Chapter 9
Remedies

Michael Bishop

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

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.

9.1 Introduction

(a) Pointless...

To paraphrase Edmund Blackadder: Law without remedies is like a broken pencil. Pointless. Indeed, for Justice Oliver Wendell Holmes and his realist progeny, the law is nothing but remedies: 'The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.' Holmes' theory is based on the intuition pump of the hypothetical 'bad man' who is interested only in what the costs and benefits of obeying or disobeying the law are. But it is not, as Holmes makes clear, only the 'bad man' who cares more about what the court does than what it says. The ultimate concern of virtually all litigants is what the court orders, not why it orders it. When a father comes to court to prevent the adoption of his child, he does not care what test the judges adopt or what factors they consider. He cares only whether he will see his child again. When people approach a court because they have nowhere to live and their constitution tells them they have a right to a house, they are not concerned about whether the court adopts a reasonableness test or a minimum-core approach to socio-economic rights. They want only to know where they will sleep tomorrow. When two men facing state-


2 'The Path of the Law' in Collected Papers (1920) 173 (my emphasis).
sanctioned execution in the United States appeal to a court in a faraway land because that country's government illegally handed them over to the people who might now kill them, the reasons for the court's decision are irrelevant. They are interested only in whether the court can keep them alive.

* A chapter as long as this does not happen without the aid of many people who must be thanked. Firstly, Stu Woolman for making me part of CLOSA and for his continuous and unflinching support and encouragement (despite me missing endless deadlines), his constant advice and his fantastic and generous edit under immense pressure. Without him I would never have started, let alone finished, this chapter. Secondly, Theunis Roux for giving me the space to work on this project at SAIFAC. Thirdly, Jonathan Klaaren, Steven Budlender and Matthew Chaskalson for allowing me to use their draft material and Kate Hofmeyr for giving me access to her fantastic Thesis. Fourthly, Irene de Vos, Oyerebea Ampofo-Anti, Lisa Chamberlain and Lauren Kelso for last-minute editorial support. Fifthly, Ute Kuhlmann and her team at Juta for being so accommodating and allowing me to push the deadline to literally the last second. Last but not least, Clare Ballard for being a constant inspiration, even in her absence.

I am not saying that substantive legal reasoning is not important. It is, obviously, fundamental to any system committed to the rule of law. And I do not agree with Holmes that law is nothing but prophecy. But I am saying, and I do believe, that if courts did nothing but reason, if they only spoke about what should happen, but had no power to make it happen, they might still be interesting and influential social actors, but they would not be courts.3 In the words of Paul Gerwitz:

To be of the law, as opposed to philosophy and economic theory . . . one must take reality as the primary realm of activity. Law moves beyond articulation to implementation, and legal scholarship therefore must address the complexities of acting within an imperfect, resisting, often vulgar real world. In law, reality is not a footnote to theory or an appendix to the ideal. The claims of reality are a central intellectual imperative as much as a practical one.4

In 'Nomos and Narrative', Robert Cover imagines law as a normative universe, a 'nomos', that is constituted and can only be understood through narrative, through stories.5 These stories are about what happens in the real world — what people have done and made and felt and lost. The normative universe of law is a function of the gap between the real world of these stories and the ideal world of our hopes and dreams:

Law may be viewed as a system of tension or a bridge linking a concept of a reality to an imagined alternative — that is, as a connective between two states of affairs, both of which can be represented in their normative significance only through the devices of narrative. . . . But the concept of a nomos is not exhausted by its 'alternity'; it is neither

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3 See D Levinson 'Rights Essentialism and Remedial Equilibration' (1999) 99 Columbia LR 857, 939 (‘Perhaps the institution of judicial review could even be changed to facilitate nonfunctional constitutional interpretation, for example by establishing a separate constitutional court and making constitutional adjudication purely declaratory or advisory. This would ensure that judges were not peering at consequences, because there would be none, and it would insulate abstract constitutional judgments from social contexts where they would be too costly to implement or threaten serious harm. Constitutional judges, given the leisure to "follow the ways of the scholar" full-time, might then more closely approach Dworkin's Herculean ideal, bringing coherence and integrity to a closed philosophical system of abstract legal principles. Obviously, however, this utopian or dystopian model of constitutional law would bear little resemblance to the current practice of constitutional adjudication.’)


5 (1983) 97 Harvard LR 4.2
utopia nor pure vision. A nomos, as a world of law, entails the application of human will to an extant state of affairs as well as toward our visions of alternative futures. A nomos is a present world constituted by a system of tension between reality and vision.6

This tension between the ideal and the real is the primary domain of legal remedies and, thus, of this chapter. But remedies do more than negotiate the difficult terrain that lies between the 'is' and the 'ought': 'To live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the "is" and the "ought," but the "is," the "ought," and the "what might be."'7 This chapter tries not only to examine what courts have done to make the black letter doctrine of courts real. It endeavours to conceive of remedies as a way for imagining new ways of seeing the Final Constitution and thereby re-imaging what our founding document means; not in the doctrinal sense (that occupies much of the remaining 5000 pages of this treatise), but in the fullest (social, political, philosophical, economic) sense of 'meaning'. It aims, though not explicitly, to save remedies from its often parasitic relationship to rights and place them at the centre of our understanding of South African constitutional law. It hopes to paint remedies not as a limitation on what can be, but as an opportunity to imagine 'what might be'.

(b) A roadmap

This ambitious goal is tackled in two separate halves. The first half — § 9.2 — asks some of the basic questions that are relevant to all remedies and is more theoretical in nature. The second half — § 9.3–9.6 — considers specific remedies and is more practical in nature. The latter portion also tries to separate the explication of the law from criticism. I hope that this separation of issues will make the chapter more useful for both practitioners and academics. Those who are interested only in the principles for the application of a specific remedy can skip straight to that discussion. Readers who want a more in-depth discussion of what remedies are, how they work and what principles should generally guide courts in their choice of remedies will be best served by the first half. This bifurcation does mean that there is a fair amount of repetition between the two sections that those brave readers who attack the chapter from beginning to end may notice. To them I apologise, but I hope the repetition serves my remaining readers well.

The chapter begins (§ 9.2(a)) by examining the various meanings of 'remedy' that are used in law and providing a fairly stable definition for the rest of the discussion. Next (§ 9.2(b)), I examine the contours of the central principle: ubi jus ibi remedium (where there's a right, there's a remedy). § 9.2(c) examines the relationship between rights and remedies. In short, I argue that the traditional separation of rights and remedies is descriptively inaccurate; rights and remedies influence each other in a number of ways. However, maintaining the separation between the two is, at the same time, beneficial because it makes it easier for courts to combat existing injustices. The following section (§ 9.2(d)) considers the extent of discretion that courts have in choosing remedies and the implications that may have for legitimacy. The way is then clear to consider the principles that should guide the courts' choices between different remedies. That is the task I set myself in § 9.2(e). I suggest a

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6 Ibid at 9.
7 Ibid at 10 (my emphasis).
structure for considering remedies that tries to make sense of the Constitutional Court's often ambiguous jurisprudence. The final question considered in the first half of the chapter is the relationship between private remedies and constitutional remedies (§ 9.2(f)).

§ 9.3 sets up the remainder of the discussion. It explains why the specific remedies are divided into remedies following a finding of invalidity, individual remedies and systemic remedies and the limitations of that division. I then consider each of these categories in turn. The first — discussed in § 9.4 — concerns the action that a court takes after it declares a law invalid. Courts can employ a number of mechanisms to limit the often drastic impact of declaring a law invalid. Courts can: add or remove specific words to invalidate only the specific portion of the law invalid; suspend the order of invalidity to allow new measures to be put in place; and regulate the effect of the declaration on past actions. Individual remedies — cases where there is a single victim of a right — are broken down into damages, declarations and interdicts. Each remedy is discussed in § 9.5. The last important part of the chapter — § 9.6 — considers an emerging and extremely important area of constitutional remedies: remedies for systemic violations. This section considers some of the same orders — declarations and interdicts — as the previous section. However, it does so in the context of systemic, rather than individual violations of rights. Finally, I briefly consider constitutional remedies flowing from statutes enacted to give effect to constitutional rights (§ 9.7) and offer a few remarks about remedies in criminal cases (§ 9.8).

9.2 Theory

(a) What is a 'remedy'?

The word remedy has many different meanings in legal scholarship and practice. Peter Birks has identified at least five different denotations in English law: They range from 'a cause of action', to 'a right born of a wrong', to 'a right born from a court order'. Such varied uses of the term 'remedy' likewise abound in South African case law. The courts have referred to the following as a 'remedy': a statutory right;
a common-law right;\textsuperscript{10} an order of summary judgment;\textsuperscript{11} a right of appeal;\textsuperscript{12} and the court's order.\textsuperscript{13}

Why such variation? 'Remedy' has a very different meaning when used by a court involved with a common-law action where the only possible order it can grant is one of damages than it does when a court considers a constitutional case where it has virtually unlimited discretion to grant whatever order it deems fit. And both systems encourage different uses of 'remedy' when a lawyer provides advice to her client ('Your best remedy here is defamation.') What all these uses of the word 'remedy' have in common is, as Birk writes

that that which is referred to as a remedy is represented as a cure for something nasty. To remedy is to cure or make better. The only precondition to the use of the word is a state of affairs which needs making better.\textsuperscript{14}

For the purposes of clarity, I will adopt a definition of 'remedy' suggested by Kate Hofmeyr: 'that which is provided by [a] court in response to the claimant's success in showing that his or her right has been violated [or threatened].\textsuperscript{15}

A few points about this definition. It does not refer only to orders. Although most remedies are found in a court's order, sometimes there are elements of a judgment not included in the order that nonetheless have direct practical effect. For example, when a court decides that legislation should be interpreted in a particular way, it ordinarily does not include that in its order. If the interpretation is the response to a showing that a right has been violated, then it qualifies as a remedy. A right must have been violated or threatened. I am, by and large, not concerned with decisions that do not involve the finding of a violation of a right or some other constitutional provision. Developments of the common law based on FC s 39(2) dismissals of leave to appeal, interim orders of condonation, postponement and so forth do not follow from the violation of a right and are not considered here. I also do not address costs. Those issues are all ably dealt with elsewhere in this treatise.\textsuperscript{16} That said, the right need not always be constitutional in nature. In some places, I refer to cures outside

\textsuperscript{10} See, for example, Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (In Liquidation) 1998 (1) SA 811 (A), 821A ('Its remedy, if any, was to sue Oneanate by way of a conductio.')

\textsuperscript{11} See, for example, First National Bank of SA Ltd v Myburgh 2002 (4) SA 176 (C) at para 8 ('Summary judgment is designed to give plaintiff a speedy and cost-effective remedy in the case where the defendant does not disclose a valid and bona fide defence. It is an extraordinary and stringent remedy.')

\textsuperscript{12} See, for example, S v Dzukuda & Others; S v Tshilo 2000 (4) SA 1078 (CC), 2000 (11) BCLR 1252 (CC) at para 48 ('If the provisions are misapplied the accused has an appeal remedy or may use the special entry mechanism of the CPA in case of irregularity.')

\textsuperscript{13} See, for example, Gory v Kolver NO & Others 2007 (4) SA 97 (CC), 2007 (3) BCLR 249 (CC) at para 21 ('The Starke sisters argue that reading words into section 1(1) as ordered by the High Court is not the appropriate remedy in this case.')

\textsuperscript{14} Birks (supra) at 9.

\textsuperscript{15} K Hofmeyr 'Understanding Constitutional Remedial Power' unpublished Mphil Thesis (Oxford University, 2006, on file with the author) 11.
the Final Constitution as 'remedies'. However, I am primarily concerned only with constitutional remedies. And so, unless the context indicates otherwise, the reader can assume that when I use the word 'remedy', I am referring to a cure for the violation of a constitutional right.

(b) Ubi jus ibi remedium

There can to my mind be no doubt that the authors of the Constitution intended that those rights (that is, the rights entrenched in the Constitution) should be enforced by the Courts of law. They could never have intended to confer a right without a remedy. The remedy is, indeed, part and parcel of the right. *Ubi jus, ibi remedium.*

— Centlivres CJ

(i) General principle

This dictum — and the ancient principle that 'where there is a right, there is a remedy' — was adopted by the Constitutional Court in *August & Another v Electoral Commission & Others*. The applicants in *August* were prisoners who wished to exercise the franchise. Ostensibly, no law prevented them from doing so and they were told that their right to vote remained as real as that possessed by any other citizen. All that prevented them from exercising their right were the prison walls between them and the polling stations. Sachs J employed the *ubi jus, ibi remedium* principle to justify an order requiring the government to take steps to make it practically possible for prisoners to vote. *August* clearly established the principle as part of our law and our courts have consistently re-affirmed that commitment.

The idea that a right must be accompanied by a remedy has achieved near universal assent in legal systems across the world and does not seem to require


17 *Minister of the Interior v Harris & Others* 1952 (4) SA 769 (A), 780 ('Harris').

18 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) at para 34.

19 See *Kaunda & Others v President of the Republic of South Africa* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC) at para 181 (In a claim for diplomatic protection to ensure that the human rights of South African citizens being held in Zimbabwe were respected, Ngcobo J held: 'Unless the South African government grants South African nationals abroad diplomatic protection, they are likely to remain without a remedy for violations of their internationally recognised human rights. And if the government cannot protect South African nationals abroad against violations or threatened violations of their international human rights, it may well be asked, what then are the benefits of being a South African citizen?'); *Engelbrecht v Road Accident Fund* 2007 (5) BCLR 457 (CC), 2007 (6) SA 96 (CC) at para 21 (In the context of common-law remedies, the Court held: 'The remedy is part and parcel of a right (*ubi ius ibi remedium*)').

20 For the position in Canada, see *Nelles v Ontario* [1989] 2 SCR 170, 196 quoted with approval in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC) at para 69 n 187 ('To create a right without a remedy is antithetical to one of the purposes of the Charter which surely is to allow courts to fashion remedies when constitutional infringements occur.')
much by way of normative justification. As one writer on the topic has noted: ‘The principle is so obviously correct that assent to it is instinctive.’\textsuperscript{21} The best justification is to simply state the consequence of rejecting the principle:

\begin{quote}
The greatest absurdity imaginable in law is: ‘that a man hath a right to a thing for which the law gives him no remedy; which is in truth as great an absurdity, as to say, the having of right, in law, and having no right, are in effect the same.’\textsuperscript{22}
\end{quote}

There would be no point in possessing a right, in terms of law, that offered no relief to the person who sought its enforcement. On its face, South African law clearly requires that the violation of every right is accompanied by some sort of remedy.\textsuperscript{23} However, the case law of the Constitutional Court suggests that the application of this general principle is not a simple matter. As it turns out, our law throws up instances in which this foundational commitment principle cannot be honoured. By considering some of these exceptions to the rule, we can get a better understanding of what \textit{ubi jus ibi remedium} really means in South African law.

(ii) Deviations

The Court seems to have departed from the principle in two classes of cases. One, cases where the principle may appear to be ignored, but is in fact respected. Two, cases where the principle is not, in fact, respected.

(aa) Imaginary deviations

First, does a declaratory order count as a remedy? If all a court does is state what the right means or that a right has been violated, is there really a remedy? For example, in \textit{Rail Commuters Action Group & Others v Transnet t/a Metrorail & Others}, the applicants argued that various government entities (the respondents) had a responsibility to ensure their safety on public trains and that those entities had failed to meet that obligation.\textsuperscript{24} The Court agreed both that the respondents had

\begin{itemize}
\item Harris (supra) at 78C quoting \textit{Dixon v Harrison} 124 All ER 958, 964, quoted with approval in \textit{Administrator, Transvaal v Brydon} 1993 (3) SA 1 (A), 13–14.
\item However, as I note below, the relationship between rights and remedies is not that simple. Remedies are not merely the handmaidens of rights; in many ways they substantively affect the content and value of rights. See § 9.2(c) infra.
\item 2003 (3) BCLR 288 (C).
\end{itemize}
an obligation and that they had failed to fulfil it. However, the only relief they
granted the applicants was to declare the existence of the obligation.

As I argue in more detail later, declaratory relief can indeed be a remedy if it
cures, or attempts to cure, the alleged ill. It will be a highly effective remedy in
situations where all the parties seek is the clarification of the legal position or
where the underlying dispute has already become moot. The difficulty is not
whether a declaration is a remedy — it is and therefore upholds the *ubi jus*
principle — but whether it is an effective remedy. In *Rail Commuters*, the declaration might
not be as effective as another remedy might be. But it does achieve the partial
remedial goal of regulating the future relationship between the parties and should
make it easier for the applicants to assert a claim for 'better' relief (such as damages
or an interdict) if the respondents fail to adhere to the declaration of rights.

Secondly, in some cases, it will seem impossible for a court to provide any relief
— say, because the party or the parties are no longer in their jurisdiction. In
*Mohamed & Another v President of the Republic of South Africa & Others*, the
applicants had been deported to the US (from South Africa) to be tried for the
bombing and the destruction of the US embassies in Nairobi and Dar es Salaam. In
the United States, a conviction in federal district court could result in the imposition
of a death sentence. The Constitutional Court held that the deportation was illegal.
Given the unconstitutionality of the death sentence under the Final Constitution, the
South African government ought not to have allowed them to be secreted out of the
country by US officials (working in collusion with South African officials) without first
obtaining an assurance that they would not receive the death penalty. By the time
the decision was handed down the applicants were in New York — outside the
Court’s jurisdiction. Is it possible for the Court to provide a remedy in such a case?

The answer, again, must be yes. The *Mohamed* Court considered carefully what
remedy would be appropriate and decided to give a declaratory order specifying how
the government had breached the law and ordered that the judgment be sent to the
federal district court in New York. The Court also held that it possessed the
authority to order the South African Government to intervene on the applicants’

25  See §§ 5(b) and 6(a) infra.

26  See, for example, *South African Police Service v Public Servants Association 2007 (3) SA 521 (CC),
[2007] 5 BLLR 383 (CC)* (Both parties only sought clarification of the legal power of the National
Commissioner of Police to upgrade or downgrade officers.)

27  See, for example, *KwaZulu-Natal MEC of Education & Others v Pillay 2008 (1) SA 474 (CC), 2008
(2) BCLR 99 (CC)* (The respondent convinced the Court that her daughter had a right to wear a
nose-stud to school, but by the time the case was decided, she had already left the school.)

28  Under common law, the inability to enforce its judgment because the parties are not in its
jurisdiction is a reason for a court to refuse to exercise jurisdiction at all. See, for example, *Tsung &
Another v Industrial Development Corporation of South Africa Limited & Another 2006 (4) SA 177
(SCA) at para 3.*

29  *2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC).*

30  Ibid at paras 70–72.
behalf with the US government but, considering the advanced stage of the criminal trial, declined to do so.\(^{31}\) Still, the Court's order and its transmission to the district court might well have influenced the district court's decision not to impose the death penalty. Although the remedy was by necessity weak, it represented an attempt to cure the wrong that had been done to the applicants. It therefore demonstrates the Court's respect for the *ubi jus* principle.

Thirdly, FC s 35(5) would appear to endorse violations of rights that then go unremedied. It permits the admission of evidence obtained in violation of rights in the Bill of Rights if it will not render the trial unfair. FC s 35(5) recently caused something of a dust-up between the Supreme Court of Appeal and the Constitutional Court. A majority of the Supreme Court of Appeal had held that if a court found that evidence had been obtained in terms of an invalid search warrant, the documents had to be returned to the person from whom they were seized.\(^{32}\) Nugent JA rejected the view that the power to fashion a 'just and equitable' remedy in terms of FC s 38 could justify a 'preservation order' that would allow the state to keep the material until the trial court decided whether it was admissible or not: 'It seems to me that the power to fashion remedies for constitutional infringements is given to courts to enable them to vindicate rights rather than to deny them.'\(^{33}\) Because a preservation order would, on his view, permit a continuing violation of the right to privacy, he regarded it as an impermissible remedy.

When the matter came to the Constitutional Court, Langa CJ came to the opposite conclusion.\(^{34}\) He held that preservation orders were not only permissible, but should

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31 Ibid at para 72.

32 *National Director for Public Prosecutions v Mohamed* [2007] ZASCA 135; [2007] SCA 135 (RSA) (Nugent JA (Mlambo J concurring) and Ponnan JA made up the majority on this issue. Farlam JA (Cloete JA concurring) would have granted the preservation order. On the ultimate outcome, however, Ponnan JA was in the minority. He was unwilling to grant any preservation order. Farlam and Cloete JA were, for the sake of deciding the case, willing to sign onto the limited preservation order accepted by Nugent JA that allowed a copy of the documents to be kept in case a future dispute about their identity arose.)

33 Ibid at para 21 (Ponnan JA was even more forceful in his rejection of preservation orders: 'If the courts were to simply escape their responsibility for redressing constitutional violations, people will be secure only in the discretion of the police and the protections of the right would evaporate. After all, the entire point of the police conduct in this case that violated constitutional guarantees was to obtain evidence for use at a possible subsequent criminal trial. The Bill of Rights must not be reduced to a code that the State may abide in its discretion. The Constitution requires more; it demands a remedy for a violation. That remedy, one would have thought, is well-settled. But, says the State in this case, there now exists a constitutional injunction to reconsider existing remedies and to re-fashion them in accordance with the spirit of our new constitutional order. To my mind, there is a fallacy in that approach. It is this: Out of a remedy available to someone wronged by a rights violation, the wrongdoer seeks to fashion for itself a right that it otherwise would not have had. That can hardly be authorised by our Constitution. Moreover, the preservation order is being sought in this case in anticipation of possible criminal proceedings, not against the respondent, but against her erstwhile client, Mr Zuma. How, it must be asked, can the State resist a claim for restoration where the items were illegally seized and where, even at the date of the hearing of this appeal, there has been no firm commitment by it that fresh charges will as a fact be preferred against Mr Zuma in regard to which the seized items might be used by it as evidence?' Ibid at para 39.)

34 *Thint (Pty) Ltd v National Director of Public Prosecutions & Others; Zuma and Another v National Director of Public Prosecutions & Others* [2008] ZACC 13 ("Thint").
be the default remedy where a warrant was declared invalid.\textsuperscript{35} In the Chief Justice's view, it should be up to the trial court — not the court hearing the application to invalidate the warrant — to decide in terms of FC s 35(5) whether the evidence should be admitted at trial or not.\textsuperscript{36} The trial court would be unable to exercise that discretion if the evidence was returned to the applicant. More importantly, he did not think there was anything unusual with his decision:

Although the point of departure is that a victim of a constitutional violation is entitled to effective relief, a court must also take into account other relevant circumstances, including the interests of others and the public interest, which in turn includes the public interest in the prosecution of serious crime.\textsuperscript{37}

I agree with the Chief Justice's conclusion, but not all his reasoning. Within the structure of the Bill of Rights, it is difficult to avoid the conclusion that the admissibility of evidence must be left to the trial court. To put it differently, even if you regard a preservation order as an ongoing violation of the right to privacy, it is endorsed by FC s 35(5). It is also legitimate to argue that there could still be a remedy: a declaration that the warrant violated the applicant's right to privacy. Such a declaration would enable an accused to clear the first hurdle in FC s 35(5): the demonstration of a violation of the right to privacy. However, to the extent that Langa CJ suggests that in contexts outside of FC s 35(5) matters, considerations outside the need to vindicate the right can justify granting no remedy at all — which, unfortunately, seems the most natural reading of the decision — he ignores the \textit{ubi jus} principle. Moreover, given that the Court has strongly endorsed the \textit{ubi jus} at principle, it is disingenuous to argue that the decision is unambiguously supported by previous precedent.

The final case of imaginary deviations is \textit{Fose v Minister of Safety and Security}.\textsuperscript{38} Mr Fose sued the Minister for pain that he had suffered as a result of abuse while in police custody. He relied directly on his constitutional rights rather than on a delictual action. The Court held that it was impermissible for him to have done so as a delictual action would have provided an adequate remedy for the violation of his rights.\textsuperscript{39} There is no violation of the \textit{ubi jus} principle in this case. The principle does not entitle a litigant to any specific type of relief or even to 'direct' relief. Kriegler J makes this clear in his concurring judgment: 'while applicants are entitled to relief if their fundamental rights have been violated, they have no right to a particular

\begin{itemize}
\item \textsuperscript{35} Ibid at para 222.
\item \textsuperscript{36} Thint (supra) at para 221.
\item \textsuperscript{37} Ibid at para 223.
\item \textsuperscript{38} 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC)('Fose').
\item \textsuperscript{39} The interaction between public and private remedies is discussed in more detail in § 9.2(f) infra. Damages are discussed in § 9.5(a) infra.
\end{itemize}
remedy.\textsuperscript{40} As long as the law somehow provides redress for the wrong suffered, it cannot matter whether the legal basis for that relief is delictual or constitutional.\textsuperscript{41}

\textbf{(bb) Real deviations}

The following cases reflect instances where, despite a finding that a right had been violated, a court does not afford the actual litigant any remedy. A litigant might prove that a constitutional violation has occurred and then find that the requested relief is ultimately offered to others, but not to him. In \textit{Fraser v Children's Court, Pretoria North & Others} the applicant successfully challenged a law that permitted a child to be adopted without the natural father's consent.\textsuperscript{42} However, because of the many different ways in which the matter could be regulated, the Court decided to suspend the order for two years to allow the legislature to draft new legislation.\textsuperscript{43} The effect was that Mr Fraser's child could be, and was, adopted without his consent. Mr Fraser found himself in precisely the same position he would have been in if the Court had concluded that he had no right at all.\textsuperscript{44} Apart from cursorily noting that 't[he applicant is not the only person affected by the impugned provision',\textsuperscript{45} the Court does not even acknowledge, let alone justify, this breach of the \textit{ubi jus} principle or the injustice that follows from failing to come to the aid of a litigant who has gone to enormous expense to have a statute declared unconstitutional. The Court's reasoning for ordering a suspension is compelling. However, it does not explain why they could not have created an interim remedy that would have come to the aid of the applicant and others in the same position.\textsuperscript{46}

In other cases, a remedy is granted to some bearers of the right, but not to others. The Court's decision to limit the retrospective effect of its orders invariably has this consequence. For example, in \textit{Ex Parte Minister of Safety and Security &}\textsuperscript{47}

\begin{quote}
\textsuperscript{40} \textit{Fose} (supra) at n 215.
\end{quote}

\begin{quote}
\textsuperscript{41} See also \textit{Pretoria City Council v Walker} 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at paras 96–97 (The Court upheld the applicant's complaint that the selective enforcement of the obligation to pay electricity rates in different areas of Pretoria unfairly discriminated against him on the basis of race. However, it decided that this was not a defence to the Council's action against him. The right entitled him to other forms of relief such as a declaration of rights or a mandamus to force the Council to cease its discriminatory practices. This decision does not deny the right, it just says that the applicant is not entitled to the remedy he sought — immunity from a claim for electricity rates due. He was entitled to other relief, but he had not sought it.)
\end{quote}

\begin{quote}
\textsuperscript{42} 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC)('Fraser').
\end{quote}

\begin{quote}
\textsuperscript{43} Ibid at paras 45–51.
\end{quote}

\begin{quote}
\textsuperscript{44} This case should be distinguished from other cases where suspension does not deny a remedy, but merely delays it. See, for example, \textit{Minister of Home Affairs & Another v Fourie & Another (Doctors for Life International and 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)(A majority of the Court suspended an order that would legalize homosexual marriages. The right was only delayed because homosexual couples would be able to marry as soon as the period of suspension ended.)
\end{quote}

\begin{quote}
\textsuperscript{45} \textit{Fraser} (supra) at para 50.
\end{quote}

\begin{quote}
\textsuperscript{46} For more on interim remedies, see § 9.4(e)(i)(cc) infra.
\end{quote}
Others: In re S v Walters & Another, the Court invalidated a provision that permitted police to use lethal force in affecting arrests in unconstitutionally wide circumstances. However, the invalidity would only apply from the date of the judgment. So although the constitutional right had been in effect from 1994, people who lost breadwinners where the police had used unconstitutional force after 1994, but prior to Walters, would have no civil claim. Those persons who suffered a similar loss after the decision would have a civil claim. As the right existed both before and after the decision, a remedy was granted to some bearers of a right and not to others.

Here, the departure from the general principle seems eminently justifiable. Retrospective application would criminalise conduct that was not criminal at the time it was committed. Such an outcome would not only be unfair, but would potentially infringe FC s 35(3)(l). Providing a remedy for one right — the FC s 12(2) right to bodily integrity — would unjustifiably limit another. In such situations, a court can justifiably depart from the principle that a remedy always requires a right.

However, even here it is necessary to proceed with care. There may well have been alternative remedies that would have avoided a violation of FC s 35(3)(l) but still vindicated FC s 12(2). The Court might have ordered the State to establish a fund to compensate victims of unconstitutional shootings, or have created a precedent or a mechanism whereby survivors or the families of deceased victims could have attained the symbolic recognition that their right to freedom and security had been violated. While situations may arise where a conflict between rights makes it genuinely impossible to provide a remedy, in almost all cases some form of 'imperfect' or 'second-best' relief will be available.

Most of the other cases where the Court has limited the effect of its retrospectivity so as to deny some people a remedy have not justified the denial based upon an unjustifiable limitation of another right. In most instances, the Court's decision turns on the potentially deleterious social consequences of a fully retrospective order. In cases dealing with succession, they have limited their orders to cases where the estate has not yet been wound up. In cases involving statutory time-bars and reverse onus provisions the orders have only applied to cases that have not yet been decided on appeal. For reasons I explain in more detail in the section dealing with retrospectivity, I believe that these departures from the ubi jus principle, while not entirely without foundation, are certainly constitutionally suspect.

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47 Walters (supra) at para 74. FC s 35(3)(l) reads: 'Every accused person has the right to a fair trial, which includes the right — not to be convicted for an act or omission that was not an offence under wither national or international law at the time it was committed or omitted'. See also Masiya v Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies & Another, Amici Curiae) 2007 (5) SA 30 (CC), 2007 (8) BCLR 827 (CC)(The Court declared the common-law definition of rape unconstitutional because it applied only to female vaginal rape, not female anal rape. The decision only had prospective effect in order not to criminalize past conduct.) For more on FC s 35(3)(l), see F Snyckers & J le Roux ‘Rights of Arrested, Detained and Accused Persons’ 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 51, § 51.5(m).

48 Walters (supra) at para 74. FC s 35(3)(l) reads: ‘Every accused person has the right to a fair trial, which includes the right — not to be convicted for an act or omission that was not an offence under wither national or international law at the time it was committed or omitted’. See also Masiya v Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies & Another, Amici Curiae) 2007 (5) SA 30 (CC), 2007 (8) BCLR 827 (CC)(The Court declared the common-law definition of rape unconstitutional because it applied only to female vaginal rape, not female anal rape. The decision only had prospective effect in order not to criminalize past conduct.) For more on FC s 35(3)(l), see F Snyckers & J le Roux ‘Rights of Arrested, Detained and Accused Persons’ 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 51, § 51.5(m).

and in many instances constitutionally infirm. To put it briefly, the practical costs have to be extremely high to justify a departure from a principle that is as important to our constitutional system as the bond between rights and remedies.

The final, and most disturbing, case in which the Court has not respected the general rule is Steenkamp NO v Provincial Tender Board of the Eastern Cape. The applicant was a liquidator of a company (Balraz) that had been awarded a tender to provide an automatic cash payment service for welfare grants in the Eastern Cape. Soon after they were awarded the tender they began preparing to discharge their contractual responsibilities, incurring significant expenses in the process. However, a year later the tender was set aside by the High Court because of negligence by the Tender Board and was re-awarded to a different company. Balraz went insolvent as a result. The applicant complained that the Board was liable for the out-of-pocket expenses the company had incurred in preparing to perform the tender and sued the Board in delict. The applicant took this course because the ordinary administrative remedies — having the award set aside or interdicting the Board to comply with some requirement — were not available in his situation. The sole issue for determination was whether the Board's conduct was wrongful, or to put it differently, whether the applicant was, in principle, entitled to claim damages.

A majority of the Constitutional Court held that even accepting that the Board had acted negligently — and therefore that Balraz's FC s 33 right to reasonable administrative action had been violated — the applicant was not entitled to a claim for damages. Moseneke DCJ went so far as to hold that 'even if there may not be a public law remedy such as an interdict, review or appeal this is no reason for resorting to damages as a remedy for out-of-pocket loss.' He offers a number of reasons for this conclusion: namely: (a) it would result in different treatment for successful and unsuccessful tenderers; (b) public considerations which require

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50 Bhe & Others v Magistrate, Khayelitsha & Others; Shibi v Sithole & Others; SA Human Rights Commission & Another v President of the RSA & Another 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) at paras 126–129; Gory v Kolver NO & Others 2007 (4) SA 97 (CC), 2007 (3) BCLR 249 (CC) at paras 32–43.

51 Mohlomi v Minister of Defence 1997 (1) SA 124 (CC), 1996 (12) BCLR 1559 (CC) at para 25; Engelbrecht v Road Accident Fund 2007 (5) BCLR 457 (CC), 2007 (6) SA 96 (CC) at para 45.

52 See, for example, S v Bhulwana; S v Gwadiso 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC), 1995 (2) SACR 748 (CC) at paras 32–34; S v Ntsele 1997 (11) BCLR 1543 (CC), 1997 (2) SACR 740 (CC) at paras 13–14.

53 § 9.4(e)(ii) infra.

54 2007 (3) SA 121 (CC), 2007 (3) BCLR 300 (CC)('Steenkamp').

55 As a result, the determination of whether the applicant was entitled to reclaim the lost expenses took place in the legal framework of a debate about the delictual wrongfulness of the Board's actions. This undoubtedly coloured the Court's approach to the question of whether a remedy was available or not. This intersection between public and private remedies is discussed in more detail in § 9.2(f) infra. However, from a constitutional point of view, it should not make a difference that the claim was brought in this manner as the right at stake remains a constitutional one. Indeed, after Fose (supra) the applicant was obliged to rely first on a delictual claim.
tender board adjudicators to be immune from damages claims in respect of their negligent but honest decisions;\textsuperscript{58} (c) the legislation was designed to ensure a tender process in the public interest, not to protect tenderers;\textsuperscript{59} and (d) permitting damages claims would create ‘a spiral of litigation [that] is likely to delay, if not to weaken the effectiveness of or grind to a stop the tender process.’\textsuperscript{60} As the dissent of Langa CJ and O'Regan J notes, these reasons do not hold up to scrutiny.\textsuperscript{61}

But even if they did, even if they were excellent reasons, they do not change the principle which underlies the Court’s decision: it is entitled to deny a specific applicant the only possible remedy for the violation of a constitutional right if it believes that it is in the public interest. This arrogation of power — that may well constitute a form of judicial overreach (re-writing, not interpreting, the basic law itself) — in effect denies the applicant the right: ‘Where a man has but one remedy to come at his right, if he loses that he loses his right.’\textsuperscript{62} Steenkamp, it seems to me, is a far more disturbing precedent than Walters or Fraser. Those cases all concerned the validity of legislation and the practical difficulty of giving relief to specific classes of rights-bearers because of the nature of the legislation and the manner in which the case was brought. The deprivation is a temporary one that only affects the right for a limited period of time, either in the past (retrospectivity) or in the future (suspension). Although one can criticise the conclusions that the Court reached in particular cases, these exceptions to the general principle seems to be an unfortunate necessity of operating within a constitutional democracy.

Steenkamp, on the other hand, stands for the proposition that a court can permanently deny a remedy to bearers of a right. No initially successful tenderer will ever be able to claim delictual damages because of the loss they suffered as a result of the negligence of a tender board.\textsuperscript{63} That makes the right to administrative justice worthless. Again: the Court has effectively decided to rewrite the Final Constitution

\textsuperscript{56} Steenkamp (supra) at para 54. He reached this conclusion because, in his view, Balraz was not without a remedy: it could have (a) re-applied for the tender; or (b) ensured contractual protection for the possibility of out-of-pocket expenses. Ibid at paras 49–52. However, as Langa CJ and O'Regan J point out in their dissent, neither of these are effective remedies for the violation of the right to administrative justice. Ibid at paras 88–89. Indeed, they are not even remedies; they are steps that Balraz might have taken to mitigate its loss, not remedies that could be enforced by a court for the violation of Balraz’s rights. To equate these options with judicial remedies is a mistake as they would have these options even without a right to administrative justice. This discussion proceeds on the basis that there were no alternative remedies.

\textsuperscript{57} Ibid at para 54

\textsuperscript{58} Ibid at para 55(a).

\textsuperscript{59} Steenkamp (supra) at para 55(b)

\textsuperscript{60} Ibid at para 55(c).

\textsuperscript{61} Ibid at paras 87–93.

\textsuperscript{62} Ashby v White (1703) 92 Eng Rep 126 (KB).
in a manner that allows it not only to decide when a constitutional right should be upheld, but whether a constitutional right actually exists. That is a very dangerous precedent indeed. However broad the Court's power under the Final Constitution may be, it does not possess the power to amend the Final Constitution. That power lies with Parliament alone.

(iii) The legal position

What then is the legal status of the *ubi jus, ibi remedium* principle in South African constitutional law? After *Fraser*, *Walters* and *Steenkamp*, it is clearly not an absolute rule. Those cases make it clear that a right can exist without a remedy. One danger is that the Court appears to treat the principle as if it were merely part of a

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63 Fortunately, the impact on the law is likely to be very limited as applicants in the position of Balraz might well have a claim under the Promotion of Administrative Justice Act 3 of 2000 (‘PAJA’). PAJA s 8(1)(c)(ii)(bb) permits the payment of compensation in exceptional circumstances. The absence of any other vindication would surely qualify as ‘exceptional circumstances’. See *Steenkamp* (supra) at paras 99–101 (Sachs J). This however does not alter the effect of the remedial principle adopted in *Steenkamp* which may affect the future development of the common law.

64 I am not advocating that rights cannot be limited — FC s 36 clearly permits them to be — but they can only be limited by laws of general application that are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. If legislation or the common law outlawed damages claims in circumstances such as those that Balraz found itself in, government could attempt to justify that limitation of FC s 33 before a Court. There would not be a problem of a right without a remedy, as the right itself would be properly limited. The problem with *Steenkamp* is that there is no attempt to limit the right to administrative justice; the right, theoretically, remains unlimited but it is de-valued by denying a remedy for its violation. For more on FC s 36, see S Woolman & H Botha ‘Limitations’ 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 34.

65 The reason for the decision in *Steenkamp* seems to be confusion between the law of delict and constitutional law. Under delict a person only has a claim to damages if an act is ‘wrongful’. In effect, wrongfulness determines the existence of a right — there is no right for compensation caused by non-wrongful conduct. Under constitutional law, the entitlement to a remedy is not based on ‘wrongfulness’ but on whether a specific right has been violated. The flaw in the majority’s reasoning is to assume that even though a constitutional right has been violated, there may not be a remedy if the violation is not wrongful. This subverts the relationship between the law of delict and constitutional law by placing delictual principles of wrongfulness above constitutional rights. This fails to respect the decree in FC s 2 that ‘[t]he Constitution is the supreme law of the Republic’ (my emphasis). The correct position is that if conduct violates a right in the Bill of Rights (or indeed, any other chapter of the Constitution) it is delictually wrongful. For more on the relationship between private remedies and public remedies, see § 9.2(f) infra.

66 There is a more generous interpretation of *Steenkamp*: All the Court said was that the applicant was not entitled to *delictual* damages, but he might have been entitled to constitutional damages. This interpretation seems to conform with Moseneke DCJ’s focus on the delictual wrongfulness of the act and it is conceivable that the Court would have come to a different conclusion if the case had been brought as a direct reliance on the FC s 33. But I find it very difficult to believe that the Court would not have considered the same factors when determining if an award of damages was ‘just and equitable’ under FC s 38 as it did in determining whether the conduct was delictually wrongful. If the Court would have reached a different decision under FC s 33 then it just shows that the decision not to award delictual damages was wrong. It makes no sense to afford constitutional damages but not delictual damages when the law of delict can reasonably be interpreted to permit the claim.

67 See, for example, *Thint* and *Steenkamp*. 
remedial balancing exercise — an orientation that absolves the Court of the need to provide a more compelling justification for these aberrant conclusions. Were the Court to reflect upon the collective effect of these deviant judgments, I do not think it would endorse as many exceptions to the rule. Its general rhetoric in favour of granting effective remedies in every case is far too strong.\(^6\) Even in Steenkamp, Moseneke DCJ wrote:

> It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated.\(^6\)

Therefore, I think it is best to view Steenkamp as mistakes. The correct position must be that the principle is not absolute, but that any deviation must be grounded in extremely weighty and compelling considerations. Every remedial avenue should be explored and ‘new tools forged’\(^7\) before a court concedes that it really is impossible to afford any relief at all.

(iv) Remedies without rights?

A final interesting question is whether a court can provide a remedy without finding that a right has been violated. The jurisprudence of the Constitutional Court, perhaps surprisingly, suggests that it can. In Sibiya & Others v Director of Public Prosecutions: Johannesburg High Court & Others, the Court concluded that legislation detailing how the sentences of people on death-row should be replaced did not violate any constitutional rights.\(^7\) However, the Sibiya Court held that the government had taken far too long to complete the process of substituting sentences. It ordered a supervisory interdict to monitor the completion of the process. In doing so, it did not suggest that government’s slow progress violated any rights. Yacoob J simply reasoned: ‘This Court has the jurisdiction to issue a mandamus in appropriate circumstances and to exercise supervisory jurisdiction over the process of the execution of its order [in \(S v\) Makwanyane & Another ]\(^7\). It is appropriate in this case for this to be done.’\(^7\) However the Court was not just enforcing Makwanyane. The order in Makwanyane required that all persons on death row ‘will remain in custody under the sentences imposed on them, until such sentences have been set aside in accordance with law and substituted by lawful

\(^6\) That rhetoric is discussed in more detail at § 9.2(e) infra.

\(^6\) Steenkamp (supra) at para 29 (my emphasis).

\(^7\) Fose (supra) at para 69 (‘Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to “forge new tools” and shape innovative remedies, if needs be, to achieve this goal.’)

\(^7\) 2005 (5) SA 315 (CC), 2005 (8) BCLR 812 (CC)('Sibiya').

\(^7\) 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC)('Makwanyane').

\(^7\) Sibiya (supra) at para 61.
punishments.\textsuperscript{74} It did not set any time limit, nor suggest that a delay would violate a right. The order in \textit{Sibiya} does not simply enforce the order in \textit{Makwanyane}: it goes further by requiring that the sentences be converted within a specified timeframe. And it does so without first finding a violation of any right.\textsuperscript{75}

Consider also \textit{Mnguni v Minister of Correctional Services & Others}\textsuperscript{76} and \textit{De Kock v Minister of Water Affairs and Forestry & Others}.\textsuperscript{77} In both these cases — involving claims for medical parole and for prevention of pollution respectively — the Court, in very brief judgments, refused the applications for direct access. However, because it saw some potential merit in the cases, it referred them to the Law Society with a request that the Society consider whether one of its members could represent the applicants.\textsuperscript{78} Thus, the applicants received a remedy (of sorts) without establishing that the Court had jurisdiction or that a right had been violated.

While granting a remedy where no right has been violated may seem anomalous, there is clear support for this practice in the constitutional text. FC s 172(1)(b) empowers any court 'when deciding a constitutional matter' to 'make any order that is just and equitable'. The power to make the order is not dependent on a finding that a right has been violated, but simply that the matter is a constitutional one. Similarly, FC s 38 requires only an allegation that a right has been infringed or threatened to trigger a court's power to 'grant appropriate relief'. There will be cases where a sense of justice manifestly requires a remedy, even where no right has been violated. Courts engage in such behaviour when they grant interim remedies; no right has yet been violated, but the real possibility that a right might be violated justifies an order to prevent that violation.\textsuperscript{79} The wide wording of FC ss 38 and 172(1)(b) suggests that constitutional drafters seemed to have envisioned that such cases would arise and that respect for the Final Constitution would require judicial intervention. One might also contend that open ended provisions such as FC s 39(2) invite the Court to pursue justifiable remedies without any meaningful alteration of the law (and thus any finding of a constitutional violation.)

However, despite the textual space for granting remedies where no rights have been violated, there are serious problems with exercising this power. Firstly, it is generally inappropriate to impose a remedial burden on a party, even the government, when they have not failed to discharge a legal duty or are not guilty of

\textsuperscript{74} \textit{Makwanyane} (supra) at para 151.

\textsuperscript{75} See also \textit{Nyathi v MEC for Health, Gauteng & Others} [2008] ZACC 8 at para 152 (Justice Nkabinde adopted a similar stance in her dissent. Despite finding that the legislation at issue — which prevented the attachment of state assets for the satisfaction of a judgment debt — did not violate any rights, she still concurred in the majority's grant of a supervisory interdict to regulate the payment of government debts.)

\textsuperscript{76} 2005 (12) BCLR 1187 (CC)\textsuperscript{('Mnguni').}

\textsuperscript{77} 2005 (12) BCLR 1183 (CC)\textsuperscript{('De Kock').}

\textsuperscript{78} \textit{Mnguni} (supra) at para 7 and \textit{De Kock} (supra) at paras 5–6.

\textsuperscript{79} See § 9.5(c)(ii) infra.
some constitutional infraction. It is not only unfair to the party, it undermines legal certainty as government does not know how it should act in order to avoid sanction. Secondly, it threatens the courts’ legitimacy. As I explain more fully below, unfettered remedial discretion poses potential problems for courts whose legitimacy depends, at least in part, on the constraints of legal materials. Courts that view themselves as unconstrained by legal texts and well-established principles are, indeed, usurping the roles of the legislature and executive. The idea that courts can only exercise their remedial powers following a legal finding that a right has been violated is an essential constraint on judicial power and lies at the heart of a new legal order that has self-consciously turned the rule of law doctrine and the principle of legality into first principles of our constitutional democracy.

I would therefore suggest that the power should only be exercised in limited circumstances. I can think of four such circumstances — although they by no means constitute a closed list. Firstly, FC s 38 contemplates situations in which a remedy may be provided where a right has not yet been violated — the right may merely be threatened. This pre-emptive remedy is an extension of the general *ubi jus* principle: it is necessary to protect the right. Second, the protection of a constitutional principle — as opposed to a right — may require a remedy. This rationale underlies the majority’s order in *Nyathi v MEC for Health, Gauteng & Others*. In justifying the imposition of a structural interdict to regulate the payment of outstanding court orders against the state, Madala J argues that:

> Certain values in the Constitution have been designated as foundational to our democracy. . . . If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a state predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy. That, in my view, means at the very least that there should be strict compliance with court orders.

These foundational values, rather than the enforcement of any rights, justified the structural remedy.

Thirdly, a remedy may be required that goes beyond the apparent parameters of the right in order to ensure that the right is actually respected. The Court in *Sibiya* seems to regard the interdict it grants as necessary to give full effect to the right not to be subjected to capital punishment.

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80 See § 9.2(d)(ii) infra.

81 See, for example, *Jamiat-Ul-Ulama of Transvaal v Johncom Media Investment Ltd & Others* [2006] ZAGPHC 12 (The High Court granted an interdict preventing the Sunday Times from publishing cartoons depicting the Muslim prophet Mohammed because it would violate the dignity of Muslims. If one accepts that finding, then granting the remedy makes sense.) For criticism of this decision, see D Milo, G Penfold & A Stein ‘Freedom of Expression’ 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 42, § 42.9(h).


83 Ibid at para 80.
Fourthly, a remedy may be necessary to ensure both the proper administration of our courts and effective use of our legal system by those most in need of the protection it ostensibly affords. Such reasons appear to animate the decisions in *Mnguni* and *De Kock*. The applicants were clearly without legal assistance and would, because of the way courts generally function, be unable to pursue possibly legitimate claims without legal assistance.

Whenever a court issues a remedy in the last three circumstances mentioned above, or in any other circumstance where a right has not been violated, it should consider very carefully the impact its decision will have on legal certainty and judicial legitimacy. Neither good should be lightly sacrificed.

(c) Rights and remedies

This section considers the relationship between rights and remedies. The traditional wisdom is that ‘rights and remedies are made of different stuff’. Rights are philosophical constructs that describe our ideal society. Remedies reflect the practical wisdom — the actual means — required to make those aspirations a reality. However, I will argue that the traditional wisdom is descriptively inaccurate. Remedies are not simply tools to be used to realise rights. In a variety of ways, remedies determine both the value and the content of rights.

(i) Ways of understanding the rights-remedies relationship

There are three ways in which to understand the relationship between rights and remedies. First, ‘automatic remedialism’. Under this approach a specific remedy flows automatically from the assertion of the right. Secondly, rights and remedies can be seen as separate. Judges have a discretion to choose a remedy that gives effect to the right. One might call this description: ‘rights essentialism’. Thirdly, rights and remedies can be viewed as inter-related. The rights a constitution recognises obviously affect the remedies that are available; but remedies also affect the value and the content of rights. I will call this ‘remedial equilibration’. The three approaches differ on two issues: the extent to which remedies affect rights and the discretion courts have in crafting remedies.

(aa) Automatic remedialism

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86 Cooper-Stephenson calls this approach ‘rights maximising’ — a phrase he borrows from Paul Gerwitz. Ibid at 5 citing P Gerwitz ‘Remedies and Resistance’ (1983) 92 *Yale LJ* 585. I do not believe Cooper-Stephenson’s use of the term in this context accurately describes the manner in which Gerwitz employs it. Gerwitz does not imply that rights-maximising judges do not have a discretion in choosing a remedy. He simply argues that such a judge must exercise the discretion in a manner that will best give effect to the right. For more on ‘rights-maximising’, see § 9.2(e)(ii) infra.

87 Both ‘rights essentialism’ and ‘remedial equilibration’ are terms borrowed from Daryl Levinson.
This approach to remedies holds that when a litigant proves that a delictual right has been violated, the remedy — normally an award of damages — flows automatically. In the United States, Abram Chayes has characterised this 'traditional' model of civil adjudication in the following terms:

The scope of the relief is derived, more or less logically from the substantive violation under the general theory that the plaintiff will get compensation measured by the harm caused by the defendant’s breach of duty.\(^88\)

This is, generally,\(^89\) the position for common-law actions. Courts do not have discretion to choose a remedy; the right a litigant relies on generally determines the remedy. A delictual claim equals damages while the rei vindicatio demands the return of property. Similarly, in constitutional law a finding that law or conduct is unconstitutional results automatically in a declaration of invalidity.\(^90\) The right and the remedy are seen as a single package — right = remedy. Courts have no discretion in picking a remedy and remedial options do not affect the content of rights. But apart from this important exception, the idea of automatic remedialism does not generally hold sway. The Constitutional Court has regularly asserted that courts have a discretion in fashioning remedies. Although it has established a number of rules and principles that confine the extent of that discretion, it has certainly not adopted any rules that automatically require a particular remedy for the violation of a particular right.\(^91\)

\((bb)\) Rights essentialism

Lawrence Sager describes 'in a nutshell'\(^92\) what rights essentialists believes:

It is part of the intellectual fabric of constitutional law and its jurisprudence that there is an important distinction between a statement which describes an ideal which is embodied in the Constitution and a statement which attempts to translate such an ideal into a workable standard for the decision of concrete issues.\(^93\)

Rights essentialists treat rights as 'ideals, ultimate value judgments that are derived from some privileged source of legitimacy' while remedies 'exist not in the realm of the ideal but in the realm of the concrete, not in the domain of constitutionally privileged values but in the domain of contingent facts.'\(^94\) Rights represent the ideal society; remedies are the means through which that society is brought into being.

\(^88\) A Chayes 'The Role of the Judge in Public Law Litigation' (1976) 89 Harvard LR 1281, 1282.

\(^89\) There are, however, cases where courts have some discretion. For example, in certain contractual claims courts can choose whether to order damages or specific performance. In defamation claims, courts can order an apology or retraction in addition to damages.

\(^90\) FC s 172(1)(a). For more on declarations of invalidity, see § 9.4(c) infra.

\(^91\) For more detail on the extent of courts' remedial discretion, see § 9.2(d)(i) infra.

\(^92\) Levinson (supra) at 861.

\(^93\) L Sager 'Fair Measure: The Legal Status of Underenforced Constitutional Norms' (1978) 91 Harvard LR 1212, 1213.
Rights essentialism holds that courts have a discretion in fashioning remedies and that the causal relationship only flows from rights to remedies, not vice versa.

This is the pre-eminant view in South African constitutional law. It is most obvious in the structure of analysis in the vast majority of Constitutional Court cases. The cases distinguish rights (and limitations) analysis from remedies analysis: only after finding an unjustifiably limitation of a right can one consider the appropriate response to the violation. Moreover, in Fose Kriegler J echoed the description of rights essentialism I gave earlier when he wrote: 'When courts give relief, they attempt to synchronise the real world with the ideal construct of a constitutional world.'

Stressing the one-way relationship between rights and remedies, Sachs and Mokgoro JJ in Bel Porto School Governing Body & Others v Premier, Western Cape & Another held: 'It is the remedy that must adapt itself to the right, not the right to the remedy.' These statements clearly indicate the court's preference for rights essentialism. Rights essentialism also seems to be the creed of South African scholars. In their excellent chapter on remedies, Iain Currie and Johan De Waal write that the object of constitutional remedies 'is to make the real world more consistent with the Bill of Rights.'

(c) Remedial equilibration

Although the 'theory' has existed for some time, remedial equilibration owes both its name and its full explication to Daryl Levinson. On this account, rights essentialism is an illusion that bears no relation to reality:

In the actual practice of constitutional adjudication...the qualitative distinction between rights and remedies blurs, or even dissolves...rights and remedies in constitutional law are interdependent and inextricably intertwined.

While the rights essentialists argue that causation only runs from rights to remedies — rights affect remedies, but remedies don't affect rights — Levinson's theory of remedial equilibration shows how causation also runs the other way — from remedies to rights. It is this 'reciprocity of right-remedy causation' that Levinson
identifies as the 'central feature of the remedial equilibration model'.\textsuperscript{101} Perhaps the position is best explained by Paul Gerwitz:

All dimensions of the law are affected by the world of the practical, the real, the subjective, the political — in short, 'the world' as we know it. The duality of the ideal and the real exists, but it pervades the judicial function. The two-sidedness is not conveniently deposited in the separate categories of right and remedy. The practicalities cannot be cordoned off into a separate domain to keep rights-declaring purely 'ideal.' There is a permeable wall between rights and remedies: The prospect of actualizing rights through a remedy — the recognition that rights are for actual people in an actual world — makes it inevitable that thoughts of remedy will affect thoughts of right, that judges' minds will shuttle back and forth between right and remedy.\textsuperscript{102}

This theory of 'the tail wagging the dog'\textsuperscript{103} has received significant support among American academics.\textsuperscript{104}

Although the Constitutional Court has primarily adopted a rights essentialist position, it has, in at least one case, acknowledged the impact that rights have on remedies. In \textit{Sanderson v Attorney-General, Eastern Cape} the Court was concerned with the FC s 35(3)(d) right to a trial within a reasonable time.\textsuperscript{105} Before considering American and Canadian case law on the topic, Kriegler J cautioned that the precedents were of limited value because the only possible remedy in those jurisdictions was a stay of prosecution and that this remedy had determined (and thereby constrained) the proper interpretation of the right.\textsuperscript{106} He then held that: 'Our flexibility in providing remedies may affect our understanding of the right.'\textsuperscript{107} And indeed it did.\textsuperscript{108} He interpreted the right to entitle applicants to different forms of relief depending on the nature of prejudice they had suffered.\textsuperscript{109} (By contrast, US and

\textit{Bel Porto} (supra) at para 180 (Sachs and Mokgoro JJ).
Canadian courts can do no more than consider whether the right is violated and a permanent stay is justified.

Part of the doctrine of remedial equilibration is that courts often mix remedies and rights unconsciously or without acknowledging that remedial concerns are affecting their construction of the right. *Sanderson* is therefore very unusual: both because it does not conform with the Court’s general adherence to rights essentialism and because the Court explicitly admits that available remedies are a factor in interpreting the content of a right. *Sanderson* is not, however, the only case in which the Court has engaged in remedial equilibration. The following section argues that, despite its assertions to the contrary, remedial equilibration is in many ways a more accurate description of the Court’s remedial jurisprudence than rights essentialism.

(ii) Methodological concerns

Before I explore each of the ways in which remedies affect rights, I must note the limits of this exercise. In almost all these cases, the judges do not acknowledge that remedies influence their construction of the right. Attributing the result to remedial concerns is therefore speculative. Levinson acknowledges this limitation with reference to remedial deterrence, although both the caution and the explanation seem to me equally applicable to other forms of remedial equilibration:

Individual examples of remedial deterrence are difficult to document with great confidence because claiming that a right would be different if a different remedy followed entails a counterfactual claim that is ordinarily highly speculative: that the right would have been A rather than B if the remedy had been X rather than Y. If we knew what the ‘real’ shape or extension of the right looked like, then we could decide whether the observed shape was ‘distorted,’ and if so, whether remedial deterrence was a causal factor. Lacking direct epistemic access to the ‘real’ right (even assuming the ontology of such an entity), the best we can do is observe the changes in judicial decisionmaking over time and test likely causes. As a result, any individual example of remedial deterrence will inevitably be contestable. This is especially true of the examples that follow, which are presented without any serious attempt to rule out alternative explanations. Nevertheless, generating a series of plausible cases will hopefully suffice to illustrate the general point that remedial consequences exert an important influence over the shape and existence of constitutional rights.  

See F Snyckers & J Le Roux ‘Criminal Procedure: Rights of Arrested, Accused and Detained Persons’ 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 51, 51–131 (The authors argue that Kriegler J’s statement ‘should not be understood to conflate the right with the remedy, or as allowing a finding of violation to depend on the appropriateness of the remedy sought. On the contrary, it is to be taken as a cue to separate the question of violation from that of the remedy sought. For while the broad array of remedies available under the Final Constitution does make it easier for a court to find a violation of a fundamental right, one must keep in mind that the finding of a violation need not entail the very drastic remedy of what amounts to unconditional discharge.’ The authors are correct that the statement does not ‘conflate the right with the remedy’; that is, it does not endorse a form of automatic remedialism. However, the assertion that it ‘separates’ right and remedy does not mean it supports rights essentialism. As they acknowledge, the statement clearly conceives of the possibility of remedial options impacting on the content of the right. That is remedial equilibration.)

Sanderson (supra) at para 41.

Levinson (supra) at 890.
My own examples are even more deficient than Levinson's as they are, generally, not based on patterns of court behaviour over time but on a court's action in a single case. Nevertheless, like Levinson, I believe that remedial equilibration is generally the best explanation for the Constitutional Court's action and that the accumulation of cases strongly suggests the validity of the equilibration thesis.

Two major differences in the legal framework in South Africa and in the US require us to slightly alter the way we understand Levinson's contribution. Firstly, unlike the US Constitution, the Final Constitution includes a limitations clause — FC s 36(1) — that is meant to permit limitations of rights if doing so is 'reasonable and justifiable in an open and democratic society based on freedom, dignity and equality'. The limitations analysis will almost always include the evaluation of the practical — read 'remedial' — consequences of upholding or abolishing the limitation. Showing the influence of possible remedies on the interpretation or application of FC s 36(1) would be redundant. This section therefore only considers cases where remedial concerns influence rights rather than the limitation of rights. Secondly, Levinson notes that

[all judicially interpreted constitutional rights are over- and under-enforced in the sense that they might well be different in some abstract, theoretical realm (or a purely declaratory system of constitutional adjudication) where they would never have to be enforced.]

Although South Africa is certainly not a 'purely declaratory system', it does demand declaration in some cases and the Constitutional Court has shown a discernable partiality to declaration as an appropriate remedy. The availability of a declaration of invalidity as a remedy does perhaps mean that courts are substantially freer to define rights in the abstract than they might be in the US. However, I do not think this 'freedom' undermines the validity of the thesis as a whole.

(iii) An equilibrating court

Rights affect remedies in six ways. Firstly, as the Court did in Sanderson, the availability of remedies can expand the content of rights. I will call this remedial flexibility. Two: remedial deterrence is in some sense the opposite of remedial flexibility — the negative practical consequences of giving a right a wide meaning may force a court to give it a narrower interpretation. Thirdly, remedial incorporation occurs where a prophylactic rule is incorporated into a right because of the remedial difficulties of precise enforcement. Remedial substantiation, four, is different from the previously mentioned methods: it does not alter the content of the right. Instead, it asserts that the value of a right is dependant on the remedies that are available for its vindication. Fifthly, the availability of remedies affects the cases that litigants


112 Levinson (supra) at 925–926 (my emphasis).

113 FC s 172(1)(b). See § 9.4(a) infra.

114 See § 9.5(b) and § 9.6(a) infra.
are willing to bring to court and, as a result, the rights that receive the most development. Finally, the remedy requested may determine whether a litigant even gets his foot in the courtroom door.

\textbf{(aa) Remedial flexibility}

This practice is precisely what occurred in \textit{Sanderson}. As Kriegler J says, it is the ‘flexibility in providing remedies’ that impacts on the ‘understanding of the right’.\textsuperscript{115} Levinson seems to regard this practice as part of remedial deterrence.\textsuperscript{116} He argues that the Supreme Court could never have created the \textit{Miranda}\textsuperscript{117} rules if it had not been able to limit the retroactive impact because ‘if the warning requirement had applied retroactively . . . every prisoner [would have been] released from custody on postconviction review.’\textsuperscript{118} It was only ‘[b]y making \textit{Miranda} mostly nonretroactive, [that] the Court eliminated the remedial deterrent threat of emptying the prisons and enabled the \textit{Miranda} right to exist.’\textsuperscript{119}

To my mind, this practice is different from remedial deterrence. Remedial deterrence involves a court interpreting a right in a certain way to avoid an undesirable remedial consequence. Remedial flexibility occurs when a court feels free to interpret the right as it deems fit because of the range of remedial options available to it. That freedom is a hallmark of remedial equilibration — and not rights essentialism — because a rights essentialist would interpret the right in the same way no matter what remedies were available. A court relying on its remedial flexibility considers the remedial consequences in fashioning the content of the right as it would reach a different decision if it did not have such a range of remedial options.

Remedial flexibility is, ironically, both the most prevalent and the most difficult to prove form of remedial equilibration in South African case law. Because of the immense remedial flexibility our courts have,\textsuperscript{120} it could be argued that any decision where they rely on that flexibility might have turned out differently if they did not have that flexibility. Apart from \textit{Sanderson}, the Court\textsuperscript{121} does not admit that its conclusions might have been different if it had fewer remedial options. However, the consequences of a more confined remedial discretion in two classes of cases illustrates the likelihood that the Court’s remedial flexibility affects its construction of rights.

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{115} \textit{Sanderson} (supra) at para 27.
\item\textsuperscript{116} Levinson (supra) at 889–890.
\item\textsuperscript{117} \textit{Miranda v Arizona} 384 US 436 (1966).
\item\textsuperscript{118} Levinson (supra) at 890.
\item\textsuperscript{119} Ibid.
\item\textsuperscript{120} See § 9.2(d)(i) infra.
\item\textsuperscript{121} The minority of Mokgoro and Sachs JJ endorse the statement in \textit{Bel Porto} (supra) at para 181.
\end{enumerate}
\end{footnotesize}
Firstly, consider cases where, as in *Miranda*, the Court limits the retrospective effect of its orders. It is difficult to believe that the Court would have found violations in certain cases if this remedial option was not open to it. Take, for example, *S v Manamela & Another (Director-General of Justice Intervening)* — the Court invalidated the rule casting a reverse onus on people in possession of stolen goods to prove they had reasonable cause to believe the goods were not stolen.\(^\text{122}\) The Court limited the retrospective effect so that it only applied to cases that had not been finalised. Considering the compelling reasons in the dissent of O'Regan J and Cameron AJ, would the majority have reached the same conclusion if they could not limit the retrospective impact and, as a result, all prisoners convicted under the section since 1994 would have to be released? Or how about *Masiya*\(^\text{123}\) and *Walters*.\(^\text{124}\) In both cases the Court limited the retrospective impact so as not to criminalize past conduct.\(^\text{125}\) Would they have reached the same conclusion if the necessary result was to violate the FC s 35(3)(l) right not to be convicted of an act that was not a crime at the time it was committed?

The second class of cases are a function of the Court’s suspension of an order of invalidity. In *S v Ntuli*\(^\text{126}\) and *S v Steyn*,\(^\text{127}\) the failure to suspend the order of invalidity would have resulted in a massive increase in the number of criminal appeals from the Magistrates’ Court and potentially would have swamped the High Courts. The failure to suspend the order of invalidity in *Mashavha v President of the Republic of South Africa & Others*\(^\text{128}\) would potentially have meant that there was no legal authority for government to make social assistance payments,\(^\text{129}\) while in *Matatiele Municipality & Others v President of the Republic of South Africa & Others*\(^\text{130}\) it would have necessitated the invalidation of a five-month-old election. Would the court have

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122 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC).

123 2007 (5) SA 30 (CC), 2007 (8) BCLR 827 (CC)(*Masiya*). *Masiya* is also one of the few cases where the Court explicitly explains how its remedial concerns influenced on its construction of the right.

124 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC).

125 In *Masiya*, the conduct (anal rape of a female) was a crime, but would be re-classified as rape rather than indecent assault.

126 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC).

127 2001 (1) SA 1146 (CC), 2001 (1) BCLR 52 (CC).

128 2005 (2) SA 476 (CC), 2004 (12) BCLR 1243 (CC) at para 69 (The Court held that the government had improperly assigned the payment of social grants to the provinces.)

129 See *Ex parte Minister of Social Development & Others* 2006 (4) SA 309 (CC), 2006 (5) BCLR 604 (CC) at paras 18–20 (The Court was considering an application to extend the suspension granted in *Mashavha*. Although it did not decide the issue, it accepted that the possibility of the suspension expiring without new legislation being enacted would be to remove the authority for officials to pay social grants.)

130 2007 (6) SA 477 (CC), 2007 (1) BCLR 47 (CC).
constructed the right in the same way if it knew that these drastic consequences would inevitably follow?

In all these cases, although we cannot know for sure, it seems very likely that the Court would have reached a different conclusion at the rights stage if the option of limiting retrospectivity or suspending the order had not been available.

**(bb) Remedial deterrence**

Remedial deterrence is the most worrying form of remedial equilibration. It is the flip-side of remedial flexibility. While in remedial flexibility rights can develop freely because remedial options are available to limit their impact, remedial deterrence shows us how constraints in the provision of remedies or concerns about the consequence of remedies directly alter the content of rights. This normally acts to constrain or lessen the content of rights as a 'threat of undesirable remedial consequences motivate[s] courts to construct the right in such a way as to avoid those consequences'.

The history of school desegregation in the US provides a good model of this phenomenon. It was unclear for a long time whether the finding in *[Brown v Board of Education]*[^132^]— where the Supreme Court banned racial segregation in schools and, in *[Brown II]*[^133^], required that existing segregation be remedied 'with all deliberate speed' — was a prohibition only of *de jure* segregation or of *de facto* segregation. As Levinson argues, the *Brown* and *Brown II* courts left that question open as they were dealing only with *de jure* segregation and obstructive officials. The real meaning of what the equal protection clause required 'only later came into focus, gradually and retrospectively, through the lens of remedy.'[^135^] Immediately after *Brown* the Supreme Court held that although *de facto* segregation was not in itself unconstitutional, but if the school district had engaged in earlier *de jure* segregation, it attracted a strong presumption of unconstitutionality. The consequence of this approach was that a large number of school districts came under the control of the federal judiciary. The judiciary then devised a range of remedies — with the bussing of children and the rearrangement of school districts being the most prominent — to achieve *de facto* integration. This interventionism led, in turn, to growing political opposition and judicial unease about the extent to which the courts were micro-managing school affairs and local government. The Supreme Court then made a series of decisions limiting the use of bussing. As Levinson notes:

[^131^] Levinson (supra) at 885.


[^134^] That is, did *Brown* prohibit only laws preventing integrated schools, or did it require that schools in fact be integrated?

[^135^] Levinson (supra) at 875.

Nominally, these are all changes that rein in remedies while leaving the Brown right untouched; functionally, however, these decisions have redefined the right. Just as allowing expansive remedies had pushed Brown toward a de facto right in many school districts, constricting remedies is now pulling Brown toward a de jure right.  

This line of cases culminates in the recent case of *Parents Involved in Community Schools v Seattle School District No. 1*. A plurality of the Supreme Court rejected two school districts' integration plans and fell one vote short of redefining Brown as endorsing a colour-blind constitution — and therefore prohibiting only de jure segregation. The case was not brought as a challenge to the underlying principle of Brown, and the Court did not rule out all attempts at integration. But the impact of the extremely small range of remedies that the Court deemed permissible — (bussing was not one) — had the effect of altering the content of the right.

Remedial deterrence is most obviously prevalent in the Constitutional Court's socio-economic rights jurisprudence. In its first brush with socio-economic rights, *Sooobramoney v Minster of Health (KwaZulu-Natal)*, the Court was confronted with a man suffering from chronic renal failure who argued that his FC s 27 right of access to healthcare entitled him to be placed on a dialysis machine at state expense. The Court rejected the claim. It argued that the practical consequences of granting Mr Soobramoney's claim would be to decrease the money available for other health needs, and ultimately for other legitimate state goals.

In determining the content of the right, the Court does not conduct a purely philosophical inquiry. It looks at the practical (read remedial) consequences of its acts. The conclusion must be that rights (or at least socio-economic rights) are made in part of the same 'stuff' as remedies.

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137 Levinson (supra) at 877. Levinson cites *Milliken v Bradley* 418 US 717 (1974)(Students in areas that had not engaged in de jure segregation could not be part of bussing plans); *Missouri v Jenkins* 515 US 70 (1995)(remedies must be narrowly tailored to remedying previous segregation); *Freeman v Pitts* 503 US 467 (1992), *Board of Education v Dowell* 498 (US) 237 (1991) and *Pasadena City Board of Education v Spangler* 427 US 424 (1976). All three cases envision that integration plans will come to an end.

138 Levinson (supra) at 877.

139 Justice Kennedy's concurrence does not fully endorse a colour-blind constitution, although the space he leaves for continued action to force integration is very limited.


141 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC).

142 Ibid at paras 27–28.
Similarly, in *Government of the Republic of South Africa v Grootboom*[^143] and *Minister of Health & Others v Treatment Action Campaign*[^144] the Court (largely)[^145] rejected a 'minimum core' approach to FC ss 26 and 27. Two related reasons offered by the Court are, arguably, remedial. Firstly, in *Grootboom* the Court argues that the minimum core may be different for people in different circumstances and that it does not have information to determine what is required.[^146] Underlying this concern is the spectre of the judiciary becoming involved in the details of managing each municipal housing scheme in order to determine what the 'minimum core' for that section of the population is. That is an undesirable remedial consequence. Second, in *TAC*, the unanimous Court held that '[c]ourts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community.'[^147] Note that this mere assertion is not a philosophical argument as to how one should determine the content of the right. It is a bald statement of concern about the impact that any remedy granted by the Court might have on social affairs that lie beyond its immediate control. And it is these remedial concerns, amongst others, that lead the Court to reject the call for a minimum core approach.

The recent decisions of the Supreme Court of Appeal in *Zuma v National Director of Public Prosecutions*[^148] and *National Director of Public Prosecutions & Another v Mahomed*[^149] also offer a powerful indication of how remedies impact on rights. Both cases concerned the validity of search warrants. In *NDPP v Mahomed* it was accepted that the right to privacy had been violated. Nugent and Mlambo JJA would only grant very limited preservation orders (which would permit copies of the seized documents to be kept in case of future disputes) because they feared that anything more would make the right to privacy — which the State admitted had been infringed — meaningless. Farlam and Cloete JJA on the other hand were willing to grant a preservation order that would allow the NPA to later gain access to the documents and to potentially use them at trial. Ponnan JA was unwilling to grant any preservation order at all. These findings become even more interesting when one examines the same judges' findings in the *Zuma* matter. In *Zuma*, the applicant argued that the warrants issued to search his premises were overbroad, primarily because the definition of the crime was not specific enough, and therefore violated his right to privacy. Farlam and Cloete JJA agreed and would have set aside the warrants, but granted a preservation order on the same terms as

[^143]: 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)('Grootboom').

[^144]: 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC)('TAC').

[^145]: The Court may have left some space in the 'reasonableness' test for minimum core obligations to play a role. See D Bilchitz *The Justification and Enforcement of Socio-economic Rights* (2007).

[^146]: *Grootboom* (supra) at paras 32-33.

[^147]: *TAC* (supra) at para 38 (my emphasis).

[^148]: [2007] ZASCA 139.

[^149]: 2008 (1) SACR 309 (SCA), [2008] 1 All SA 181 (SCA)('NDPP v Mahomed').
the one they were willing to grant in Mahomed. Nugent, Mlambo and Ponnan JJA disagreed, holding that the warrants did not infringe the right to privacy.

The direct correlation between the voting blocs in the two cases, all but demands the conclusion that all the judges' decisions in Zuma were influenced by their convictions about the possible remedy in Mahomed. It was easier for Farlam and Cloete JJA to hold that Zuma's privacy had been infringed because they knew it was unlikely to influence his future prosecution: the documents would be preserved and easily admissible at trial. Similarly, Nugent, Mlambo and Ponnan JJA would have been extremely hesitant to find a violation of privacy because the only remedy that they deemed acceptable would have almost certainly ensured that the documents would never have been introduced in the trial. Both sets of judges, it seems, allow their idea of the appropriate remedy to influence their construction of the right to privacy.

Let me offer one final example of the way in which remedies have impacted on the content of not only of rights, but also on the doctrine of application of rights:150 Masiya v Director of Public Prosecutions, Pretoria & Another (Centre for Applied Legal Studies & Another, Amici Curiae).151 The case concerned the trial of a man who had anally raped a young girl. The issue before the Court was whether the common-law definition of rape, which only criminalized the non-consensual penetration of a vagina by a penis, was unconstitutional for not including anal penetration. A majority of the Court152 concluded that the common-law definition did not directly violate any of the rights relied on — equality, dignity, freedom and security of the person and privacy — but that it should be developed in terms of FC s 39(2) in light of the spirit, purport and objects of the Bill of Rights to include anal penetration of females, but not males. This remarkable conclusion is based on a fundamental misunderstanding of the remedies available to the Court following a finding of direct invalidity. The Court's reasoning is summarized in this passage:

The definition of rape is not unconstitutional in so far as it criminalises conduct that is clearly morally and socially unacceptable. In this regard it is different from the common law crime of sodomy which was declared unconstitutional by this Court because it subjected people to criminal penalties for conduct which could not constitute a crime in our constitutional order. There is nothing in the current definition of rape to suggest that it is fatally flawed in a similar manner. The current definition of rape criminalises unacceptable social conduct that is in violation of constitutional rights. It ensures that the constitutional right to be free from all forms of violence, whether public or private, as well as the right to dignity and equality are protected. Invalidating the definition because it is under-inclusive is to throw the baby out with the bath water. What is


151 2007 (5) SA 30 (CC), 2007 (8) BCLR 827 (CC)('Masiya').

152 Langa CJ (Sachs J concurring) left this issue open. Ibid at para 76.

The Court was operating under the mistaken assumption that a finding of direct invalidity can only result in declaring the common-law definition unlawful. Because it believed its remedial options were limited, the Court changed the content of the right to avoid that undesirable remedial consequence — total invalidity of the definition. The majority asserts that FC s 9 — insofar as it applies to crime-creating laws — requires only that laws do not criminalize conduct that 'could not constitute a crime in our constitutional order.' It does not require rational reasons for the differentiation or that any differentiation does not amount to unfair discrimination. On this reasoning, crimes that only prohibited acts by white people or Jews would not violate the right to equality because their only flaw would be 'under-inclusiveness'. That is a serious — and unwelcome — change in the content of the right.

In addition, the majority’s assumption that only indirect application can permit the alteration of a common-law rule explains their distaste for the direct application of rights to the common law. If it were indeed true that direct application only permitted a common-law rule to be accepted or rejected, the Court's preference for indirect application would make sense. Because this hypothesis is blatantly false this choice has, rightly in my view, been the subject of serious criticism. However, the wisdom of the decision is not the point here. The point is that remedial concerns — the remedies that the Court believes are at its disposal or the remedies that it would prefer to use — alter the content both of rights and application doctrine.

There are many other cases in which one could argue that the Court has, consciously or unconsciously, engaged in remedial deterrence. But I trust that these examples suffice to prove that remedial deterrence is a part of the fabric of our constitutional law.

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154 Masiya (supra) at para 27 (my emphasis).

155 This assumption is clearly incorrect. See Minister of Home Affairs & 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) (In Fourie, the Court relied on the direct application of the right to equality to extend the common-law definition of marriage to include homosexual couples. Clearly the Court could also have used direct application to extend the definition in Masiya.)

156 For the content of the right prior to Masiya, see, for example, Harksen v Lane NO & Others 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 53 (Sets out the test for the violation of the right to equality.) See also C Albertyn & B Goldblatt 'Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskaison & M Bishop (eds) Constitutional Law of South Africa (2nd Edition, OS, July 2006) Chapter 35. Hopefully, the Court will treat Masiya as an aberration and will not follow this precedent in future cases.

157 Woolman 'Amazing' (supra)(Woolman argues that the Courts decisions in Masiya, NM & Others v Smith & Others (Freedom of Expression Institute as Amicus Curiae) 2007 (5) SA 250 (CC), 2007 (7) BCLR 751 (CC) and Barkhuizen v Napier 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC) indicate a disturbing predilection for relying on FC s 39(2) and therefore an ongoing failure to give content to the rights in the Bill of Rights.)
Remedial incorporation occurs when a court defines a right to include a prophylactic remedy that is not itself part of the right, but is necessary to ensure that the 'core' of the right is not violated. In Hutto v Finney, the Supreme Court held that keeping a prisoner in isolation for longer than 30 days was not itself a violation of the prohibition on cruel and unusual punishment. However, it upheld a District Court order limiting stays in isolation cells to 30 days. There were two reasons for this apparently contradictory stance. Firstly, the other conditions in the prison — including overcrowding and malnutrition — when combined with long periods of solitary confinement did constitute cruel and unusual punishment and it was pointless to determine which specific combination of conditions was a violation and which was not. Secondly, the long history of unwillingness on the part of the state to

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158 See I Currie & J De Waal The Bill of Rights Handbook (5th Edition, 2005) 192 n 7 (The authors argue that '[c]ourts are likely to be more hesitant to find a violation of a right in situations where there is no appropriate remedy for the violation.' They mention President of the Republic of South Africa & Another v Hugo 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) ('Hugo') and 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) ('New National Party') as examples. In Hugo the Court was faced with an equality challenge to a decision by the President to remission of sentences to all mothers of children under 12. The President's act was challenged, predictably, by a father of a child under 12. A majority of the Court held that although there was discrimination, it was fair. Currie and De Waal suggest that part of the reason for this conclusion was that any remedy would either release a large number of male prisoners or re-incarcerate the mothers who had already been released. The New National Party Court concluded, very shortly before the 1999 elections, that a law requiring voters to have a bar-coded Identity Document was valid. Currie and De Waal argue that the Court was ‘hesitant to find a violation because any relief that it granted would have placed the 1999 elections in jeopardy.’) See also Kaunda & Others v President of the Republic of South Africa & Others 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC) (The applicants argued that the President had an obligation to intervene diplomatically on their behalf to ensure that their human rights were not violated while they were in Zimbabwe. A majority of the Court concluded that citizens only have a right to request diplomatic protection and to have that decision properly considered by government. Part of its reasoning was that courts are institutionally ill-suited to control diplomatic negotiations: ‘The timing of representations if they are to be made, the language in which they should be couched, and the sanctions (if any) which should follow if such representations are rejected are matters with which courts are ill equipped to deal. The best way to secure relief for the national in whose interest the action is taken may be to engage in delicate and sensitive negotiations in which diplomats are better placed to make decisions than judges, and which could be harmed by court proceedings and the attendant publicity.’) Ibid at para 77. Because it saw the only available remedy — ordering government to make diplomatic representations — as potentially more harmful to the applicants' interests than granting no remedy at all, it limited the right to require intervention only when government had incorrectly exercised its discretion.)

159 See, generally, Levinson (supra) at 899–904. See also O Fiss 'Foreword: The Forms of Justice' (1979) 93 Harvard LR 1, 49–50 (Fiss argues that specific elements of structural orders (such as requiring showers) are not directly required by the right, but are instrumental means to enforce the right either by preventing evasion, or simply to let officials know what is expected of them. However, unlike Levinson, he argues that these considerations do not become part of the right itself but are ‘instrumental or remedial rights rather than constitutional rights proper’. The strength of the remedial equilibration model is that it illustrates that there is no difference between ‘remedial rights’ and constitutional rights. All rights are affected by remedial concerns and are no less valid or real for being motivated by instrumentality instead of principle.)

remedy prison conditions necessitated ‘specific, and easily verifiable remedial orders that aimed for a level of prison quality well above the constitutional standard.’

The remedial influence on rights here is perhaps more subtle than remedial deterrence. Because the standard of ‘cruel and unusual punishment’ is inherently subjective and incapable of specific articulation, ‘[r]emedies are used by courts to define a constitutional standard that would otherwise be impossible to articulate, and those remedies become the normative criteria by which constitutional violations are judged.’ The real impact is not seen in *Hutto* itself, but in subsequent cases where litigants — and courts — rely on the remedial measures taken to establish constitutional violations.

There are not as many South African examples of this practice. However, *Dawood & Another; Shalabi & Another; Thomas & Another v Minister of Home Affairs & Others* does fit the profile. In *Dawood*, the Court struck down a provision which required foreign spouses of South African citizens to be outside South Africa when they applied for a permanent residence permit. An exception was made that allowed spouses to stay in South Africa on a temporary permit, but the granting of the temporary permit was subject to the unguided discretion of an administrative official. O'Regan J held that, even though it was possible that the power would be properly exercised, the existence of the power was itself a limitation of the right to

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161 Levinson (supra) at 879. See also J Jeffries 'The Right-Remedy Gap in Constitutional Law' (1990) 109 Yale LJ 87, 111–112 (Discussion of impact of remedies on rights in prison reform litigation. Referring to Levinson, he argues: 'Whether this phenomenon is described as remedy exceeding right or as remedy implicitly redefining right or as remedy merely becoming a "criter[ion] by which . . . lawfulness is judged" is for present purposes immaterial. The important point is that in structural reform litigation, courts prospectively and selectively impose requirements that in other remedial contexts would not be constitutionally compelled.\')

162 Levinson (supra) at 879.

163 Ironically, the consequence of this phenomenon was for district courts to get involved in the minutiae of prison management which in turn led to concerns of the legitimacy of judicial management and the Supreme Court eventually cutting down the content of the right to limit such interference to cases of 'deliberate indifference' by prison officials. This is another example of remedial deterrence — fears that the nature of remedies will lead to cutting down the content of rights. Levinson (supra) at 901–902.

164 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC)('Dawood'). My use of *Dawood* is inspired by D Strauss 'The Ubiquity of Prophylactic Rules' (1988) 55 University of Chicago LR 190, referred to and discussed in Levinson (supra) at 900–904. Strauss's goal is to establish the legitimacy of prophylactic rules — rules which are not themselves required by the Constitution, but are practically necessary to ensure a right is protected — such as the *Miranda* warnings. He does this by showing that prophylactic rules are the norm, not the exception. He relies, for example, on *Lovell v Griffin* (303 US 444 (1938), where the Supreme Court struck down a statute prohibiting people from distributing literature without the permission of the City Manager. The rationale for this holding was not that the material Lovell wanted to distribute was protected by the First Amendment or that the City Manager had improperly denied Lovell permission. Rather, as Strauss notes, the Court's reasoning was that 'if there are no standards to guide an official's discretion, the official is too likely to deny a permit for an impermissible reason. Relatively clear standards do not eliminate the danger that an official will deny permission for an improper reason, but at least they reduce that danger.' Strauss (supra) at 196. The comparison with this case and *Dawood* should be immediately apparent. For more on prophylactic remedies, see T Thomas 'The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief' (2004) 52 Buffalo LR 301.
Having found that the limitation was unjustifiable, the Court suspended the order of invalidity but created interim guidelines on how the administrative officials should exercise their discretion in the meantime. This remedy can be nothing other than a prophylactic rule. O'Regan J's contention that the state's power itself violates dignity is unconvincing – as it implies that a spouse's dignity is impaired even if she is in fact granted the permit. In fact, what the *Dawood* Court does is to expand the right to dignity to include a right for administrative officials to act according to proper guidelines because of the possibility of officials making the wrong decision and the remedial difficulty/impossibility of a court re-assessing each application.

*The Union of Refugee Women & Others v The Director: Private Security Industry Regulatory Authority & Others* fits the same mould. The applicants unsuccessfully challenged a law that prevented refugees from registering as security guards. However, they also brought a challenge to the way that the regulator dealt with their applications for exemption from that law. A majority of the Constitutional Court held that the failure of the Authority to provide information to applicants on how to apply for exemption might violate their FC s 33 right to administrative action. It therefore ordered the Authority to ensure that all potential applicants had the necessary information. The Court must be right that the failure by the Authority to provide information cannot in itself be an infringement of the right to administrative action. There may be individual applicants who are assisted by the Authority or who are aware of what information to supply without the Authority's assistance, or who supply the correct information simply by careful thought, or by chance. In all these situations, the applicants will receive a fair hearing and the decisions that follow will be lawful, reasonable and procedurally fair. It is the probability that many applicants will not know what information to supply or how to apply that requires a prophylactic rule to prevent the potential of a limitation of FC s 33 because it is impractical for each applicant to separately request information when they do not have it. In the process, the Court builds into FC s 33 a right to information where the failure to provide it is likely to make it impossible to apply. The difficulty in fashioning perfect remedies for each violation necessitates a different interpretation of the right.

One more example: *Jaftha v Schoeman & Others; Van Rooyen v Stoltz & Others*. The two applicants had their houses sold in execution to repay meagre Magistrate Court judgment debts. They challenged the provision which permitted their immovable property to be sold without the intervention of a court. The

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165 *Dawood* (supra) at para 39 ("The right to dignity of spouses is limited by the statutory provisions that empower immigration officers and the DG to refuse to grant or extend a temporary permit.")

166 2007 (4) BCLR 339 (CC) ("Union of Refugee Women").

167 Ibid at para 79 (Kondile AJ poses the following question: 'Is the provision of this information not an element of procedurally fair administrative action envisaged in section 3 of [the Promotion of Administrative Justice Act 3 of 2000]?' However, it leaves the question unanswered. The clearest indication that Kondile AJ had no intention of answering the question is that, despite his insistence that all administrative action claims must first be considered in terms of PAJA, he does not engage PAJA at all.)

168 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC) ("Jaftha").
Constitutional Court held that the removal of somebody's existing access to housing violated FC s 26(1) which guarantees that '[e]veryone has the right to have access to adequate housing.' They remedied the violation by reading words into the statute that required a magistrate, after considering all relevant circumstances, to approve the execution of any immovable property. This seems like an entirely appropriate remedy. However, like Dawood and Union of Refugee Women, Jaftha effectively turns the FC s 26(1) right to adequate housing into a right not to have any immovable property sold without intervention of a court. The remedy — and therefore the right — applies equally to the execution of business premises or a holiday home as it does to a person's only potential shelter). The necessary prophylactic rule expands the content of the right because it was too difficult (or even impossible) to draft a remedy that would only apply to those persons whose access to basic housing was really at stake. Although the owner of business premises or a holiday home will not be able to avoid execution, after Jaftha, FC s 26(1) prevents his property from being sold unless a court has considered the case.

**Remedial substantiation**

While the first three forms of remedial equilibration all affect the content of the right, the fourth — remedial substantiation — exposes how remedies determine a right's value: 'the cash value of the right is . . . nothing more than what the courts . . . will do if the right is violated' or, to put it differently, it is not only the case that 'a right without a remedy is worthless, but also that a right with less remedy is worth less and a right with more remedy is worth more.' Unlike remedial deterrence and remedial incorporation, remedial substantiation is always present — the value of every right is determined by the possible (or probable) remedies that accompany its violation. A right that can only be accompanied by a declaratory order is generally less valuable than a right that can be remedied by an interdict or an award of damages. Remedial substantiation does not rely on a single conception of value. As long as the metric employed takes some account of how a right brings about real-world change, the value of the right is affected by the remedy it can provide.

This idea of remedial substantiation is, in many ways, the heart of the assertion that rights and remedies are not separate. The ultimate test of the value of a right, on this account, is the practical change that it can achieve. As Thomas correctly argues:

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169 Ibid at paras 64 and 67.

170 Levinson (supra) at 887.

171 Ibid at 904. This extension of the normative basis for the ubi jus ibi remedium principle is discussed earlier at § 9.2(b) supra.

172 Of course the standard to determine whether a remedy is 'better' or 'worse' — and therefore whether a right is more or less valuable — is far from uncontroversial. Although I think that other considerations can legitimately be taken into account in choosing a remedy (see § 9.2(d) infra), for present purposes, when I say that a remedy is less valuable, I mean that it provides less relief to the victim. However, even employing that relatively clear standard, what remedy best vindicates a right and therefore makes the right more 'valuable' will, in many cases, be open for debate. The best I can do is to acknowledge that limitation.
Rights standing alone are simply expressions of social values. It is the remedy that defines the right by making the value real and tangible by providing specificity and concreteness to otherwise abstract guarantees.\textsuperscript{173}

Levinson offers the fate of criminal procedure rights in the post-Warren Court era as an example of remedial substantiation.\textsuperscript{174} The Warren Court had established very powerful doctrines protecting accused persons: perhaps none so powerful as the \textit{Miranda} rights to be informed of the right to silence and the right to legal counsel.\textsuperscript{175} Under the more conservative Burger and Rehnquist courts, these rights remained untouched and were even rhetorically strengthened. However, the remedies available to enforce these rights were dramatically reduced. Originally, the admission of any evidence obtained without \textit{Miranda} warnings was automatically excluded. However, the Court later defined the warnings as a sub-constitutional prophylactic rule that could be deviated from in certain circumstances.\textsuperscript{176} This move then permitted the Court to permit the admission of evidence indirectly derived from a \textit{Miranda} violation\textsuperscript{177} and to hold that evidence obtained without a \textit{Miranda} warning is admissible to impeach the accused’s testimony.\textsuperscript{178} Levinson’s point is that a right requiring automatic exclusion is very different from a right that permits evidence to be admitted in certain circumstances.

It is not strictly necessary to provide examples of remedial substantiation. Once the basic principle — that rights are only worth as much as their remedies — is accepted, every decision where a remedy is provided provides a measure of the value of the right. However, for the sake of illustration, I will provide a few examples of rights that are worth less (or more) because of the remedies that they can provide.\textsuperscript{179} The big difference between these examples and the fate of the \textit{Miranda} remedies outlined above is that these do not describe a change in the value of rights over time, but show how the choice of remedy in specific instances affects the worth of the right.

\textit{Sanderson v Attorney-General, Eastern Cape} is an excellent example of remedial substantiation.\textsuperscript{180} To recap: \textit{Sanderson} concerns the FC s 35(3)(d) right to be tried

\begin{thebibliography}{99}
\bibitem{174} Levinson (supra) at 908–911. See also C Steiker ‘Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers’ (1996) \textit{94 Michigan LR} 2466.
\bibitem{175} \textit{384 US 436} (1966).
\bibitem{176} See, for example, \textit{Michigan v Tucker} \textit{417 US 433}, 439 (1974).
\bibitem{179} See also the cases discussed in § 9.2(b) supra.
\bibitem{180} \textit{1998 (2) SA 38 (CC), 1997 (12) BCLR} 1675 (CC).
\end{thebibliography}
without unreasonable delay. Kriegler J held that the remedy granted for a violation of the right depended on the nature of the prejudice caused by the delay:

appropriate relief for an awaiting-trial prisoner who has been held too long; a refusal of a postponement is appropriate relief for a person who wishes to bring matters to a head to avoid remaining under a cloud; a stay of prosecution is appropriate relief where there is trial prejudice.\(^{181}\)

In contrast, in both the US and Canada the only remedy available is a permanent stay, no matter what the nature of the prejudice.\(^{182}\) The difference in possible remedies means that the value of the South African right is very different from American or Canadian right. One permits an accused to go free without ever facing a trial; the other will ordinarily only allow the accused to speed up the trial or to be compensated for a delay.

Other easy examples are *Fose v Minister of Safety and Security* and *Thint (Pty) Ltd v National Director of Public Prosecutions & Others; Zuma & Another v National Director of Public Prosecutions & Others*.\(^{183}\) In *Fose*, the Court held that punitive damages are not appropriate for isolated cases of police abuse.\(^{184}\) The case is easy because the ‘cash value’ of the right can be measured in monetary terms. If the Court had permitted punitive damages, Mr Fose would have received far more compensation and the right would have had impact on the systemic problem of police brutality. In *Thint* the Constitutional Court overturned an SCA decision\(^{185}\) that had held when a warrant was declared invalid for violating the right to privacy, the items seized under the warrant had to be returned to the accused. The Constitutional Court held that the evidence could be preserved so that the trial court could decide whether to admit or not. The value of the right to privacy varies drastically across the two decisions.

The next two examples are instances where the Constitutional Court suspends orders of invalidity. One. When the Constitutional Court invalidated the laws prohibiting homosexual marriage, it suspended — over the dissenting voice of O'Regan J — the order for one year to allow the legislature to create an appropriate legislative framework.\(^{186}\) The effect was that the applicants, and all other homosexual couples, would have to wait one year to marry. The majority and O'Regan J envisage not only different remedies, but different rights: the majority protects a right to marry in the future; O'Regan J protects a right to marry now. Two:

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\(^{181}\) *Ibid* at para 41.

\(^{182}\) Although, as I noted above (§ 9.2(c)(i)(cc) supra) the difference in remedy also allowed the Court to adopt a much more lenient approach to determining whether a delay was unreasonable than that adopted in the US and Canada. In some ways, the combination of making it easier to prove a violation but offering lesser remedies once that is done places the South African right on more or less the same level as the US or Canadian alternative.


\(^{184}\) 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC).

\(^{185}\) *National Director of Public Prosecutions & Another v Mahomed* [2008] 1 All SA 181 (SCA).
Matatiele Municipality & Others v President of the Republic of South Africa & Others. The applicants successfully challenged a constitutional amendment that had moved them from KwaZulu-Natal to the Eastern Cape just before the 2006 municipal elections. The Court ruled that the KwaZulu-Natal legislature had not adequately facilitated public involvement when it considered the legislation. The Court, however, decided not to invalidate the elections and granted Parliament 18 months to remedy the defect. The right of the people of Matatiele to participate in the law-making process permitted only a future opportunity to convince the legislature not to move them to the Eastern Cape. It did not — and was therefore worth less than a right which did — automatically entitle them to elections held in accordance with lawfully drawn provincial boundaries.

**(ee) Litigation impact**

Remedies can determine the content of rights by influencing what rights get litigated and how they get litigated. A right with a powerful remedy is more likely to encourage potential beneficiaries of the right to seek a judicial solution, while beneficiaries of a right with a very weak remedy might be more inclined to seek alternative redress. For example, the Constitutional Court in National Coalition for Gay and Lesbian Equality v Minister of Home Affairs found that it had the power to read words into a statute and therefore to extend benefits offered to heterosexual couples to same-sex couples. This sparked a long string of cases successfully challenging similar laws. And in most cases, the Court articulated virtually identical remedies. It is conceivable that the Court could have decided that it did not have the power to read words into a statute, or that the appropriate remedy was to declare the provision invalid, leaving both heterosexual and homosexual couples without legal recognition. If it had chosen either course, it is highly unlikely that the other cases would have been brought. Same-sex couples would know that they would have very little to gain even if they succeeded on the merits.

Socio-economic rights offer a powerful counter-example. Despite the unique inclusion of directly enforceable socio-economic rights in the Final Constitution and

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186 Minister of Home Affairs & 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) ("Fourie").

187 2007 (6) SA 477 (CC), 2007 (1) BCLR 47 (CC) ("Matatiele II").

188 Ibid at paras 92–99.

189 Levinson (supra) at 912–913 (Levinson does not fully develop this aspect, but suggests it as an additional possibility.)

190 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC).

191 See, for example, Satchwell v President of the Republic of South Africa & Another 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC) (Extending benefits for judges partners); Du Toit & Another v Minister of Welfare and Population Development & Others (Lesbian and Gay Equality Project as Amicus Curiae) 2003 (2) SA 198 (CC), 2002 (10) BCLR 1006 (CC) (Extending adoption rights); Gory v Kolver NO & Others 2007 (4) SA 97 (CC), 2007 (3) BCLR 249 (CC) (Permitting same-sex partners to inherit intestate).
widespread lack of access to adequate food, water, healthcare, housing and education, relatively few socio-economic rights cases have been litigated. Thus far the Constitutional Court has considered only five cases that rely directly on socio-economic rights.\(^{192}\) There has been no direct challenge in any court on the rights to education or food. While there are a number of possible reasons for this paucity of challenges,\(^{193}\) at least one plausible cause is the ineffectiveness of the orders that the Constitutional Court has granted in the cases that it has decided. Despite the applicant's 'success' in *Grootboom* and TAC, serious structural and political problems undermine the implementation of the respective orders. Potential litigants may feel that it is not worth their time to litigate socio-economic rights if the remedy they are likely to receive will do little to directly alter their circumstances — even if it does have some influence on government policy.

**((ff)) Remedies and jurisdiction**

Finally, the remedy an applicant claims may determine whether the Court hears the case at all.\(^{194}\) The paradigmatic case is *East Zulu Motors (Proprietary) Limited v Empangeni/Ngwelezane Transitional Local Council & Others*.\(^{195}\) The Court held that because there were no 'reasonable prospects that this Court would make an order on appeal which would be of any benefit to the applicant', it refused leave to appeal.\(^{196}\) Similarly, in *Hlophe v Constitutional Court of South Africa & Others*, the minority judges refused to consider Judge President Hlophe's allegations that the Constitutional Court had infringed its constitutional rights because no matter what they found on the substantive question, they would not have granted the remedy he sought — a declaration of rights.\(^{197}\)

Although the content of the right is not directly affected by the remedy, the remedy determines whether the content of the right is examined at all. It acts in a

\(^{192}\) Soobramoney *v* Minister of Health, KwaZulu-Natal 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC); Government of the Republic of South Africa & Others *v* Grootboom & Others 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC); *Minister of Health and others v Treatment Action Campaign and Others (2) 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC); 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)(Extending social security benefits to permanent residents); and Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg *v* City of Johannesburg & Others 2008 (3) SA 208 (CC)(Addressing the housing rights of residents in dilapidated buildings in the inner city of Johannesburg.)

\(^{193}\) The most obvious reasons are lack of resources to litigate and the difficulty of proving a violation under the reasonableness standard adopted by the Court.

\(^{194}\) See generally, R Fallon 'The Linkage Between Justiciability and Remedies — And Their Connections to Substantive Rights' (2006) 92 *Virginia LR* 633 (Argues that remedies affect whether litigants have standing to litigate rights. Because of our extremely wide standing rules, this exact link is not present (or at least, not visible) in South Africa. However, the issue under discussion here — the link between jurisdiction and remedies — is closely related.)

\(^{195}\) 1998 (2) SA 61 (CC), 1998 (1) BCLR 1 (CC).

\(^{196}\) Ibid at para 13.

\(^{197}\) [2008] ZAGPHC 289 (Gildenhuys J and Marais J wrote dissenting judgments.)
similar way to the phenomenon discussed above — the remedy may influence a court to consider some rights in detail and ignore others completely.

This approach also echoes elements of remedial substantiation. A right that cannot be meaningfully litigated to achieve certain ends is worth less than a right that can be so used. That is not to say that there are not good reasons to limit jurisdiction to avoid hearing cases where the remedy sought is clearly inappropriate, but it does mean that there is a connection between right and remedy.

(gg) Conclusion

I hope I have shown that, as a descriptive matter, the theory of remedial equilibration (and not rights essentialism) is the most accurate account of the manner in which the Constitutional Court operates. The Court does not think about rights in a void that is uninfluenced by the practicalities of the real world. It interprets rights with a constant eye on the remedy that it could provide. These observations are not, generally, meant as a criticism of the Court, but as a description of how it reasons. In the next section I consider whether remedial equilibration, as well as being descriptively accurate, recommends itself on normative grounds.

(iv) Equilibration and Transformation

The fact that courts do allow remedial considerations to colour their interpretation of rights does not automatically mean that we should support that practice. Despite the difficulties inherent in separating remedies from rights in the judicial mind, it is not impossible to imagine a judicial system that does just that:

the institution of judicial review could . . . be changed to facilitate nonfunctional constitutional interpretation, for example by establishing a separate constitutional court and making constitutional adjudication purely declaratory or advisory. This would ensure that judges were not peeking at consequences, because there would be none, and it would insulate abstract constitutional judgments from social contexts where they would be too costly to implement or threaten serious harm.  

Levinson himself seems to advocate against this approach. In his view, full adoption of remedial equilibration is preferable and would be very different from the 'dystopia' described above:

In a constitutional culture that had thoroughly repudiated rights essentialism, courts would be liberated to take as full account of empirical knowledge in the process of interpreting the Constitution as they sometimes do in developing elaborate institutional reform remedies. There would be no reason, for example, why the types of fact-finding procedures used by legislatures and administrative agencies — and for that matter by courts in the remedial phase of structural reform litigation — should not also be available to courts deciding the shape of constitutional rights.

In order to understand the debate between these two visions properly, it is useful to sketch the outlines of a deeper jurisprudential debate between Ronald Dworkin and his adherents on the one hand, and the Chicago School of Richard Posner and Cass Sunstein on the other. Dworkin endorses a rights essentialist philosophy where

198 Levinson (supra) at 939.

199 Levinson (supra) at 939.
judges seek legal principles and then apply them to concrete cases.\textsuperscript{200} Posner and Sunstein prefer a theory more compatible with remedial equilibration — their theory takes account from the start of social realities and devises constitutional rights in order to best solve practical problems.\textsuperscript{201} The difference is exemplified by Levinson's discussion of the two school's different approaches to the question of assisted suicide which came before the United States Supreme Court in \textit{Washington v Glucksberg}.\textsuperscript{202} Dworkin contributed to an amicus brief — which became known as the 'Philosophers' Brief' — that argued that the moral and constitutional principles demanded the recognition of a right 'to live and die in the light of [one's] own religious and ethical beliefs'.\textsuperscript{203} The implementation of that right was only relevant once the principle had been adopted. Sunstein and Posner rejected Dworkin's 'top down' approach and agreed with the Court that the existence of a right to assisted suicide should depend on the practicalities of implementing it: If the risks of abuse by doctors or others are too great, then there ought not to be any cognizable right.\textsuperscript{204}

Both positions seem to have benefits and drawbacks. Remedial equilibration makes it easier to take account of detailed facts. The problem is that by making that inquiry part of the definition of the right, it seems more likely to protect the status quo. If a court defines a right according to the existing position, it will be far more difficult to explain why the right requires that position to change. On the other hand, while it avoids the danger of stasis, the rights essentialist position risks irrelevance by creating rights that can never be realized.\textsuperscript{205} It seems obvious to me that either extreme position is undesirable. But what balance should South African courts strike?\textsuperscript{206}

To begin, we must remember that the Final Constitution is not an ordinary document; it is a powerfully \textit{transformative} document.\textsuperscript{207} It is not meant to maintain the status quo, but to change it. Its goals map most closely onto those of the rights essentialist. In the words of Justice Kriegler:

\begin{quote}
When Courts give relief, they attempt to synchronise the real world with the ideal construct of a constitutional world created in the image of s 4(1). There is nothing surprising or unusual about this notion. It merely restates the familiar principle that rights and remedies are complementary. The relationship holds true and is uncontroversial at common law. The Constitution is also a body of legal rules and we should expect to find in it the same pairing of rights and remedies. Indeed, \textit{how much more so} in the case of an instrument that seeks to 'to create a new order' and provide a bridge
\end{quote}

\textsuperscript{200} Ibid at 927 citing R Dworkin 'In Praise of Theory' (1997) 29 \textit{Arizona State LJ} 353. See also, generally, R Dworkin \textit{Law's Empire} (1986).


\textsuperscript{202} 521 US 702 (1997).

\textsuperscript{203} Levinson (supra) at 928–929.
between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

The nature of our founding document favours a rights essentialist position that is more likely to transform current understandings of how society is structured.

That said, judges will inevitably consider remedial consequences in their determination of rights. Even in the pure declaratory system Levinson hypothesises, judges would be influenced by the actions that might flow from the implementation of their declarations. It is useless to deny or suppress the judicial instinct to

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204 Ibid at 929–930. Another issue that arises in the choice between rights essentialism and remedial equilibration is the question of legitimacy. One defence of rights-essentialism is that it is the foundation for the legitimacy of judicial review. While judicial remedies inevitably bear a great resemblance to legislative or executive action, constitutional rights have some higher authority by virtue of the manner of the adoption or the truth of the principles they embody that separates them from the ordinary political concerns of the other branches of government. Traditional justifications for constitutionalism rest on the special status of constitutional rights. Remedies are merely the ‘practical handmaids’ necessary to realise these rights. A theory that disrupts the separation between rights and remedies also threatens the legitimacy of judicial review. As Levinson notes, the fact that legitimacy depends on rights rather than remedies can be used cynically by courts to keep rights officially untouched but gut their meaning by altering the remedies they can provide: ‘Evisceration of constitutional protections is often accomplished by severing remedies while preserving the veneer of rights. . . . Eliminating remedies, on the other hand, does not create the same kind of legitimacy problems, not just because remedies are much less visible to the public, but, more importantly, because constitutional theory takes for granted that remedies are expected to change along with political and policy preferences.’ Levinson (supra) at 934–935. On the other hand, ‘whenever the Court revokes a controversial constitutional right, it announces that constitutional rights are the contingent product of political forces and social needs rather than abstract, timeless moral principles, and consequently threatens its own legitimacy as the privileged expositor of constitutional values,’ ibid at 936–937. Levinson argues against this conclusion which is, in his view, based on a narrow view of democracy and therefore of what is necessary to legitimate judicial review. But while he suggests possible ways for political theory to develop to legitimate a more remedial-equilibration-type view of judicial practice: One, ‘jettison the simplistic equation of democracy and majoritarianism and develop a richer conception of democracy more inclusive of minority viewpoints than simple majoritarianism.’ Two, ‘give up trying to reconcile judicial review and democracy and instead to show how judicial review serves values that are supplementary to, and perhaps (in limited areas) more important than, democracy.’ Ibid at 937. His main argument is that ‘the legitimacy of judicial review, as a sociological matter, depends far more on its practical consequences than on any political theory developed to defend it. . . . A persuasive theoretical defense of the legitimacy of judicial review,’ he continues, ‘therefore, may be a cog that plays no part in any consequential mechanism. Perhaps forgetting about legitimacy and concentrating on results would lead not only to better results but also, ironically, to enhanced legitimacy.’ Ibid.

205 See Bel Porto School Governing Body & Others v Premier, Western Cape & Another 2002 (3) SA 265 (CC), 2002 (9) BCLR 891 (CC) at para 186 (Mokgoro and Sachs JJ) (‘It would indeed be most unsatisfactory and have negative consequences for constitutionality to fail to provide a remedy where there has been an infringement of a constitutional right. While courts should exhibit significant deference towards the administration and recognise the practical difficulties which the administration faces, it could create a misleading impression that in instances where there is an infringement of a constitutional right, and there are significant practical difficulties in remedying the injustice caused, a decision-maker will not be held to account. It is the remedy that must adapt itself to the right, not the right to the remedy.’)

206 I am concerned here only with South African courts and not with creating a theory for all jurisdictions primarily because I do not think the same approach would necessarily be appropriate in all jurisdictions.
coordinate rights and remedies that permits judges to occupy simultaneously the world of the ideal and the world of the real. This recognition seems to support a moderate rights essentialist position. First, the awareness of remedial consequences that Levinson celebrates as the major benefit of a remedial equilibrationist position can occur equally well within the bifurcated structure of rights essentialism by relegating the serious fact-finding procedures to the remedial stage. Courts can there take cognisance of factual reality without distorting the aspirational and transformative nature of the Final Constitution.

Secondly, the major benefit of Levinson's thesis is making us all — and especially judges — aware of how rights and remedies are connected. While that awareness can be used to embrace those connections, it can also be used to try and avoid them. If a judge is aware of the potential dangers of remedial equilibration, she will be more likely to keep rights and remedies separated in her mind and her judgments. It is necessary here to distinguish between the various forms of remedial equilibration: for not all forms of remedial equilibration preclude judges from making the constitutional dream real. Remedial flexibility and remedial incorporation aid in the realisation of the constitutional ideal by making it possible for rights to be defined as broadly as possible and by including practical guarantees that do not undermine the content of the right itself. Remedial substantiation is neutral in this

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208 Fose (supra) at para 94 (my emphasis) quoting the FC's preamble. See also S v Makwanyane 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 262 (Mahomed J)('All Constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people, and which discipline its government and its national institutions; the basic premises upon which judicial, legislative and executive power is to be wielded; the constitutional limits and the conditions upon which that power is to be exercised; the national ethos which defines and regulates that exercise; and the moral and ethical direction which that nation has identified for its future. In some countries the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and 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. The past institutionalised and legitimised racism. The Constitution expresses in its preamble the need for a "new order . . . in which there is equality between . . . people of all races". . . . The past was redolent with statutes which assaulted the human dignity of persons on the grounds of race and colour alone; s 10 constitutionally protects that dignity. The past accepted, permitted, perpetuated and institutionalised pervasive and manifestly unfair discrimination against women and persons of colour; the preamble, s 8 and the post-ambles seek to articulate an ethos which not only rejects its rationale but unmistakenly recognises the clear justification for the reversal of the accumulated legacy of such discrimination. The past permitted detention without trial; s 11(1) prohibits it. The past permitted degrading treatment of persons; s 11(2) renders it unconstitutional. The past arbitrarily repressed the freedoms of expression, assembly, association and movement; ss 15, 16, 17 and 18 accord to these freedoms the status of "fundamental rights". The past limited the right to vote to a minority; s 21 extends it to every citizen. The past arbitrarily denied to citizens, on the grounds of race and colour, the right to hold and acquire property; s 26 expressly secures it. Such a jurisprudential past created what the post-ambles to the Constitution recognises as a society 'characterised by strife, conflict, untold suffering and injustice'. What the Constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting "future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex".')
regard — it is simply a way of evaluating the worth of rights. Looking through that frame can inspire more or less change. The relationships between remedies and litigation strategies can similarly act either way depending on the remedy. It can promote or prevent litigation to enforce rights. The only truly dangerous relationship is remedial deterrence. The urge for judges to define rights restrictively because they believe their remedial options are limited undercuts the transformative potential of the Final Constitution.

In my view, awareness of remedial deterrence, combined with a commitment to making constitutional rights real and a remedial regime that gives courts virtually unlimited powers to construct any remedy they need to realise the right, justifies rejecting the adoption of remedial equilibration as the normative basis for remedial action. While there will always be instances where judges instinctively limit the content of a right in order to avoid the creation of paper tigers, we ought to encourage judges to be adventurous in fashioning remedies to give effect to rights which may, on first blush, seem unenforceable. Paul Gerwitz has, in a slightly different context, endorsed a similar approach:

While the existence of certain remedial costs may justify their consideration at the remedy stage if they are not part of the definition of the right, it does not explain or justify why these costs are not included as part of the right itself, why the right-remedy gap should not be closed by redefining the right to take such costs into account. . . . The . . . answer is that where [the] consideration of remedial costs leads to a failure to provide a fully effective injunction, it does not necessarily foreclose other remedies. Even if an injunctive remedy is too costly, other judicial remedies such as damages may be available to eliminate some effects of the violation, or other branches of government may try to vindicate the right in ways that a court believes it should not. Thus, it is meaningful not to redefine the right but to preserve it as an aspiration that may be vindicated in other ways or places. 210

An important element that Gerwitz identifies is that courts are not the be all and end all of enforcing rights. Other branches of government, and even civil society and individual citizens, have the power and in some cases, the responsibility to realise the constitutional dream. But if courts define rights restrictively then the other branches are likely to view the restrictive interpretation as the limit of their obligations. 211

To sum up, my answer to the relationship between rights and remedies is: (a) acknowledge the interaction between the two; (b) use this awareness to avoid those

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209 Gerwitz is concerned with different ways of choosing remedies — rights maximizing or interest balancing — which are discussed in detail below. § 9.2(e)(ii) infra.


211 That is not to suggest that courts should only declare rights, but that their declarations of rights impact not only what courts do in individual cases, but how all other social actors perceive the meaning of the Final Constitution. Susan Sturm has correctly argued against privileging the rule elaboration role of courts because courts are much more than rule- announcers. S Sturm 'Equality and the Forms of Justice' (2003) 58 Univ of Miami LR 51, 63 ('Treating rule elaboration and enforcement as the only legitimate mode of judicial interaction discounts much of courts' actual practice. It also discourages the development of theories and criteria to guide judicial intervention aimed at responding to complex conditions that threaten publicly articulated values.' ) But that does not mean that rule-announcing is not part of the courts' role.
instances where remedies act to narrow rights; (c) use creative remedies to realise rights — it is better that we start by imagining that things 'could be different, could be better.'\(^\text{212}\) Of course my answer requires a remedial regime which gives courts the necessary discretion. That regime is the subject of the next section.

\((d)\) Discretion

This section considers two issues: (a) the extent of remedial discretion enjoyed by South Africa’s courts; and, briefly, (b) the relevance of discretion for the legitimacy of judicial review.

\((i)\) The Extent of Discretion

It is difficult to imagine language which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion.\(^\text{213}\)

These words of McIntyre J were written about s 24(1) of the Canadian Charter of Rights. Section 24(1) permits courts the power to grant a remedy that is 'appropriate and just in the circumstances'. The words of our own Constitution in FC s 38 — 'appropriate relief' — and FC s 172(1)(b) — 'any order that is just and equitable' — are equally broad. Have South African courts followed Justice McIntyre's advice about not interfering with this free discretion? Yes and no. The courts have paid considerable judicial lip service to the broad discretion afforded by FC ss 38 and 172(1)(b). But they have limited remedial discretion by creating standards and principles to guide the exercise of that discretion and have limited the discretion that trial courts have by interfering regularly on appeal (at least in some classes of cases).\(^\text{214}\)

Kate Hofmeyr argues that we should analyse the extent of remedial discretion courts can exercise using a 'central case' model.\(^\text{215}\) This model works by determining what the conditions would be for the freest exercise of discretion — the central case — and then analysing how far from that central case any particular system fails. She analyses this on two axes: standards and review. The standards axis measures 'the range of choices open to the decision-maker' while the review axis evaluates 'the extent to which the decision is reviewable and the grounds upon which it is reviewed'.\(^\text{216}\) The central case of discretion exists where a body has

\[\text{OS 06-08, ch9-p45}\]

\[\text{OS 06-08, ch9-p46}\]

\[\text{212}\] Langa (supra) at 360 (‘For as long as [challenges to the constitutional goal] exist there will be a drive to overcome them, there will be a tension that keeps alive the idea that things can be different. When all the challenges are gone, that is when the real danger arises. That is when we slip into a useless self-congratulatory complacency, a misplaced euphoria that where we are now is the only place to be. That is when we stop dreaming, imagining and planning that things could be different, could be better. That, for me, is the true challenge of transformation.’)

\[\text{213}\] R v Mills [1986] 1 SCR 863, 965

\[\text{214}\] ‘Understanding Constitutional Remedial Power’ (Unpublished Mphil Thesis Oxford University, 2006, on file with the author) (‘Remedial Power’).
The discretion of South African courts does not fit that description. But just how far is our situation from that of the central case? This question is best answered by separately analysing the two axes.

**(aa) Standards Axis**

The standards axis can be further broken down to measure both procedural and substantive standards. Hofmeyr identifies three procedural limits on judicial remedial discretion: *(a)* courts must reach a decision; they cannot — generally — decide not to decide; *(b)* courts are constrained by form — they must provide a reasoned judgment; *(c)* courts are reactive — they have to wait for cases to come to them. A fourth procedural constraint relates to the adversarial nature of the South African legal system. The court will, ordinarily, not consider a remedy that has not been debated by the parties because it is unfair to make an order without giving both sides an opportunity to comment on it. The remedy need not be raised by the parties themselves — the Court could raise the possibility in oral argument — but the parties must somehow be able to argue for or against it.

Hofmeyr credits her use of these two axes to Galligan (supra) and M Rosenberg 'Judicial Discretion of the Trial Court, Viewed from Above' (1971) 22 Syracuse LR 635. Hofmeyr 'Remedial Power' (supra) at n 100. Her taxonomy is also comparable — although it employs different nomenclature — to that suggested by William Fletcher. 'The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy' (1982) 91 Yale LJ 635, 642–645. Fletcher describes the forms of control over discretion as 'internal' and 'external'. Internal controls correspond to Hofmeyr's 'standards' axis and determine the impact of legal norms on the original decision. External controls are those controls which operate after the decision has been made, usually by appellate courts.

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215 Hofmeyr 'Remedial Power' (supra) at 53.

216 Ibid at 54.

217 Ibid at 54–55.

218 See, for example, Nyathi v Member of the Executive Council for the Department of Health Gauteng & Another [2008] ZACC 8 (Court ordered raised the possibility of a structural interdict with the parties in oral argument. It eventually made the order, despite no party originally requesting it.)

219 Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae); President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae) 2004 (6) SA 40 (SCA), 2004 (8) BCLR 821 (SCA)('Modderklip SCA').
If a constitutional breach is established, [courts are] mandated to grant appropriate relief. A claimant in such circumstances should not necessarily be bound to the formulation of the relief originally sought or the manner in which it was presented or argued.\(^\text{223}\)

However, this does not detract from the duty to raise, as the SCA did in *Modderklip*, alternative relief with the parties either in oral argument or through directions. This procedural rule does therefore still somewhat limit the options that a court may choose from.

The impact of substantive standards depends not only on the quantity of standards, but also their ‘quality’; or, to put it differently, how many options the standard leaves for the decision maker. Generally, a standard can be either ‘broad’ or ‘narrow’. A broad standard constrains discretion but still leaves a number of options open. On the other hand, a narrow standard allows very few possible outcomes.\(^\text{224}\) In terms of this framework, to what extent are South African courts bound by substantive standards? There are two answers to this question: what the Constitutional Court says, and what it does. These are not in direct conflict, but they are in tension.

At the level of rhetoric, the Court has constantly maintained that courts must possess a broad discretion in crafting remedies.\(^\text{225}\) The Final Constitution gives the courts the power to grant ‘appropriate relief’ for any infringement or threat of infringement to a right in the Bill of Rights\(^\text{226}\) and the power to ‘make any order that is just and equitable’ when deciding any constitutional matter.\(^\text{227}\) The best rhetorical statement of the Court’s position appears, somewhat ironically, in *Fose*: The only requirement of the interim Constitution is that the relief given by a competent court in any particular case should be “appropriate relief”. *It is left to the courts to decide what would be appropriate relief in any particular case.*\(^\text{228}\)

\(^{222}\) President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd (Agri SA & Others, Amici Curiae) 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC)2 at para 52.

\(^{223}\) Modderklip SCA (supra) at para 18.

\(^{224}\) Hofmeyr ‘Remedial Power’ (supra) at 55–57.

\(^{225}\) See, for example, Janse van Rensburg NO & Another v The Minister of Trade and Industry NO & Another 2001 (1) SA 29 (CC), 2000 (11) BCLR 1235 (CC) at para 28 (‘This Court has *broad remedial discretion* to make a just and equitable order’ (my emphasis)); Minister of Health & Others v Treatment Action Campaign & Others (2) 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC) at para 101 (‘[FC s 38] contemplates that where it is established that a right in the Bill of Rights has been infringed a court will grant “appropriate relief”. It has *wide powers* to do so.’ (my emphasis)); Sanderson v Attorney-General, Eastern Cape 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC) at paras 27 and 38 (‘Our *flexibility in providing remedies* may affect our understanding of the right’ and ‘[the court has] adopted a *flexible approach* that is certainly inconsistent with the availability of a single remedy in North American jurisdictions’ (my emphasis)).

\(^{226}\) FC s 38.

\(^{227}\) FC s 172(1)(b). As noted above this power embraces the ability to grant a remedy even where there has been no violation of a right. See § 9.2(b)(iv) supra.
The Court has only accepted two unalterable limitations on remedial discretion. First, the Court has acknowledged that the command in FC s 172(1)(a) that a court 'must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency' prevents it from granting an order that avoids invalidity. Second, as discussed in detail later, the Court has read the Final Constitution to require that every remedy must be 'effective'.

But despite the Constitutional Court's expression of relatively unfettered choice of remedy, it has, over time, established a wide range of specific presumptions and principles that seriously constrain the decisions of both itself and lower courts. As Hofmeyr puts it:

The Constitutional Court's remedial approach has mimicked the development of equitable discretion in English law in so far as it has set out guidelines for the exercise of remedial power in order to constrain its exercise. With the accretion of cases, this approach has drawn the constitutional remedial power towards the periphery of the concept of discretion.

For example, there are presumptions in favour of retrospectivity and against suspension, supervisory interdicts, punitive damages and interim interdicts. The Court has also created a real hierarchy of remedial choice when dealing with the substantive effect of declarations of invalidity. A court must first determine whether the provision is capable of a constitutional interpretation. If not, it should, if possible, read-in or sever to cure a constitutional infirmity rather than declare the whole section invalid. The Court has created relatively complex rubrics to determine whether reading-in or severance is appropriate. Only if reading-in or severance are not possible should it declare the whole section invalid. The Court has also

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228 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC) at para 18
(The court does earlier recognize the limitation imposed by the obligation to declare unconstitutional law and conduct invalid.)

229 See § 9.2(e) infra. This 'limitation' is not, however, universally respected.

230 Hofmeyr 'Remedial Power' (supra) at para 63.

231 See § 9.4(d)(ii) infra.

232 See § 9.4(e)(i) infra.

233 See § 9.6(e) infra.

234 See § 9.5(a)(ii)(bb) infra.

235 See § 9.5(c)(ii) infra.

236 See § 9.4(a) infra.

237 See § 9.4(d)(iii) infra.

238 See § 9.4(d)(i) infra.
established at least two absolute rules: Notional severance can never be used to
cure an omission and a suspension can never be extended after the period of
suspension has expired. But it is not only the presumptions, principles and rules that the Court has laid
down that constrain remedial discretion. The general principle that like cases should
be treated alike means that decisions in similar previous cases will have a strong
gravitational pull on future judgments. For example, in Engelbrecht v Road
Accident Fund the Court had to decide whether to limit the retrospective effect of an
order that a prescription clause was unconstitutional. It conducted no analysis of
the effect of retrospectivity in the specific case. Instead, it simply cited a general
principle that ‘an order of invalidity should have no effect on cases which have been
finalised prior to the date of the order of invalidity’ and then noted that the
‘principle was apparently applied in Mohlomi [another case dealing with
prescription] and there is no reason not to apply it in this matter.’ For the Court, a
principle combined with its application in a similar case provided an
absolute answer to the question of remedy. As the Court decides more and more
cases, courts' remedial discretion will move further and further along the standards
axis and away from the central case of discretion.

This narrowing of discretion was inevitable. The Court was confronted with a blank
canvas and had to create some sort of guidelines to ensure certainty and relative
uniformity in the future. If the Court had not set down guidelines for when reading-in
was appropriate, High Courts would not have known what to look for and might have
taken disparate approaches. The disparity between these approaches would
eventually have to be solved by the Constitutional Court on appeal. If it did so
without laying down principles, the problem would have been perpetuated. However,
it is important that the guidelines and standards remain just that. FC ss 38 and
172(1)(b) do afford broad discretion: such discretion ought not to be undermined by
judicial fiat. And there is nothing in the case law to suggest that the Constitutional

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239 See § 9.4(d)(ii) infra.

240 See § 9.4(e)(i)(ee) infra.

241 For example, a string of cases concerning the retrospective application of changes affecting
succession took virtually identical tacks. See Brink v Kitshoff NO 1996 (4) SA 197 (CC), 1996 (6)
BCLR 752 (CC); Bhe & Others v Magistrate, Khayelitsha and Others; Shibi v Sithole & Others; SA
Human Rights Commission & Another v President of the RSA & Another 2005 (1) SA 580 (CC), 2005
(1) BCLR 1 (CC); Gory v Kolver NO & Others 2007 (4) SA 97 (CC), 2007 (3) BCLR 249 (CC)
discussed in § 9.4(e)(ii) infra.

242 2007 (6) SA 96 (CC), 2007 (5) BCLR 457 (CC)('Engelbrecht').

243 Ibid at para 45 quoting S v Bhulwana; S v Gwadiso 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579
(CC).

244 Mohlomi v Minister of Defence 1997 (1) SA 124 (CC), 1996 (12) BCLR 1559 (CC)

245 Engelbrecht (supra) at para 45.
Court would want to do so. The danger comes when the Court relies too easily on past precedent and fails to consider the virtue and vices of various remedies afresh in each case that comes before it. Similar cases may require similar results. However, an exercise of remedial discretion in one case should only provide guidance on how it should be exercised in a future case, not binding precedent.

(bb) The Review Axis

The review axis measures the extent to which lower court decisions are subject to alteration by higher tribunals. The central case would be where there is no review of a decision. In constitutional matters, the Constitutional Court occupies this position. But what is the position of the lower courts? A standard of review will fall closer to the central case if a higher court is only entitled to intervene in tightly circumscribed instances such as abuse of power or irrationality. The furthest one can go from the central case is de novo review.

The approach of the Constitutional Court turns on the nature of the remedy requested. These fall into two classes. If it is confronted with a 'constitutional remedy' such as a reading-in or suspension, then it applies a very high standard of review — and usually considers the remedy afresh. The Court has adopted the same approach to interdicts. On the other hand, where a more traditional remedy such as damages or a sentence of imprisonment is at issue, the Court has, generally, given lower courts much more leeway.

As Hofmeyr argues, the Court's approach to the first class of remedies — which I will, for lack of a better term, call 'constitutional remedies' — must be understood in light of the fact that the Court is obliged to confirm any order declaring an Act of Parliament or conduct of the President unconstitutional before the order has any force. As a result, the Court is obliged to determine the extent of the violation and therefore to interfere with the lower court's decision relating to the substantive extent of the invalidity and therefore will often have a direct impact on the possibility of reading-in and severance. In S v Shinga, the Court confirmed the High Court's declaration of invalidity of s 309B and 309C of the Criminal Procedure Act regulating appeals from the Magistrates' Court. But whereas the High Court found the procedure invalid in toto, the Constitutional Court found it invalid only to the extent that it permitted a record not to be sent in some cases and for appeals to be considered by only one judge. Accordingly, Yacoob J simply read the necessary words in to cure those narrow constitutional inconsistencies.

Although the Final Constitution does not require the Constitutional Court to review the lower court's ancillary remedial orders — such as suspension, limiting retrospectivity and so on — the Court has assumed that it has the power to do so virtually de novo. This attitude of the Constitutional Court is expressed by O'Regan J in Dawood v Minister of Home Affairs:

246 See my criticism of the Court's retrospectivity jurisprudence in § 9.4(e)(ii)(cc) infra.

247 FC 167(5).

248 2007 (5) BCLR 474 (CC), 2007 (2) SACR 28 (CC).

249 Ibid at paras 55–56.
Although this matter is before this Court for the confirmation of an order of invalidity, there is nothing in section 172 that suggests that the Court's power to make appropriate orders is limited in such matters. It seems clear from the language of section 172(1), in particular, that as long as a court is deciding a constitutional matter "within its power", it has the remedial powers conferred by that section, as broad as they may be. In the circumstances, therefore, the Court is not empowered merely to confirm or refuse to confirm the order that is before it. The Court, as section 172(1) requires, must, if it concludes that the provision is inconsistent with the Constitution, declare the provision invalid and then the Court may make any further order that is just and equitable.250

The Court has interpreted its power under FC s 167(5) to include a power to alter the remedy as it deems fit. This power is not an obvious consequence of the wording of either ss 167(5) or 172(2)(a).

This interpretation might also explain the Court's willingness to interfere with the granting of supervisory orders. In both Grootboom251 and TAC252 the Court, although largely confirming the High Courts' substantive findings, replaced the structural interdicts both High Courts had granted with declaratory orders. In neither case did the Court even consider the possibility of deference to the High Court's determination. This attitude is not limited to the Constitutional Court. The Supreme Court of Appeal expressed a similar willingness to interfere with orders requiring supervision in President of the Republic of South Africa v Modderklip Boerdery.253

However, when it comes to the second class of cases — traditional remedies — the Court has been reluctant to meddle with high court orders. In Dikoko v Mokhatla a majority of the Constitutional Court held that even if the amount of damages in a defamation suit was a constitutional issue (and it suggested strongly that it was) appellate courts should be very hesitant to interfere with the determination of the trial court.254 Moseneke DCJ held that in determining damages the 'trial court is entrusted with a wide discretion'255 that should only be interfered with if it was 'based on wrong principle' or was 'glaring disproportiona[te]'.256 Similarly, when dealing with criminal sentences, the Court has stated that the discretion of the trial court must be respected. In S v Shaik, a unanimous Court held:

250 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) at para 60.


252 Minister of Health & Others v Treatment Action Campaign & Others (2) 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC)('TAC').

253 President of the RSA & Others v Modderklip Boerdery (Pty) Ltd 2004 (8) BCLR 821 (SCA).

254 2006 (6) SA 235 (CC), 2007 (1) BCLR 1 (CC).

255 Ibid at para 94.

256 Ibid at para 95.
It has been stated repeatedly by courts that an appeal court would not easily interfere with a sentence imposed by a trial court exercising its discretion. The question is not which sentence the appeal court would have imposed, but rather whether the sentence is shockingly inappropriate, or whether an irregularity or misdirection occurred.\textsuperscript{257}

The same approach has been taken with regard to the exclusion of evidence in criminal trials.\textsuperscript{258} The approach in all these circumstances applies a much lighter form of review and therefore places the remedial discretion of lower courts much closer to the central case for traditional remedies.

What is the reason for this seemingly schizophrenic approach: zero discretion in some cases, massive deference in others, and virtually nothing in between? The Court has never explained its approach and so what follows is largely speculative. Based on the Court’s judgments, the first answer that comes to mind is that the 'traditional remedies' are more intimately tied up with the facts of a specific case. A trial court would be better suited to determine the 'fact'. 'Constitutional remedies' are largely contingent upon issues of constitutional principle. An appellate court is equally well placed to determine such matters — indeed an 11 person bench may be better equipped to engage issues of principle.

However, on its own, the 'fact-principle' distinction is insufficient. Many remedial decisions in the class of constitutional remedies depend on the facts. When deciding to read-in, sever, suspend the order of invalidity or limit its retrospectivity, some of the most important factors are the impact that it will have on government administration, the budget or any other number of factual concerns. The same goes for supervisory orders: whether it is necessary to monitor the state's progress and what the precise terms of the order should be depend, as the Court itself has admitted,\textsuperscript{259} largely on the factual situation, not on constitutional principle.

The additional difference between the two classes is that the 'constitutional remedies' deal with relief that will often have an impact on large classes of persons other than the litigants. Traditional remedies normally affect only the parties before the court. It is not so much that one determination is factual and the other is not. Rather, it is the nature of the facts. The relevant facts for 'traditional remedies'

\textsuperscript{257} 2008 (2) SA 208 (CC), 2007 (12) BCLR 1360 (CC) at para 72.

\textsuperscript{258} See, for example, Thint (Pty) Ltd v National Director of Public Prosecutions & Others; Zuma & Another v National Director of Public Prosecutions & Others [2008] ZACC 13 at para 61 ('The trial court, rather than preliminary courts, is best placed to balance the varying public and private interests at stake, namely, the public and private interests in the emergence of truth, the applicants' interests in their privacy and property, and the accused persons' fair trial rights.') See also Nyathi v Member of the Executive Council for the Department of Health Gauteng & Another [2008] ZACC 8 at para 84 (In this case the Court did grant a structural interdict because: 'It is apparent from the facts and history of this case that the legislature and the executive have not taken measures, legislative or otherwise, to ensure that the orders of a court are obeyed.\textsuperscript{259}')
relate to the actions of individuals and the impact it will have in a very specific setting. On the other hand, 'constitutional remedies' rely on facts affecting the broad functioning of the mechanisms of government and a wider domain of social life. These facts are more connected to how our ideal society ought to be constructed (and how government ought to go about constructing it) than are facts about the appropriate sentence for a particular criminal.

A final possible explanation is precedent. When the Interim Constitution came into force there was no existing precedent specifying when constitutional remedies should be granted. That precedent had to be created. If the Constitutional Court had adopted an extremely deferential approach, the development of principles to guide remedial discretion would have been severely delayed and would have been created largely by the High Courts. The contrary is true when we consider the individual remedies: there was a huge amount of precedent relating to sentencing, damages and the exclusion of evidence. Not only was it not necessary for the Court to develop new precedent, but the existing precedent told it to avoid interfering in the decisions of trial courts.

Going forward, the Court would be well advised to increase the scope given to trial courts to fashion remedies, particularly supervisory orders. The main reason is that trial courts are better positioned to gather and analyse evidence than appellate courts. The Court has recognised this greater access to the pertinent facts. In S v Ntsele Kriegler J had the following to say:

\[Q\]uestions of retrospectivity, prospectivity and the conditional suspension of orders of invalidity often present difficult choices, as is borne out by several judgments of this Court. Those choices often depend upon factors in respect of which evidence is necessary, for example, regarding the likely impact on the administration of justice if a provision were to be struck down with immediate effect, or the financial consequences for third parties of a retrospective order. Where that is so, all the relevant evidence should be received and evaluated by the court of first instance.\[260\]

(ii) Discretion and Legitimacy

The problem judicial remedial discretion poses for the legitimacy of judicial review is best expressed by Owen Fiss:

The rightful place of courts in our political system turns on the existence of public values and on the promise of those institutions - because they are independent and because they must engage in a special dialogue - to articulate and elaborate the true meaning of those values. The task of discovering the meaning of constitutional values such as equality, liberty, due process, or property is, however, quite different from choosing or fashioning the most effective strategy for actualizing those values, for eliminating the threat posed to those values by a state bureaucracy.\[261\]

In essence, Fiss' argument is that courts derive their legitimacy from their unique — because they are independent and have to engage in reasoned dialogue with anybody who brings a case to court — ability to give content to public values. But they are not unique in their ability to give effect to those values. While courts can claim legitimacy in determining rights, they cannot claim the same legitimacy in crafting remedies. If they are given a free reign in crafting remedies — particularly constitutional remedies that have influence far outside the confines of the parties to


\[261\] O Fiss 'Foreword: The Forms of Justice' (1979) 93 Harvard LR 1 ('Forms of Justice') 51.
a particular case — they will be performing tasks that could be equally well performed by the legislature or the executive.\textsuperscript{262}

There are a number of solutions to this problem of legitimacy. Fiss' solution is that we cannot afford to allow judges only to declare rights and other branches of government to enforce them because 'a delegation of the task of actualization to another agency . . . necessarily creates the risk that the remedy might distort the right, and leave us with something less than the true meaning of the constitutional value.'\textsuperscript{263} In order to ensure the protection of rights, it is necessary that remedies are devised by the same body that defines the rights.

Paul Gerwitz finds Fiss' solution un compelling. He supports the remedial equilibration thesis,\textsuperscript{264} namely that 'it [is] inevitable that thoughts of remedy will affect thoughts of right, that judges' minds will shuttle back and forth between right and remedy.'\textsuperscript{265} The rights declaring function is already a function that mixes with those traditionally assigned to the other branches of government. However, even if it were possible to separate rights and remedies, Gerwitz does not believe that Fiss' reasoning solves the problem of legitimacy. It simply shifts judges' illegitimate engagement with the real world to a different box. 'If legitimacy is undercut when judges behave adaptively and compromise with realities', Gerwitz argues, 'then this behaviour undercuts legitimacy at whatever "stage" it occurs.'\textsuperscript{266} In Gerwitz's view, the legitimacy problem is insoluble on Fiss' terms. Fiss sets a standard for legitimacy that can only be met by a court that does not engage with the real world at all.

If constitutional adjudication as we know it is to be deemed legitimate, the conditions of legitimacy must accommodate both the idealizing and adaptive nature of the enterprise and the pervasive nature of the enterprise and the pervasiveness of the duality.\textsuperscript{267}

\begin{itemize}
  \item \textsuperscript{262} Ibid at 51–52. See also William Fletcher 'The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy' (1982) 91 Yale LJ 635, 694 (Fletcher argues that structural reform by federal courts must always be presumptively illegitimate. 'When a court resolves a non-legal polycentric problem ordinarily resolved by a political body, it mimics the manner of decisionmaking of the political body. But even if the mimicking is skillfully done, a critical element is, and always must be, missing. As an unavoidable structural matter, a federal judge is not controlled by the elements of the problem that he resolves. This control by the problem’s constituent parts is what legitimates the exercise of discretion by a political body. Since this political control cannot exist over a federal judge, his or her discretionary resolution of the same problem simply cannot be legitimated on the same basis. And since the problem is non-legal in nature, the conventional means of control within the judiciary — legal rule and principle applied through the traditions of judicial reasoning and craft — are also unavailable as bases upon which to legitimate this exercise of power. Finally, since the problem is non-legal in nature, the district judge lacks even the internal control that would permit him or her to distinguish as a legal matter between appropriate and inappropriate remedial solutions. ')
  \item \textsuperscript{263} Fiss 'Forms of Justice' (supra) at 53.
  \item \textsuperscript{264} See § 9.2(c)(i)(cc) supra.
  \item \textsuperscript{265} P Gerwitz 'Remedies and Resistance' (1983) 92 Yale LJ 585, 679.
  \item \textsuperscript{266} Ibid.
  \item \textsuperscript{267} Ibid at 680.
\end{itemize}
While Gerwitz is probably right that Fiss' definition of legitimacy puts him in a Chinese finger-trap from which he can't escape, Gerwitz' solution is equally unsatisfying. He seems to say: 'We must find a definition of legitimacy that legitimizes what we currently have.' That seems to get things backwards. It is current practice that must meet a definition of legitimacy, not the other way round.

William Fletcher offers an alternative. He argues that since 'remedial discretion in institutional suits' is inevitably political in nature, it must be regarded as presumptively illegitimate. That presumption can only be 'overcome when the political bodies that should ordinarily exercise such discretion are seriously and chronically in default.' A 'credible threat' of judicial intervention will encourage government to solve the problem: 'the greatest benefit of legitimating judicial remedial power may not be that it permits the court to act, but rather that it may force the political bodies to perform their functions.'

Theunis Roux's recent work suggests a final possible approach to legitimacy. Roux is not concerned with providing a theory of legitimacy. His project is instead to provide a description of the Constitutional Court's actions in a number of difficult cases. He argues that these cases are best understood in terms of the Court trying to maintain a balance between three different forms of legitimacy: legal legitimacy, public support and institutional security. The first measures whether a decision is convincing within the legal community, the second whether it enjoys public support, and the third, 'the court's capacity to resist real or threatened attacks on its independence'. He argues that the Constitutional Court acts out of mixed motives of principle and pragmatism in order to secure its institutional security without sacrificing its legal or public legitimacy. For example, Roux argues that the two decisions in Fourie are best understood through this lens. There was no clear legal answer to the difficult question of whether the Court should suspend its order permitting same-sex couples to get married. In deciding in favour of suspension, Sachs J can be understood to have wanted to 'enlist the legislature's cooperation in the enforcement of a legal change that was likely to be highly divisive,'

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269 Although Fletcher is concerned with institutional suits, there is no reason why his reasoning would not apply to other remedies such as reading-in, severance, suspension and limiting retrospectivity that also tend to push into the territory of the other branches.

270 Fletcher (supra) at 637.

271 Ibid.

272 Ibid at 696.


274 Roux 'Principles and Pragmatism' (supra).

275 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC).
and ran the risk of . . . weakening public support for the Court.' O'Regan J, who would have made the order immediate, felt that suspension would undermine the Court's legal legitimacy which 'was ultimately a more important factor in securing public support for the Court.'

My own view is that the question of legitimacy is not as difficult in South Africa as it may be in the United States. As noted earlier, the Final Constitution explicitly gives the courts very wide remedial powers. They can make any 'appropriate' order and any order that is 'just and equitable'. It would be odd indeed to argue that the existence of those powers is illegitimate.

However, that does not satisfactorily answer the deeper normative question. While the existence of discretion is secure, there is still an argument that it may be exercised in a way that undermines legitimacy. There is no doubt that courts have the power to take over the management of government institutions or even whole departments, but if they did so in situations that did not warrant that incursion, it would be perceived (rightly) as illegitimate. Let me put the point differently, the question for legitimacy in South Africa is whether the exercise of judicial discretion is indeed 'appropriate' or 'just and equitable'. It would not, absent special circumstances, be just and equitable for a court to take over the running of government or to re-write legislation from scratch. That leads into the next discussion: how courts choose remedies in specific cases.

(e) Choice of Remedy

This section constitutes the core of the chapter. It examines what factors are relevant to a court’s choice of remedy generally and attempts to construct a framework for the determination of an appropriate remedy.

(i) Textual Considerations

The Final Constitution gives very little guidance on what concerns should guide a court’s choice of remedy. It says only that any relief granted for the infringement or threat of infringement for a violation of a right in the Bill of Rights must be 'appropriate' and that when dealing with any constitutional matter, a court may make 'any order that is just and equitable.' But what do these fairly vague terms mean and is there a difference between 'appropriate relief' in terms of FC s 38 and a 'just and equitable' order in terms of FC s 172(1)(b)?

The Court has given us some guidance on what 'appropriate relief' in terms of FC s 38 means. It has held that '[a]ppropriate relief will in essence be relief that is required to protect and enforce the Constitution' and that appropriateness,

require[s] "suitability" which is measured by the extent to which a particular form of relief vindicates the Constitution and acts as a deterrent against further violations of rights enshrined in chapter 3.'

OS 06-08, ch9-p56

276 Ibid.

277 Ibid.

278 Fose v Minister of Safety and Security 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC)('Fose') at para 19.
More recently, the Court has held that 'appropriate relief must necessarily be effective.'\textsuperscript{280} These dicta — which as we shall see are not the Court's last word on the topic — suggest that 'appropriate relief' demands a victim-centred approach to remedies.

Does 'just and equitable' in FC s 172(1)(b) bear a different meaning? Some of the cases suggest that it does. The Constitutional Court has in a number of contexts held that what is 'just and equitable' requires a balance between the interests of all parties involved.\textsuperscript{281} It has re-iterated that interpretation with regard to the use of the phrase in FC s 172(1)(b).\textsuperscript{282} So while FC s 38 requires a victim-oriented approach, FC s 172(1)(b) can be read to require an all-embracing, all things considered exercise of discretion.

The conflict between the two remedial forms is plainly presented in the following passage from Bayda CJS's opinion in\textit{ Saskatchewan Human Rights Commission v Kodellas}:\textsuperscript{283}

> Appropriateness connotes efficaciousness and suitability from the standpoint of the violation itself — a remedy 'to fit the offence' as it were. It suggests a remedy that, from the perspective of the person whose right was violated, will effectively redress the grievance brought about by the violation. The quality of justness, on the other hand,

\textsuperscript{279} \textit{Sanderson v Attorney-General, Eastern Cape} 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC) at para 38. Although Kriegler J purports to be relying on the majority judgment in Fose, his construction more closely resembles the interpretation of 'appropriate relief' suggested in his concurring judgment. See \textit{Fose} (supra) at para 97 ("When something is appropriate it is "specially fitted or suitable". Suitability, in this context, is measured by the extent to which a particular form of relief vindicates the Constitution and acts as a deterrent against further violations of rights enshrined in chapter three.'

\textsuperscript{280} \textit{President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd (Agri SA & Others, Amici Curiae)} 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC) at para 57.

\textsuperscript{281} See, for example, \textit{Zondi v MEC for Traditional and Local Government Affairs & Others} 2005 (3) SA 589 (CC), 2005 (4) BCLR 347 (CC) at para 130 (In a case concerning cattle that trespassed on neighbours' land, the Court held that 'just and equitable' relief 'should protect both the rights of stockowners and landowners.'); \textit{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 94 (The Court was considering when an order limiting retrospectivity would be just and equitable and specifically whether there was a difference between s 98(6) of the Interim Constitution, which mentioned 'the interests of good government' and the Final Constitution. Ackermann J held that 'the test under the [Final] Constitution is a broader and more flexible one, where the concept of the interests of good government is but one of many possible factors to consider.'); \textit{Minister of Home Affairs & Another v Fourie & Another} (Doctors for Life International & Others as Amici Curiae); \textit{Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others} 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) at para 132 (Court held that the test for whether a suspension should be granted is 'what is just and equitable, taking account of all the circumstances' (my emphasis.).)
The Constitutional Court was required to engage just such a conflict in *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) & Others.*

In considering whether it was possible for a court to grant a temporary exemption from a statutory provision in order to allow prisoners to vote, it held:

This must of course be done within the overriding considerations of justice and equity. These considerations must be understood in the light of the constitutional imperative of providing appropriate relief to successful litigants.

This reasoning is contradictory. The word 'overriding' suggests that justice and equity are the primary considerations. However, the use of 'imperative' implies that the relief must be appropriate at all costs. The dictum does not tell us what to do when justice and equity pull in one direction and appropriateness in another.

As Ackermann J argues in *Fose,* in many cases a remedy can be just, equitable and appropriate:

Construed purposively . . . I see no material difference between the two concepts. It can hardly be argued, in my view, that relief which was unjust to others could, where other available relief meeting the complainant's needs did not suffer from this defect, be classified as appropriate. In [determining what is 'appropriate'] the interests of both the complainant and society as a whole ought, as far as possible, to be served.

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283 (1989) 60 DLR (4th) 143; [1989] 5 WWR 1 (Sask CA)(The Court was required to consider the meaning of s 24(1) of the Canadian Charter of Rights and Freedoms which permits those whose Charter rights are infringed to 'obtain such remedy as the court considers appropriate and just in the circumstances.' The facts concerned an applicant whose complaint of sexual harassment had not been decided by the Human Rights Commission for over four years. All the judges agreed that the delay violated Kodellas' Charter rights, but disagreed on the remedy. Bayda CJS held that a stay was inappropriate because it would impact negatively on the original complainants' rights to have their sexual harassment complaint dealt with. He was however in the minority. Vancise and Wakeling JA held that only a permanent stay of the proceedings could cure the infringement of the applicant's rights. Interestingly, although they reached a different result, the majority's conception of the meaning of 'appropriate and just' was virtually indistinguishable from Bayda CJS's interpretation.)

284 Ibid at para 34. The Constitutional Court has rejected this dictum. *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC)('*Hoffmann*') at n 36 ('This statement must be understood in the context of section 24(1) of the Canadian Charter, which provides that anyone whose rights, guaranteed in the Charter, have been infringed may apply to court "to obtain such remedy as the court considers appropriate and just in the circumstances." The Canadian Constitution, therefore, makes a distinction between "appropriateness" and "justness". Our Constitution does not. As we shall see, this assertion is not entirely true.')

285 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC)('*Nicro*').

286 *Nicro* (supra) at para 77.

287 *Fose* (supra) at para 38.
Of course, a court should choose a remedy that is both appropriate and just — that fulfils the interests of the right-bearer and society. But Ackermann J too does not tell us what should be done in those cases, however few they may be, where it is not possible to find a remedy that is both 'just' and 'appropriate'. Is appropriateness ultimately subordinated to justness or do the interests of the right-bearer trump those of society?

The Court tried to finesse — or deny, if one wishes to be less charitable — this conflict in *Hoffmann v South African Airways* by importing the element of 'fairness':

Section 38 of the Constitution provides that where a right contained in the Bill of Rights has been infringed, 'the Court may grant appropriate relief'. In the context of our Constitution 'appropriate relief' must be construed purposively, and in the light of s 172(1)(b), which empowers the Court, in constitutional matters, to make 'any order that is just and equitable'. Thus construed, appropriate relief must be fair and just in the circumstances of the particular case. Indeed, it can hardly be said that relief that is unfair or unjust is appropriate. As Ackermann J remarked in the context of a comparable provision in the interim Constitution, '[i]t can hardly be argued, in my view, that relief which was unjust to others could, where other available relief meeting the complainant's needs did not suffer from this defect, be classified as appropriate'. Appropriateness, therefore, in the context of our Constitution, imports the elements of justice and fairness.

Fairness requires a consideration of the interests of all those who might be affected by the order. In the context of employment, this will require a consideration not only of the interests of the prospective employee but also the interests of the employer. In other cases, the interests of the community may have to be taken into consideration.

Again, Ngcobo J, by relying on Justice Ackermann's reasoning in *Fose*, only answers the easy question: what to do when 'other available relief meeting the complainant's needs' is not unjust to others. He does not tell us what to do when the only relief 'meeting the complainant's needs' is unjust to others. That is the hard question. Resort to the word 'fairness' does not answer it — it simply slaps a label on the problem.

(ii) Rights-maximising and Interest Balancing

As should be clear by now, this textual debate about the difference between 'appropriate' and 'just' reflects a deeper conflict about the purpose of constitutional remedies. A classification of the possible approaches to this problem should help to clarify the issue. Paul Gerwitz identifies two basic approaches to the choice of remedy: 'rights maximising' and 'interest balancing'. Any approach to remedies

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288  His qualification 'as far as possible' implies that he realised such cases would arise.

289  *Hoffmann* (supra) at paras 42-43.

290  On the use of words like 'fairness' to plaster over difficult legal cracks, see J Frank *Law and the Modern Mind* (1985)('Lawyers use what the layman describes as "weasel words", so-called "safety-valve concepts," such as "prudent", "negligence", "freedom of contract", "good faith," "ought to know," "due care," "due process," — terms with the vaguest meaning — as if these vague words had a precise and clear definition; they thereby create an appearance of continuity, uniformity and definiteness which does not in fact exist."

will fall somewhere between these two poles. The 'rights maximising' approach is entirely victim-focused; the sole aim is to vindicate the right in the most effective way possible. Other considerations — such as the separation of powers or budgetary concerns — will only be relevant if they have a bearing on the effectiveness of the right or if two remedies give effect to the right equally well and a court needs to choose between them.\footnote{Ibid.} A less than perfect remedy is only acceptable if it is unavoidable. This corresponds to some of the interpretations of 'appropriate' adopted by the Constitutional Court.

On the other hand, 'interest balancing' would appear to reflect the Court's understanding of the FC s 172(1)(b) phrase 'just and equitable'. It treats the vindication of a right as one of many factors to be considered in fashioning a remedy: 'In evaluating a remedy, courts in some sense "balance" its net remedial benefits to victims against the net costs it imposes on a broader range of social interests.'\footnote{Ibid.} Unlike a 'rights maximising' judge, a judge adopting an 'interest balancing' philosophy could choose a remedy that gives less than optimal effect to the right. She choose this less effective remedy because sufficiently weighty concerns justify doing so.\footnote{Ibid.}

A pure rights-maximising position — however intuitively attractive it may be for people like me who find the practical difficulties in implementing rights a permanent frustration — is untenable. In Gerwitz's words:

\begin{quote}
However strong remedial effectiveness is as a value, it is not society's only value. Where effective remedies conflict with interests that were not considered at the rights stage — interests that are not relevant to the question of whether a right has been violated — those interests press to be considered at the remedy stage and, on occasion, to override the value of remedying violations of the right.\footnote{Gerwitz (supra) at 604.}
\end{quote}

However, as the quote implies, it does not follow that interest balancing ought to be the default position. Effective relief must be a priority if the Final Constitution is to have any meaning. And it should only be overridden 'on occasion'. But between these two contrasting extremes there are an infinite number of interim positions. The spectrum starts with the (hypothetical) judge who would accept that no limits are unavoidable — the right must always be fully vindicated. It then proceeds to judges who accept that some gap between right and remedy is unavoidable. The greater the acceptable gap, and the more often they will permit a gap to exist, the further they depart from the absolutist rights maximiser. Eventually, there will be a judge who accepts that an imperfect remedy is avoidable but other considerations are so strong that they justify granting it. We are now in the domain of 'interest balancing'. From there, the weaker the interests that are needed to outweigh the need to vindicate the right, the more the judge tends towards the interest balancing end of the spectrum. The final position is occupied by a judge for whom the need to vindicate the right is but one of many factors that must be weighed with all the others in choosing an appropriate remedy.
Where does the Constitutional Court’s approach fall on the spectrum between rights maximiser and interest balancer? The case law throws up no easy answer. The passages from NICRO, Fose and Hoffmann quoted earlier show how ambivalent the Court has been on this score. The two primary impediments for slotting the Court into an identifiable position along the spectrum between rights maximiser and interest balancer are: (1) what the Court has said, and what it has done are not always the same; (2) it has adopted different approaches in different cases. In some remedial contexts, like damages, it has emphasized the need to maximize the right. In others, say, where reading-in is the remedy, it has stressed the importance of other factors. Even when concerned with the same remedy, the Court has sometimes adopted seemingly incompatible positions.296

However, despite this ambiguity, two things are clear. First, the Court is not a pure rights-maximiser. It has constantly accepted the proposition that avoidable concerns can limit rights. Second, neither is it a hard-core interest-balancer. It consistently emphasizes the need to provide effective relief as not merely one of many factors, but as an 'imperative'. Read as a whole, the Court's jurisprudence suggests that its preferences lie somewhere in the middle. The Court sees the need for effective relief as the primary goal of a remedy. Yet it accepts that in certain circumstances other considerations will justify affording relief that is less than perfect, (or will justify affording no relief at al297), even if perfect or more effective relief is available.

The position is most clearly exhibited in the Court’s consideration of a remedy in Gory v Kolver NO & Others.298 The Court, concerned with whether the Intestate Succession Act299 should be extended to same-sex life-partners, held that ‘where a litigant does establish that an infringement of an entrenched right has occurred, he or she should as far as possible be given effective relief so that the right in question is properly vindicated.’300 This rights-maximising position accepts only unavoidable limits with regard to the vindication of the right. However, two paragraphs later, the Court describes a different, interest-balancing, approach:

It is necessary to balance the potentially disruptive effects of an order of retrospective invalidity . . . and the effect of such an order on the vested rights of third parties, on the one hand, with the need to give effective relief to Mr Gory and similarly situated persons, on the other.301

To properly understand the tension — if not the contradictions — in the Court’s approach, these two statements need to be read together: The Court will try as hard as possible to vindicate the right, but will allow avoidable limits in compelling circumstances.

296 On retrospectivity, see § 9.4(e)(ii) infra.

297 See § 9.2(b) supra.

298 2007 (4) SA 97 (CC), 2007 (3) BCLR 249 (CC)('Gory').


300 Gory (supra) at para 40 (my emphasis).

301 Ibid at para 42.
circumstances. Within that broad framework, there still remain a number of different ways to thinking about remedial choice.

(iii) Ways of conceiving choice

In this section I proffer five ways of thinking about how courts choose remedies. Each brings something new to the table. My own Frankenstein-like approach draws down on the insights from all these approaches.

(aa) Bollyky’s Formula

Thus far, the most serious attempt to construct a ‘theory’ for choice of remedies in South Africa has been provided by Thomas Bollyky.\(^{302}\) Although his primary targets are remedies in socio-economic rights cases, his theory draws from, and is meant to apply to, all constitutional cases. Bollyky expresses his theory in the form of the following algorithm: \(R \text{ if } C > P + B\). I will let him explain what this formula means:

\[
\text{When remedying a violation of the Bill of Rights, courts intuitively weigh the degree to which they must make choices regarding policies and budgets against the extent of the constitutional violation. If a remedy entails extensive — quantitatively and qualitatively — policy and budgetary considerations, the court will not make them for a constitutional violation which is not proportionately — quantitatively or qualitatively — extensive. The reverse is also true.}
\]

\[
\text{This insight may be expressed algebraically as: } R \text{ if } C > P + B, \text{ where } R \text{ is the desired remedy, } C \text{ equals the extent of the constitutional violation (expressed as a product of its quantitative and qualitative elements), } P \text{ is the level of policy interference required by the remedy sought, and } B \text{ equals the level of budgetary interference required by that remedy.}^{303}
\]

Bollyky emphasises that the formula does not propose a ‘cost benefit analysis’. ‘The common unit for the variables is not’, he insists, ‘economic.’ \(^{304}\)

Instead, it describes the intuitive calculation judges use to arrive at an assessment of the legitimacy of ordering a particular remedy in a constitutional democracy with separation of powers. . . . The common unit, or the basis of comparison, for the variables in this paradigm is whether they add, or detract, from the legitimacy of granting the form of relief. Judges intuitively weigh these competing normative values and ultimately make an assessment of remedies based on their proportionality.\(^{305}\)

Bollyky’s theory has its virtues and vices — as well as its inconsistencies and inaccuracies. His characterisation of the choice of remedies as an intuitive weighing of competing normative values is extremely helpful. The choice of remedies will almost always involve competing values and interests that cannot, ultimately, be weighed on any other metric other than the judge’s own sense of legitimacy.\(^{306}\)

However, this insight seems to undermine the core of Bollyky’s project: to reduce


\(^{303}\) Bollyky (supra).

\(^{304}\) Ibid at 175.

\(^{305}\) Ibid.

\(^{306}\)
this intuitive process to a simple formula. A process this complex will necessarily resist analysis based on any three (intuitive) variables. Here is a short list of factors that the Bollyky equation ignores: unfairness to third parties; conduct of the victim or the violator; impact on existing practice; the courts' own practical limitations; and whether the problem is isolated or systemic. These factors are not easily captured under either 'the extent of the violation', 'policy interference' or 'budgetary interference'.

(bb) The purposive approach

Kent Roach explains that, at least until recently, the Canadian Supreme Court adopted a 'purposive approach' to remedies which sought 'to integrate Charter remedies with purposes of the particular Charter right being remedied, the general purposes and values of the Charter and the methodology that is applied to the interpretation of all Charter remedies.' To put it plainly, the remedy must be fashioned to give effect to the purpose of the right, interpreted in light of the whole Bill of Rights. So, in Osborne v Canada (Treasury Board) Sopinka J wrote:

In selecting an appropriate remedy under the Charter, the primary concern of the court must be to apply the measures that will best vindicate the values expressed in the Charter and to provide the form of remedy to those whose rights have been violated that best achieves that objective.

The Constitutional Court, famous for its purposive approach to interpretation, has flirted with purposivism as a remedial theory. In Fourie, Justice Sachs held that it was important: 'to look at the precise circumstances of each case with a view to determining how best the values of the Constitution can be promoted by an order that is just and equitable.'

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308 [1991] 2 SCR 170, 346 as quoted in Roach Remedies (supra) at § 3.380.


310 Minister of Home Affairs & 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) at para 135. See also Fose v Minister of Safety and Security 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC)('Fose') at para 96 (Kriegler J)('Our object in remedying these kinds of harms should, at least, be to vindicate the Constitution, and to deter its further infringement. Deterrence speaks for itself as an object, but vindication needs elaboration. Its meaning, strictly defined, is to "defend against encroachment or interference". It suggests that certain harms, if not addressed, diminish our faith in the Constitution. It recognises that a Constitution has as little or as much weight as the prevailing political culture affords it. The defence of the Constitution — its vindication — is a burden imposed not exclusively, but primarily, on the judiciary. In exercising our discretion to choose between appropriate forms of relief, we must carefully analyse the nature of a constitutional infringement, and strike effectively at its source.')
This purposive approach avoids ‘restrictive and technical approaches’ to remedies — such as Bollyky's — and encourages courts to ‘be explicit about what they are trying to accomplish' with a particular remedy.\(^\text{311}\) However, it is also incomplete. Rights serve many different goals. A purposive approach still requires a court to ‘select among different purposes and constraints and apply them in particular contexts.’\(^\text{312}\) The purpose of the Final Constitution as a whole, or of a specific right, even if it could be divined, would only ever be part of the inquiry. It also is incompatible with an interest-balancing approach —partially endorsed by the Court — that recognizes that other factors other than fulfilling the purpose of a right are relevant to crafting a remedy.

\(^{\text{311}}\) Roach Remedies (supra) at § 3.400

\(^{\text{312}}\) Ibid.

\(^{\text{313}}\) Hoffmann v South African Airways 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC) at para 45 quoting Fose (supra) at para 96 (Kriegler J).

\(^{\text{314}}\) Doucet-Boudreau v Nova Scotia (Minister of Education) [2003] 3 SCR 3 (The Court provided a list of five-principles which should be used to determine the remedy: (a) The remedy must 'meaningfully vindicate[ ] the rights and freedoms of the claimants'. Ibid at para 55. (b) The remedy 'must employ means that are legitimate within the framework of our constitutional democracy' and should not 'depart unduly or unnecessarily from [the courts'] role of adjudicating disputes and granting remedies that address the matter of those disputes.' Ibid at para 56. (c) The court must understand its functional limitations and should not grant remedies 'for which its design and expertise are manifestly unsuited'. Ibid at para 57. (d) The relief must also be 'fair to the party against whom the order is made.' Ibid at para 58. (e) 'The judicial approach to remedies must remain flexible and responsive to the needs of a given case.' Ibid at para 59.)

\(^{\text{315}}\) I Currie & J De Waal The Bill of Rights Handbook (5th Edition, 2005) 196–198 (The authors identify eight factors that are relevant in choosing a remedy: (a) providing an effective remedy; (b) coming to the aid of similarly situated people; (c) the separation of powers; (d) the identity of the violator; (e) the nature of the violation; (f) the impact on the victim; (g) victim responsibility; and (h) the possibility of successful execution. I include all of these in my structure (and owe much of my thinking to Currie and de Waal's discussion of them) but instead of treating them as free-floating factors, I place them in a structure which I think gives effective relief its proper weight.)
idea of the purpose of a right — let alone the Bill of Rights as a whole. Nor do they try to construct a strict formula which automatically spits out remedies. They provide more general guidance than Bollyky and more specific and universal direction than the purposive approach.

What they lack though is a clear system for their application. They do not order the principles nor do they suggest how a conflict between principles is to be resolved. While no perfect lexical ordering of principles is possible, one can, I think, offer greater specificity about what factors to consider when crafting a remedy.

(dd) Taxonomies and constraints

Ken Cooper-Stephenson has suggested a detailed structure. He calls his rubric a ‘remedial taxonomy’ — to evaluate remedies. The purpose of the taxonomy is not to provide a ‘rigid sequence’ or formula to determine remedies, but a ‘framework for organizing analytic constructs’. The main headings of his taxonomy are: (a) the target of the remedy; (b) the purpose of the remedy; (c) applicable legal principles; (d) procedural issues; and (e) implementation. Each of these headings then has a large number of subheadings. These concepts are ‘heavily integrated and will function in an interactive way.’ In addition to these factors, Cooper-Stephenson also identified a number of underlying themes that are relevant to most or all of the taxonomic factors.

The approach Roach adopts is to identify both the purposes remedies serve and the constraints that limit the achievement of those purposes. He conducts his discussion under four headings: (a) correction of the violation; (b) regulating government behaviour; (c) balancing interests; and (c) institutional roles. The first two are aimed at the vindication of the right and the last two at what may justify departing from full vindication. Finally, as explained earlier, Paul Gerwitz distinguishes between avoidable and unavoidable limits on the full realisation of a right. I think this is a useful distinction because it helps us to identify when a court
is engaged in weighing interests, and when it is simply recognizing unfortunate but inevitable limits on its powers.

(iv) Structuring Remedies

Roach, Gerwitz and Cooper-Stephenson all articulate 'theories' that identify both the purposes remedies serve and the constraints that limit the achievement of those purposes. My somewhat eclectic approach borrows the best from each.

In my view, a court should start by determining what the most effective possible relief would be without regard for any potential problems with actually providing that relief. In doing so, it must consider the purpose of the right which, it must be remembered, will often go beyond the interests of the specific litigant before the court. From there, a court should consider the unavoidable limitations and pare down the remedy accordingly. Finally, the court should consider if any of the avoidable limitations justify a further limitation of the remedy. At all times, the goal should be to make the relief as effective as possible. I think this structure reflects the courts' emphasis on effective relief while still acknowledging the role that other factors play. In my view, it does this better than simply including effective relief as one of many factors to be considered.

However, this structured approach also has limitations. Firstly, although I think following this three-step structure is a useful way to balance competing interests, courts need not — and probably will not — go through each and every potential limitation in every case. The relevant limitations will often be clear — largely because of the experience manifest in existing precedent. But in cases where courts are uncertain as to what the appropriate remedy should be, thinking of it in these terms should be helpful. Secondly, there may well be considerations that are not listed here that may also be relevant to choice of remedy. What is most important about this structure, to my mind, is not so much the specific factors that it includes, but the structure that forces courts to first determine the most effective remedy and then justify every departure from that ideal. Finally, by far the biggest limitation is that it does not tell courts when an avoidable limitation justifies a limitation of a right. There is no absolute answer to that question. I hope that the second half of this chapter - which examines in depth each type of remedy - provides some more guidance about what sort of limitations on effective relief are justifiable and why. But at this very abstract level, it is impossible to provide more direction. In Justice Kriegler's words: 'One cannot be more specific. The facts surrounding a violation of rights will determine what form of relief is appropriate.'

(aa) Effective Relief

(1) General principle

The Court has regularly stressed the need for effective relief. In Fose v Minister of Safety and Security, decided under the Interim Constitution, Ackermann J held:

Given the historical context in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution,
effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced.\(^{327}\)

The Court has since made it clear that this holding applies equally to FC s 38.\(^{328}\)

In *Modderklip* the Court identified a ‘constitutional right[ ] to an effective remedy as required by the rule of law and entrenched in section 34 of the Constitution.’\(^{329}\) However, considering the factual matrix of the case,\(^{330}\) it appears that this remedy does not issue from FC s 38. Instead, it is a right to have remedies properly enforced by the state.\(^{331}\) Even if this more limited interpretation is correct, *Modderklip* still adds to the right to effective remedies because it ensures that a remedy, once granted, will become a reality.

Having established the importance that the Court places on providing effective relief, it is necessary to consider what the phrase actually means. 'Effective relief' is relief that leaves no gap between right and remedy: it makes the constitutional ideal a reality. The purpose of the right and of the constitutional scheme as a whole will be central in this determination. However, there are a number of more specific issues that can be identified.

**(2) Corrective or distributive**

The first question is whether the relief requires the rectification of past injustices or the prevention of present and future injustices. Some cases will only require

\(^{327}\) Ibid at para 69 (my emphasis).

\(^{328}\) *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) (‘NCGLE v Minister of Home Affairs’) at para 65; *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd (Agri SA & Others Amici Curiae)* 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC) (‘Modderklip’) at para 57. As Hofmeyr notes, the courts interpretation of FC s 38 is strange because its predecessor (IC s 7(4)(a)) was couched in mandatory terms while FC s 38 is in permissive terms. K Hofmeyr ‘Understanding Constitutional Remedial Power’ (Unpublished Mphil Thesis, Oxford University, 2006, on file with the author) (‘Remedial Power’) 64–65. IC s 7(4)(a) read: ‘When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.’ Although s 7(4)(a) is ambiguous as to whether the ‘shall’ entitles a person only to approach a court or also to appropriate relief, one would have thought that any ambiguity would have been removed by the use of the word ‘may’ in FC s 38. The Court, however, seems to have ignored this change.

\(^{329}\) *Modderklip* (supra) at para 50. It is, admittedly, unclear whether this is a reference to a remedy for the violation of constitutional rights or simply a statement that litigants are entitled to have court orders enforced.

\(^{330}\) *Modderklip* involved the invasion of a farm by people searching for housing. The state was unable or unwilling to enforce the eviction order secured by the owner of the farm. It was this failure that lead to a finding that right to access to courts had been violated.

\(^{331}\) See A Friedman & J Brickhill ‘Access to Courts’ in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2007) Chapter 59, § 59.4(b); Hofmeyr ‘Remedial Power’ (supra) at 67–68. Although this result seems like the best interpretation, it is strange that the Court did not rely on this finding in *Nyathi v MEC for Health, Gauteng & Others* [2008] ZACC 8 (The Court struck down a provision which prevented judgment creditors from attaching state assets to satisfy a court order.)
rectification. In *NM & Others v Smith*, the applicants' privacy and dignity interests had been violated by the negligent publication of their HIV status.\(^{332}\) There was no systemic wrong that required improvement.\(^{333}\) The problem was an isolated incident of journalistic recklessness and all that was required was for the applicants to be compensated for their suffering. Other cases will be almost entirely forward looking. When *Lawyers for Human Rights* challenged the new Immigration Act, they did not allege or cite any wrongs that had been committed.\(^{334}\) They challenged the Act in order to prevent constitutional rights being violated in the future. A mere declaration of invalidity sufficed and no damages or release orders were necessary.

Thus, Kriegler J may have overstated the case when he said that all remedies must both vindicate the right and deter future violations.\(^{335}\) However, he was undoubtedly correct that most cases will require a court to look both backwards and forwards — even cases that seem to involve only an individual claim. In *Hoffmann v South African Airways*, for example, the applicant had been refused a post as an air host because he was HIV positive.\(^{336}\) Ngcobo J found this action unconstitutional and decided that instatement was the appropriate remedy:

> Where a person has been wrongfully denied employment, the fullest redress obtainable is instatement. Instatement serves an important constitutional objective. It redresses the wrong suffered, and thus eliminates the effect of the unfair discrimination. It sends a message that under our Constitution discrimination will not be tolerated and thus ensures future compliance. In the end, it vindicates the Constitution and enhances our faith in it. It restores the human dignity of the person who has been discriminated against, achieves equality of employment opportunities and removes the barriers that have operated in the past in favour of certain groups, and in the process advances human rights and freedoms for all.\(^{337}\)

If Justice Ngcobo had chosen to simply award Mr Hoffmann damages, then companies in the future might have decided that it was worth refusing to employ HIV positive people and to compensate them with damages. By insisting on employment as the appropriate remedy, Ngcobo J removed that possibility and made future violations less likely.

\(^{332}\) 2007 (5) SA 250 (CC), 2007 (7) BCLR 751 (CC).

\(^{333}\) This is true of the majority opinion which found that the journalists had acted with intention. The minority opinions of Langa CJ and O'Regan J recognized that the common law should be developed to punish negligent wrongdoing by journalists. This was a systemic change that also recognized the need to protect people in the applicants' position in the future.

\(^{334}\) *Lawyers for Human Rights & Another v Minister of Home Affairs & Another* 2004 (4) SA 125 (CC), 2004 (7) BCLR 775 (CC).

\(^{335}\) *Fose* (supra) at para 97.

\(^{336}\) 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC).

\(^{337}\) Ibid at para 52. See also *NCGLE v Minister of Home Affairs* (supra) at para 82 ("But it must vindicate at more than an abstract level. It must operate to eradicate these stereotypes. Our constitutional commitment to non-discrimination and equal protection demands this. There is a wider public dimension. The bell tolls for everyone, because "[t]he social cost of discrimination is insupportably high and these insidious practices are damaging not only to the individuals who suffer the discrimination, but also to the very fabric of our society."").
It will not always be possible to both rectify past injustice and prevent future injustice. Such a choice between past and future faced the Court in *Fraser*.\(^3\) If it did not suspend the order, then Mr Fraser would be able to prevent the adoption of his child. However, other children might not be adopted in the future because fathers less worthy than Mr Fraser could prevent the adoption from taking place. The Court felt that permitting the injustice to Mr Fraser was warranted in order to safeguard the interests of children in the future. However, as I argue when considering orders of suspension,\(^4\) difficulties such as those confronting the *Fraser* Court are not insurmountable. At the initial stage of imagining the most effective possible relief, courts should avoid ‘lesser evil’ outcomes: They should conjure up solely those remedies that would both vindicate and deter.

### (3) Nature of the violation

The nature of the violation can be broken down in several ways: isolated or systemic; complete or ongoing; serious or trivial; individual or widespread. For a remedy to be effective it must consider these differences. *Rail Commuters* — which concerned violent attacks on trains — explains the impact of a number of these distinctions.\(^5\) If the case had simply concerned a single, complete attack, then damages would probably have been the most effective remedy. However, the violation was not isolated but, ongoing and widespread — a result of systemic deficiencies in the security apparatus on all trains. Damages, even for all the people who had been victims, would not have been an effective solution. As a result, the High Court granted a structural interdict to ensure that security on the train improved.\(^6\)

### (4) Similarly situated

The Constitutional Court has made it clear on several occasions that ‘[e]ffective relief requires that relief be afforded not only to the specific litigant, but to all people who are similarly situated.’\(^7\) A remedy that only aids a single litigant is not ‘effective relief’. In many cases, this result will be easy and obvious. In *Fourie*, the

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3\(^3\) *Fraser v Children's Court, Pretoria North & Others* 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC).

4\(^4\) See § 9.4(e)(i)(cc) infra.

5\(^5\) *Rail Commuter Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2003 (3) BCLR 288 (C).

6\(^6\) But see, *Rail Commuters Action Group & Others v Transnet Ltd t/a Metrorail & Others* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC)(On appeal the Constitutional Court overturned this order and granted a simple declaration setting out the state's obligations. However, the Court does not seem to have regarded this as the most effective relief, but that the most effective relief — a structural interdict — was not appropriate because of separation of powers concerns.)

7\(^7\) *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC) at para 32. See also *Gory v Kolver NO & Others* 2007 (4) SA 97 (CC), 2007 (3) BCLR 249 (CC) at para 42; *Van der Merwe v Road Accident Fund & Another (The Women's Legal Centre Trust as amicus curiae)* 2006 (4) SA 230 (CC), 2006 (6) BCLR 682 (CC) at para 71; *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) & Others* 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC) at para 74.
right of same-sex couples to marry was extended to all same-sex couples, not just the particular couple that litigated the case. In *Bhulwana* the invalidation of a reverse onus provision had to apply not only to the litigant who had challenged it, but to all other people who had been convicted or were being convicted under the law. But determining who is similarly situated is not always easy. In *S v Masiya*, the Court had to consider whether the definition of rape should be extended to include anal penetration. The particular case before the Court concerned a young girl who had been raped. The majority of the Court decided that it should limit itself to the facts of the case before it and extended the definition of rape solely to the anal penetration of females. Chief Justice Langa (with the support of Justice Sachs) dissented. He found that boys who were anally raped were 'similarly situated' and were therefore entitled to the same relief. In *Satchwell* the Court refused to 'lump together' unmarried homosexual partners — to whom it extended the benefits of the law in question — with unmarried heterosexual partners — to whom it did not extend those benefits. In the Court's view, the two groups raised 'quite different legal and factual issues'.

At the stage of determining what qualifies as effective relief, 'similarly situated people' should be defined as widely as possible. Only if a genuinely meaningful difference exists between the two groups should effective relief be limited at this stage. I therefore agree with Chief Justice Langa that such a difference was not present in *Masiya*. The very reasons the majority relied upon — that rape is about power, not sex and that rape infringes the victim's dignity and bodily autonomy — to extend the common law to cover anal rape of females applies equally to males. However, the distinction in *Satchwell* fits with the reasoning because homosexual couples were unable to get married at the time — and therefore automatically qualify for the benefits at issue — while heterosexual people had that opportunity.

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343 But see § 9.4 (e)(ii)(cc) infra. I criticise the Court's approach to retrospectivity in this and other cases. Although I do not frame the criticism as one of not giving relief to 'similarly situated' people, it can be seen in that way. By only applying the declaration of invalidity to people whose cases have not yet been finalised, the Court could be said to presume there is a meaningful distinction (on a par with the distinction between men and women in *Masiya* or heterosexual and homosexual in *Satchwell*) between the two classes. It seems obvious to me that there is not. However, although the judgments are unclear on this point, I do not think that is how the Court conceived of the problem. Rather, I think they would acknowledge that finalised and unfinalised cases are similar, but that other reasons (concerns about the administration of justice) justify treating them differently.

344 2007 (5) SA 30 (CC), 2007 (8) BCLR 827 (CC) (*Masiya*).

345 Ibid at para 29.

346 Ibid at para 92.

347 *Satchwell v President of the Republic of South Africa & Another* 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC) at para 16.

348 Ibid.

349 *Masiya* (supra) at paras 78–79.
Whether this distinction would ultimately justify refusing benefits to unmarried heterosexual couples is unclear, but it does clearly raise different substantive questions.

(5) Reason for violation

This issue is considered in more detail in the context of systemic relief. Suffice to say that different forms of relief may be more or less effective depending on whether the reason for the infringement of the right is inattentiveness, incompetence or intransigence. In the first instance, a mere declaration pointing out the problem may be sufficient. In the other cases, interdicts or structural remedies may be necessary to ensure that the appropriate steps are taken.

(bb) Unavoidable limits

Once one has determined what a fully effective remedy would be, there may be certain unavoidable limits on achieving it.

(1) Multiple goals

Where a remedy aims to achieve multiple goals, one may have to be sacrificed for another. Gerwitz offers the example of school desegregation. Desegregation might have the dual goal of creating integrated schools and improving education in black schools. The best remedy for the first goal might be bussing, while the best remedy for the second goal might be to improve education in one-race schools. It might be necessary to trade the one goal off against the other. A similar conflict confronted the Court in Fourie. Effective relief clearly demanded that same-sex couples be permitted to marry immediately, but the Court was aware that it was necessary to attain social recognition and stability for those unions. Such legitimacy, the majority concluded, would best be achieved if the change came from Parliament.

(2) Conflicting rights

A different form of the multiple goals problem is the problem of conflicting rights. Different parties may have different legitimate interests that cannot all be satisfied. In Mandel & Another v Johncom Media Limited; Johncom Media Limited v Mandel & Others, the applicants challenged the constitutionality of s 12 of the

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351 See § 9.6(c)(v) infra. See also K Roach & G Budlender ‘Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable?’ (2005) 122 SALJ 325; K Cooper-Stephenson ‘Principle and Pragmatism in the Law of Remedies’ in J Bennyman (ed) Remedies: Issues and Perspectives (1991) 15–17 (Cooper-Stephenson draws even finer distinctions than I, following Roach and Budlender. He distinguishes between (a) failure of comprehension; (b) failure of capacity; (c) failure of motivation; (d) failure by negligence; and (e) systemic failure.)


353 Ibid.

354 Minister of Home Affairs & 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
Divorce Act. The section prohibited the reporting of divorce proceedings. Although the ban clearly violated the right to freedom of expression, lifting the ban completely — which would have been the most effective relief as far as the right to freedom of expression was concerned — might have undermined FC s 28(2)'s protection of the best interests of the child.

The problem also arises when the retrospective application of a crime is in question. In Walters, the Court declared invalid a provision of a statute that permitted the use of deadly force to arrest criminals because it violated the rights to life, freedom and security and dignity of victims. However, to give it full retrospective application would turn legal acts (at the time they were committed) into criminal acts and thereby violate FC s 35(3)(l).

(3) Implementation

A final unavoidable limitation is implementation. It may be physically impossible for a fully effective remedy to be implemented. In Mohamed, the applicants had been illegally deported to the US to face trial where they might be sentenced to death. Fully effective relief would have required that the applicants be returned to South Africa and extradited to the US only following a proper procedure and on assurance that he would not receive the death penalty. And that was not about to happen.

Problems of implementation will not always be that extreme. More often, they will only nibble at the edges of effective relief and not prevent it completely. In Modderklip, the applicant's farm had been invaded by people seeking land and the police were unable or unwilling to evict them. Part of the reason the Supreme Court of Appeal and the Constitutional Court opted for damages as an appropriate remedy stemmed from the practical difficulty of enforcing an order of eviction.


357 Ibid at paras 10–12 (The Court ultimately rejected this contention because it held that the discretion retained by the High Court as the upper guardian of all minors afforded sufficient protection. At the time of writing, judgment was reserved in the Constitutional Court where the amicus curiae argued strongly in favour of a limited order. Johncom Media Investments Limited v Mandel & Others CCT08/08 (Heard on 8 May 2008).)

358 Ex parte Minister of Safety and Security & Others: In re S v Walters & Another 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC).

359 Mohamed & Another v President of the Republic of South Africa & Others 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC).


361 President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA & Others, Amici Curiae) 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC)('Modderklip').
Avoidable limits

This section addresses limits that are avoidable. Such limits constrain a court's ability to provide an effective remedy only as a matter of good judgment, not of necessity.

(1) Separation of powers

The separation of powers, in its most basic form, is the idea that that the three branches of government have separate roles to play and that the other branches should not interfere in those roles. However, as Seedorf and Sibanda argue, this 'pure' or 'negative' form of separation of powers does not tell the whole story. In order to be effective, separation of powers requires not only the independence of the three branches, but also their interdependence. The power of the legislature to dismiss the President or judges, of the Executive to appoint judges and of the Judiciary to strike down illegal laws or executive conduct all form part of the separation of powers.

However, when separation of powers is invoked in the remedial context, it is normally meant in its 'pure' form and is used as a reason for a court to refrain from providing fully effective relief. To do so would allegedly intrude too far into the prerogatives of the other branches. The Court has admitted that this doctrinal injunction remains rather vague:

[A court must keep the principle of separation of powers in mind] and, flowing therefrom, the deference it owes to the legislature in devising a remedy for a breach of the Constitution in any particular case. It is not possible to formulate in general terms what such deference must embrace, for this depends on the facts and circumstances of each case. In essence, however, it involves restraint by the courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the legislature.

Not only is it vague, but at least one Constitutional Court Justice has questioned its relevance at the remedial stage. In Fourie, Justice O'Regan held:

The doctrine of the separation of powers is an important one in our Constitution but I cannot see that it can be used to avoid the obligation of a court to provide appropriate relief that is just and equitable to litigants who successfully raise a constitutional complaint.

I agree with this statement insofar as separation of powers can never be a reason to avoid providing any relief at all. However, I think, and the Court's jurisprudence clearly accepts, that it can be used to make relief less than perfect. Justice O'Regan herself relied on the separation of powers in Dawood to suspend an

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362 This case also involved a conflict of rights as the invaders' right to housing would be infringed by forcing them off the land to vindicate the applicant's right to property (SCA) or access to court (Constitutional Court).


364 NCGLE v Minister of Home Affairs (supra) at para 66 as quoted in Sibanda & Seedorf (supra) at § 12.3(d)(i)(cc).

365 Fourie (supra) at para 170.
order of invalidity — where immediate invalidity would have been the ultimate effective relief.\(^{366}\) Her statement in *Fourie* should be understood in this light.

Separation of powers concerns arise in the courts' relationship with both the legislature and the executive. I consider each in turn.

**(x) Legislature**

Deference to the legislature is of greatest concern where the most effective remedy would require reading-in words to legislation.\(^{367}\) If there are a number of possible ways to cure the invalidity, then the judiciary might stand accused of usurping the role of the legislature if the court decided which of those possibilities to adopt. *Dawood* best expresses this concern:

> Where, as in the present case, a range of possibilities exists . . . it will ordinarily be appropriate to leave the legislature to determine in the first instance how the unconstitutionality should be cured. This Court should be slow to make those choices which are primarily choices suitable for the legislature.\(^{368}\)

**(y) Executive**

Deference to the executive is most relevant when a court is considering detailed interdicts or supervisory orders.\(^{369}\) The Court has recognised that the separation of powers doctrine does not prevent the issuing of these orders against the state:

> Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.\(^{370}\)

However, in the same case, the Court held that the power to supervise the state's compliance with an order should only be exercised when the government has given the Court reason to believe that it will not obey the order.\(^{371}\) This proviso

\(^{366}\) *Dawood & Another; Shalabi & Another; Thomas & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) at paras 62–63 ('It would be inappropriate for this Court to seek to remedy the inconsistency in the legislation under review. The task of determining what guidance should be given to the decision-makers, and in particular, the circumstances in which a permit may justifiably be refused, is primarily a task for the legislature and should be undertaken by it. There are a range of possibilities that the legislature may adopt to cure the unconstitutionality.') O'Regan J did however grant interim relief in *Dawood* and, as I argue below, seemed to make interim relief mandatory in cases where suspension would fail to effectively vindicate rights. See § 9.4(e)(i)(bb) infra. For this reason, I think this reading of her statement in *Fourie* is probably the best interpretation.

\(^{367}\) For a full discussion, see § 9.4(c)(iii) Infra.

\(^{368}\) *Dawood* (supra) at para 64. See also *NCGLE v Minister of Home Affairs* (supra) at paras 65–66.

\(^{369}\) For more, see § 9.6 infra.

implies that the courts should expect the other branches to be competent and willing to do whatever the Final Constitution demands. Unlike the more structural elements of the separation of powers, this respect can be lost and earned. If the executive continuously fails to comply with court orders, the Court will feel more comfortable issuing detailed interdicts or supervisory orders.\(^{372}\)

(2) **Courts' limitations**

In addition to the need to respect the position of the legislature and the executive, the nature of the Court as an institution may make it unsuitable or unable to carry out certain tasks. When the Court had to order the Electoral Commission to make arrangements to permit prisoners to vote, it acknowledged that it did 'not have the information or expertise to enable it to decide what those arrangements should be or how they should be effected.'\(^{373}\) It therefore had to rely on the Commission to determine the steps that had to be taken.\(^{374}\) Courts are generally ill-suited to taking over the detailed management of institutions and are therefore often hesitant to grant structural interdicts that will place them in a role that they have neither the expertise nor the resources to fulfil.

(3) **Administration of justice**

One of the most common limitations on full effective relief is the impact that an immediate change in the law will have on the past and the future. As explained in detail later,\(^{375}\) orders of invalidity apply retrospectively to the date the Final Constitution came into force unless the Court orders otherwise. Effective relief would ordinarily require this retrospective application to ensure that all people who were affected by this unconstitutional law will be afforded redress. However, in some cases this will result in many decided cases being overturned. In the context of the criminal law, the Constitutional Court has adopted the reasoning of Justice Harlan of the United States Supreme Court:

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371 Ibid at para 129. See also *President of the RSA & Others v Modderklip Boerdery (Pty) Ltd* 2004 (6) SA 40 (SCA), 2004 (8) BCLR 821 (SCA) at para 39 ('Structural interdicts . . . have a tendency to blur the distinction between the executive and the judiciary and impact on the separation of powers. They tend to deal with policy matters and not with the enforcement of particular rights. ')

372 See *Nyathi v Member of the Executive Council for the Department of Health Gauteng & Another* [2008] ZACC 8 (Court, on its own initiative, grants a structural interdict to monitor the payment of the State's outstanding judgment debts); *MEC for the Department of Welfare v Kate* 2006 (4) SA 478 (SCA)(Court orders damages, rather than a mere declaration, because the state continuously failed to comply with court orders.)

373 *August & Another v The Independent Electoral Commission (IEC) & Others* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) at para 39.

374 See also *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) at para 32 (Although it relates more to the content of the right, the Constitutional Court's rejection of a minimum core because of the informational deficit inherent in its institutional position also demonstrates this problem.). *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC) at para 77 (court unsuited to diplomatic negotiations).

375 See § 9.4(e)(ii) infra.
No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.\textsuperscript{376}

Administration of justice can also be affected by giving a decision immediate prospective effect. In \textit{S v Ntuli}, the Court struck down the overly restrictive system for appeals from the Magistrates' Court to the High Court.\textsuperscript{377} If the decision had had immediate effect, then the High Courts would have been swamped by all the appeals.\textsuperscript{378} It was necessary to suspend the declaration of invalidity to allow some other filter mechanism to be implemented.

\textbf{(4) Financial costs}

Courts might also be deterred from providing a remedy if it would involve massive financial cost. Courts are hesitant, though not unwilling, to interfere with budgetary concerns. However, the refusal to interfere need not be motivated by separation of powers issues. A court may, on its own accord, come to the conclusion that the cost is too high. That was the case in \textit{Fose}.\textsuperscript{379} The applicant claimed punitive damages for the abuse he suffered in police custody because he believed that such damages would help prevent similar attacks in the future. Ackermann J held that even if punitive damages would have such a deterrent effect, they would be inappropriate:

\begin{quote}
In a country where there is a great demand generally on scarce resources, where the government has various constitutionally prescribed commitments which have substantial economic implications and where there are 'multifarious demands on the public purse and the machinery of government that flow from the urgent need for economic and social reform', it seems to me to be inappropriate to use these scarce resources to pay punitive constitutional damages to plaintiffs who are already fully compensated for the injuries done to them, with no real assurance that such payment will have any deterrent or preventative effect.\textsuperscript{380}
\end{quote}

\textbf{(5) Impact on third parties}

A remedy may have negative consequences for people who aren't party to the litigation. A court may feel that it is unfair to require others to suffer so that the litigants can receive effective relief. The Court has relied on just this sense of injustice to justify limiting the retrospective effect of its orders. For example, in \textit{Gory v Kolver NO} — one of a number of important challenges to succession laws — the Court extended the Intestate Succession Act\textsuperscript{381} to apply to same-sex couples but did not apply that decision to estates that had already been wound up or to payments that had been received in good faith because it would be unfair to take

\textsuperscript{376} \textit{Mackey v US} 401 US 667, 691 (1971) quoted in \textit{S v Bhulwana; S v Gwadiso} 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC) at para 32.

\textsuperscript{377} 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC).

\textsuperscript{378} Ibid at para 27.

\textsuperscript{379} 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC)(‘\textit{Fose}’).

\textsuperscript{380} Ibid at para 72.
benefits away from people who had already received them. This remedy may be rather easily distinguished from the unavoidable harm of conflicting rights. The interests at stake here are mere private or financial interests. The most obvious example is the difference between criminal and civil liability in Walters. Criminal liability invokes another constitutional right (FC s 35(3))(l)). Civil liability invokes only a financial interest.

(6) Fault

A court may decide that although effective relief is possible, the litigant is not entitled to it because of the way he has conducted the litigation. Thus, in Pretoria City Council v Walker the Court refused to grant a remedy to a litigant who proved that the City's rate-collection policy was unfairly discriminatory because he had simply stopped paying his arrears rather than pursuing 'more practical remedies which would have been effective in getting the council to cease its objectionable conduct, thus eradicating the reason for the complaint.' A similar attitude seems to have motivated the Court in Steenkamp when it refused a remedy because the applicant should have re-applied for the tender or secured better contractual protection when it was awarded the tender.

(dd) Conclusion

Courts should only detract from the fully effective relief to the minimum degree necessary to accommodate the countervailing principle. If the problem is the financial cost, that is not a reason to provide no remedy at all, but to provide a remedy that incurs the maximum accessible economic burden. Where the limitation is based on the inadequacy of the Court as an institution, the answer is not for the Court to throw up its hands and do nothing, but to do the most it can within its limitations or to find another body that has the capacity to do what it cannot. This leads to the final point, that I have made before, and I want to make again. Courts must not feel constrained by the traditional forms of remedies. Anything is possible. Courts must think outside the box. They must 'forge new tools' and 'shape innovative remedies' to ensure that, within the inevitable limitations they provide the most effective relief available. No, not 'available'. The most effective relief imaginable.

(f) Constitutional Remedies and Private Remedies

381 Act 81 of 1987.

382 2007 (4) SA 97 (CC), 2007 (3) BCLR 249 (CC).

383 Ex parte Minister of Safety and Security & Others: in Re S v Walters & Another 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC)

384 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at para 96.

385 2007 (3) SA 121 (CC), 2007 (3) BCLR 300 (CC) at paras 49-50.

386 Fose (supra) at para 69.
This section attempts to answer two questions and make one suggestion about the relationship between constitutional remedies and private remedies. First, what characteristics do the two types of remedies share, and what sets them apart? Second, when should a litigant rely on a constitutional remedy and when on a private remedy? Third, I suggest that where the Constitutional Court has spurned direct reliance on the Bill of Rights for common-law cases in favour of indirect application in terms of FC s 39(2), direct application may still have a role to play when a new remedy is needed.

(i) Characteristics

Traditionally, a fairly strict distinction is drawn between private remedies and constitutional remedies based on the purpose that they serve. This distinction is accurately summarised by Currie and de Waal: ‘Constitutional remedies are forward-looking, community-oriented and structural [while private remedies are] backward-looking, individualistic and retributive.’ The Constitutional Court, speaking in the context of the law of delict, has described the difference in more detail:

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

This distinction is generally accurate. It is especially true when we are talking about remedies flowing from a finding that a law is invalid or when the constitutional remedy is aimed at a systemic violation. But the distinction should not be pressed in

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387 The term ‘public remedies’ is often employed instead of ‘constitutional remedies’. In my view, as well as that of Justice Ackermann, the former term is misleading. For Ackermann J, the problem is that using the term ‘public’ pulls one into the debate about the distinction between the ‘public’ and the ‘private’. That debate is unhelpful when one attempts to understand the distinction between private remedies and constitutional remedies. I do not think that the difficulty can be avoided by changing the words we use. But I have my own reason for preferring the ‘constitutional’ prefix: Using ‘public remedies’ implies that there are public remedies outside of the Final Constitution that share features with the subset of constitutional remedies. I know of no remedies that fall into that category and therefore prefer to stick to the term: ‘constitutional remedies’.


389 Fose v Minister of Safety and Security 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC) at para 17. See also Steenkamp v Provincial Tender Board of the Eastern Cape 2007 (3) BCLR 280 (CC) at para 29 (In an administrative law context, Moseneke DCJ said: ‘Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.’)
too categorical a fashion. Constitutional remedies are concerned with the future, but they must also be concerned with the past. They must provide relief to the individual before them which will often be retrospective in nature. At the same time, when crafting private law remedies courts are often concerned with the future impact of their decisions. When a court decides whether to impose delictual liability in the face of a new set of facts, it considers not only the backward-looking justice of doing so, but also the forward-looking question of how imposing liability in all similar future cases will affect society. The Supreme Court of Appeal in Steenkamp refused to impose delictual liability for out-of-pocket expenses suffered by a successful tenderer because:

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

In addition, interim and final interdicts — which are designed not to compensate for loss, but prevent it — are available under common law and are forward rather than backward looking. So while it may be necessary to distinguish between retributive private remedies and distributive public remedies, the distinction has limited utility in understanding the details of either category of remedies.

(ii) When should litigants rely on private remedies?

The general rule for when a litigant should rely on a constitutional remedy and when a private remedy, can best be described in terms of the notion of subsidiarity. Kentridge AJ explains the principle of subsidiarity as follows: 'I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.'

This principle was applied to remedies in Fose v Minister of Safety and Security where the Constitutional Court rejected a claim for constitutional damages because the damages the plaintiff could claim under the existing law of delict would adequately vindicate the right. The implication of the judgment is that where there is an adequate private law remedy — whether in common law or statute — that vindicates the right, it should be used. Only if the remedy supplied by the existing

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390 2006 (3) SA 151 (SCA) at para 40. See also National Media Ltd v Bogoshi 1998 (4) SA 1196, 1210 (SCA), [1998] 4 All SA 347 (SCA) (the court changed the law of defamation for media defendants from strict liability to reasonableness in part because: 'If we recognise, as we must, the democratic imperative that the common good is best served by the free flow of information and the task of the media in the process, it must be clear that strict liability cannot be defended . . . . Much has been written about the “chilling” effect of defamation actions but nothing can be more chilling than the prospect of being mulcted in damages for even the slightest error.')

law is insufficient to fully vindicate the right, should resort be made to direct reliance on constitutional remedies.\footnote{392}{See J Klaaren ‘Judicial Remedies’ in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) Constitutional Law of South Africa (1st Edition, R55, 1999) 9–9; H Varney ‘Forging New Tools: A Note on Fose v Minister of Safety and Security CCT 14/96’ (1998) 14 SAJHR 336, 343.}

Subsidiarity in constitutional remedies works fine in theory. It should not prevent any constitutional right from being vindicated. If common-law remedies are not adequate, then litigants are always entitled to bring a pure constitutional claim. Indeed, it has the apparent additional benefit of preventing the development of two different streams of jurisprudence for compensatory damages: a common-law stream and a constitutional stream. However, the doctrine has two practical drawbacks. The first relates to the way it encourages litigants to act. Although \textit{Fose} does not prevent litigants from bringing private claims and constitutional claims together when the relief they seek goes beyond what private law can provide, in the majority of cases an individual litigant seeking compensation will have no motivation to go beyond the ordinary confines of the private law. The individual litigant is interested primarily in securing individual compensation — and far less concerned about preventing future violation. Broader problems with state actions or private conduct may go unnoticed and unaddressed. For example, in \textit{Carmichele},\footnote{393}{\textit{Carmichele v Minister of Safety and Security & Another (Centre for Applied Legal Studies Intervening)} 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC)(The applicant was attacked because of a failure by the police and the prosecutor to oppose bail.)} \textit{K},\footnote{394}{\textit{K v Minister of Safety and Security} 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC)(Applicant was attacked and raped by off-duty policemen.)} and \textit{Zealand}\footnote{395}{\textit{Zealand v Minister for Justice and Constitutional Development and Another} 2008 (4) SA 458 (CC), 2008 (6) BCLR 601 (CC), 2008 (2) SACR 1 (CC)(The applicant was kept in gaol for five years longer than his criminal sentence because of administrative failures.)} the litigants brought pure delictual claims for individual damages even though their individual loss may well have been related to broader structural problems with the police and correctional services. Constitutional remedies by necessity address themselves to systemic problems and hold out the promise that future violations of the Final Constitution will be curtailed.

\textit{Steenkamp v Provincial, Tender Board, Eastern Cape} demonstrates the second potential pitfall of the \textit{Fose} approach — namely, a business as usual orientation towards remedies.\footnote{396}{2007 (3) SA 121 (CC), 2007 (3) BCLR 300 (CC). For more on \textit{Steenkamp}, including the facts and a criticism of the Court’s failure to provide a remedy, see § 9.2(b)(ii)(bb) supra.} The applicant, presumably motivated by the Court’s decision in \textit{Fose}, relied on the law of delict to enforce his constitutional right to just administrative action.\footnote{397}{Without explaining the facts in any detail, the ordinary administrative law remedy — setting aside the decision — would not have aided the applicant. The only remedy he regarded as effective was an award of damages — hence the reliance on the law of delict.}
traditional delictual framework and found that the act was not 'wrongful' in a textbook delictual sense. Now, it is difficult to know what the Court would have done if Mr Steenkamp had not relied on the law of delict, but directly on the Final Constitution to found his claim. The Court may well have reached the same conclusion. But it seems to me that it would have been much more difficult for the Court to say: 'Your right to administrative justice has been infringed, but we will give you no remedy'. The business as usual approach allowed the Court to say: 'Your constitutional right has been infringed, but unfortunately that does not entitle you to delictual damages.' The Fose principle, at least in cases like Steenkamp, requires a litigant to frame his constitutional claim in delictual terms, but then allows the law of delict to prevent the vindication of the constitutional right.\footnote{398}

Based on these two practical difficulties, I think a slight modification of the Fose principal is warranted. The way it is ordinarily interpreted,\footnote{399} Fose stands for the following proposition:

If a private remedy partially vindicates the constitutional right, then a litigant must rely on the private law for that part of the relief and may also rely on constitutional law for the relief necessary to vindicate the rest of the right.

My modification of the Fose principle would be:

If a private remedy fully vindicates a constitutional right, the litigant must rely on the private remedy. If the private remedy only partially vindicates the right, a litigant is entitled, but not obliged, to rely solely on constitutional law for all aspects of her relief. If she does so, the existence of a remedy under private law should not be a bar for granting the same relief under constitutional law.

This modest modification reflects the position taken by the Supreme Court of Appeal in Kate.\footnote{400} In considering whether direct constitutional damages could be awarded to compensate to the plaintiff for the state's inexplicable delay in deciding whether to grant a social security grant, Nugent JA held:

No doubt the infusion of constitutional normative values into delictual principles itself plays a role in protecting constitutional rights, albeit indirectly. And no doubt delictual principles are capable of being extended to encompass state liability for the breach of constitutional obligations. But the relief that is permitted by s 38 of the Constitution is not a remedy of last resort, to be looked to only when there is no alternative — and indirect — means of asserting and vindicating constitutional rights. While that possibility is a consideration to be borne in mind in determining whether to grant or to withhold a direct s 38 remedy it is by no means decisive, for there will be cases in which the direct assertion and vindication of constitutional rights is required. Where that is so...

\footnote{398} I should make it clear that this does not mean that whenever a constitutional right founds a delictual claim, the applicant is automatically entitled to damages. Where there is an alternative effective remedy, it will not be necessary for the vindication of the constitutional right to grant delictual damages. This was the case in, for example, Olitzki where an ordinary review of the administrative action would have adequately vindicated the right. Olitzki Property Holdings v State Tender Board & Another 2001(3) SA 1247 (SCA). That was not the case in Steenkamp.

\footnote{399} This interpretation seems like the correct interpretation to me because Ackermann J refuses to grant compensatory constitutional damages before he has decided whether to grant punitive constitutional damages. Therefore, even if he had decided that punitive damages were warranted, Mr Fose would still have had to rely on the law of delict, not his constitutional right, for compensation.

\footnote{400} MEC for the Department of Welfare v Kate 2006 (4) SA 478 (SCA)('Kate').
the further question is what form of remedy would be appropriate to remedy the breach.\textsuperscript{401}

Although not a closed list, the Supreme Court of Appeal listed two factors that prompted it to grant direct constitutional damages. First, the constitutional infirmity was a direct breach of a specific normative right, not 'merely a deviation from a constitutionally normative standard'.\textsuperscript{402} Second, the breach of the right was endemic and required a clear assertion of the importance of the constitutional — as opposed to only the private — right.\textsuperscript{403} The first justification goes further than my revision suggests because it would permit a constitutional remedy where the reliance is on a specific right, even if the private law completely vindicates the right. I am not sure if Nugent JA intended for the first justification alone to be a sufficient condition. One good reason to reject that proposition is that it could lead to the development of parallel systems of law.\textsuperscript{404} For example, there could be one set of rules for victims of police brutality who relied on the law of delict and another for those who based their claim on a direct violation of FC s 12. That is undesirable. In my view, the first reason — a direct violation — is a necessary but insufficient justification for a constitutional remedy. It will need to be supplemented by other factors, such as the systemic breach at issue in \textit{Kate}.

(iii) \textbf{Indirect application and remedies}

In addition to its preference for private remedies rather than constitutional remedies, the Constitutional Court has also expressed a clear preference for indirect application rather than direct application of the Bill of Rights to the common law. Because the Court is generally able to achieve all its preferred goals equally well through indirect application as it would through direct application, there is a danger that direct horizontal application — despite its explicit inclusion in the Final Constitution — may become extinct. Leaving aside criticisms of this move\textsuperscript{405} — with which I agree — the question for supporters of direct application is what role, if any, it might still play in private disputes.

I think a small space for direct application exists when the remedy sought falls outside the range of the private action or goes against the general purpose of the law. For example, the ordinary private law remedy for defamation is compensation because the purpose of the remedy is to right the wrong done to the person defamed. Other possible common-law remedies include an apology and retraction

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{401} \textit{Kate} (supra) at para 27.
\item \textsuperscript{402} Ibid.
\item \textsuperscript{403} Ibid.
\item \textsuperscript{404} Some commentators have suggested that two parallel systems — with twin peaks so to speak — might not be such a bad idea. See, for example, F Michelman 'Constitutional Supremacy and Appellate Jurisdiction in South Africa' in S Woolman & M Bishop (eds) \textit{Constitutional Conversations} (2008) 33.
\end{itemize}
\end{footnotesize}
and an interdict to prevent publication. Those remedies would ordinarily seem more than sufficient. But imagine that a newspaper regularly defamed people and that the problem seemed to be inadequate fact-checking structures or a 'we do whatever we please' culture which the institution was unwilling to fix. A well-known figure who was defamed by this newspaper might want not only compensatory damages, but also a supervisory interdict to ensure that the structural deficiencies were rectified. A court would not be able to grant such an order under existing common law, but it might be willing to do so based on a direct reliance on the right to dignity.

While examples of such situations may be limited, I think that we, in fact, anticipate such challenges. Viewing FC s 8 as a means of providing remedies in private disputes that would not be available through indirect application may guarantee a meaningful, ongoing role for direct application of the Bill of Rights and therefore avoid the untoward end that the Court's expansive use of FC s 39(2) currently promises.

9.3 Categorising remedies

There are many ways to break down a discussion of remedies. We could separate them into positive remedies (that tell people to do something) and negative remedies (that tell people not to do something). The line could be drawn between remedies that change law and those that do not. The relevant distinction could rest on the degree of discretion that courts have: confined remedies and unconfined remedies.
remedies. Remedies that are based on a direct reliance on the Final Constitution could be separated from those that rest on an indirect reliance. All of these are valid, but limited, ways of thinking about remedies.

I separate remedies into three categories: (a) remedies following the invalidation of a law; (b) remedies for isolated/individual violations of rights; and (c) remedies for systemic violations. The first type is easy to define: They are whatever order a court makes following a finding in terms of FC s 172(1)(b) that law is unconstitutional. FC s 172(1)(b) necessitates that this include a declaration of invalidity, but it can also include supplementary orders regulating when the declaration begins to have effect and to isolate the specific parts of the law that are invalid from those that are not. These remedies are easy to differentiate from the other two types of remedies which do not involve the invalidation of law or conduct. The first of these two, individual remedies, concerns isolated or individual violations of rights. Individual is perhaps not the best label as I include under this heading violations of the rights of a group where that violation is a once-off or completed occurrence. By contrast, systemic remedies concern ongoing violations of many people's rights. The cause of the violation is often the result of existing policies, practices or institutional structures that actively or tacitly encourage rights violations. These situations more often, though not always, require remedies that try not only to compensate for past losses but to prevent or deter future violations.

However, while I separate these three categories for ease of analysis, it is important to stress the large degree of overlap between them. In fact, it is perhaps best not to see them as separate categories but as points on a spectrum. On the one extreme are the most general remedies, those involving invalidity. These remedies are the most general because they affect the whole country. At the other extreme are individual remedies which concern the compensation of only a single individual. Systemic remedies fall in the middle as they require both individual redress and forward-looking transformation. Few cases will fall exactly in any category. They will have elements of each type and will rest somewhere on the spectrum between the various categories.

Thus, an invalidity remedy will almost always arise out of an actual individual or systemic violation and there will be real litigants who will often want relief that goes beyond merely declaring the law invalid. In Nyathi v Member of the Executive Council for the Department of Health Gauteng & Another the applicant, who had been seriously injured by negligence in a state hospital, went to court because he wanted an interim payment from the state. It was only when the state failed to pay that Mr Nyathi challenged the constitutionality of s 3 of the State Liability Act which exempted the State from attachment procedures. By the time the case arrived at the Constitutional Court, it was clear that Mr Nyathi's experience was far from an isolated incident. There was a systemic problem with the state's payment of judgment debts. One can only understand Nyathi properly and provide an adequate

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411 See generally S Sturm & H Gadlin 'Conflict Resolution and Systemic Change' (2007) Journal of Dispute Resolution (Argue, in the context of conflict resolution in the National Institute of Health that individual problems can require systemic interventions and systemic problems may only permit individual interventions.)


413 Act 20 of 1957.
remedy if one sees the intersections between the three categories of remedies. The Constitutional Court did just that. At the first hearing — which was set down as an urgent matter — the Court demanded that the state immediately pay Mr Nyathi the money he was owed. Once that urgent issue was addressed the Court postponed the case to consider the challenge to the legislation and the systemic problem in more detail. In addition to declaring s 3 invalid, the Court, on its own initiative, raised the question of a supervisory interdict to monitor the state's payment of all outstanding judgment debts — an order it eventually granted.

Sometimes the links are less obvious. In *KwaZulu-Natal MEC for Education & Others v Pillay* the litigation was a result of a school's refusal to allow a specific learner (Sunali) to wear a nose-stud to school.\(^{414}\) However, the Constitutional Court recognized that the case was about more than Sunali's nose; it was about the way that the school — and many other schools — evaluated claims for exemptions from their code of conduct. If the remedy had applied only to Sunali, it would not necessarily have aided learners who found themselves in a similar position in the future. The Court therefore ordered the School to change its code of conduct to create a better process and substantive standard for granting religious and cultural exemptions.

There might also be cases where a systemic violation only permits an individual remedy. *Fose* is perhaps such a case.\(^{415}\) The applicant was severely assaulted and tortured while in police custody. However, the evidence showed that the problem, especially at the police station where the assault took place, was widespread and endemic. The applicant claimed delictual damages, but in addition claimed constitutional punitive damages in part to deter future violations. Kriegler J noted that 'where there are systematic, pervasive and enduring infringements of constitutional rights, delictual relief compensating a particular plaintiff does not seem adequate as a means of vindicating the Constitution and deterring further violations of it.'\(^{416}\) However, the alternative — punitive damages — was not an appropriate remedy because it unduly enriched a single plaintiff without any clear impact on the underlying problem. The possibility of a supervisory order to improve the situation was not raised and the court could not consider it. Despite the systemic nature of the problem, only an individual remedy could be afforded.

The inter-connectedness of these three types of remedies is vital in order to make constitutional rights real. Courts must always be aware of the potential systemic problems that may underlie an application to declare a law invalid or for individual damages. They should not be afraid to raise these issues *mero motu* and have the parties address potential remedies that may go beyond the narrow interests of the parties to the case.

### 9.4 Remedies following a finding of inconsistency

#### (a) Hierarchy

\(^{414}\) 2008 (2) BCLR 99 (CC).

\(^{415}\) *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC).

\(^{416}\) Ibid at para 102.
A finding that a law — whether statutory, common or customary — is inconsistent with the Final Constitution requires a particular set of remedies to cure the defect. There are two basic options: either interpret the law so that it is conforms to the dictates of the Final Constitution to avoid the violation or invalidate the law. If a court chooses the second option, they can limit their declaration of invalidity by cutting out only the offending words or adding new words or making the application of the law subject to a condition. Courts are also specifically empowered by FC s 172(1)(b) to suspend an order of invalidity to allow the legislature to put a new law in place and to limit the impact that the declaration of invalidity will have on the past.

The Constitutional Court has set out the following basic hierarchy for choosing these remedies:

(a) If possible, the law must be interpreted — 'read down' — to avoid the inconsistency;

(b) If that is not possible, the law must be declared invalid;

(c) Rather than declaring the law completely invalid, the substantive impact of the declaration should, if possible, be limited by altering the law through severance, reading-in or notional severance to cure the constitutional defect;

(d) It might also be necessary to limit the temporal impact of the order by:
   a. If it is not possible to make an order in terms of (c), suspending the order of invalidity.
   b. Even if an order in terms of (c) is competent, limiting the retrospective effect of the order.

The discussion that follows will adhere, roughly, to this structure. However, this remedial hierarchy is not set in stone. Quite often, one step will affect the determination under another step. For example, whether a court is willing to read words in to a law may depend on the possibility of suspending the order and a

417 Although the vast majority of cases concern legislation, and most of the Constitutional Court's statements only mention legislation, there is no reason in theory why the same principles should not apply to rules of common law and customary law that are found to directly violate (rather than to be in need of development in terms of FC s 39(2)) the Final Constitution. See, for example, National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC)(Invalidated the common-law criminalization of sodomy); Bhe & Others v Magistrate, Khayelitsha & Others; Shibi v Sithole and Others; SA Human Rights Commission & Another v President of the RSA & Another 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC)(Invalidated customary-law rule of primogeniture).

418 See Van Rooyen v The State 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC) at para 88 ('[L]egislation must be construed consistently with the Constitution and thus, where possible, interpreted so as to exclude a construction that would be inconsistent with [the Constitution]. If held to be unconstitutional, the appropriate remedy ought, if possible, to be in the form of a notional or actual severance, or reading-in, so as to bring the law within acceptable constitutional standards. Only if this is not possible, must a declaration of complete invalidity of the section or subsection be made.')

419 J & Another v Director General, Department of Home Affairs & Others 2003 (5) SA 621 (CC), 2003 (5) BCLR 463 (CC) at para 22 ('Where the appropriate remedy is reading-in words in order to cure the constitutional invalidity of a statutory provision, it is difficult to think of an occasion when it would be appropriate to suspend such an order.' This statement is discussed in more detail at § 9.4(d)(iii) infra.)
court’s willingness to read-down may be affected by the retrospective implications of that decision. The Constitutional Court has also combined temporary reading-in orders with suspension orders — that combination does not fit neatly into this structure.\textsuperscript{420} But the hierarchy still provides a useful starting point for how the Court thinks about how to remedy constitutionally infirm laws.

\textbf{(b) Reading Down}

\textbf{(i) The nature of reading down: interpretation or remedy?}

It is necessary at the outset to explain precisely what reading-down means, and perhaps more importantly, what it does not mean. Reading down occurs when a statute\textsuperscript{421} possesses two (or more) possible interpretations: one construction is constitutional while the other directly violates a constitutional provision.\textsuperscript{422} A court faced with this situation must choose the constitutional interpretation over the unconstitutional interpretation. The classic statement\textsuperscript{423} of this principle appears in \textit{Hyundai Motor Distributors}: ‘judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section.’\textsuperscript{424} Described in this sense, reading down does not appear as a remedy but as a mandatory rule of interpretation. Unlike ‘true’ remedies, reading down does not follow a finding of invalidity, but avoids such a finding by choosing an interpretation that does not

\begin{footnotesize}
\textsuperscript{420} See § 9.4(e)(i)(cc) infra.

\textsuperscript{421} Technically, this mode of interpretation can also apply to rules of common law and customary law. However, those forms of law are generally less clear than statutes and are also open to ‘development’ under FC s 39(2). Reading down of common law or customary law is therefore theoretically possible, but practically irrelevant.

\textsuperscript{422} Although ordinarily applied to the Bill of Rights, reading down applies to all other sections of the Final Constitution as well. See \textit{AAA Investments (Pty) Ltd v Micro Finance Regulatory Council & Another} 2007 (1) SA 343 (CC), 2006 (11) BCLR 1255 (CC) at para 72 (Langa CJ), dissenting, held: ‘This principle is not limited to consistency with the spirit, purport and objects of the Bill of Rights as required by section 39(2), it is an implied principle of the Constitution as a whole that a constitutional interpretation should always be preferred to a non-constitutional interpretation.’

\textsuperscript{423} Although this case provides the clearest account of what reading down entails, it was not the first time the method was considered as an option. See \textit{S v Bhulwana; S v Gwadiso} 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC) at para 28; \textit{Mistry v Interim Medical and Dental Council of South Africa & Others} 1998 (4) SA 1127 (CC), 1998 (7) BCLR 880 (CC) at para 32; and \textit{National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others} 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) (‘\textit{NCGLE v Minister of Home Affairs}’) at paras 23–24.

\textsuperscript{424} \textit{Investigating Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Ltd & Others: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO & Others} 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC) (‘\textit{Hyundai Motor Distributors}’) at para 23 (The case concerned s 29(5) of the National Prosecuting Authority Act 32 of 1998 which allowed for search and seizure warrants for preparatory investigations to be issued without a reasonable suspicion of wrongdoing. The section was challenged as a violation of the right to privacy. The Court held that, constitutionally interpreted, the section did require a reasonable suspicion that an offence had been committed.) See also \textit{National Director of Public Prosecutions & Another v Mohamed NO & Others} 2003 (4) SA 1 (CC), 2003 (5) BCLR 476 (CC) at para 35 (‘If the one construction leads to constitutional invalidity but the other not, the latter construction, being in conformity with the Constitution must be preferred to the former, provided always that such construction is reasonable and not strained.’)
\end{footnotesize}
violate the Final Constitution. Is it still accurate to talk about reading down as a 'remedy'?

The position is further complicated by the existence of a process very similar to reading-down: indirect application. In order to understand the difference between reading down and indirect application, it is necessary to look briefly at the Interim Constitution. That document created two separate rules of interpretation. The first demanded that if the prima facie reading of a law limited a right in the Bill of Rights, but the law was capable of another construction that did not limit the right, the law should be given the second interpretation. The second rule required courts to interpret all law with 'due regard to the spirit, purport and objects' of the Bill of Rights. The phrase 'reading down' referred exclusively to the first process. The second process was called 'indirect application'. Under the Final Constitution indirect application is entrenched in similar terms in FC s 39(2). However, no equivalent provision exists for 'reading down'. Reading down survives only as an implicit provision of the Final Constitution. (Indeed, the absence of an equivalent provision to IC s 35(2) in the Final Constitution has led courts and academics to conflate the two processes.)

Does it make any sense to distinguish between reading down and indirect application? In the realm of substantive constitutional analysis, the two processes are clearly distinct. Reading down first requires the application and the interpretation

425 See NCGLE v Minister of Home Affairs (supra) at para 24 ('There is a clear distinction between interpreting legislation in a way which "promote(s) the spirit, purport and objects of the Bill of Rights" as required by s 39(2) of the Constitution and the process of reading words into or severing them from a statutory provision which is a remedial measure under s 172(1)(b), following upon a declaration of constitutional invalidity under s 172(1)(a). . . . The first process, being an interpretative one, is limited to what the text is reasonably capable of meaning. The latter can only take place after the statutory provision in question, notwithstanding the application of all legitimate interpretative aids, is found to be constitutionally invalid.' While this statement is correct as far as it goes, it fails to draw a distinction between reading down and interpretation in terms of s 39(2). As I argue below, there is a difference between the two.)

426 IC s 35(2).

427 IC s 35(3).

428 The major difference between IC s 35(3) and FC s 39(2) is that s 39(2) also permits 'development' of common law and customary law. While the exact scope of the development power is unclear, it certainly is broader than mere interpretation as it permits courts to change the wording of common law tests. See, for example, 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 (CC) (Court altered the common-law definition of rape). This important distinction allows courts dealing with the common law or customary law to largely dispense with direct application and the specific remedies that follow as any changes they wish to make to the law can be achieved through indirect application. That option is not available when dealing with legislation that can only be interpreted. In drawing the distinction between 'reading-down' and indirect application, I am referring only to that part of indirect application that applies to the interpretation of statutes. For more on the development and reading down in terms of FC s 39(2), see S 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.

429 That reading down remains part of the Final Constitution is clear from, amongst other cases, Hyundai Motor Distributors (supra) which performed reading down under the Final Constitution.
of a specific substantive right to the law under scrutiny. Indirect application amounts to little more than an 'all-things-considered' type of test: namely does the rule of law comport with some vague notion of the spirit, purport, and object. But does that difference translate to a difference from a remedial perspective? Yes, because indirect application does not have a remedial phase. Determining whether interpretations conform to the spirit, purport and objects of the Bill of Rights — and whether they do not — and then choosing the best interpretation or alteration of that rule of law is undertaken simultaneously. The substantive and remedial phases are collapsed into a single inquiry. In terms of direct application of a specific substantive provision of the Bill of Rights, the substantive and remedial phases can be logically separated. At the first phase the court deter-

mines whether a right has been violated. At the second phase it decides how to cure that violation. I, therefore, not concerned here with interpretations and alterations of the law that flow from an indirect application of the Bill of Rights. That topic is dealt with at length elsewhere in this treatise.

However, two further issues regarding the relationship between reading down and indirect application bear mention. One, the test for how far the words of a statute can be stretched to bear a constitutional meaning is similar under both processes and it is therefore not inappropriate to draw some guidance from FC s 39(2) cases when a court first attempts to read down a statute. Two, the Constitutional Court's

Although this answer provides a conclusive theoretical reason for treating the two processes separately, it still seems somewhat practically unsatisfying. A litigant could not care less whether a court engages in 'reading down' or indirect application; what she cares about is the end result. For the litigant an interpretation flowing from an indirect interpretation is as much a 'remedy' as one that results from reading down. This takes us back to the different uses of the word 'remedy'. The litigant uses the word in its broad sense to connote any action that cures a wrong. I use it in its narrow sense to connote a discretionary decision taken by a court following some finding of constitutional inconsistency. That is again a theoretical rather than a practical answer. However, there is also an important practical consequence to the choice of direct or indirect application. If a litigant only brings an indirect challenge and the words of the statute are incapable of bearing a meaning that is compatible with 'the spirit, purports and objects of the Bill of Rights' a court is obliged to apply that statute anyway and the litigant will receive no remedy. See, for example, Giddey NO v JC Barnard and Partners 2007 (5) SA 525 (CC), 2007 (2) BCLR 125 (CC) at para 29 (O'Regan J held that s 13 of the Companies Act was incapable of being read so as to prohibit requiring security for costs if doing so would prevent the litigation. Because '[t]he applicant did not challenge the constitutionality of the section' he failed.) On the other hand, if the litigant relies on the direct application of the Bill of Rights and the statute cannot be interpreted to avoid a finding of inconsistency, the statute will still be declared invalid and the litigant will, probably, find some other form of relief. From this perspective, direct application would seem like the preferable option. However, the position is further complicated by the Constitutional Court's preference for indirect application. The Constitutional Court prefers, if it can, to engage in indirect application, rather than direct application, a fact which reinforces the reliance by litigants on indirect application. From a strategic point of view, if there is any doubt that the words to be interpreted can bear the meaning contended for, it is best to bring both a direct and an indirect challenge.


The test, explained in more detail below, is whether the words are 'reasonably capable' of bearing the assigned meaning. See § 9.4(a)(ii). For the most recent endorsements of this principle, see MEC Department of Agriculture Conservation and Environment & Another v HTF Developers (Pty) Ltd [2007] ZACC 25 at para 75; Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & Another [2008] ZACC 12 at para 105 (Yacoob J dissenting).
preference for indirect application rather than direct application\(^433\) may well make reading down, in the formal sense described here, largely redundant. Courts will always be able to reach the same result through reliance on the general test in FC s 39(2) rather than the specific rights analysis required by direct application and reading down. They are likely to follow the Constitutional Court's lead and employ FC s 39(2) wherever possible.

(ii) When is reading down appropriate?

Reading down comes into the picture when some form of limitation of a constitutional provision is alleged. An interesting question is whether, when the provision in question is a right in the Bill of Rights, the interpretation must also be unjustifiable under FC s 36(1) before reading down, or whether reading down can be used as a means not to prevent a limitation, but to allow it to be justified under s 36(1), or, finally, whether reading down occurs to prevent any limitation of the right at all. It seems that reading down can be used in all three ways. The first form of analysis was at play in Lawyers for Human Rights & Another v Minister of Home Affairs & Another.\(^434\) The High Court had interpreted s 34(8) of the new Immigration Act to permit the mere say-so of an immigration officer to cause the indefinite detention of an immigrant. Yacoob J held that such an interpretation 'would be arbitrary and the subsection would be unconstitutional'.\(^435\) He therefore adopted an interpretation of the subsection to avoid that consequence. Langa DP employed reading down in its second guise in Hyundai Motor Distributors. He was obliged to interpret a provision that permitted investigators to obtain a search warrant if there was a 'suspicion' that an offence had been committed to mean 'reasonable suspicion'. That interpretation still limited the right to privacy.\(^436\)

However, because the limitation was very 'narrow', it was deemed justifiable under FC s 36(1). Reading down takes its third form in Daniels v Campbell. A majority of the Court re-interpreted the word 'spouse' so as to avoid any limitation of the right to equality.\(^437\)

Reading-down cannot occur if there is no (notional) invalidity with respect to any of these three interpretive processes. That is, it is not possible to read down a statute that does not violate or limit a section of the Final Constitution. That rule would seem self-evident. However, it was ignored by Nicholson J in his recent decision in Zuma v National Director of Public Prosecutions.\(^438\) He concluded that s 179 of the National Prosecuting Authority Act should have required the National


\(^434\) 2004 (4) SA 125 (CC), 2004 (7) BCLR 775 (CC).

\(^435\) Ibid at para 29.

\(^436\) Hyundai Motor Distributors (supra) at para 52.

\(^437\) Daniels v Campbell & Others 2004 (5) SA 331 (CC), 2004 (7) BCLR 735 (CC)('Daniels')(The Court interpreted 'spouse' to include parties to a Muslim marriage and thereby avoided any limitation of the right to equality.) See also Engelbrecht v Road Accident Fund 2007 (6) SA 96 (CC), 2007 (5) BCLR 457 (CC) at paras 33–38 (Although the Court rejected the interpretation urged on it, if it had accepted it, it would have operated at the third level.)
Director of Public Prosecutions to consult the accused when reconsidering a decision to prosecute made not only by the Directors of Public Prosecutions — which the section mentioned — but also the Deputy National Director of Public Prosecutions (DNDPP) — which the section did not mention. He reached this conclusion without finding — or even suggesting — that s 179 limited any provision of the Final Constitution. His only reason for adopting his line of argument was that when the statute was enacted, prosecutions did not begin with the DNDPP. Today they do. It therefore makes no sense to exclude the DNDPP. That may be a good argument to interpret the statute in a particular way. However, it does not require, or even permit, a constitutional remedy, either in the form of reading down or reading-in.

This Zuma judgment also highlights the distinction between reading-in and reading down. Nicholson J called his actions: 'the process of interpretation known as reading-in'. This statement of the law is an error. Reading-in is not a process of 'interpretation' but of adding words to a statute. If he really meant to interpret s 179 then he was engaged in reading down not reading-in. If he thought he was engaged in reading-in, then he failed to do so. His order contains no mention of changing the words in the section.

After a court has found some form of constitutional violation, the next question is how far a court will go in stretching the words of a statute to afford it a meaning that conforms with the Final Constitution. The Hyundai Motor Distributors Court clearly identified the framework within which reading down should operate:

On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read 'in conformity with the Constitution'. Such an interpretation should not, however, be unduly strained.


439 Ibid at para 125.

440 Ibid.

441 See Daniels (supra) at para 85 (In dissent, Moseneke J criticised the majority of the Court for interpreting the word ‘spouse’ to include parties to a Muslim marriage rather than declaring the provision invalid and reading-in words to include Muslim marriages: 'The meaning of "spouse" preferred in the main judgment is said to be compelled by the need to redress "past discriminatory interpretations". The main judgment explains that "the potential under-inclusiveness and consequent discriminatory impact is avoided simply by correcting the interpretation." In this way, the main judgment conflates the meaning that the Acts can reasonably bear with the constitutional remedy the applicant and others similarly situated may be entitled to. These processes ought to be two separate enquiries, the first goes to interpretation, and the second to remedy. Otherwise the meaning of the text becomes subservient to a preferred outcome or relief.' (my emphasis)).

442 Hyundai Motor Distributors (supra) at para 24 (footnotes omitted). See also Daniels (supra) at para 46 (Ngcobo J).
As is clear from this description, reading down is not always possible: the provision must be 'reasonably capable' of the constitutional interpretation.\textsuperscript{443} If it is not reasonably capable of that meaning, then words must be severed or read-in to the statute.\textsuperscript{444} To give an indication of how far the Court will go in interpreting statutes so that they remain constitutionally valid,\textsuperscript{445} the Court has interpreted the word ‘direction’ in one section to mean something different from ‘direction’ in the next section,\textsuperscript{446} and that a statute that required submission to a ‘local representative’ could be satisfied by submission to a central collecting point.\textsuperscript{447}

However, on other occasions the desired ‘constitutional interpretation’ would stretch the extension of the words beyond all recognition.\textsuperscript{448} As Justice Yacoob has recently warned, it is very dangerous for courts to begin assigning meanings to statutes that the words are incapable of bearing:

This Court has no mandate, constitutional or otherwise, to afford to any law a meaning that it cannot reasonably bear. Courts ought never to go down that road, even to fulfil the laudable aim of achieving greater harmony between fundamental rights conferred by the Constitution and the law in question.\textsuperscript{449}

\textsuperscript{443} See, for example, \textit{S v Bhulwana; S v Gwadiso} 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC) at para 29 (Holding that a reverse-onus provision cannot be read down to impose an evidentiary burden); \textit{NCGLE v Minister of Home Affairs} (supra) at paras 25–26 (The court found that the word ‘spouse’ could not be read to include same-sex couples and thus cure a constitutional defect.)

\textsuperscript{444} See \textit{Minister of Home Affairs & 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) (‘\textit{Fourie}’ at para 33 (‘In my view where the Legislature prescribes a formula of this kind its words can not be substituted by "updating" interpretation. If the court, and not the Legislature, is to make a constitutionally necessary change to such a formula, that must be done not by interpretation but by the constitutional remedy of "reading-in". That remedy is appropriate because it changes in a permissible manner the nature of the action the statute requires, without purporting merely to interpret its words.’)

\textsuperscript{445} Both these cases rely on FC s 39(2). However, as I noted earlier, the ‘reasonably capable’ test is used both for reading down and indirect application to statutes, so they do provide useful guidance on how far a court will stray from the natural meaning of a statute.

\textsuperscript{446} \textit{MEC Department of Agriculture Conservation and Environment & Another v HTF Developers (Pty) Ltd} [2007] ZACC 25 (The applicant successfully argued that ‘direction’ in s 31A of the Environmental Conservation Act 73 of 1989 — which permitted local government to direct that a person stop harming the environment — was not the same as the reference to ‘direction’ in s 32 — which required that directions be published 30 days before taking effect for public comment. The Court relied on the FC s 24 right to a healthy environment and the FC s 33 right to just administrative action.)

\textsuperscript{447} \textit{African Christian Democratic Party v The Electoral Commission & Others} 2006 (3) SA 305 (CC), 2006 (5) BCLR 579 (CC) (The legislation required a deposit to be submitted in order to contest a local election. The ACDP had, by the cut off date, had not submitted its deposit to the Cape Town office, but had submitted enough money to cover their participation in the Cape Town election to the central office of the Independent Electoral Commission. O'Regan J (Skweyiya J dissenting) held that, interpreted in light of the right to vote, this constituted sufficient compliance with the statute.)

\textsuperscript{448} The most obvious instances are the various cases concerning the word ‘spouse’. Those cases are dealt with in more detail later in this section.
In *Mistry v Interim Medical and Dental Council of South Africa*, the Court was confronted with a section that gave medical inspectors overly broad powers to search any home containing medicine.\(^{450}\) Sachs J found that it was impossible to read the legislation down as it would do 'violence to the explicit language' of the legislation and alter drastically the powers of the inspectors.\(^{451}\) One might contend, following Sachs J, that Nicholson J exceeded the bounds the words were reasonably capable of bearing in *Zuma*. The phrase 'Director of Public Prosecutions' does not seem to be obviously capable of meaning 'Director of Public Prosecutions and Deputy National Director of Public Prosecutions'.

Whether an interpretation is 'reasonable' is not always obvious. It has twice been the subject of disagreement on the Constitutional Court.\(^{452}\) *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & Another*\(^{453}\) required the Constitutional Court to consider whether a piece of land qualified as 'agricultural land' in terms of s 1 of the Agricultural Land Act.\(^{454}\) The details of the argument are somewhat technical. The interesting point is that a majority of seven judges held that the land was agricultural land while the remaining three judges not only disagreed with the finding, but disagreed so strongly that they would have dismissed leave to appeal because the majority's construction was not reasonable. Both sets of judges relied on a contextual method of interpretation. And yet they reached radically different conclusions. (It might seem, therefore, that context isn't everything.)

The reasonableness of an interpretation is debatable not only because of disagreement about the technical meaning of a word, but because it is a value-laden exercise. Two decisions regarding the meaning of 'spouse' illuminate this point. In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, the Court was faced with legislation that facilitated the immigration of 'spouses', but not same-sex life partners. The question was whether the word 'spouse' could be read to include same-sex life partners. The Court held that 'spouse' as it was used generally and in the context of the legislation applied only to married couples.\(^{455}\) As same-sex marriage was, at that time, not possible, 'spouse' could not apply to same-sex couples. The Court was forced to make a finding of invalidity and to read words in to the statute to cure the discrimination.\(^{456}\) This restrictive reading of the word

\(^{449}\) *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* [2008] ZACC 12 at para 105.

\(^{450}\) 1998 (4) SA 1127 (CC), 1998 (7) BCLR 880 (CC).

\(^{451}\) Ibid at para 32.

\(^{452}\) *Daniels* is discussed in greater detail below.

\(^{453}\) [2008] ZACC 12.

\(^{454}\) Act 70 of 1970.

\(^{455}\) NCGLE v Minister of Home Affairs (supra) at paras 25–26.

\(^{456}\) For more on reading-in, see § 9.4 (c) (iii) infra.
'spouse' was confirmed in a case involving payments to partners of homosexual judges, and the maintenance of partners of life-long co-habitants. By contrast, in Daniels v Campbell, the Court adopted a much broader understanding of the word 'spouse'. In Daniels, the question was whether parties to a Muslim marriage — that was not recognised by law — could be identified as 'spouses' for purposes of intestate succession. The High Court purported to follow NCGLE v Minister of Home Affairs and found that 'spouse' applied only to legally recognised marriages and therefore did not cover Muslim unions. The majority of the Constitutional Court reversed that decision. Sachs J found that any ordinary understanding of 'spouse' would embrace the parties to a Muslim marriage and that the extension of the word 'spouse' would have to be drastically curtailed in order to exclude them. Daniels held that any interpretation of the word 'spouse' had to be conducted with reference to the social context and the purpose of the particular statute. In Daniels, the purpose was, largely, to give protection to widows. The question, according to Sachs J, was therefore, 'not whether it had been open to the applicant to solemnise her marriage under the Marriage Act, but whether, in terms of "common sense and justice" and the values of our Constitution, the objectives of the Acts would best be furthered by including or excluding her from the protection provided.' Ngcobo J (also writing for the majority) distinguished Daniels from NCGLE v Minister of Home Affairs by arguing that the same-sex couples accepted that their partnership was not protected by any law, while the Muslim applicants based their claim on the recognition Islamic law afforded their union.

As Moseneke J notes in his dissent, there is much to quarrel with in the Court's attempt to distinguish the two cases. But for now, the most important point to make is that the distinction rests on implicit normative assumptions about what types of relationships the word 'spouse' encompasses. This exercise is a far cry from looking up 'spouse' in a dictionary.

457 Satchwell v President of the Republic of South Africa & Another 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC) at para 9.
458 Volks v Robinson NO 2005 (5) BCLR 446 (CC) at paras 40–45.
459 2004 (5) SA 331 (CC), 2004 (7) BCLR 735 (CC)(‘Daniels’).
460 Daniels v Campbell NO & Others 2003 (9) BCLR 969 (C).
461 Daniels (supra) at para 19.
462 Ibid at para 25.
463 Ibid at paras 60–61.
464 Moseneke J accused the Court of engaging in reading-in instead of reading down. Ibid at para 86. He also held that the word 'spouse' was incapable of bearing the meaning the majority assigned it. Ibid at paras 88–89.
A final, obvious, point to make is that the reading down must solve the constitutional violation (at whatever level that is pitched). The interpretation adopted must in fact cure the constitutional violation asserted; it must be 'effective relief'. If it only provides a partial solution, then the court may have to order additional relief in addition to the new gloss on the statute. In *Engelbrecht v Road Accident Fund*, the Court was concerned with an access to court challenge to a regulation that gave people only 14 days to submit a claim to the RAF. However, the regulation also included the qualifications 'if in a position to do so' and 'if reasonably possible'. The Court gave these phrases a relatively wide construction that would require that the claimant was 'mentally and physically able to do so and, in addition, [had] knowledge of the identity of the debtor and of the facts from which the claim arises and which the affidavit has to contain' and was not prevented from submitting the affidavit by some outside force. Kondile AJ held that, even with this relatively expansive interpretation, the regulation still violated the right at issue. Reading down was not a solution because it did not cure the violation.

(c) Bald Declarations of Invalidity

As Currie and de Waal note, while the Court has held that the enactment of the

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466 It is more than a little ironic that when the Court eventually extended marriage to same-sex life partners, it did so by reading-in the word 'spouse' to the Marriage Act. See *Fourie* (supra).


468 *Engelbrecht* (supra) at para 36.

469 Ibid at para 37.

470 Ibid at para 38.
Final Constitution automatically invalidated all unconstitutional laws\footnote{Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at paras 26 and 158; Fose v Minister of Safety and Security 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC) at para 94 (Kriegler J).} (and continues to do so whenever a new unconstitutional law is enacted), 'as a practical matter, inconsistency, invalidity and remedies cannot be separated from one another. . . . Invalidity . . . follows from inconsistency with the constitution but, by \textit{declaring} the law or conduct to be invalid, a court grants a remedy.\footnote{I Currie & J de Waal \textit{The Bill of Rights Handbook} (5th Edition, 2005) 193.} FC s 172(1)(a) recognises this inextricable link by requiring that a court 'must' declare that any law or conduct that is inconsistent with the Constitution is invalid'. The word 'must' means that, unlike most remedies, declarations of invalidity are not subject to judicial discretion: a declaration of invalidity is a mandatory result of a finding of constitutional inconsistency and flows automatically from that finding. This mandatory rule is sourced in the principle of the supremacy of the Final Constitution. While any court may declare a statute invalid, declarations of invalidity of national or provincial legislation or conduct of the President have no force unless they are confirmed by the Constitutional Court.\footnote{FC s 172(2)(a).}

These orders are the default remedy following a finding of invalidity and will only be departed from when a more limited order will provide a better outcome.\footnote{See Currie & de Waal (supra) at 199 (The authors contend that a limited remedy is justified 'where the resulting situation would be more unconstitutional than the existing one.' For the reasons described in detail earlier in this chapter, I do not think that comparative constitutionality is the only — or even the most — relevant concern. See § 9.2(e) supra.)} This 'better remedy' outcome is, as often as not, the rule. In most cases, the problem with a statute will be the exclusion (or inclusion) of a particular group, the attachment of a particularly onerous condition or process or some other form of overbreadth. Or, the invalid law may serve an important purpose that would make invalidation an inappropriate response. To give two of the simplest examples, if a law is invalid for permitting heterosexual couples to marry, but not same-sex couples, no sensible person would suggest that the appropriate remedy is to destroy — through a declaration of invalidity — the legal framework for marriage for everyone.\footnote{See Minister of Home Affairs & Another v Fourie & Another (Doctors for Life International and Others as Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs & Others 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC).} Or, where full invalidity would remove the legal authority for the government to pay social grants, it would make no sense to give the declaration immediate force.\footnote{See Mashavha v The President of the Republic of South Africa & Others 2005 (2) SA 476 (CC), 2004.}

However, although surprisingly uncommon, cases exist in which complete, immediate and fully retrospective\footnote{Under the IC the default position was not full retrospectivity. See § 9.4(e)(ii)(aa) infra. I include cases here where the Court adopted the default position under the Interim Constitution.} invalidity is the only sensible remedy.\footnote{Under the IC the default position was not full retrospectivity. See § 9.4(e)(ii)(aa) infra. I include cases here where the Court adopted the default position under the Interim Constitution.} In
S v Makwanyane, the Constitutional Court declared all provisions permitting the death penalty immediately invalid and banned any executions based on convictions already delivered.\textsuperscript{479} Although the Court has expressed a clear preference for limited rather than full declarations of invalidity, in some cases, full declarations of invalidity respect the separation of powers more than limited orders, such as severance or reading-in. With unlimited orders, the Court does not appear to be making law. Instead, it puts the ball back in the legislature's court. Mokgoro J adopted this reasoning in\textit{ Larbi-Odam & Others v Member of the Executive Council for Education (North-West Province) & Another} to declare unconstitutional a regulation which prevented permanent residents from being employed as teachers in a permanent capacity.\textsuperscript{480} Invalidating the legislation in part might have operated unfairly with regard to temporary residents. The Justice was certain that the legislature would not want such a result.\textsuperscript{481} By issuing a simple order of invalidity, she left it up to the legislature to decide the best course to follow.

\textbf{(d) Limiting Substantive Impact}

Limiting substantive impact — invalidating only part of the legal effect of a law — can take three different forms: severance, notional severance, and reading-in. Severance requires the excision of certain words from a statute. When a court leaves the words of a statute unaltered, but submits its application to a condition, it engages in notional severance. Finally, when a court adds words to a statute, we call it 'reading-in'. These practices are not mutually exclusive. A court can simultaneously sever words and read-in words. Here, I treat them separately. For although the tests for each remedy may be similar, certain features are unique to each one.

Generally, a court should use one of these devices rather than a bald declaration of invalidity because it is 'less intrusive of the legislative function' to invalidate only that portion of the legislation that violates the Constitution, rather than the whole.\textsuperscript{482} These devices permit the law to continue in operation rather than

\textsuperscript{478} See, for example,\textit{ Magajane v Chairperson: North West Gambling Board} 2006 (5) SA 250 (CC), 2006 (10) BCLR 1133 (CC) at paras 97–99 (Court declared a whole section permitting unconstitutional search and seizures invalid immediately and in toto); \textit{Case & Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security & Others} 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC)(Obscenity law); \textit{Coetzee v Government of the Republic of South Africa; Matiso & Others v Commanding Officer, Port Elizabeth Prison, & Others} 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC)(Civil imprisonment); \textit{Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women’s Legal Centre as Amicus Curiae)} 2001 (4) SA 491 (CC), 2001 (8) BCLR 765 (CC)(Time limitation clause).

\textsuperscript{479} \textit{S v Makwanyane} 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC) at para 151

\textsuperscript{480} 1998 (1) SA 745 (CC), 1997 (12) BCLR 1655 (CC).

\textsuperscript{481} Ibid at paras 45–46.

\textsuperscript{482} \textit{De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, & Others} 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC) at para 87. See also \textit{National Director of Public Prosecutions & Another v Mohamed NO & Others} 2002 (4) SA 843 (CC), 2002 (9) BCLR 970 (CC) at para 29; \textit{National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others} 2000 (1) BCLR 39 (CC), 2000 (2) SA 1 (CC)('\textit{NCGLE v Minister of Home Affairs}') at paras 73–76.
creating a lacuna in the law that may disrupt social relations and require immediate action by the legislature.483

A special relationship exists between limiting substantive impact, and suspension. Both suspension and the three devices for limiting substantive impact aim to cure a defect in the law in the least intrusive manner. Suspension accomplishes this end by allowing the legislature an opportunity to fix the problem, while the other three remedies propose a solution that the legislature remains free to amend. Which remedy is to be preferred? In J v Director General, Department of Home Affairs Goldstone J seemed to express a preference for limiting substantive impact rather than suspending an order:

Where the appropriate remedy is reading-in words in order to cure the constitutional invalidity of a statutory provision, it is difficult to think of an occasion when it would be appropriate to suspend such an order. This is so because the effect of reading-in is to cure a constitutional deficiency in the impugned legislation. If reading-in words does not cure the unconstitutionality, it will ordinarily not be an appropriate remedy. Where the unconstitutionality is cured, there would usually be no reason to deprive the applicants or any other persons of the benefit of such an order by suspending it. Moreover the legislature need not be given an opportunity to remedy the defect, which has by definition been cured.484

The same reasoning would apply equally if the appropriate remedy was severance or notional severance. We can agree that there is no point in delaying a remedy when an adequate cure can be instantly provided. However, Goldstone J moves too quickly. He ignores the possibility of combined orders. As I discuss in more detail when I address suspension,485 it is possible to limit the substantive impact of the section as a temporary measure while the suspension lasts or to suspend an order, but craft a limited order that takes effect if the legislature fails to remedy the defect in time.

(i) Severance

Severance involves precisely what it describes: an invalid section of a statute is 'severed' or 'cut off' from the rest of the statute. Severance is appropriate when only part of a piece of legislation is constitutionally infirm. It gives effect to the injunction in FC s 172(1)(a) that law that is inconsistent with the Final Constitution must be declared invalid 'to the extent of its inconsistency'. Unlike reading-in, severance has never been viewed as controversial; it does not seem to infringe the separation of powers to invalidate less, rather than more of a statute.

However, severance is not always appropriate. Sometimes the law may be structured in such a way that it is impossible or unwise to sever only the unconstitutional parts without affecting the rest of the legislation. Accordingly, in Coetzee v Government of the Republic of South Africa, the Constitutional Court laid down the following two-part test for severance:

483 Not all bald declarations of invalidity create problematic gaps. When the Constitutional Court struck down corporal punishment in S v Williams there was no gap as other sentences could be employed in its place. 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC).


485 See § 9.4(e)(i) infra.
If the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute. The test has two parts: first, is it possible to sever the invalid provisions and, second, if so, is what remains giving effect to the purpose of the legislative scheme?\textsuperscript{486}

The first requirement has been rephrased as the need to 'ensure that the provision which results from severance or reading words into a statute is consistent with the Constitution and its fundamental values'.\textsuperscript{487} Whether this objective can be realised will depend on the wording of the particular section as well as its place in the broader statutory scheme. The Court has also held that since 'the statute books still contain many provisions enacted by a Parliament not concerned with the protection of human rights, the first consideration will in those cases often weigh more heavily than the second'.\textsuperscript{488}

A good example of where it was easy to separate the good from the bad is \textit{South African National Defence Union v Minister of Defence & Another}.\textsuperscript{489} O'Regan J found that a regulation was valid to the extent that it prohibited strike action by members of the Defence Force, but invalid in so far as it banned public protest. To remedy the defect, the Court simply severed the words 'or perform any act of public protest' and related phrases and left the proscription of strike action intact.\textsuperscript{490}

On the other hand, such textual surgery was impossible in \textit{Magajane v Chairperson, North West Gambling Board}.\textsuperscript{491} Van der Westhuizen J held that a provision permitting warrantless search and seizures of unlicensed gambling premises was overbroad and therefore unconstitutional. However, the provisions permitting the searches applied to both licensed and unlicensed premises. Justice van der Westhuizen concluded that the 'intertwining of licensed and unlicensed premises . . . make[s] severance difficult and undesirable.'\textsuperscript{492} To put it in Kriegler J's words, it was not possible to separate the good (licensed premises) from the bad (unlicensed premises).

\textsuperscript{486} \textit{Coetzee v Government of the Republic of South Africa; Matiso & Others v Commanding Officer, Port Elizabeth Prison, & Others 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC)(footnote omitted).}

\textsuperscript{487} \textit{NCGLE v Minister of Home Affairs (supra) at para 74.}

\textsuperscript{488} Ibid.

\textsuperscript{489} 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC)('\textit{SANDU I}'). See also \textit{S v Lawrence; S v Negal: S v Solberg 1997 (4) SA 1176 (CC), 1997 (10) BCLR 1348 (CC) at para 133 (O'Regan J dissenting would have cured the infringement of separation between church and state in a law banning the selling of alcohol on Sundays, Christmas Day and Good Friday — referred to in the legislation as 'closed days' — by simply excising 'closed days' from the prohibition.)}

\textsuperscript{490} \textit{SANDU I (supra) at paras 15 and 45.}

\textsuperscript{491} 2006 (5) SA 250 (CC), 2006 (10) BCLR 1133 (CC), 2006 (2) SACR 447 (CC).

\textsuperscript{492} Ibid at para 98.
Other cases resist textual surgery.\textsuperscript{493} Most of these cases fail the severance test at the second leg. However, before I address those cases, let me give one example where the severed legislation would still give effect to the purpose of the legislation — ie that would pass the second leg.\textsuperscript{494} In *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) & Others*\textsuperscript{495} Chaskalson CJ severed a portion of the Electoral Act\textsuperscript{496} that prevented prisoners from voting. The Court did not even discuss whether the severance still gave effect to the purpose of the law. The purpose of the legislation — regulating elections and thereby promoting the right to vote — could obviously only be enhanced by expanding the pool of voters.

*Fraser v Children's Court Pretoria North & Others* illustrates the contrary position — where severance would not give effect to the intent of the legislation. Mahomed DP refused to sever a portion of the unconstitutional legislation that permitted a child born out of wedlock to be adopted without the father's consent.\textsuperscript{497} The effect of the severance would be that the father's consent would always be required: thus the fathers of children born from rape, incest or 'a very casual encounter on a single occasion' would retain the right to consent — or to withhold such consent.\textsuperscript{498} The Court was not satisfied that position 'would adequately reflect what Parliament would wish to retain if it became alive to the fact that the section was vulnerable' for the reasons described in the judgment.\textsuperscript{499} Severance was therefore inappropriate.

The same problem arose in *South African Liquor Traders Association & Others v Chairperson Gauteng Liquor Board & Others*.\textsuperscript{500} The Constitutional Court held a provision that defined a shebeen as an unlicensed outfit selling less than 10 cases of beer, without specifying the time within which the 10 cases had to be sold, to be

\begin{itemize}
\item \textsuperscript{493} See, for example, *Chief Lesapo v North West Agricultural Bank & Another* 2000 (1) SA 409 (CC), 1999 (12) BCLR 1420 (CC) at paras 30–32 (The Court found it was impossible to sever the offending provisions which allowed the Bank to bypass courts as it would require an amendment to other sections. In addition, severance would not give effect to the statutory scheme or to the legislative purpose to provide the Bank with a quick and effective remedy. Severance failed at both legs of the test); *First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa & Others; Sheard v Land and Agricultural Bank of South Africa & Another* 2000 (3) SA 626 (CC), 2000 (8) BCLR 876 (CC) (‘Sheard’) at paras 14–15 (The case concerned similar legislation to *Chief Lesapo* and was inappropriate for the same reasons. The Court also held: ‘Severing the proposed part would alter the system of debt recovery set forth by the Legislature and would amount to legislating, a function reserved for Parliament.’)
\item \textsuperscript{494} See also *Shinga v S (Society of Advocates, Pietermaritzburg Bar as Amicus Curiae); O’Connell & Others v S* 2007 (5) BCLR 474 (CC), 2007 (2) SACR 28 (CC) (Court severs exceptions from the general rule that the record should be applied to the High Court in criminal appeals from the Magistrates’ Courts.)
\item \textsuperscript{495} 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC).
\item \textsuperscript{496} Act 73 of 1998.
\item \textsuperscript{497} 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC) at paras 47–49.
\item \textsuperscript{498} Ibid at para 49.
\item \textsuperscript{499} Ibid at para 48.
\item \textsuperscript{500} 2006 (8) BCLR 901 (CC) (‘South African Liquor Traders’).
\end{itemize}
unconstitutionally vague. The High Court had simply severed the words 'and is selling less than ten (10) cases'.\textsuperscript{501} The effect of that order was that 'any business primarily concerned with the sale of liquor and unlicensed, [would] fall within the terms of the definition and would in terms of the regulation be entitled to operate unlicensed.'\textsuperscript{502} O'Regan J concluded that severance would not be the correct remedy because the 'potential harm to the wider community of such a broad definition is clear and directly in conflict with the stated purposes of the Act': namely to regulate the sale of liquor.\textsuperscript{503}

Although the Court has presented the severance test as requiring two separate inquiries, in many cases the two steps are collapsed into a single inquiry. \textit{Case v Minister of Safety and Security; Curtis v Minister of Safety and Security} provides an excellent example of the linguistic difficulty associated with separation of powers questions.\textsuperscript{504} The Court was concerned with a censorship provision that was manifestly overbroad. Mokgoro J held, applying the first part of the Coetzee test, that severance was not a 'viable option' because the 'overbreadth cannot be laid at the door of any one word, or group of words, but rather permeates the entire text.'\textsuperscript{505} She then went on to hold that even if it were possible to 'apply a blue pencil to each and every [word] that presents overbreadth problems, we would effectively write a new provision that bears only accidental resemblance to that enacted by Parliament.'\textsuperscript{506} The Court would violate the second leg of the test by 'paring down' the provision 'to prohibit only that discrete set of sexually-oriented expressions that this Court believes may constitutionally be restricted' and thus 'depart[ ] fundamentally from its assigned role under our Constitution'.\textsuperscript{507} What is interesting about \textit{Case & Curtis} is that whether the Court believes severance is textually

\begin{itemize}
\item \textsuperscript{501} Ibid at para 30.
\item \textsuperscript{502} South African Liquor Traders (supra) at para 32.
\item \textsuperscript{503} Ibid at para 34.
\item \textsuperscript{504} 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC), 1996 (1) SACR 587 (CC)(‘Case & Curtis’) at paras 70–75. See also Chief Lesapo v North West Agricultural Bank & Another 2000 (1) SA 409 (CC), 1999 (12) BCLR 1420 (CC) at paras 30–32 (The Court found it was impossible to sever the offending provisions which allowed the Bank to bypass courts as it would require an amendment to other sections. In addition, severance would not give effect to the statutory scheme or to the legislative purpose to provide the Bank with a quick and effective remedy. Severance failed at both legs of the test.); Sheard (supra) at paras 14–15 (The case concerned similar legislation to Chief Lesapo and was inappropriate for the same reasons. The Court also held: ‘Severing the proposed part would alter the system of debt recovery set forth by the Legislature and would amount to legislating, a function reserved for Parliament.’); South African Association of Personal Injury Lawyers v Heath & Others 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC) at paras 47–48 (The Court held that the investigative (constitutional) and litigation (unconstitutional) functions of a judge appointed to head a commission of inquiry were inextricably linked. It was impossible to separate the good from the bad.)
\item \textsuperscript{505} Case & Curtis (supra) at para 71.
\item \textsuperscript{506} Ibid at para 72.
\item \textsuperscript{507} Ibid at paras 72 and 73.
\end{itemize}
plausible depends, at least in part, on the degree to which severance would usurp the legislature's role. The two elements of the test should be seen as related, not isolated, and should be considered simultaneously, not sequentially.

(ii) Notional Severance

Notional severance is one of the more difficult remedies to understand. Like severance, it involves removing parts of the offending provision while leaving other words and provisions intact. However, as the adjective 'notional' suggests, no words are actually excised from the law. Instead the unconstitutional reach of the provision is identified by limiting the cases to which the law can apply or by making its valid operation subject to a condition. Notional severance also bears a passing similarity to reading down: both remedies leave the words of the statute unaltered, but affect its meaning or application. The difference between the two remedies is that notional severance does not claim that the words can actually bear the meaning that the court ascribes to them. In fact, they clearly cannot. Were it otherwise, the Court would have been obliged to read down the section, rather than notionally sever its parts. Notional severance provides instructions for the application of the rule, rather than specifying the correct interpretation.

These fine distinctions can be difficult to grasp. Perhaps the best way to explain notional severance is by example. In *Islamic Unity Convention*, the Court found that a clause prohibiting broadcast of any material that was 'likely to prejudice relations between sections of the population' was over-broad and infringed the right to freedom of expression. Langa DCJ found that invalidating the provision completely would leave an impermissible gap in the law. Severance or reading-in, on the other hand, would trench too deeply into the legislative domain. He therefore opted for an order of notional severance which declared the clause invalid except to the extent that it prohibited what was already impermissible in terms of FC s 16(2): '(i) propaganda for war; (ii) incitement of imminent violence; or (iii) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.' The effect of the order was that a prohibition on certain broadcasts remained in place, but that prohibition would henceforth only apply to the much more limited category of broadcasts that conflicted with the dictates of FC s 16(2).
While *Islamic Unity* is perhaps the clearest illustration of notional severance, it is by no means the only one.¹¹¹ Notional Severance was first employed in *Ferreira v Levin No & Others; Vryenhoek & Others v Powell NO & Others*. The Ferreira Court invalidated legislation¹¹² permitting a recalcitrant witness in a company's winding up process to be imprisoned.¹¹³ However, the only defect the Ferreira Court found in the law was that the answers given by the witness could be used against the witness in subsequent criminal proceedings. It therefore limited the order of invalidity by a notional severance: it prohibited the answers given in the winding up proceedings from being used in non-perjury related criminal proceedings.¹¹⁴ Notional severance has also been successfully combined with a suspension order so that the condition comes into effect if the legislature fails to fix the problem by the time the suspension period ends.¹¹⁵ The benefit of this combination — if done properly¹¹⁶ — is that it gives clear guidance to the legislature regarding the nature of the constitutional defect, and provides a ‘constitutional fix’ should the legislature fail to intervene before the suspension period expires.

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¹¹¹ See, for example, *First National Bank (FNB) of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) at para 114* (The Court declared invalid a provision permitting property to be sold to cover a customs debt, even if the owner of the property is not the custom debtor. The constitutional flaw was limited to the selling of property belonging to a third party. It accordingly ordered a notional severance limiting the invalidity to these situations); *Prince v President, Cape Law Society & Others 2002 (2) SA 794 (CC) at para 85* (Ngcobo J dissenting) (Ngcobo J held that legislation prohibiting the possession of dagga violated the rights of Rastafarians. He declared it invalid to the extent that it prohibited ‘the use or possession of cannabis by Rastafari adherents for bona fide religious purposes’.)

¹¹² Companies Act 61 of 1973 s 417(2)(b).

¹¹³ 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC).

¹¹⁴ Ibid at paras 156–157. See also *De Lange v Smuts NO 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at para 103* (The Court invalidated a law that permitted imprisonment of recalcitrant witnesses in insolvency proceedings only to the extent that the imprisonment could be ordered by non-judicial officers.)

¹¹⁵ See *Nyathi v MEC of the Department of Health & Another [2008] ZACC 8* (Madala J, for the majority, declared that s 3 of the State Liability Act was invalid ‘to the extent that it does not allow for execution or attachment against the state and that it does not provide for an express procedure for the satisfaction of judgment debts.’ He suspended that order for 12 months. This order gives Parliament a clear indication of what they need to alter to ensure that the new system is constitutional. The first part of the notional severance also makes it clear that if Parliament does not act, judgment creditors will be able to execute against state assets. The second part clearly might also justify the courts themselves to develop a process for attaching state assets if the legislature failed to do so.)

¹¹⁶ An example of a failure to do this intelligently is *Fraser v Children's Court, Pretoria North & Others 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC) at paras 45–52* (The Court invalidated s 18(4)(d) of the Child Care Act 74 of 1983 which permitted a child to be adopted without an unmarried father’s consent. It suspended the order to allow the legislature to regulate the area. However, although it noted that it was indeed proper to dispense with the father’s consent in certain cases — such as rape — its order would have required the father’s consent even in the case of rape. The Court would have done better to construct a more limited order.)
While notional severance is an attractive remedy for courts faced with teasing out the good from the bad in intricately worded statutes, it has its limits. These limits were explained by Ackermann J in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*:

The device of notional severance can effectively be used to render inoperative portions of a statutory provision, where it is the presence of particular provisions which is constitutionally offensive and where the scope of the provision is too extensive and hence constitutionally offensive, but the unconstitutionality cannot be cured by the severance of actual words from the provision. . . . Where, however, the invalidity of a statutory provision results from an omission, it is not possible, in my view, to achieve notional severance by using words such as 'invalid to the extent that' or other expressions indicating notional severance. An omission cannot, notionally, be cured by severance.517

Notional severance can cure presence, not absence. The High Court’s judgment in *National Director of Public Prosecutions & Another v Mohamed NO & Others* provides a fine example of such misapplication.518 The constitutional flaw at issue flowed from the fact that s 38 of the Prevention of Organised Crime Act519 always required an application for preservation of property to be brought ex parte and did not permit a court to issue a rule nisi for interested parties to make submissions. Cloete J attempted to remedy this defect by an order for notional severance that would allow courts to make a rule nisi order. On appeal, Ackermann J held that the remedy was not competent. The High Court had attempted to cure what was in fact ‘an omission from the section, namely the failure to provide for the above procedure and remedy.’520 That could not be done by notional severance.

In addition, because of the greater certainty provided by actual severance, an order of actual severance should be preferred to an order of notional severance if it is ‘linguistically competent’.521 This advice was not followed in *Fraser v Children’s Court, Pretoria North & Others*.522 The Court invalidated s 18(4)(d) of the Child Care Act.523 The infirm provision had permitted a child to be adopted without an unmarried father’s consent. The Court suspended the order to allow the legislature to regulate the area. However, it also fashioned its order — which would come into

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517 *NCGLE v Minister of Home Affairs* (supra) at paras 63 and 64. See also *S v Niemand* 2002 (1) SA 21 (CC), 2001 (11) BCLR 1181 (CC) at para 31; *National Director of Public Prosecutions & Another v Mohamed NO & Others* 2002 (4) SA 843 (CC), 2002 (9) BCLR 970 (CC) at paras 26–27 (The High Court attempted to cure a defect in the Prevention of Organised Crime Act by declaring the provision invalid that it did not allow an application to be brought in a different form); *Dawood & Another; Shalabi & Another; Thomas & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) at para 61; *Janse van Rensburg v Minister of Trade and Industry* 2001 (1) SA 29 (CC), 2000 (11) BCLR 1235 (CC) at para 28.

518 Unreported Witwatersrand Local Division Case No. 2000/21921.

519 Act 121 of 1998.

520 *National Director of Public Prosecutions & Another v Mohamed NO & Others* 2002 (4) SA 843 (CC), 2002 (9) BCLR 970 (CC) at para 26.

521 *SANDU I* (supra) at para 16.

522 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC) (‘Fraser’).
effect at the end of the suspension period if the legislature did not cure the defect — as notional severance of s 18(4)(d) 'to the extent that it dispenses with the father's consent for the adoption of an "illegitimate" child in all circumstances.'\textsuperscript{524} Precisely the same result could have been better achieved by simply deleting the proviso to s 18(4)(d).

One final point. Like actual severance, notional severance will only be appropriate where it is possible to quarantine the unconstitutional parts of the legislation and where what is left will still give effect to the purpose of the legislation.

(iii) Reading-in

Reading-in is the opposite of severance. Instead of removing words from legislation, when a court reads-in it adds words to the statute to cure the constitutional defect. It is also important to distinguish reading-in from reading down and notional severance. With both reading down and notional severance, the text of the legislation remains untouched; it is simply given a meaning that conforms to the Final Constitution. When reading-in, courts change the text.

Reading-in has been the object of some suspicion. The actual act of 'writing' and 'editing' legislation, some charge, constitutes a judicial usurpation of legislative prerogatives and, therefore, a violation of the separation of powers.\textsuperscript{525} The Constitutional Court thus went to some length to justify the use of reading-in in \textit{National Coalition for Gay and Lesbian Equality v Minister of Home Affairs}.\textsuperscript{526} Although it acknowledged that reading-in invariably posed this apparent problem, it rejected the idea that reading-in should be treated any differently from severance:

\begin{quote}
there is in principle no difference between a court rendering a statutory provision constitutional by removing the offending part by actual or notional severance, or by reading words into a statutory provision. In both cases the parliamentary enactment, as expressed in a statutory provision, is being altered by the order of a court. In the one case by excision and in the other by addition. This chance difference cannot by itself establish a difference in principle. The only relevant enquiry is what the consequences of such an order are and whether they constitute an unconstitutional intrusion into the domain of the legislature.\textsuperscript{527}
\end{quote}

The same considerations that apply to severance, therefore, also apply to reading-in: the reading-in must remedy the defect, interfere as little as possible with the

\textsuperscript{523} Act 74 of 1983. Section 18(4)(d) read: ‘A children’s court to which application for an order of adoption is made . . . shall not grant the application unless it is satisfied - (d) that consent to the adoption has been given by both parents of the child, or, if the child is illegitimate, by the mother of the child, whether or not such mother is a minor or married woman and whether or not she is assisted by her parent, guardian or husband, as the case may be’.

\textsuperscript{524} \textit{Fraser (supra)} at para 52.


\textsuperscript{526} 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC)('NCGLE v Minister of Home Affairs').

\textsuperscript{527} Ibid at paras 67–68.
legislation and still give effect to the purpose of the legislation. However, because reading-in is more often employed to extend the reach of a law, courts are, despite the assertions in *NCGLE v Minister of Home Affairs*, more wary of reading-in.

There are two other important threads to be drawn from *NCGLE v Minister of Home Affairs*. The first is what has been called 'the equality of the vineyard or the graveyard'. When a statute is unfairly discriminatory because it provides a benefit to some groups and not others, is the correct remedy to provide the benefit to everybody, or to nobody? There is no single answer. The remedy will, as always, depend on the facts of the case. However, possible budgetary implications that reading-in would have should not automatically deter a court from expanding protection. The court should instead consider the extent of the budgetary intrusion and weigh the intrusion against the injustice of 'levelling down' — a Vonnegutian consequence in which everyone is made equal by ensuring that all are similarly disabled. In doing so, the guiding principle should not be the purpose of the legislation, but the constitutional norms underlying the finding of inequality. Budgetary implications, did not, for example, deter the *Khosa* Court from expanding social security benefits to protect permanent residents as well as citizens.

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528 *NCGLE v Minister of Home Affairs* (supra) at para 75 ('In deciding to read words into a statute, a Court should also bear in mind that it will not be appropriate to read words in, unless in so doing a Court can define with sufficient precision how the statute ought to be extended in order to comply with the Constitution. Moreover, when reading-in (as when severing) a Court should endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution."

529 See *Minister of Home Affairs & Another v Fourie & Another (Doctors for Life International & Others as Amici Curiae); Lesbian & Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) at para 149 ('[T]he achievement of equality would not be accomplished by ensuring that if same-sex couples cannot enjoy the status and entitlements coupled with the responsibilities of marriage, the same should apply to heterosexual couples. Levelling down so as to deny access to civil marriage to all would not promote the achievement of the enjoyment of equality. Such parity of exclusion rather than of inclusion would distribute resentment evenly, instead of dissipating it equally for all. The law concerned with family formation and marriage requires equal celebration, not equal marginalisation; it calls for equality of the vineyard and not equality of the graveyard."

530 See E Caminker 'A Norm-based Remedial Model for Underinclusive Statutes' (1986) 95 Yale LJ 1185.

531 *NCGLE v Minister of Home Affairs* (supra) at para 75 ('Even where the remedy of reading-in is otherwise justified, it ought not to be granted where it would result in an unsupportable budgetary intrusion. In determining the scope of the budgetary intrusion, it will be necessary to consider the relative size of the group which the reading-in would add to the group already enjoying the benefits."

532 Caminker (supra) quoted with approval in *NCGLE v Minister of Home Affairs* (supra) at para 72.

533 *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)('Khosa') (The budgetary considerations in *Khosa* were considered as part of the limitations analysis rather than the remedy analysis. This is, perhaps, a mistake as the budgetary impact depends on the remedy that the Court chooses to grant which should not be determined at the limitations stage. The Court could conceivably have devised a remedy that slightly decreased the social grants across the board in order to accommodate the permanent residents. If the budgetary increase is considered before a remedy is devised, the remedial possibility of avoiding — or at least minimizing — the increase in spending is lost.)
However, an 'unsupportable budgetary intrusion' would bar a reading-in that would otherwise be valid.\textsuperscript{534}

The second thread to be drawn from \textit{NCGLE v Minister of Home Affairs} is that reading-in does not give the judiciary the final word on what the law is. It merely starts a conversation between the legislature and the courts.\textsuperscript{535} In the Court's words: 'Legislatures are able, within constitutional limits, to amend the remedy, whether by re-enacting equal benefits, further extending benefits, reducing them, amending them, "fine-tuning" them or abolishing them. Thus they can exercise final control over the nature and extent of the benefits.'\textsuperscript{536} It matters not whether the remedy is pure invalidity, severance, notional severance or reading-in. However, because reading-in generally provides the Court with more options than the other remedies, courts should be especially cautious in this domain and are best advised to leave the choice to the legislature.\textsuperscript{537} Such caution is most commonly signalled by suspending the order of invalidity. In \textit{Dawood v Minister of Home Affairs}, the Court suspended an order relating to residence permanents for South Africans' spouses because there were so many ways the legislature could cure the defect.

The most obvious use for reading-in is to increase the reach of a provision to include a class of people currently excluded by the law. That was how the remedy was first employed in \textit{NCGLE v Minister of Home Affairs}. The Constitutional Court read in the words 'or partner, in a permanent same-sex life partnership' after the word 'spouse' so as to extend the benefit of immigration laws to same-sex couples. It has employed the same strategy in a long string of subsequent cases to bring homosexual couples within the reach of various laws.\textsuperscript{538} The Court has also used reading-in to extend social security to permanent residents,\textsuperscript{539} to allow attorneys from the former homelands to be admitted in South Africa\textsuperscript{540} and to allow multiple spouses and children to benefit from intestate succession.\textsuperscript{541} The last case, \textit{Bhe}, is particularly interesting because of the extreme detail of the Court's order. The Court invalidated the customary-law rule of primogeniture which limited inheritance to the eldest son. However, the Court could not simply apply the provisions of the Intestate Succession Act\textsuperscript{542} because the Act did not cater for polygamous unions. It therefore fashioned what is, in effect, an entirely new set of laws to regulate these families which largely adhered to the same basic principles that regulated monogamous unions. But grafting such principles on to...

\textsuperscript{534} \textit{NCGLE v Minister of Home Affairs} (supra) at para 75.


\textsuperscript{536} \textit{NCGLE v Minister of Home Affairs} (supra) at para 76.

\textsuperscript{537} \textit{Dawood & Another; Shalabi & Another; Thomas & Another v Minister of Home Affairs & Others} 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) (’Dawood’) at para 64 (’Where, as in the present case, a range of possibilities exists and the Court is able to afford appropriate interim relief to affected persons, it will ordinarily be appropriate to leave the Legislature to determine in the first instance how the unconstitutionality should be cured. This Court should be slow to make those choices which are primarily choices suitable for the Legislature.’)
polygamous unions is hardly uncontroversial. The Court justified this extensive incursion into the legislative terrain by stressing the vulnerability of those persons who would be affected by a delay and by stating that its order 'should be regarded by the legislature as an interim measure.' Ngcobo J dissented. In his view, regulating the problem involved policy choices that were best left to the legislature. While there is something to be said for Ngcobo J's rejection of the Court's reading-in — its boldest use of the remedy thus far — the result remains the best solution to a difficult, if not intractable, problem.

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538 See Satchwell v President of the Republic of South Africa & Another 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC) and Satchwell v President of South Africa & Another 2003 (4) SA 266 (CC), 2004 (1) BCLR 1 (CC)(Legislation limited benefits for judges' spouses to heterosexual couples); J & Another v Director General, Department of Home Affairs & Others 2003 (5) SA 621 (CC), 2003 (5) BCLR 463 (CC)(Law prohibited same-sex partners from becoming the parents of a child born by artificial insemination); Du Toit & Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amici Curiae ) 2003 (2) SA 198 (CC), 2002 (10) BCLR 1006 (CC)(Provision at issue prevented same-sex couples from adopting); Minister of Home Affairs & 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)(Altered the common law and the Marriage Act to permit homosexuals to marry); Gory v Kolver NO & Others 2007 (4) SA 97 (CC), 2007 (3) BCLR 249 (CC)(Expanded the Intestate Succession Act to apply to homosexual couples).

539 Khosa (supra).

540 Mabaso v Law Society, Northern Provinces 2005 (2) SA 117 (CC), 2005 (2) BCLR 129 (CC).

541 Bhe & Others v Magistrate, Khayelitsha & Others; Shibi v Sithole & Others; SA Human Rights Commission & Another v President of the RSA & Another 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC)('Bhe').


543 The Bhe Court never uses the word 'reading-in' to describe its order, nor is the order itself fashioned in the normal manner for reading-in orders which read: 'The omission of "X" from the provision is unconstitutional.' Further, the order is phrased more like an order for notional severance that is aimed at the 'application' of the Intestate Succession Act rather than its wording. This judicial sleight of hand is interesting because it indicates that the Court realised how much further its order went than traditional reading-in orders that are limited to a few words or a phrase. However, it is clear that the order can be nothing but an order for reading-in. It cannot be notional severance because it cures an omission. See § 9.4(d)(ii) supra. It cannot be an instruction on how to interpret the Act because the words of the Act clearly cannot bear that meaning. The only way the Court could achieve its desired outcome is by altering the law; ie, reading-in.

544 Bhe (supra) at paras 115–116.

545 Ibid at paras 224–226 ('The determination of the choice of law rule which regulates the circumstances in which indigenous law is applicable involves policy decisions. In particular, it involves a decision on the criteria for determining when indigenous law is applicable. There is a range of options in this regard. The choice of law may be based on, among other things, agreement, the lifestyle of individuals, the type of marriage, the nature of the property such as family land, justice and equity, or a combination of all these factors. The Legislature is better equipped to make these policy choices.')
Reading-in can also be used to add a proviso to a section. This use of reading-in bears many similarities to forms of notional severance except that reading-in actually adds the words. It does not simply prevent an unconstitutional application. For example, in *Jaftha v Minister of Justice* the Court altered s 66(1)(a) of the Magistrates Court Act to prevent attachment of immovable property without court intervention. It read-in the words 'a court, after consideration of all relevant circumstances, may order execution' to ensure that people were not deprived of their right to housing.

There are, however, many other possible uses for reading-in. As the Court has noted, reading-in need not be 'confined to cases in which it is necessary to remedy a provision that is under-inclusive. There is no reason in principle why it should not also be used as part of the process of narrowing the reach of a provision that is unduly invasive of a protected right.'

Reading-in cannot, however, be used as a 'back door' to address issues that were not properly raised in argument about the content of the right. In *Satchwell v President of the Republic of South Africa & Another*, the Court expanded a statute regulating benefits for judges' spouses to include same-sex life partners. The

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546 Ngcobo J’s solution was for customary to continue to apply without the absolute rule of primogeniture. The parties would try to reach agreement and if they failed, a Magistrate would have to come up with a solution that was ‘fair, just and equitable in the circumstances of the case.’ Ibid at para 239. There is good reason to be sceptical of this proposal. Not only does it not provide any solace to vulnerable women, but it fails to take seriously the systems of power that operate in many communities that would continue to prevent women from inheriting. The only other alternative — suspension — was rightly rejected by Langa DCJ for failing to provide relief to extremely vulnerable people whose most basic rights to equality were being violated.

547 See, for example, *S v Manamela & Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC) (‘Manamela’) at paras 55–59 (The law at issue created a presumption that a person in possession of stolen property was guilty of an offence unless they could prove they had a ‘reasonable cause’ to possess it. A majority of the Court found that construction overly invasive of the right to be presumed innocent but because of the prevalence of ‘fencing’ they did not want to strike down the whole provision. Instead, they removed the offending phrase and replaced it with the following slightly narrower construction: ‘In the absence of evidence to the contrary which raises a reasonable doubt, proof of such possession shall be sufficient evidence of the absence of reasonable cause.’); *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC), 2004 (7) BCLR 775 (CC) at para 47 (The Immigration Act 13 of 2002 permitted people to be detained indefinitely without a trial. The Court found that position unconstitutional and read-in words to require that if the person were detained for 30 days, their continued detention had to be confirmed by a court for a maximum period of 90 days.); *S v Niemand* 2002 (1) SA 21 (CC), 2002 (3) BCLR 219 (CC) at paras 33–34 (The Court read in the words 'Provided that no such prisoner shall be detained for a period exceeding 15 years' to prevent indefinite detention of habitual criminals.)

548 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC).

549 Ibid at para 67.

550 Manamela (supra) at para 57. The cases described as to adding ‘conditions’ could also be described as narrowing the scope of the law. It is because they all narrow the scope in a particular way that I have chosen to place them under the rubric of ‘conditions’.

551 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC).
Court was not, however, willing to extend it to heterosexual life partners. As Madala J put it:

This Court is not at large to grant any relief under its power to grant "appropriate relief" — it cannot import matters that are remote to the case in question — otherwise it will be intruding too far into the legislative sphere. The intended accommodation of heterosexuals cannot be introduced via the backdoor into this case. It was not properly before us, nor did we hear argument on the complexities involved.\(^{552}\)

The appropriateness of reading-in will always turn on the reason for invalidity and the structure of the particular section. Two possible scenarios warrant mention. In *South African Liquor Traders*, the Constitutional Court was faced with provincial legislation that intended to bring shebeens into the legislative framework.\(^{553}\) The legislation defined shebeens as commercial operations that sold only 10 cases of quarts, but failed to specify the period in which they should be sold. The Court invalidated the provision on the basis of vagueness. Given the proffered evidence, the Court decided that shebeens could sell 60 cases within a week.\(^{554}\) As an interim measure, and in order to avoid leaving the situation unregulated, it read words into the legislation to that effect.\(^{555}\) The Court was not, however, prepared to permanently read words into the statute.\(^{556}\)

If expanding protection and creating additional conditions are the primary uses for reading-in, the most common argument against it is the range of choices available to the legislature. Again, the concern raised here engages separation of powers doctrine: the 'Court should be slow to make . . . choices which are primarily choices suitable for the legislature.'\(^{557}\) Such care was, at least on its face, part of the motivation for the majority's decision in *Fourie* to suspend the declaration of invalidity.\(^{558}\) Sachs J believed that there were different ways that the state could

\(^{552}\) Ibid at para 40. See also 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 (CC)(The Court expanded, through FC s 39(2), the common-law definition of rape to include anal penetration of women, but refused to include men because the litigant in the case was female. If this alteration of the law had presented itself as a question of reading-in — if the Court had found a direct violation of the Final Constitution — reading-in might not have been justified for the same reason. However, Masiya differs from Satchwell because the issue of male anal rape was in fact raised in argument. But once the Court made its substantive decision on a basis that excluded men, it would have been improper to bring them back into the fold through the remedy.)

\(^{553}\) *South African Liquor Traders Association & Others v Chairperson, Gauteng Liquor Board & Others* 2006 (8) BCLR 901 (CC)('South African Liquor Traders').

\(^{554}\) *South African Liquor Traders* (supra) at paras 41-45.

\(^{555}\) Ibid at para 55.

\(^{556}\) Ibid at para 40.

\(^{557}\) Dawood (supra) at para 64. Se also *South African Liquor Traders* (supra) at para 44.

\(^{558}\) Minister of Home Affairs & 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).
solve the problem of same-sex marriage. The state could simply include same-sex
couples under the existing legislation or it could create some variation on existing
templates for traditional marriages and normal marriages.559 O'Regan J rightly
pointed out how limited these options — especially when combined with the Court's
guidelines — were.560 Even with such limited options, eight judges felt that 'the
legislature [should] be given an opportunity to map out what it considers to be the
best way forward.'561 One senses here a genuine separation of powers concern: if
legislatures possess greater political legitimacy by virtue of their election and
ongoing accountability, then the legislature, and not an ostensibly unaccountable
judiciary, should take responsibility for crafting a remedy that better fits the 'mores'
and the inclinations of the electorate.

(iv) Shinga

I conclude this discussion of limiting the substantive impact of decisions with a case
where a number of remedial options were in play: Shinga v S (Society of Advocates,
Pietermaritzburg Bar as Amicus Curiae); O'Connell & Others v S.562 The Court found
constitutional defects in three sections of the Criminal Procedure Act563 dealing with
appeal procedures from the Magistrates' Court to the High Court and used three
different remedial strategies. The first defect related to a

procedure which permitted petitions for appeal to be considered in chambers
instead of in open court. The Court found the entire process unconstitutional and
invalidated the whole section.564 The second defect related to s 309C(4)(c). This
section required the record of the case to be sent to the High Court except in four
instances: all four instances included appeals related only to sentence or to
condonation. The Constitutional Court held that the record should be sent in every
case and, therefore, that all the exceptions were unconstitutional. Declaring the
whole section invalid would mean the record would never have to be sent. The Court
therefore severed the exceptions and left intact the general rule that the record
should be sent.565 The final defect concerned a section which required that appeals
only had to be considered by one judge, save in exceptional circumstances where
the appeal would be considered by two judges. The Court held that the right to an
appeal required that appeals always be considered by at least two judges. Shinga
combined severance and reading-in by removing the reference to one judge and the

559 Ibid at paras 139-147.
560 Ibid at para 168.
561 Ibid at para 147.
562 2007 (5) BCLR 474 (CC), 2007 (2) SACR 28 (CC)('Shinga').
563 Act 51 of 1977.
564 Shinga (supra) at para 54.
565 Ibid at para 55.
proviso for exceptional circumstances, and by reading-in a requirement that appeals be considered by two judges.\textsuperscript{566}

\textbf{(e) Limiting Temporal Impact}

The previous section considered ways in which courts can 'work' declarations of invalidity in a manner that limits their impact to only those substantive issues that have a genuine affect on our constitutional rights. This section addresses how a court can regulate the effect of their orders of invalidity on the future and the past. Suspension orders allow a court to prevent an order of invalidity from having effect until a future date. Retrospectivity orders determine an order's impact on the past. Although declarations of invalidity normally operate retrospectively to the date of the law's enactment or the enactment of the Final Constitution, courts are able to limit the potentially disruptive impact of such orders in many different ways.

\textbf{(i) Suspension}

\textbf{(aa) How does suspension operate?}

\textbf{(x) Suspension as a resolutive condition}

Ordinarily orders apply from the date upon which they are made. However, FC s 172(1)(b)(ii) specifically gives courts the power to suspend the coming into effect of an order of invalidity. It is important to understand exactly how these orders work. A court will declare a provision invalid, but state that the invalidity will only come into effect on a future date. The primary reason for suspension is to give the body responsible for the unconstitutional provision — normally the Legislature — an opportunity to rectify the defect. For that reason the suspension acts as a resolutive condition:

\begin{quote}
If the matter is rectified, the declaration falls away and what was done in terms of the law is given validity. If not, the declaration of invalidity takes place at the expiry of the prescribed period and the normal consequences attaching to such a declaration ensue.\textsuperscript{567}
\end{quote}

While this approach is eminently sensible, it could lead to confusion down the line. It leaves uncertain whether the measures adopted by the legislature have in fact 'rectified' the matter. Such a matter has not yet come before the courts. However, a party with an interest in the outcome could apply to the Constitutional Court to determine whether the defect has been correctly remedied and whether the suspended order of invalidity should come into effect. It might be argued, for example, that the separate regime created by the new Civil Union Act\textsuperscript{568} did not really 'rectify' the unconstitutional failure to permit same-sex couples to marry identified by the Court in \textit{Fourie}. If it did not, then the suspended consequences

\begin{footnotesize}
\textsuperscript{566} Ibid at para 56.

\textsuperscript{567} Executive Council, Western Cape Legislature & Others v President, Republic of South Africa & Others 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC)(‘Executive Council, Western Cape 1995’) at para 106.

\textsuperscript{568} Act 17 of 2006.
\end{footnotesize}
specifed in the *Fourie* order[^569] (altering the common law and reading-in 'or spouse' to the Marriage Act[^570]) should, in theory, have come into effect on the expiry of the suspension period.

(y) Do suspended orders that come into effect have retrospective force?

The next interesting question is whether — when the legislature fails to cure the defect and the suspended order comes into effect — the declaration operates retrospectively. As I explain below, unless the Court explicitly limits the retrospective effect, any declaration of invalidity operates back to 4 February 1997[^571]. In theory then, if a declaration comes into force on a suspended date and the Court has not said anything about retrospectivity, the order should operate back to when the Final Constitution came into force, or at least to the date the order was made. The Court in *Executive Council of the Western Cape* held that if the constitutional infirmity was not rectified ‘the normal consequences attaching to such a declaration ensue. In the present case that would mean that [the relevant law] and everything done under it would be invalidated.’[^572] In short, the order will operate retrospectively. General retrospective effect for a suspended order is not, however, how the Court has understood suspension orders since *Executive Council of the Western Cape*. Although it has not explicitly dealt with the issue, the correct position seems to be that suspended orders will not operate retrospectively unless the court has expressly stated otherwise.

In an ordinary case, when a suspension order is based on the need to retain the legal position in place in order to avoid disruption of a legal system, the order will not operate retrospectively. It would make no sense to have a suspension order act retrospectively when it would cause the precise ill that the court intended to avoid. The Constitutional Court implicitly confirmed this principle in *Mashavha v President of the Republic of South Africa & Others*.[^573] The *Mashavha* Court declared various provisions of a presidential proclamation[^574]— assigning the administration of social grants to the provinces — invalid and suspended that invalidity for 18 months without any mention, in the judgment or the order, of the retrospective effect. Eighteen months later, the minister responsible for social grants applied to the Court to extend the suspension period.[^575] In refusing to extend the period, the Court noted that the invalidity would operate only from the date the suspension period expired. It is, therefore, open to a court to specifically regulate the timing, and the

[^569]: Minister of Home Affairs & 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) at para 162.


[^571]: See § 9.4(e)(ii)(aa) infra.

[^572]: *Executive Council, Western Cape* 1995 (supra) at para 106.

[^573]: 2005 (2) SA 476 (CC), 2004 (12) BCLR 1243 (CC).

[^574]: Proclamation R7 of 1996.

retrospectivity, of the order of suspension. In *Executive Council of the Western Cape 1999*, for example, the Court's order made it clear that if the defect was not remedied, the order would not have retrospective effect.\(^{576}\)

However, in at least one case, the ratio and the holding of the Court's judgment required retrospective application. In *Matatiele Municipality & Others v President of the Republic of South Africa & Others*, the Court invalidated part of a constitutional amendment that had changed the provincial boundary between KwaZulu-Natal and the Eastern Cape because the KwaZulu-Natal legislature had failed to facilitate public involvement.\(^{577}\) The amendment was made only a few months before the 2006 municipal elections and the decision given a few months after the election. The Court decided to suspend the declaration for 18 months. The declaration posed the possibility of a massive disruption in service delivery. Moreover, Parliament could pass another amendment — this time following the correct procedure — in the same terms as the invalidated amendment. However, the Court recognised that ‘[i]f Parliament decides not to proceed with the amendment, or does not enact it within the period of suspension, or if the KwaZulu-Natal provincial legislature decides to veto an amendment that alters its boundary, the order of invalidity will take effect and the elections of 1 March 2006 will be rendered invalid.’\(^{578}\) It therefore contemplated the retrospective effect of the suspended order. If the order did not have retrospective effect, the past election could not be rendered invalid. (That said, the change in municipal boundaries would have necessitated a new election).

*Matatiele II* is an easy case because it explicitly states that the order could have retrospective effect. The difficult cases occur when the rationale for the Court's order is not based on a need to avoid disruption and the Court remains silent on retrospectivity. In *Volks NO v Robinson*,\(^{579}\) a minority of the Court would have read-in words to extend the Maintenance of Surviving Spouses Act\(^{580}\) to apply to permanent heterosexual life-partners. It would have suspended the order because it recognised that there were a number of ways the legislature could solve the problem. However, if the legislature had failed to attend to the matter, then one would expect that the order would have had the same limited retrospective effect that the Court has employed for other succession cases. The invalidity would apply to all estates that have not yet been finalised. In situations such as *Volks*, there is enough uncertainty to necessitate an application to the Court to clarify the position, but there is no principle that prevents suspended orders from acting retrospectively.\(^{581}\)

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576 *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development & Another; Executive Council, KwaZulu-Natal v President of the Republic of South Africa & Others 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC) at para 139* (*‘In the event of the period of one year . . . expiring before the defect in question is corrected, the declaration of invalidity in paragraph 4.1 above will only take effect as from the date of such expiry.’*).

577 *2007 (1) BCLR 47 (CC)* (*‘Matatiele II’*).

578 *Matatiele II* (supra) at para 96.

579 *2005 (5) BCLR 446 (CC)*.

580 *Act 27 of 1990*. 
(z) Calculating time periods

Considering the difficulty in getting periods of suspension extended,\(^{582}\) it is necessary to know exactly how time periods are calculated. In *Ex Parte Minister of Social Development*, the Constitutional Court had to consider how time periods in suspension orders should be computed.\(^{583}\) The relevant order of invalidity had been delivered on 6 September 2004 and suspended its effect for 18 months.\(^{584}\) On 6 March 2006, the Minister applied for an order extending the period of suspension. The Court rejected the Minister's contention that a special form of computation of time should apply to suspensions of invalidity.\(^{585}\) It held that ordinary common-law rules of computation of time should apply: the period would expire at the end of the day of the previous calendar day of the relevant month. In this case, the period would expire at midnight on 5 March 2006.\(^{586}\)

(bb) When is suspension appropriate?

In *Coetzee v Government of the Republic of South Africa & Others* — the first case in which the Constitutional Court considered (and rejected) the option of suspension — Sachs J foretold the Court’s approach for the next 13 years:

> The words ‘in the interests of justice and good government’\(^{587}\) are widely phrased and, in my view, it would not be appropriate, particularly at this early stage, to attempt a precise definition of their ambit. They clearly indicate the existence of something substantially more than the mere inconvenience which will almost invariably accompany any declaration of invalidity, but do not go so far as to require the threat of total breakdown of government. Within these wide parameters, the Court will have to make an assessment on a case-by-case basis as to whether more injustice would flow from the legal vacuum created by rendering the statute invalid with immediate effect, than would be the case if the measure were kept functional pending rectification. No hard and fast rules can be applied.\(^{588}\)

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581 Indeed, a principled approach would place the onus on the person disclaiming retrospectivity as orders are always retrospective unless specified otherwise. However, a practical approach seems more appropriate — at least until the Court provides greater clarity — and the person seeking retrospective application of a suspended order should apply to the Court to make it clear whether the order operates retrospectively or not.

582 See § 9.4 (e) (i)(ee) infra.


584 The declaration of invalidity emanated from the decision in *Mashavha v President of the RSA*. 2005 (2) SA 476 (CC), 2004 (12) BCLR 1243 (CC).


586 *Ex Parte Minister of Social Development* (supra) at paras 23–24.

587 Referring to IC s 98(5). The equivalent in the Final Constitution is s 172(2) which permits an order of suspension if it is ‘just and equitable’. 
Although the Court operates on a case-by-case analysis, one can divine some common features in its suspension jurisprudence. In short, some factors support suspension and some factors do not. In J & Another v Director General, Department of Home Affairs & Others, Goldstone articulated the primary components of the Court's inquiry:

the Court must consider, on the one hand, the interests of the successful litigant in obtaining immediate constitutional relief and, on the other, the potential disruption of the administration of justice that would be caused by the lacuna.

This statement properly sets out the main elements of the test. There are, however, other factors that are also relevant.

**Factors in support of suspension**

One: The most common and obvious use for a suspension order is when an immediate order of invalidity will create a lacuna in the law that would create uncertainty, administrative confusion or potential hardship. For example, in S v Ntuli the Constitutional Court set aside legislation requiring that people appealing from the Magistrates' Court obtain a judge's certificate. Because of the massive number of appeals that would ensue and the need to create structures to deal with...
those appeals, the Court suspended the order to allow for those structures to be created.\footnote{593} The Court in \textit{South African National Defence Union v Minister of Justice} suspended a declaration lifting a ban on trade unions in the military to allow the Defence Force to create regulations.\footnote{594} It reasoned that immediate invalidity would be ‘potentially harmful’ and that regulations ‘should assist in avoiding the disruption to discipline feared by the respondents and to ensure that labour relations develop in an orderly and constructive manner.’\footnote{595} In \textit{South African Association of Personal Injury Lawyers v Heath & Others}, Chaskalson P held that the Special Investigating Unit that had been set up to investigate government corruption could not be headed by a judge.\footnote{596} He suspended the order so as not to disrupt the ‘important work’ being done by the Unit.\footnote{597}

A variation of this motivation — not to disrupt important work or services — has been relied on to protect the holding of future elections and the validity of past elections. The Court in \textit{Executive Council of the Western Cape} suspended an order to ensure that the first local government elections went ahead. It reasoned that even the possibility that the elections would be disrupted ‘could lead to increased tension in areas where the inhabitants are anxious to democratise their local structures and to considerable waste of expenditure bearing in mind the preparations that are already under way and the steps that have been taken to lay the groundwork for such elections.’\footnote{598} In \textit{Matatiele II} the Court also refused to invalidate elections. Had they done so there would have been ‘no municipalities in the affected areas’. The absence of these municipalities would ‘have serious implications for the provision of services in the affected areas.’\footnote{599}

An undesirable lacuna in the law does not necessarily exist merely because a power or requirement is removed: the remaining powers may well continue to give adequate effect to the purpose of the legislation.\footnote{600} Indeed, in the majority of the cases in which the issue has been considered, the Court has rejected claims that immediate invalidity will create a lacuna. In \textit{Coetzee v Government of the Republic of South Africa}, the Court held that the invalidation of imprisonment as an option to enforce civil debt collection could take immediate effect because the system of enforcing debts was not ‘dependent upon the imprisonment sanction for its

\footnote{592} 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC).

\footnote{593} Ibid at paras 27–28. See also \textit{S v Steyn} 2001 (1) SA 1146 (CC), 2001 (1) BCLR 52 (CC) at paras 45–46 (The Court invalidated the legislative response to \textit{Ntuli} and again suspended the period to allow a new system to be implemented. The Court however granted a much shorter suspension period and coupled it with an interim order to regulate the situation in the meantime. Ibid at para 47.)

\footnote{594} 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC).

\footnote{595} Ibid at para 42.

\footnote{596} 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC) (‘\textit{Heath}’).

\footnote{597} Ibid at paras 49–50.

\footnote{598} \textit{Heath} (supra) at para 110 (Chaskalson P) and paras 158–159 (Ackermann & O’Regan JJ).

\footnote{599} \textit{Matatiele II} (supra) at para 92.
viability’ and there were 'a number of other aids to judgment debt collection in the system.' That was also the reasoning in *Case v Minister of Safety and Security*. The Court struck down laws prohibiting the possession of obscene material for being overbroad. It refused to suspend the order because there was sufficient other legislation prohibiting the dealing in various forms of obscene and indecent material. A final example is *Ex parte Minister of Safety and Security and Others: in Re S v Walters and Another*. The Walters Court invalidated s 49(2) of the Criminal Procedure Act which permitted the use of lethal force to effect an arrest or prevent a suspect from fleeing. The Court found it unnecessary to suspend the order because the surviving s 49(1) provided the police with sufficient powers to effect arrests. All these cases indicate that the Court will scrutinize very closely any allegation that invalidity will create a gap in the law.

Two: Suspension may also be appropriate where multiple legislative cures to the constitutional defect exist. This rationale is based on the separation of powers doctrine. It is for the legislature, not the judiciary, to make policy decisions where the Final Constitution does not require a particular outcome. In *Fraser v Children's Court, Pretoria North*, the Court had invalidated a provision that did not require the

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600 See Magajane *v The Chairperson, Northwest Gambling Board* 2006 (5) SA 250 (CC), 2006 (10) BCLR 1133 (CC) at para 99 (The Court invalidated provisions permitting searches without warrant of unlicensed casinos. It held that the remaining search and inspection options were more than sufficient to fulfil the purpose of the Act); *Engelbrecht v Road Accident Fund* 2007 (6) SA 96 (CC), 2007 (5) BCLR 457 (CC) at para 44 (The Court invalidated a regulation requiring certain claimants from the Road Accident Fund to file an affidavit with the police within 14 days. It did not suspend the declaration as the purposes of the Act could be achieved without that requirement); *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC) at para 38 (Invalidity of legislation banning public protest by soldiers not suspended because other regulations preventing acts causing 'actual or potential prejudice to good order and military discipline' catered for any gap); *De Lange v Smuts NO & Others* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at para 106 (Declared legislation permitting non-judicial officers to imprison people who failed to answer questions at an insolvency inquiry unconstitutional because only judicial officers should have that power. Refused to suspend the order because the function could validly be performed by magistrates); *Minister of Welfare and Population Development v Fitzpatrick & Others* 2000 (3) SA 422 (CC), 2000 (7) BCLR 713 (CC) at paras 35–36 (Order permitting foreign couples to adopt South African children not suspended because existing legislation and international law provided adequate safeguards to children); *First National Bank (FNB) of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) at para 123 (Invalidated legislation permitting the forfeiture to pay customs debts of property owned by people not responsible for the debt because those ‘goods represent no more than a minute proportion of goods annually attached and its effect on the fiscus is negligible’); *Du Toit & Another v Minister of Welfare and Population Development & Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC), 2002 (10) BCLR 1006 (CC) at para 41 (Court permitted homosexual and unmarried couples to adopt children because the upper guardianship of the High Court provided sufficient safeguards.)


602 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC).

603 Ibid at paras 84–86 (Mokgoro J, concurred in this part by the majority).

604 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC) (‘Walters’).

605 Act 51 of 1977.

606 Walters (supra) at para 76.
consent of fathers of children born-out-of-wedlock for their adoption. When determining the remedy, Mahomed DP found that there were ‘multifarious and nuanced legislative responses which might be available to the legislature in meeting these issues’ and that it was therefore ‘in the interests of justice and good government that there should be proper legislation to regulate’ the situation. The Court suspended the order for two years notwithstanding the fact that this suspension would deny the applicant the relief he sought. Similar concerns motivated the Court to suspend the order in Dawood. The Dawood Court had invalidated, as a violation of the right to dignity, a provision which limited the right of foreign spouses of South African citizens to reside in South Africa while seeking permanent residence status. O'Regan J reasoned:

There are a range of possibilities that the legislature may adopt to cure the unconstitutionality. For example, the legislature may decide that it is not necessary for foreign spouses of persons permanently and lawfully resident in South Africa to possess valid temporary residence permits while their applications for immigration permits are being processed. Another alternative would be for the legislature to provide an exhaustive list of circumstances that it considers would permit an official justifiably to refuse to grant a temporary permit. There are almost certainly other alternatives as well. Where, as in the present case, a range of possibilities exists, and the Court is able to afford appropriate interim relief to affected persons, it will ordinarily be appropriate to leave the legislature to determine in the first instance how the unconstitutionality should be cured. This Court should be slow to make those choices which are primarily choices suitable for the legislature.

607 See Mashavha v The President of the Republic of South Africa & Others 2005 (2) SA 476 (CC), 2004 (12) BCLR 1243 (CC) at para 69 (Van der Westhuizen J suspended an order invalidating the assignment of the payment of social grants to the provinces because the whole social payment grant needed to be ‘unified’ which was a ‘Herculean task’ requiring legislative action); South African Defence Union v Minister of Defence & Others 2007 (5) SA 400 (CC), 2007 (8) BCLR 863 (CC) at para 103 (Order invalidating legislation regulating membership of Military Arbitration Boards who determine union disputes suspended because there were so many ways that the legislation could be constitutionally constituted); S v Jordan & Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae) 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC) at paras 125–126 (O'Regan and Sachs J, in dissent, would have found that a law criminalizing only the prostitute and not her client was unfairly discriminatory. Because the constitutional defect was not based on the right to privacy, decriminalization was not the only option available to the legislature. It could also choose to criminalize prostitution without discriminating. They therefore would have suspended the invalidity.)


609 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC)('Fraser').

610 Ibid at para 50.

611 Fraser (supra) at para 51.

612 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).
The italicised portion of the above quote indicates a slight departure from the approach under Fraser. The existence of legislative choice on its own should not, it would seem, justify suspension where continued validity would have an ongoing deleterious effect on the applicant's constitutional rights. In such circumstances, other concerns must justify a suspension — such as the possibility of service disruption or the need to protect the threatened rights. 614

The difference in approach appears to be the basis for the disagreement within the Court regarding the appropriate order in Minister of Home Affairs & Another v Fourie. 615 In Fourie, the Court held that the common law and legislation preventing same-sex couples from marrying was unconstitutional and read-in words to cure the defect. However, the majority of the Court decided to suspend the invalidity for one year. It did so not because immediate invalidity would create a gap in the law, but because there was a limited range of choices as to exactly how same-sex couples could be accommodated. 616 But if we take Dawood seriously, the presence of an array of legislative choices should not, on its own, justify a suspension without interim relief. This recognition might have prompted Sachs J to put forward two additional justifications: (a) legislation would ostensibly provide a more solid foundation for the change in the law and would lessen the likelihood of an alteration of the law in the future; 617 and (b) on such a contentious social issue, a change in the law would be viewed as more legitimate if it was initiated by the legislature rather than the courts:

The right to celebrate their union accordingly signifies far more than a right to enter into a legal arrangement with many attendant and significant consequences, important though they may be. It represents a major symbolical milestone in their long walk to equality and dignity. The greater and more secure the institutional imprimatur for their union, the more solidly will it and other such unions be rescued from legal oblivion, and the more tranquil and enduring will such unions ultimately turn out to be. 618

These justifications have not been used before or since Fourie to justify suspension. The justifications appear to turn on the Court's awareness that same-sex marriage was extremely unpopular in South Africa. It is difficult to imagine that the Court would have felt it necessary to suspend the order if the majority of citizens were overwhelmingly in favour of permitting same-sex couples to marry.

O'Regan J dissented on the issue of suspension. She reasoned as follows. Given that the definition of marriage was found in the common law and that the common

613 Ibid at paras 64–65.

614 For more on interim orders, see § 9.4(e)(i)(cc) infra.

615 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC)('Fourie').

616 Ibid at para 139.

617 Fourie (supra) at paras 136–137.

618 Ibid at para 137. See also ibid at para 138.
law remains within the accepted purview of the courts,\textsuperscript{619} that the choices available to Parliament were very limited,\textsuperscript{620} that it was important to provide individual relief,\textsuperscript{621} and that Parliament always retained the power to amend the position later,\textsuperscript{622} the order should have had immediate effect.\textsuperscript{623} O'Regan J was correct not to take the majority's reliance on legislative choice seriously. The 'guidelines' the majority provided offered Parliament little space for choice. Justice Sachs wrote that the new law must not 'create equal disadvantage for all'\textsuperscript{624} and must also be 'as generous and accepting towards same-sex couples as it is to heterosexual couples, both in terms of the intangibles as well as the tangibles involved.'\textsuperscript{625} It is difficult to think of any remedy other than granting homosexuals all the benefits of marriage and calling the new institution of homosexual union 'marriage' that would satisfy these criteria. The justification for the remedy in \textit{Fourie} relies entirely on an alleged need for stability and greater public acceptance. Ordinarily, such ground would not justify a suspension of invalidity. However, because the effect of suspension in \textit{Fourie} was only to delay, not permanently deny, the applicants' rights, these weak justifications may be defensible, if not terribly convincing.

\textbf{Three:} If the deficiency found in the law is purely procedural, the Court may suspend the order to give the legislature a chance to pass new legislation according to the proper procedures and to avoid a gap in the legal system. In \textit{Doctors for Life International v Speaker of the National Assembly & Others},\textsuperscript{626} the Court invalidated two entire pieces of legislation — the Traditional Health Practitioners Act\textsuperscript{627} and the Choice on Termination of Pregnancy Amendment Act\textsuperscript{628} — because of a failure by the National Council of Provinces to facilitate public involvement. It suspended the order of invalidity for the following reasons: 'Members of the public may have already taken steps to regulate their conduct in accordance with these statutes. An order of invalidity that takes immediate effect will be disruptive'.\textsuperscript{629} It would be particularly disruptive to remove the existing legal framework only to have that framework return when Parliament passed the legislation again with the correct procedure.

\textsuperscript{619} Ibid at para 167.

\textsuperscript{620} Ibid at para 168.

\textsuperscript{621} Ibid at para 170.

\textsuperscript{622} Ibid at para 168.

\textsuperscript{623} Ibid at para 173.

\textsuperscript{624} Ibid at para 149.

\textsuperscript{625} Ibid at para 153.

\textsuperscript{626} 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC) (‘\textit{Doctors for Life}’).

\textsuperscript{627} Act 35 of 2004.

\textsuperscript{628} Act 38 of 2004.
(y) Factors against suspension

There is always a presumption against suspension. In the absence of any of the factors discussed above, suspension will not be granted. The two factors mentioned here will only become relevant if some of the factors favouring suspension are also present.

Perhaps the primary factor which weighs against granting a suspension is the importance of the right at issue to the constitutional scheme, or the extent of the violation of the right. Kriegler J in Coetzee v Government of the Republic of South Africa held that even if immediate invalidity of the system of imprisonment for civil debt would 'lead to a break down of the whole debt collection procedure' the order could not be suspended because civil imprisonment 'is so clearly inconsistent with the right to freedom protected by [IC] section 11(1) and so manifestly indefensible under section 33(1) of the [Interim] Constitution that there is no warrant for its retention, even temporarily.' In Bhe & Others v Magistrate, Khayelitsha & Others, the Court likewise rejected the option of suspending an order invalidating the customary-law rule of primogeniture. Langa DCJ's sole justification was that '[t]he rights implicated are [so] important . . . [that] those subject to the impugned provisions should not be made to wait much longer to be relieved of the burden of inequality and unfair discrimination'. Of course, if the suspension will not result in further violations of the rights in question, then the severity of the past violation loses its relevance.

However, the value of the right at issue is not always decisive. In Moseneke & Others v The Master of the High Court & Another, the Court was confronted with perhaps the most flagrant violation of the Final Constitution: a statue that created different procedures for the administration of the estates of Black people. The

629 Doctors for Life (supra) at para 214.

630 See, for example, S v Bhulwana; S v Gwadiso 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC) at para 30 (Suspension of reverse onus provision for cannabis possession would result in possibly innocent people being convicted); S v Mbeta; S v Prinsloo 1996 (2) SA 464 (CC), 1996 (3) BCLR 293 (CC) at para 30 (Suspension inappropriate because the provision — which created a reverse onus for arms possession — was 'not only manifestly unconstitutional, but [would] also result[ ] in grave consequences for potentially innocent persons in view of the serious penalties prescribed') De Lange v Smuts NO 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at para 106 ('It would . . . be unconscionable to continue to allow persons to be committed to prison unconstitutionally in the future. ')

631 Coetzee (supra) at para 18.

632 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC).

633 Ibid at para 108.

634 See South African Association of Personal Injury Lawyers v Heath & Others 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC) at para 50 (Noting that the damage to the independence of the judiciary had already been caused and would not be substantially worsened by a suspension of invalidity.)

635 2001 (2) SA 18 (CC), 2001 (2) BCLR 103 (CC).
Court acknowledged that the law was 'manifestly racist', made 'invidious and wounding distinctions on grounds of race' and was part of 'a law which was a pillar of "the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice"'. Despite the odious aspects of the law, it suspended the order of invalidity because the law had become 'encrusted with processes of great practical, day-to-day importance to a large number of people' and immediate invalidity would cause 'undue dislocation and hardship'. It was necessary for the legislature to create a new system. However, in line with the reasoning in Dawood, the Court did draft an interim order to protect individuals against the 'continuing indignity of racist treatment'.

Two: The Court will be very reluctant to grant suspension if it has previously granted a suspension on the same or similar issue. In S v Steyn the Court had to consider the legislature's attempt to remedy the provisions declared unconstitutional several years earlier in S v Ntuli. The state had failed to make use of the suspension granted in Ntuli and had enacted new provisions after that period expired which failed to take account of the Court's judgments and again limited accused persons' right to appeal. Somyalo AJ expressed the Court's extreme displeasure at the state's conduct and made it clear that their continued failure to mend the situation weighed against granting another suspension:

In such circumstances the Court will not necessarily refuse to order suspension altogether, it is more likely, as the Court concluded in Steyn, to affect the length of the suspension. In S v Shinga — the most recent (and hopefully final) case in the

636  Ibid at para 25.

637  Ibid at para 26 quoting the epilogue to the Interim Constitution.

638  Ibid at para 26.

639  Ibid at para 27.

640  2001 (1) SA 1146 (CC), 2001 (1) BCLR 52 (CC)('Steyn').

641  1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC).

642  See Minister of Justice v Ntuli 1997 (3) SA 772 (CC), 1997 (6) BCLR 677 (CC)(The state applied for an extension of the suspension period in Ntuli which the Court refused. For more detail, see § 9.4(e)(j)(ee) infra.)

643  Steyn (supra) at para 45. See also South African National Defence Union v Minister of Defence & Another 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC) at paras 40–42 (Noted that the Defence Force's tardiness in remedying the constitutional defect weighed against suspension, but still granted a very short 3-month suspension.)

644  For more, see § 9.4(e)(j)(dd) infra.
saga of Magistrate's Court appeals — Yacoob J did not even mention the possibility of suspension.645 This silence might be a direct result of the states continuous failure to make good on previous suspensions.646 Related issues, such as whether new legislation is in the pipeline, might also affect the court's determination. However, even pipeline legislation is only likely to affect the length of the period of suspension.647

(cc) Interim orders

I have, in the preceding discussion, referred to the possibility of granting an interim remedy during the period of suspension to diminish the continued violation of rights. It is a power that the Court has exercised fairly regularly and a practice that, in my view, should be expanded even further. These interim orders fall into two broad categories: those orders that establish guidelines for the exercise of a power and those orders that read-in words to the statute.

The Court first granted an interim order in Dawood & Another v Minister of Home Affairs.648 The Dawood Court held that s 25(9) of the Aliens Control Act649 violated the right to dignity because it gave officials the discretion to refuse to grant a temporary residence permit to the spouse of a South African Citizen without giving any guidance as to how that discretion should be exercised. The Court held that a suspension was necessary because there were a number of options open to the legislature on how to regulate the issue in the future. However, O'Regan J then noted that the Court should also 'ensure that appropriate relief is provided to the successful litigants in this case, and to those who are situated similarly to those litigants in the meantime.'650 She therefore included a mandamus in the order that required the relevant officials, when exercising their discretion, to consider the constitutional rights of the applicants and only to refuse the permit if 'good cause' was shown.651 Justice O'Regan maintained that this order constituted a limited interference with the legislative power to provide guidance to decision-makers, and, therefore, that it was 'the best way in which to avoid usurping the function of the legislature on the one hand without shirking our constitutional responsibility to protect constitutional rights on the other.'652

645 2007 (5) BCLR 474 (CC), 2007 (2) SACR 28 (CC).
646 The Court did however suspend the order for two weeks under the misleading heading of 'retrospectivity'.
647 See Walters (supra) at para 76 (Refuses suspension in part because there was legislation 'in the wings' that could be put into effect in a matter of days.)
648 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC)('Dawood').
650 Dawood (supra) at para 66 (footnote omitted).
651 Dawood (supra) at para 67.
The reasoning and approach in *Dawood* was followed soon after in, amongst other cases.653 *Janse van Rensburg v Minister of Trade and Industry.*654 The challenged provision permitted the Minister to issue orders to stay or prevent unfair business practices. The Court concluded that it was unconstitutional because it did not provide the Minister with any guidance on how to exercise her powers. The Court suspended the order of invalidity. At the same time, it provided detailed guidelines on how the Minister should exercise her discretion until new legislation was enacted.655 It stressed that the guidelines were not meant to inform any future legislative enactments. The order merely regulated the exercise of executive discretion in the intervening period.656 The Court also used an interim remedy in *S v Steyn.*657 The decision had a long history as the Court had previously declared similar provisions regulating appeals from the Magistrates' Court unconstitutional. Although Madlanga AJ agreed to give the legislature one last chance to remedy the defect, he held that it was 'necessary to ameliorate the adverse effects of the leave to appeal and petition procedure' in the interim.658 These procedures required the clerk of the Magistrates Court to provide the High Court with the record of the case in certain circumstances. The final order reads more like a piece of legislation in the way it identifies when a record is required and went far further than the Court would have gone if they had altered the law through a permanent reading-in.659

The second class of cases — where the Court alters the wording of the legislation — needs to be properly understood. As I noted earlier,660 the Court has expressed the opinion that reading-in (or severance or notional severance) and suspension

652 Ibid at para 68.

653 See also *Booysen & Others v Minister of Home Affairs & Another* 2001 (4) SA 485 (CC), 2001 (7) BCLR 645 (CC)(In a very similar case to *Dawood* — this time involving work permits — the Court gave an order in terms comparable to that in *Dawood*); *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) at paras 136 and 216–218 (Mokgoro and O'Regan JJ as well as Sachs J, in dissent, would have suspended an order invalidating the restriction of maintenance to surviving spouses only to married couples because 'the discrimination we have found may be cured by the Legislature in a variety of ways and that those ways need not be identical to the manner in which marriages are currently regulated.’ The minority would, like the *Dawood* Court, have provided an interim solution.)

654 2001 (1) SA 29 (CC), 2000 (11) BCLR 1235 (CC).

655 Ibid at paras 29–36.

656 Ibid at para 30.

657 2001 (1) SA 1146 (CC), 2001 (1) BCLR 52 (CC).

658 Ibid at para 47.

659 See also *Zondi v MEC for Traditional and Local Government Affairs & Others* 2005 (3) SA 589 (CC), 2005 (4) BCLR 347 (CC)The Court struck down laws permitting farmers to sell livestock that wandered onto their property. Ngcobo J crafted detailed interim procedures that would protect stockowners from having their livestock sold without their knowledge. Like *Steyn*, the procedures

660 See § 9.4(d)(iii) supra.
should be mutually exclusive.\footnote{1} This statement is not compatible with the Court's interim remedies jurisprudence. Why the discrepancy? When a court reads in as an interim measure, it has already found that reading-in as a permanent solution is inappropriate and suspension is necessary (normally because of the range of possible solutions). Nonetheless, it concludes that until the legislature gets around to deciding which of the many options it prefers, a stop-gap measure is required. The temporary reading-in is not an ultimate cure for the constitutional defect. Conceived as such, temporary reading-in does not violate the principle requiring reading-in rather than suspension.

The two examples of this practice are \textit{Moseneke v The Master of the High Court}\footnote{2} and \textit{South African Liquor Traders Association & Others v Chairperson, Gauteng Liquor Board & Others}.\footnote{3} In \textit{Moseneke} the Court invalidated the sections of the Black Administration Act that provided for the estates of Black people to be administered by Magistrates, while white estates were dealt with by the Master of the High Court. As explained earlier, the Court suspended the order because of the practical value of the procedure. In the interim, it ordered that black people should be able to choose whether their estates would be governed by the Magistrates or the High Court. To accomplish this end, it ordered that the word 'shall' in the relevant section should be read as 'may' for the duration of the suspension.\footnote{4}

\textit{South African Liquor Traders} offers an even more extreme example of the extent of the Court's interim remedial powers. The Court struck down as vague and irrational provincial legislation which limited the amount of beer that shebeens could sell to '10 cases' without specifying the period within which those cases must be sold. The Court deemed it necessary to suspend the order to allow the Gauteng Legislature to attend to the problem, but also concluded it necessary to provide some interim regulation because it would be inconsistent with the rule of law to leave in force a provision that was meaningless.\footnote{5} Based on the evidence before it, it concluded that most shebeens sold approximately 60 cases of beer per week and ordered that during the suspension period, the legislation and all licenses issued under it, should be read accordingly.\footnote{6}

The usefulness of both categories of interim remedies is obvious. It permits the Court to have the best of both worlds — deferring ultimately to the legislature, but providing interim relief to the litigants and other similarly situated persons. Because they are only stop-gap measures that do not permanently interfere with the law, the

\begin{footnotes}
\footnote{1}{J & Another v Director General, Department of Home Affairs & Others 2003 (5) SA 621 (CC), 2003 (5) BCLR 463 (CC) at para 21.}
\footnote{2}{2001 (2) SA 18 (CC), 2001 (2) BCLR 103 (CC)('\textit{Moseneke}').}
\footnote{3}{2006 (8) BCLR 901 (CC)('\textit{South African Liquor Traders}').}
\footnote{4}{\textit{Moseneke} (supra) at para 27. In some sense this is more of a reading down than a reading-in because the word is not replaced, but 'read as'. However, it would not make sense for it to be a reading down because then there would be no reason for it not to be permanent. However it is classified, the order remains a good example of the possibilities of interim relief.}
\footnote{5}{\textit{South African Liquor Traders} (supra) at para 41.}
\footnote{6}{Ibid at paras 43–45.}
\end{footnotes}
Court feels free to go further than it might were the judgment to require permanent reading-in of potentially contentious wording or the fashioning of quite detailed procedures to guide the executive. Such flexible ‘new tools’ can be used to vindicate rights without interfering with other remedial goals. An interim remedy could, for example, have been productively employed in *Fraser* to prevent the applicant’s child from being adopted without his consent.667

Of course, interim remedies will not always be helpful. I tend to agree with Justice Sachs that an interim remedy would not have served any purpose in *Fourie*. The very reason to suspend the invalidity was to find a permanent solution to the problem.668 It would also not have helped in cases like *Matatiele*669 or *Doctors for Life*670 where the purpose of the suspension was to allow the legislature to craft a remedy for a procedural defect.

**The Period of Suspension**

The period for which the Constitutional Court suspends a declaration of invalidity varies widely from two weeks671 to 18 months.672 The majority of suspensions range from 12 to 18 months. The Court has not constructed any rules in this regard, nor would it have been wise for it do so. Each case should be judged on its merits. Generally, the relevant factors for determining the period of suspension are: the government’s previous conduct;673 whether there is any legislation in the pipeline or how long it will take to draft new legislation if there is not;674 and the nature and severity of the continuing infringement. The onus is on the government to provide the court with the information necessary for it to make a reasoned decision. In addition, courts should remember that suspension is always a departure from the standard position that remedies for violations of constitutional rights should be immediate. Courts should always, therefore, adopt the shortest feasible time period for suspension.675

667 For example, the Court could have read-in words permitting the Children’s Court to depart from the general rule that paternal consent was unnecessary on application by the father.

668 *Minister of Home Affairs & 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) at paras 154–155.*

669 *Matatiele Municipality & Others v President of the RSA & Others 2007 (1) BCLR 47 (CC) (‘Matatiele II’).*

670 *Doctors for Life International v Speaker of the National Assembly & Others 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC) (‘Doctors for Life’).*

671 *S v Shinga 2007 (5) BCLR 474 (CC), 2007 (2) SACR 28 (CC).*

672 See, for example, *Doctors for Life* (supra); *Matatiele II* (supra).

673 *Steyn* (supra) at para 46.

674 *Mistry v Interim Medical and Dental Council of South Africa & Others 1998 (4) SA 1127 (CC), 1998 (7) BCLR 880 (CC) at para 30.*
(ee) Can suspension be extended?

On three occasions the State has applied to the Constitutional Court for an extension of the period of suspension in order to enact the provisions that would remedy a constitutional flaw. These three cases paint a fairly clear picture of when an extension will be granted, and when it will not.

In *Minister of Justice v Ntuli* the Minister applied for an 'extension' of the period after the original period had expired.\(^{676}\) The Court pointed out that as the period had already expired, the Minister was in reality asking for a revival of the suspension. The Court expressed severe doubts as to whether such a revival was possible.\(^ {677}\) However, while the *Ntuli* Court assumed that there might be exceptional cases where such an order was possible, given the lassitude of the Minister and the minimal effect of the order of invalidity, the Court decided that the instant matter was not an appropriate case for such an order.\(^ {678}\)

In *Zondi v MEC for Traditional and Local Government Affairs & Others*, the Minister asked for an extension of suspension before the expiry of the original period.\(^ {679}\) The Constitutional Court held that it had not only the power, but an obligation under FC s 172(1) to extend the period, if it would be just and equitable on the facts of the case.\(^ {680}\) Ngcobo J emphasised, however, that the power only existed for as long as the original suspension period lasted.\(^ {681}\) While noting that in the interests of finality extending a period of suspension was a power that should be 'very sparingly exercised', it was ultimately a question of what relief was just and equitable.\(^ {682}\) Factors relevant to that decision included:

- the sufficiency of the explanation for failure to comply with the original period of suspension;
- the potentiality of prejudice being sustained if the period of suspension were extended or not extended;
- the prospects of complying with the deadline;
- the need

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\(^{675}\) See K Roach & G Budlender ‘Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable?’ (2005) 122 SALJ 325, 340–341.

\(^{676}\) 1997 (3) SA 772 (CC), 1997 (6) BCLR 677 (CC) (‘*Ntuli*’).

\(^{677}\) Ibid at para 26 (‘The construction suggested by counsel for the Minister would enable a Court to revive a statute which it had previously declared to be invalid. If such an unusual power had been intended, I would have thought that it would be expressed in language much clearer than that which has been used, and that there would at least be some indication of the circumstances which would have to exist to justify the exercise of the power.’)

\(^{678}\) Ibid at paras 35–39.

\(^{679}\) 2006 (3) SA 1 (CC), 2006 (3) BCLR 423 (CC).

\(^{680}\) Ibid at para 39. The Court considered that it might also have the power under FC s 173 which gives the Court the power to regulate its own process. However, it found it unnecessary to decide the question.

\(^{681}\) Ibid at paras 40 and 43.

\(^{682}\) Ibid at paras 46–47.
to bring litigation to finality; and the need to promote the constitutional project and prevent chaos.\textsuperscript{683} The \textit{Zondi} Court found that the case satisfied these criteria and that it was therefore appropriate to extend the suspension period.

\textit{Ex Parte Minister of Social Development} is the final case in the trilogy.\textsuperscript{684} In \textit{Mashava v President of the Republic of South Africa & Others}, the Court had set aside a presidential proclamation that provided for the payment of social grants and suspended the order for 18 months. The Minister lodged an application the day before the period expired and the case was heard on the day the order expired. The effect of the \textit{Mashava} order coming into force would be the absence of legal authority for the state to pay social grants.\textsuperscript{685} The Court, though not unmindful of the hardship this lacuna in the law might cause, correctly confirmed what had been implicit in \textit{Ntuli} and \textit{Zondi}: a court has no power to revive an invalid law.\textsuperscript{686}

\begin{verse}
\hspace{1cm} According to van der Westhuizen J
There are important reasons of constitutional principle underlying the conclusion that a court is not empowered to resuscitate legislation that has been declared invalid. To do so, a court would in effect legislate. Such an exercise would offend both the separation of powers principle in terms of which law-making powers are reserved for the legislature, and the principle of constitutional supremacy which renders law that is inconsistent with the Constitution invalid.\textsuperscript{687}
\end{verse}

While clearly not wanting to encourage that the grants be paid without legal authority, the Court suggested that there might be other means to ensure that people received their grants.\textsuperscript{688}

\section*{(ii) Retrospectivity}

While the power to suspend an order of invalidity allows courts to determine the impact of the order on the future, the power to limit the retrospective effect permits regulation of the order's consequences for the past. Of course, the regulation of the past is only interesting because it affects the present. The retrospective effect of an order of invalidity can determine whether people remain in jail, receive inheritances, or are able to bring claims for damages. It may also determine whether subordinate legislation or executive action taken under an invalid law shares its fate.

In this section I describe, first, the default position for the retrospective application of laws and the variety of mechanisms a court can employ to regulate

\begin{verbatim}
683  Ibid at para 47.
684  2006 (4) SA 309 (CC), 2006 (5) BCLR 604 (CC)('Ex Parte Minister of Social Development').
685  \textit{Ex Parte Minister of Social Development} (supra) at paras 18–19.
686  Ibid at para 38.
687  Ibid at para 39.
688  Ibid at paras 45–46.
\end{verbatim}
the retrospective effect of an order. Second, I discuss the reasons that may motivate a court to depart from that default position. Thirdly, and finally, I criticise the Court’s approach to retrospectivity as overly cautious.

(aa) Mechanics of Retrospectivity

This section first explains how retrospectivity operates in the absence of any order by a court. It then briefly considers the various ways in which a court can limit retrospectivity.

(x) The Default Position

The retrospectivity provisions of the Final Constitution differ markedly from those in the Interim Constitution. Under s 98(6) of the Interim Constitution, a distinction was drawn between pre- and post-constitutional law. A declaration of constitutional invalidity of a law existing when the Interim Constitution was adopted (pre-constitutional law) would not operate retrospectively and therefore would not invalidate acts performed under the invalid law, unless the Constitutional Court ordered otherwise. However, an order invalidating post-constitutional law would ordinarily — again, unless the Constitutional Court ordered otherwise — operate retrospectively and thus invalidate all acts performed in terms of that law. The reason for this distinction was explained in *Executive Council, Western Cape* as follows: 'The former are an inheritance from the past. The latter are the actions of a Legislature in a constitutional State and special circumstances must exist to justify a decision by the Court to give validity to such legislation.'

The Final Constitution differs from the Interim Constitution in three important ways. Ackermann J identified these differences in *National Coalition for Gay and*
Lesbian Equality v Minister of Justice. First, the Final Constitution draws no distinction between pre- and post-constitutional laws. This understanding follows from viewing the Interim Constitution as responsible for governance during a specific transition period which followed directly after apartheid. After the three-year buffer the Interim Constitution provided, the majority of unconstitutional apartheid-era laws should have been removed and the continued existence of any such laws could be made the responsibility of the new legislature that has failed to repeal them.

Second, and most importantly, if no ancillary order is made, an order of invalidity under the Final Constitution is automatically retrospective to either: (a) 4 February 1997 — the day the Final Constitution came into effect — if the law existed on that date; or (b) the date the law came into force if it was enacted after the Final Constitution. This position is based both on the wording of FC s 172(1)(b)(i) and the doctrine of objective unconstitutionality. FC s 172(1)(b)(i) grants courts the power to 'limit the retrospective effect of [a] declaration of invalidity'. The implication must be that if they do not exercise that power, the declaration has full retrospective effect. The doctrine of objective unconstitutionality was first enunciated in Ferreira v Levin NO and states — in part — that all pre-existing unconstitutional laws were automatically invalidated the moment the Final Constitution came into effect and all post-Constitutional laws that violate the Constitution were automatically invalid from the moment they are enacted. 'The Court's order' the Ferreira Court tells us, 'does not invalidate the law; it merely declares it to be invalid.'

The automatic retrospectivity of orders was at issue in Ex Parte Women's Legal Centre: In re Moise v Greater Germiston TLC. In an earlier case, the Court had issued a declaration of invalidity without saying anything about the retrospective effect of its order. The amicus in the original case brought an application for the Court to clarify the retrospective effect of its order. Kriegler J, for the Court, held that

692 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) (‘NCGLE v Minister of Justice’) at para 84.


694 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC). Although Ferreira was decided under the Interim Constitution, the Court has held that the doctrine is equally applicable under the Final Constitution. See Ex Parte Women's Legal Centre: In re Moise v Greater Germiston TLC 2001 (4) SA 1288 (CC), 2001 (8) BCLR 765 (CC) at para 12; Gory v Kolver NO & Others 2007 (4) SA 97 (CC), 2007 (3) BCLR 249 (CC) at para 39.

695 Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others 1996 (1) SA 984 (CC),

696 2001 (4) SA 1288 (CC), 2001 (8) BCLR 765 (CC) (‘Women's Legal Centre’).

697 Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae) 2001 (4) SA 491 (CC), 2001 (8) BCLR 765 (CC) (The case held that a 1970 statute that required a plaintiff suing a local government to issue notice of her intention to sue within 90 days of the debt becoming due violated the FC s 34 right of access to court.) For more on FC s 34, see J Brickhill & A Friedman 'Access to Courts' in S Woolman, T Roux & M Bishop (eds) Constitutional Law of South Africa (2nd Edition, OS, November 2007) Chapter 59.
there was no need for clarification: 'Because the order . . . [was] silent on the question of limiting the retrospective effect of the declaration, the declaration was retrospective to the moment the Constitution came into effect. That is when the inconsistency arose. As a matter of law the provision has been a nullity since that date.'

This holding is important. The Court often does not mention retrospectivity in cases where it may seem that the retrospective effect of an order would be undesirable. Women's Legal Centre makes it plain that there is no need for doubt in these cases: the orders are fully retrospective.

A question that is not answered by the constitutional text is the retrospective effect of orders that develop the common law in terms of FC s 39(2) rather than declare it invalid in terms of FC s 172. It seems that, under the Interim Constitution, and for current developments that do not rely on the Final Constitution, the common law is presumed to be developed retrospectively. In the words of Kentridge AJ in Du Plessis v De Klerk:

In our Courts a judgment which brings about a radical alteration in the common law as previously understood proceeds upon the legal fiction that the new rule has not been made by the Court but merely 'found', as if it had always been inherent in the law. Nor do our Courts distinguish between cases which have arisen before, and those which arise after, the new rule has been announced. For this reason it is sometimes said that 'Judge-made law' is retrospective in its operation.

Of course, as Kentridge AJ went on to note, and as the Court later held in Masiya, courts are entitled to depart from this starting point. The standard — discussed in the next paragraph — for limiting retrospectivity should not be any different under FC s 39(2) than under FC s 172: the order should be 'just and equitable'. However, in Masiya, Nkabinde J states that prospective development will only be appropriate in 'rare cases'. To the extent that Nkanbinde's statement suggests a higher bar for prospective development as opposed to retrospective application in FC s 39(2) cases, it should be ignored. There is, in this context, no meaningful distinction between development and invalidity.

A similar question is the retrospective effect of 'reading down' a provision. The Court explicitly left the question open in Daniels v Campbell NO. It has not yet answered it. Despite the Court’s reluctance to address the issue, it seems that the normal rule should apply: the interpretation is presumptively fully retrospective, but it can be limited. There is no reason why a court should have the power to limit the

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698 Women's Legal Centre (supra) at para 13.


700 Du Plessis (supra) at para 65.

701 Masiya (supra) at para 48.

702 Ibid at para 51.
The retrospective effect of an order of invalidity, but not have the same power when adopting a new interpretation. Indeed, courts would be well advised to address the issue as soon as they adopt a new interpretation — and force the parties, particularly the government — to supply them with the necessary information to do so — rather than waiting for problems to arise and forcing the courts and other parties to undertake further costly and time-consuming litigation to solve them.

The third difference under the Final Constitution from the position under the Interim Constitution is noted in NCGLE v Minister of Justice. Under IC s 98(6), retrospective effect could be altered if it was 'in the interests of justice and good government'. The same power under the Final Constitution is part of the court's general 'just and equitable' remedial discretion. Because the Interim Constitution's formulation requires that the order be in the interests of justice and of 'good government' it is much narrower than the broad discretion afforded to courts by the phrase 'just and equitable'. Although in many cases what is 'just and equitable' will also be what is 'in the interests of justice and good government', there will be other cases where it is not. The change in wording seems to imply that there may be cases where retrospectivity need not be limited, even if it is in the interests of good government. Why? Again, the litigation may raise other concerns — such as the rights of individuals — that are more important. I argue below that the Court has failed to account of this important alteration.

A final difference between the Interim Constitution and the Final Constitution — noted by the Court in S v Ntsele — is that all courts are empowered to make orders affecting retrospectivity under the Final Constitution. Under the Interim Constitution, only the Constitutional Court exercised such powers. In Ntsele, Kriegler J stressed the importance of lower courts considering the issue of retrospectivity because (a) their reasoning would aid the Constitutional Court when deciding whether to confirm the order; and (b) the order would often depend on the evidence led and the trial court is generally in the best position to evaluate the evidence and to request more evidence if necessary.

(y) Ways to limit the default position

An order limiting retrospectivity can take two main forms. It can limit the date from which it operates, or it can limit the type of people or cases to which the order applies. Thus far, the Court, when limiting retrospectivity based on a date, has made its orders applicable from the date of judgment and therefore effectively given the

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703 Daniels v Campbell & Others 2004 (5) SA 331 (CC), 2004 (7) BCLR 735 (CC) at para 38 ('It is not necessary for the purposes of this case to deal with the possible retrospective effect of upholding the appeal. No pronouncement is made on whether in the absence of a declaration of invalidity, this Court is empowered to limit the retrospective effect of the declaration. Should problems concerning retrospectivity arise, they stand to be dealt with on a case by case basis.')

704 See NCGLE v Minister of Justice (supra) at paras 84 and 92–94.

705 For more on the meaning of 'just and equitable', see § 9.2(e)(i) supra.

706 1997 (11) BCLR 1543 (CC) at para 12.

order no retrospective effect. However, there is no reason why the Court could not choose a date in the past and thus make the order applicable to a relatively short period before the judgment. It is, however, an unusual case in which that kind of remedy would be preferable to an order that is limited to certain classes of cases or people.

Masiya is a good example of an order with prospective effect only. The Court developed the common-law definition of rape to include non-consensual anal penetration of women and, in order not to retrospectively create a crime, ordered that the development would only apply prospectively from the date of the order.708 People who anally penetrated a woman before the date Masiya was handed down would be guilty of indecent assault. Those persons who committed the same act after the judgment would be guilty of rape.

In some situations, an order based solely on a date will not cover all those cases that the court wishes the order to cover and exclude all those cases that the court does not want the order to affect. In such circumstance, the court will specify the types of cases or people to which the order applies. For example, in S v Bhulwana O'Regan J held that her order invalidating a reverse onus provision would only apply to cases that had not yet been finally decided on appeal, or where an appeal could still be noted.709 This common construction has been adopted by the Court in other cases concerning reverse-onus provisions,710 statutory time bars711 and crime-creating provisions.712 I will call this type of order: ‘the finalised cases order’.

The Court had to create an even more detailed remedy to address the difficulties posed by invalidating provisions dealing with succession. The first attempt came in Brink v Kitshoff NO. In Brink, the Court applied its order invalidating gender discriminatory provisions retrospectively to all estates, but exempted payments that had been made in terms of the invalidated provisions.713 In Bhe Langa DCJ constructed an even more narrowly tailored solution.714 The Court had invalidated the customary law rule, and accompanying legislation, that provided for male primogeniture. But it did not want to invalidate transfers that had already been made, provided they were made in good faith — ie, that they were not made while the beneficiary was aware of the court challenge to the rules of primogeniture. Accordingly, the order did not apply to estates that had already been wound up,

708 Masiya (supra) at paras 47–57. See also Ex parte Minister of Safety and Security & Others: In Re S v Walters & Another 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC).


710 See, for example, S v Coetzee 1997 (3) SA 527 (CC), 1997 (4) BCLR 437 (CC) at para 52.

711 Mohlomi v Minister of Defence 1997 (1) SA 124 (CC), 1996 (12) BCLR 1559 (CC) at para 26; Potgieter v Lid van die Uitvoerende Raad: Gesondheid, Provinsiale Regering Gauteng & Andere 2001 (11) BCLR 1175 (CC) at para 11; Engelbrecht v Road Accident Fund & Another 2007 (6) SA 96

712 NCGLE v Minister of Justice (supra).

713 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC).

714 Bhe & Others v Magistrate, Khayelitsha & Others: Shibi v Sithole & Others; SA Human Rights Commission & Another v President of the RSA & Another 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC)('Bhe').
unless the beneficiary had been aware of the pending decision in *Bhe*. The Court adopted the same construction when it expanded the Intestate Succession Act to apply to homosexual partners.

As *Bhe* suggests, there is virtually no limit to the manner in which a court may phrase an order limiting retrospective effect. Courts should not be afraid to craft innovative and detailed retrospective orders that catch all the people — and only those people — to whom it would be just and equitable to apply the order. However, although courts have a wide discretion, the Constitutional Court has explicitly rejected the possibility of reaching back into the past to aid a single litigant and deny the same benefits to others who are similarly situated. In *Mistry v Interim Medical and Dental Council*, the Court struck down a law that permitted searches of medical professionals’ homes and offices in unconstitutionally broad terms. Sachs J gave the order only prospective effect. Indeed, the Court refused to come to the aid even of the applicant in the case who had gone ‘to the trouble and expense of launching constitutional litigation’ because making ‘an order reaching selectively back into the past simply to come to the aid of one successful litigant without affording such relief to "all people who are in the same situation as the [litigant]" would "result in a denial of equal protection of the law [and would] raise considerations of legal certainty"’. However, it is not clear that *Mistry* imposes an absolute prohibition on retrospectivity to aid a single litigant. In the subsequent paragraphs, Justice Sachs points out that the impact of the prospective order on Mr Mistry was in fact minimal. It may be that in a case where non-retrospectivity will have disastrous consequences for the named litigant — or even for a small group that can only be captured by naming them individually — the Court may be willing to reach back in time to come to her aid alone.

### (bb) Reasons for limiting retrospection

Two rough categories exist for limiting retrospectivity. First, unlimited retrospectivity may cause some form of injustice to the litigants before the court or other similarly placed people. Second, retrospectivity may impair the administration of justice by invalidating acts already performed. All cases where the Constitutional Court has limited retrospectivity fall, fairly neatly, into one of these two categories. However, limiting retrospectivity is not a one-way street: the protection of individual rights almost always conflicts in some way with the good of the commonweal. What is interesting about retrospectivity is that individual good sometimes calls for limited and sometimes for unlimited retrospectivity. The same is true of the common good.

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715 Ibid at paras 126–127 and 136.

716 *Gory v Kolver NO & Others* 2007 (4) SA 97 (CC), 2007 (3) BCLR 249 (CC) (‘Gory’) at paras 32–42 (Applying the same remedy to an invalidation of provisions of the Intestate Succession Act which prevented same-sex life partners from inheriting from each other.)

717 1998 (4) SA 1127 (CC), 1998 (7) BCLR 880 (CC) (‘Mistry’).

718 Ibid at para 42 (footnotes omitted).

719 Ibid at paras 42–43.
Before I consider these cases in more detail, I should mention that retrospectivity is, usually, also limited when an order of invalidity is suspended. Many of the concerns that motivate a court to suspend an order may also have motivated it to limit retrospectivity. However, in this section I consider only cases where there was no suspension, but retrospectivity alone was circumscribed. In *S v Shinga* the Court, under the heading of ‘Retrospectivity’ held that it would not be just and equitable for the order — invalidating large portions of the system for criminal appeals from the Magistrates' Court — to apply retrospectively but that the order should only apply from 14 days after the order. This order is not, strictly speaking, an order limiting retrospectivity, but an order suspending the declaration of invalidity that makes express that the suspended order, when it comes into force, will not operate retrospectively.

(x) Injustice to individuals

There are a number of ways in which retrospectivity can cause harm to individuals: from criminalising previously legal conduct to imposing formerly non-existent financial obligations. The first case — criminalising past conduct — is, perhaps, the consequence most at odds with a system committed to legality and the rule of law. In *Ex parte Minister of Safety and Security v Walters*, the Constitutional Court held that s 49(2) of the Criminal Procedure Act, which permitted police officers to use lethal force when affecting arrest, violated the rights to life and freedom and security of the person. The Court decided that it had to limit the retrospective effect to avoid injustice:

> [I]t would clearly be neither just, nor equitable to allow unqualified retrospectivity of invalidation. This the instant case demonstrates. When the two accused shot the fleeing burglar, they were ostensibly entitled to invoke the indemnity afforded them by section 49(2). The effect of the unqualified striking down of the section by the trial court might in their case in effect retrospectively criminalise conduct that was not punishable at the time it

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720 For example, in *Walters* — where the Court found that the law permitting the use of force in effecting an arrest was too broad — retrospective effect would have acted unfairly against the individual litigants who had acted according to the law by criminalizing (and rendering civilly actionable) their ostensibly lawful acts. *Ex parte Minister of Safety and Security v Walters* 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC). Non-retrospectivity, on the other hand, would operate unfairly on those who lost breadwinners as a result of reliance on the provision as they would have no civil claim for their loss, despite the authorizing statute being unconstitutional. In cases, such as *Bhulwana*, involving the invalidation of criminal laws, non-retrospectivity operates unfairly to individuals because they remain in jail. And in the succession cases, non-retrospectivity would have been unfair to some individuals — because they would not benefit from the change in the law — and beneficial to others — because their concluded transactions would be unaffected.


722 2007 (5) BCLR 474 (CC), 2007 (2) SACR 28 (CC).

723 For a more detailed discussion of when suspension orders operate retrospectively and when they

724 Act 51 of 1977.

725 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC)('Walters') (The underlying facts were that a father and son who owned a bakery shot and killed a fleeing burglar. They relied on s 49(2) to justify their actions.)
was committed. Whipping away the protective statutory shield against criminal prosecution with the wisdom of constitutional hindsight would not only be unfair but would arguably offend the right protected by section 35(3)(l) of the Constitution “not to be convicted for an act . . . that was not an offence . . . at the time it was committed”.  

Although the Walters Court in this passage relies on FC s 35(3)(l), such reliance was clearly not necessary for its decision: The Court also refused to permit any retrospective application that might lead to civil liability. The Court wrote that it would 'to some extent still be unfair to create even civil liability only after the event', even though, creating civil liability would not have been prohibited by s 35(3)(l).  

Retrospectivity can, therefore, be limited even where s 35(3)(l) is not violated.

A more difficult set of facts — in which the High Court and the Constitutional Court disagreed — arose in Masiya v Director of Public Prosecutions (Pretoria). The accused had been charged with rape for anally penetrating a young girl. The problem was that, at the time the crime was committed, the definition of rape only covered vaginal penetration. The High Court found the common-law definition to directly violate the right to equality and altered it to include anal rape. According to Ranchod AJ, retrospective application was not a problem and did not violate FC s 35(3)(l) because the order would not criminalise non-criminal activity — anal penetration already constituted the crime of indecent assault:

The unlawful deed the accused committed is simply given another name, such name constituting a more serious form of indecent assault. The accused knew very well that he was acting unlawfully. It has never been a requirement that an accused should know, at the time of the commission of an unlawful deed, whether it is a common law or statutory offence, or what the legal/official terminology is in naming it.

The Constitutional Court approached the matter differently. Firstly, it relied on indirect application of the Bill of Rights in terms of FC s 39(2) — instead of direct application under FC s 8 — to develop the common law definition.

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726 Ibid at para 74. See also Masiya (supra) at para 6 of the order (The Court extended the definition of rape to include anal penetration, but to avoid retroactively creating crimes, made the decision prospective only. This decision meant that the applicant before them could only be convicted of indecent assault, not rape.)

727 Walters (supra) at para 75. The Court did however acknowledge that the development of the law carried out by the SCA in Govender would apply to all unfinished cases. Govender v Minster of Safety and Security 2001 (4) SA 273 (SCA).

728 For more on FC s 35(3)(l), see F Snyckers & J le Roux 'Criminal Procedure: The Rights of Arrested, Accused and Detained Persons' in S Woolman, T Roux & M Bishop (eds) Constitutional Law of South

729 For a discussion of Masiya see C Snyman 'Extending the Scope of Rape - A Dangerous Precedent' (2007) 124 SALJ 677 (Argues against any extension of crimes by courts).

730 S v Masiya 2006 (11) BCLR 1377 (T), 2006 (2) SACR 357 (T).

731 Ibid at para 73.

732 For a (justified) criticism of this approach, see S Woolman 'The Amazing Vanishing Bill of Rights' (2007) 124 SALJ 762. For an attempt to defend the Court's approach, see F Michelman 'On the Uses of Interpretive 'Charity': Some Notes From Abroad on Application, Avoidance, Equality, and Objective Unconstitutionality from the 2007 Term of the Constitutional Court of South Africa' (2008) 1 Constitutional Court Review (forthcoming).
secondly, the new definition embraced only anal rape of females. More importantly for present purposes, it refused to apply the development retrospectively. Nkabinde J held that s 35(3)(l) — as interpreted in Veldman v Director of Public Prosecutions (Witwatersrand Local Division) prohibited a court from giving a person a greater sentence than what had been proscribed at the time of the offence. Since rape carried a heavier sentence than indecent assault, FC s 35(3)(l) proscribed retrospective application. In addition, Mr Masiya could not have been expected to foresee that his conduct would constitute rape, rather than indecent assault and it would therefore be unfair to convict him of the former offence. The Court therefore endorsed a very strict approach to retrospectivity when altering criminal offences or sentences. Indeed, under the Masiya approach, it is difficult to think of any case where it would be permissible to apply such an order retrospectively.

The Constitutional Court has also limited retrospectivity to avoid financial hardship to individuals. This approach to retrospectivity has occurred, primarily in two contexts: succession and delictual liability. In the succession cases — Brink, Bhe and Gory — individual hardship flows from both full retrospectivity and non-retrospectivity. In Brink v Kitshoff NO the Court invalidated legislation that limited the benefits that a wife could gain from her husband’s life insurance policy if it was ceded to her and the husband’s estate was insolvent. It permitted the policy’s benefits to flow to the estate’s creditors. O’Regan J held that, on the one

733 Langa CJ (Sachs J concurring) dissented on this point. For criticism of this aspect of the majority decision, see K Phelps & S Kazee ‘The Constitutional Court Gets Anal about Rape — Gender Neutrality and the Principle of Legality in Masiya v DPP’ (2007) 20(3) SACJC 341.

734 2007 (3) SA 210 (CC), 2007 (8) BCLR 827 (CC).

735 Masiya (supra) at paras 55–56.

736 Ibid at para 56. The reasoning in Masiya is questionable. On the first point, it would have been possible to convict Masiya of rape, but still sentence him as if his crime were indecent assault. The only additional punishment he would incur would be the additional stigma that might attach to the label ‘rapist’. This additional punishment is however not mentioned in the judgment. The second argument supposes that in order to convict a person, that person must know not only that his act is criminal, but what crime it constitutes. That cannot be correct. The High Courts and the Supreme Court of Appeal regularly re-align the border between, for example, murder and culpable homicide or theft and fraud. The result of the Masiya approach is that whenever they do so, they must convict the person before them on law that they perceive to be wrong. It is in any event difficult to accept that Mr Masiya, or indeed any other right minded person, would not have described his anal

737 See First National Bank (FNB) of SALtd t/a Wesbank v Commissioner, South African Revenue Service and Another; First Nationa Bank of SALtd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) at para 122 (The Court struck down a section that permitted property to be sold to settle a customs debt, even if the owner of the property was not the customs-debtor. However, it prevented the decision from applying to goods that had already been sold in good faith or cases that had been finalised by the courts. The Court mixed both injustice and administration reasons as it would prejudice individuals and also be ‘disruptive, burdensome and difficult to reverse the consequences of such sales if they were to be invalidated.’)

738 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC)('Brink').

739 Insurance Act 27 of 1943 s 44.
hand, unlimited retrospectivity would operate unfairly to creditors of estates that had already been wound up and who had, in good faith, benefited from the provision.\footnote{Brink (supra) at para 56.} On the other hand, purely prospective application 'would deny some married women the protection of the Constitution' as their husbands' estates would still be subject to the discriminatory law.\footnote{Ibid at para 57.} To avoid (as far as possible) both injustices, O'Regan J limited the order of invalidity to apply only where payments had already been made in reliance on the now invalid provision.\footnote{Ibid at paras 58 and 60. The same analysis — and a similar solution — was adopted in both \textit{Bhe} (supra) (invalidated customary-law rule of primogeniture) and \textit{Gory} (supra)(expanded the Intestate Succession Act to same-sex life partners). In \textit{Bhe} a retrospective order would invalidate the transfer of money or goods which had already occurred in good faith. A prospective order would preserve a blatantly unconstitutional law and would prevent re-opening transactions even when the person who benefited knew that the rule of primogeniture was under court challenge. The Court therefore applied the order only to payments made in good faith.) In \textit{Gory}, the law in issue was s 1(1) of the Intestate Succession Act 81 of 1987 which prevented homosexual life-partners from inheriting from their partners' intestate estates. A group of three sisters intervened in the case because if it was successful they would not benefit from the estate of their (homosexual) brother. Van Heerden AJ, for a unanimous Court, held that it would not be 'just and equitable' to deny Mr Gory relief, at least partly because he was part of a group that had been the victim of continued stigmatization and marginalization. Ibid at para 40. Van Heerden AJ therefore adopted the form of the order in \textit{Bhe} with the additional proviso that if a party could show serious administrative or financial hardship, they could approach the Court for a variation of the order. Ibid at paras 58 and 60.} De \textit{Lange} \textit{v Smuts NO} indicates the clear distaste on the part of the Court for creating delictual liability for people, even official bodies, who relied on unconstitutional laws.\footnote{1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC).} The provision in question permitted officials, including non-judicial officers, to imprison a person who refused to answer questions at an insolvency inquiry. The majority of the Court found the provision invalid only to the extent that the power was extended to non-judicial officers. They also held that the decision should only apply from the date of the decision:

> Persons who have, since the coming into operation of the Constitution, been unconstitutionally committed to prison, can unfortunately not be afforded effective relief in the sense of undoing any detention they might have suffered prior to the making of this order. Moreover, if the order is granted any retrospective effect it could raise uncertainties as to whether a person unconstitutionally committed to prison in the past had a claim for damages in respect of a committal which was unassailable at common law at the time and ordered in good constitutional faith. If it were to transpire that the retrospective operation of the order does not provide a cause of action for damages, then persons unconstitutionally detained in the past suffer no prejudice in relation to damages. If it has the effect of giving rise to such a claim, then it seems to be a most undesirable consequence, having regard to the fact that the committal took place in good faith. Retrospectivity can in any event not assist the applicant, inasmuch as his committal was ordered by a magistrate and was therefore constitutional.\footnote{Ibid at paras 104–105.}
The *Walters*\(^\text{745}\) and *Mistry*\(^\text{746}\) Courts express a similar sentiment: namely that it is a lesser evil for a constitutional violation to go without compensation than to impose monetary liability on a person who, knowingly or not, relied on what she thought to be a valid law.

Of course, where that reliance was indeed in good faith and where the person on whom liability might be imposed is a private person, that assessment seems correct. However, where the body that would bear liability is an organ of state — and therefore responsible for respecting, protecting, promoting and fulfilling the rights in the Bill of Rights\(^\text{747}\) — or where the person knew the law was subject to a constitutional challenge, there would seem to be very good reasons in favour of imposing liability. There might well be good reasons that justify limiting retrospectivity even in these circumstances — but they would have to be clearly established by the state.\(^\text{748}\) If they were not established, a court could easily make an order that — along the lines of those granted in *Bhe* and *Gory* — strikes a fair balance between the various interests at stake by making retrospective application dependant on whether the person or organ of state acted in good faith or bad faith. The simple prospective orders in *De Lange* and *Walters* fail to take account of these nuanced possibilities.

### (y) Administration of Justice

The primary reason for limiting retrospectivity is that it can threaten the administration of justice and legal certainty by invalidating acts (or laws) that have been taken (or made) under the invalidated provision. The Court has regularly relied on the need to preserve the sanctity of legal order to limit retrospectivity where it would undo court decisions or executive or legislative action.

This trend began in the Court’s very first decision: *S v Zuma & Others*.\(^\text{749}\) The Court struck down a law that placed the onus on the accused to prove that a confession was not made freely and voluntarily. Although the Court recognised that limiting retrospectivity ‘may well . . . cause[] injustice to accused persons’, it concluded that it ‘cannot repair all past injustice by a simple stroke of the pen.’\(^\text{750}\) It

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\(^{745}\) *Walters* (supra) at para 75 (‘Allowing the order to operate retrospectively in respect of civil liability only would not involve section 35(3)(l) of the Constitution and would not be as manifestly inequitable as retrospectively taking away a defence to a criminal charge. Nevertheless it would be anomalous to have such a distinction between civil and criminal liability and it would to some extent still be unfair to create even civil liability only after the event.’)

\(^{746}\) *Mistry* (supra) at para 41 (‘[Retrospectivity] could also give rise to delictual claims by persons subjected to searches and seizures after that date, and add further burdens to a health budget already under considerable strain.’)

\(^{747}\) FC s 7(2).

\(^{748}\) Of course, even when dealing with a state acting in bad faith, the quantity of compensation might be so immense that it would jeopardise the functioning of the state.

\(^{749}\) 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC)(‘Zuma’).

\(^{750}\) Ibid at para 44.
therefore limited\textsuperscript{751} the retrospective effect of the order to cases that (a) started after 27 April 1994 (the day the Interim Constitution came into force); and (b) were not completed at the date of the judgment.\textsuperscript{752} However, the Zuma position would turn out to be only a temporary solution. Both elements of this order on retrospectivity would be altered by the Court two months later in \textit{S v Mhlungu & Others.}\textsuperscript{753}

The reason for the change was a serious disagreement within the Court on how to interpret IC s 241(8). IC s 241(8) dealt with the application of the Interim Constitution to cases pending when the Interim Constitution was enacted.\textsuperscript{754} One camp of judges (led by Kentridge AJ) proposed a literal reading of the provision that would preclude the application of the Interim Constitution to any cases pending on 27 April 1994. However, the majority of judges (represented by Mahomed J) preferred a more liberal reading that permitted application of the Interim Constitution to pending cases. Although Mahomed J proffered a number of reasons for his reading of the section, the first justification was the 'very unjust, perhaps even absurd, consequences' that would result from Kentridge AJ's reading. One of those consequences was:

\begin{quote}
[M]erely because an accused person was served with an indictment before 27 April 1994, (and even if no evidence whatever was lead before that date) he could not contend that the [reverse onus for confessions was] unconstitutional. In the result, the Court could be compelled to convict him (and in consequence thereof even to imprison him for a substantial period) in circumstances where it has a reasonable doubt whether his confession was freely and voluntarily made and therefore even if the Court has a reasonable doubt about his guilt. Another accused charged as his co-conspirator could be acquitted simply because the indictment was served on him on 28 April 1994 in respect of an offence arising from exactly the same incident and the same evidence.\textsuperscript{755}
\end{quote}

\textsuperscript{751} Strictly speaking, the Court did not limit the retrospectivity as, under the Interim Constitution, non-retrospectivity was the default position for pre-constitutional legislation. However, because the Court has not altered its practice under the Final Constitution — a point I criticise later (see § 9.4(e)(ii)(cc) infra) — and in order to integrate the discussion of Interim Constitution and Final Constitution cases, I use the phraseology of 'limiting retrospectivity' under both the Interim Constitution and the Final Constitution.

\textsuperscript{752} Ibid at para 44.

\textsuperscript{753} 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC)\texttext{"Mhlungu\textquoteright\textquoteleft"). In this chapter I consider only the relevance of \textit{Mhlungu} for retrospectivity. For more on the different interpretative strategies adopted by the judges, see L Du Plessis \textquoteleft Interpretation\textquoteright in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) \textit{Constitutional Law of South Africa} (2nd Edition, OS, June 2008) Chapter 32.

\textsuperscript{754} IC s 241(8) read: \textquoteleft All proceedings which immediately before the commencement of this Constitution were pending before any court of law, including any tribunal or reviewing authority established by or under law, exercising jurisdiction in accordance with the law then in force, shall be dealt with as if this Constitution had not been passed: Provided that if an appeal in such proceedings is noted or review proceedings with regard thereto are instituted after such commencement such proceedings shall be brought before the court having jurisdiction under this Constitution.\textquoteleft

\textsuperscript{755} \textit{Mhlungu} (supra) at para 4. Ibid at paras 5-6 (Details further \textquoteleft absurd\textquoteright consequences that would follow from the minority's interpretation.)
Mahomed J felt that it was 'arbitrary and irrational' that accused persons whose cases had been finalised before the date of the order in *Mhlungu* should not qualify for protection while otherwise identically placed accused whose trials were not yet finalised would be protected. He therefore changed the order in *Zuma* to apply to all cases pending on 27 April 1994, whether they had been finalised or not.

*Mhlungu* stands for a very powerful principle in favour of retrospective application when non-retrospectivity will arbitrarily deny people their constitutional rights. The strength of the Court’s commitment to this principle is evident both in the lengths they went to finesse the wording of IC s 241(8) and the fact that they were willing to effectively overrule their own order that was but two-months-old. One of the most interesting aspects of *Mhlungu* is that, unlike *Zuma* and the cases that would come later, there is very little attention paid to the potential impact of re-opening already finalised court decisions. The majority’s focus is solely on the rights of the accused. It is therefore extremely surprising that, less than six months later, the Court would retreat from its position in *Mhlungu* and revert, largely, to the reasoning and outcome it adopted in *Zuma*.

*S v Bhulwana; S v Gwadiso* turned on a very similar issue to *Zuma* and *Mhlungu*: a reverse onus provision. The law at issue in *Bhulwana* placed an onus on people found in possession of a certain amount of marijuana to prove that they were not guilty of distribution (as well as simple possession). The Court easily found the provision unconstitutional and then, in what has since become the standard precedent for retrospectivity cases, held that the order should only apply to cases that had not yet been finalised, or that could still be appealed — what I earlier labelled the ‘the finalised cases construction’. Because of the influence *Bhulwana* has had on similar matters over the past 13 years, it is worth quoting O’Regan J’s reasoning at some length:

> Central to a consideration of the interests of justice in a particular case is that successful litigants should obtain the relief they seek. It is only when the interests of good government outweigh the interests of the individual litigants that the court will not grant relief to successful litigants. In principle too, the litigants before the court should not be singled out for the grant of relief, but relief should be afforded to all people who are in the same situation as the litigants. On the other hand, as we stated in *S v Zuma*, we should be circumspect in exercising our powers under [IC] s 98(6)(a) so as to avoid unnecessary dislocation and uncertainty in the criminal justice process. As Harlan J stated in *Mackey v US* 401 US 667 (1971) at 691:

> "No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved."

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756 *Mhlungo* (supra) at para 48.

757 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC) (‘*Bhulwana*’).

758 Ibid at para 33.

759 § 9.2(e)(ii)(aa)/(y) supra.
As a general principle, therefore, an order of invalidity should have no effect on cases which have been finalised prior to the date of the order of invalidity.\textsuperscript{760}

This final principle has been accepted as the definitive statement of law on retrospectivity where the problem is that decided cases will be overturned.\textsuperscript{761}

It should be helpful to list some of the situations in which the principle has been applied. It has been applied in a series of case which, like \textit{Bhulwana}, concerned reverse onus provisions.\textsuperscript{762} Most of these cases are very short. They simply repeat the holdings in previous decisions and then applying the remedy developed in \textit{Bhulwana}. The template has also been used in time-limitation clause cases. In \textit{Mohlomi v Minister of Defence},\textsuperscript{763} s 113(1) of the Defence Act\textsuperscript{764} required people suing the Defence Force to do so within six months of the claim arising and to give notice within one month. Didcott J concluded that the provision unjustifiably limited the applicant’s right of access to court.\textsuperscript{765} Without much explanation, he adopted a slight variation of the finalised cases construction. His remedy limited the retrospective effect to cases that were not already barred by s 113 and that had been either decided on first instance on appeal or settled. Similar orders were made in \textit{Potgieter v Lid van die Uitvoerende Raad: Gesondheid, Provinsiale Regering}\textsuperscript{766} and \textit{Engelbrecht v Road Accident Fund}.\textsuperscript{767} Interestingly, in \textit{Moise}, which concerned a very similar provision, the order was permitted to operate with full retrospectivity.\textsuperscript{768}

\footnotesize{760} \textit{Bhulwana} (supra) at para 32 (references omitted, emphasis added).

\footnotesize{761} This passage — or parts of it — has been quoted with approval on numerous occasions. See \textit{S v Ntsele} 1997 (11) BCLR 1543 (CC) (‘\textit{Ntsele}’) at para 14; \textit{S v Mello} 1998 (3) SA 712 (CC), 1998 (7) BCLR 908 (CC) (‘\textit{Mello}’) at para 13; \textit{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 94; \textit{Engelbrecht v Road Accident Fund & Another} 2007 (6) SA 96 (CC), 2007 (5) BCLR 457 (CC) at para 45. The reasoning has been followed in \textit{S v Mbatha} 1996 (2) SA 464 (CC), 1996 (3) BCLR 293 (CC) (‘\textit{Mbatha}’) at para 31; \textit{Brink v Kitshoff NO} 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at para 54; \textit{S v Julies} 1996 (4) SA 313 (CC), 1996 (7) BCLR 899 (CC) (‘\textit{Julies}’) at para 4; \textit{Scagell & Others v Attorney-General, Western Cape & Others} 1997 (2) SA 368 (CC), 1996 (11) BCLR 1446 (CC) at paras 35–36.

\footnotesize{762} See \textit{Julies} (supra)(Presumption that possessor of drugs was also a dealer); \textit{Scagell} (supra)(various reverse-onus provisions concerning gambling); \textit{Ntsele} (supra)(Person in charge of land where marijuana plants found, presumed to be dealing in marijuana); \textit{Mello} (supra)(Person in ‘immediate vicinity’ of drugs, presumed to be in possession thereof); \textit{Mbatha} (supra)(law presumed that a person on a property where illegal arms were found was in possession of those arms.)

\footnotesize{763} 1997 (1) SA 124 (CC), 1996 (12) BCLR 1559 (CC).

\footnotesize{764} Act 44 of 1957.


\footnotesize{766} 2001 (11) BCLR 1175 (CC).

\footnotesize{767} \textit{Engelbrecht v Road Accident Fund & Another} 2007 (6) SA 96 (CC), 2007 (5) BCLR 457 (CC) (‘\textit{Engelbrecht}’).
The Court provided no explanation for why Moise was treated differently. None is apparent upon close analysis after the fact.\textsuperscript{769}

\textit{Mistry v Interim Medical and Dental Council of South Africa} is another excellent example of the chaos that can be caused by retrospectivity.\textsuperscript{770} The Court struck down an overbroad search and seizure provision with prospective effect only because:

Any general declaration of invalidity with retrospective effect would impact negatively on good government by rendering unlawful all such searches conducted after the retrospective date specified. This could create considerable uncertainty with regard to the validity of proceedings which were conducted on the basis of evidence obtained as a result of such searches.\textsuperscript{771}

Other contexts in which retrospectivity has been limited to avoid disruption are the process for appointing magistrates,\textsuperscript{772} indefinite detention,\textsuperscript{773} adoption,\textsuperscript{774}

\begin{flushright}
\textsuperscript{768} Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae) 2001 (4) SA 491 (CC), 2001 (8) BCLR 765 (CC).

\textsuperscript{769} The best explanation seems to be that the Court simply forgot to deal with retrospectivity in the original judgment and when they were caught out in the subsequent case of Ex Parte Women's Legal Centre: In re Moise v Greater Germiston Transitional Local Council, did not want to admit their error. 2001 (4) SA 1288 (CC), 2001 (8) BCLR 765 (CC).

\textsuperscript{770} 1998 (4) SA 1127 (CC), 1998 (7) BCLR 880 (CC).

\textsuperscript{771} Ibid at para 41. Compare this response to Magajane v The Chairperson, Northwest Gambling Board, where the Court also struck down search and seizure provisions but did not limit retrospectivity. 2006 (5) SA 250 (CC), 2006 (10) BCLR 1133 (CC). Unfortunately the Magajane Court did not explain its decision, so it is difficult to know if there is any meaningful difference between the two cases.

\textsuperscript{772} Van Rooyen & Others v The State & Others (General Council of the Bar of South Africa Intervening) 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC) at para 272 (The Court invalidated a variety of provisions detailing how Magistrates are appointed. Without much ado, Chaskalson CJ held that it was 'All that is necessary is to make the orders prospective so that completed matters are not affected.' The order clearly makes sense as retrospectivity would have invalidated all the cases decided by a magistrate appointed in terms of the defunct provisions and the constitutional flaw was in any event fairly minor.)

\textsuperscript{773} S v Niemand 2002 (1) SA 21 (CC), 2002 (3) BCLR 219 (CC) at para 33 (A provision permitting indefinite detention of habitual criminals was held to constitute 'cruel, inhuman and degrading punishment' contrary to FC s 12(1)(e). The order set the maximum detention period at 15 years and was prospective only. What is interesting about Niemand is that the Court specifically recognized that the prospective order would still aid currently imprisoned criminals because '[i]mprisonment is an ongoing process, and the terms of the order will apply to all such persons, despite the fact that they were declared to be habitual criminals before the coming into effect of the order.')

\textsuperscript{774} Fraser v Children's Court, Pretoria North 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC) at para 51 (A law permitting adoption without the consent of the father was held to be unfairly discriminatory. Mahomed DP limited the retrospective impact of the order because 'it would be quite chaotic and clearly prejudicial to the interests of justice and good government if we made any order in terms of section 98(6) of the Constitution which might have the effect of invalidating any adoption order previously made'.)
immigration, decriminalizing an act, and permitting inter-spouse civil claims.

(z) Validating invalidating legislation

Generally, a court will not limit retrospectivity in the absence of any of the factors discussed above. Indeed, the Court has produced a large number of orders in which it provides no reasons for its decision not to limit the order's retrospective effect. In addition to the general presumption in favour of retrospectivity, there is a specific situation in which the court has held retrospectivity is inappropriate for separate reasons. In Executive Council of the Western Cape Legislature & Others v President of the Republic of South Africa & Others, the Court overturned legislation under which various proclamations amended the initial legislation. The proclamations — though made in error — had been intended to create the structure for the first local government elections in 1994. The Court eventually suspended the

775 National Coalition for Gay and Lesbian Equality & Another v Minister of Home Affairs & Others 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) at para 89 (The Court invalidated a law that facilitated immigration of heterosexual spouses without affording the same benefit to homosexuals, and read-in words to cure the defect. Retrospectivity, the Court held, would 'cause uncertainty concerning the validity of decisions taken and acts performed in the past' and since limiting retrospectivity would cause no prejudice to homosexual couples as they could 'seek afresh, or persist with seeking' under the altered version of the legislation.)

776 See National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) (‘NCGLE v Minister of Justice’) (The Court invalidated the common-law (and the derivative statutory) criminalisation of consensual sodomy and limited retrospectivity with a slight variaion of the 'unfinalised cases' construction. Ackermann J argued that Bhulwana, where the flaw was in the trial procedure, was not entirely applicable in this context because in Bhulwana 'unqualified retrospective operation . . . could cause severe dislocation to the administration of justice and also be unfair to the prosecution who had relied in good faith on such evidentiary provisions.' Ibid at para 95. The unconstitutionality of criminalising consensual sodomy was different because it was 'manifestly and grossly unjust and inequitable that such convictions should not be capable of being set aside' where the crime had in fact ceased to exist in 1994 and where it was just a 'chance fact' that a challenge to the act had not been brought earlier. Ibid at para 96. Accordingly, Ackermann J ordered that although the order should not apply directly to finalized cases, where the time for lodging an appeal had lapsed, people in jail should have an opportunity to apply for condonation for late filing of their appeal. Although there is technically nothing to stop people from doing this on the ordinary 'finalised cases' construction, it has not been specifically included in the order in other cases); Phillips & Another v Director of Public Prosecutions, Witwatersrand Local Division, and Others 2003 (3) SA 345 (CC), 2003 (4) BCLR 357 (CC) at para 31 (The Court, over the dissent of Madala J, found unconstitutional a provision which criminalised, amongst other acts, stripping on premises that sold liquor. Without much explanation, Yacoob J found that it was 'just and equitable' to apply the standard 'finalised cases' construction); South African National Defence Union v Minister of Defence & Another 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC) at para 39 (Invalidated the criminal prohibition on members of the Defence Force engaging in acts of public protest. 'Given the scope of the prohibition and the absence of proof of any unconstitutional reliance on the provisions, it is not appropriate in the circumstances of this case to make an order with retrospective effect.')

777 Van der Merwe v Road Accident Fund & Another (The Women’s Legal Centre Trust as amicus curiae) 2006 (4) SA 230 (CC), 2006 (6) BCLR 682 (CC) at para 77 (Moseneke DCJ invalidated legislation that prohibited spouses married in community of property from claiming patrimonial damages from each other. In a very confusing piece of retrospectivity analysis, he held: ‘I think that the interest of justice requires that Mrs Van der Merwe and people similarly situated should get effective relief immediately from this order. I have not been referred to any major administrative dislocation or other consideration that militates against making the order retrospective. I have not been pointed to any prejudice; nor can I find any. I plan to limit the operation of the order to claims in which a final court order has not been made.’ It is unclear what he meant by ‘prejudice’ or how the conclusion follows from the premises.)
order to ensure that the elections could take place. It then considered the possibility of limiting retrospectivity in order to save the proclamations (despite invalidation of the empowering legislation.) It rejected this option. Although the Court accepted that its remedial powers are broad enough to do so, it concluded that it will seldom, if ever, be appropriate to use this power to validate amendments made to Acts of Parliament. It is logically inconsistent to strike down the empowering legislation, and at the same time, to validate Proclamations made under it, which will have the result that the things validated — laws which should be made only by Parliament — will apply not only to the past, but to the future as well. This is a task for Parliament and not for the Court.780

(cc) Criticism

The power to limit the retrospective impact of decisions is not uncontroversial. Under the leadership of Chief Justice Warren, the US Supreme Court, in a series of landmark criminal procedure cases,781 was roundly criticised for using its remedial powers to 'mak[e] the law' and violating the separation of powers by permitting judges to legislate by creating new law.782 Other critics complained that retrospectivity made it too easy for the Court to change settled constitutional doctrine.783 As these criticisms indicate, limiting retrospectivity was originally associated with a liberal or ‘activist’ court. Fallon and Meltzer show how this perspective changed under the more conservative Burger and Rehnquist Courts. The power to limit retrospective effect which had been a tool to expand constitutional rights, became a means to deny people rights by prohibiting them from relying on ‘new law’.784 Victims of rights violations were not permitted to rely on doctrines.

778 There are several cases where the Court did not limit retrospectivity and did not provide reasons for not doing so where it might seem that reasons were warranted. See, for example, Du Toit & Another v Minister of Welfare and Population Development & Others (Lesbian and Gay Equality Project as Amicus Curiae) 2003 (2) SA 198 (CC), 2002 (10) BCLR 1006 (CC)(Permitting same-sex couples to adopt); Satchwell v President of the Republic of South Africa & Another 2003 (4) SA 266 (CC), 2004 (1) BCLR 1 (CC)(Expanding judicial benefits to same-sex life partners); Islamic Unity Convention v Independent Broadcasting Authority & Others 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC)(Invalidating restrictive broadcast regulations); J v Director General, Department of Home Affairs 2003 (5) SA 621 (CC), 2003 (5) BCLR 463 (CC)(Permitting same sex couples to engage in artificial insemination.)

779 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC).

780 Ibid at para 105.

781 See, for example, Mapp v Ohio 367 US 643 (1961)(‘Mapp’) (Court requires states to exclude evidence obtained in violation of the Fourth Amendment); Linkletter v. Walker 381 U.S. 618 (1965) (Held that Court had the power to limit the retrospective impact of Mapp ); Miranda v Arizona 384 US 436 (1966)(‘Miranda’) (Court requires warnings to be read to people who are arrested).


783 Ibid.

784 Ibid at 1734–1735. Indeed even during the Warren era there was a tension between the judges. Although almost all the judges supported limiting retrospectivity, some did so because it permitted them to more easily expand existing doctrine, while others did it to limit the impact of a doctrine they disagreed with. Ibid at 1739–1740.
developed after their rights had been infringed. The American experience leaves us with two important lessons. One, the power to limit retrospectivity is one of the most powerful tools the Court has in its possession. Indeed, some suggest that this power is almost as important as judicial review itself. Courts should always keep that in mind. Two, the power can be used both to promote change and to deny rights.

Flowing from this brief introduction, I have four inter-related criticisms of the Court’s approach to retrospectivity. These criticisms focus mainly on the reverse-onus and time-limitation lines of cases because they are the most egregious, though not the only, examples of the flaws I see in the current retrospectivity doctrine.

Firstly, by continuing to apply the Bhulwana test — ‘as a general principle . . . an order of invalidity should have no effect on cases which have been finalised prior to the date of the order of invalidity’— the Court has failed to appreciate two vital differences between the Interim Constitution and the Final Constitution. First, under the Interim Constitution invalidation of pre-constitutional legislation — such as that at issue in Bhulwana — was presumed not to operate retrospectively. The presumption under the Final Constitution is reversed — all declarations are presumed to operate retrospectively. Second, the substance of the test is not based on ‘the interests of justice and good government’, but what is ‘just and equitable’. These standards differ: ‘the test under the [Final] Constitution is a broader and more flexible one, where the concept of the interests of good government is but one of many possible factors to consider.’ Indeed, the Constitutional Court itself has acknowledged that Bhulwana can no longer provide the authoritative test. Yet, more than eight years later, the Court still relies on Bhulwana as if it were binding precedent. But considering these two changes, Bhulwana cannot be the controlling test. It creates a presumption that runs counter to the more basic presumption in favour of retrospectivity and it privileges non-interference in legal decisions above other concerns that go to justice and equity. While both may have been justified under the Interim Constitution, they cannot be justified under the Final Constitution.

Secondly, and most importantly, the standard is inherently unjust, even under the Interim Constitution. The result in Bhulwana is that a person who may well have been innocent of the crime of distribution remains in prison because of a law that violated one of his most basic rights: the right to be presumed innocent. To argue that the general need for finality in legal decisions is more important than the constitutional demand that innocent people should not be imprisoned seems outrageously indefensible. Take the facts in Engelbrecht. Kondile AJ held,

785 Bhulwana (supra) at para 32.

786 See § 9.2(e)(ii)(aa)(x) supra.

787 NCGLE v Minister of Justice (supra) at para 94.

788 Ibid at paras 93–94.

789 See Engelbrecht (supra) at para 45 (‘[The] Bhulwana principle was apparently applied in Mohlomi and there is no reason not to apply it in this matter.’)
correctly, that a regulation which required certain motor vehicle accident victims to submit an affidavit to the Road Accident Fund within two weeks of their accident, failing which they would have no claim, violated their right of access to court because it gave them an unreasonably short period to act. The Court, without any explanation other than a bald referral to Bhulwana limited the retrospective effect to unfinalised cases. The principle the Court created was that it is more important not to disturb decided cases than to provide relief to innocent victims of road accidents. As a result, a person who had been paralysed by a hit-and-run accident, had submitted their affidavit one day late and whose final appeal was turned down the day before Engelbrecht was decided would be entitled to absolutely nothing. In the words of Mahomed J, such an outcome is ‘very unjust, perhaps even absurd’. The Court seems stuck in a traditional common-law mindset that values legal certainty and stability — especially the sanctity of court decisions — above all else, even the rights conferred by a Final Constitution whose manifest aim is transformation. From the perspective of a transformative constitution, disruption is the norm, not the exception. A society founded on a transformative constitution is a society in which, as Chief Justice Langa has put it, ‘new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant.’ The Court’s approach to retrospectivity is incommensurable with that vision.

Thirdly, I do not wish to argue that retrospectivity should never be limited. The cost — monetary or otherwise — to the country may well matter. My problem with the case law is that, as a general rule, it does not examine the evidence to determine what the actual cost of retrospectivity will be. There is no reference to statistics that indicate how many prisoners will be released or how many claims will have to be paid out. The judges do not question whether the state institutions have the capacity or the funds to deal with the impact of retrospectivity. Instead they seem to act on the assumption that in any case where a single prisoner might be released or a single penny spent, the cost will be too great. That approach gets the onus in retrospectivity cases back-to-front. If the starting point is full retrospectivity, then the state must bear the onus of providing evidence that would move a court to depart from that norm. Where the state fails to present evidence, it must face the consequences, namely, full retrospectivity. Of course, there may be cases where the social chaos created by retrospectivity will be so great and so obvious that the court may only take judicial notice of the likely consequences and

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790 The Road Accident Fund Act 56 of 1996 makes the Road Accident Fund the only body against which delictual claims arising from motor vehicle accidents can be instituted. Victims are not entitled to institute claims against the actual wrongdoer. RAF Act s 17 read with s 21.

791 Engelbrecht (supra) at para 45.

792 Mhlungu (supra) at para 4. The gap that is sometimes left for people who would otherwise be denied relief to approach a court is insufficient as it requires resources and knowledge that are far beyond the means of ordinary people.


794 Langa ‘Transformative Constitutionalism’ (supra) at 356.
not require the state to lead evidence. But that could not possibly be the case in Bhulwana or Engelbrecht or any of the other reverse-onus or time-limitation clause cases where the Court could not possibly have had any idea how many innocent people were in gaol, or how many people who had filed their claims late still had legitimate claims, without the state supplying such evidence. If the Court had that evidence, then they certainly did not mention it in their judgments. That possibility would imply that they did not think the evidence was necessary to decide the case: but that too would be perverse. It would mean the rule was applied irrespective of the facts.

Fourthly, the Court has been inconsistent in its application of the principles it has laid down and has often failed to justify its decisions. Let’s take the time-limitation cases. In Mohlomi, Potgieter and Engelbrecht the Court applies the unfinalised cases construction. In Moise it orders full retrospectivity. No attempt was made to distinguish Moise from the other cases — not even when an amicus questioned the retrospective effect of the order. Earlier I tried to expound in the best possible light the Court’s movement from Zuma through Mhlungu to Bhulwana. But the truth is that the Zuma and Bhulwana cannot be reconciled with Mhlungu. In Mhlungu Mahomed J held that ‘[i]t would . . . be arbitrary and irrational to deny to an accused person the right to rely on such invalidity merely because the declaration of invalidity by the Court took place on a date subsequent to the date when his pending trial was fortuitously completed.’ Yet that is precisely what the Court in Bhulwana does. It denies relief to people whose cases had been ‘[un]fortuitously completed’ before the order was made. O’Regan J does not deny the consequences of these remarks in Mhlungu. She simply ignores them. We are left to speculate as to why the Court backtracked in Bhulwana rather than sticking with the clearly superior principle it adopted in Mhlungu.

I also find the Court’s attempt to distinguish Bhulwana in NCGLE v Minister of Justice highly unsatisfactory. In NCGLE v Minister of Justice, the court invalidated the common law crime of sodomy. It held that it would be ‘manifestly and grossly unjust

795 I think that Mapp (supra) and Miranda (supra) are good examples of this. Unlimited retrospectivity in these cases would have resulted in a large portion (perhaps even the majority in the case of Miranda) of convicted prisoners being released. That would clearly be unacceptable.

796 Women’s Legal Centre (supra).

797 Mhlungu (supra) at para 45.

798 Bhulwana (supra) at para 31.

799 The only difference is that Mhlungu applies to all cases where there is a confession, while the other applies only to cases involving a certain amount of marijuana possession. This difference gives rise to two possible — but ultimately unsuccessful — justifications. First, the Court might have been motivated by the greater number of cases that would be affected by one order rather than the other. However, there were no facts before the Court on this question and it would seem that more cases would be affected by the provision in Mhlungu than that in Bhulwana. Second, there may have been a greater sympathy on the part of the Justices for people whose confessions were coerced than for those who carried too much marijuana on them. However there is nothing in the Constitution that seems to require a greater protection for the one class than the other. Both are victims of the same constitutional defect — a violation of their right to be presumed innocent — and should be afforded the same relief. Perhaps the best explanation is that Mahomed J — the author of Mhlungu — did not sit in Bhulwana...
and inequitable' to allow convictions for consensual sodomy to stand. However, the Court felt that the overturning of those convictions should still occur through the machinery of the courts. It therefore made specific provision in the order for those persons to apply to a court for the late filing of a notice to appeal so that they could have their convictions set aside. The NCGLE v Minister of Justice Court tries to draw a distinction between the two cases by arguing that it was concerned with the validity of a criminal provision, not a rule of evidence. The latter would involve much greater disruption to the criminal justice system. Each case would have to be considered anew to determine whether the person would still have been convicted without the excluded evidence, and would be unfair to the prosecution who had relied on the evidence in good faith.

Leaving aside the ridiculous reference to unfairness to the prosecutor, and the absolute lack of evidence in any of the reverse-onus cases to show that the state could not easily cope with the number of prisoners who might be affected by the decision, the distinction might still have a gut-reaction appeal. However, consider this comparison: X is convicted of being in possession of arms and ammunition solely because he happened to be innocently present in a building where, without his knowledge, a large arms cache was stored. He is arrested and at trial is unable to satisfactorily explain his presence and is sentenced to 15 years imprisonment. Y, who knows that sodomy is a crime, continues to have sex with his boyfriend and is convicted of sodomy and sentenced to 5 years imprisonment. Is it more unjust for Y to remain in gaol after the law under which he was convicted is invalidated? That, in sum, is the reasoning in NCGLE v Minister of Justice. Such reasoning cannot be countenanced. The continued imprisonment of X and Y are, in my eyes, equally unjust.

800 NCGLE v Minister of Justice (supra) at para 96.

801 Ibid at para 97. The relevant section of the order read: 'In terms of s 172(1)(b) of the 1996 Constitution, it is ordered that the order in para 1.1 shall not invalidate any conviction for the offence of sodomy unless that conviction relates to conduct constituting consensual sexual conduct between adult males in private committed after 27 April 1994 and either an appeal from, or a review of, the relevant judgment is pending, or the time for noting of an appeal from that judgment has not yet expired, or condonation for the late noting of an appeal or late filing of an application for leave to appeal is granted by a Court of competent jurisdiction.' While there was technically nothing stopping those convicted under the Bhulwana law from applying for the same condonation, the Bhulwana Court clearly did not envisage that it would be 'just and equitable' to include it in the order. The result is that any prisoner who did apply for condonation would be far less likely to receive it because the implication of the Court's judgment seems to be that he deserves to remain incarcerated.

802 NCGLE v Minister of Justice (supra) at para 95.

803 Ibid.

804 It is ridiculous because the prosecutor suffers no prejudice if his good faith decision is later set aside because of a change in the law. The accused continues to sit in gaol.

805 This was the effect of the statute invalidated in S v Mbatha, S v Prinsloo 1996 (2) SA 464 (CC), 1996 (3) BCLR 293 (CC)('Mbatha'). The Court which relied directly on, and imposed the same order as the Court had in Bhulwana. The minimum sentence was 5 years and the maximum 25 years. Mbatha (supra) at para 20.
These four criticisms demonstrate, I hope, that the Court needs to rethink its attitude to retrospectivity. I do not think it needs to look far. All the tools are already in its jurisprudence. The first flaw can be cured simply by picking up on the difference, which it has already explained, between the Interim Constitution and the Final Constitution. The reasoning I rely on to make the second criticism is nothing more than what Mahomed J had to say in Mhlungu. The Court already demands — in rhetoric but not practice — that litigants, especially the state, provide evidence of the practical impact of retrospectivity. The inconsistency in the Court's judgments will probably be cured by taking the first three criticisms to heart and thinking a little more carefully about retrospectivity.

The Court also has the remedial tools to deal with the types of problems that arise in cases like Bhulwana and Engelbrecht. Simple retrospectivity would not be enough as there is no way to know whether all the people whom the declaration would affect would hear of the decision, whether they would be able to access a lawyer to take advantage of it and whether the state would aid or inhibit the realisation of the order. The best way to solve these problems is to make the type of supervisory order that the Court made in Sibiya. The Sibiya order regulated the commuting of the death sentences of people still on death row when the death penalty was abolished. The government was required to provide a list of all the people who were still under sentence of death and then report on a regular basis on what progress was being made to change their sentences. In a case like Bhulwana — or even NCGLE v Minister of Justice — the government could be ordered to provide a list of all the people convicted in terms of the relevant statute and examine their cases to determine whether they might fall under the Court's order. Some mechanism could then be devised to deal with the cases. Although this scheme would impose a small administrative burden on the Court, the gain we secure in the protection of individual rights make such a scheme an obvious improvement on the current default position on retrospectivity.

9.5 Individual remedies

This section considers remedies available for an isolated violation of an individual's rights (or the violation of the rights of a small identifiable group of individuals). I should stress again that individual remedies are not strictly separable from systemic remedies or remedies following findings of invalidity. All three types of remedies are rooted in similar textual sources, offer analogous forms of relief and often reinforce one another. In sum, all three remedies are inter-related and must be as part of the same basket of remedies available to a court.

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807 Sibiya & Others v The Director of Public Prosecutions, Johannesburg, & Others 2005 (5) SA 315 (CC), 2005 (8) BCLR 812 (CC).

808 For example, they could be classified into cases where the person should clearly be released and cases where release was uncertain. The first class could be immediately released. The second class could be referred to the High Court to reconsider.
The three main remedies assayed under this heading — damages, declarations of rights and interdicts — are all available in most cases and the primary role of a court is to choose between them. No formula or algorithm exists for courts charged with determining which remedy is appropriate. Indeed, the chosen remedy most often turns on the facts and the relief pursued by the person asserting a constitutional claim. That said, the process of determining individual remedies is not as casuistic as it might appear. Upon closer inspection, the cases reveal some principles and suggest the process by which courts determine the appropriate remedy in cases where an individual's rights have been violated.

(a) Damages

There are two categories of damages in constitutional matters. The first category consists of damages awarded in terms of the common law or a statute that gives effect to a constitutional right. I call these 'indirect constitutional damages' because they do not flow directly from the Final Constitution. The second category — 'direct constitutional damages' — flow from the Final Constitution alone. As I explain in more detail below, courts will, where possible, award indirect, rather than direct damages. Indeed, the courts will do so even if the award of indirect damages necessitates a development or re-interpretation of the law at issue.

(i) Indirect constitutional damages

In some sense, every award of delictual damages where the right asserted is also a constitutional right — such as dignity, bodily integrity, privacy or freedom of expression — is a constitutional remedy. Why? Because the indirect constitutional remedy serves to cure the violation of a constitutional right. The Court first enunciated this proposition in Fose v Minister of Safety and Security. Mr Fose had sued in delict for abuse suffered at the hands of the police but had, in addition to the normal delictual damages, asked for further constitutional damages to vindicate the violation of his constitutional rights. The Minister excepted to the second part of the claim. Ackermann J dismissed Mr Fose’s argument in the following terms:

[T]here can, in my view, be no place for further constitutional damages in order to vindicate the rights in question. Should the plaintiff succeed in proving the allegations pleaded he will no doubt, in addition to a judgment finding that he was indeed assaulted by members of the police force in the manner alleged, be awarded substantial damages. This, in itself, will be a powerful vindication of the constitutional rights in question requiring no further vindication by way of an additional award of constitutional damages.

The remedial principle established in Fose is that where a remedy under existing law adequately vindicates the constitutional right, there is no need to rely on the Constitution to create a new, self-standing, remedy. Litigants who wish to vindicate


810 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC)('Fose').

811 Fose (supra) at para 67.

812 See § 9.2(f)(ii) supra.
a constitutional right through an award of damages should first determine whether they have a common-law (or statutory) claim. Claims that implicate constitutional rights of, for example, dignity and privacy have been successfully litigated in the Constitutional Court in the form of delictual actions and requests, where necessary for the development of delictual actions in order to secure the desired relief.

As I have just noted, the Final Constitution is not just the source of direct constitutional remedies. It also underwrites the creation and the award of indirect constitutional damages. Indirect constitution damages sourced in the Constitution generally occur where the Final Constitution is used to develop the common law (or interpret a statute) to provide a damages claim where no such claim was previously available. The case that set the precedent for this kind of development was *Carmichele v Minister of Safety and Security*.  

Ms Carmichele had been assaulted by a known offender who had recently been arrested and then released on bail. Carmichele argued that the investigators and prosecutors were at fault for not having informed the presiding magistrate of the offender's state of mind and previous convictions. The High Court and the Supreme Court of Appeal rejected the claim on the basis that the state officials did not owe any legal duty to Carmichele in the circumstances. The Constitutional Court reversed the Supreme Court of Appeal. It held that the Final Constitution placed a cognizable duty on the state to protect people, particularly women, from violent crime. It sent the case back to the High Court to reconsider the matter and to appropriately develop the common-law of delict in light of its findings. After further litigation in both the High Court and the Supreme Court of Appeal, Ms Carmichele succeeded in her claim for (indirect constitutional) damages. *Carmichele* led to the litigation of a significant number of other cases that turned on alleged negligence or abuse by state officials. In these matters, the Final Constitution was employed to extend common-law liability beyond its traditional boundaries to hold the state liable for permitting prisoners to escape; issuing licenses to an

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814  *NM & Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae)* 2007 (5) SA
815  The line between these two classes of cases is by no means clear. I accept that some of the cases I identify as ‘developments’ merely relied on existing precedent. But nothing turns, from a remedial perspective, on whether a case is a development or not; the same principles of when damages are available apply.
816  2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC).
817  See *Carmichele v Minister of Safety and Security & Another* 2003 (2) SA 656 (C), 2002 (10) BCLR 1100 (C).
818  *Minister of Safety and Security & Another v Carmichele* 2004 (3) SA 305 (SCA).
819  *Van Eeden v Minister of Safety and Security (Women's Legal Centre as Amicus Curiae)* 2003 (1) SA 389 (SCA), 2002 (4) All SA 346.
unstable person and failing to remove a gun from a man they knew to be dangerous. In another line of cases, the courts have use the Final Constitution in order to stretch the bounds of vicarious liability to ensure that those who are injured by delinquent policemen are able to claim from the state.

These cases have relied heavily on the norm of accountability — one of the founding values of the Final Constitution mentioned in FC s 1 — to establish the award of (indirect constitutional) damages. This sentiment, and its limitations, is best expressed by Nugent JA:

Where the conduct of the State, as represented by the persons who perform functions on its behalf, is in conflict with its constitutional duty to protect rights in the Bill of Rights, in my view, the norm of accountability must necessarily assume an important role in determining whether a legal duty ought to be recognised in any particular case. The norm of accountability, however, need not always translate constitutional duties into private law duties enforceable by an action for damages, for there will be cases in which other appropriate remedies are available for holding the State to account. Where the conduct in issue relates to questions of State policy, or where it affects a broad and indeterminate segment of society,

constitutional accountability might at times be appropriately secured through the political process or through one of the variety of other remedies that the courts are capable of granting. . . . There are also cases in which non-judicial remedies, or remedies by way of review and mandamus or interdict, allow for accountability in an appropriate form and that might also provide proper grounds upon which to deny an action for damages. However, where the State’s failure occurs in circumstances that offer no effective remedy other than an action for damages the norm of accountability

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820 Minister of Safety and Security & Another v Hamilton 2004 (2) SA 216 (SCA).

821 Minister of Safety and Security v Van Duivenboden 2003 (1) SA 389 (SCA) ('Van Duivenboden') (The failure of the police failed to remove a gun from a man they knew to be dangerous led, almost ineluctably, to the shooting deaths of the man’s wife and daughter.) But see Minister of Safety and Security & Another v Rudman & Another 2005 (2) SA 16 (SCA) (No legal duty on policeman without necessary training to perform CPR on drowning baby). For a discussion of these cases, see M Bishop & S Woolman ‘Freedom and Security of the Person’ 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 40, § 40.5 (b).

822 K v Minister of Safety and Security 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC) (Court held the Minister vicariously liable for the rape of a woman by on-duty policemen); Minister of Safety and Security v Luiters 2006 (4) SA 160 (SCA) (Minister vicariously liable for shooting spree of off-duty policeman); Minister of Safety and Security v Luiters 2007 (3) BCLR 287 (CC) (Confirmed SCA

823 FC s 1(d) reads: ‘The Republic of South Africa is one, sovereign, democratic state founded on the following values: . . . (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.’ For more on the role of founding values, see Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC) at para 21 (‘The values enunciated in section 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves.’) See also C Roederer ‘Founding Values’ in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) Constitutional Law of South Africa (2nd Edition, OS, 2006) Chapter 13. For more on the correct reading of FC s 1(d), see T Roux ‘Democracy’ 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 10.
will, in my view, ordinarily demand the recognition of a legal duty unless there are other considerations affecting the public interest that outweigh that norm.\textsuperscript{824}

Nugent JA also suggests that 'in some cases the need for effective government, or some other constitutional norm or consideration of public policy, will outweigh accountability in the process of balancing the various interests that are to be taken into account in determining whether an action should be allowed.'\textsuperscript{825} To the extent that this suggestion applies to cases where no remedy other than damages is appropriate, it must be regarded with care. As I have argued above, there may be cases where compelling concerns justify the granting of no remedy at all.\textsuperscript{826} However, in order to live up to the Final Constitution's promise of effective redress, such cases ought to remain the rare exception. This principle — itself extracted from the cases law — should be understood as a safety valve. It is not to be read as an endorsement for judicial abdication in cases where constitutional rights are deemed to conflict with one another.\textsuperscript{827}

While the courts have been very eager to develop the common law to provide remedies for those who have suffered physical injury as a result of state negligence or abuse, they have proved far less sympathetic to those persons who have incurred only financial loss as a result of the state's negligence. In a string of cases related to negligent administrative action, the courts have refused to develop common-law administrative principles\textsuperscript{828} to provide for compensation where the constitutional right to administrative justice has been infringed.\textsuperscript{829} The holding in \textit{Olitzki Properties} offers two main reasons for this distinction.

The applicant ('Olitzki') applied unsuccessfully for a government tender to provide office space. Disappointed, Olitzki argued that the tender board had been improperly influenced by the provincial government and that they should have won the tender. It argued that the board had breached its responsibilities under the procurement provision of the Interim Constitution and therefore was liable in delict for the loss of profit Olitzki had suffered as a result of not receiving the tender. Cameron JA rejected

\begin{footnotesize}
\begin{enumerate}
  \item Van Duivenboden (supra) at para 21, quoted with approval in, for example, \textit{Premier of the Province of the Western Cape v Fair Cape Property Developers (Pty) Ltd} 2003 (6) SA 13 (SCA)('\textit{Fair Cape}') at para 40; \textit{Steenkamp v Provincial Tender Board, Eastern Cape} 2007 (3) SA 121 (CC), 2007 (3) BCLR 300 (CC) at para 86 (Langa CJ and O'Regan J dissenting); \textit{Minister of Safety and Security & Another v Carmichele} 2004 (3) SA 305 (SCA) at para 37.
  \item Van Duivenboden (supra) at para 22. But see \textit{Fair Cape} (supra) at para 40 (Lewis JA implies that Nugent JA held that there would \textit{definitely} be cases where accountability would be outweighed by other factors. In my view, Nugent JA's use of the phrase 'there \textit{might} be cases' and his deliberate avoidance of the issue point to a far more tentative suggestion.)
  \item See § 9.2(b)(iii) supra.
  \item These cases were decided before the advent of the Promotion of Administrative Justice Act 3 of 2000 which now governs administrative law. PAJA specifically permits compensation in extraordinary circumstances. PAJA s 8 (1)(c)(ii)/(bb). It is therefore highly unlikely that there will be any further cases in this field. However, the tender cases provide a useful model for how courts might address similar questions that are not specifically regulated by statute.
\end{enumerate}
\end{footnotesize}
the claim. Firstly, he held that Olitzki had alternative remedies. It could have had the decision set aside and re-applied, or — because it was aware of the government's influence before the decision was taken — it could have sought an interdict preventing the award of the tender. Secondly, Olitzki was claiming the profit it lost as a result of not receiving the tender (some R10 million). Such an award would, the court found, place an undue burden on the 'public purse'. The award would amount to 'a double imposition on the State, which would have to pay the successful tenderer the tender amount in contract while paying the same sum in delict to the aggrieved plaintiff.

On the facts of Olitzki Properties, these reasons are compelling. However, they are far less compelling on the facts of Steenkamp. The case is discussed in detail earlier in this chapter and I will not rehearse the facts or my criticism here. In short, the principles articulated in Olitzki ought not to have been applied in Steenkamp because there were no meaningful alternative remedies available and the applicant was only claiming the money it had spent in preparing to perform the tender. The Supreme Court of Appeal and the majority of the Constitutional Court were therefore wrong to deny the claim for damages.

The only context in which the courts have been willing to grant compensation for loss suffered from unjust administrative action is where there is proof of fraud on the part of the state. In Minister of Finance & Others v Gore NO, Cameron JA distinguished Olitzki and Steenkamp in the following terms:

In Olitzki and Steenkamp, the cost to the public purse of imposing liability for lost profit and for out of pocket expenses when officials innocently bungled the process was among the considerations that limited liability. We think the opposite applies where deliberately dishonest conduct is at issue: the cost to the public of exempting a fraudulent perpetrator from liability for fraud would be too high.

829 See, for example, Olitzki Property Holdings v State Tender Board 2001 (3) SA 1247 (SCA)('Olitzki') (An unsuccessful tenderer may not claim the lost profits it would have received had it been awarded the tender); Faircape (supra)(No damages for loss suffered from negligent processing of application for removal of restrictions on property. Fair Cape, though an important decision, does not add much to our understanding of when damages can be awarded for negligent); Dispersion Technology (SA) (Pty) Ltd t/a Pelo Healthcare v State Tender Board & Another [2007] ZAGPHC 175 (Claim for damages flowing from a decision not to award a tender at all refused); Steenkamp v Provincial Tender Board of the Eastern Cape 2006 (3) SA 151 (SCA); Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) BCLR 280 (CC).

830 Olitzki (supra) at paras 36-38.

831 Ibid at para 30.

832 See § 9.2(b)(ii)(bb) supra.

833 Minister of Finance & Others v Gore NO 2007 (1) SA 111 (SCA).

834 Gore (supra) at para 88. While the decision in Gore is clearly correct — the law cannot immunise dishonest government action from liability — it also highlights what is wrong with Steenkamp. Surely the Constitution requires the government to be not only honest, but also competent. See FC s 195(1). Where other remedies are unavailable and the strain on the public purse is minimal, the same reasons that motivate granting damages in Gore should have led to the opposite outcome in Steenkamp.
(ii) Direct Constitutional Damages

Direct constitutional damages are damages that arise from a provision or a principle in the Final Constitution rather than from the common law or a statute which protects — purposefully or incidentally — a constitutional right. While it has been rightfully chary with regard to the award of such damages, the Constitutional Court has made it clear that constitutional damages are appropriate in our constitutional regime:

[T]here is no reason in principle why 'appropriate relief' should not include an award of damages, where such an award is necessary to protect and enforce [IC] chap 3 rights. Such awards are made to compensate persons who have suffered loss as a result of the breach of a statutory right if, on a proper construction of the statute in question, it was the Legislature's intention that such damages should be payable, and it would be strange if damages could not be claimed for, at least, loss occasioned by the breach of a right vested in the claimant by the supreme law. When it would be appropriate to do so, and what the measure of damages should be will depend on the circumstances of each case and the particular right which has been infringed.835

The rest of the judgment in Fose made quite clear that, generally,836 constitutional damages will be inappropriate where the existing law — as developed and interpreted in light of the Constitution — provides a remedy that fully vindicates the right.837 The Supreme Court of Appeal has — in MEC for the Department of Welfare v Kate — taken a view that permits direct damages in a somewhat wider set of circumstances:

No doubt the infusion of constitutional normative values into delictual principles itself plays a role in protecting constitutional rights, albeit indirectly. And no doubt delictual principles are capable of being extended to encompass state liability for the breach of constitutional obligations. But the relief that is permitted by s 38 of the Constitution is not a remedy of last resort, to be looked to only when there is no alternative — and indirect — means of asserting and vindicating constitutional rights. While that possibility is a consideration to be borne in mind in determining whether to grant or to withhold a direct s 38 remedy it is by no means decisive, for there will be cases in which the direct assertion and vindication of constitutional rights is required.838

The Kate Court did not provide any detail on what those cases might be. But it did draw a distinction between a breach of a 'constitutionally normative standard' where indirect damages would be appropriate and the 'direct breach of a substantive constitutional right' where direct damages are fitting.839 Also, if the breach of rights

835  Fose (supra) at para 60.

836  Ackermann J does not set the principle as an absolute rule, but it is difficult to think of a situation where another form of relief (whether damages or otherwise) is available through common law or statute and direct constitutional damages would still be justified. Perhaps, where a statute only permits a partial remediation (by limiting the damages to special damages for example) and it cannot be interpreted or developed to provide full remediation, direct constitutional damages should be employed to make up the shortfall.

837  Fose (supra) at para 67.

838  2006 (4) SA 478 (SCA) at para 27.

839  Ibid.
was widespread and continuous — as they were in Kate — then the situation would 'call out . . . for the clear assertion of [the right's] independent existence' through direct damages.\(^\text{840}\)

The reasoning in Kate is far superior to that proffered in Fose. The vast majority of cases can be adequately addressed through indirect damages. However, a litigant should not have to fail at claiming indirect damages or prove that they will be ineffective to qualify for direct relief. Whether a court should award direct or indirect damages should depend on all the facts of the matter. The fact that a person framed a claim in terms of direct relief rather than indirect relief should not be used to deny them any relief at all. For what is ultimately at stake is the vindication of a constitutional right.\(^\text{841}\)

That being said, three types of direct damages have been at least notional recognized. They are: damages to compensate for loss; punitive damages in addition to damages already claimed; and nominal or symbolic damages.

**(aa) Damages to compensate for loss**

To date, the Constitutional Court has only awarded direct constitutional damages in one, very unusual, case: President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd.\(^\text{842}\) A large number of people had illegally occupied a portion of Modderklip’s farm. Modderklip eventually obtained an eviction order. However, by that time, some 40 000 illegal occupants lived on the farm. The sheriff required a deposit of R 1.8 million to enlist the help of a private contractor to evict the unlawful occupiers. That amount was far more than the value of the occupied portion of the farm, so Modderklip sought alternative relief. It instituted action against the President and the Ministers of Safety and Security, Housing and Agriculture and Land Affairs. The Pretoria High Court ordered the various organs of state to ensure compliance with the eviction order and devised a supervisory interdict\(^\text{843}\) to ensure compliance.\(^\text{844}\)

On appeal, the Supreme Court of Appeal confirmed the findings that the state had failed to fulfill its obligations under FC ss 25 and 26. However, it altered the High Court's remedy.\(^\text{845}\) The Supreme Court of Appeal took into consideration the fact that

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840 Ibid.

841 This was not the case. In Fose, the claim was for free-standing constitutional damages was made in addition to what he could claim through ordinary reliance on the law of delict.

842 President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae) 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC) (‘Modderklip’).

843 For more on structural interdicts, see § 9.5(c)(iv) infra.

844 Modderklip Boerdery (Edms) Bpk v President van die RSA & Andere 2003 (6) BCLR 616 (T) at paras 51–52.

if the occupiers were evicted, they would have nowhere to go. Removing them from the land in the absence of alternative land was therefore not a viable option. It held:

The only appropriate relief that, in the particular circumstances of the case, would appear to be justified is that of 'constitutional' damages, ie damages due to the breach of a constitutionally entrenched right. No other remedy is apparent. Return of the land is not feasible. There is in any event no indication that the land, which was being used for cultivating hay, was otherwise occupied by the lessees or inhabited by anyone else. Ordering the State to pay damages to Modderklip has the advantage that the Gabon occupiers can remain where they are while Modderklip will be recompensed for that which it has lost and the State has gained by not having to provide alternative land.  

The matter then came before the Constitutional Court. While the Court altered the basis of the relief, it essentially confirmed the Supreme Court of Appeal's award of damages. Langa ACJ specifically referred to the findings in Fose that sometimes constitutional damages would be the only appropriate relief and that the need for an effective remedy supported an award of constitutional damages. An order of compensation also fit with the spirit and purpose of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. Finally, the Court identified the following factors as favouring an award of constitutional damages:

It compensates Modderklip for the unlawful occupation of its property in violation of its rights; it ensures the unlawful occupiers will continue to have accommodation until suitable alternatives are found and it relieves the state of the urgent task of having to find such alternatives.

The Court rejected the possibilities of declaratory relief and an order for the state to expropriate the property. It eventually settled on an award of damages. The appropriate lesson to draw from Modderklip is precisely what was suggested in Fose.

846 Ibid at para 43.

847 Modderklip (supra) at paras 39–51 (Instead of relying on violations of the rights to property and housing, it based the decision on contempt for the rule of law and the right of access to courts (FC s 34).)

848 Fose (supra) at para 60.

849 Ibid at para 69.

850 Modderklip (supra) at para 55.

851 Ibid at para 59. The Court also avoided the difficulty of determining the amount of damages by holding that it should be determined in terms of the Expropriation Act 63 of 1975. Ibid.

852 Modderklip (supra) at para 60 (The Court held that a declaratory order would not fully satisfy the right. Importantly, it held that this was the case even though Modderklip would still be able to bring a subsequent delictual action.)

853 Ibid at paras 62–64 (The Court expressed concern that such an order would violate the separation of powers, but eventually rejected it because it did not know if the state had alternative land available to relocate the illegal occupiers. An order to expropriate would be unjust if such land was available.)
There will be situations that require constitutional damages. They will, however, be exceptional cases where no other remedy is appropriate.

Somewhat more encouragingly, direct constitutional damages were also awarded by the Supreme Court of Appeal in the, now infamous, context of the continued failure of the Eastern Cape provincial government to pay social grants to people who were clearly entitled to them. The case, MEC for the Department of Welfare v Kate, concerned an unexplained 40 month delay to decide whether to award Kate a disability grant. Nugent JA held that the delay infringed Kate's FC s 27(1)(c) right to social security and that damages were the appropriate remedy. Whether damages are appropriate must, he held, 'necessarily be determined casuistically with due regard to, amongst other things, the nature and relative importance of the rights that are in issue, the alternative remedies that might be available to assert and vindicate them, and the consequences of the breach for the claimant concerned.' Like Langa DCJ in Modderklip, Nugent JA also considered and rejected the possibility of a declaration and a mandamus. A declaration was inappropriate because the long history of litigation made it clear that merely pointing out the illegality would have no impact on government. The Supreme Court of Appeal seriously considered the possibility that Kate could have, within the 40 months she waited, obtained an interdict forcing the government to decide her application. Ultimately, this option was rejected for two reasons. First, persons who relied on social grants were amongst the poorest in society and they

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854 For a summary of the situation and the accompanying litigation, see Njongi v Member of the Executive Council, Department of Welfare, Eastern 2008 (6) BCLR 571 (CC) at paras 8–26. See also Ngxuza & Others v Permanent Secretary, Department of Welfare, Eastern Cape, & Another 2001 (2) SA 609 (E), 615F-618D; Permanent Secretary, Department of Welfare, Eastern Cape, & Another v Ngxuza & Others 2001 (4) SA 1184 (SCA), 2001 (10) BCLR 1039 (SCA).

855 2006 (4) SA 478 (SCA)('Kate'). See also Kate v MEC, Dept of Welfare, Eastern Cape [2005] 1 All SA 745 (SE)(Froneman J too awarded constitutional damages, but for the violation of the right to administrative action.)

856 Kate (supra) at para 22 (It is significant that the SCA found a violation of the right to social security rather than the right to administrative action. Nugent JA held: 'The realisation of substantive rights is usually dependent upon an administrative process. Rights that protect that process, like those that are embodied in s 33(1) and s 237 of the Constitution and in PAJA, are essentially ancillary to the realisation of those substantive rights. For without protection being given to the process the substantive rights are capable of being denied. Where, as in this case, the realisation of the substantive right to social assistance is dependent upon lawful and procedurally fair administrative action, and the diligent and prompt performance by the state of its constitutional obligations, the failure to meet those process obligations denies to the beneficiary his or her substantive right to social assistance. What has been denied to Kate is not merely the enjoyment of a process in the abstract, but through denial of that process she has been denied her right to social assistance, which is dependant for its realisation upon an effective process. It is the denial of that substantive right that lies at the centre of her claim.' (footnote omitted.) For more on FC s 27(1)(c), see M Swart 'Social Security' 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 56D. For more on FC s 33, see G Penfold & J Klaaren '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.

857 Kate (supra) at para 25.

858 Kate (supra) at paras 28–29.
‘can be expected to have little or no knowledge of where their rights lie nor the resources readily to secure them’. According to the existence of numerous other cases like *Kate*, a requirement that interdicts be sought in all of them would simply render impotent an already dysfunctional process. Significantly, Nugent JA rejected an argument that damages would place an undue drain on the public purse in the following strident terms: ‘the cause for that is the unlawful conduct of the provincial administration and it does not justify withholding a remedy.’ A final, vital element of *Kate* is that the damages did not cover financial loss. ‘To be held in poverty is a cursed condition,’ wrote Nugent JA. Kate was therefore entitled to compensation for both the physical discomfort and the reduction in her human dignity that her continued endurance of that condition caused.

**Punitive damages**

The question of punitive damages was thoroughly considered by the Constitutional Court in *Fose v Minister of Safety and Security*. The applicant had been severely assaulted and tortured while in police custody. He also alleged that police torture and abuse were widespread at that police station. He asked the Court not only for delictual damages for his physical and emotional suffering, but for constitutional damages which, in addition to vindicating the right and compensating the applicant for loss suffered, would aim (a) to deter and to prevent future infringements of fundamental rights by the legislative and executive organs of State at all levels of government; and (b) to punish those organs of State whose officials had infringed fundamental rights in a particularly egregious fashion.

The *Fose* Court refused to award any constitutional damages: of greatest import, perhaps, was its rejection of punitive damages. The majority adumbrated twelve criticisms of punitive constitutional damages. However, it appears that the two most telling concerns were the unfairness and ineffectiveness of punitive damages. Ackermann J held that punitive damages in civil cases were generally inappropriate as it would give an aggrieved party the ‘option to inflict for his own benefit punishment by a method which denies to the offender the protection of the...
criminal law'. He also questioned whether an award of damages would really serve to decrease instances of police abuse in the current South African context:

For awards to have any conceivable deterrent effect against the government they will have to be very substantial and, the more substantial they are, the greater the anomaly that a single plaintiff receives a windfall of such magnitude. . . . In a country where there is a great demand generally on scarce resources, where the government has various constitutionally prescribed commitments which have substantial economic implications and where there are 'multifarious demands on the public purse and the machinery of government that flow from the urgent need for economic and social reform', it seems to me to be inappropriate to use these scarce resources to pay punitive constitutional damages to plaintiffs who are already fully compensated for the injuries done to them, with no real assurance that such payment will have any deterrent or preventative effect. It would seem that funds of this nature could be better employed in structural and systemic ways to eliminate or substantially reduce the causes of infringement.

However, despite these strong misgivings about punitive damages, the majority made it clear that its decision was limited to the facts of the specific case and left open the door for the possibility of punitive awards in future matters. It would, however, be accurate to describe Fose as creating a presumption against punitive damages.

(\textbf{cc}) \textbf{Nominal damages}

Finally, damages could be awarded merely as a symbolic means to vindicate a plaintiff's right. This award would occur where the plaintiff had not suffered any actual damages and no punitive damages were required. Although not deciding the issue, the Fose Court had considerable doubts whether, even in the case of the infringement of a right which does not cause damage to the plaintiff, an award of constitutional damages in order to vindicate the right would be appropriate for purposes of [IC] s 7(4). The subsection provides that a declaration of rights is included in the concept of appropriate relief and the Court may well conclude that a declaratory order combined with a suitable order as to costs would be a sufficiently appropriate remedy to vindicate a plaintiff's right even in the absence of an award of damages.

\begin{itemize}
\item \textbf{865} Ibid at para 70 quoting Lord Devlin in \textit{Rookes v Barnard} [1964] AC 1129, 1230 (HL).
\item \textbf{866} \textit{Fose} (supra) at paras 71–72 (footnote omitted).
\item \textbf{867} Ibid at paras 20–21 and 74. Two judges took slightly different views on the correct approach to punitive damages. Didcott J felt the logic of Ackermann J's judgment served to completely rule out the possibility of punitive damages in any case. Ibid at para 86. Kriegler J preferred to limit his finding even more closely to the facts of the case where a punitive order was unlikely to solve the systemic problems described by the applicant. He left completely unanswered the possibility of punitive damages in other cases. Ibid at para 103.
\item \textbf{869} \textit{Fose} (supra) at para 68.
\end{itemize}
It is difficult to argue that, as far as symbolic value goes, damages will have any more force than a finding of invalidity or a declaration of rights.

(iii) Is the quantum of damages a constitutional matter?

The Constitutional Court's jurisdiction is limited by FC 167(3) to 'constitutional matters' and 'issues connected with decisions on constitutional matters'. In order for the Court to reconsider a quantum of a damages award handed down by a High Court or the Supreme Court of Appeal, a litigant must convince the Court that it falls into one of those two categories. Given the Court's liberal approach to its jurisdiction — which has allowed the Court to recognise and to reinterpret traditional common-law issues, such as defamation or bodily injury claims as constitutional challenges — it is somewhat surprising that the Court has resisted a similar reconceptualization of damages.

However, it has not entirely shied away from using our basic law to rethink time-honoured approaches to damages. The Court recently engaged in a rather interesting — albeit unresolved — debate on damages in *Dikoko v Mokhatla*. *Dikoko* concerned defamation in the environment of a municipal council. The main application related to whether the statement was protected by the councillor's legislative privilege. The Court found that it was not. It then considered whether *Dikoko*'s claim that the High Court's award of damages was too high raised a constitutional issue. Moseneke DCJ, for the majority, argued that defamation affects the right of freedom of speech and dignity and therefore concerns constitutional rights. He reasoned that '[t]here appears to be no sound reason why common law remedies, which vindicate constitutionally entrenched rights, should not pass for appropriate relief within the reach of section 38', thus rendering the quantum a constitutional issue. He noticed that especially high awards in defamation cases would have a 'chilling effect' on freedom of speech which is the 'lifeblood of an open and democratic society'. However, despite holding that 'there is a very strong argument to be made that the assessment of damages in a defamation suit is a constitutional matter,' the majority avoided deciding the issue. Instead, it found that interference with the High Court's award was not justified. Mokgoro J, with whom Nkabinde J concurred, were inclined to decrease the quantum and were forced to conclude, for the reasons given by Moseneke DCJ, that the question of quantum raised a constitutional issue. Sachs J agreed with Mokgoro J.

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871 2006 (6) SA 235 (CC), 2007 (1) BCLR 1 (CC)('*Dikoko*').

872 Ibid at para 90.

873 *Dikoko* (supra) at para 91.

874 Ibid at para 92.

875 Ibid.
but wrote separately to emphasise the need for a more restorative approach to damages claims.

By contrast, Skweyiya J held that the quantum of damages generally does not raise a constitutional matter or issues connected with constitutional matters. He emphasised that despite the wide impact of the Final Constitution, a line had to be drawn somewhere between constitutional and non-constitutional issues. He argued, with reference to earlier decisions, that a mere disagreement with the High Court on its finding of quantum on the facts of the case, without some general challenge to the rule on which it relied, could not raise a constitutional issue. However, Skweyiya J conceded that ‘[i]t 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 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.’ Such a case might raise a constitutional issue, he argued, but Dikoko was not such a case.

The possibilities envisaged by Skweyiya J arose in NM & Others v Smith & Others. NM concerned the non-consensual disclosure of the HIV status of three women in the biography of a prominent politician. The High Court partly upheld their claim but in determining damages took into account the fact that the women were poor and illiterate and that it was unlikely that other people in their community would read the book. The majority of the Constitutional Court, including Skweyiya J, agreed that consideration of these factors was inappropriate and that the High Court had failed to give sufficient weight to the claimants' rights to dignity and privacy. It accordingly increased the damages from R15 000 to R35 000. Although

876 Ibid at paras 53–54.


878 S v Boesak 2001 (1) SA 912 (CC), 2001 (1) BCLR 36 (CC)(appeal against factual findings of a criminal court not a constitutional matter) and Phoebus Apollo Aviation CC v Minister of Safety & Security 2003 (2) SA 34 (CC), 2003 (1) BCLR 14 (CC)(whether employer liable for employee's actions on a particular set of fact not a constitutional matter.) The holding in Boesak and especially Phoebus Apollo have been somewhat undermined by the decision in K v Minister of Safety and Security 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC)(accepted that vicarious liability almost always raises constitutional issues). See further, Seedorf ‘Jurisdiction’ (supra) at Chapter 4; C Lewis ‘Reaching the Pinnacle: Principles, Policies and People for a Single Apex Court in South Africa” (2005) 21 SAJHR 512.

879 Dikoko (supra) at para 135.

880 2007 (5) SA 250 (CC), 2007 (7) BCLR 751 (CC)('NM').

881 NM (supra) at para 75.

882 Ibid at paras 74–75 and 81.
it never specifically declared the issue a constitutional matter or explained why thought it was, it is clear that they considered it such.

Ultimately, it seems that the conclusion that the amount damages in a constitutional matter is also a constitutional matter will most likely prevail. It has the tentative support of seven judges. Another three were willing to eschew their caution and hold that it is. However, there is much to be said for Skweyiya J's objection. One must wonder whether the Court would find it had jurisdiction where an applicant in, say, a medical negligence case, did not question the merits of the High Court's decision but only the quantum of damages awarded. A medical negligence claim, like a defamation claim, requires a court to consider important constitutional rights: the right to bodily integrity. A particularly high award could discourage any innovation by doctors, while a low award would seem to tolerate negligence. A similar analysis could be constructed for most non-commercial common-law damages claims. Do they all fall within the jurisdiction of the Constitutional Court? The reasoning in Dikoko would suggest that they do. It was, perhaps, this rather drastic consequence that motivated the majority of judges to prefer not to finally decide the issue.

Until the Court is confronted with a case where damages are the only issue, they are likely to leave this new and potential radical 'doctrine' undecided. Until then, an easier path, both for litigants and the Court will be to argue that where the gravamen of the complaint constitutes a constitutional challenge, as in Dikoko, the issue of quantum is an 'issue connected to a decision on a constitutional matter'. This reasoning may limit the number of cases that fall within the Court's jurisdiction, but still enable it to intervene in most cases where it finds the award of damages to be inappropriate.

(b) Individual Declaratory Relief

(i) The nature of the power

FC s 38 makes specific provision for a court to grant a 'declaration of rights'. A declaration of rights does not invalidate any laws or actions. It simply declares that certain conduct fails to meet constitutional standards or specifies what conduct would meet those standards. Jonathan Klaaren describes a declaration of rights in the following terms:

OS 06-08, ch9-p165

By declaring the shape and content of the fundamental rights at issue — although not enforcing them directly in terms of any order — a court may employ a remedy that in a sense goes beyond the usual defensive remedy of refusing to apply an unconstitutional law. A declaration of rights purports merely to clarify but not to alter an unconstitutional law. 883

The importance of the distinction between clarity and invalidity arose clearly in Hlophe v The Constitutional Court of South Africa & Others. 884 The facts are notorious. The Constitutional Court issued a public statement that it had lodged a complaint with the Judicial Services Commission ('JSC') against Judge President John Hlophe for attempting to influence their decision on the validity of search warrants.

883 Klaaren 'Judicial Remedies' (supra) at 9–8A.

884 [2008] ZAGPHC 289 ('Hlophe'). To avoid confusion, please note that the paragraph numbers of the unreported version of the judgment restart at the beginning of each of the two dissenting opinions.
executed against ANC President Jacob Zuma. Hlophe JP took exception to the complaint being made public and, in addition to lodging a counter-complaint with the JSC, applied to the Johannesburg High Court for a declaration that the Constitutional Court had violated a range of his constitutional rights, particularly his rights to be heard, to dignity and to equality. Because of the unusual circumstances of the case, it was heard by a bench of five judges that produced three judgments. Hlophe argued that if the High Court found that his rights were violated, they were obliged under FC s 172(1)(a) to declare them as such. All three judgments rejected this proposition because what was sought was not invalidity, but a declaration of rights. The distinction is made clear by considering, as Marais J did, the absurd consequences of a declaration of invalidity:

we would . . . have to make an order ‘that the publication of a media statement by the Constitutional Court judges was invalid’. What exactly would this mean? The act complained of was done; it cannot be undone. In what sense was it ‘invalid’? Are we declaring it to have no force and effect? The applicant’s very complaint is that it has a most detrimental force and effect and invades his rights. That cannot be undone by a declaration of invalidity.

A declaration of rights would not suffer from this same absurdity because it would not claim to undo anything but merely state that rights had been violated.

The general approach taken in Hlophe is certainly correct: a declaration of invalidity can only apply to conduct that has legal effect. It is senseless to talk about invalidating something that was never ‘valid’. In these cases, courts clearly do have a discretion to grant or to refuse to issue a declaration of rights.

However, while the Hlophe court was entitled not to issue an order of invalidity, Kriegler J in Hugo v President of the Republic of South Africa had no such luxury. The

Court was required to determine whether a Presidential order freeing female prisoners if they had children under the age of 12, but not their male counterparts was discriminatory on the basis of sex or gender. Kriegler J found, in dissent, that the Presidential order constituted unfair discrimination and was then faced with the difficult issue of what order to make. An order of invalidity would mean that the mothers who had already been released would — absent a further Presidential order — have to be re-incarcerated. An order extending the reach of the President’s order would release a large portion of the criminal population. To avoid these unwanted consequences, Kriegler J did not declare the order invalid but issued a declaration that the Presidential order violated the right to equality. While one sympathises with the difficult position that Kriegler J was in, the Presidential order, unlike the publication at issue in Hlophe, had legal effect and the Court was therefore obliged,

885 That decision was handed down several weeks later. Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma & Another v National Director of Public Prosecutions and Others [2008] ZACC 13.

886 Hlophe (supra) at para 108 (Mojapelo DJP), para 26 (Gildenhuys J) (‘The publication of the media statement has happened. A declaration of invalidity cannot change that.’) and paras 3–9 (Marais J).

887 Ibid at para 9.

888 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) (‘Hugo’).
under FC s 172(1)(a) to declare it invalid. The same result could have been achieved by limiting the retrospective effect of the order of invalidity so that the mothers who had been released would not have to be incarcerated and no male prisoners would be released.

Before we get to the more interesting discussion of when declarations can actually be granted, it is necessary to consider the source of the power to make a declaration of rights. *Hlophe* provides a useful lens through which to analyse this problem. Mojapelo DJP held that the power rested in s 19(1)(a)(ii) of the Supreme Court Act read with FC s 38. Gildenhuys J held that the power came from FC s 38, but then applied it with heavy reliance on s 19(1)(a)(ii). Marais J agreed that FC s 38 was the fountainhead of the power but did not refer to the statutory discretion in his discussion of how it should be exercised. All three approaches have some merit, but none are entirely correct.

Firstly, FC s 38 applies only to violations of the Bill of Rights, not to other provisions of the Final Constitution. It is therefore only the remedial source in fundamental rights challenges. When other constitutional provisions are at stake, litigants can rely on the 'just and equitable' jurisdiction in FC s 172(1)(b). Secondly, s 19(1)(a)(ii) cannot be the source of the power where constitutional rights are concerned. The power flows solely from FC ss 38 and 172(1)(b). Thirdly, the case law that has developed to interpret s 19(1)(a)(ii) has no precedential value in so far as the exercise the constitutional discretion is concerned. The considerations relied on by courts interpreting that statutory provision may, however, be persuasive if they provide sound normative guidance.

(ii) When should declarations be ordered?

Before I begin, I must repeat that I am not here concerned with declarations for remedying systemic problems. We are still occupied by individual rights violations.

There are not, as yet, any clear constitutional principles for when declaratory relief should be granted. It is useful to briefly look at the principles for relief under s 19(1)(a)(ii). There are two requirements for a declaration under this section: 'First the Court must be satisfied that the applicant is a person interested in an "existing, future or contingent right or obligation", and then, if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion

889 *Hugo* (supra) at paras 87–88.

890 Act 59 of 1959.

891 *Hlophe* (supra) at para 108.

892 Ibid at para 26.

893 See *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC) ("Rail Commuters") at para 106.

894 See § 9.6(a) infra.
The idea of 'tangible' advantage is misleading. At common law, declarations would be avoided because of the courts' general aversion to deciding hypothetical cases. The Final Constitution has, however, vastly increased standing rules and is aimed at regulating society and future conduct, not only resolving past disputes between individuals. The question is not therefore whether declaratory relief has a 'tangible' impact, but whether it is the most appropriate relief available. If damages or interdicts are unavailable, declaratory relief will often be an appropriate fall-back in constitutional litigation.

For example, declaratory relief has been used in cases that are already moot because the order retains symbolic value. In Pillay, a high school student successfully challenged her school's decision to prevent her from wearing a nose stud to school as part of her Hindu Tamil religion and culture. However, by the time final appeal was decided in the Constitutional Court, she had already left school.

O'Regan J, in dissent, held that as the matter was moot, a declarator was not just and equitable. Chief Justice Langa, writing for the majority, rejected this proposition. He held: 'The declarator is simply a reflection of this Court's findings. A failure to grant a declarator would, to my mind, fail to vindicate [the student]'s right and would therefore not qualify as effective relief.' Langa CJ is clearly correct. Although the declaration would neither elucidate the legal positions of the parties nor regulate their future conduct, a declaration of rights has the psychological and the symbolic effect that a mere finding in a judgment does not. In short, it

895 Durban City Council v Association of Building Societies 1942 AD 27, 32 quoted with approval in Hlophe (supra) at para 28 (Gildenhuys J).

896 1961 (3) SA 283 (T), 285B-D quoted with approval in Hlophe (supra) at para 31 (Gildenhuys J).


898 KwaZulu-Natal MEC for Education v Pillay 2008 (2) BCLR 99 (CC) at para 183.

899 Ibid at para 115.

900 This effect is perhaps also what motivated Kriegler J in Hugo.
provides an important reminder of the potential consequences of any similar future violation.

The symbolic value of a declaration was also part of the motivation behind the order in *Mohamed*. The applicants had been illegally removed from South Africa to face trial in the USA. No more powerful relief could be granted because the applicants were already in US custody. In rebuffing assertions by the government that no appropriate relief was available, the Court stressed that 'quite apart from the particular interest of the applicants in this case, there are important issues of legality and policy involved and it is necessary that we say plainly what our conclusions as to those issues are.' A declaration was therefore necessary.

Perhaps the best instance for declaratory relief occurs where there is uncertainty as to the respective obligations of the parties and they have come to court solely to seek clarity on the legal position. For example, in *South African Police Service v Public Service Association*, a dispute arose as to whether the National Commissioner had a discretion to continue to employ a person when their post was upgraded or if the person had to automatically be employed in the upgraded post. The lack of clarity caused significant disruption: many disgruntled employees had taken their cases to arbitration. The case was brought in order to obtain

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901 *Mohamed & Another v President of the Republic of South Africa & Others* 2001 (3) SA 893 (CC), [2001] 7 BCLR 685 (CC).

902 Ibid at para 71.

903 The Court also noted that the declaration might have some real practical effect if it was sent to the US court where the applicants were being tried. Ibid.

904 See *Rail Commuters Action Group & Others v Transnet Ltd t/a Metrorail & Others* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC) ("Rail Commuters") at paras 106–109. See also *Alexkor v The Richtersveld Community* 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC) (The only issue before the Court was whether the community in question was entitled to the return of their land in terms of the Restitution of Land Act. The Richtersveld Court simply declared that they were without determining how that return would be facilitated); *Shilubana & Others v Nwamitwa* [2008] ZACC 9; *Shilubana & Others v Nwamitwa (Commission for Gender Equality as Amicus Curiae)* 2007 (2) SA 432 (SCA); *Nwamitwa v Philla & Others* 2005 (3) SA 536 (T)(The applicant in this case sought a declarator that he was the rightful hosi (chief) of the Valoyi community. The order was granted by the High Court and the SCA and refused by the Constitutional Court. Because the parties sought only a clarification of their legal rights, a declarator was the only remedy on the table.)

905 2007 (3) SA 521 (CC), [2007] 5 BLLR 383 (CC) ("SAPS").

906 Ibid para 4.

907 SAPS (supra) at para 5.

908 Ibid para 37.
nature, is interesting because a remedy is granted where no right has been violated. This phenomenon is discussed in more detail above.\(^909\)

Similarly, declarators are also appropriate where the law has changed because of the influence of the Final Constitution and it would be unfair to immediately impose liability on a party who relied upon the legal position under the Interim Constitution or the pre-constitutional democratic era. Under such circumstance, it may be more appropriate to simply declare the new position under the Final Constitution and give the party an opportunity to comply. Thus, when the High Court developed the common law to impose a duty on paternal grandparents to support their extra-marital grandchildren, it did not order the grandparents at issue to pay any money. It simply declared that they now had a legal duty to do so.\(^910\)

A number of other important principles emerge from the dissenting judgments in \textit{Hlophe}.\(^911\) Both Gildenhys J and Marais J found that a declaration of rights was inappropriate for several reasons. Firstly, if the declaration bound the JSC, it might well usurp its constitutionally assigned jurisdiction, which Hlophe had accepted by lodging a complaint with that body, to decide the complaint.\(^912\) Secondly, and alternatively, if the court's decision could not bind the JSC, it would make no sense to have the issue adjudicated twice.\(^913\) Marais J articulated the objections against having two tribunals decide the same issue as follows:

\begin{quote}
It is inherently undesirable that two tribunals inquire into the same conduct, this being a waste of time, money and expertise. But more than that the two tribunals particularly where there are different methods of arriving at a decision might come to different conclusions. This in itself is undesirable but even more undesirable is that this is a high profile matter and the public perception has to be taken into account. The judiciary would inevitably be subject to a loss of confidence in the public eye should there be such different results, as the public will be unable to understand the effect of different methods of deciding the same dispute. The public would simply say that judges cannot agree on what occurred and that will leave them in the dark in a matter of this public moment and exposure. This is highly undesirable.\(^914\)
\end{quote}

Similarly, and thirdly, if the purpose of the claim was to pave the way for a future damages claim, then it would result in a twofold process which was itself enough reason not to grant the order.\(^915\) Finally, Gildenuys J stressed that declaratory relief

\begin{itemize}
\item \(^909\) See § 9.2(b)(iv) supra.
\item \(^910\) \textit{Petersen v Maintenance Officer & Others} 2004 (2) BCLR 205 (C).
\item \(^911\) The majority judgment of Mojapelo DJP simply asserted, without discussion, that declaratory relief was appropriate. \textit{Hlophe} (supra) at para 108.
\item \(^912\) Ibid at paras 37–41 and 45–46 (Gildenuys J) and para 35 (Marais J).
\item \(^913\) Ibid at paras 42–44 (Gildenuys J).
\item \(^914\) Ibid at para 34.
\item \(^915\) \textit{Hlophe} (supra) at paras 48–49 (Gildenuys J).
\end{itemize}
was not appropriate for mere unfair treatment. The treatment also had to violate a statutory or constitutional right.916

A Court will also be disinclined to settle for a declaration where it has reason to believe that the government will not comply with the order. Thus, in MEC for the Department of Welfare v Kate, the Supreme Court of Appeal found that the Eastern Cape provincial government's continued failure to comply with court orders compelling them to provide social welfare was sufficient reason to reject the possibility of declaratory relief.917

(c) Interdictory Relief

(i) Interdicts versus declarations

Unlike declarations of rights, interdicts not only declare what the legal position is, they order a party to perform, or not to perform, a specific act. They are therefore far more powerful remedies. A party that fails to comply with an interdict risks being held in contempt of court. Despite, or perhaps because of, the additional power of an interdict, the Constitutional Court has expressed some hesitation in employing it in place of simple declaratory relief. The reason for this approach seems to be based upon respect for the other arms of government: absent indications to the contrary, it is necessary for the courts to presume that the other branches of government will comply with its declarations without the threat of an interdict requiring them to do so.918 That expectation of good faith is particularly apt when a court considers a supervisory interdict.919 In sum, courts should be hesitant to employ an interdict if the same result can be obtained through declaratory relief.

(ii) Interim interdicts

Interim interdicts can be given prior to the final determination of a matter to ensure that no irreparable harm is suffered before the matter is finally determined. The requirements for an interim interdict at common law are four-fold:

(a) a prima facie right;
(b) a well-grounded apprehension of irreparable harm if the relief is not granted;
(c) that the balance of convenience favours the granting of an interim interdict; and
(d) that the applicant has no other satisfactory remedy.920

916 Ibid at paras 57-58. Neither Gildenhuys J nor Marais J made a finding whether Hlophe's rights had been violated because they determined first that the remedy sought was inappropriate.

917 MEC for the Department of Welfare v Kate 2006 (4) SA 478 (SCA) at paras 28–29.

918 Rail Commuters (supra) at para 109.

919 Minister of Health & Others v Treatment Action Campaign & Others (2) 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC) at para 129.

920 Hix Networking Technologies v System Publishers (Pty) Ltd and Another 1997 (1) SA 391 (A), 398I-399A quoted with approval in Janse van Rensburg NO & Another v Minister of Trade and Industry & Another NNO 2001 (1) SA 29 (CC), 2000 (11) BCLR 1235 (CC)("Janse van Rensburg") at para 32.
The Constitutional Court seems to have adopted these principles for interim interdicts flowing from violations of constitutional rights as well. Generally, these principles are appropriate. Because interim interdicts by definition arise when it is impossible to finally decide the issue, an interim interdict should only be granted when absolutely necessary. However, the common law test is not binding on courts exercising their powers under FC ss 38 or 172. If a court feels that it is necessary to grant an interim interdict where one of the four requirements are not met, it is free to do so.

While current rules for interim interdicts remain quite general, we can expect new, more nuanced, rules to develop over time in response to the exigencies of novel constitutional claims. For example, the Supreme Court of Appeal has suggested that prior restraints on publication of, for example, defamatory material will seldom be justified. (Thus a new rule for interim interdicts flows from our commitment to freedom of expression.)

A similar special role for interim interdicts in constitutional law may arise when a party requests the suspension of the enactment of legislation pending a determination of the constitutionality of that legislation. Such a problem arose in United Democratic Movement v President of the Republic of South Africa. Parliament had passed legislation, including a constitutional amendment, that allowed legislators to change political parties. Various parties urgently challenged the constitutionality of the legislation. The High Court suspended the operation of the laws pending an application to the Constitutional Court. The Constitutional Court did not suspend the operation of the acts. (However its order did preserve the status quo.) The Court explained that the peculiar circumstances of the case and the immense political uncertainty created by the High Court order and the pending constitutional challenge warranted an interim order. The Court made it clear that granting an interim interdict, or what it called a status quo order, would turn on the particular facts of the case. A litigant would have to prove that 'there is a need to prevent what might otherwise be substantial prejudice.'

921 Janse van Rensburg (supra) at para 32.

922 2007 (5) SA 540 (SCA) at para 20 (‘Where it is alleged, for example, that a publication is defamatory, but it has yet to be established that the defamation is unlawful, an award of damages is usually capable of vindicating the right to reputation if it is later found to have been infringed, and an anticipatory ban on publication will seldom be necessary for that purpose.’) For more on prior restraints, see D Milo, G Penfold & A Stein ‘Freedom of Expression’ 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 42, § 42.9(h).

923 President of the Republic of South Africa & Others v United Democratic Movement (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa & Another as Amici Curiae) 2003 (1) SA 472 (CC), 2002 (11) BCLR 1164 (CC)(‘UDM’).

924 It appeared that many politicians had already attempted to change political parties and that this could potentially cause municipal and provincial power to shift from one party to another. Ibid at para 10-11.

925 UDM (supra) at paras 9–11.
While it is clear that status-quo orders turn on the facts of the case, it seems that the following three factors are the most relevant for their issuance:

(a) are there reasonable prospects that the statute will be found unconstitutional?
(b) is there a real prospect of irreparable harm to the applicants or others?
(c) taking into account the public interest, where does the balance of convenience lie?

Interim interdicts have also been regularly employed by the Constitutional Court to regulate the period until a suspension order takes effect. These cases involving interim interdicts and suspension orders are discussed in depth elsewhere in this chapter.

Interim interdicts may also be of service where a High Court or the Supreme Court of Appeal wishes to regulate a situation pending the confirmation of an order of invalidity by the Constitutional Court. For example, the High Court prohibited an inquiry in terms of s 415 of the Companies Act from asking questions of a director that might incriminate him in a criminal offence while the Constitutional Court itself was considering the constitutionality of s 415.

(iii) Final interdicts

Final interdictory relief can take the form of either mandatory relief or prohibitory relief. Mandatory relief — normally called a mandamus — obliges a party to act. A prohibitory interdict — often referred to simply as an interdict — compels a party not to act. There is no way to identify the manifold situations in which an interdict will be appropriate other than to (somewhat rather facilely) state that they will be appropriate where the plaintiff wants another person to do or refrain from doing something.

At common law, the requirements for a final interdict are slightly different from those for an interim interdict. These requirements make it both easier and harder to obtain final relief. Easier: there is no need to show that the balance of convenience favours granting an interdict. Harder: instead of a mere prima facie right, an applicant for a final interdict must show a clear right. The requirements of irreparable harm and the absence of an alternative remedy apply equally to final interdicts. Again, these common-law rules should be seen as guidelines, not rules

926 Ibid at para 12.
927 J Klaaren 'Judicial Remedies' (supra) at 9-14.
928 For more on these orders, see § 9.4(e)(i)(cc) supra.
929 Wehmeyer v Lane NO 1994 (2) BCLR 14 (C).
930 Uthukela District Municipality & Others v President of the Republic of South Africa & Others 2002 (5) BCLR 479 (N).
931 Ibid.
when constitutional rights are at stake. Specifically, the court should not feel bound by the 'no alternative remedy' requirement. In fact it would make little sense for them to feel so bound. In many cases where final interdicts might be appropriate, an alternative remedy will be an award for direct constitutional damages. But the Constitutional Court has also held that direct damages are a remedy of last resort. What does a court do when confronted with a choice between two remedies, both of which can only be employed if the other is unavailable? Interdicts should be granted when appropriate, even if other remedies are technically available.

Probably the most common use for an interdict in the constitutional context is to force an official to perform a constitutional duty. Interdicts are used to: force the police to investigate crimes;\(^{932}\) enforce environmental regulations;\(^ {933}\) force an administrative body to make a decision about registration;\(^ {934}\) require the Legal Aid Board to provide legal aid;\(^ {935}\) force the government to intervene with foreign states for the benefit of a citizen;\(^ {936}\) and make the Minister of Defence negotiate with unions.\(^ {937}\) In these cases interdicts were the only way to fully vindicate the right. The right to a healthy environment at stake in *Wildlife Society of Southern Africa* could not have been protected by a damages award after the environment had been destroyed. Where an interdict would prevent a crime from taking place, one cannot, in good faith, argue that an award of damages after a person has been the victim of a crime will constitute a full a vindication of the right.

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\(^{932}\) *Fullimput 221 CC t/a Hawk Molaba Luxury Tours v Sono & Another; In Combination with Fullimput 221 CC t/a Hawk Molaba Luxury Tours v Minister of Safety and Security & Others* 2006 (10) BCLR 1202 (T)(The applicant had obtained an interim order to prevent members of the taxi industry from intimidating or assaulting his employees. When the attacks continued, he requested the police to investigate which the refused to do. Relying on the Police Service’s constitutional duty to prevent people from harm, the Court granted an interdict compelling the police to investigate the incidents.)

\(^{933}\) *Wildlife Society of Southern Africa & Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa & Others* 1996 (9) BCLR 1221 (Tk)(The government had failed to enforce a decree making part of the Transkei coast an ecologically protected area. Various people had been violating the decree with impunity. Relying in part on the constitutional right to a healthy environment, the applicants obtained an interdict forcing the government to enforce the decree.)

\(^{934}\) *Noupoort Christian Care Centre v Minister of National Department of Social Development & Another* 2005 (10) BCLR 1034 (T)(The applicant ran a centre for drug addicts. The Minister had granted temporary registration pending compliance with a number of requirements which the applicant said it had fulfilled. The Minister refused to apply his mind to the question of final registration. The court ordered the Minister to take a decision within 1 month.)

\(^{935}\) *Klink v Government of the Republic of South Africa & Others* 1997 (10) BCLR 1453 (E)(The applicant believed he was entitled to legal aid for a criminal appeal. The application was dismissed on the grounds that a final decision not to grant legal aid had not yet been taken.)

\(^{936}\) *See Kaunda & Others v The President of the Republic of South Africa & Others* 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC)(The applicants wanted the government to ensure they were properly treated while in custody in Zimbabwe); *Van Zyl & Others v Government of RSA and Others* 2005 (11) BCLR 1106 (T)(Application for diplomatic protection to enforce mining rights in Lesotho refused).

\(^{937}\) 2004 (4) SA 10 (T), 2003 (9) BCLR 1055 (T)(Smit J found that FC s 23(5) imposed a duty on the Minister to negotiate with unions, and therefore ordered him to do so.)
A particularly interesting form of interdict was at play in *Hoffmann v South African Airways*. Mr Hoffmann was refused employment by SAA on the grounds that he was HIV positive. The Court held that SAA’s conduct constituted unfair discrimination. In light of the clear factual finding that, but for his HIV status, Hoffmann would have been employed, the appropriate remedy was instatement. The Court ordered the SAA to employ Hoffmann. Describing the order as the ‘fullest possible redress’, Ngcobo J expressed the benefits of instatement in these terms:

Instatement serves an important constitutional objective. It redresses the wrong suffered, and thus eliminates the effect of the unfair discrimination. It sends a message that under our Constitution discrimination will not be tolerated and thus ensures future compliance. In the end, it vindicates the Constitution and enhances our faith in it. It restores the human dignity of the person who has been discriminated against, achieves equality of employment opportunities and removes the barriers that have operated in the past in favour of certain groups, and in the process advances human rights and freedoms for all. All these are founding values in our Constitution.

Instatement should only be denied if there were other considerations rendering it unfair or impractical. No such considerations obtained in this case. Mr Hoffmann was perfectly capable of performing the job. The Court also made the important point that ‘[w]hat constitutes appropriate relief depends on the facts of each case' and the possibility that granting relief in one case would open a floodgate of other cases should be ignored. While the Court has not applied this reasoning in other remedial contexts, particularly damages, it is certainly a prudent principle to guide the award of final interdicts.

Prohibitory interdicts have been less common. There have simply been fewer instances in which threatened or ongoing violations of constitutional rights have come before the courts. The Constitutional Court did, however, grant a prohibitory interdict in the very first case it heard: *S v Makwanyane*. The Court declared the legislation providing for the death penalty invalid and, in addition, ordered that ‘the State is and all its organs are forbidden to execute any person already sentenced to death’.

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938 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC) (‘Hoffmann’). See also, for example, *Police and Prisons Civil Rights Union & Others v Minister of Correctional Services & Others* 2006 (8) BCLR 971 (E)(Reinstatement was ordered after setting aside as unlawful administrative action the dismissal of a large group of employees.)

939 *Hoffmann* (supra) at para 52.

940 Ibid at para 53.

941 Ibid at para 55.

942 See, for example, *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC), *Steenkamp v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC), 2007 (3) BCLR 300 (CC).

943 *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC).
Although the following comments do not fall not strictly within the scope of this chapter, I think it important to the manner in which interdicts may function as limits on constitutional rights. For example, in Acting Superintendent-General of Education of Kwazulu-Natal v Ngubo & Others, the respondents were the leaders of a group that had been protesting at the Natal College of Education in favour of more teachers in black high schools.\textsuperscript{945} The protest turned belligerent and property was damaged. A temporary order banned further protests. Hurt J was asked to make that order final. The judge acknowledged the importance of the rights to freedom of assembly and to freedom of expression relied upon by the respondents. He found, however, that the rights were not absolute and could be limited by an interdict. In this case, the limitation might be said to have engaged the penumbra of the two rights: the respondents could still get their message across equally, if not more effectively, by other means. He found instead that the more pressing right at stake favoured the applicants: namely the right to be protected from trespass, vandalism and intimidation. The mere fact that the leaders admitted that they were unaware of the unlawful activities of the original protesters constituted sufficient reason to believe that they could not, in good faith, provide an assurance that similar, harmful activities would not occur again.

\textbf{(d) Contractual relief}

The relief granted in terms of contracts can also be affected by — and used to vindicate — constitutional rights. In \textit{Mpange & Others v Sithole}, the High Court made innovative use of the Final Constitution to justify an order of specific performance.\textsuperscript{946} The applicants were lessees of a 'slum'. The abysmal living conditions under which they were forced to live encompassed shelters without partitions between rooms, unhygienic sanitation facilities and general decay.\textsuperscript{947} They took their landlord to court in order to force him to improve the conditions as required by the rental contract. Satchwell J noted that specific performance was not traditionally awarded in these cases. Lessees are expected to effect repairs themselves and then claim damages from the lessor. However, in this case, the constitutional rights to housing, dignity and privacy compelled the court to develop the common law to permit specific performance to be granted in situations where the lessees could not afford to put up the funds to repair the dwelling themselves.\textsuperscript{948} However, the Court eventually decided against an order for specific performance. It noted two significant impediments. First, the owner of the property

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{944} \textit{Makwanyane} (supra) at para 151. Strictly speaking, the interdict was unnecessary as execution had been made illegal. The Court does not explain why it felt it necessary to include the interdict. Perhaps it wished to make clear that the order applied even to people who had been convicted and sentenced before the Interim Constitution came into force without engaging with the difficulties of retrospective application of the order of invalidity. For more on retrospectivity, see § 9.4(e)(ii) supra.
\item \textsuperscript{945} 1996 (3) BCLR 369 (N).
\item \textsuperscript{946} [2007] ZAGPHC 202 (‘Mpange’).
\item \textsuperscript{947} Ibid at para 7.
\item \textsuperscript{948} \textit{Mpange} (supra) at paras 48–58.
\end{itemize}
\end{footnotesize}
— to which substantial alterations would have to be made — was not joined. Second, the order would have to be quite specific. The Court found that it lacked sufficient information to make a meaningful order. Instead, the Court ordered a reduction of rent. While not as dramatic as specific performance, this remedy constituted a significant departure from the ordinary common-law position. Mpange deserves special attention from judges, lawyers and academics alike. It demonstrates how all traditional remedies can be radically reconstructed or reconceived when viewed through a constitutional lens.

9.6 Systemic remedies

In this section I discuss three possible remedies for systemic violations: declarations, interdicts and supervisory orders. Supervisory orders are declarations or interdicts over which the court maintains continuing jurisdiction.

(a) Declarations

While it is often perceived as a weak remedy because it creates no direct legal consequences, declaratory relief is often very useful in allowing a court to maintain its own institutional role and to reinforce the duties and the obligations of other branches of government. It is particularly useful when confronting systemic violations of constitutional rights because the steps that need to be taken to address the violations may be detailed and complex, and therefore avoid precise formulation in a court order. The Canadian Supreme Court has put it this way: ‘[a] declaration as opposed to some kind of injunctive relief, is the appropriate remedy in this case because there are myriad options available to the government that may rectify the unconstitutionality of the current system. It is not this Court’s role to dictate how this is to be accomplished.’

This advice was followed by the Constitutional Court in Rail Commuters Action Group v Transnet Ltd t/a Metrorail. The applicant was a group representing rail commuters in the Western Cape who were unhappy with the high levels of violence on trains in the area. They argued that the organs of state responsible for the railway had a constitutional duty to ensure commuters’ safety which they had failed to fulfil. The Constitutional Court agreed. As a remedy, the applicant sought a supervisory order that would have made sure the state took steps to improve safety on trains. The Court, however, preferred a simple declaration of the state’s obligations:

949 Ibid at paras 75–82.

950 Ibid at paras 64–70.


952 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC) (‘Rail Commuters’).

953 This remedy was granted by the High Court.
A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values. . . . It should also be borne in mind that declaratory relief is of particular value in a constitutional democracy which enables courts to declare the law, on the one hand, but leave to the other arms of government, the executive and the legislature, the decision as to how best the law, once stated, should be observed.\textsuperscript{954}

The Constitutional Court has also employed declaratory relief in socio-economic rights cases: the orders in both Grootboom\textsuperscript{955} and TAC\textsuperscript{956} (in part) defined the scope of the government obligations — under the rights to housing and the right to healthcare respectively. The decisions largely left the creation of ‘coordinated and comprehensive programmes’ required to fulfill constitutional desiderata to the government.

The benefits of declaratory relief for the separation of powers are twofold. Firstly, it gives the government another chance to eliminate the constitutional infirmity and allows the court to avoid the dangers associated with threats of contempt of court. Secondly, it permits the court to avoid getting too involved in the detail of state administration and limits the court’s role to placing an appropriate gloss on the constitutional norm without telling the state how to meet its requirements.

However, declaratory relief for systemic violations can be too weak a remedy. Iacobucci J of the Canadian Supreme Court has identified the following deficiencies: 'declarations can suffer from vagueness, insufficient remedial specificity, an inability to monitor compliance, and an ensuing need for subsequent litigation to ensure compliance'.\textsuperscript{957} In his view, declarations were only appropriate in cases where compliance with the Charter of Rights was optional or where an interdict would make the claimants worse off.\textsuperscript{958}

In the South African context, these deficiencies are perhaps even more serious than they are in Canada. Government is generally less efficient and less likely to be

\begin{itemize}
  \item \textsuperscript{954} Rail Commuters (supra) at para 108.
  \item \textsuperscript{955} Government of the Republic of South Africa v Grootboom & Others 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)(‘Grootboom’) at paras 96 and 99. (The case concerned a group of people who were in a crisis situation and had no access to housing. The Court granted the following declarator:
    \begin{itemize}
      \item (a) Section 26(2) of the [Final] Constitution requires the State to devise and implement within its available resources a comprehensive and co-ordinated program progressively to realise the right of access to adequate housing.
      \item (b) The program must include reasonable measures such as, but not necessarily limited to, those contemplated in the Accelerated Managed Land Settlement Program, to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.
      \item (c) As at the date of the launch of this application, the State housing program in the area of the Cape Metropolitan Council fell short of compliance with the requirements in para (b), in that it failed to make reasonable provision within its available resources for people in the Cape Metropolitan area with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations.)
  \item \textsuperscript{956} Minister of Health & Others v Treatment Action Campaign & Others (No 2) 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC)(‘TAC’) at para 235 (The Court coupled the declaratory relief with an interdict.)
\end{itemize}
able to comply with broad declarations and litigants are not as well-resourced and will find it more difficult to bring subsequent litigation. The post-litigation history of TAC testifies to the inadequacy of simple declaratory orders.\footnote{959} While there may still be cases in which they can be productively employed, the general fondness for declarations rather than interdicts expressed in Rail Commuters should be reconsidered. This is especially true considering that there are a number of other remedial devices that bring about the benefits of declaratory orders, without the negative effects. As discussed later, the Court’s more recent jurisprudence suggests that they may be more inclined to supervision rather than declaration in the future.\footnote{960}

\subsection*{(b) Interdicts}

Non-supervisory interdicts have been productively employed to solve systemic problems. For example, in Union of Refugee Women & Others v The Director: The Private Security Industry Regulatory Authority the applicants were refugees who wanted to become security guards.\footnote{961} The relevant legislation, which the majority of the Court upheld, generally prohibited refugees from becoming security guards, but made provision for them to be granted an exemption. However, the majority of refugee applicants were unaware of how to apply for this exemption or what information was required because the regulatory authority took no steps to inform them. The Court found this behaviour unacceptable:

\begin{quote}
The least that can be done by the Authority is to furnish the refugee applicants with information regarding the existence of various categories of security activities and information regarding the possibility of exemptions and the procedure for applying for them.\footnote{962}
\end{quote}

The Court accordingly ordered the regulatory authority to make all potential applicants ‘aware of the nature of the information that must be furnished in their applications for exemption’.\footnote{963} An interdict was also employed in, KwaZulu Natal MEC
The Court held that Durban Girls High School had violated a learner's right to equality by not allowing her to wear a nose-stud in school. (The nose-stud was deemed to be an important part of her Hindu religious and cultural identity and practice.) In addition to declaring her right to wear a nose-stud to school, the Court also ordered the school to change its rules so that it would accommodate other learners in a similar position in the future.

Once-off interdicts occupy a halfway station between declarations and supervisory interdicts. Unlike declarations, they are enforceable by an order of contempt. Like declarations, the Court does not retain jurisdiction or supervision over the process, so it is still up to litigants to go to court to enforce the order. If they are unable to do so, then there is no way to force the government to comply with the order.

(c) Supervisory orders

(i) Models for supervision

Supervisory orders come in a variety of forms but share the common characteristic that the performance of the remedy is kept under the supervision of the court. Supervisory orders have two primary purposes: (a) to determine the terms of a more detailed future order; and (b) to ensure that the state complies with an order. A supervisory order can bear one or both of these purposes. The form of the order will generally depend on what the purpose of the order is.

The most common form of the order is an interdict coupled with a requirement that the government submit regular reports on its compliance with this order. These reports are ordinarily submitted to the courts and the other original parties, but can also be ordered to be submitted to other parties who were not involved in the initial litigation. The other parties are given an opportunity to

963 Union of Refugee Women (supra) at para 90.

964 2008 (2) BCLR 99 (CC) (‘Pillay’).

965 Ibid at para 117.

966 There are two points to make, one terminological and one structural. One: Supervisory orders are often also referred to as ‘structural interdicts’. This is a less accurate term as not all supervisory orders are structural, while all structural orders require supervision. A supervisory order simply entails that the court retains jurisdiction or oversight over the implementation of its order. The term ‘structural’ implies either that the problem to be solved is with the structure of an institution or is in some sense caused by the structure of power. That need not be the case. Two: The supervisory order can rest either on a declaration or an interdict. The term ‘interdict’ or ‘injunction’ is therefore misleading.

967 There is no reason in South Africa why supervisory orders cannot be used to cure constitutional violations by private parties, particularly corporations. See § 9.2(f) supra. However, the primary target will invariably be the state.

968 S v Z and 23 Similar Cases 2004 (4) BCLR 410 (E).
comment on the reports and the Court will then make another order. The order can also include a specific re-hearing date when the reports will be discussed, or the option of re-hearing can be left open and the Court will only hold a future hearing if the reports seem to make it necessary. This basic form can be used to achieve both the compliance and the determinative purpose. It is also possible that the Court could delegate the monitoring of the case to another body.  

When the purpose is primarily to determine what the appropriate relief should be, Sturm has identified five basic models employed in US courts. The first — the traditional adjudicatory model — does not deviate from a courts' ordinary practice in crafting a remedy and is only supervisory if the court maintains jurisdiction over its implementation. The traditional court either makes a decision based on the evidence before it, or leaves it to the defendant to determine what should be done. This has with only a few exceptions been the approach adopted by South African courts.

The second model is ‘bargaining’ where the parties are encouraged to agree to a remedy. This can be done by forcing negotiation between the parties or appointing a third party to oversee the negotiations or simply requiring the parties to submit proposals and penalising one or both if they fail to reach agreement. A variant of this was used by the Constitutional Court in Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others to encourage agreement between the parties. At the hearing the Court issued an order compelling the parties to negotiate to attempt to reach an agreement. They did, and that agreement was made part of the Court's order.

Third, the legislative hearing model. The court conducts a hearing in which all interested parties are invited to participate, often with relaxed rules of evidence. The judge uses the information gathered from the hearings to fashion the remedy. Fourth, the remedy can also be referred to an expert to develop and propose a remedy. The expert should try to mobilize support among parties for his proposal, but should also bring his own expertise to the matter. The approach of the High Court in Centre for Child Law v MEC for Education partially fits this profile. The Court ordered a school of industry that was failing to protect children's rights to undergo and implement a developmental quality assurance process.

Fifth, the court and the parties can develop ‘structures that involve the interested actors in a process of developing a consensual remedy through joint fact-finding and collaborative decisionmaking assisted by a third party.’ In one case

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969 See Grootboom (supra) at para 97 (The Court held that the Human Rights Commission, who was a party to the case would monitor the State's progress and report on the progress if necessary.)


971 2008 (3) SA 208 (CC).

972 Sturm 'Normative Theory' (supra) at 1370–1371.

973 Ibid at 1371–1373.

974 Unreported, Transvaal Provincial Division, Case No 19559/06 (30 June 2006).
this involved, as a starting point, creating a computer program that mimicked the variables that applied to a dispute over fishing rights and then determined what possible solutions would meet all the parties’ minimum requirements. This ‘consensual remedial formulation model’ is an amalgam of the bargaining model and the expert model as the expert works with the parties to come to a solution.

Sturm finds inadequacies in all these models and suggests a slight variation on the fifth option — which she calls the ‘deliberative model’ — as the most appropriate approach. Like the consensual model, a third party is appointed to engage with the stakeholders to reach a conclusion. The primary difference is that in the deliberative model the court is centrally involved at all stages of the process to ensure that fair procedures are followed. The court also ensures that the solution meets the original normative goals of the remedy and makes a decision if agreement cannot be reached.

In Canada, the question of structural interdicts is largely governed by the Supreme Court decision in *Doucet-Boudreau*. The Court agreed that the government had not taken account of their obligation to provide all children with an education in either English or French when deciding where to build new schools. The High Court had granted a structural interdict to solve the problem and the Supreme Court split 5–4 over whether that remedy was appropriate. The majority upheld the structural interdict, stressing the need to provide effective remedies and downplayed the danger of institutional interference. Echoing the US Supreme Court, the majority also noted the need for appellate courts to defer to trial courts’ determination of the appropriate remedy. In the minority’s view, the remedy required the trial court to take on an administrative or a political role, both of which were inappropriate for a court. They believed that ordinary contempt of court procedures were sufficient to ensure compliance.

975 Sturm ‘Normative Theory’ (supra) at 1373–1374.

976 *United States v Michigan* File No M26–73CA (WD Mich, 7 May 1985) discussed in Sturm ‘Normative Theory’ (supra) at 1734. See also Brazil ‘Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?’ (1986) 53 University of Chicago LR 394, 410.

977 Sturm ‘Normative Theory’ (supra) at 1411–1427.


979 *Doucet-Boudreau v Nova Scotia (Department of Education)* 2000 CarswellNS 220.

980 *Doucet-Boudreau* (supra) at paras 25 and 36 (‘Deference ends . . . where the constitutional rights that the courts are charged with protecting begin.’)

981 Ibid at para 87.

982 Ibid at paras 118–129.

983 Ibid at para 136.
(ii) The Case Law on Structural Interdicts

The first hint from the courts that supervisory orders were a possibility came in Pretoria City Council v Walker. The case concerned discrimination arising from the use of different charging and collection policies for electricity rates in different areas of Pretoria. The Court found that the collection policies were unfairly discriminatory, but held that Mr Walker was not thereby entitled to — as he had — refuse to pay for his electricity as other remedies were available to him:

Instead of withholding amounts lawfully owing by him to the council, [Mr Walker] could, for instance, have applied to an appropriate court for a declaration of rights or a mandamus in order to vindicate the breach of his [right to equality]. By means of such an order the council could have been compelled to take appropriate steps as soon as possible to eliminate the unfair differentiation and to report back to the court in question. The court would then have been in a position to give such further ancillary orders or directions as might have been necessary to ensure the proper execution of its order.

In Minister of Health v Treatment Action Campaign the government argued that a court that found a violation of socio-economic rights could only make a declaratory order and leave it to the state to determine how to comply with that order. An order that actually told government what to do would, the government submitted, violate the separation of powers by intruding into issues of policy, the realm of the legislature and executive. The Court strongly rejected this claim. While it acknowledged that courts should always pay 'due regard . . . to the roles of the Legislature and the Executive in a democracy', courts are also 'under a duty to ensure that effective relief is granted' and therefore must have the power 'to make orders that affect policy as well as legislation' including mandatory and supervisory orders.

It is clear then, that courts have the power to make supervisory orders, but what have they done with it? The results have been mixed. The Constitutional Court has set a fairly high bar for the use of structural interdicts and it and the SCA have overturned some such orders made by the High Court, particularly in socio-economic rights cases. On the other hand, the Constitutional Court, the SCA and the High Courts have all indicated their willingness to supervise government's compliance in certain circumstances. The most recent instance also strongly suggests that such supervision will become more common in the future.

(aa) Cases where supervisory interdicts have been refused

The most important case on supervisory orders is Minister of Health v Treatment Action Campaign. The Constitutional Court held that the government's refusal to

984 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC)('Walker').

985 Walker (supra) at para 96 (my emphasis).


987 Ibid at paras 106 and 113. (The Court notes the support for this position in foreign jurisdictions (paras 107–111) and its own precedents supporting the need for effective relief and the power to grant mandatory orders where necessary. Ibid at paras 100–106.)
distribute the drug Nevirapine to prevent mother-to-child transmission of HIV/AIDS fell short of their obligations under the FC s 26(1)(a) to take reasonable measures to make healthcare progressively accessible.  

The High Court had devised a supervisory interdict which ordered the government to develop a plan on how Nevirapine would be made available and to submit that plan to the Court for approval. As noted earlier, the Constitutional Court confirmed the High Court's power to make such an order, however it determined that it was not appropriate in this case. The Court first established a strict test for when supervisory orders would be appropriate: 'Courts should exercise such a power if it is necessary to secure compliance with a court order. That may be because of a failure to heed declaratory orders or other relief granted by a Court in a particular case.' It then noted that government had 'always respected and executed orders of this Court' and that there was therefore 'no reason to believe that it will not do so in the present case.' The Court made an order that both declared government's obligations and ordered them to take certain specific steps, while allowing government to deviate from the second part of the order if they found a better way to meet their obligations.

The two important lessons to take from Treatment Action Campaign are: One, courts can grant supervisory orders even when they have policy implications, but, two, only where it is necessary to ensure compliance. The second lesson may seem to undermine the first as it will be very difficult to prove that supervision is necessary to ensure compliance unless a litigant can show that government is incompetent or in bad faith.

This view was given some credence in Rail Commuters Action Group & Others v Transnet Ltd t/a Metrorail & Others. The supervisory orders granted by the High Court was substituted on appeal. Rail Commuters concerned the duty of government to protect people using trains in the Western Cape from violence. The High Court had ordered the relevant organs of state to 'take all such steps . . . as are reasonably necessary to put in place proper and adequate safety and security services . . . in order to protect [the constitutional] rights of rail commuters' and required them to submit reports to allow the court to evaluate their progress. The Constitutional Court preferred to grant a simple declaratory order specifying the state's obligations and leaving it to the state to determine how to meet those benchmarks. Part of the

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2002 (4) BCLR 356 (T).

TAC (supra) at para 129 (my emphasis).

Ibid.

Ibid at para 135.

2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC).

2003 (3) BCLR 288 (C) at order para 3.1.
reason given by O'Regan J was the flexibility afforded by declaratory orders, but she also noted that 'there is nothing to suggest on the papers that [the state] will not take steps to comply with the terms of the order.'

The Supreme Court of Appeal has expressed a different set of reservations about supervisory orders. The facts of *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* are described in detail above, but, in brief, people had invaded Modderklip’s land and the state had been unable or unwilling to evict them. The High Court set out Modderklip’s rights and required the government to submit a detailed plan of how it would remove the invaders from Modderklip’s land and provide them with alternative housing. On appeal, Harms JA advocated against supervisory orders.

Structural interdicts . . . have a tendency to blur the distinction between the executive and the judiciary and impact on the separation of powers. They tend to deal with policy matters and not with the enforcement of particular rights. Another aspect to take into account is the comity between the different arms of the state. Then there is the problem of sensible enforcement: the state must be able to comply with the order within the limits of its capabilities, financial or otherwise. Policies also change, as do requirements, and all this impacts on enforcement.

Instead, he ordered the state to pay constitutional damages to Modderklip to compensate for his loss. The Constitutional Court confirmed the SCA’s order, but did not directly consider the High Court’s supervisory order.

**(bb) Cases where supervisory interdicts have been granted**

In *August & Another v Electoral Commission* the Court found that prisoners had been unconstitutionally deprived of their right to vote by the Electoral Commission’s policy and ordered the Commission to make the necessary arrangements to permit prisoners to vote in the 1999 national elections. Sachs J acknowledged that what those arrangements should be was ‘a matter pre-eminently for the Commission’ and

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995 *Ibid* at order para 3.2.

996 *Rail Commuters* (supra) at para 108. For more on declaratory orders, see § 9.6(a) supra.

997 *Rail Commuters* (supra) at para 109.

998 2004 (6) SA 40 (SCA), 2004 (8) BCLR 821 (SCA) (‘Modderklip SCA’).

999 See § 9.5(a)(ii)(aa) supra.

1000 2003 (6) BCLR 616 (T) at para 52.

1001 *Modderklip SCA* (supra) at para 39.

1002 For more on constitutional damages, see § 9.5(a) supra.

1003 *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd (Agri SA & Others, Amici Curiae)* 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC).
that the Court did 'not have the information or expertise to enable it to decide what those arrangements should be or how they should be effected'. 1005 It therefore ordered the Commission to draft an affidavit detailing what arrangements it would make and that that affidavit should be available for public inspection. 1006 Although the Court did not specifically state this, it seems implicit that any of the parties or other interested persons who were unsatisfied with the Commission's plan could apply to the Court to rule on whether they

were adequate. Five years later, the same issue arose in the 2004 elections. 1007 Again the Court upheld prisoners' right to vote and again it ordered the Commission to lodge an affidavit explaining how the process would be managed. 1008

The Court's willingness to adopt supervisory orders in these cases probably rested on two factors. First, it would not be a long drawn out process of supervision of an institution, but a temporary supervision for a defined time. Second, and perhaps more importantly the task at hand — making it possible for prisoners to vote — was well defined and relatively simple, compared to, for example, the provisioning of housing for all people in the Johannesburg inner city. The Court probably felt that any disagreement on the plan adopted by the Commission was likely to be minor and could be easily resolved. The same would not be true when dealing with more complicated or institutional problems.

The Court engaged in a much more detailed supervisory process in Sibiya v The Director of Public Prosecutions, Johannesburg to regulate the conversion of sentences of people still sitting on death row after the death penalty was abolished. 1009 The Government was required to submit information on all the prisoners still on death row and explain why their sentences had not yet been changed and what would be done to ensure that they were. The Court did not justify its supervision of the process in its original judgment, but later explained that it was based on 'the delay that had occurred since [the death penalty was declared unconstitutional] coupled with the pressing need for the sentences to be replaced'. 1010 The Court eventually considered five reports by the government until the process was finalized. The first report set out the number of sentences that still needed to be converted while each subsequent report indicated what steps had

1004 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC)('August').
1005 Ibid at para 39.
1006 Ibid.
1007 Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) & Others 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC)('NICRO').
1008 Ibid at para 80 (This part of the order is not discussed in the body of the judgment. Presumably the same reasoning applied as in August.)
1009 2005 (5) SA 315 (CC), 2005 (8) BCLR 812 (CC)('Sibiya I'). The death penalty was abolished in S v Makwanyane & Another 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC).
1010 Sibiya & Others v DPP, Johannesburg High Court & Others 2006 (2) BCLR 293 (CC)('Sibiya III') at para 6.
been taken and what still remained to be done. The entire Court considered in detail each report and identified what problems remained and ordered a further report to be made. At the completion of the process, the Court issued a judgment reflecting on the supervisory process in generally positive terms:

This judgment on the supervisory process in relation to the substitution of the death sentence shows the following:

(a) Successful supervision requires that detailed information be placed at the disposal of a court.

(b) Supervision entails a careful analysis and evaluation of the details provided.

(c) Supervision cannot succeed without the full co-operation of others in the process.

(d) Courts should exercise flexibility in the supervisory process.\textsuperscript{1011}

\textit{Sibiya} reflects a growing comfort in the Court with supervision and satisfaction with their first serious foray into that area. Their emphasis on detail is particularly interesting. Yacoob J wrote that '[t]he detail was . . . essential so that this Court would not have to rely completely on the say-so of some other person that a particular stage in the process had been reached; there had to be sufficient information for the Court itself to be satisfied that a particular stage had been reached.'\textsuperscript{1012} This indicates that the Court is willing to engage in detailed analysis of government's plans and to identify the problems in them. Perhaps another explanation for the original order and the Court's satisfaction with the process is that \textit{Sibiya} did not require the Court to substitute its own opinion for that of the government, but merely to ensure that the government completed a process to which it had already committed itself.

Although the SCA's dislike for supervisory orders was made clear in \textit{Modderklip}, it has recently granted a supervisory order in a socio-economic case: \textit{City of Johannesburg v Rand Properties (Pty) Ltd & Others}.\textsuperscript{1013} The court held that, although the City was entitled to evict people from buildings in the inner city, it had to provide them with alternative housing. It ordered the City to file an affidavit showing that it had done so. On appeal to the Constitutional Court, the Court, in the course of oral argument, ordered the parties to negotiate and attempt to reach a settlement.\textsuperscript{1014} The parties did so and the Court was thus spared deciding any further the question of remedy. Of course, the order to negotiate is itself a form of supervisory interdict as the parties were required to report back to the Court on their progress and the Court still had a discretion whether to make the agreement an order of court.

The High Court has been more willing to craft supervisory interdicts. What is particularly interesting is that many of the cases in which it has done so involve children.\textsuperscript{1015} In \textit{S v Z and 23 Similar Cases} the Eastern Cape High Court was confronted with the problem that juvenile offenders were being sentenced to attend

\textsuperscript{1011} Ibid at para 22.

\textsuperscript{1012} \textit{Sibiya III} (supra) at para 7.

\textsuperscript{1013} 2007 (6) BCLR 643 (SCA).

\textsuperscript{1014} [2008] ZACC 1.
reform schools, yet there was no reform school in the Eastern Cape. The result was that many juveniles were being held for long periods of time in places of safety, prison and police cells. Plaskett J found this situation unacceptable and, after hinting at the utility of a supervisory order, postponed the matter for further consideration. When it was considered again, Plaskett J ordered the state to report every four months to the Judge President of the Court, the Inspecting Judge of Prisons and two interested NGO's on the progress made in converting the facility where children were currently held and on building a reform school until the Judge President released them from the obligation.

This is a fascinating case because the Court is willing to undertake, in partnership with other interested bodies, the supervision of the sizable project of building a new school for an indefinite time. More recently the Centre for Child Law approached the Pretoria High Court to force the provincial government to improve conditions for children staying at a so-called 'school of industry'. Murphy J granted a wide-ranging order that required the state to immediately provide sleeping bags to the children, devise plans to control access to the school, subject the school to a developmental quality assurance process and commit to implement the plans arising from that process. The High Court retained supervisory jurisdiction over the implementation of this order. A supervisory order was also held to be necessary in S v Mokoena; S v Phaswane where the Court ordered radical revisions to the law regulating how children testify in criminal proceedings including requirements that any trial involving children be expedited and that children were entitled to testify through an intermediary. The responsible government agencies were ordered to report back to the Court on the progress that had been made in implementing the order a year later.

Why have the High Courts been so willing to intervene in cases involving children? Firstly, the High Court is, even under common law, the upper guardian of all children. It therefore feels an innate responsibility to ensure their well-being which it may not feel for adults. Secondly, children's rights are all — unlike socio-

1015 See, eg Grootboom & Others v Oostenberg Municipality & Others 2000 (3) BCLR 277 (C). Davis J held that the state's failure to provide temporary shelter for families desperately in need violated the FC s 28(1)(c) right of children to 'basic shelter'. However, Davis J did not want to be 'prescriptive' about how the state should fulfill its obligations and therefore did not grant an interdict. Instead, he made a declaration of rights and retained supervisory jurisdiction by ordering the government to submit a plan that would then be responded to by the other parties and would ultimately be considered by the Court.

1016 2004 (4) BCLR 410 (E)(‘Z and 23’) discussed in Roach & Budlender (supra) at 331.


1018 Unreported, Transvaal Provincial Division, Case No 19559/06 (30 June 2006)(‘Centre for Child Law’).


1020 At the time of writing, the case was before the Constitutional Court for confirmation.

1021 See Z and 23 (supra) at para 39.
economic rights — couched in absolute terms. Judges feel more comfortable intervening in government where there is a clear interest to protect rather than where the right is limited to the construction of a reasonable plan where policy is likely to play a much greater role.

There have, however, been several cases not involving children. As I noted earlier, the High Court’s supervisory orders in TAC and Modderklip in other areas were overruled on appeal. That was not the case in City of Cape Town v Rudolph.\textsuperscript{1022} The City had attempted to evict a group of people from vacant public land. The occupiers replied with a counterclaim alleging that the City had failed to fulfill their obligations to provide them with housing. Selikowitz J agreed with the occupiers on both counts and made a supervisory order to ensure the City fulfilled its obligations. He distinguished the case from TAC by pointing out that a mere declaration had already been made — by the Constitutional Court in Grootboom.\textsuperscript{1023} The failure of the City to comply with that order justified the Court taking over supervision of the City’s provision of housing.

The High Court has also supervised the provision of antiretrovirals to HIV positive prisoners in KwaZulu-Natal,\textsuperscript{1024} the provision of electricity to prisoners in Pretoria\textsuperscript{1025} and the creation of an administrative regime to process asylum-seekers in Cape Town.\textsuperscript{1026} This final case warrants further consideration. The refugee centres in Cape Town were seriously overwhelmed and many asylum-seekers were unable to get access to them in order to seek refugee status despite sleeping outside the centres because only a limited number of people were admitted each day.\textsuperscript{1027} The applicants argued, and the Court held, that this failure violated both South Africa’s international law obligations and the constitutional rights to life and freedom and security of the person.\textsuperscript{1028} Van Reenen J emphasised that ‘as far as the upholding of the fundamental rights and other imperatives of the Constitution are concerned, all those involved in the public administration, must, despite a lack of adequate resources, purposefully take all reasonable steps to ensure maximum compliance with constitutional obligations even under difficult circumstances’.\textsuperscript{1029} In order to

\textsuperscript{1022} 2004 (5) SA 39 (C) (‘Rudolph’).

\textsuperscript{1023} Rudolph (supra) at 88.

\textsuperscript{1024} EN & Others v Government of RSA & Others 2007 (1) BCLR 84 (D) (‘EN’).

\textsuperscript{1025} Strydom v Minister of Correctional Services 1999 (3) BCLR 342 (W) (The Court found that certain prisoners had a right to electrical plug points in their cells and ordered the Minister to make them available. Schwartzman J required the Minister to submit a report indicating the timeline for completion of the project.)

\textsuperscript{1026} Kiliko & Others v Minister of Home Affairs & Others 2007 (4) BCLR 416 (C) (‘Kiliko’).

\textsuperscript{1027} Ibid at para 10.

\textsuperscript{1028} Ibid at para 31.

\textsuperscript{1029} Ibid at para 29 citing Jaipal v S 2005 (4) SA 581 (CC), 2005 (5) BCLR 423 (CC) at para 56.
ensure that refugees would be able to access the centres, he granted a wide-ranging supervisory order that compelled the government to produce a report detailing: the number of officials assigned to each centre; which days of the week such tasks are performed; whether provision has been made for overtime; the number of applicants at each centre; the extent of the backlog of applications; the progress that has been made with each application; whether any remedial steps have resulted in improvements; and what other plans had been made for improvement. The court and the other parties would then be able to comment on the report and monitor the state's progress in improving the situation.

(iii) Factors to draw from the case law

Kent Roach and Geoff Budlender identify three types of cases where supervisory intervention is appropriate. Although the authors frame these as separate cases, they could of course overlap so that it is perhaps better to think of them as factors, rather than categories. In some cases one factor will favour supervision, while another will act against it.

The first factor is whether there is any reason to believe that the government will not comply completely with the order. If government has previously failed to comply with an order, or has been slow in doing so, or if there is any other reason to believe they may not comply with this order, supervision may be warranted. Both Sibiya (where the government had failed to implement the decision in Makwanyane) and Rudolph (where the government had failed to implement Grootboom) indicate the effect of this thinking. This also seems to have been the primary barrier to the Constitutional Court granting supervisory orders in TAC and Rail Commuters; there was no reason to believe the government would not comply with a declaration.

Second, the consequences of non-compliance with the order: the more severe the consequences, the more likely a court will be to supervise to ensure that it is complied with. This could include concerns about the importance of the right at issue as well as practical concerns such as how many people will be affected by the order and whether the result of delay will be discomfort or death or something in between. The children's rights cases discussed above reflect this rationale as the best interests of the child are treated by the Final Constitution as 'paramount' and therefore it is easier to justify intrusions on the separations of powers to protect them than it is for other rights. It might also relate to the need for deadlines. If the

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1030 Kiliko (supra) at para 32.

1031 Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable?” (2005) 122 SALJ 325.

1032 For example, in NICRO and August the relief was clear and there was no reason to suspect

1033 Roach & Budlender (supra) at 333.

1034 Ibid.

1035 Ibid.
harm will be increased by delay, there would be a stronger case for supervision.\(^{1036}\)

In \textit{EN} if the applicants did not receive antiretrovirals they could die within a couple of weeks. The High Court therefore ordered antiretrovirals to be supplied immediately and gave government only two weeks to come up with further plans.\(^{1037}\)

The last factor identified by Roach and Budlender is how clear it is what steps should be taken to fix the problem.\(^{1038}\) If it is clear, then a simple mandamus may be sufficient. If it is unclear, then supervision may be necessary to determine in consultation with all stakeholders what the appropriate relief is. This was the primary motivator of the supervision ordered by the High Court in \textit{Grootboom} and was probably also part of the reasoning in \textit{Kiliki}. As I argued earlier, this is a distinct purpose for supervisory orders; the other purpose is ensuring compliance. There may be cases where an order that is perfectly clear would still need to be monitored to ensure compliance.

\section*{(iv) Nyathi}

Mr Nyathi was injured as a result of negligence in a government hospital. He sued the government and they conceded liability but disputed the amount of compensation they owed him. Pending the hearing on quantum, Mr Nyathi wrote a letter requesting interim relief, both for medical expenses and for money to permit him to pay his legal expenses for the quantum trial. The state again refused, so Mr Nyathi brought an application to compel the state to make an interim payment. The state ignored the application and it was granted. The state ignored it. Fast running out of options, Mr Nyathi argued that s 3 of the State Liability Act\(^{1039}\) which prohibited the execution and attachment of state property violated his rights to equality and access to court. He succeeded in the High Court\(^{1040}\) and the matter was sent to the Constitutional Court for confirmation. On the day of the hearing in the Constitutional Court and under immense pressure from the Justices, the state finally paid Mr Nyathi. The determination of the constitutional challenge was postponed. Before it could be decided, Mr Nyathi died.\(^{1041}\)

This is the background — which I think is vital to understand the Court's reaction — to the decision in \textit{Nyathi v MEC for Health, Gauteng}.\(^{1042}\) The Constitutional Court

\begin{itemize}
\item \(^{1036}\) That would have been the case in, for example, \textit{Sibiya III, NICRO} and \textit{August (supra)}.
\item \(^{1037}\) \textit{EN} (supra) at para 33.
\item \(^{1038}\) Roach & Budlender (supra) at 334.
\item \(^{1039}\) Act 20 of 1957.
\item \(^{1040}\) \textit{Nyathi v MEC for the Department of Health, Gauteng & Another}, 26014/2005 TPD, 30 March 2007, unreported.
\item \(^{1041}\) Cases like \textit{Nyathi} cannot but remind us that, in Robert Cover's famous assertion: 'Legal interpretation takes place in a field of pain and death'. 'Violence and the Word' (1986) 95 Yale LJ 1601, 1601.
\item \(^{1042}\) [2008] ZACC 8 ('Nyathi').
\end{itemize}
confirmed the High Court's finding that s 3 was unconstitutional; but what is interesting for our purposes, is that it also crafted an order whereby the Court would supervise the payment of all the government's outstanding judgment debts. Astonishingly, considering the Court's earlier distaste for supervisory orders, the Court granted this order on its own initiative.

The reasoning behind the order is murky, to say the least. The Court does not clearly explain why a supervisory order is necessary — as was required by TAC — to ensure compliance. The heart of the reasoning seems to come when Madala J states that

we need legislative measures that will provide an effective way in which judgment orders may be satisfied, and mechanisms that will inform the litigants in detail on the procedures that they will need to follow regarding payment of court orders against the state. It has become necessary for this Court to oversee the process of compliance with court orders and to ensure ultimately that compliance is both lasting and effective.\textsuperscript{1043}

This excerpt is difficult to understand and does not support the order made. The first sentence calls for legislative measures to regulate the payment of judgment debts, which does not imply the need for court supervision, but for intervention by the legislature.

\textsuperscript{1043} Ibid at para 83.

Later, Madala J argues that ‘oversight is essential in the circumstances . . . [because] there can be no other effective manner to ensure that the state complies with the order’\textsuperscript{1044} and that ‘[i]n a state that has pledged itself to redeem the dignity of its citizens, it should not be the state itself that tramples on the rights of its citizens. On the contrary, everyone should be working tirelessly to protect and promote that dignity’.\textsuperscript{1045} These passages provide a clearer indication of the Court's reasoning. Although there was no indication that the government would not comply with an order by the Constitutional Court in the particular case, the government had clearly shown its disregard for court orders and for the dignity of its citizens generally by its continued failure to pay their judgment debts. The TAC assumption that Government would comply with any order the court made in Nyathi therefore no longer applied and supervision was necessary.

It is this reasoning that suggests that Nyathi may have far-reaching implications. If the impression that government was unwilling to comply with court orders is a general impression that applies to all instances when government is before the courts, then it must also apply in future cases. That is, the disdain for the courts proved in Nyathi was so serious that the courts will be unlikely in the future to ever take government assurances of compliance seriously. That may seem like an exaggeration. But consider the alternative position. It would make no sense to argue that the record of non-compliance in Nyathi only indicated that government would continue not to comply in another single case. Why would that general attitude change after one case? It is for that reason that I think the Court will be much more willing to grant supervisory orders in the future and that government will have to build up a record of compliance to re-establish the TAC assumption of compliance.

\textsuperscript{1044} Nyathi (supra) at para 85.

\textsuperscript{1045} Ibid at para 89.
Roach and Budlender have suggested a more general structure for considering remedies to systemic violations of rights. Drawing from the work of other scholars, they argue that there are generally three levels of supervision that ought to be based on the attitude of government that is causing the problem: inattentiveness, incompetence and intransigence. I present their suggestions together with my own embellishments.

At the first level, the problem is mere inattentiveness on government's part. Once government's attention is drawn to the problem they are able and willing to fix it. At this stage, the appropriate order is, on Roach and Budlender's account, a declaration of rights accompanied by a requirement that government report to the public on its progress. There are two reasons for the reporting requirement. Firstly, it is difficult to be sure whether the reason for the violation of rights is truly inattentiveness and not unwillingness or inability. Reporting serves as a backstop that puts continued pressure on government to comply with the order. The history of compliance with the Grootboom and TAC orders show how useful a reporting requirement might have been. Secondly, it is a means to keep the public informed of the progress that is being made, both to allow them to prepare and to influence the process. August is the best example of this. There was no question about the Electoral Commission's willingness to comply with the order, but supervision was ordered because it was necessary to have certainty on the steps that would be taken to allow prisoners to vote.

It seems to me that there is an additional reason for supervision: determining the terms of the remedy. Even a government that is merely inattentive may not be clear of what should be done to solve the problem once their attention is drawn to it. Supervision may be necessary to help the government devise a plan, especially if the constitutional rights at issue require relatively quick action.

The supervision at this level is both distant and light. It is distant because the Court will generally not scrutinize the government's plans in detail and will allow them space to determine how to meet their obligations. It is light because it gives the government 'two more chances'. Because it is based on a declaration, it cannot found an order of contempt of court; a further order turning the declaration into an interdict and non-compliance with the interdict will be necessary before any contempt proceedings could be brought.

The next level addresses government incompetence. As Roach and Budlender argue, incompetence is probably the most common reason for non-fulfillment of

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1047 Roach & Budlender (supra) at 348.

1048 August (supra) at para 39.

1049 Roach & Budlender (supra) at 348 citing O Fiss 'Dombroski' (1977) Yale LJ 1103, 1122-1124.
rights and non-compliance with orders. Supervision is justified because without it government, even with the best of intentions, may not be able to meet its commitments. It should not be seen as punishment, but as a means to help government to comply with its constitutional obligations.\textsuperscript{1051} As a result, it may often require much closer or more detailed supervision by the court than is the case at the first level. Supervision may also include the use of outside experts to determine what the appropriate remedy should be.\textsuperscript{1052} The use of a developmental quality assurance process in Centre for Child Law is a good example of that sort of process.\textsuperscript{1053} The remedy at this level will normally be based on an interdict rather than a declaration. However, Roach and Budlender argue that the interdict might not be in specific enough terms so that it can result immediately in a finding of contempt. This is the kind of order the Court devised in \textit{TAC} (without, of course, any supervision). The government was ordered to take various steps to provide Nevirapine, but was allowed to deviate from the Court’s order if they thought there was a better way to achieve the goal. That type of interdict can hardly found a finding of contempt. Depending on the facts, a supervisory interdict may also be necessary. \textit{Kiliki} is an excellent example of this. There was no bad will on government's part, merely an inability to comply due to a lack of resources. Once the Court decided that the provision of services to refugees was sufficiently important, they could ensure that resources were channeled in that direction and were most effectively used to aid refugees.

Government intransigence, or purposeful non-compliance, is the target of the third level.\textsuperscript{1054} Supervision will be necessary even for the simplest goals in order to ensure, through the threat of contempt, that government does in fact do what it is meant to do. Supervision will generally be extremely close to ensure that government does not try through subterfuge to avoid or undermine compliance with the order. It will also be heavy as it will be accompanied by the immediate threat of contempt in the case of non-compliance. The need to give government space to determine how best to achieve a goal will give way here to the necessity of ensuring government does something. The order will be based on a detailed interdict to ensure that contempt is an immediate threat.

\textit{EN} fits into this category. Pillay J admitted that he was initially skeptical of a supervisory order because the government 'had shown some sense of commitment, however inadequate and irrational, to redress [the applicants’] plight.'\textsuperscript{1055} However, after considering the evidence he found that government had not provided any 'rational or workable' solutions and those steps that had been taken had been

\textsuperscript{1050}
Roach & Budlender (supra) at 349-350.

\textsuperscript{1051}
Ibid at 350.

\textsuperscript{1052}
Ibid at 349-350.

\textsuperscript{1053}
Centre for Child Law (supra).

\textsuperscript{1054}
Roach & Budlender (supra) at 350-351.

\textsuperscript{1055}
\textit{EN} (supra) at para 32.
'characterised by delays, obstacles and restrictions which seriously compromise the [applicants'] health'. 1056 The order compelled the government not only to submit a plan but to immediately provide anti-retrovirals. This was enforceable by a contempt order. Indeed, this is what happened when the compliance with the order was considered. 1057 Nicholson J found that the government had failed to comply with Pillay J's order and were therefore in contempt. 1058 However, because s 3 of the State Liability Act prevented him from taking any steps to enforce an order of contempt and because the government had made some progress in complying with the order, he granted an extension rather than an order of contempt. 1059 The Judge however summed up the serious problems faced when government refuses to comply with Court orders:

If the refusal to comply does not result from instructions from the first respondent, the Government of the Republic of South Africa, then the remaining respondents must be disciplined, either administratively or in an employment context, for their delinquency. If the Government of the Republic of South Africa has given such an instruction then we face a grave constitutional crisis involving a serious threat to the doctrine of the separation of powers. Should that continue the members of the judiciary will have to consider whether their oath of office requires them to continue on the bench. 1060

(vi) Beyond Supervision

Although supervision is a progressive and extremely effective remedy, there are other possibilities that go beyond supervision. One of these possibilities is the 'experimentalist approach', 1061 Unlike traditional supervisory orders where government bodies are required to comply with specific rules, the experimentalist approach 'combines more flexible and provisional norms with procedures for ongoing stakeholder participation and measured accountability'. 1062 There is no one set of orders that compromises the experimentalist approach. Basically it involves helping institutions to improve themselves by seeing what works and what doesn't under the

1056 Ibid.

1057 Treatment Action Campaign & Others v Government of the Republic of South Africa & Others

1058 Ibid at para 29.

1059 Ibid at paras 29–34.

1060 TAC 2006 (supra) at para 33.


1062 Sabel and Simon (supra) at 1019.
guidance of the court. Courts are, as Sabel and Simon note, both more and less involved in experimental remedies than they are in ordinary supervisory orders:

They are more involved because experimentalist remedies contemplate a permanent process of ramifying, participatory self-revision rather than a one-time readjustment to fixed criteria. But the courts are less involved because the norms that define compliance at any one moment are the work not of the judiciary, but of the actors who live by them. At least in prospect, the demands on the managerial capacities of the court, and the risk to its political legitimacy, are smaller in this continuous collaborative process than in top-down reform under court direction.\textsuperscript{1063}

The very idea with the experimentalist approach is to open up spaces for innovation. In Roberto Unger's phrase experimentalist remedies are 'destabilization rights\textsuperscript{1064} that aim to induce uncertainty.\textsuperscript{1065} The use of the phrase 'right' also indicates how experimentalism breaks down the barriers traditionally established between rights and remedies.\textsuperscript{1066} Experimentalist remedies also try to get as many stakeholders as possible involved in the determination of an appropriate solution.

Another possibility is to force the parties to negotiate to a settlement.\textsuperscript{1067} The Constitutional Court did this in \textit{Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg & Others.}\textsuperscript{1068} The applicants were living in terrible conditions in rundown buildings in the Johannesburg city centre. The City wanted to evict them, allegedly, because the buildings were a health risk.\textsuperscript{1069} The applicants did not want to leave because there was no other accommodation available near the downtown area where they needed to live to get work. During oral argument, the Court decided to order the parties to try to reach a settlement. The parties were able to negotiate successfully and agreed that government would make improvements to the buildings to remove the health risk as an interim remedy while a more permanent solution was sought for all people living in the inner city. The

\textsuperscript{1063} Ibid at 1020.
\textsuperscript{1064} \textit{False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy} (1987) 530.
\textsuperscript{1065} See Sabel & Simon (supra) at 1055 ('The message that the new public law sends to prospective defendants is not that they will suffer any specific set of consequences in the event of default, but that they will suffer loss of independence and increased uncertainty. Uncertainty does not represent a failure of articulation but the deliberate crux of the message.')
\textsuperscript{1066} See § 9.2(c) supra.
\textsuperscript{1067} See \textit{Lingwood & Another v The unlawful occupiers of R/E of Erf 9 Highlands} 2008 (3) BCLR 325 (W) (Court ordered the parties and the City of Johannesburg to engage in mediation to find a suitable solution. In my considered view, the justice and equity of the matter dictates that the parties . . . engage in mediation in an endeavour to achieve mutually acceptable solutions, and in achieving the underlying philosophy of [the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998], "to promote the constitutional vision of a caring society based on good neighbourliness and shared concern" and in line with the spirit of ubuntu which "suffuse the whole constitutional order".)
\textsuperscript{1068} 2008 (3) SA 208 (CC)('Occupiers of 51 Olivia Road').
\textsuperscript{1069} The real reason behind the evictions was a plan to gentrify the inner city.
Court endorsed the agreement, but made it clear that endorsement was not automatic; an agreement would only be endorsed if it was a reasonable response to the problem.\footnote{Occupiers of 51 Olivia Road (supra) at para 30. Yacoob J also noted that ideally these negotiations should occur prior to litigation. Ibid.} In light of this renewed attitude of engagement, the Court declined to rule on the City's long term obligations:

The City has agreed that these solutions will be developed in consultation with them. The complaint by the occupiers that negotiations have been marred by unclear and inconcrete housing plans is not in my view a sufficient reason for this Court to consider this question at this stage. There is every reason to believe that negotiations will continue in good faith. The situation now is very different from that which confronted the occupiers in the High Court. The City has shown a willingness to engage. As a result, the desperate situation of the occupiers has been alleviated by the reasonable response of the City to the engagement process. There is no reason to think that future engagement will not be meaningful and will not lead to a reasonable result. In any event this Court should not be the court of first and last instance on whether the City has acted reasonably in the process. Nor should it be the only determinant of whether the plan is reasonable in the sense of being sufficiently concrete and clear. It is the duty of both parties to continue with the process of negotiation and for the occupiers or the City to approach the High Court if this course becomes necessary.\footnote{Occupiers of 151 Olivia Road (supra) at para 34.}

As David Bilchitz notes, there are real benefits to this approach.\footnote{'Taking Socio-economic Rights Seriously: The Substantive and Procedural Implications' in Geraldine van Bueren (ed) \textit{Freedom from Poverty} (2008 forthcoming).} It forced the government to encompass opinions of those affected by the decisions and provided a solution that both sides could agree to. But there are also shortcomings. The Court's related decision to avoid deciding the constitutional duty of the City meant that, should the engagement fail, the applicants will have to go back to the High Court and fund and endure another round of litigation. If the parties had not reached agreement, the Court might have been compelled to decide the issue and thus potentially avoid future disagreement and suffering. There is also a possibility that negotiation will not be meaningful because of unequal power relations between the parties. If the applicants had not been represented by extremely competent lawyers, it is possible that the City could have negotiated an agreement that was not in the applicants' interests. Courts should be aware of this danger both when ordering negotiation and when monitoring the results of that engagement.

### 9.7 Legislative remedies

Many constitutional rights are regulated by specific pieces of legislation including:

• The National Environmental Management Act (FC s 24)\textsuperscript{1074}
• The Promotion of Administrative Justice Act (FC s 33)\textsuperscript{1075}
• The Promotion of Equality and Prevention of Unfair Discrimination Act (FC s 9)\textsuperscript{1076}

When parties rely on these rights, they must first bring their case under the legislation that gives effect to these rights. In the words of the Constitutional Court:

\[\text{[A] litigant who seeks to assert a constitutional right should in the first place base his or her case on any legislation enacted to regulate the right, not on }\]
\[\text{[the section of the Final Constitution]. If the legislation is wanting in its protection of the . . . right in the}
\]
\[\text{litigant's view, then that legislation should be challenged constitutionally. To permit the}
\]
\[\text{litigant to ignore the legislation and rely directly on the constitutional provision would}
\]
\[\text{be to fail to recognise the important task conferred upon the legislature by the}
\]
\[\text{Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights.}\]

The legislation cannot be used to challenge other pieces of legislation — in those cases the constitutional right is still the only option. But in all other cases, if the


\textsuperscript{1079} Act 19 of 1998 (PIE). For more on PIE and FC s 25(6), see Pienaar & Brickhill (supra) at Chapter 48.

\textsuperscript{1080} South African Defence Union v Minister of Defence & Others 2007 (5) SA 400 (CC), 2007 (8) BCLR 863 (CC) at para 52. See also KwaZulu-Natal MEC for Education & Others v Pillay 2008 (2) BCLR 99 (CC) (‘Pillay’) at para 40.
dispute in question is captured by the statute, a litigant must bring his case 'within the four corners of [the relevant] Act.'\textsuperscript{1081}

The majority of these pieces of legislation not only provide the normative framework to determine whether a right has been violated, they also determine what remedies are available if the statute has been violated. Litigants must therefore frame not only their substantive claim, but also their remedial claim under the statute. However, most of the statutes do not strictly limit the relief a court can grant; they grant a general power to afford 'appropriate' or 'just and equitable' relief and then provide a non-exclusive list of remedies that are included in that power.\textsuperscript{1082}

For example, s 21(2) of PEPUDA empowers the court to 'make an appropriate order in the circumstances' and then lists 16 possible forms of relief. When phrased in this way, the legislation is suggestive rather than prescriptive. However, it may still limit a court's discretion by setting a higher bar for certain remedies. Section 8 of PAJA, for example, only permits a court to replace an invalid decision with its own decision or to award compensation in 'exceptional circumstances'.\textsuperscript{1083}

Some legislation, such as the LRA, is more prescriptive. In the case of ordinary unfair dismissals, for example, the LRA does not provide the Labour Court with a general remedial power, but limits the power to re-instatement, re-employment or compensation\textsuperscript{1085} and strictly limits the conditions for the re-instatement, re-employment\textsuperscript{1086} and the amount of compensation.\textsuperscript{1087} It is, in part, because of these remedial limits that litigants have tried to avoid the jurisdiction of the Labour Court by framing their labour disputes either directly under FC s 23 or as contractual or administrative claims.\textsuperscript{1088} However, the Constitutional Court has recently expressed disapproval of this practice and has stressed that labour law issues should be dealt

\textsuperscript{1081} Pillay (supra) at para 40.

\textsuperscript{1082} PEPUDA s 21(1), PAJA s 8(1) and PAIA s 82.

\textsuperscript{1083} PAJA s 8(1)(c)(ii).

\textsuperscript{1084} If the dismissal is automatically unfair or based on operational requirements, the Labour Court does have a general remedial discretion. LRA s 193(3).

\textsuperscript{1085} LRA s 193(1).

\textsuperscript{1086} LRA s 193(2).

\textsuperscript{1087} LRA 194.

\textsuperscript{1088} See, for example, Fedlife Assurance Ltd v Wolfaardt 2002 (1) SA 49 (SCA).

\textsuperscript{1089} See, for example, Mgijima v Eastern Cape Appropriate Technology Unit and Another 2000 (2) SA 291 (Tk); Coin Security Group (Pty) Ltd v SA National Union for Security Officers and Other Workers and Others 1998 (1) SA 685 (C).
within the framework of labour law\textsuperscript{1090} so it is unclear whether litigants will still be able to seek remedies outside those provided for in the LRA.

9.8 Criminal remedies

The availability of remedies in the context of a criminal trial is dealt with in detail elsewhere in this work.\textsuperscript{1091} However, for the sake of completeness, I address the topic very briefly here. Before I mention some of the available remedies, I must note that the same basic principles of remedies discussed in the first half of the chapter apply to remedies in criminal trials. Indeed, I have used some criminal cases in explicating those principles.

One of the most common uses of the Final Constitution in criminal trials is to exclude unconstitutionally obtained evidence. This issue is directly addressed by FC s 35(5) which reads:

Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.\textsuperscript{1092}

What is interesting about this remedy is that the terms for its use are specifically set in the text of the Constitution: (a) the evidence was gathered in a way that violates a constitutional right; (b) including the evidence would either (i) render the trial unfair; or (ii) be detrimental to the administration of justice. The Constitutional Court has emphasised that this is a decision that should principally be made by the trial court; evidence should not be excluded in pre-trial proceedings by other courts.\textsuperscript{1093}

Another possible remedy is a permanent stay of prosecution which prevents the accused from ever being tried on the same charges again.\textsuperscript{1094} This remedy is very rare in South Africa and will only be granted where the accused can show that it is impossible for him to receive a fair trial. For irregularities at trial, the obvious remedies are an acquittal or invalidating the trial. The Constitutional Court has adopted the pre-constitutional standard to determine the appropriate remedy. If the irregularity is not too serious, the court on appeal can reconsider the facts, excluding any evidence tainted by the irregularity, and convict or acquit the accused. Only

\textsuperscript{1090} See \textit{Chirwa v Transnet Ltd \\& Others} 2008 (3) BCLR 251 (CC) particularly the judgment of Ngcobo J. For justified criticism of this element (and others) of \textit{Chirwa} see C Hoexter. Clearing the Intersection? Administrative Law and Labour Law in the Constitutional Court' (2008) 1 \textit{Constitutional Court Review} (forthcoming).


\textsuperscript{1092} FC s 35(5) is discussed at length in Schwikkard 'Evidence' (supra) at Chapter 52.

\textsuperscript{1093} \textit{Thint (Pty) Ltd v National Director of Public Prosecutions \\& Others; Zuma \\& Another v National Director of Public Prosecutions \\& Others} [2008] ZACC 13 at paras 215–223.

\textsuperscript{1094} See generally, \textit{Sanderson v Attorney-General, Eastern Cape} 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC).
when the irregularity is so severe that it cannot be said that a trial actually took place will a court set aside the trial.\footnote{1095} When it sets aside a trial, unlike when it orders a permanent stay of prosecution, there is nothing to prevent the charges from being brought again. An arrested or detained person may also approach a court for an interdict to ensure that his rights are respected.\footnote{1096}

\footnote{1095}{See generally, \textit{S v Shaik \\
& Others} 2008 (2) SA 208 (CC), 2007 (12) BCLR 1360 (CC); \textit{Veldman v Director of Public Prosecutions (Witwatersrand Local Division)} 2007 (3) SA 210 (CC), 2007 (8) BCLR 827 (CC).}

\footnote{1096}{See, for example, \textit{Strydom v Minister of Correctional Services} 1999 (3) BCLR 342 (W).}