>

On that basis the Court concluded: '[Issues connected with decisions on constitutional matters] are all legal and factual issues that need to be decided in order to determine [a constitutional matter]'.<sup>379</sup> Thus, the decisive factor is that a decision on the 'issues' is crucial to any meaningful decision on the constitutional matter itself, i.e. it must be a legal question that needs to be considered in order to reach a decision on the constitutional matter.<sup>380</sup>

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377 *Richtersveld* (*supra*) at para 30.

378 *Gory v Kolver NO & Others* 2007 (4) SA 97 (CC), 2007 (3) BCLR 249 (CC) at para 47.

379 *Basson* (*supra*) at para 22.

The Constitutional Court has the final word not only with regard to constitutional matters, but also with regard to issues connected with decisions on constitutional matters. This contention appears to be self-evident. FC s 167(3)(a), however, states that the Constitutional Court 'is the highest court in all constitutional matters' and does not mention issues connected with decisions on constitutional matters. Moreover, FC s 168(3) declares that the Supreme Court of Appeal 'is the highest court of appeal except in constitutional matters'. On the basis of these provisions, the Final Constitution could be interpreted to mean that the Constitutional Court may indeed decide issues connected with decisions on constitutional matters, but that it is the Supreme Court of Appeal that has the final word on these issues. Such an interpretation, however, would obviously lead to the time-consuming, costly and disruptive passing of cases back and forth between the two courts. The Constitutional Court has therefore made it clear that this interpretation is not supported by a proper understanding of its jurisdiction:

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[W]hen one adopts a purposive approach to the harmonising of section 167(3) and (7) and section 168(3) . . . it is evident that this Court is the highest court in respect of issues connected with decisions on constitutional matters. The contrary conclusion would be anomalous and contrary to the Constitution's structure of jurisdiction and its division between this Court and the SCA. It would mean that, although this Court is granted jurisdiction in respect of 'issues connected with decisions on constitutional matters,' those would be the only matters under its jurisdiction in respect whereof its judgment would not be final. This would moreover give rise to a serious hiatus in the Constitution, since there is no appeal from this Court. The conclusion that this Court is the highest court also in relation to 'issues connected with decisions on constitutional matters' is in our view placed beyond doubt by the fact that section 167(3)(c) provides that this Court also makes the final decision on 'whether an issue is connected with a decision on a constitutional matter.'<sup>381</sup>

In sum, the Constitutional Court has the final word on everything that falls under its jurisdiction.

### **(f) The Constitutional Court's power to make the final decision whether a matter is a constitutional matter, FC s 167(3)(c)**

FC s 167(3)(c) provides that the Constitutional Court 'makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter'. This provision is the other side of the coin of the Constitutional Court's jurisdiction. The limited jurisdiction the Court enjoys must always be understood against the background of its institutional purpose and function, i.e. to ensure that all law and conduct is in line with the Final Constitution. All the Court's reasoning about there being only one legal standard for executive and administrative action, and its holdings about how the Final Constitution permeates the entire body of South African law, would be of little effect if it did not have the power finally to determine whether a matter is a constitutional matter.

On the other hand, it is not as though the entire constitutional structure would fall apart without FC s 167(3)(c). Even in the absence of this provision, the Constitutional Court would have been able to come to the conclusion that its role as final interpreter of the Final Constitution necessarily implied the power to decide whether a particular matter was a constitutional matter. As noted above, the Constitutional

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380 See Iain Currie & Johan de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 107.

381 *Richtersveld* (supra) at paras 27-28.

Court had little difficulty in finding that its final decision-making powers related to both 'constitutional matters' and 'issues connected with decisions on constitutional matters'. It simply held that 'the contrary conclusion would be anomalous and contrary to the Final Constitution's structure of jurisdiction and its division between this Court and the SCA.' The Court would no doubt have used a similar argument to ensure that its jurisdiction included the power finally to decide whether a particular matter was a constitutional matter or

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not. Given this, it seems that FC s 167(3)(c) was included simply to head off a potential source of conflict between the Constitutional Court and other courts over whether a lower court could prevent a case from going to the Constitutional Court by declaring that it did not involve a constitutional matter. In light of FC s 167(3)(c), lower courts clearly do not have the power to do this.

Nobody has questioned the Constitutional Court's power finally to determine the scope of its jurisdiction. One could, however, argue that such a power renders obsolete any attempt to define the term 'constitutional matter' in an abstract and principled way. If the Court has the power finally to determine the meaning of this term, why should we bother to define it? Two reasons come to mind. First, it is certainly not the purpose of FC s 167(3)(c) to rule out the possibility that there might be a general principle underlying the Constitutional Court's jurisdiction. Had that been the case, the term 'constitutional matter' would not have featured so prominently as an ostensible limitation on the Court's jurisdiction. Put differently, if the Constitutional Assembly had not wanted this term to function in this way, it would have granted the Constitutional Court jurisdiction in every matter in which it decided to grant access.<sup>382</sup> Secondly, the interpretation of any phrase or term in the Final Constitution is ultimately for the Constitutional Court to decide, even if this is not explicitly stated in the Final Constitution. Nothing precludes the Court from developing a principled understanding of these other phrases and terms, and the same should thus be true of the phrase 'constitutional matter'.

### **(g) The Constitutional Court's findings on what is not a 'constitutional matter'**

#### **(i) Factual findings by lower courts**

The leading case in which the Constitutional Court declined jurisdiction for want of a constitutional matter is *Boesak*. In this case, as we have seen, the Court held that a challenge to a decision of the Supreme Court of Appeal on the sole basis that it was wrong on the facts is not a constitutional matter.<sup>383</sup> The Court held:

In the context of section 167(3) of the Constitution the question whether evidence is sufficient to justify a finding of guilt beyond reasonable doubt cannot in itself be a constitutional matter. Otherwise, all criminal cases would be constitutional matters, and the distinction drawn in the Constitution between the jurisdiction of this Court and that of the SCA would be illusory. There is a need for finality in criminal matters. . . . Disagreement with the SCA's assessment of the facts is not sufficient to constitute a breach of the right to a fair trial. . . . Unless there is some separate constitutional issue

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382 Frank Michelman argues that a principled approach to constitutional matters is supported by such a provision because it pins final responsibility on the Constitutional Court for the prudent implementation of such a principle. Michelman (*supra*) at § 11.2(a).

383 *Boesak* (*supra*) at para 15.

raised therefore, no constitutional right is engaged when an appellant merely disputes the findings of fact made by the SCA.<sup>384</sup>

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Langa DP's argument in this passage is essentially pragmatic: all criminal cases require the court to decide whether the accused really committed the crime. If that process raised a constitutional matter, then the Constitutional Court would have jurisdiction to review all criminal matters. In addition to this, pragmatic considerations determine that criminal cases should be brought to finality as soon as possible.

The problem with this 'everything becomes a constitutional matter' argument is that it has not always been consistently invoked by the Constitutional Court. As noted above, the Court has had no problem in assuming jurisdiction to review every labour law case, every land restitution case, every broadcasting case and every administrative law case. It has also had no problem in reviewing all defamation cases on the basis that defamation law in general strikes a constitutional balance between freedom of expression and dignity. One might argue that when a matter deals with a statute, which has been enacted to give content or effect to a constitutional right, the Court is not confronted with questions of fact, as it was in *Boesak*, but of law. This is true, but the argument in *Boesak* was not that the Constitutional Court did not want to deal with evidentiary matters, but that the term 'constitutional matter' should not be defined in a way that would bring an entire body of law under the jurisdiction of the Constitutional Court. What the Court said in *Boesak*, in essence, was that the standard question faced by courts in a particular area of law cannot in itself be a constitutional matter. The standard question that a court in criminal cases is asked to decide is whether there is sufficient evidence to make a finding of guilt. In other areas of law, the standard question is different. In labour law, for example, the Labour Court has to decide whether a dismissal was fair. The difference between these two standard cases is not so big as to justify the Court's holding that the first type of case never gives rise to a constitutional matter whereas the other always does. What would happen, one is tempted to think, if Parliament enacted a new Criminal Procedure Act with the express aim of giving effect to FC s 35? The logic of *NEHAWU* and the other decisions mentioned earlier would suggest that, in that event, all criminal cases would indeed give rise to constitutional matters.

Perhaps one should understand the *Boesak* judgment as standing for the principle that the Constitutional Court will not assume jurisdiction if all it is being asked to do is to reverse a factual finding made by a lower court. In a more recent judgment, the Constitutional Court has indeed stated its reluctance to reconsider factual findings already established in the course of adjudication: 'This Court, as any court of appeal, would be slow to interfere with findings of fact by a trial court based on a careful assessment of the credibility of witnesses and the probabilities of their respective versions.'<sup>385</sup> If this is so, however, this principle should apply to labour law and any other area of law as well. In addition, the basis for this principle would need to change from a pragmatic concern for limiting the

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384 Ibid.

385 *Minister of Safety and Security v Van Niekerk* 2007 (10) BCLR 1102 (CC) at para 10.

flow of cases to the Court to an institutional and functional concern for the appropriate supervisory role of the Constitutional Court in relation to findings of fact (note the reference to 'any court of appeal' in the quote immediately above).

Even this narrow version of the *Boesak* principle has not been consistently applied by the Constitutional Court. While the *Luiters* Court held that the question of whether a person acted with intention is a purely factual question beyond the scope of its jurisdiction,<sup>386</sup> this very question was the basis on which the Court assumed jurisdiction in *NM*.<sup>387</sup> In another case, *Rail Commuters Action Group*, the Court emphasized that the *Boesak* judgment should not be read to mean that factual questions may never be resolved by the Court:

This reasoning [in *Boesak*] does not imply that disputes of fact may not be resolved by this Court. It states merely that where the only issue in a criminal appeal is dissatisfaction with the factual findings made by the SCA, and no other constitutional issue is raised, no constitutional right is engaged by such a challenge. Where, however, a separate constitutional issue is raised in respect of which there are disputes of fact, those disputes of fact will constitute 'issues connected with decisions on constitutional matters' as contemplated by section 167(3)(b) of the Constitution.<sup>388</sup>

The rationale behind this holding, apparently, is that, in the eyes of the Constitutional Court, too many cases turn on the application of open-textured laws to facts in ways that render a distinction between fact and law uncertain. This conclusion means, in turn, that the distinction between fact and law does not provide a principled basis for determining the Court's jurisdiction.<sup>389</sup> This point obviously raises the question as to whether the Constitutional Court is in a position to establish facts itself. In most cases, it will rely on the facts as they have been established in the High Court and the Supreme Court of Appeal. But there will be exceptions to this rule:

Where an applicant seeks constitutional relief, and there is a dispute of fact on the papers before the Court, the identification of the facts upon which the constitutional matter should be adjudicated constitutes an issue connected with a decision on a constitutional matter which falls within this Court's jurisdiction. In such circumstances, this Court is not bound by the facts as determined by the SCA . . .<sup>390</sup>

In other words, the Constitutional Court will not decide a case that *only* raises factual questions. Factual questions are not constitutional matters in themselves. Nevertheless, the Court may decide them in exceptional circumstances where a

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386 See *Minister of Safety and Security v Luiters* 2007 (2) SA 106 (CC), 2007 (3) BCLR 287 (CC) at para 28.

387 See *NM & Others v Smith & Others (Freedom of Expression Institute Intervening)* 2007 (5) SA 250 (CC), 2007 (7) BCLR 751 (CC).

388 *Rail Commuters Action Group* (supra) at para 52.

389 Kate O'Regan 'On the Reach of the Constitution and the Nature of Constitutional Jurisdiction: A Response to Frank Michelman' in Stu Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 51.

390 *Rail Commuters Action Group* (supra) at para 53.

clear mistake made by a trial court can possibly justify the re-examination of a factual finding<sup>391</sup> or when doing so is necessary to decide another constitutional matter raised by the case, since factual questions would then be issues connected with a decision on a constitutional matter.

## (ii) Incorrect application of the law

In *Phoebus Apollo Aviation* and, arguably, *Metcash*, the Constitutional Court declined jurisdiction on the basis that it has no power to overturn lower court judgments where the ordinary law is simply incorrectly applied. The starting point for this holding was the short decision of *Lane & Fey NNO v Dabelstein & Others*.<sup>392</sup> As in *Boesak*, the applicants in this case had argued that the Supreme Court of Appeal had failed to consider certain evidence and made a wrong factual finding, which infringed their right to a fair trial. The Constitutional Court rejected this argument:

Even if the SCA had erred in its assessment of the facts that would not constitute the denial of the constitutional right contended for. The Constitution does not and could hardly ensure that litigants are protected against wrong decisions. On the assumption that section 34 of the Constitution does indeed embrace that right [to a fair trial], it would be the fairness and not the correctness of the court proceedings to which litigants would be entitled.<sup>393</sup>

The second and the third sentence in the above quote extend the Court's holding beyond the purely factual realm. In these sentences, the Court implies that it will not assume jurisdiction to overturn legally wrong decisions by lower courts if no additional constitutional complaint is involved. This rule formed the basis for the Court's later holding in *Metcash* that, as a general rule, litigants who dispute the correctness of an order made by the High Court — on the law or on the facts — are confined to an appeal to the Supreme Court of Appeal, with the Supreme Court of Appeal's decision being final.<sup>394</sup> As noted earlier, these statements show that the Constitutional Court does not accept the argument that a wrong legal finding constitutes unlawful action by a court, and that such a finding in itself violates the principle of legality, thereby raising a constitutional matter.<sup>395</sup>

The problem with the principle that the application of the ordinary law is not a matter for the Constitutional Court is that it has been so eroded by the Court that today it is very difficult to predict whether the Court would accept such an argument (typically raised in opposition to an application for leave to appeal). One simply needs to recall the cases discussed above in which the Court has

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391 *Minister of Safety and Security v Van Niekerk* (supra) at para 10 with explicit reference to *Rail Commuters Action Group*.

392 2001 (2) SA 1187 (CC), 2001 (4) BCLR 312 (CC).

393 *Dabelstein* (supra) at para 4.

394 *Metcash* (supra) at para 14.

395 See § 4.3(d)(ii) supra.

included whole areas of law under its jurisdiction on the basis that the controlling statute was enacted to give effect to the Final Constitution.<sup>396</sup> All of these cases involve the application of the ordinary law, and yet any such case will automatically raise a constitutional matter.

Even beyond these areas of law, the mere application of a legal rule in itself is sometimes regarded as being inconsistent with some constitutional right or principle. In *Phoebus Apollo Aviation*, the Constitutional Court declined jurisdiction on the basis that the application of a common-law principle was a matter solely for the High Courts and, eventually, for the Supreme Court of Appeal to determine. In *K*, the Constitutional Court held the very same common-law principle to be so imbued with policy and normative content that every application of it raised a constitutional matter.<sup>397</sup> In consequence, only applications of the ordinary law that do not involve policy choices can be said not to raise a constitutional matter.

Finally, there is a thin line between application and interpretation of legislation and application and development of the common law, the second of each of these pairs being subject to constitutional jurisdiction under FC s 39(2). There is also a lot of merit in the argument that application and interpretation are in fact one and the same thing.<sup>398</sup> In *Fraser*, the Court defined its role as being that of a benign interpreter of a statute that was relatively new on the statute book, the interpretation *and application* of which the Court therefore had to guide.<sup>399</sup> Could this mean that only the application of old statutes or longstanding common-law principles might *not* give rise to a constitutional matter? Probably not. Instead, what is crucial for the Constitutional Court is whether the lower court's decision is in line with the Final Constitution: 'Where an individual's rights have been infringed because a legal norm has been applied to a set of facts in a manner oblivious or careless of constitutional rights, a constitutional issue is raised.'<sup>400</sup>

In more practical terms, cases at the level of the Supreme Court of Appeal or the LAC usually involve questions about the interpretation of law *and* the development of the common law. It seems inevitable that any legal finding made by these courts could be attacked on the basis that it did not take the Final Constitution properly into account.

How far the Constitutional Court is prepared to go in assuming jurisdiction to review a case that really just deals with the application of non-constitutional law is also visible in *Basson*. One of the challenges in this case involved the trial judge's

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396 See § 4.3(d)(iii) *supra*.

397 See § 4.3(d)(i) *supra*.

398 See Lourens du Plessis 'Re-reading Enacted Law-texts. The Epoch of Constitutionalism and the Agenda for Statutory and Constitutional Interpretation in South Africa' (2000) 15 *SAPR/PL* 257, 295—99; Lourens du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 32, § 32.3(d) and § 32.5(c)(ii).

399 *Fraser* (*supra*) at para 46 (my emphasis).

400 Kate O'Regan 'On the Reach of the Constitution and the Nature of Constitutional Jurisdiction: A Response to Frank Michelman' in Stu Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 51.

decision to quash certain charges because they did not disclose an offence. The Supreme Court of Appeal had declined to reverse this finding because South African criminal law does not permit the prosecution to reserve a question of law for decision by the Supreme Court of Appeal in circumstances where an objection to a charge is upheld by a trial court. On appeal by the state, the Constitutional Court eventually held that this question raised a constitutional matter. But it was divided on how to justify this conclusion.

A majority of the Court took a route that rode roughshod over established precedents on constitutional jurisdiction. After a rather emotional beginning on how the criminal law plays an important role in protecting constitutional rights and values, and on the importance of the state's prosecutorial capacities, the majority held:

Where a court quashes charges on the ground that they do not disclose an offence with the result that the state cannot prosecute that accused for that offence, the constitutional obligation of the prosecuting authority and the state, in turn, is obstructed. The constitutional import of such a consequence is particularly severe where the state is in effect prevented from prosecuting an offence aimed at protecting the right to life and security of the person. In these circumstances the quashing of a charge in an indictment will raise a constitutional matter.<sup>401</sup>

This passage is hard to reconcile with the Court's decision in *Boesak*, in which it held that the conviction of an accused is not in itself a constitutional matter. It would appear to follow from that decision that the acquittal of an accused should not in itself constitute a constitutional matter either. While *Boesak* could perhaps be distinguished on the grounds that it dealt with factual findings, cases like *Dabelstein* and *Metcash* clearly hold that legally wrong decisions do not per se raise constitutional matters. The majority in *Basson* is not, of course, wrong to say that the effective prosecution of crime is impeded if an accused is erroneously acquitted. But the error in such cases is part of the ordinary law and is exactly the sort of error that the High Courts and the Supreme Court of Appeal are in the best position to rectify. This, at any rate, was the view taken by the minority in *Basson*. For these judges, there was no difference between a wrong decision that leads to the failure of a prosecution and a wrong decision that leads to the conviction and imprisonment of an accused person.

The *Basson* minority found a more sophisticated way to assume jurisdiction. First, the minority considered whether the trial court, in interpreting the applicable law, failed to take international law properly into account. This question is in line with the question the Constitutional Court asks in assuming jurisdiction under FC s 39, only in this case FC s 233 is the operative section. Having raised this question, however, the minority ultimately left it open in favour of assuming jurisdiction on another ground. This second ground was based, not on the decision by the trial court, but on the decision by the Supreme Court of Appeal.

According to the minority, FC s 168(3), which regulates the jurisdiction of the Supreme Court of Appeal, was 'relevant to the proper construction' of the section of the Criminal Procedure Act on which the Supreme Court of Appeal had relied in deciding not to review the trial court's decision to quash the charges. It was this point that put the case within the Constitutional Court's jurisdiction. An

401 *Basson* (supra) at para 33.

interpretation of the Criminal Procedure Act that precludes an appeal to the Supreme Court of Appeal, the minority held, 'has a material bearing' on 'the nature and ambit' of the powers of the Supreme Court of Appeal, and therefore raises a constitutional matter.<sup>402</sup>

This line of argument appears flawed: an interpretation of the Criminal Procedure Act in a single case has nothing to do with the general appellate jurisdiction of the Supreme Court of Appeal, and certainly does not limit 'the powers' of the Supreme Court of Appeal in terms of Chapter 8 of the Final Constitution. The only ground, therefore, that could convincingly have been used to bring the *Basson* matter under the jurisdiction of the Constitutional Court would have been the proper consideration of international law by the trial court, but the minority found this question to be too difficult to decide.

A similarly faulty line of reasoning was applied in *Phillips & Others v National Director of Public Prosecutions*.<sup>403</sup> This matter concerned a High Court decision rescinding an earlier restraint order against certain assets of the applicants on the basis of a provision of the Prevention of Organised Crime Act 121 of 1998 ('the POCA'). The Supreme Court of Appeal reversed the High Court's decision, holding that a restraint order may not be varied or rescinded except in the narrow circumstances provided for in a statute or on the basis of a recognized common-law ground, which must have existed when the restraint order was granted. A High Court that grants a restraint order, in other words, has no inherent jurisdiction to rescind that order, because the POCA has limited that possibility. On appeal, the Constitutional Court rejected the respondent's claim that no constitutional matter was present as being 'clearly incorrect'.<sup>404</sup> According to the Court, the applicants' contention once again related to the 'nature and ambit of the powers of superior courts, in particular the scope of their inherent power'.<sup>405</sup>

In both *Basson* and *Phillips*, the Constitutional Court relied on its earlier decision in *Bannatyne v Bannatyne*.<sup>406</sup> *Bannatyne* concerned the power of a High Court to commit someone to prison for contempt of a maintenance order by a magistrate's court by way of so-called process-in-aid.<sup>407</sup> The respondent had contended that the

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402 *Basson* (supra) at paras 109-111.

403 2006 (1) SA 505 (CC), 2006 (2) BCLR 274 (CC).

404 *Phillips* (supra) at para 31.

405 *Ibid.*

406 2003 (2) SA 363 (CC), 2003 (2) BCLR 111 (CC).

407 Although money judgments cannot ordinarily be enforced by contempt proceedings, maintenance orders are in a special category in which such relief is competent. However, while a High Court has the power to entertain civil proceedings for committal for contempt to ensure that its own orders are obeyed, a maintenance court (which has the status of a magistrate's court) does not have these inherent powers, as there are only statutory remedies for the enforcement of its orders. Its orders may be enforced by execution upon the property of the person against whom the order has been made, or by the attachment of emoluments or debts due to him. The failure to comply with such an order might also constitute a criminal offence.

High Court had no jurisdiction to commit him for contempt by reason of his failure to comply with an order of the maintenance court, and that the applicant instead had to rely on the limited powers granted to the maintenance court. The Constitutional Court had assumed jurisdiction because it regarded this question as one concerning 'the nature and ambit' of the High Court's powers, thus implicating FC s 169.<sup>408</sup>

This finding appears justified. However, it perhaps stretches (a bit) the implications of FC Chapter 8 High Court powers. In *Bannatyne*, the Constitutional Court indeed had to rule on the exercise by the High Court of a general power, ie the power to convict a person for contempt when the original order was issued by another court. In *Basson*, by contrast, the Supreme Court of Appeal's general competence to hear appeals was not in question, but merely whether the state was entitled to a particular remedy in the circumstances. In *Phillips*, too, the Supreme Court of Appeal had not questioned the general power of the High Court to rescind its own orders. The Supreme Court of Appeal judgment in *Phillips*, in fact, was a decision on the merits: the applicants did not seek to have the restraint order rescinded on one of the grounds provided for in the Act — presumably because none of them would have been met. The same applied to the so-called common-law grounds under which a court may always set aside its own decisions,<sup>409</sup> as those conditions were not met either. Instead, Mr Phillips and the other applicants had asked the High Court to rescind the order in the circumstances which prevailed in that particular case. Against this background, the Supreme Court of Appeal held that the statute prescribed conclusively the circumstances in which a High Court may vary or rescind a restraint order.<sup>410</sup> Thus, the *Phillips* case did not concern the inherent jurisdiction of the High Court, but whether in the specific circumstances of that case there was a legal basis for the applicants' rescission claim.

In the end, therefore, the Constitutional Court's reasoning in both *Phillips* and *Basson* that these cases touched on the nature and ambit of the judiciary's powers as contemplated in FC Chapter 8 is not persuasive. Instead, both cases simply involved questions of statutory interpretation (of the Criminal Procedure Act in *Basson*, and of the POCA in *Phillips*). As such, they illustrate the Constitutional Court's general willingness to reconsider the interpretation of the ordinary law by a lower court.

The Constitutional Court's decisions in other cases involving the POCA confirm this trend. The Act provides that property derived from crime ('proceeds') or used in the commission of crime ('instrumentalities') may be forfeited to the

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state.<sup>411</sup> The first set of cases concerned challenges to the procedure followed under the Act. All of these challenges were unsuccessful.<sup>412</sup> In 2006, however, an applicant challenged the forfeiture as such and thereby the application of the POCA.<sup>413</sup> The applicant, Mr Prophet, contended that there had to be proportionality between the offence committed and the property forfeited and that this had been not the case in

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408 *Bannatyne* (supra) at para 17.

409 Such judgments would encompass decisions founded upon fraud, common mistake and the doctrine of *instrumentum noviter repertum* (the coming to light of as yet unknown documents). See the SCA judgment in *National Director of Public Prosecutions v Phillips & Others* 2005 (5) SA 265 (SCA) at para 21.

410 *Phillips SCA* (supra) at para 19. See also *Phillips CC* (supra) at para 36 ('[T]he grounds for rescission provided by the Act constitute a closed list'.)

the forfeiture in question (a house which he had allegedly used for manufacturing drugs). The Supreme Court of Appeal agreed with the applicant that the POCA required some form of proportionality between the crime committed and the property to be forfeited. The majority of the Supreme Court of Appeal, however, set a standard of 'significant disproportionality' to render a deprivation of property arbitrary and thus unconstitutional, and found that no disproportionality justifying the refusal of a forfeiture order had been shown to exist in Mr Prophet's case.<sup>414</sup>

The Constitutional Court assumed jurisdiction on the basis of FC s 39(2), holding that the relevant sections of the POCA needed to be interpreted in light of the Final Constitution, particularly the property clause in FC s 25.<sup>415</sup> The Court first considered whether the property at issue had been 'an instrumentality of an offence'. This pure question of law had been answered by the Supreme Court of Appeal. Instead of providing guidelines on how this term should be interpreted, however, the Constitutional Court merely repeated the Supreme Court of Appeal's finding. In so doing, the Constitutional Court did not refer to the Final Constitution at all, but simply re-evaluated the evidence.<sup>416</sup> The only thing the Court was asked to do was to confirm the constitutionality of the evidentiary standard applied by the SCA (proof on a balance of probabilities). It did so in a single sentence, almost by way of parenthesis.

With regard to the proportionality enquiry, the Constitutional Court did provide guidelines, holding that the proportionality of a forfeiture order depended on a number of different factors, including whether the property was integral to the commission of the crime; whether the forfeiture would prevent the further commission of the offence and its social consequences; whether the 'innocent owner'

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defence would be available to the applicant; the nature and use of the property; and the effect on the applicant of the forfeiture of the property.<sup>417</sup> Since the Supreme Court of Appeal had essentially applied this test, the appeal was dismissed.

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411 Both 'instrumentalities forfeiture' and 'proceeds forfeiture' are possible when the owner is not convicted of an offence but where it is established, on a balance of probabilities, that the particular property has been used to commit an offence, or constitutes the proceeds of unlawful activities, even where no criminal proceedings in respect of the relevant crimes have been instituted.

412 See *National Director of Public Prosecutions & Another v Mohamed NO & Others* 2002 (4) SA 843 (CC), 2002 (9) BCLR 970 (CC); *National Director of Public Prosecutions & Another v Mohamed NO & Others* 2003 (4) SA 1 (CC), 2003 (5) BCLR 476 (CC).

413 *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC), 2007 (2) BCLR 140 (CC). The applicant had also challenged the provisions of the POCA. The Constitutional Court did not allow the challenge because the applicant raised the issue for the first time in the Constitutional Court and had not sought a declaration of constitutional invalidity in the High Court or in the Supreme Court of Appeal.

414 See *Prophet v National Director of Public Prosecutions* 2006 (1) SA 38 (SCA) at paras 37 and 41.

415 *Prophet* (supra) at para 46.

416 *Ibid* at paras 55-57.

In *Prophet*, therefore, the Constitutional Court fulfilled its constitutional mandate by giving guidance to other courts on how to interpret and apply the POCA in line with the Constitution. In *Mohunram*, however, the Court assumed jurisdiction without adding to *Prophet* in any significant way.<sup>418</sup> The facts of *Mohunram* were almost identical to those in *Prophet*, the difference being that the offence of which Mr Mohunram had been accused was illegal gambling rather than the production of drugs. In addition, the property to be forfeited — the premises on which Mr Mohunram operated gaming machines — was registered in the name of a company in which he held a 100 percent member's interest. The High Court had dismissed the state's application for a forfeiture order, concluding that the property had not been shown to be an instrumentality of an offence. The state appealed to the Supreme Court of Appeal, which upheld the appeal and granted the forfeiture order.

Mr Mohunram appealed to the Constitutional Court. The Court assumed jurisdiction on the basis of its holding in *Prophet*.<sup>419</sup> It later did the same in *Fraser*.<sup>420</sup> These cases therefore indicate that the Court seems to have taken the view that every application of the POCA raises a constitutional matter. This conclusion either means that the Court has included the POCA in its list of statutes, the mere application of which is always subject to constitutional review, or that civil forfeiture is an area of law so imbued with policy considerations that every application of the POCA raises a constitutional matter.<sup>421</sup> Either way, these cases further erode the general principle that the ordinary application of the law is not subject to constitutional review.

In its decision on the merits in *Mohunram*, the majority of the Constitutional Court (in two separate judgments) found the forfeiture to be disproportional. (A minority found it to be proportional.) Before considering this issue, the Court reviewed all of the applicant's contentions in the same way that the Supreme Court of Appeal had done, with all the judges agreeing that an illegal casino

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417 The quantity of the prohibited substance found on the premises was not a decisive factor in determining proportionality. *Prophet* (supra) at paras 63, 65.

418 *Mohunram & Another v National Director of Public Prosecutions & Another (Law Review Project As Amicus Curiae)* 2007 (4) SA 222 (CC), 2007 (6) BCLR 575 (CC).

419 Ibid at para 9.

420 *Fraser v ABSA Bank Limited* 2007 (3) SA 484 (CC), 2007 (3) BCLR 219 (CC).

421 A similar argument was used in *Van der Merwe & Another v Taylor NO & Others* 2008 (1) SA 1 (CC), 2007 (11) BCLR 1167 (CC) (With regard to seizure in terms of the Criminal Procedure Act.) In a minority judgment, Mokgoro J wrote: 'Once the State seizes private property . . . and the legal basis for the seizure and holding is in dispute, the question of arbitrary deprivation of property under section 25(1) of the Constitution is clearly implicated, making the matter intrinsically a constitutional one.' Ibid at para 20. The majority of the Court avoids that conclusion (because it may have 'serious implications') and merely assumes, without deciding, that the case raises a constitutional matter. Ibid at para 106.

had been operated on the premises in question<sup>422</sup> and that the property was instrumental in this illegal gambling activity.<sup>423</sup> In addition to these questions, the Constitutional Court considered two aspects of the case that had not been considered earlier, viz, whether illegal gambling was a sufficiently serious offence for an order of civil forfeiture in terms of the POCA (the minority of the Court held that it was while the majority left this question open),<sup>424</sup> and whether the forfeiture provisions in the applicable provincial gambling act should preclude the application of the POCA (the minority and the majority disagreed on this question).<sup>425</sup> These two questions on their own could be said to have raised constitutional matters since they required the Court to define the overall scope of the POCA in light of the Bill of Rights and to determine whether a provincial or a national act should apply. Even if the Constitutional Court was legitimately entitled to answer these questions, however, it was not strictly speaking necessary for it to reconsider the Supreme Court of Appeal's factual findings, or its application of the proportionality test. While these issues could be seen to be issues connected to the Court's decision on the two genuinely constitutional matters, a more restrained Court might have assumed jurisdiction to decide the two novel points, and left the Supreme Court of Appeal's findings on the facts, and its application of the proportionality test, undisturbed.

*Mohunram* is not the only case in which the Constitutional Court has essentially second-guessed the Supreme Court of Appeal's application of a legal test without adding to our constitutional understanding of it. A common thread running through these judgments is that they almost all involve some sort of proportionality or balancing enquiry mandated by the ordinary law. *Dikoko*, for example, concerned the assessment of damages for defamation,<sup>426</sup> while *Du Toit v Minister of Transport* engaged the calculation of compensation for expropriation.<sup>427</sup> In some of these cases the Constitutional Court agreed with the Supreme Court of Appeal, while in others it substituted its view for that of the other court. In theory, when the Constitutional Court upholds an appeal against the Supreme Court of Appeal, it must do so on the basis that the Supreme Court of Appeal failed to take constitutional considerations into account, or that it misunderstood the true import of the Final Constitution for the case. All that the Constitutional Court really does in these cases, however, is to repeat the enquiry that the Supreme Court of Appeal has already conducted. Whether it ultimately upholds or dismisses the appeal, the ordinary law is not *constitutionally* developed.

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A particularly unfortunate example of this trend is *NM & Others v Smith & Others (Freedom of Expression Institute Intervening)*.<sup>428</sup> The applicants in *NM* claimed damages against the defendants for publishing their names and HIV status in a book

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422 *Van der Merwe & Another v Taylor NO & Others* (supra) at paras 35-37.

423 *Ibid* at paras 43-55.

424 *Ibid* at paras 15-34 (minority) and 111-117 (majority).

425 *Ibid* at paras 38-42 (minority) and 127-128 (majority).

426 *Dikoko v Mokhatla* 2006 (6) SA 235 (CC), 2007 (1) BCLR 1 (CC).

427 2006 (1) SA 297 (CC), 2005 (11) BCLR 1053 (CC).

without their prior consent. The High Court had dismissed the claim on the basis that the defendants had not acted wrongfully and had had no intention of harming the applicants. The Constitutional Court, by majority judgment, awarded damages. The jurisdictional part of the judgment is nothing short of a conceptual disaster:

The dispute before us is clearly worthy of constitutional adjudication and it is in the interests of justice that the matter be heard by this Court since it involves a nuanced and sensitive approach to balancing the interests of the media, in advocating freedom of expression, privacy and dignity of the applicants irrespective of whether it is based on the constitutional law or the common law. This Court is in any event mandated to develop and interpret the common law if necessary.<sup>429</sup>

As mentioned above in relation to *Dikoko*, the problem with assuming jurisdiction to review rules that are related to constitutional rights is that almost every legal rule is so related. For the Court to base its jurisdiction on this factor — not to mention on an empty slogan like 'worth[iness]' — is to ignore even the lowest threshold the Final Constitution offers for limiting its jurisdiction. The holding in *NM* not only distorts any such idea. It also seems to imply that the idea of limited jurisdiction is nothing but a minor inconvenience that can be ignored or overcome with ease. FC s 167 does not, however, grant jurisdiction to the Constitutional Court when a dispute is 'worthy', but only when it involves a constitutional matter. What has happened in *NM*, one might ask, to the notion of the need for a bona fide constitutional matter emphasized in *Fraser*? The reference to the development of the common law only adds insult to injury. The High Courts and the Supreme Court of Appeal are primarily responsible for developing and interpreting the common law. The Constitutional Court is only mandated to oversee their decisions when there is some indication that these courts have developed the law in a way not countenanced by the Final Constitution. Instead, FC s 39(2) is introduced in *NM* almost light-heartedly as a kind of fall-back position. It is exactly this understanding of the Constitutional Court's jurisdiction that has made more or less every application of the common or statutory law a constitutional matter.

The *NM* Court might be forgiven had it been necessary to develop the common law in order to vindicate the applicant's claim. But the majority expressly held that the common law as it stood was in line with the Final Constitution.<sup>430</sup> The sole basis for its decision was that the defendants, contrary to what the lower courts had found, had acted intentionally. The assumption of jurisdiction in such

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circumstances directly contradicts *Luiters*, in which the Court held that the question of whether someone acts with intention is a factual question and does not therefore raise a constitutional matter.<sup>431</sup> In ignoring this precedent, the majority in *NM* assumed the role of an ordinary appeal court, second-guessing the lower courts' application of the ordinary law and their interpretation of the facts. Although the Constitutional Court may, after this decision, still pay lip service to the doctrine that

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428 2007 (5) SA 250 (CC), 2007 (7) BCLR 751 (CC).

429 *NM* (supra) at para 31.

430 *NM* (supra) at para 57.

431 See *Luiters* (supra) at para 28.

cases involving the application of the ordinary law, whether common or statutory, do not raise constitutional matters, its own jurisprudence points in the other direction.

### **(h) An alternative conception of the Constitutional Court's jurisdiction**

This chapter has thus far been concerned with an overview of the Constitutional Court's case law on its jurisdiction under FC s 167. The different categories of constitutional matters that the Constitutional Court has embraced have been examined, together with the situations in which the Court has declined jurisdiction. The critique thus far has been limited to the question of coherence, i.e. to the question whether the Court has established clear rules determining its jurisdiction and whether these rules have been consistently applied. The aim of this exercise has been to provide litigants with assistance on how to assess their case with regard to the Constitutional Court's jurisdiction — the first hurdle in bringing a successful constitutional claim.

This section tries to address the broader consequences of the Constitutional Court's understanding of its jurisdiction and asks a number of conceptual questions. Has the Court delivered on its mandate as a court of limited jurisdiction and as an institution with a transformative function? Does the framework for the division of responsibilities between the Constitutional Court and the Supreme Court of Appeal devised by the Constitutional Assembly in the mid-1990s still make sense? Is it possible to draw a theoretically sound distinction between constitutional and non-constitutional matters in a system of constitutional supremacy? Is it possible to draw a meaningful distinction between matters that are decided by the Constitutional Court and those that are not?

### **(i) Consequences of the Constitutional Court's approach to its jurisdiction**

The Constitutional Court's approach to understanding the term 'constitutional matter' as the entry point to its jurisdiction has had a number of unfortunate consequences.

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### **(aa) It has become impossible to determine when the Constitutional Court will decline jurisdiction**

If the cases discussed above indicate anything at all, it is that the Constitutional Court has adopted an understanding of the all-pervasiveness of the Final Constitution in the legal system that effectively renders the distinction between constitutional and non-constitutional matters illusory. This is not to say that the Constitutional Court will never decline jurisdiction. It is just that it has become impossible to predict with any certainty in which cases it will do so. This is not merely a problem for parties seeking to access the Court. It also casts doubt on the foundational notion of the Constitutional Court as a court of special, limited jurisdiction.

Save for the exceptional situation where no issue other than a purely factual question is present when the case reaches the Constitutional Court,<sup>432</sup> every case that involves the interpretation and application of either statutory or common law may potentially raise a constitutional matter. With regard to statutes that have been enacted after 1994, one can never be entirely sure whether the Constitutional Court will include them in its list of legislation enacted to give effect or content to a provision of the Bill of Rights, or otherwise to provide the framework for some constitutional principle. Depending on this classification, the Constitutional Court may or may not assume jurisdiction over any interpretation or application of the legislation concerned, leading in the first instance to total control of the subject matter of the case.

With regard to the common law, the distinction between development of the law (which is subject to constitutional scrutiny) and mere application (which is supposedly not) has collapsed in cases where the common-law principle is open to 'policy choices' or where the case 'implicates' one or more rights in the Bill of Rights. And yet what lawyer would confidently advise a client that the common-law principle central to his or her matter was not an expression of some or other social policy or a balance struck between competing constitutional rights?

How did this happen? The most likely explanation is that the Constitutional Court's almost de facto plenary jurisdiction is a consequence of the supervisory role it has undertaken to ensure that lower courts interpret, develop, construe or apply the law through the prism of the Final Constitution. The original basis for this notion was the Court's understanding of the all-pervasiveness of the Final Constitution in relation to the rest of the legal system. The Court early on recognized that the ordinary law is not separate from the Final Constitution, but 'intertwined'<sup>433</sup> with it, and that the Final Constitution and the ordinary law form

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just one standard against which the conduct of those bound by the Final Constitution is to be measured. Frank Michelman has pointed out that the Constitutional Court in this respect follows an ideal of the unity of the legal system.<sup>434</sup> In my view, Michelman not only correctly describes the ideals followed by the Constitutional Court, his description also embraces the ideals espoused by the Final Constitution itself. This ideal is to be found not only in the supremacy clause (FC s 2) but also in FC s 8(1) — FC s 8(1) proclaims that the Bill of Rights applies to all law.

None of the above is problematic. The problem only arises because of the further step that the Constitutional Court has taken: according to its jurisprudence, not only is all law subject to the Final Constitution, but so too is every legal finding. In the eyes of the Court, every alleged shortcoming in a judgment renders the case in principle appealable. Here, I respectfully differ with Michelman: the structural basis for this understanding is not the principle of legality, ie the fact that the lower court

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432 This qualifier is important to show that the case may well have included many constitutional matters when it started in the High Court. However, on its way up the court hierarchy all of them had been decided and the parties did not pursue any of them further. The open questions that were still decisive for the case had been reduced. What the Constitutional Court is really saying, therefore, is that it does not want to deal with cases where the only matter left for it to decide is one of fact.

433 *Pharmaceutical Manufacturers* (supra) at para 33.

434 Michelman (supra) at § 11.4(b).

(allegedly) made a wrong finding of law. Instead, the Constitutional Court assumes jurisdiction because it regards it as its duty to ensure that lower courts fulfil their constitutional obligation to interpret and apply the ordinary law in line with the Final Constitution. The constitutional basis, therefore, is not the principle of legality, but FC s 39(2). The Constitutional Court has developed its understanding of its mandate on the back of this provision, but reads the provision in a very wide sense, in a way that arguably goes beyond the provision's intended scope. Today, the Constitutional Court's understanding of FC s 39(2) requires 'every court, tribunal or forum [to] promote the spirit, purport and objects of the Bill of Rights' not only when interpreting any legislation and when developing the common law (or customary law), but in everything they do, including every settlement of a dispute and every process of adjudication. From this conception of the constitutional character of other courts' ordinary functions, the Constitutional Court has developed its conception of itself as being constitutionally mandated and empowered to supervise the work of the lower courts. This does not mean, of course, that every assumption of jurisdiction by the Constitutional Court can be retraced to FC s 39(2). What it means is that the Court has adopted a reading of FC s 39(2) that renders the distinction between constitutional and non-constitutional matters practically meaningless.

The enlargement of the scope of FC s 39(2) so as to support the Constitutional Court's supervisory role is paradoxically visible in the *Boesak* case, one of the few cases in which the Court eventually declined jurisdiction. In *Boesak*, the Court held that a constitutional matter would arise if the Supreme Court of Appeal (or any other court) 'developed, or failed to develop, the rule under circumstances inconsistent with its obligation under section 39(2) of the Constitution *or with some other right or principle of the Constitution*'.<sup>435</sup> In this passage the wide reading of FC s 39(2) is

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clearly present: the Court's jurisdiction to oversee the development of the law arises not just where FC s 39(2) is directly engaged and not only when the Bill of Rights is in issue, but also where the lower court develops or fails to develop the law in line with 'some other [constitutional] right or principle'.<sup>436</sup>

Other cases point in the same direction, in particular those in which the Constitutional Court assumed jurisdiction on questionable grounds — most obviously, *Dikoko*, *Basson*, *NM* and *K*, but also *NEHAWU*. In all these cases the Court assumed jurisdiction on the basis that the lower court was bound to take the Final Constitution into account: either in the exercise of its discretion in relation to a procedural or substantive matter, or in the application of a statute. It is this understanding that makes the Court's conception of what constitutes a 'constitutional matter' virtually limitless. Put slightly differently, the Final Constitutional Court has adopted an understanding of the influence of the Final Constitution in the application of the ordinary law that is based on an extremely wide interpretation of FC s 39(2).

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435 *Boesak* (supra) at para 15(b), my emphasis, footnote omitted.

436 See Lourens du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 32 at § 32.1(c): although there are difference between provisions of the Bill of Rights and other provisions in the Constitution these should not be overemphasized as both can mutually reinforce the values of the Constitution, in particular with regard to rights: fundamental rights can be protected — or conditions conducive to their protection can be created and enhanced — by giving effect to constitutional norms that do not form part of the Bill of Rights.

Michelman argues that the principle of legality, properly understood, collapses the distinction between unlawful and unconstitutional decisions of lower courts. His point is that the yardstick for every court, ie the lawfulness of its decision, has been constitutionalized. But the distinction between unlawful and unconstitutional decisions is at least theoretically still upheld in South African law (with the exception of cases involving the review of administrative and executive action). The Constitutional Court has adopted its own yardstick for reviewing lower court decisions that encompasses everything they do in a way that makes it irrelevant whether the lower court's decision was lawful or not. To put it differently: when the emphasis is placed on the principle of legality, every *wrong* decision is open to review by the Constitutional Court. This means that an applicant to the Constitutional Court would have to argue that the lower court made a wrong decision in the same way s/he would argue an appeal from a High Court to the Supreme Court of Appeal. When the emphasis is placed on the Constitutional Court's power to control the interpretation and application of the law, every decision is open to review by the Court, even lawful ones.

Is such a wide understanding of the Constitutional Court's jurisdiction the consequence of the underlying principle embodied by FC s 39(2) or just of an aberrational reading of that provision? One approach might be to argue that every application of legislation necessarily involves its interpretation, but that there must be a difference between the development and the mere application of the common law. FC s 39(2) only mentions the former and thus the Constitutional Court

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was right to emphasize the distinction between application and development in cases like *Shabalala* and *Carmichele*. But is it really possible hermetically to seal off the courts' function in applying the law from their duty to develop or interpret it?

Both legal scholars and practitioners have strongly and convincingly advocated that it is not.<sup>437</sup> In her extra-curial writings, Constitutional Court judge Kate O'Regan has pointed out that the Constitution envisages a unified legal system within an overall objective, normative framework provided by the text of the Final Constitution. This unified system encompasses statute law, common law and customary law, and subjects all of them to the discipline of constitutional norms and values. FC s 39(2) is a textual indicator that all courts are enjoined to work within this unified system to promote the Final Constitution's vision for a just society.<sup>438</sup> Against that backdrop, there can be no distinction between interpretation, application and development of non-constitutional law.

Furthermore, experience in Germany suggests that once constitutional influence on the interpretation, application and formation of non-constitutional law is accepted and subject to review by the Constitutional Court (by the method of indirect application of the Final Constitution under an objective, normative framework), the

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437 See Lourens du Plessis 'Re-reading Enacted Law-texts. The Epoch of Constitutionalism and the Agenda for Statutory and Constitutional Interpretation in South Africa' (2000) 15 *SAPR/PL* 257, 295-299; Lourens du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 32, § 32.3(d) and § 32.5(c)(ii).

438 Kate O'Regan 'On the Reach of the Constitution and the Nature of Constitutional Jurisdiction: A Response to Frank Michelman' in Stu Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 51.

jurisdiction of the Constitutional Court is potentially limitless.<sup>439</sup> When a Constitution is both supreme and all-pervasive, and when this all-pervasiveness is at least partly executed by way of the interpretation and application of the ordinary law, a clear-cut distinction between constitutional and ordinary (read: non-constitutional) law, and between a Constitutional Court and every other court, is impossible to draw.<sup>440</sup> Importantly, any resultant blurring of the distinction between constitutional and non-constitutional jurisdiction should not be seen as part of some or other strategy on the part of the Constitutional Court to expand its domain at the expense of other judicial and political actors. Rather, any shift in

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the balance of power between the various branches of government and within the judicial branch must be seen as an almost inevitable consequence of the Constitutional Court's attempt to give full recognition to the Final Constitution.<sup>441</sup>

### **(bb) Every case notionally raises a constitutional matter**

The other side of the coin of the Constitutional Court's move to control lower courts' interpretation and application of the law is that every case can be *treated* as raising a constitutional matter. The Constitutional Court has been very clear that a constitutional matter raised must be genuine:

[T]his Court will not assume jurisdiction over a non-constitutional matter only because an application for leave to appeal is couched in constitutional terms. It is incumbent upon an applicant to demonstrate the existence of a bona fide constitutional question. An issue does not become a constitutional matter merely because an applicant calls it one.<sup>442</sup>

The Court itself, however, is to blame for the fact it has become all too easy to do just that. By ruling that it has jurisdiction whenever a litigant contends that a lower court has failed to develop the common law or to interpret legislation in accordance with the Final Constitution, the Court has set the jurisdictional threshold very low: such allegations, at any rate, are seemingly sufficient to raise a *bona fide* constitutional matter.

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439 The Bundesverfassungsgericht's jurisprudence on indirect horizontal application and the establishment of an objective order of values has been criticized on the basis that, although these doctrines have opened the legal system to fundamental rights, they have at the same time eliminated any distinction between constitutional and non-constitutional law. See Ernst-Wolfgang Böckenförde *Zur Lage der Grundrechtsdogmatik nach 40 Jahren Grundgesetz* (1990) 32; Christian Starck 'Verfassungsgerichtsbarkeit und Fachgerichte' (1996) 51 *Juristenzeitung* 1033, 1035. It has even been suggested that the doctrine of a clear-cut distinction between constitutional and non-constitutional law in the German context is nothing but a 'Lebenslüge' (a lifelong illusion). See Philip Kunig 'Verfassungsrecht und einfaches Recht — Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit' (2002) 61 *VVDStRL* 34, 40.

440 See Georg Hermes 'Verfassungsrecht und einfaches Recht — Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit' (2002) 61 *VVDStRL* 119, 124-126; and the comment by Dieter Grimm (ibid) at 180-82.

441 Dieter Grimm 'Constitutional Issues in Substantive Law — Limits of Constitutional Jurisdiction' in Ingolf Pernice, Juliane Kokott & Cheryl Saunders (eds) *The Future of the European Judicial System in a Comparative Perspective* (2006) 277, 279.

442 *Fraser* (supra) at para 40 (footnote omitted).

The crucial point is not that a litigant will sometimes try to postpone a final ruling by applying to the Constitutional Court and desperately 'couch[ing]' its application 'in constitutional terms'. Rather, the point is that the Court's conception of the term 'constitutional matter' does not stop it from assuming jurisdiction if it wants to in these cases. It is always possible to claim that the ordinary law either itself infringes the Final Constitution or that the lower court did or did not interpret/develop the ordinary law consistently with the Final Constitution.

### **(cc) The transformative function of the Constitutional Court is impaired**

A third consequence of the approach adopted by the Constitutional Court to its jurisdiction is that the Court has blurred the line between itself, on the one hand, and the Supreme Court of Appeal and the High Courts, on the other, in a way that has damaged its transformation agenda. As we have seen, the Constitutional Court has asserted its jurisdiction in a way that goes beyond even the few conceptual limits it has imposed on the exercise of its powers. It has decided not only cases, or issues within cases, that engaged the Final Constitution, but on several occasions has assumed jurisdiction when merely the application of statutory or common law was at stake. To this extent, I agree with Stu Woolman that part of the problem lies in the fact that the mere assertion by a litigant of a need to

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develop the common law often persuades the Court to assume jurisdiction, even though the judges later find that the common law need not be developed.<sup>443</sup> But the deeper problem is that the Court does not take its own institutional function seriously.

As I pointed out at the beginning of this chapter, the Constitutional Court was established to institutionalize the break from the colonial and apartheid legal order to a new legal order in which constitutional parameters would inform the limits and the content of the law, both with regard to rules and their application in day-to-day life. The purpose of the Constitutional Court's jurisdiction is, consequently, to ensure that this transformation takes place. The role of the Constitutional Court is, as far as the common law and statutory law are concerned, to ensure legal unity from the perspective of the Final Constitution.<sup>444</sup> This transformative function is secured by the possibility of appeal to the Constitutional Court against any lower court's decision, and by the Constitutional Court's mandate to ensure that other courts have as much regard to the Final Constitution as it does itself. The Court's jurisdiction 'includes' (or is equivalent to, as noted earlier) 'the interpretation, protection or enforcement of the Constitution' (FC s 167(7)), because the exercise of these powers by the Court ensures that the legal order is brought into line with constitutional imperatives. The Court needed to say in *Pharmaceutical Manufacturers* that there is only one system of law in South Africa because its comprehensive review powers, and thus its transformative function, would otherwise have been threatened. This is also why the Court in *Du Plessis v De Klerk* and later in *Carmichele* mentioned the 'evolving fabric of our society',<sup>445</sup> to which the judiciary has to have regard in bringing the common law into harmony with the Final Constitution. By interpreting,

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443 See Stu Woolman 'The Amazing, Vanishing Bill of Rights' (2007)124 *SALJ* 762, 782 n40 (With particular reference to *NM*).

444 The value of legal unity as a constitutional value has been convincingly portrayed by Michelman. See Michelman (*supra*) at § 11.4(b).

protecting and enforcing the Final Constitution, the Constitutional Court guides the development of the legal order, and ensures that constitutional standards that have already been established are adhered to.

The flipside of these observations, however, is that the Constitutional Court should *not* have jurisdiction when the constitutional project is not advanced. When there is neither a need to bring the law into line with the Final Constitution nor to ensure that a lower court adheres to an established constitutional standard, there is also no need for the Constitutional Court to become involved in the matter. What is required in these cases is the simple ascertainment of facts or the mere application of constitutionally compliant law. This principle does not only apply to entire judgments, but is also valid with regard to different aspects of a judgment. As most cases involve several legal issues, the Constitutional Court

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should distinguish between those aspects of a case that raise a constitutional matter and those that do not. As we have seen, however, the Constitutional Court, while upholding the credo that purely factual questions are none of its business, has effectively given up (or at least has substantially cut back) on its limited jurisdiction in cases where constitutionally compliant law is applied. In so doing it has turned itself into an 'Über-Appeal Court'.

The Court's failure to distinguish between matters in which it provides a constitutional guideline and those where it assumes the role of a High Court and second-guesses the facts of the case weakens the influence of the Constitution in the overall legal framework of South Africa. This is so for two reasons. First, since the Court has to justify its findings with regard to the Final Constitution, deciding cases that it does not have to creates the impression that everything may be deduced from the Final Constitution. The Final Constitution is, in other words, presented as the answer to all legal questions. This stance undermines the value of the Final Constitution as a foundation — but not a substitute — for the legal and social order in South Africa.

Secondly, the Constitutional Court, even with all the supervisory powers it has assumed, will not be able to transform the entire legal system on its own. As a practical matter, the Court will never be able to hear all the cases that have constitutional implications. What is needed to ensure the transformation of the South African legal order is for every other court to feel not only bound, but also encouraged to 'promote the spirit, purport and objects of the Bill of Rights' (FC s 39(2)). To achieve transformation of the kind envisaged by the Final Constitution, the Constitutional Court needs the support of the lower courts, in particular the Supreme Court of Appeal. It is in this regard that the 'über-appeal-court approach' taken by the Constitutional Court has been particularly unhelpful.

The same criticism could be levelled against the Constitutional Court's seeming determination to decide every factual question in the process of adjudicating a constitutional matter, even where this means overturning factual findings made by the Supreme Court of Appeal.<sup>446</sup> The Constitutional Court's assumption of a general supervisory role can be justified. The principle underlying FC s 39(2), after all, inevitably leads to this sort of role. But the Court's supervisory role should be

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445 *Du Plessis v De Klerk* (supra) at para 61; *Carmichele* (supra) at para 36.

446 See *Rail Commuters Action Group* (supra) at para 53; but compare *Minister of Safety and Security v Van Niekerk* (supra) at para 10.

performed with care and respect for the Supreme Court of Appeal — not only because of the Supreme Court of Appeal's greater experience in dealing with the common law, but also because of the need to trust the Supreme Court of Appeal's general willingness and capacity to take account of the Final Constitution in its decisions. The need for such institutional respect has been acknowledged by the Constitutional Court on several occasions. But it needs to be observed, too. What this means is that, when the Constitutional Court is asked to review a decision of the High Court or the Supreme Court of Appeal involving the balancing of rights or the application of a proportionality test, the Constitutional Court

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should refrain from interfering with the decision unless it can be shown to have been based on a misunderstanding of the applicable constitutional standard or a misapplication of the applicable constitutional criteria. The mere fact that the Constitutional Court would have decided the case differently is not enough.

To sum up: the Constitutional Court has established an understanding of the term 'constitutional matter' that makes it impossible to predict whether it will assume jurisdiction in any given case, and which encourages parties to pretend that their case raises a constitutional matter. The Court has also asserted its jurisdiction in a way that often second-guesses the Supreme Court of Appeal's legal findings, even where the Final Constitution is not applied. This approach has led to a situation in which the Court has declared large areas of law to be automatically subject to its jurisdiction, including labour law, administrative law, broadcasting law and the law of defamation. In these matters, the Court does not distinguish between cases and aspects of cases that engage the Final Constitution, but applies and interprets the common law and statute law like any other court. This approach is not what was envisaged by the Constitutional Assembly. It is also conceptually and analytically weak, and bad for the Court's own transformation agenda.

## **(ii) A functional approach to jurisdiction**

In order to remedy these shortcomings, the Constitutional Court needs to do three things. First, it should in conception and in practice adopt an approach to its jurisdiction that recognizes the limited powers it is supposed to exercise according to FC s 167(3)(b). Secondly, the Court's approach to its jurisdiction should at least to some extent distinguish between cases it is likely to hear and those it will leave to the Supreme Court of Appeal to decide. Finally, the Court should take account of its transformative function, which is to say, it should distinguish between cases it needs to decide to ensure that the ordinary law is in line with the Final Constitution, both in form and in application, and those that it does not need to decide for this reason.

### **(aa) Limits of a substantive, and benefits of a functional, understanding of 'constitutional matter'**

The Court's current, substantive approach to the definition of 'constitutional matter' is inherently inadequate. An all-encompassing, all-pervasive Constitution and a Constitutional Court that has a mandate to ensure the unity of the legal system — as Frank Michelman has convincingly shown — is irreconcilable with any distinction between areas of substantive law that fall inside, and areas that fall outside, the scope of the Court's jurisdiction. Any definition of the term 'constitutional matter' that tries to limit the type of matters that the Court may conceivably hear by asking what the case is about is futile and bound to fail. As long

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as a dispute is legal, and as long as there is any statutory, customary or common-law principle guiding the dispute, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights, i.e. must decide the case from a constitutional vantage point. And as long as the Court adopts its supervisory role with regard to other courts' obligations under FC s 39(2), there is no case which is beyond its jurisdiction.

In *Dikoko*, Skweyiya J, in dissent, made a remark that pointed to the dilemma that a solely substantive understanding of the Court's jurisdiction poses: '[W]hile it is accepted that all matters have constitutional implications, in order to recognise and preserve this Court's jurisdictional distinction a line must be drawn.'<sup>447</sup> When all matters have 'constitutional implications', substantive considerations cannot be used to distinguish between constitutional and non-constitutional matters: something cannot be part of itself. It is necessary therefore to ignore substantive considerations — at least to a certain extent. For the Constitutional Court to make sense of its limited jurisdiction and to develop an understanding of its position in the court structure, the Court will have to move beyond the notion that in some areas of law legislation has been enacted to give effect to a fundamental right. It will also have to move beyond the notion that a dispute raises a constitutional matter because it has implications for the balance struck between rights enshrined in the Final Constitution. These propositions are not false, but they are meaningless as devices to determine the Court's jurisdiction. In some very limited cases, the substantive approach may suffice — for example, to decline jurisdiction when only factual questions are left for decision by the Constitutional Court. But in the majority of cases factual questions play only a secondary role. And, in any case, the Constitutional Court's approach to its jurisdiction cannot be restricted to sorting out purely factual disputes. Legal questions can be non-constitutional matters, too.

It remains a dilemma that with an all-pervasive Constitution every legal rule has some or other constitutional dimension. This conclusion seems to be at odds with the idea of a Constitutional Court separate from other courts, not only as an institution, but also in jurisdictional terms. Other constitutional courts, however, have also struggled with this situation, and there is much to be learned from their experience. In Germany, the Federal Constitutional Court has over time developed an approach that tries to reconcile its limited jurisdiction with the all-pervasiveness of the German Constitution.<sup>448</sup> The conceptual breakthrough in this process came when the Court realized that a distinction between constitutional

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and non-constitutional matters (or between constitutional and non-constitutional law) based on purely substantive criteria was not viable — but that functional criteria might work.

From early on the Bundesverfassungsgericht made it clear that it would ensure that all courts in their respective jurisdictions took the Constitution into account and did not adjudicate contrary to it. The approach adopted by the Bundesverfassungsgericht has widened the scope of its review powers to include,

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447 *Dikoko* (supra) at para 123.

448 In Germany, the pervasiveness of the Basic Law is amplified by the fact that the Grundgesetz states explicitly what Frank Michelman assumes to be the case for South Africa's Final Constitution. According to art 20(3) of the Grundgesetz, both the executive *and* the judiciary are bound by law and justice. Thus, in the constitutional order of the Grundgesetz, every wrong legal finding can indeed be seen as an infringement of the principle of legality and thus the Constitution.

effectively, all judgments of all other courts.<sup>449</sup> Of course, such an extensive and all-encompassing supervisory function, which the Court has opened up through its judgments, has raised questions about its status as a court of limited jurisdiction, and also about the practicality of broadening its jurisdiction in this way. The Bundesverfassungsgericht has therefore moved to temper its broad review powers by reducing the intensity of its control function, especially with regard to constitutional complaints concerning judicial decisions (roughly the equivalent of appeals to the South African Constitutional Court). In particular, the Bundesverfassungsgericht has developed the principle that it will — notwithstanding the doctrine of legality — not review every (alleged) breach of the ordinary law, but only whether the court a quo's interpretation and application of the law has disregarded constitutional obligations:

The Bundesverfassungsgericht has to check whether the ordinary court has rightly assessed the scope and the effect of the fundamental rights in the sphere of civil law. There follows from this at the same time the limit to this review: it is not for the Constitutional Court to check judgments of the civil courts completely for errors in law; the Constitutional Court has merely to assess the 'permeating effect' [also translated as the 'radiating effect'] of the fundamental rights on the civil law mentioned, and bring the value content of the constitutional principle to bear here too. It is the object of the institution of the constitutional complaint to make all acts of the legislative, executive and judicial power subject to review for 'constitutionality' (s 90 of the Federal Constitutional Court Act). Just as the Federal Constitutional Court is not called upon to act as a body for appeal or indeed 'super appeal'

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over the civil courts, so it should not universally refrain from reviewing such judgments and ignoring a misapprehension of norms and standards of fundamental rights that may occur in them.<sup>450</sup>

In this passage, the Bundesverfassungsgericht made it clear that its function is not to ensure that other courts' judgments are 'correct' — this is the task of the appeal courts — and that it will not overturn judgments simply because they are wrong in law. Like the efforts by the South African Constitutional Court to get to grips with the term 'constitutional matter', however, the Bundesverfassungsgericht initially struggled to determine when the judgment of an ordinary court should be construed as violating the Constitution. In 1964 it invented a test, which it has retained and developed since then:

The . . . specific function of the Bundesverfassungsgericht would not be achieved if it were to review court decisions on questions of law in an unrestricted way like an

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449 Milestones in the Bundesverfassungsgericht's jurisprudence in this regard are: BVerfGE 6, 32 ('*Elfes*')(1957)(The constitutional right to personal freedom protects every aspect of human behaviour and not just those specified and enumerated by other, more specific constitutional rights or by legislation. An infringement of a constitutional right can only be justified when the infringing act is both procedurally and substantively in line with the Constitution. Anybody can challenge any burdensome law as an infringement of basic rights through the procedure of constitutional complaint. The Constitutional Court will have jurisdiction in these cases and will assess both whether the challenged norm violates the fundamental rights as such and whether the norm was enacted according to the formally correct procedure); BVerfGE 7, 198 ('*Lüth*')(1958) (Ordinary courts can infringe fundamental rights when they fail to recognize the impact the Constitution has on private law. Here the Court used the 'objective value order' argument that later featured prominently in the South African Constitutional Court's decision in *Carmichele*. The Constitutional Court will review judgments with regard to such failures); BVerfGE 39, 1 ('*Schwangerschaftsabbruch (1)*' ['*First Abortion Decision*'])(1975)(The state has a duty to protect the fundamental rights of the Grundgesetz against private infringement. If non-action leaves citizens' fundamental rights unprotected, the legislature is constitutionally obliged to act. The Constitutional Court has jurisdiction to decide whether the state has fulfilled these positive obligations.)

appellate court, just because an incorrect decision could possibly affect the constitutional rights of the parties concerned. . . . Only when a court decision violates *specific constitutional law*, may the Bundesverfassungsgericht interfere on the basis of a constitutional complaint. Specific constitutional law has not been violated merely when a judgment has been incorrectly decided in terms of the ordinary law; instead the mistake of the lower court must lie in its disregard for constitutional rights.<sup>451</sup>

The now famous 'Heck formula' of 'specific constitutional law' (named after its inventor, Judge Karl Heck) of course begs the question of what is 'specific' about constitutional law. The Bundesverfassungsgericht admitted that even this formula would not always be able to delineate the limits of the court's review powers. However, it claimed, nevertheless, that limitation was a blessing in disguise: a certain degree of flexibility in the scope of its review powers was necessary to

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ensure the performance of its supervisory function. In later judgments, the Bundesverfassungsgericht has refined its definition of 'specific constitutional law'.<sup>452</sup> As the law now stands, a judgment of a lower court violates constitutional law:

1. when the court a quo relies on a statute that in itself is unconstitutional;
2. when the court a quo infringes a procedural constitutional right of the applicant;
3. when the interpretation and application of the law by the court a quo violates constitutional law; and
4. when the decision of the court a quo is arbitrary.

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450 BVerfGE 7, 198, 207 ('Lüth'): 'Das Verfassungsgericht hat zu prüfen, ob das ordentliche Gericht die Reichweite und Wirkkraft der Grundrechte im Gebiet des bürgerlichen Rechts zutreffend beurteilt hat. Daraus ergibt sich aber zugleich die Begrenzung der Nachprüfung: es ist nicht Sache des Verfassungsgerichts, Urteile des Zivilrichters in vollem Umfange auf Rechtsfehler zu prüfen; das Verfassungsgericht hat lediglich die bezeichnete 'Ausstrahlungswirkung' der Grundrechte auf das bürgerliche Recht zu beurteilen und den Wertgehalt des Verfassungsrechtssatzes auch hier zur Geltung zu bringen. Sinn des Instituts der Verfassungsbeschwerde ist es, daß alle Akte der gesetzgebenden, vollziehenden und richterlichen Gewalt auf ihre 'Grundrechtmäßigkeit' nachprüfbar sein sollen (§90 BVerfGG). Sowenig das Bundesverfassungsgericht berufen ist, als Revisions- oder gar 'Superrevisions'-Instanz gegenüber den Zivilgerichten tätig zu werden, sowenig darf es von der Nachprüfung solcher Urteile allgemein absehen und an einer in ihnen etwa zutage tretenden Verkennung grundrechtlicher Normen und Maßstäbe vorübergehen.' This judgment was published in English in Bundesverfassungsgericht (ed) *Decisions of the Bundesverfassungsgericht 1958-1995*, Volume 2/I (1998) 1.

451 BVerfGE 18, 85, 92-93 ('Patentbeschluss' ['Patent Decision']): '[Es würde] . . . der besonderen Aufgabe des Bundesverfassungsgerichts nicht gerecht werden, wollte dieses ähnlich wie eine Revisionsinstanz die unbeschränkte rechtliche Nachprüfung von gerichtlichen Entscheidungen um deswillen in Anspruch nehmen, weil eine unrichtige Entscheidung möglicherweise Grundrechte des unterlegenen Teils berührt. . . . [N]ur bei einer Verletzung von spezifischem Verfassungsrecht durch die Gerichte kann das Bundesverfassungsgericht auf Verfassungsbeschwerde hin eingreifen. Spezifisches Verfassungsrecht ist aber nicht schon dann verletzt, wenn eine Entscheidung, am einfachen Recht gemessen, objektiv fehlerhaft ist; der Fehler muß gerade in der Nichtbeachtung von Grundrechten liegen.' (References omitted)

452 For a summary of the Bundesverfassungsgericht's jurisprudence, see Werner Heun 'Access to the German Federal Constitutional Court' in Ralf Rogowski & Thomas Gawron (eds) *Constitutional Courts in Comparison — The U.S. Supreme Court and the German Federal Constitutional Court* (2002) 143-145.

The last criterion is obviously a very flexible one that effectively allows the Court to overturn judgments when it does not like the outcome — even if the judgment was based entirely on non-constitutional law. But while this category can be seen as an emergency escape hatch in cases where the need for equity outweighs the value of legality, the more important category is the third one, which mirrors the cases the South African Constitutional Court decides on the basis of FC s 39(2). As to the question when the interpretation and application of the law by the court a quo violates constitutional law, the Bundesverfassungsgericht has offered the following guideline:

The ordinary application of the ordinary law to the case is beyond the review powers of the Constitutional Court unless the lower court's errors in interpreting the law were based on a fundamental misconception of the importance of the fundamental right, in particular its scope, and had some significance for the specific case.<sup>453</sup>

In addition to such 'fundamental misconceptions', a lower court commits a constitutional error in the interpretation and application of the law when it fails to realize that the Constitution impacts on the interpretation of the ordinary law or that conflicting fundamental rights need to be balanced against each other. Furthermore, the Bundesverfassungsgericht has held that the intensity of its powers of review depends on the intensity of the asserted impairment to a constitutional right.<sup>454</sup> Generally, the Constitutional Court will refrain from reviewing the interpretation and application of the ordinary law and from substituting its

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view for the assessment and evaluation of the particular circumstances of the case by the trial court. So, for example, in a defamation case, the Constitutional Court will not second-guess the trial court's findings about what was said and done and whether it was defamatory or not.<sup>455</sup> In cases of a high 'infringement intensity', however, constitutional review extends into the details of the application and interpretation of the law, both by the administration and the judiciary.<sup>456</sup> In some cases, the Constitutional Court may even substitute its view of the appropriate balance to be struck for that of the lower court.<sup>457</sup>

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453 BVerfGE 18, 85, 93: 'Freilich sind die Grenzen der Eingriffsmöglichkeiten des Bundesverfassungsgerichts nicht immer allgemein klar abzustecken; dem richterlichen Ermessen muß ein gewisser Spielraum bleiben, der die Berücksichtigung der besonderen Lage des Einzelfalls ermöglicht. Allgemein wird sich sagen lassen, daß die normalen Subsumtionsvorgänge innerhalb des einfachen Rechts so lange der Nachprüfung des Bundesverfassungsgerichts entzogen sind, als nicht Auslegungsfehler sichtbar werden, die auf einer grundsätzlich unrichtigen Anschauung von der Bedeutung eines Grundrechts, insbesondere vom Umfang seines Schutzbereichs beruhen und auch in ihrer materiellen Bedeutung für den konkreten Rechtsfall von einigem Gewicht sind.' (References omitted)

454 BVerfGE 35, 202 ('Lebach').

455 BVerfGE 30, 173, 197 ('Mephisto'). This judgment was published in English in Bundesverfassungsgericht (ed) *Decisions of the Bundesverfassungsgericht 1958-1995*, Volume 2/II (1998) 147.

456 BVerfGE 83, 130 ('Josephine Mutzenbacher') at 145. This judgment was published in English in Bundesverfassungsgericht (ed) *Decisions of the Bundesverfassungsgericht 1958-1995*, Volume 2/II (1998) 474, 485-86.

457 BVerfGE 42, 143, 148 ('Deutschland Magazine').

As Werner Heun has correctly pointed out, all these allocation criteria, and the differentiation between 'specific constitutional law' and limited review by the Bundesverfassungsgericht, are incomprehensible if they are only seen as an exercise in the interpretation of the constitutional text.<sup>458</sup> Instead, one needs to see them as an attempt to distribute tasks *functionally* between the Bundesverfassungsgericht and the other courts. The latter have comprehensive jurisdiction in the interpretation and application of all (usually statutory) law. The Constitutional Court controls whether the Constitution has been properly taken into account, without, however, hesitating to overrule a particularly grave miscarriage of justice.

Strictly speaking, by the time all these deliberations on the scope and intensity of review occur, the Bundesverfassungsgericht has already assumed jurisdiction and is dealing with the merits of the case. However, reduced review is, in effect, a jurisdictional criterion as it is used to distinguish between those aspects of the case in which the decision of the lower court is final and those in which the Constitutional Court can and does exercise its review powers. The distinction is a device to respect the expertise of the ordinary courts in their field and to limit the caseload of the Federal Constitutional Court. It achieves this in two ways: first, it allows the Court to decline to decide a case when the crucial matters are the interpretation and application of the law. Secondly, within a case, it allows the Constitutional Court to distinguish those aspects that have no constitutional implications from those that do. This is more than the decision, or rather non-decision, of 'issues connected with decisions on constitutional matters' found in FC s 167(3)(b). It is an exercise that leaves legal questions as they were decided by the lower courts and concentrates on those that demand a decision by the Constitutional Court. Lower courts enjoy discretion in their interpretation, application and development of the law unless it is the specific interpretation, application and development of statutory or common law adopted by the lower court that is prohibited by the Constitution or — the other way around — unless there is a

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specific interpretation, application and development of statutory or common law demanded by the Constitution which the lower court failed to adopt.

As the South African Constitutional Court faces the very same challenge of ensuring that the legal order complies with the all-encompassing Constitution (and transforms in this direction), while exercising limited jurisdiction in constitutional matters, the Court might profitably draw on the German experience. In particular, the Constitutional Court could adopt an approach to its jurisdiction where it is not primarily the subject matter of a case, but its function with regard to other courts, and its overall transformative role in the South African court structure, that determines whether it decides to review a case or not.

The functional approach is partly based on the specific setting and composition of the court concerned and its relative advantages and disadvantages. Such factors have already been recognized by the Constitutional Court, for example, with regard to evidentiary matters. The Court has declined to decide purely factual issues, at least in part because it is ill equipped to do so. Besides the fact that some of the judges of the Constitutional Court have no experience as trial judges, the fact that the Court is composed of eleven judges is not ideal for cross-examining witnesses.

Then there is the fact that the Court is often in recess and not ready to sit:

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458 Heun (supra) at 145.

The Constitutional Court is not designed to act in matters of extreme urgency. It consists of eleven members and a quorum of the Court is eight of them. This Court is in recess for some months of each year and during those times its members disperse to their homes which, in some cases, are a considerable distance from the seat of the Court in Johannesburg . . . [and] it is not always possible to convene a quorum of the Court at very short notice during a recess.<sup>459</sup>

This dictum in one of the *UDM* decisions was used in the context of exclusive jurisdiction. But it points to a functional understanding of the Constitutional Court as a court that deals with abstract legal questions that has wider implications for its jurisdiction in general.

The Court should also adopt a functional approach to its jurisdiction in cases where these practical aspects are not decisive. Even when, for example, the balancing of rights in a defamation case could be justifiably argued to raise a constitutional matter, the Constitutional Court should refrain from doing so and respect the lower court's discretionary judgment. To make sense of its limited jurisdiction and to ensure that the Final Constitution's transformation agenda is advanced, the Constitutional Court needs to focus on questions of constitutional principle, not on the application of the law. It should see its function as being to define the constitutional standards for the interpretation of a statute, the application and development of a common-law rule or the balancing of competing

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interests in the ordinary law. The Court should ask itself whether a case requires it to set or elaborate these standards. It also needs to ask itself what can be achieved by deciding a certain case: is it just adjudicating a dispute between two parties or deciding what the common law is in relation to a specific set of circumstances, or is it shaping the constitutional order in the broadest sense? By focusing on principles, the Constitutional Court would ensure that the law transforms according to the Final Constitution.

The purpose of such an approach is not to limit the relevance of the Final Constitution and its influence in court proceedings — every court, tribunal or forum must still promote the spirit, purport and objects of the Bill of Rights. Rather, since this obligation creates a common and mutual task for every court, the aim is to distribute the burden of this task between the courts, and to ensure that the Constitutional Court is able to fulfil its mandate.

Although the Constitutional Court's main task is to set guidelines for other courts, this does not mean that, once this task is done, the Court may not intervene when questions concerning the application of the guidelines arise. Guidelines set in earlier cases may need further clarification from time to time, or another criterion may need to be added. In this regard, the distinction between the Court's focus on issues of principle and the adoption of a supervisory role is really one of emphasis. By focusing on issues of principle the Constitutional Court would be able to demonstrate, not only that other courts have a duty to promote the Final Constitution, but that they are trusted agents of the constitutional project. The more credibility the Constitutional Court enjoys among the High Courts and the Supreme Court of Appeal, and the more room it leaves them for manoeuvre in the development of the common law and the interpretation of statutes, the more the judges of these other courts will take account of constitutional values in the

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459 *President of the Republic of South Africa & Others v United Democratic Movement & Others* 2003 (1) SA 472 (CC), 2002 (11) BCLR 1164 (CC) at para 30, cited with approval in *Ex parte: Minister of Social Development & Others* 2006 (4) SA 309 (CC), 2006 (5) BCLR 604 (CC) at para 51.

adjudicative process. In addition, the more the Constitutional Court leaves the application of the constitutional guidelines it sets to the lower courts, the more these courts will accept that the Court may on occasion have to exercise its supervisory function under FC s 39(2) to review an erroneous application of these guidelines.

A functionalist (and consequently more limited) understanding of the Constitutional Court's jurisdiction, therefore, not only makes sense of the principle of limited jurisdiction as set out in the Final Constitution. It also promotes the constitutional transformation of the legal order by passing more responsibility for the transformation of the ordinary law to the other courts. Of course, this argument may be contested. One could argue that the Constitutional Court needs to assert the utmost possible control of the other courts in order to ensure transformation. From this perspective, a limited jurisdiction is indeed an obstacle, and the Constitutional Court should endeavour to expand its jurisdiction as much

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as possible. The Court, on this approach, should decide as many cases as possible in order to build a strong body of constitutional law and ensure that the other courts toe the line.

This view is voiced by Moseneke J in *Daniels v Campbell NO*:<sup>460</sup>

The problem of readily importing interpretations piecemeal into legislation is the precedent it sets. Courts below will follow the lead and readily interpret rather than declare invalid statutes inconsistent with the Constitution. However, constitutional re-interpretation does not come to this Court for confirmation. The result may be that high courts develop interpretations at varying paces and inconsistently. This makes for an even more fragmented jurisprudence and would have deleterious effects on how people regulate their affairs. It is highly undesirable to have an institution as important as marriage recognised for some people in some provinces and not in others. The rule of law requires legal certainty.<sup>461</sup>

Moseneke J's concern in this passage is directed against the threat of a fragmented legal system and a concomitant loss of control by the Constitutional Court. He raises this concern in relation to the difference between declarations of invalidity, which have to be confirmed by the Court, and lower court decisions on how statutes should be interpreted, which do not. But the same unease may be raised in relation to jurisdiction: is there not a danger, if the Constitutional Court relinquishes the wide jurisdiction it currently enjoys, that constitutional transformation will develop in different ways and at different speeds in the lower courts?

This concern is valid. But it can also be exaggerated. In every legal system, different courts may interpret or apply legal rules in different ways. That is why there are appeal courts, whose task it is to settle these differences. The occurrence and eventual settling of conflicting interpretations is part and parcel of the legal process, as much as it may cause dissatisfaction in a particular case. Like other legal systems, the South African legal system makes provision for this scenario: conflicting High Court interpretations of the common law or of particular statutes eventually reach the Supreme Court of Appeal, whose decision, absent a constitutional matter, should be final.

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460 2004 (5) SA 331 (CC), 2004 (7) BCLR 735 (CC).

461 *Daniels v Campbell NO* (supra) at para 104.

The same process should apply to constitutional matters: conflicting constitutional interpretations by different courts should be reviewed by the Constitutional Court in terms of FC s 39(2). Any such conflicts would be temporary only, pending the Constitutional Court's decision. Admittedly, such conflicts would not automatically reach the Constitutional Court, since they would be dependent on the aggrieved litigant's capacity to prosecute an appeal. There is no greater risk, however, that such conflicts would endure in the legal system than there is with regard to conflicting common-law interpretations. The main concern is that the Final Constitution should be mirrored in the legal system, and that its values should inform statutory interpretation and the development of the common law. From this perspective, the best system is one that encourages lower courts

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to take the Final Constitution into account. In some cases, parties may not have the financial means or the emotional stamina to appeal a particular disputed interpretation all the way to the Constitutional Court. But in other cases litigants may benefit from a High Court that is not afraid to shape the law in terms of the Final Constitution by its own lights. The point is not that the Constitutional Court should necessarily decide fewer cases. It is that the Court should be more aware of the competence of lower courts to take the Final Constitution into account, both so that it can concentrate on those cases (or those aspects of cases) that really require its attention, and so as to encourage lower courts to apply the Final Constitution in their daily work.

### **(bb) Constitutional leeways as limits to constitutional jurisdiction**

The functionalist approach to the definition of 'constitutional matter' suggested above is well-suited to reconciling the principle of an all-pervasive Constitution with the idea of the Constitutional Court's limited jurisdiction. The virtue of the functionalist approach is apparent when the jurisdiction of the Constitutional Court is linked to the way in which the Final Constitution itself 'applies to all law'. Although the Final Constitution is supreme and all-pervasive, its function is nevertheless limited to that of a framework and a foundation for the legal order. This conclusion means that the Final Constitution, on the one hand, sets the outer limits for every possible legal rule, but, on the other hand, does not contain all possible legal rules. Instead it contains 'leeways' — such leeways allow conflicting legal rules to be constitutional.

A constitutional leeway exists when the Final Constitution neither prohibits nor demands a certain decision. The Final Constitution, of course, prohibits decisions that are inconsistent with a constitutional right (not necessarily, but most often, a right in the Bill of Rights). The jurisprudence of the Constitutional Court is full of cases in which the Court has held that a particular legal rule infringes the Final Constitution and cannot be justified. Cases in which the Final Constitution demands a certain decision are less common. Here, the Final Constitution may set a minimum standard that can rise until there is only one decision possible. The Court has also sometimes ordered the legislature to cure a constitutional defect in a specific way.<sup>462</sup> More often, minimum standards may be satisfied by more than one decision, and the

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462 See *Minister of Health & Others v Treatment Action Campaign & Others* (2) 2002 (5) SA 721 (CC), 2002 (10) BCLR 1075 (CC); *Minister of Home Affairs and Another v Fourie & Another (Doctors for Life International & Others as Amici Curiae)*; *Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC).

courts, the legislature or the executive may exercise their discretion about how to do this.<sup>463</sup> Where the Final Constitution neither prohibits

nor demands a particular decision, it creates a leeway.<sup>464</sup> Leeways start, in other words, where the definitive normative control of the Final Constitution ends.

The South African Constitution leaves ample leeway in this sense for the ordinary law to exist and evolve.<sup>465</sup> Such evolution takes place in the courts through the interpretation and application of legislation and the common law. It is also done through traditional dispute-resolution mechanisms in the case of customary law. When there is no conflict between the rule or its application and the Final Constitution, then the rule still derives its force from the Final Constitution and is subject to its supremacy.<sup>466</sup>

Since the Final Constitution is the Constitutional Court's only yardstick and its sole basis for review, the jurisdiction of the Court should end where constitutional leeway begins. The Constitutional Court should recognize the existence of leeways and respect the Supreme Court of Appeals's final decision-making powers in relation to matters falling within a leeway. It may, of course, review whether the lower courts have remained within the boundaries of a leeway left open by the Final Constitution. But the Constitutional Court should not substitute its view for that of a lower court where this set of circumstances does not obtain. In the context of constitutional interpretation, Lourens du Plessis has rightly pointed out that the Final Constitution is indisputably the supreme law of the Republic of South Africa, but that at the same time it is not the 'overarching, all-encompassing, omni-regulative, super law'.<sup>467</sup> The Final Constitution does not take the place of any other legal rule or, in other words, it does not have readymade answers to all legal problems.<sup>468</sup> This does not mean that the Final Constitution is not all-pervasive, however. What it means is that the Final

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463 See, eg, *Grootboom v Government of the Republic of South Africa & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC); *Rail Commuters Action Group & Others v Transnet Ltd t/a Metrorail & Others* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC).

464 Robert Alexy 'Verfassungsrecht und Einfaches Recht — Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit' (2002) 61 *VVDStRL* 7, 22. See also Robert Alexy *A Theory of Constitutional Rights* (2002) 394. Instead of leeway, Alexy's translator uses the phrase '(structural) discretion'.

465 The High Courts and the Supreme Court of Appeal have adopted an approach to the development of the common law that takes note of this leeway. See Stu Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31, § 31.4.(e)(iv).

466 Here I agree with Kate O'Regan, who emphasizes that an issue may be regulated in several different ways, but still be part of one legal system whose precise content is not entirely or perhaps even substantially determined by the Constitution, because it operates within an overall normative constitutional framework. See Kate O'Regan 'On the Reach of the Constitution and the Nature of Constitutional Jurisdiction: A Response to Frank Michelman' in Stu Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 51.

467 Lourens du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 32 at § 32.3(e)(ii) and § 32.5(b)(iii)(bb).

468 Du Plessis (supra) at § 32.5(b)(iii)(bb).

Constitution leaves many legal questions for decision according to the ordinary law, provided such decisions remain within the parameters set by the Final Constitution.

In *Mhlungu*, Kentridge AJ remarked: 'I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a

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constitutional issue, that is the course which should be followed.<sup>469</sup> This remark, which is usually regarded as the origin of the 'principle of avoidance',<sup>470</sup> was made in a jurisdictional context, ie in the context of deciding when a case should be referred to the Constitutional Court rather than being decided by the High Court. In my view, the 'possibility' of deciding a case without reaching a constitutional issue has both a material and a functional side to it. The principle of avoidance is the other side of the coin of the Constitutional Court's limited jurisdiction. It is a manifestation of 'jurisdictional subsidiarity', a term coined by Lourens du Plessis with which I fully agree, requiring a (lower) court to take a decision in the realm of its own jurisdiction if it is possible to do so and refrain from referring it to the Constitutional Court merely because the matter could be construed as raising a constitutional matter.<sup>471</sup> That does not mean that lower courts should avoid the Final Constitution, but rather that they should endeavour to bring the ordinary law in line with the imperatives of an all-pervasive Constitution. The Constitutional Court would then only exercise jurisdiction where, in terms of FC s 39(2), this standard has not been met. High Courts should be aware of their obligation to take the Final Constitution into account when applying the ordinary law, but a case does not need to be reviewed by the Constitutional Court when the Final Constitution is not engaged by it.

The problem, of course, is how to determine whether the Final Constitution is engaged. When is it necessary for the Court to decide a legal question in accordance with the Final Constitution and when should it leave legal questions to the Supreme Court of Appeal to decide? The German experience shows that the determination of a constitutional leeway will always be difficult, and will not be entirely free of contradictions. Nevertheless, in order to establish whether there is a constitutional leeway, the Bundesverfassungsgericht has adopted (but not always applied) a test that may be helpful in the South African context. According to this test, the interpretation or application of the law by the court a quo needs to be tested against the Constitution in the same way that a statutory provision is tested against the Constitution in the process of abstract review. The logic underlying this test is that a court should not be able to apply or interpret the law in a way that would be unconstitutional if the legislature were to enact such application or interpretation as a general legal rule. The first step in the performance of this test, therefore, is for the Constitutional Court (hypothetically) to reframe the court a quo's interpretation or application of the law as a general rule. The second step is for the Court to test the reframed rule against the Final Constitution. If the legal rule, reframed as an abstract norm, is not inconsistent with the Final Constitution, then the court a quo must be found to have adopted an interpretation that falls

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469 *S v Mhlungu* 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC) at para 59.

470 See Iain Currie & Johan de Waal *The Bill of Rights Handbook* (5th Edition, 2005) 24-25; Stu Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 SALJ 762, 784; *Transnet Ltd & Others v Chirwa* 2007 (2) SA 198 (SCA) at para 42.

471 Du Plessis (supra) at § 32.5(b)(iii)(aa).

into the leeway allowed by the Final Constitution. In other words, the interpretation or application of the statute or the common law in itself needs to be constitutional — nothing more, nothing less.<sup>472</sup>

The application of this test can be illustrated by using the contract law question Michelman employs in his 'rule of law' chapter: is it a constitutional matter whether acceptance of a written contractual offer occurs as soon as a letter of acceptance is posted or only later when it is received?<sup>473</sup> Although it is settled South African law that, according to the 'expedition theory', an offer made in writing becomes a contract on the posting of the letter of acceptance,<sup>474</sup> an aggrieved party might some day challenge this theory and appeal to the Constitutional Court to reverse a judgment of the Supreme Court of Appeal. On a purely substantive understanding of its jurisdiction, the Constitutional Court could legitimately decide this case on the basis that the answer requires it to interpret the Final Constitution. According to the functionalist approach, however, it should decline jurisdiction. The rule that the Supreme Court of Appeal would have applied in this case — 'an offer made in writing becomes a contract on the posting of the letter of acceptance' — does not violate any constitutional provision. Parliament could enact such a rule as a statutory provision. Therefore, even if the judges of the Constitutional Court were of the opinion that it would be better on policy grounds that a contract should become valid once the acceptance letter has been received by the offeror, it should decline to decide the case.

The crucial point about a constitutional leeway is that, even if South African law had adopted the other rule (that an offer made in writing becomes a contract when the letter of acceptance is received), this rule, too, would have been within the boundaries of the Final Constitution, and therefore beyond the jurisdiction of the Constitutional Court. It is the institutional function of the Supreme Court of Appeal to determine the common law. This construction of the Final Constitution means that the Supreme Court of Appeal should have the final say on the common law as long as its holdings are in line with the Final Constitution. The Constitutional Court may be asked to perform its function in ensuring that every legal rule is constitutional, even if the 'rule' is the consequence of an interpretation of the law. But this is a different question from the one the Supreme Court of

Appeal is asked to decide. Any pronouncement by the Constitutional Court on the narrow contract law question itself would not advance the constitutional project.

472 In German constitutional law this test is known as the 'Schumann formula' because it was first proposed in Ekkehard Schumann *Verfassungs- und Menschenrechtsbeschwerden gegen richterliche Entscheidungen* (1963). It was, for example, applied in BVerfGE 89, 28 ('*Richterliche Selbstablehnung*' ['*Judicial Recusal*']) at 36: 'Nicht jeder Verfahrensfehler ist zugleich auch als Verletzung von Art. 103 Abs. 1 GG zu werten. Es gibt jedoch ein Mindestmaß an Verfahrensbeteiligung, das keinesfalls verkürzt werden darf. Ein Verfassungsverstoß liegt zumindest dann vor, wenn die Auslegung durch die Gerichte zu einem Ergebnis führt, das nicht einmal der Gesetzgeber anordnen könnte.'

473 Michelman (*supra*) at § 11.4(c).

474 See *Cape Explosive Works Ltd v South African Oil and Fat Industries Ltd* 1921 CPD 244; *Kerguelen Sealing and Whaling Co Ltd v Commissioner for Inland Revenue* 1939 AD 487. For a discussion of the theory, see Schalk van der Merwe et al *Contract — General Principles* (3rd Edition, 2007) 68-72.

Such an approach would in no way limit the Constitutional Court's supervisory function under FC s 39(2). The Court would still protect the Final Constitution and ensure that the High Courts and the Supreme Court of Appeal observed the limits of the Final Constitution in the application and interpretation of statutes and the common law. The difference between the two approaches is that the functionalist approach is case-based, not area-of-law-based. On the functionalist approach, a case does not raise a constitutional matter because it involves the Labour Relations Act or because it deals with administrative action. It raises a constitutional matter because it engages the Final Constitution. The Constitutional Court would still be able to hold that, in any given case, the Supreme Court of Appeal or a High Court failed to promote the spirit, purport and objects of the Bill of Rights. It could do so in cases where administrative action is present, in labour law disputes and in defamation cases. But it would be necessary to define more precisely what constitutional obligation the court a quo misconstrued or misapplied. Such an approach would not only provide greater clarity about what the rights in the Final Constitution really mean and what content they have. It would also clarify what sort of disputes should be decided finally by the Supreme Court of Appeal as opposed to the Constitutional Court.

### **(cc) FC 167(7) as a basis for the Constitutional Court's jurisdiction**

FC s 167(7) can be read as laying the basis for this functionalist understanding of the Constitutional Court's jurisdiction. As pointed out above, this subsection was the source of the Constitutional Court's jurisdiction under the Interim Constitution. Although, in the Final Constitution, the subsection is phrased in a way that suggests that there must be more to a constitutional matter than the interpretation, protection or enforcement of the Final Constitution, it is reasonable at least to begin with these terms. What they have in common is that they emphasize that the Final Constitution is the starting point in determining the Constitutional Court's jurisdiction.

To be sure, the Constitutional Court would have to interpret FC s 167(7) in a particular way. It would have to say that the word 'involving' in FC s 167(7) should be read as implying that there must be a reasonably close connection between the legal question and the constitutional provision to be interpreted, protected or enforced. Such an interpretation of FC s 167(7) would be the opposite of the interpretation offered in *Dikoko*, i.e. that the legal question must have 'implications' for a right in the Bill of Rights.<sup>475</sup> The *Dikoko* reading is certainly

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plausible, but is no more plausible than one that attributes to FC s 167(7) a jurisdiction-limiting function, in line with the rest of FC s 167.

If FC s 167(7) is read in this way, the 'involvement' of the Final Constitution would be the threshold test for the limited jurisdiction of the Court. The Constitutional Court would need to ask in every application for leave to appeal or direct access whether the Final Constitution needs to be interpreted, protected or enforced. Effectively, this means that the Court should ask itself if the Final Constitution has anything to say on the question that the parties bring to it and which (in most cases) a lower court has already decided. By adopting such an approach the Court would give greater content and meaning to the Final Constitution because it would start its

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475 *Dikoko* (supra) at para 92 (majority judgment) and *Dikoko* (supra) at paras 53-54 (minority judgment).

enquiry by asking which constitutional provision needs to be interpreted.<sup>476</sup> The Court would at an early stage of the investigation be able to look a little deeper into the contestation by a party that a lower court failed to interpret legislation or develop the common law in accordance with the Final Constitution. It could ask if there really is anything the Final Constitution can add to the interpretation or application of the common or statutory law. It could, at least, assess whether these concerns were already addressed in earlier judgments. It could, in short, use its role as an interpreter, protector and enforcer of the Final Constitution to be more of a guide for the other courts than just a supervisor.

An understanding of FC s 167(7) as the basis of the Constitutional Court's jurisdiction not only explains the Court's assumption of jurisdiction in almost every case it has thus far decided, it also explains the cases in which jurisdiction was declined. In *Boesak*, at least when the matter reached the Constitutional Court, the Constitution provided no answer to the only question still open, as it was purely factual. *Phoebus Apollo*, seen against the background of the later decision in *K*, is still hard to grasp. But one could read it as saying that both applications of the common law contended for were in line with the Final Constitution and thus the Constitutional Court had nothing to add to the finding of the Supreme Court of Appeal.

Even in cases involving the development of the common law, a closer connection to the Final Constitution could be required. Indeed, it seems that the Court has occasionally realized that it has opened the door too wide for applicants to argue constitutional matters. In *Luiters*, for example, the Court held: 'In the case of the development of the common law under section 39(2) of the Constitution, the [jurisdictional] question is whether the argument *forces* us to consider constitutional rights or values.'<sup>477</sup> Here, at least, the use of the word 'force' suggests

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that the argument for the application of the Final Constitution needs to be compelling, and a mere allegation that the development of the common law somehow has constitutional implications might not suffice.

### **(dd) Consequences of the functionalist approach for some Constitutional Court judgments**

To be sure, FC s 167(7) is not the answer to all problems. In many cases, the Court would have to decide if the Final Constitution needs to be interpreted, protected or enforced to decide the matter. There will always be a grey area of unpredictability. But an understanding that a constitutional matter should involve the interpretation of the constitutional text, the protection of its principles or the enforcement of its obligations could at least provide some guidance that goes beyond the fragmented understanding the Court has adopted thus far. Again, absolute certainty in advance is not possible. The question of what a constitutional matter is must be answered at a level of abstraction that defies absolute certainty.

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476 Such an approach would accommodate the argument so forcefully made by Stu Woolman that the Constitutional Court has become more and more reluctant to give content to constitutional provisions, in particular with regard to the Bill of Rights. See Stu Woolman 'The Amazing, Vanishing Bill of Rights' 124 (2007) *SALJ* 762.

477 *Luiters* (supra) at para 21, my emphasis.

More important than absolute predictability is that the Court should assume jurisdiction on the basis of the specific case and its constitutional relevance, not on the basis that certain parts of the law always trigger constitutional scrutiny. On the functionalist approach, the Constitutional Court should have declined jurisdiction or assumed jurisdiction on a different basis in a number of cases:

*NEHAWU*: The Constitutional Court should not have based its jurisdiction on the fact that the Labour Relations Act gives effect to the right to fair labour practices. Rather, the Court should have assumed jurisdiction because in the case presented to it an interpretation of a constitutional provision was at stake. It had jurisdiction because it was asked to ensure that the specific interpretation of s 197 of the LRA passed constitutional scrutiny. Other labour law matters in future may or may not raise constitutional matters in this way.

*Dikoko*: The Constitutional Court should have declined jurisdiction on the basis of the dissenting judgment by Skweyiya J. It may be a constitutional matter whether a judge calculating damages in a defamation case has applied the constitutionally required guidelines. But the manner in which a judge chooses to apply the guidelines, the factors to which he chooses to give weight and other similar matters are matters left to his discretion.

*Mohunram*: Here, it is important to differentiate. A proper understanding of jurisdiction that advances the transformation agenda of the Constitutional Court and respects the domain of the Supreme Court of Appeal should not only work as a switch to the overall competence of the Constitutional Court to deal with a case. It should work as a gauge for the identification of those parts of a legal dispute where constitutional guidance is really required. Hence, the Constitutional Court did legitimately decide the few legal questions in which constitutional guidelines were necessary (on the scope of the POCA). But it should not

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have engaged in assessing the proportionality of the forfeiture, as it had already given guidelines on this issue in the earlier case of *Prophet* and there was no indication that this test had not been applied by the Supreme Court of Appeal.

To some extent, the Constitutional Court has already adopted the functionalist approach. It has, however, not done so through its approach to jurisdiction, but through its jurisprudence on whether it is in the interests of justice to hear an appeal or grant direct access. In the beginning of this chapter we saw that in several cases the distinction between jurisdiction and access, and even between the merits of the case and these two earlier stages of the constitutional enquiry, has been blurred. The conclusion seems inevitable that one needs to consider at least briefly the merits of a case to decide whether the Constitutional Court should decide a matter.

## 4.4 Access to the constitutional court

As we have seen, the Constitutional Court's jurisdiction has developed in a way that renders the distinction between constitutional and non-constitutional matters illusory.<sup>478</sup> In consequence, the jurisdictional door to the Constitutional Court has been left so wide open that the Court has had to develop another way of limiting its case load. The method the Court has devised for this purpose is to test whether it is in the interests of justice for it to grant leave to appeal.

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478 See § 4.3(h) supra.

The constitutional basis for this test is FC s 167(6), which states that '[n]ational legislation or the rules of the Constitutional Court must allow a person, *when it is in the interests of justice* and with leave of the Constitutional Court to— (a) bring a matter directly to the Constitutional Court; or (b) to appeal directly to the Constitutional Court from any other court'. The Court has held that the term 'any other court' in this provision excludes the Supreme Court of Appeal, because the subsection does not concern itself with appeals to the Constitutional Court in the ordinary course and in the context of the hierarchy of courts, but only with 'direct appeals', which is a situation in which the Supreme Court of Appeal (and perhaps other courts) is bypassed.<sup>479</sup> Although the rules of the Constitutional Court do not distinguish between 'normal appeals' from the Supreme Court of Appeal and 'direct appeals' from other courts, the Court has established slightly different criteria for these two forms of appeal. The details on appeals and other ways of accessing the Constitutional Court are set out elsewhere in this work.<sup>480</sup> For purposes of this chapter, it is sufficient to show how the enquiry into the interests of justice relates to the question of jurisdiction.

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The decision to grant leave to appeal is a matter entirely within the discretion of the Constitutional Court.<sup>481</sup> A standard practice has, however, emerged to guide the exercise of this discretion. While FC s 167(6) could be read in such a way that jurisdiction, the interests of justice and leave to appeal are treated as three different criteria that all need to be fulfilled, the Constitutional Court has held that jurisdiction and the interests of justice are the two decisive criteria in deciding whether leave to appeal will be granted.<sup>482</sup> Once jurisdiction has been established, everything depends on the interests of justice. If interests of justice are established, then the application for leave to appeal will be granted.

Whether it is in the interests of justice for an application for leave to appeal to be granted depends on a careful and balanced weighing-up of all relevant factors,<sup>483</sup> in which each case has to be considered in the light of its own facts and all the relevant circumstances.<sup>484</sup> Some of these factors include broad principles of public policy, such as the importance of the constitutional matter raised or the public interest in a determination of the constitutional issue.<sup>485</sup> On this basis, the Constitutional Court has affirmed that it is in the interests of justice for it to consider a case even where

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479 *Director of Public Prosecutions, Cape of Good Hope v Robinson* 2005 (4) SA 1 (CC), 2005 (2) BCLR 103 (CC) at para 22.

480 See Kate Hofmeyer 'Rules and Procedure in Constitutional Matters' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 5.

481 This position has been confirmed by the Court on several occasions. See, eg, *Armbruster & Another v Minister of Finance & Others* 2007 (6) SA 550 (CC), 2007 (12) BCLR 1283 (CC) at para 24; *Phillips* (supra) at para 31; *NEHAWU* (supra) at para 25; *Ingledeu* (supra) at para 13.

482 See *Ingledeu* (supra) at para 13.

483 *S v Shaik & Others* 2008 (2) SA 208 (CC), 2007 (12) BCLR 1360 (CC) at para 15 (For further references.)

484 *S v Basson* (supra) at para 39 (For further references.)

the prospects of success are not self-evident.<sup>486</sup> In other cases, the Court has stated that it may decide a constitutional matter for the benefit of the broader public or to achieve legal certainty, even though such a decision would go beyond the immediate needs of the parties,<sup>487</sup> or would have no practical value to the litigants themselves.<sup>488</sup> The purpose of broadening the interests of justice test in these cases is to go beyond the limited criterion of prospects of success and to give the Court an opportunity to decide a matter it might otherwise have been forced to decline. Against this background, it would require a bold move for the Court explicitly to accommodate functional considerations, as outlined above,<sup>489</sup> as part of the interests of justice enquiry and to state, for example, that the broader public would benefit were it *not* to decide the case, but rather leave the High Court or the Supreme Court of Appeal to have the final word on the matter.

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The Court could, however, use the prospects of success enquiry, which is an important factor in determining the interests of justice,<sup>490</sup> as a means to limit the cases it decides from a functional point of view. At the beginning of this chapter, it was argued that both in the Constitutional Court's enquiry into its jurisdiction, and in its enquiry whether it is in the interests of justice to decide a case, the merits of the applicant's claim play an important role.<sup>491</sup> Here the substantive assessment whether a case involves the interpretation, protection or enforcement of the Final Constitution becomes instrumental again.

As argued above, the Constitutional Court should not substitute the outcome of a balancing enquiry or an interpretation of the ordinary law by a High Court or the Supreme Court of Appeal with its own view, simply because FC s 167(3)(c) gives it the power to do so. This would just undermine the transformative potential of the Final Constitution. It was also argued that the Court could apply a more rigid approach to its jurisdiction by way of a stricter approach to FC s 167(7), i.e. by asking whether a case really requires the interpretation, protection or enforcement of the Final Constitution. If the Court, however, wants to keep the jurisdictional door wide open and still apply functional criteria, it would have to adopt an approach to the prospects of success criterion that takes the discretion of the High Court and the Supreme Court of Appeal in the interpretation of statutes and the common law seriously, even if the legal issue for decision involves policy considerations. It would then have to say that the Final Constitution sets the limits for such interpretations,

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485 See Hofmeyer (*supra*) § 5.

486 *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) & Others* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC) at para 3.

487 *Islamic Unity Convention v Independent Broadcasting Authority & Others* 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC) at para 18.

488 *Radio Pretoria* (*supra*) at para 22.

489 See § 4.3(h)(ii) *supra*.

490 See Hofmeyer (*supra*) at § 5.3(e)(i)(bb).

491 See § 4.2(b) *supra*.

but leaves margins in which the lower courts may exercise their jurisdiction, such that every outcome that stays within these limits is constitutional. Cases assessed as staying within constitutional limits in this way would have no prospects of success.

Such an approach was followed in the dissenting judgment of Langa ACJ in *Du Toit v Minister of Transport*.<sup>492</sup> As explained above,<sup>493</sup> the minority judgment emphasized that an application will have no prospects of success if it is simply aimed at overturning the lower court's interpretation of the ordinary law without stating a constitutional ground for this:

If the compensation awarded by the Supreme Court of Appeal is just and equitable as contemplated by section 25(3) of the Constitution, then the applicant has no cause for constitutional complaint, no matter how the compensation was calculated in other courts. The applicant would accordingly have no prospects of obtaining relief in this Court.<sup>494</sup>

This is an approach that could reconcile the idea that the Constitutional Court is a court of limited jurisdiction with that of its supervisory role. At the same time, it

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does not require the Court to change (not to mention overrule) its existing jurisprudence. The problem with this solution, of course, is that the Constitutional Court would still not operate as a court of limited jurisdiction in the technical sense, because it would first assume jurisdiction and then decline to hear the matter because the applicant has no cause for constitutional complaint. It would be a little contradictory, to say the least, for the Court to hold that cases where no constitutional complaint has been established were nonetheless constitutional matters. But perhaps conceptual clarity in this instance has to give way to the need for a good working relationship between the Constitutional Court and the Supreme Court of Appeal and the promotion of the constitutional project.

## 4.5 The constitutional court as a single apex court

In December 2005, the Department of Justice and Constitutional Development published the Constitution Fourteenth Amendment Bill for comment.<sup>495</sup> The aim of the Bill was, among other things, to transform the Constitutional Court into the highest court *in all matters* and to further regulate the jurisdiction of the Constitutional Court and the Supreme Court of Appeal. Several lawyers and concerned interest groups commented on the Bill and made submissions to the

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492 *Du Toit* (supra) at paras 57-90.

493 See § 4.2(b) supra.

494 *Du Toit* (supra) at para 85.

495 GN 2023 in GG 28334 of 2005. The Constitution Fourteenth Amendment Bill was introduced as part of a package of Bills, including the Superior Courts Bill (B52-2003); the Judicial Service Commission Amendment Bill; the South African National Justice Training College Draft Bill and the Judicial Conduct Tribunal Bill. Only the first two Bills were introduced to Parliament at that stage, while the other three Bills were still the subject of discussion between the Department and the Judiciary. The Judicial Service Commission Amendment Bill was eventually introduced in November 2007 (B50 — 2007), and a reworked South African Judicial Education Institute Bill in February 2007 (B4 — 2007). Neither of these bills has yet been passed.

Portfolio Committee on Justice and Constitutional Development.<sup>496</sup> Most of these submissions were highly critical of the Bill for undermining the independence of the judiciary, a topic that is beyond the scope of this chapter. The submission to Parliament on behalf of the general Council of the Bar of South Africa, though generally critical of these aspects of the Bill, nevertheless welcomed the proposed creation of a single apex court, as did Carole Lewis in her 2005 Oliver Schreiner Memorial Lecture.<sup>497</sup> Following the largely negative response, the Bill was withdrawn from the formal parliamentary process. Its eventual re-introduction, however, seems certain after a decision taken at the ANC's Polokwane conference in December 2007 that the Constitutional Court should become the single apex court in South Africa. It is therefore worth examining these particular provisions

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of the Bill to see what difference they would make to the current arrangements.<sup>498</sup>

Clause 3 of the Bill substitutes FC s 167(3) as follows (words in square brackets indicate deletions from the current text, words underlined indicate additions):

'(3) The Constitutional Court-

(a) is the highest court **[in all constitutional matters]** of the Republic; and

(b) may decide **[only]**-

(i) constitutional matters- [, and issues connected with decisions on constitutional matters;]

(aa) on appeal;

(bb) directly, in accordance with subsection (6); or

(cc) referred to it as contemplated in section 172(2)(c) or in terms of an Act of Parliament; and

(ii) any other matter, if the Constitutional Court grants leave to appeal that matter on the grounds that the interests of justice require that the matter be decided by the Constitutional Court.

(c) **[makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.]'**

In addition, FC s 167(6)(a) would be amended to allow a person to bring a constitutional matter (but not other kinds of matter) *directly* to the Constitutional Court and by the addition of a new section 167(8) confirming the Constitutional

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496 Submissions were made by, inter alia, the General Council of the Bar of South Africa, the International Bar Association, the Legal Resources Centre and IDASA.

497 Submission by the General Council of the Bar of South Africa to the Portfolio Committee on Justice and Constitutional Development in re Constitution Fourteenth Amendment Bill (2005) and Superior Courts Bill (2003) at 27; Carole Lewis 'Reaching the Pinnacle: Principles, Policies and People for a Single Apex Court in South Africa' (2005) 21 *SAJHR* 509, 510.

498 In May 2008, the Department of Justice and Constitutional Development published a new Constitution Fourteenth Amendment Bill for comment. This Bill, however, concerned only the so-called 'floor-crossing' of members of the National Assembly and the National Council of Provinces. This Bill did not affect the structure of the judiciary at all and has nothing to do with the Bill published in 2005.

Court's power to make the final decision whether a matter is a constitutional matter (i.e. the current FC 167(3)(c), which would be deleted by clause 3).

The consequence of these amendments to FC s 167 would be that the term 'constitutional matter' would still be mentioned in the constitutional text, but would no longer delimit the ambit of the Constitutional Court's jurisdiction. Instead, the Court would have jurisdiction both in constitutional matters and in other matters. Effectively, therefore, the amendment would collapse the current two-stage enquiry into jurisdiction and access into a single enquiry, with the emphasis on whether granting leave to appeal would be in the interests of justice. With regard to constitutional matters, the Court would continue to grant leave to appeal on this basis in terms of FC s 167(6)(b), which remains unchanged. In non-constitutional matters, the new FC s 167(3)(b)(ii) dictates that the same criterion would apply.<sup>499</sup>

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It is doubtful whether the proposed amendment would substantially change the Constitutional Court's current jurisdictional practice. As indicated in this chapter, the Constitutional Court has watered down the criterion of constitutional matter to such an extent that it is already the apex court in every possible case. Effectively, the Constitutional Court already has the final word in the interpretation of statutes and the development of the common law. The proposed constitutional amendment would merely confirm this situation.<sup>500</sup> An earlier, 2001 amendment to the Final Constitution that changed the title of the President of the Constitutional Court to 'Chief Justice' in any case confirmed the Constitutional Court's status as the *de facto* apex court.

Given the Constitutional Court's generous interpretation of the term 'constitutional matter', the number of cases decided by the Court should not increase significantly as a consequence of this amendment. As we have seen, the Court rarely declines jurisdiction, and controls the size of its docket through its access jurisprudence. The constitutional amendment would not change this: the new FC s 167(3)(b)(ii) and FC s 167(6) would still require that a case should be heard only where it is in the interests of justice to do so.

The main change introduced by the amendment is that it would allow the Constitutional Court to decide non-constitutional matters as long as it was in the interests of justice to do so. When would this condition be satisfied? First, since the amendment removes the Court's power to decide 'issues connected with decisions on constitutional matters', the Court could simply hold that it was in the interests of justice to decide non-constitutional matters connected with decisions on constitutional matters. Secondly, the amendment enlarges the Constitutional Court's jurisdiction, but does not abolish the Supreme Court of Appeal. Thus, most non-constitutional matters reaching the Constitutional Court would already have been decided by the Supreme Court of Appeal. It may be assumed that the Constitutional Court would not want to make the SCA completely redundant, and thus that it would

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499 The submission by the General Council of the Bar that constitutional matters will have a privileged status because they will have a greater prospect of being heard by the Court than a non-constitutional matter is therefore not supported by the text of the Bill. See Submission by the General Council of the Bar of South Africa to the Portfolio Committee on Justice and Constitutional Development in re Constitution Fourteenth Amendment Bill (2005) and Superior Courts Bill (2003) at 30.

500 The Department's Memorandum on the Objects of the Bill describes the purposes of the amendment to FC s 167 as being 'to *confirm* the status of the Constitutional Court as the apex court' (my emphasis).

decide non-constitutional matters only where the Final Constitution demanded a particular decision. The remaining aspects of the interests of justice enquiry as currently applied would remain unchanged.

This raises a more general question: what should the relationship between the Constitutional Court, on the one hand, and the Supreme Court of Appeal and the High Courts, on the other hand, be, once the Constitutional Court's notionally limited jurisdiction has fallen away? The argument throughout this chapter has been that the Constitutional Court misses an opportunity to promote the Final Constitution's transformative agenda whenever it fails to encourage the Supreme Court of Appeal and the High Courts to apply the Final Constitution in everyday adjudication. The chapter has also argued that the Constitutional Court's

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occasional second-guessing of Supreme Court of Appeal decisions does not help in this regard (apart from being irreconcilable with the notion of separate constitutional matters).

As long as the Supreme Court of Appeal exists, even if it is effectively downgraded to an in-between appellate court,<sup>501</sup> the Constitutional Court would have to explain its choice to hear some appeals from the Supreme Court of Appeal but not others. Here, functional considerations might again be decisive. Although the proposed constitutional amendment would change the jurisdiction of the Constitutional Court, it would not change its function: it would still be the guardian of the Final Constitution and oversee the transformation of the South African legal order. Therefore, any future interests of justice test would have to include consideration of the transformative effect of the judgment and whether the Final Constitution needed to be engaged in the particular case.

Carole Lewis has argued that if the Constitutional Court is given the power to hear an appeal on any matter of general public importance, then the Court should be composed largely of judges appointed on the basis of wider skills and experience than is presently the case with the Constitutional Court.<sup>502</sup> This conclusion is not obviously necessary. As things stand, FC s 174(5) ensures that at least four of the Constitutional Court judges must at all times be persons who were judges at the time of their appointment to the Constitutional Court. Thus, a distinctive judicial qualification beyond constitutional law in the formal sense is already ensured in the composition of the court. Secondly, most constitutional cases concern the normative interaction between the common law, statutory law and the Final Constitution, rather than the philosophical elaboration of abstract values. In order to deliver competent judgments, the judges of the Constitutional Court need to engage with and fully grasp the common-law rules or statutory provisions that the case implicates. The record of the Constitutional Court to date shows that its members possess such a capacity. There is no reason to anticipate, therefore, that giving the Court the additional power to decide non-constitutional matters would render it less technically competent to decide cases than it currently is. In recent years, a number of judges from other courts have served on the Constitutional Court as acting judges. The skills and experiences of these acting judges have certainly enhanced the capacity of the Constitutional Court. At the same time, however, one hopes that

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501 It would operate like a US Court of Appeals ('Circuit Court') or an Oberlandesgericht in Germany: the important difference is that the Supreme Court of Appeal's territorial jurisdiction would cover the whole of South Africa.

502 Lewis (supra) at 522.

these judges have returned to their courts with a better understanding of the Constitutional Court and its role in the judicial system.

At the end of the day, the Constitutional Court will have to define where it sees itself in the South African legal order. In my view, the Court has rightly adopted an understanding of its function that links it strongly to the Final Constitution's

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transformative project and its underlying value system. To fulfil this function, the Constitutional Court needs to establish a relationship with other courts that best serves these interests. It needs to do so as a court of limited, specialized jurisdiction. However, it would face the same task should it one day become the single apex court of South Africa. Under either arrangement, it is impossible for one court singlehandedly to drive constitutional transformation. On the other hand, the central and unique character of the Final Constitution in the legal system justifies a specialized court whose task it is to ensure that the transformative potential of the Final Constitution is fulfilled and its values embraced by other courts.

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