

# Chapter 13

## Founding Provisions

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### **Preamble**

We, the people of South Africa,

Recognise the injustices of our past;

Honour those who suffered for justice and freedom in our land;

Respect those who have worked to build and develop our country; and

Believe that South Africa belongs to all who live in it, united in our diversity.

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to—

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person; and

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

May God protect our people.

Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso.

God seën Suid-Afrika. God bless South Africa.

Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika.

### **1 Republic of South Africa**

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the constitution and the rule of law.
- (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

## **13.1 Introduction: A Structural Approach \***

This chapter adopts a structural approach to its two main subjects, the Preamble and the founding values set out in s 1 of the Final Constitution.<sup>1</sup> Two features recommend this approach.

The more critical one is that the Preamble and FC s 1 are value-laden terms in a very value-laden Constitution. What distinguishes them from other sections is not their content. To understand them, we need to know what their *role* is in the constitutional mechanism. What tasks are they meant to fulfill that explain why they are there along with all the other value-laden provisions?

In the case of the Preamble, this question is quite easy to answer. Its role is readily understood, and because it is not part of the operative mechanism of the Constitution, redundancy is much less of a concern: duplication of content does

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not matter, because the Preamble has a different function to the provisions whose content it might duplicate.

By contrast, it will take some work to offer an account of FC s 1's role. FC s 1 has a strong appearance of redundancy, and that is more concerning in an operative provision. But it can be dispelled for the same reason that the Preamble's can be: because FC s 1 has a different function to the provisions whose content it overlaps. Currently, the function of FC s 1 is a source of some uncertainty. As Heinz Klug has recently noted, 'it is still unclear exactly how [the founding] values may be raised by litigants and applied in litigation.'<sup>2</sup> This chapter will endeavour to remedy this. It will argue that the role of FC s 1 is not to set out unique content, but to describe some of the content set out in other provisions, and by describing it, to pick out and super-entrench those aspects of other provisions of the Constitution. FC s 1 *does* duplicate content found elsewhere, but that is not a problematic source of redundancy: in fact, it is critical to the section's operation.

The second reason for adopting a structural approach is that Chapter 1 of the Constitution contains different kinds of provisions that need to be kept apart. The Constitution begins, as it ends, with a set of provisions that might be marked 'miscellaneous' if this did not imply a certain lack of importance. Most of the chapter retains the content of Chapter 1 of the Interim Constitution,<sup>3</sup> though sometimes in altered terms, and most of this content is of the nuts and bolts variety, albeit of an elevated kind: official languages, other important languages, national flag and the national anthem. This content is largely formal and self-explanatory, and no more will be said about it here. A second sort of content in Chapter 1 is similarly of a nuts and bolts variety, but its content is not nearly as self-explanatory. FC s 2, providing for the supremacy of the Constitution, FC s 3 on citizenship, and aspects of FC s 6 on language policy all fall into this category. Most if not all of the constitutional debates on these provisions are the subject of other chapters in this work. Language and citizenship issues are the subjects of fundamental rights, discussed elsewhere.<sup>4</sup> A chapter by Frank Michelman considers constitutional supremacy and the rule of law.<sup>5</sup> Since part of this

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

2 H Klug *The Constitution of South Africa: A Contextual Analysis* (2010) 108.

3 Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC').

4 J Klaaren 'Citizenship' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2007) Chapter 60 and S Woolman 'Official Languages and Language Rights' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) Chapter 65.

5 F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) Chapter 11.

content overlaps with that of FC s 1(c), this chapter covers some of the same ground as Michelman's, but the account of FC s 1 offered here differs from his understanding of it.<sup>6</sup>

In the context of Chapter 1, FC s 1 is a structural outlier. Its counterpart in the Interim Constitution simply stated that South Africa was 'one, sovereign state' and defined the national territory with reference to a schedule.<sup>7</sup> FC s 1 was formed by adding in a good deal of substantive content, most of it drawn more or less

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directly from the Constitutional Principles.<sup>8</sup> The result was then super-entrenched by FC s 74(1), which provides that a 75% vote in the National Assembly and the assent of six of the nine provinces are required to amend FC s 1. FC s 1 is the only provision to be super-entrenched in this way (apart from FC s 74(1) itself), and this feature marks it as structurally separate to the rest of Chapter 1 and offers the most important clue to its unique role. This structural understanding suggests that little significance should be attached to the fact that FC s 1 occurs in the same chapter as the other provisions, beyond the obvious implication that all are important and basic in some way.

This Chapter is structured as follows. First, §13.2 considers the role of the Preamble and its most important content. §13.3 sets out an approach to FC s 1. It engages with the apparent inconsistencies and other problematic features of the case law and argues that we can reconcile the cases and gain an attractive account of s 1 by understanding its values as *descriptive principles*. This descriptive account then provides a basis to engage other questions about FC s 1. §13.4 describes FC s 1's relation to other constitutional provisions, to law outside the Constitution, and to private actors. It examines the significance of FC s 1 and s 74(1) in the constitutional amendment process and, although this is an area not without its perplexities, offers an account of the ways in which these sections constrain, and do not constrain, changes to the Constitution. It also considers the neglected question of how FC s 1 relates to the internal operative mechanisms and value provisions of the Bill of Rights. Finally, §13.5 works through the text of FC s 1, discussing its opening words and each of the founding values in turn.

## 13.2 The Preamble

### (a) Role and interpretative significance

The Preamble has been understood by the courts as an interpretative aid, rather than a source of rights and duties in its own right. This is in line with the usual approach to preambles in interpretation,<sup>9</sup> and is structurally consistent with the fact that rights are dealt with elsewhere in the Constitution. The classic statement of the Preamble's significance comes from *S v Mhlungu*, where Sachs J held that it had important interpretative value and set out the 'basic design' and 'fundamental purposes' of the Constitution.<sup>10</sup> Sachs J here was writing for himself alone. However, Ngcobo J conveyed a similar idea, albeit in a more specific context, in his separate judgment in *Bato Star* in which the whole Constitutional Court concurred.<sup>11</sup> He held that the Court must interpret legislation in a way that promotes 'the values of our constitutional democracy', and treated the Preamble as an important datum

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6 See §13.3(b)(ii) and (v) below.

7 IC s 1: '(1) The Republic of South Africa shall be one, sovereign state. (2) The national territory of the Republic shall comprise the areas defined in Part 1 of Schedule 1'.

8 See §13.4(b)(v).

9 G Devenish *The South African Constitution* (2005) 27-29.

10 *S v Mhlungu* [1995] ZACC 4, 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC) ('*Mhlungu*') at para 112 ('The preamble...should not be dismissed as a mere aspirational throat-clearing exercise of little interpretive value. It connects up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and indicate its fundamental purposes'.)

in identifying what these values are.<sup>12</sup> This approach was recently re-affirmed by the Court in *Van Vuuren*.<sup>13</sup> The Preamble is understood both to imply a purposive approach to interpretation, and to be an important source for determining what those purposes are.

### (b) Founders' intentions?

The passage from Sachs J's judgment in *Mhlungu* just mentioned continues by understanding the interpretative act as an exercise in determining the intentions of the framers.<sup>14</sup>

This aspect of Sachs J's judgment is likely to be more controversial. It draws an analogy to the way that preambular statements in the statutory context are seen as evidence of legislative intention and therefore have interpretative relevance.<sup>15</sup> However, South African constitutional law has been resistant to notions of originalism.<sup>16</sup> There will be resistance to the idea that the enquiry should be into what 'the framers of the Constitution intended'.<sup>17</sup>

Later judgments have finessed this point by treating the Preamble as a statement of *purposes*, rather than as an expression by the founders of what they intended.<sup>18</sup> If that distinction can seem exceedingly fine, it may nevertheless be significant. An intention implies that something is foreseen, and so talk of intentions raises the concern that the Preamble might in the future be used to *limit* the Constitution's ambit to uses anticipated by the framers. If the Preamble is a statement of purposes, on the other hand, then it is open to each generation to choose how to pursue those purposes.

In my view, the best understanding combines the two ideas. The Preamble, speaking as it does in the voice of 'We, the people of South Africa', *does* reflect the intentions of a founding generation as expressed 'through [their] freely chosen representatives.' But that intention was only to establish a Constitution that would serve certain broad purposes. Accordingly, the interpretative question posed, at any time, is: given that the Constitution is meant to serve those broad purposes, how should it be understood? The Preamble, therefore, *does* reflect a form of

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- 11 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15, 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) ('*Bato Star*').
  - 12 *Bato Star Fishing* (supra) at paras 72-73.
  - 13 *Van Vuuren v Minister of Correctional Services* [2010] ZACC 17, 2012 (1) SACR 103 (CC), 2010 (12) BCLR 1233 (CC), ('*Van Vuuren*') at para 47.
  - 14 *Mhlungu* (supra) at para 112 continues: 'This is not a case of making the Constitution mean what we like, but of making it mean what the framers wanted it to mean; we gather their intentions not from our subjective wishes, but from looking at the document as a whole.'
  - 15 Devenish (supra) at 27-29.
  - 16 See, for example, *South African Association of Personal Injury Lawyers v Heath* [2000] ZACC 22, 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC) at para 19. See further L du Plessis 'Interpretation' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2008) 32-41-32-44 and 32-170-32-171.
  - 17 *Mhlungu* (supra) at para 102.
  - 18 *Islamic Unity Convention v Independent Broadcasting Authority* [2002] ZACC 3, 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC) ('*Islamic Unity Convention*') at para 43; *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* [2002] ZACC 5, 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) at para 52; *Bato Star* (supra) at paras 72-73; *Van Vuuren* (supra) at para 47.

originalism, but one so open that it can do little confining, and chiefly serves to exhort.<sup>19</sup>

A good example here is the aim to 'Heal the divisions of the past...', 'establish a society based...on social justice...' and '[I]ay the foundations for a...society...in which... every citizen is equally protected by law.' It is easy to see how the founding generation would understand this language to require, indubitably, that affirmative action measures be applied. But it is also easy to see how a later generation, hopefully in possession of a much more equal society, might come to think it required just the opposite.

That said, certain aspects of the Preamble are potentially confining. Most notably, the text states that the Constitution aims to ensure that 'every *citizen* is equally protected by law' and to 'improve the quality of life of all *citizens*' while 'freeing the potential of each *person*' (emphasis added). Naturally this does not prevent the state from seeking to protect non-citizens and improve their lives, but the wording could be used to support arguments for reducing or limiting the state's efforts in relation to non-citizens, to the extent that the law offers room for discretion. Looking to the longer term, the reference to South Africa as 'a sovereign state' would also militate against significant moves to integrate South Africa into a regional governing structure that took over substantial sovereign power.<sup>20</sup> Although the Preamble is only of subsidiary interpretative effect, provisions like these could have some residual originalist effect on interpretation.

### (c) Judicial usage: breaking with the past

Judicial reliance on the Preamble has focused on the idea that the Constitution represents a break with South Africa's Apartheid past. In *Bato Star*, which concerned fishing quotas allocated in part on the basis of the need to address historical imbalances, Ngcobo J understood South Africa as a 'country in transition...from a society based on inequality to one based on equality', and understood this 'commitment to the transformation of our society' to be expressed, in part, by the Preamble.<sup>21</sup> *FNB* invoked the Preamble's references to not only 'democratic values' and 'fundamental rights' but also 'social justice' to underline the tensions between individual rights and social transformation at the heart of the property right.<sup>22</sup> *Islamic Unity Convention* understood the Preamble to imply the 'healing of the divisions of the past', the creation of 'national unity' and the 'building of a united society'.<sup>23</sup> *Shabalala*, decided under the Interim Constitution, drew on the Preamble to that document to conclude that the text 'constitutes a decisive break...' and that '[t]here is a stark and dramatic contrast between the past in which South

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Africans were trapped and the future on which the Constitution is premised'.<sup>24</sup> *Van Vuuren* drew on it to highlight the way in which the Correctional Services Act 111 of 1998 served to replace the old, Apartheid-era correctional services legislation and understood this to be relevant to the Acts interpretation. *McBride*<sup>25</sup> cited it in interpreting the

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19 For this sort of originalism in the US context see, for example, J Balkin *Living Originalism* (2011).

20 See also §13.5(b).

21 *Bato Star* (supra) at para 73.

22 *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* [2002] ZACC 5, 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) at paras 49-50.

23 *Islamic Unity Convention* (supra) at para 45.

24 *Shabalala v Attorney-General of the Transvaal* [1995] ZACC 12, 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC) at paras 25-26.

25 *The Citizen 1978 (Pty) Ltd v McBride* [2011] ZACC 11, 2011 (4) SA 191 (CC), 2011 (8) BCLR 816 (CC) at para 74.

Promotion of National Unity and Reconciliation Act<sup>26</sup> and the effect of amnesty. In her dissent in *Kaunda*, O'Regan J drew on the Preamble in holding that South Africa is now a constitutional democracy, in which human rights are of foundational importance, and in which the country 'after decades of isolation' is 'now a member of the community of nations, and a bearer of obligations and responsibilities in terms of international law.'<sup>27</sup>

Judicial reliance of the Preamble in support of this general idea, however, is not consistent. In *Mhlungu*, for example, Mohamed DP talked of the Interim Constitution as 'a ringing break with the past', but did not cite its Preamble (or Postamble).<sup>28</sup> Decisions that otherwise follow *Bato Star's* approach to FC s 39(2) do not always use the Preamble to understand the duty to promote the 'spirit, purport and objects of the Bill of Rights'.<sup>29</sup>

A key reason for this patchy usage is that the idea of breaking with the past and building a very different future is now associated with transformative constitutionalism, and that idea has become axiomatic. Thus although the Preamble is a powerful citation for the idea, no citation is really necessary. Furthermore, the Preamble may have been crowded out because the idea of transformation that makes a break with the past has become firmly associated with the most quoted image in South African constitutional law, the bridge, originally taken from the Postamble to the interim Constitution and deployed by Etienne Mureinik.<sup>30</sup> The Preamble, however, should not be excluded. It should be understood as a valuable statement of what the Constitution must be a bridge to, fleshing out Mureinik's idea of 'a culture of justification' and doing so, no less, with constitutional authority. It offers a rich articulation of transformative constitutionalism that has yet to be fully tapped.

#### **(d) Content besides transformation**

The most evocative part of the Preamble is this transformative statement, which follows the statement of purpose: 'We, the people of South Africa, adopt this

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Constitution so as to:...'!. However, three other aspects of its language deserve mention.

First, the Preamble states that the Constitution is an exercise of popular sovereignty. This content no doubt traces ultimately to the 'We, the People' language of the 1787 United States Constitution, but its most important echo in South Africa is of the identical opening words of the Freedom Charter.<sup>31</sup> The authority and legitimacy of the document is said to lie in its being the will of the people. The implication is that the Final Constitution is not, like the German Basic Law, grounded ultimately in the rightness of its values, the most basic of which are meant to be above amendment by the representatives of the people or anyone else. Instead, if 'We, the people of South Africa' have constitution-making power, then that power may be resorted to again. Even though the Final Constitution marks a nation's emergence from a deeply unjust, 'wicked' legal system, like the German case, it is nonetheless based on popular sovereignty. South Africa's emergence from its unjust past was an exercise in trying, for the first time, to build a

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26 Act 34 of 1995.

27 *Kaunda & Others v President of the Republic of South Africa*, [2004] ZACC 5, 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC) at paras 218-20.

28 *Mhlungu* (supra) at para 8.

29 See, for example, *Minister for Provincial and Local Government v Unrecognized Traditional Leaders, Limpopo Province (Sekhukhuneland)* [2004] ZASCA 93, 2005 (2) SA 110 (SCA), [2005] 1 All SA 559 (SCA) at para 16.

30 See, for example, *Shabalala* (supra) at para 25; E Mureinik 'A Bridge to Where? Introducing the interim Bill of Rights' (1995) 10 *SAJHR* 31.

31 The Charter begins: 'We, the People of South Africa, declare for all our country and the world to know'.

state that reflected the will of the whole people. In *Doctors for Life*, Ngcobo J referred to this content in support of the importance of public participation in law-making processes.<sup>32</sup> In his judgment in *McBride*, he cited it in support of the importance of freedom of expression in South Africa's democracy.<sup>33</sup>

Second, the language immediately following 'We, the People of South Africa' is an articulation of the self-understanding on which South Africa's nation-building effort aspires to build itself. Post-1994 nation-building is based on recognizing the 'injustice of the past', paying homage to those 'who suffered for justice and freedom', respecting those 'who have worked to build and develop our country' — a phrase designed to include the constructive parts of the work of pre-1994 regimes, very unequally shared though they were<sup>34</sup> — and accepting the need for different groups to live together, 'united in ... diversity'. The declaration that 'South Africa belongs to all who live in it' is taken from the opening lines of the Freedom Charter.<sup>35</sup> The *First Certification Judgment* recognized the way in which these provisions, which include recognition of past injustices, express the ideal of national unity.<sup>36</sup>

Third, the Preamble closes with two monotheistic religious phrases in several languages. During the Certification process, it was objected that this discriminated against non-theists and so violated Constitutional Principle III, the anti-discrimination principle. The Court dismissed this by stating that the objector

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did not 'demonstrate that the invocation of a deity constitutes any form of discrimination against non-theists that breaches a [Constitutional Principle].'<sup>37</sup> It has been argued that the Court in this passage 'glossed over' the objection.<sup>38</sup> Since the question of certification is forever closed, the point need not be re-hashed. What is important is the implication of the *Certification* ruling: the religious language should not in the future be used in any way that undermines the constitutional prohibition of discrimination, 'save in the most compelling circumstances'.<sup>39</sup> Accordingly, the only interpretative effect the language could plausibly have is to affirm the religious practices and beliefs of '(mono) theists', which are subject to the equality rights of all, and to symbolize the fact that provided this equality condition continues to be met, a state does not have to avoid all association with religion in order to be secular and non-discriminatory.<sup>40</sup>

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32 *Doctors for Life International v Speaker of the National Assembly & Others* [2006] ZACC 11, 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC) at para 111.

33 *McBride* (supra) at para 141.

34 An interpretation supported by the drafting history: the phrase was inserted at the instigation of the National Party and the Freedom Front. See H Ebrahim *The Soul of a Nation: Constitution-making in South Africa* (1998) 205.

35 'We, the People of South Africa, declare for all our country and the world to know: that South Africa belongs to all who live in it, black and white, and that no government can justly claim authority unless it is based on the will of all the people'.

36 *Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26, 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) ('*First Certification Judgment*') at para 205.

37 CP III states: 'The Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity.' For the objection and its dismissal, see *First Certification Judgment* (supra) at paras 203-04.

38 Devenish (supra) at 26.

39 *First Certification Judgment* (supra) at para 43.

40 See further P Farlam 'Freedom of Religion, Belief and Opinion' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2003) 41-17-41-18 and 41-23-41-30.



## (e) Relationship to FC s 1

There can appear to be an overlap between the statement of founding purposes in the Preamble, and the statement of foundational values in FC s 1. The understanding of FC s 1 to be presented here rejects the idea that the section is a reservoir of broad values with interpretative significance. One point in favour of that reading is that it serves to distinguish the import of s FC 1 from that of the Preamble, and does not understand the Final Constitution to start with *two* statements of broad, partly overlapping, value considerations relevant to interpretation.

On the understanding of the Preamble and FC s 1 advanced in this chapter, the relationship between the two is as follows. The Preamble sets out the purposes that the founders intended the Constitution to be used to achieve. FC s 1 super-entrenches certain aspects of the constitutional mechanism they created to serve those purposes. Thus the Preamble should inform the interpretation of FC s 1, just like any other provision, but FC s 1 does not affect the Preamble, since the Preamble is not an operative part of the constitutional mechanism.

## 13.3 Founding Values as Descriptive Principles: Understanding the Role of FC s 1

An account of FC s 1 must confront a number of apparent inconsistencies and problematic features in the case law. This section argues that the case law is basically correct, although very under-theorized: the decisions can be reconciled with one another, and in a way that produces a robust and satisfying account of the role of FC s 1, but in order to do so it will be necessary to offer a fuller understanding of the section than the courts have done.

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### (a) Problems in the case law for an account of FC s 1

#### (i) Is FC s 1 merely of subsidiary interpretative significance, or does it apply more directly?

In *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders ('NICRO')*, the Constitutional Court expressed the following understanding of FC s 1 in one of its few fuller comments on the section. After noting the importance of the FC s 1 values and their interpretative significance, the judgment states that FC s 1 values '*do not, however, give rise to discrete and enforceable rights in themselves*' (emphasis added).<sup>41</sup> On this view, the rights in the Bill of Rights give 'effect to the values and must be construed consistently with them'.<sup>42</sup> The founding values themselves are only applied indirectly, via other parts of the text. Their role is to be some sort of subsidiary interpretative aid.

The foremost challenge for an account of FC s 1 is to understand exactly what *NICRO* means by these statements — and to reconcile it with the way in which FC s 1 is used in several other cases. Frank Michelman argues elsewhere in this work that 'no simple explanation' of the Constitutional Court's approach to the legality doctrine 'can be squared with the Court's declaration in *NICRO*'.<sup>43</sup> The reason is that the case law on the legality principle seems to apply FC s 1(c) in a more direct fashion than *NICRO* appears to

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41 [2004] ZACC 10, 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC) ('*NICRO*') 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.')

42 *NICRO* (supra) at para 23.

43 F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2005) 11-3.

permit. Nor are the legality cases alone in this: the decisions in *Modderklip, UDM (2)* and a series of decisions on the abolition of cross-border municipalities, beginning with *Matatiele (2)*, appear similarly at odds with *NICRO*. These decisions are discussed below.<sup>44</sup>

## (ii) The blurring of FC s 1 and other provisions

In addition, even the cases that fit more easily into the *NICRO* understanding pose problems for an account of FC s 1, because these cases tend to use FC s 1 sporadically and in a way that mixes the section up with other provisions. The sense of redundancy discussed in the introduction can be strongly felt here, but there are two further difficulties.

The first of these is the problem of blurring, which is most easily explained by example. *August v Electoral Commission* uses FC s 1(d) in a manner squarely within the *NICRO* dictum.<sup>45</sup> In *August*, two prisoners brought a case under the FC s 19(1) right to vote after the Electoral Commission failed to make arrangements for prisoners to vote. The judgment invokes the relevant founding values from FC s 1(d) — 'universal adult suffrage' and 'a national common voters roll' — to frame the case and begin the rights analysis.<sup>46</sup> However, the Court does not start by stating

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what FC s 1(d) means, and then move to interpret FC s 19 in light of that; or at least it is far from obvious if, and to what extent, that is happening.<sup>47</sup> The relevant passage begins with a reference to the text of FC s 1(d) (the section is not explicitly cited, nor are any other provisions). But what follows is a holistic, cluster argument which includes an historical argument, a reference to citizenship and its rights (thus implicating the FC s 3 citizenship provision, the FC s 20 citizenship right, and the other rights accruing only to citizens); a reference to other parts of FC s 1, including the opening words 'one, sovereign democratic state' and the FC s 1(a) statement of dignity as another foundational value; an invocation of the other references to dignity in the Constitution; a reference to structural features of the Constitution such as the FC s 36 limitation clause; and a reference to foreign case law.

How much of what follows the first sentence should be taken as an interpretation of FC s 1(d)? All of it? It has been read that way.<sup>48</sup> But this is a long list of content, and some of that content belongs to other sections — at the very least, belongs to other parts of FC s 1. It therefore seems implausible to treat it all as an articulation of FC s 1(d). But once we admit that, it becomes hard to decide just when the Court is discussing the meaning of FC s 1(d) and when it is discussing the meaning of other sections that are being read alongside FC s 1(d). This is a regular feature of the FC s 1 case law. Even when the section is used in conjunction with only one or two provisions (usually a right) the courts

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44 See §§13.3(b) and 13(4)(b) *infra*.

45 [1999] ZACC 3, 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC).

46 *Ibid* at paras 3 and 14-15.

47 *August* (*supra*) at para 17 (The passage reads: 'Universal adult suffrage on a common voters roll is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everyone counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined into a single interactive polity. Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement.' (internal quotation omitted) The internal quotation refers to two Canadian decisions.)

48 T Roux 'Democracy' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) 10-30.

almost never separate the discussion of the relevant FC s 1 value from the discussion of the other text. The value is usually referred to at the start of the analysis, with one or more sections usually cited immediately thereunder, and the final interpretation is reached, apparently, based on a consideration of the whole. This can make it hard to extract specific information about FC s 1 from the case law.

The understanding of FC s 1 presented in this chapter will respond to these problems. On this understanding, FC s 1 does not have to be assigned unique content distinct from the content of other sections<sup>49</sup> and FC s 1 is not a higher norm in relation to the rest of the Constitution, its super-entrenchment notwithstanding. By illustration, it would be problematic if the FC s 33 right to just administrative action meant nothing more than the Promotion of Administrative Justice Act ('PAJA') and was understood in terms of it, because then PAJA would not be able to be tested against FC s 33. But because FC s 1 does not stand in that relation to

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the rest of the Constitution, these problems do not arise, though there are some technical details that require working out.<sup>50</sup>

### (iii) Sporadic and ad hoc use of FC s 1

The other problematic feature of the courts' approach to FC s 1 is that the section seems to be treated as a kind of optional extra, cited or not cited as a matter of judicial whim, often without much appearing to turn on whether it is mentioned or not.

One reason for this is that South African constitutional talk often takes it for granted that important values like those in FC s 1 are relevant to interpretation, so much so that offering a citation for the point may well be thought a matter of technical nicety only. Judges sometimes draw on values just because they are values — Sachs J, for example, tended to invoke values more than most, but often did so without citation and seldom cited FC s 1. Another reason is that FC s 1 hardly enjoys a monopoly as a textual source of values, as discussed in the introduction, and in fact often tends to be marginalized relative to other value-based sections. Section 1 is not an unavoidable part of a key constitutional mechanism the way that the FC s 36 limitations clause is, for example. It seems to apply to everything and nothing in particular, and so is easily neglected by courts focusing on more specific text. Given that there are plenty of other provisions that contain value references — including the operative provisions in FC ss 7, 36 and 39 — it is easy to see how a judge might not feel it imperative to look beyond them and also mention FC s 1.

On the understanding presented in this chapter, FC s 1 is not a set of broad values potentially relevant to almost any case. The section instead picks out certain things deemed particularly important. The use of FC s 1 *should* be patchy to some extent, because so is the degree of the section's relevance from case to case.<sup>51</sup> That said, FC s 1 is not used consistently even accounting for this fact. An important reason for this is that there is plenty of uncertainty about the details of FC s 1's function, and the Court has not given a firm answer to the concrete question of exactly when and where it must be used. It has also not paid a great deal of attention to FC s 39(1)(a), which concerns the interpretation of rights and offers the most natural link between FC s 1 and the Bill of Rights.

Even the key dictum from *MICRO* does not link the interpretative role it envisions for FC s 1 to s 39(1)(a), or to other text. This absence of work to fold the FC s 1 values into

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49 See §13.3(b) *infra*.

50 See §13.4(a)(i) *infra*.

51 See §13.3(b)(v)–(vi) *infra*.

formal interpretation mechanisms has doubtless contributed to their uncertain status. These issues are considered below.<sup>52</sup>

### **(b) The legal effect of FC s 1: founding values as descriptive principles**

In sum, the reading I will defend in this chapter runs as follows. One possible reading of *NICRO* is that FC s 1 values are just a matter of interpretative background, with a similar legal effect to the Preamble. By contrast, one possible

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reading of several other cases is that FC s 1 has a stand-alone legal effect such that one could be said to *violate* a founding value, as one might violate a right or a mandatory provision. These readings understand FC s 1 very differently and some might argue that they are incompatible.

However, there is a middle way, which permits the cases to be reconciled. On this understanding, the founding values are not just a subsidiary interpretative resource, like the Preamble. They are values that ground obligations, a thing we more commonly call a *principle*. However, these obligations are given effect to by other provisions of the Constitution, notably the Bill of Rights. The reason that FC s 1 values are principles, but nevertheless do not have stand-alone legal effect, is that they are *descriptive* principles. They describe basic features of South Africa's constitutional order. The implication, in other words, is not that these are values that must be realized, but that they are descriptions of particularly important aspects of what other parts of the Constitution *already* protect and uphold. The obligation that FC s 1 imposes is that this description must be borne out when the Constitution is implemented.

I will defend this understanding as the best way to reconcile the case law and produce a satisfying account of FC s 1 that explains its unique role in the text. The rest of this section sets out an analysis of the case law that underlies this reading.

This approach also finds support in the drafting history. FC s 1 bears an interesting resemblance to a document drafted by the Panel of Constitutional Experts during the negotiations of the 1996 Constitution. The document, tabled in May 1995, was aimed at helping delegates to the Constitutional Assembly by setting out 'the criteria that should be applied when considering issues for inclusion in the constitution', as opposed to being left for ordinary legislation.<sup>53</sup> Clause 5.1(i) of that document asked 'Does the implementation of democracy and the constitutional state, based on the values recognized in the Constitution, require its inclusion (either as an institutional necessity, or in view of the country's history and needs)?'<sup>54</sup> Naturally FC s 1 is not there to decide what goes into the Constitution. But on the descriptive understanding, it is in a similar fashion a way of asking what is *essential* to the Constitution. Whatever the role of the May 1995 document in FC s 1's origins, it does offer at least a way to think about how the section operates on the descriptive understanding.

### **(i) FC s 1(c) as a source of obligations: Reconciling Modderklip and NICRO**

Some of the time, the Constitutional Court's decision in *President of the Republic of South Africa v Modderklip Boedery (Pty) Ltd*<sup>55</sup> seems to use FC s 1(c) merely as an interpretative aid to understand FC s 34, fitting easily with the understanding of FC s 1 expressed in *NICRO*. This is the way the Court itself presents the point in its order, which

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52 See §13.4(c) *infra*.

53 Ebrahim (*supra*) at 190.

54 Reproduced in relevant part in Ebrahim (*supra*) at 191.

55 [2005] ZACC 5, 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC) ('*Modderklip*').

refers to the right of Modderklip 'as entrenched in section 34 read with section 1(c) of the Constitution'.<sup>56</sup>

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But at other times, it gives a different impression. At one point, the Court treats FC s 1(c) as a provision from which *obligations* flow.<sup>57</sup> Later on, the Court states that 'court orders must be executed in a manner that prevents social upheaval. Otherwise the purpose of the rule of law would be subverted by the very execution process that ought to uphold it.'<sup>58</sup> The Court concludes this line of argument by asking whether the state ought 'to do more than it has done to satisfy the requirements of the rule of law *and* fulfill the s 34 rights of Modderklip'.<sup>59</sup>

This language treats FC s 1 as something more than a subsidiary interpretative source. It implies that FC s 1 grounds obligations and imposes requirements that the state can fail to fulfill. However, the decision remains ambiguous about whether s 1 imposes stand-alone requirements, such that the Court could have found that the state violated FC s 1(c) and that its actions were unconstitutional just for that reason, or whether s 1 obligations are always to be manifested in terms of other provisions, such as FC s 34 in this case. To put it another way, it is uncertain whether *Modderklip* implies that an order in a FC s 1 case must always refer to the breach of a section 'as read with' FC s 1, or whether it could simply refer to a breach of FC s 1 alone.

Setting that ambiguity aside for a moment (I address it below), note that *Modderklip*'s understanding of FC s 1 as obligation-creating in some sense is not obviously incompatible with *NICRO*. *NICRO* addressed an argument that, because FC s 1 entrenched 'universal suffrage', the right to vote (of prisoners, in that case) could not be limited.<sup>60</sup> The Court's rejection of that argument is a rejection of the idea that one can rely on FC s 1 to subvert the mechanism of the Bill of Rights and the FC s 36 limitations clause in particular. FC s 1(d) does not grant a right to vote: FC s 19 does, and s 19 is subject to FC s 36. The key to reconciling *Modderklip* and *NICRO* is that this proposition does not exclude the possibility that FC s 1(d) might *require* there to be the FC s 19/s 36 mechanism in order to give effect to the idea of 'universal suffrage'. As it happened, in *NICRO* that mechanism was present and, because of the inadequacy of the government's submissions on the limitations analysis, the case turned mostly on general propositions about what FC s 36 requires of the state, so the question of whether it was giving adequate effect to the FC s 1(d) idea of universal suffrage was not really at issue.<sup>61</sup> But *NICRO* poses no obstacle to this understanding, and if it is read this way, FC s 19 (as limited using FC s 36) is understood as the corollary of an obligation grounded in FC s 1(d) — just as FC s 34 is the corollary of an obligation that *Modderklip* grounds in FC s 1(c).

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56 Ibid at para 68.

57 *Modderklip* (supra) at para 38. ('The first aspect that flows from the rule of law is the *obligation* of the State to provide the necessary mechanisms for citizens to resolve disputes that arise between them. This *obligation* has its corollary in [the s 34 right]'. In para 40, it continues: 'The mechanisms for the resolution of disputes include the legislative framework, as well as mechanisms and institutions such as the courts and an infrastructure created to facilitate the execution of court orders. In this case, the legislative framework includes the provisions of [the Prevention of Illegal Eviction and Unlawful Occupation of Land Act] which are directed at assisting both the landowner and the unlawful occupier. In argument, *the State has accepted the existence of this obligation*, but claims that it had been fulfilled'. (internal footnotes omitted, emphasis added)).

58 Ibid at para 46.

59 Ibid at para 47 (emphasis added).

60 *NICRO* (supra) at paras 18-26.

61 Ibid at paras 49, 51, 65-67.

It is significant in this regard that *NICRO*, after acknowledging FC s 1 and the FC s 3 citizenship provision, concludes that 'neither of these sections requires voting rights to be absolute and immune from limitation'.<sup>62</sup> It also states that '[t]he rights entrenched in the Bill of Rights...give effect to the founding values and must be construed consistently with them.'<sup>63</sup> *NICRO* can be naturally read consistently with the idea that FC s 1(d) requires there to be a right to vote.

If so, *NICRO* and *Modderklip* stand for the same principle; *Modderklip* simply had to flesh it out more than *NICRO* (the easier case) did. When *NICRO* says that the FC s 1 values 'inform and give substance' to rights, it means that the FC s 1 values should guide the implementation and enforcement of the rights that give effect to them.<sup>64</sup> That, of course, includes judicial interpretation of them, but it also guides their enforcement more generally by other actors. That was the Court's point in *Modderklip*. The state argued that it had satisfied its rule of law obligations by passing an eviction statute and establishing an eviction mechanism and it was now up to the courts and the sheriff and the landowner to do the rest. The Court rejected this proposition and held that the state was obliged to do more to ensure that court orders were in fact given effect to and the rule of law was in fact maintained.<sup>65</sup> In turn — the 'corollary' of this proposition, in *Modderklip*'s language — this meant that *Modderklip* had a right under FC s 34 to more than the government had done in that case. So while FC s 1(c) does not give rise to discrete rights (*NICRO*), it does impose obligations on the state, which are enforced via other provisions like the FC s 34 right, and the fact that these other provisions are understood to give effect to FC s 1(c) is important to how they are interpreted and implemented (*Modderklip*).

## **(ii) FC s 1(c) and the legality principle: Reconciling Pharmaceutical Manufacturers and NICRO**

As noted, Michelman has pointed out elsewhere in this work that it is not obvious how *NICRO* is compatible with the Court's approach in the cases on the legality principle. However, the task becomes easier once we understand *NICRO* as compatible with the idea that FC s 1 imposes obligations.

The Court's legality jurisprudence begins under the Interim Constitution. The 1993 text contained no equivalent of FC s 1(c)'s protection of the rule of law, and the principle of legality accordingly was treated as a principle implicit in the idea of constitutionalism.<sup>66</sup> However, the Court's first legality decision in *Fedsure*, on facts arising under the Interim Constitution, was handed down in 1998, and the Court took note of the new FC s 1 in the 1996 text as partial support for its conclusion

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that the principle of legality was a 'fundamental principle of constitutional law'.<sup>67</sup> The Court's later judgment on the legality principle in *Pharmaceutical Manufacturers*, now under the 1996 text, simply absorbed the *Fedsure* precedent, noting that the 1996 text 'in specific terms now declares that the rule of law is one of the foundational values of the Constitution'.<sup>68</sup>

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62 *Modderklip* (supra) at para 19.

63 *Ibid* at para 21.

64 *Ibid* at para 21.

65 *Modderklip* (supra) at paras 24, 31 and 41-51.

66 *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* [1998] ZACC 17, 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) ('*Fedsure*') at paras 56, 58; *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 11, 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC) at para 148.

67 *Fedsure* (supra) at para 57.

*Pharmaceutical Manufacturers* draws on an array of provisions and legal sources on its way to holding that the control of public power under the legality principle is a constitutional issue for the purposes of the Court's confirmation jurisdiction. However, the narrow basis for the result in that case — the invalidation of a presidential proclamation — appears to be that '[i]t is a requirement of the rule of law that the exercise of public power ... should not be arbitrary'. This is the 'important constitutional principle' that grounds the rationality review that invalidates the proclamation.<sup>69</sup> If the reference to 'the rule of law' is a reliance on s 1(c), then *Pharmaceutical Manufacturers* is an instance of the direct, stand-alone enforcement of a founding value. (And if it is, then there are many other examples, since the decision has been repeatedly applied).

Michelman contends that this conclusion is barred by *NICRO*'s statement that FC s 1 does not 'give rise to discrete and enforceable rights.' He comments that 'one is left to infer' that the legality principle is 'an implication from the Final Constitution in its entirety.'<sup>70</sup> The way out being taken is the following. *Pharmaceutical Manufacturers* leaves no room for doubt that the legality principle is a constitutional principle, such that any irrational government action involves a violation of the Constitution. But it *does* leave it open whether that violation is a violation of FC s 1(c), as opposed to a violation of a general constitutional principle not grounded on any particular provision, as the legality principle was understood in *Fedsure*. So, in order to read *Pharmaceutical Manufacturers* consistently with *NICRO*, we should understand that the legality principle is not grounded on FC s 1(c). To violate the legality principle is not to violate FC s 1(c), but instead to violate a structural principle of the Constitution as a whole. The role of FC s 1(c) is no more than an interpretative aid guiding the Court's understanding of its jurisdiction, and perhaps also emphasizing the importance of the structural principle, as FC s 1(d) is used in *August* to underline the importance of the right to vote.

However, this degree of marginalization of FC s 1(c) is not easy to reconcile with the affirmative statement in *Pharmaceutical Manufacturers* that 'the rule of law' imposes a 'requirement' that exercises of public power should not be arbitrary. Perhaps that could be explained away, but the discussion of *Modderklip* shows that it is not necessary to do so. It is consistent with *NICRO* to view FC s 1 values as imposing obligations on the state. In *Pharmaceutical Manufacturers*, as in *Modderklip*, FC s 1(c) obliges the state to uphold the rule of law. It is just that, instead of FC s 34, here that obligation is given effect to, or is enforced via, the doctrine of

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legality. This reading is perfectly compatible with the *Fedsure* idea that legality is a principle inherent in South African constitutionalism. *Modderklip* sees the FC s 34 right as giving effect to FC s 1(c), but there is no reason why effect might not also be given to a founding value by multiple provisions or by a structural principle.

This reading offers a simple explanation for why *Pharmaceutical Manufacturers* invoked the rule of law when arguing that irrational conduct should be treated as a violation of the Constitution: irrationality represents a failure to comply with the *obligation* imposed on the state by FC s 1(c), as given effect to by the doctrine of legality. When the principle of legality is not adhered to, the constitutional obligation imposed by FC s 1(c) is not being upheld. That is why irrationality is a constitutional issue.

To reverse gears, it is also illuminating to understand *Modderklip* as concerned with the enforcement of the same deep constitutional obligation as *Pharmaceutical Manufacturers*. The government in *Modderklip* had made it possible for the applicant's dispute to be heard and had provided a mechanism for the enforcement of the resulting

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68 *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* [2000] ZACC 1, 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) ('*Pharmaceutical Manufacturers*') at para 17.

69 *Ibid* at paras 85-87 and 89-90.

70 Michelman (*supra*) at 11-34, 11-3.

judicial decision. It was not implausible that this satisfied the language of FC s 34. However, to accept that conclusion would be to accept that legality did not need to be upheld, substantively, in every case. That acceptance is repudiated by *Pharmaceutical Manufacturers'* concern that every act of public power be rationally traceable to law and that this link must, constitutionally, be maintained in each case. It was the absence of that concern to ensure that legality was upheld in *Modderklip* that made the government's position there unacceptable, and that is why FC s 1(c) plays such a key role in the decision in that case.

### (iii) Stand-alone enforcement? Reconciling NICRO, Modderklip, the legality cases and UDM (2)

As noted, *Modderklip* does not rule out the possibility that FC s 1(c) might be enforceable as a stand-alone provision, and *Pharmaceutical Manufacturers* is sometimes read as involving the direct enforcement of FC s 1(c). In each case, the obligation imposed by FC s 1 is understood along with other law (FC s 34, the legality principle), but *must* it be? Are both decisions simply instances of the blurring tendency noted above,<sup>71</sup> in which the presence of other provisions prevents us from learning specific things about FC s 1 as a discrete section?

*NICRO* poses one obstacle to this possibility. The idea that FC s 1 is not a source of discrete rights and that its provisions only 'inform and give substance' to other rights provisions at least firmly implies that FC s 1 is not a source of any discrete legal effects and always only informs and gives substance to other provisions.<sup>72</sup> However, a more decisive obstacle is presented by the body of cases on the legality principle as a whole.

*Fedsure* understood legality as an implicit principle, and looking ahead to the 1996 text saw FC s 1(c) as merely a confirmation of this idea. Presumably the fact that FC s 1(c) was not actually part of the constitution that *Fedsure* was enforcing means that the section's status might be greater under the 1996 text. However, if

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*Pharmaceutical Manufacturers* and its sequels are to be understood as treating legality as a direct violation of FC s 1(c) standing alone, then they would be disagreeing sharply with *Fedsure* — whereas in fact, they seem to understand themselves as doing exactly the opposite and cite *Fedsure* as part of their line of authority.<sup>73</sup> More telling still is the fact that the legality decisions are patchy in their citation of FC s 1(c). They sometimes do not cite it at all, or fail to cite it to nearly the extent that one would expect were it *the* provision being violated. FC s 1(c) is cited in *Pharmaceutical Manufacturers*, but subsequent cases often just cite that decision rather than the provision itself. That usage is consistent with the idea is FC s 1 is relevant (in some way) to the shaping of points of constitutional law, such that it must be cited when deciding about what that law requires — deciding a point of jurisdiction, or that there has to be a constitutional mechanism for enforcing legality. In that situation, it is a matter of authorial discretion or technical nicety whether one chooses to cite FC s 1 unless the legal point is novel or unsettled, which is how the various judges in the legality decisions seem to have approached the citation of the section. It is not consistent with the idea that it is the actual provision being violated, such that it would have to be cited each time the point of law arises. One cites FC s 19 every time one considers an allegation that the right to vote has been violated, and it would not be appropriate to cite, say, *August* instead. We will see that something similar is also true of cases on constitutional supremacy, where FC s 2 is always cited (like the legality principle) but FC s 1(c) is not.<sup>74</sup>

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71 See §13.3(a)(ii) supra.

72 *NICRO* (supra) at para 21.

73 See, for example, *Pharmaceutical Manufacturers* (supra) at paras 26-51.

74 See §13.5(d)(i) infra.



Finally, at least one judge (Sachs J) has expressly understood the legality principle as a structural feature of the Constitution as a whole,<sup>75</sup> whilst there is no example of judicial language that clearly treats FC s 1(c) as a discrete provision being violated on its own.<sup>76</sup> *United Democratic Movement v President of the Republic of South Africa (No. 2)* ('UDM (2)')<sup>77</sup> can be read as treating FC s 1 as having stand-alone legal force, but on closer examination the decision does not necessarily entail this and in fact seems best read as entailing the opposite. The decision holds that laws 'which undermine multi-party democracy, will be invalid.'<sup>78</sup> This language seems to treat FC s 1 as a source of obligations, not just a mere interpretative aid. In this, *UDM (2)* is in line with the preceding discussion. At the same time, one does not have to understand *UDM (2)* to treat FC s 1(d) as a stand-alone source of discrete obligations. The line just quoted comes from the Court's ruling on whether the challenged legislation was

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contrary to FC s 1(d), such that it would have to be taken as an attempt to amend FC s 1 and would therefore be invalid because it was not passed in accordance with the special procedure for amending FC s 1 laid out in FC s 74(1).<sup>79</sup> So the line is really subject to the proviso that such laws will be invalid for reason of being incompatible with FC s 1(d) *unless* the procedure for amending FC s 1 is followed. Given that this is the enquiry, the focus is inevitably on whether the challenged law violates FC s 1(d). But it is entirely open on this argument whether FC s 1(d) is the *only* thing being violated, or whether FC s 1(d) is merely *part* of what is violated: either way, FC s 74(1) would be in play. It is, therefore, perfectly possible to read the Court's concern for multi-party democracy as drawn from multiple provisions, of which FC s 1(d) is one, but also including the 'open and democratic society' language from the Bill of Rights' value provisions which the Court uses,<sup>80</sup> the political rights, and perhaps a structural idea of democracy drawn from the Constitution as a whole. Read thus, *UDM (2)*'s use of FC s 1 does not depart from *Modderklip* and *Pharmaceutical Manufacturers*.

Furthermore, *UDM (2)* does not, strictly speaking, imply that legislation contrary to FC s 1(d) will be invalid. The precise violation being alleged is a violation of FC s 74, failure to follow the proper constitutional amendment procedures. If FC s 74 were not in play, and one were instead challenging the substance of law or conduct, *UDM (2)* is not authority that the proper approach would be to lay just FC s 1(d) down next to the law or conduct and invalidate whatever does not fit with it. Indeed, if anything, the decision implies the opposite, since its approach to democracy is closer to the holistic, cluster arguments of decisions like *August*.

Finally, *UDM (2)* is best read as treating FC s 1 as a source of obligations, but not stand-alone obligations, for reasons of consistency. The decision considers both FC s 1(c) and FC s 1(d). It would be odd if the decision employed FC s 1(c) and the rationality

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75 *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14, 2006 (2) SA 311 (CC), 2006 (8) BCLR 872 (CC) at paras 585-88, 612-16 and 642 (Sachs J). See also the dissenting judgment of Ngcobo J in *Van der Walt v Metcash Trading Ltd* [2002] ZACC 4, 2002 (4) SA 317 (CC), 2002 (5) BCLR 454 (CC) at paras 34-37 (Ngcobo J focuses on the s 9(1) equality right but seems to understand the rule of law as part of a deep structural principle of the constitutional text, bound up in ideas of equality.)

76 See §13.5(d) *infra*.

77 [2002] ZACC 21, 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC).

78 *Ibid* at para 26 (The relevant passage reads in full: 'A multi-party democracy contemplates a political order in which it is permissible for different groups to organize, promote their views through public debate and participate in free and fair elections. These activities may be subjected to reasonable regulation compatible with an open and democratic society. Laws which go beyond that, and which undermine multi-party democracy, will be invalid.')

79 *UDM (2)* (*supra*) at para 20.

80 *Ibid* at para 26.

enquiry in a different way to the general body of legality cases without announcing this fact.<sup>81</sup> It would also be odd if the decision understood FC s 1(c) to work in a structurally different way to FC s 1(d). Accordingly, if the legality cases do not treat FC s 1(c) as the stand-alone basis for rationality violations, we should understand *UDM (2)*'s use of FC s 1(d) in line with that, and not read the Court as referring to a discrete violation of FC s 1(d).

#### (iv) Making sense of the reconciliation I: FC s 1 values as principles

The reading of FC s 1 presented can finesse the problems of reconciling the Court's understanding of FC s 1 in *NICRO* with *Modderklip*, *UDM (2)* and the legality cases. But does it make sense? Is it possible that FC s 1 creates obligations, but is not a source of discrete rights and is not enforceable as a stand-alone provision? How are we to make sense of the implication that FC s 1 has obligation-creating legal effect, but not standing alone? Answering these questions is key to understanding FC s 1, and there are three parts to the answer. The discussion so far gives us the first two of them.

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First, a self-described 'value' provision can create obligations. In legal theory, this kind of object is more commonly called a *principle*.<sup>82</sup> A principle has weight in every situation to which it is relevant. To impose a principle on someone is, accordingly, to impose some sort of obligation on that actor whenever the principle is implicated. Thus the FC s 1 values will be of some relevance to many decisions, even if only to add their weight to a proposition articulated by other text, as in *August*. This is why FC s 1 values often appear to be of merely subsidiary interpretative significance. It also accounts for why their use is sporadic: in these sorts of situations, citing the principle merely adds weight to a legal decision, and so whether or not to cite FC s 1 will often only be a point of style on which judges will differ.

Secondly, however, it *is* possible to violate a principle. Something violates a principle when it is sufficiently contrary to it that one cannot understand it compatibly with the principle. This is why FC s 1 values sometimes have implications that go beyond a merely subsidiary interpretative effect. *Modderklip*, as discussed, looks more like a violation of the state's duties under the rule of law than merely a situation where a rule is interpreted in such a way as to give best effect to the rule of law and bolster its importance. Successful rationality challenges, similarly, are about sufficiently egregious failures of process or logic that they cannot be reconciled with the principle of legality. This also explains why *UDM (2)* phrases its enquiry as whether proportional representation, strictly understood as prohibiting defection between elections, is 'an essential component' of the value of democracy in FC s 1(d).<sup>83</sup> If it were 'an essential component', then floor-crossing legislation that permitted defection would be too squarely contrary to FC s 1(d) to be anything other than a violation of its principles. Because the Court ruled that it was not, the principle in FC s 1(d) was not violated. Since the challenge was not directed to what the challenged legislation meant, but simply whether the FC s 74(1) procedure should have been used, that ended the enquiry; in another case, the Court might have gone on to interpret the legislation in light of FC s 1(d).

The third part of the answer is to understand how FC s 1 values can operate like principles, yet not have stand-alone legal effect. Usually a legal principle can be invoked, enforced or violated directly. Yet the best reading of the cases appears to deny this. The solution to this puzzle is to be found in the Final Constitution's structure, not in legal theory, and so it is necessary to say a little more about that structure.

#### (v) Redundancy and super-entrenchment

81 Ibid at paras 55-74.

82 See, for example, R Dworkin *Taking Rights Seriously* (1978) 22-28 and 71-80; R Alexy *A Theory of Constitutional Rights* (J Rivers trans, 2010) Chapter 3.

83 *UDM (2)* (*supra*) at paras 30 and 35.

Section 1's apparent degree of redundancy is one of its most striking features. As noted in the introduction, most of its content is the explicit subject of other provisions in the text. If one includes structural content implicit in the Constitution, like the legality principle, there is little if anything covered by FC s 1 that cannot very readily be found elsewhere. Even if FC s 1 is treated as a reservoir

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of broad, abstract, background principles, the impression of redundancy is strong — especially because the rights in the Bill of Rights themselves have a radiating effect. The value of dignity, after all, is commonly traced to the FC s 10 right to dignity, or to its mention in FC ss 7, 36 and 39 of the Bill of Rights, rather than to the FC s 1(a) value of dignity.<sup>84</sup>

Frank Michelman offers a sustained examination of this problem elsewhere in this work. He notes that FC s 1(c)'s protection of constitutional supremacy as a value is immediately followed by FC s 2's provision that the Constitution is supreme. The implication, he argues, is that FC s 1(c) must say something that FC s 2 does not, and yet it is 'somewhat daunting' to comprehend what the FC s 1(c) value might comprehend that is not fairly obviously covered by FC s 2. Michelman's tentative answer to a problem he candidly acknowledges is puzzling is to understand FC s 1(c) as expressing certain ideas about South African constitutionalism: that it should be unified, all-pervasive, value-based and move beyond Apartheid-era formalism.<sup>85</sup>

It is hard to think of a better answer to the question as posed, but it may be the wrong question. Michelman seeks to show what content FC s 1 has that is not also the content of other provisions. That is very difficult to do. Even Michelman's ingenious suggestions for the unique content that FC s 1(c) might have are easily, and probably more naturally, located outside FC s 1. He suggests that the content of constitutional supremacy of FC s 1(c), as distinct from that of constitutional supremacy in FC s 2, should be the idea of all-pervasive, value-based, post-Apartheid constitutionalism. But these ideas of transformative constitutionalism are typically traced to many provisions or treated as a structural idea, like legality or the constitutional principle of democracy. His suggestion also creates new redundancy problems. If this is what FC s 1(c) means, it is hard to see what could be left for the rest of FC s 1, which as a whole seems to express the idea of a state based on pervasively value-based constitutionalism. Michelman also suggests that we should locate within FC s 1(c) the imperative that the whole legal system be unified within the Constitution, which he rightly detects in *Pharmaceutical Manufacturers*.<sup>86</sup> This idea can indeed be understood as part of the rule of law. (Specifically, it is probably best understood as the element of *systematicity* in the idea of the Rechtsstaat that is lost when that term is simply translated as 'rule of law state.')

But it is also naturally understood as part of the legality principle, drawn from the Constitution as a whole, and it has already been argued that this represents the better reading of *Pharmaceutical Manufacturers*.

If FC s 1 must have its own content in order to avoid redundancy, than these objections will be a little beside the point. If FC s 1 must have its own content, it will have to be found somewhere, and given the richness of the text and its many value provisions, that will no doubt involve some rather tenuous and picayune line-drawing. However, it might be the wrong question to ask, because FC s 1 does not need to have its own content in order to avoid redundancy.

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The clue to FC s 1's uniqueness lies in the only thing the Constitution says about it that marks it as different to other provisions: its super-entrenchment. That super-

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84 But see, for example, *McBride* (supra) at paras 143-47 (Ngcobo J).

85 Michelman (supra) at 11-35-11-44.

86 *Ibid* at 11-36-11-38.

entrenchment tells us which parts of the Constitution are of particular, foundational importance. The role of FC s 1 is to tell us this, and that on its own is enough to make FC s 1 non-redundant, even if it contains no unique content — redundancy, after all, arises only when a section has no *purpose*.

The idea that FC s 1 picks out particular aspects of the text runs contrary to the idea that it is broad reservoir of value, at a higher level of generality than the text. The strongest textual indicator that this is correct is FC s 1(d). The section focuses on particular representative ideas of democracy: voting in elections for multiple parties open to all adults. Whether we read this narrowly or broadly,<sup>87</sup> the section picks out particular aspects of democracy and so looks unavoidably narrow than the general idea of democracy that can be drawn from the Constitution as a whole. This particular focus of FC s 1(d) is consistent with the idea that the role of FC s 1 in general is to pick out certain foundational features of the text for super-entrenchment, and directly *inconsistent* with the idea that FC s 1 sets out a set of background values broader than the more particularized provisions that follow it.

The case law on FC s 1(d) is also indicative here. We could think of FC s 1(d) as establishing a broad norm of democracy, and the rest of the constitutional and statutory arrangements as (one possible way of) giving effect to that broader norm. If that were the right way to understand FC s 1(d), then all the democratic mechanisms of the rest of the Constitution and the law in general would have to be understood as giving effect to FC s 1(d). But *UDM (2)* does not say that floor-crossing legislation is one way to give effect to FC s 1(d) and that legislation prohibiting it is another way to give effect to FC s 1(d). Instead, it says that that FC s 1(d) is essentially *indifferent* on the point. Pure proportional representation is *not part* of FC s 1(d)'s description of the elements of the constitutional democracy mechanism that are super-entrenched, which is why FC s 74(1) does not apply to an amendment that introduces floor-crossing and so abrogates pure proportional representation.<sup>88</sup> Conversely, when *August* invokes FC s 1(d), it should not be understood as saying that FC s 19 gives effect to a broader value of democracy set out in FC s 1(d), in the light of which FC s 19 should be interpreted. Instead, it is saying that FC s 19 is important because the right to vote is part of what FC s 1(d) describes, and so it is super-entrenched, and it should be interpreted in light of *that*. One might say that the FC s 1(d) reference in *August* is serving to *underline* FC s 19; it is not adding to its content.

This understanding does not mean that FC s 1 does not have any content. On the contrary, FC s 1 must have content so that we can separate what FC s 1 picks out (eg, at least the broad idea of the right to vote in *August*) from what it does not pick out (eg, the pure form of proportional representation at issue in *UDM (2)*). All it means is that FC s 1 does not have to have any *unique* content in order to avoid redundancy, because it has a unique role that does not depend on unique

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content. In fact, its role relies precisely on *overlap* in content. It is when what FC s 1 sets out matches what is found in other provisions that we know that that part of those provisions is super-entrenched.

## **(vi) Making sense of the reconciliation II: FC s 1 values as descriptive principles**

This *descriptive* understanding of the FC s 1 values allows us to understand the third and final part of the reading suggested here: how it is that the founding values, though they behave like principles and so can create obligations (in line with, in particular, *UDM (2)* and *Modderklip*), nonetheless do not have stand-alone legal effect, and are not enforceable as discrete rights (in line with *NICRO* and the general body of legality principle cases).

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87 See §13.5(e) *infra*.

88 *UDM (2)* (*supra*) at para 35.

On the descriptive understanding, FC s 1 sets out which of the aspects of the subsequent sections are of special, foundational importance. It operates by picking out parts of what the rest of the Constitution does in order to super-entrench them. In principle, it could have achieved the same effect by providing a list of sections, as FC s 37 does by stipulating which rights can be limited during a State of Emergency and to what extent. If so, FC s 1 would have been quite straightforward. It would simply have told courts that any provision on the list could only be amended in accordance with FC s 74(1). But instead of doing this, FC s 1 picks content according to whether it fits a description.

This is important, because the idea of a list of provisions, either entrenched or not, would be limiting. The ideas set out in FC s 1 are potentially given effect to by many different provisions, some squarely, some in more unusual or marginal ways. That FC s 1 works by description means that it super-entrenches any provision to the extent that an aspect of it is part of what gives effect to the values of FC s 1.

A metaphor may be helpful here: instead of a list, it is better to think of FC s 1's values as a set of spotlights being shone on to the multi-faceted provisions of the rest of the text. Different facets will be illuminated to different extents. Some facets may not be illuminated at all — they will fall entirely outside FC s 1's description, and it will be irrelevant to them. The lights will pick out some facets directly, and these will be the aspects of provisions that are super-entrenched by FC s 1. Facets near them, though not picked out by the lights, will nonetheless be bathed in their glow to varying degrees. These facets will fall within the scope of FC s 1's principles, such that the principle will have weight in their interpretation, but not such that a change to that facet will be said to violate the principle. In ordinary practice, new facets of rights will be discovered over time, and so each time it will be important to look to the light cast by FC s 1 and see how it shines on the facets of the provisions at issue.

This is illustrated in *NICRO*. The applicants' papers implausibly argued that the FC s 19 right to vote could not be limited because it fell within FC s 1(d).<sup>89</sup> In terms of the account presented here, that was an argument that the FC s 19 right fell within the description of FC s 1(d)'s 'universal suffrage' and so FC s 19 was super-entrenched (and also that in some way this super-entrenchment in

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turn meant that the right could not be limited). *NICRO* squarely rejects that argument.<sup>90</sup> FC s 1(d) does not mean that anything at all done to limit the right to vote is effectively an attempt to amend FC s 1(d). This is because FC s 1(d) does not pick out and super-entrench FC s 19 as a section (although its light no doubt falls on all or almost all aspects of the section). Its spotlight picks out only those aspects of FC s 19 which, if changed, would falsify the description of South Africa as a state with universal adult suffrage, a national common voters roll, multi-party democracy and regular elections. To put it another way, FC s 1(d) super-entrenches FC s 19 against changes which would constitute contraventions of these principles, as opposed to things that merely implicate these principles or press against them.

It is also important to understand FC s 1 as entrenching aspects of provisions, rather than provisions, in order to make sense of FC s 74. That section makes it clear that FC s 1 and FC s 74(1) are the only super-entrenched *provisions* in the text. It would be inconsistent with this to understand FC s 1 to super-entrench a further list of provisions. If, on the other hand, FC s 1 entrenches only aspects of other provisions, then it remains true that no other provision requires the FC s 74(1) procedure to be followed in amending it. It is only that some aspects of other provisions fall within what is described by FC s 1 such that to amend them is to change the state that FC s 1 describes, and in that case the amendment is an attempt to change FC s 1 as well as the other provision. In fact,

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89 *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)* [2004] ZACC 10, 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC) ('*NICRO*') at para 18.

90 *NICRO* (supra) at paras 19-25.

very technically, one does not actually need to comply with FC s 74(1) in order to amend that sort of aspect of an ordinary provision. It is just that one cannot do so without amending FC s 1 and in order to do *that* one has to comply with FC s 74(1). The reading offered, then, is entirely consistent with the text of FC s 74.

Given this understanding, it is not at all surprising that FC s 1 is always invoked along with other parts of the Constitution, because its legal effect is only to tell us something about the status of other parts of the text. FC s 1 does not ground discrete rights because that is not its role. Its role is to tell us about rights granted elsewhere. It does not grant additional rights in the same way that putting your money in a safe makes it more protected but does not grant you any additional money.

As long as FC s 1 is thought of as a source of broader background principles, there will be an incentive to want it to be discretely enforceable in case it turns out that an aspect of its content is not covered elsewhere in the text. One will not want to close the door on that possibility lest one foreclose a substantive protection by adopting an absolute formal rule. But on the descriptive understanding, this concern is entirely groundless. The descriptive understanding means that anything s 1 contains is already found elsewhere in the text. Since it picks out what is already there, there is no need for FC s 1 to be a source of discrete rights, for by its very logic, anything that it covers is necessarily protected by the rest of the text.

For example, when FC s 1 describes the Constitution as founded on the rule of law, it is stating that the rest of the Constitution protects and promotes the rule of law. Other provisions, accordingly, have to be interpreted in line with that, in order to make sense of FC s 1 and read the provisions of the Constitution in harmony

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with each other.<sup>91</sup> This is what is happening in *Modderklip*. The government is obliged to respect FC s 34 (and the rest of the law of eviction) in light of the fact that it is obliged to do so in a way that matches up to FC s 1. Because it does not, it can be said to be failing to meet the obligations imposed by FC s 1. However, it does not follow that FC s 1 is the source of *Modderklip*'s right, or even a source of it, because FC s 1 is only serving to tell us something about the provision that does grant the right, namely FC s 34. This is also what is happening in *Pharmaceutical Manufacturers*. As a result of FC s 1(c), nothing can be done in terms of the Constitution in a way that belies FC s 1(c)'s description of the Constitution as founded on the rule of law. That is why FC s 1(c) can be said to oblige the government to act in accordance with the principle of legality (always, since every act of the government is an act of public power). The courts, in turn, are constitutionally obliged to enforce the principle of legality in respect of all public power, otherwise *they* will be belying FC s 1's statement. This is why the upholding of the legality principle is a constitutional matter, falling within the Constitutional Court's jurisdiction.

This also explains why the applicant's submission in *NICRO* was treated as obviously untenable. To try and use FC s 1(d) to bypass the FC s 19 / FC s 36 mechanism is to try to invoke as a right a provision that only describes rights protected elsewhere.

Finally, it is important to note that this understanding does not run contrary to the idea that South African constitutionalism is based on living values, the implications of which might change over time. Naturally, aspects of the Constitution that are not implicated by FC s 1 may evolve or be added to freely. But it might be thought that, if those parts of the Constitution that give effect to FC s 1 can only be amended in accordance with the high threshold of FC s 74(1), and if FC s 1 itself cannot contain anything new because by definition it is supposed to set out only what is already in the text, the result might be to constrain constitutional development. The thought is as true as far as it goes, but it does not go very far. It will be open to interpreters and drafters in new times and contexts to revisit what the FC s 1 values mean and what they pick out, and what can be added to the text or read there consistent with that description. The descriptive understanding implies no more than that constitutional evolution cannot

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91 See §13.4(a)(i) *infra*.

occur in a way that belies the description in FC s 1. If society's ideas evolve, then so will the answer to that test. That *is* a constraint — if it were not, there would be no point to FC s 74(1)'s super-entrenchment of FC s 1. But as with the purposes articulated in the Preamble, it is a constraint within which there is considerable room for revisiting and re-interpreting.

## 13.4 Application and Relationship to Other Constitutional Mechanisms

The Constitution does not offer textual guidance on how FC s 1 is to be used or how it relates to other parts of the Constitution or to other law or conduct more generally. The descriptive understanding offers an approach to these questions, but several issues require spelling out.

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### (a) Application

#### (i) A norm of higher status? FC s 1's relationship to the rest of the Constitution

The way that, for example, FC s 34's interpretation is shaped by FC s 1 in *Modderklip* can give the impression that FC s 1 is a set of higher order norms, standing in relation to the rest of the Constitution as, for example, FC s 33 stands to PAJA. This view will be especially tempting if one thinks of FC s 1 as a reservoir of broad background norms or an expression of the text's deepest values. After all, if FC s 1 is *not* a norm of higher status, then FC s 1 should be read in light of other provisions as much as they are read in light of FC s 1. That might be thought an uncomfortable implication, on some views of FC s 1, for the same reasons that it would be problematic if FC s 33 were understood in light of PAJA. Sense must also be made of FC s 1's super-entrenchment: does that imply that FC s 1 norms are of higher status?

The best answer is that FC s 1 values are not higher order norms in the way that FC s 33 is of higher status than PAJA. FC s 1 is to be read in harmony with the rest of the text, like any other provision. But that said, a harmonious reading must take account of FC s 1's special role, and the implications of this satisfy the intuition that FC s 1 is 'higher' in some sense.

This answer begins with *UDM (2)*,<sup>92</sup> which states that constitutional provisions are to be read in harmony with one another. This is why the decision holds that there is little if any scope for arguing that one provision is unconstitutional for failure to fit with another.<sup>93</sup> That rules out the possibility that some provisions stand to others as FC s 33 stands to PAJA.

However, while *UDM (2)* does reject the strong-form conclusion that FC s 1 is of a different *order* of norm to other constitutional provisions, it leaves plenty of room for less stark understandings of the status of constitutional provisions in relation to each other. To see why, consider the relationship between the language, culture and religious rights in FC ss 30 and 31, and other rights in the Bill of Rights. All the rights are certainly norms of the same order. But the text is also explicit that FC ss 30 and 31 rights may not be exercised in a manner incompatible with the other rights. They cannot, for example, be exercised in a way inconsistent with the equality right.<sup>94</sup> In some ways, that can look similar to the idea that PAJA cannot be exercised in a way incompatible with FC s 33. But

92 *United Democratic Movement v President of the Republic of South Africa (No. 2)* [2002] ZACC 21, 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC) ('*UDM (2)*').

93 *Ibid* at para 12.

94 S Woolman 'Community Rights: Language, Culture & Religion' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2007) 58-50.

it does not arise from the other rights being of higher status than FC ss 30 and 31. It arises from the nature of the provisions: after all, FC ss 30 and 31 contain the textual stipulation that they are subject to the other rights, and so the harmonious reading required by *UDM (2)* must include that text and so cannot but produce the outcome that those rights are subject to other rights.

Recognizing this feature of intra-constitutional interpretation dissolves any difficulty that might arise from FC s 1's status. If and to the extent that FC s 1 is properly understood to relate to other constitutional provisions in such a way that

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they must be understood subject to its description, then that is something that an interpretative act involving the section will have to take into account. But that is a feature of FC s 1's role and purpose in the constitutional mechanism, rather than of its being a provision of higher order status. It is entirely compatible with *UDM (2)*'s finding that provisions must be read together harmoniously; indeed, as noted, an interpretation implicating FC s 1 that did not take account of the role of the FC s 1 values would fail to be a harmonious reading for just that reason.

This point is also important because the way that the FC s 1 values are used in the case law is inconsistent with the idea that FC s 1 norms are of higher-order status. As noted, FC s 1 is often used in cluster arguments, or simply cited along with a right or another provision. If FC s 1 values were of higher-order status in relation to the rest of the Constitution, then these arguments would involve it being read alongside lower norms without the necessary attention to keeping its meaning separate from that of the lower norms. It is necessary to keep understandings of FC s 33 independent of PAJA if FC s 33 is to be able to function as a higher order norm. But in practice, in the case law, it is seldom possible to separate what is being said about s 1 from what is being said about other provisions.<sup>95</sup> The fact that the courts do not show concern for this problem supports the idea that there is actually no problem: that FC s 1 is just one part of the Constitution being read along with the others.

Considerations of subsidiarity, in relation to FC s 1, are also better understood in terms of FC s 1's role rather than by treating FC s 1 values as higher order norms. If FC s 1 values were of higher order status, then considerations of subsidiarity would imply that cases should be resolved in terms of other provisions where possible. As noted, however, FC s 1 is used far more haphazardly than this in cluster arguments, and with no suggestion that there is a subsidiarity issue at stake. The role of the section explains this practice better. If FC s 1 is a set of descriptive principles, then it will often be of some weight in interpretative exercises, and so whether it will be cited depends on the degree of that weight and the degree to which individual judges prefer to construct their arguments that way. The real considerations of subsidiary arise simply from the fact that FC s 1 is harder to amend, and this is also reflected in the case law. There will be an understandable reluctance to rule too freely that FC s 1 prohibits or requires something simply because that will be very hard to change. Significant considerations of subsidiarity therefore arise when making findings about what would be *incompatible* with a FC s 1 value, in a way that is not true when one is only finding that the value has weight in a situation, and merely serves to underline another provision's importance.

Finally, this understanding is compatible with FC s 1's super-entrenchment. The difficulty of changing a provision is relevant to, but not determinative of, whether it is a higher order norm. It is true that one key indicator that constitutional provisions are of higher status than ordinary law is indeed that ordinary law is not entrenched and so is easier to change. But the fact that constitutional amendments to provisions outside the Bill of Rights are harder to pass if they affect provinces does not mean that non-rights provisions affecting provinces are of higher order

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95 See §13.3(a)(ii) *supra*.



status than ones that do not.<sup>96</sup> Instead, higher order status depends on how authority is understood in a legal system. For example, the fact that statutes override the common law, rather than the other way round, has nothing to do with how easily the two types of law can be changed; it is due to our understanding of legislative authority. The super-entrenchment of FC s 1, therefore, does not necessarily imply that it is norm of higher-order status. It only indicates something about its role in the constitutional mechanism, as we have seen, and *that* determines its relationship to other provisions.

## (ii) FC s 1's relationship to law outside the Constitution

Since non-constitutional law is subject to the Constitution, FC s 1 clearly has an effect on non-constitutional law. But should we understand FC s 1 to have a legal effect on the rest of the Constitution, which in turn has an effect on non-constitutional law, or should it be possible for FC s 1 to affect non-constitutional law, such as statutes, directly? It is submitted that the rule should be that ordinary law must comply with the Constitution as *described by FC s 1*, meaning that FC s 1 has only an indirect legal effect on non-constitutional law.

Research for this chapter uncovered no exception in the case law to the rule that FC s 1 is always applied via another constitutional provision. The case that comes closest is the High Court decision in *De Lille*,<sup>97</sup> which dealt with a statutory provision that a judge should immediately cease proceedings on a question if Parliament certified that the question concerned parliamentary privilege. Whilst *De Lille* mentioned several other constitutional provisions, it did not use them as part of a cluster argument. Instead it held that the statutory provision was invalid on the basis of FC s 1(c) considered alone, and having made that finding, added that the statutory provision was also inconsistent with the other sections, including FC s 2.<sup>98</sup> However, this aspect of the decision was impliedly overruled by the SCA on appeal. The SCA relied only on FC s 2's supremacy clause and the FC ss 57 and 58 provisions on parliament's power to invalidate the statutory provision.<sup>99</sup> The best understanding adopts the SCA's reading but understands these provisions as giving effect to FC s 1(c).

The legality cases, on the interpretation offered above, do not represent the application of FC s 1(c) directly to exercises of public power. Instead, they understand legality as a structural principle of the Constitution as a whole, linked to a range of provisions, which gives effect to FC s 1(c). *NICRO*'s ruling that FC s 1 values should not be relied on to subvert mechanisms in the Bill of Rights is a further strong suggestion that FC s 1 should not be applied separately or to do something other than what is contained in the rest of the text.

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RS6, 04-14, ch13-p28

On the descriptive understanding, this makes sense. According to it, FC s 1 gives us information about the special importance of some of what is elsewhere in the text, rather than being a broad reservoir of principle that might need to have a more expansive legal effect on all law. It is therefore logical that FC s 1 is used to read other constitutional provisions, which are then applied. It is also riskless, since there is nothing that FC s 1 could contain that would not be applicable to non-constitutional law or conduct via another provision already.

## (iii) Horizontal application

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96 Compare FC s 74(3)(a) and (b) — see further M Bishop & N Raboshakga 'National Legislative Authority' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2011) 17-19-17-20.

97 *De Lille v Speaker of the National Assembly* 1998 (3) SA 430 (C).

98 *Ibid* at paras 39-41.

99 *Speaker of the National Assembly v De Lille* [1999] ZASCA 50, 1999 (4) SA 863 (SCA), [1999] 4 All SA 241 (SCA) especially at paras 14, 22, 29.

In *Modderklip*, FC s 1(c) was treated as a source of obligations binding on the state. The reason was that the state was the entity, in that context, charged with upholding the FC s 34 right, as understood in light of FC s 1(c). The logic of direct horizontal application is that rights sometimes bind private parties because in some contexts, private parties should also bear responsibilities for upholding the rights of other private parties. By parity of reasoning, then, FC s 1 should be a source of obligations for private parties just as it was a source of obligations for the state in *Modderklip* and the other decisions considered above.<sup>100</sup> This approach is also in line with the African Charter of Human and Peoples' Rights, which provides that '[e]very individual shall have duties', inter alia, 'towards his family and society' and 'the state', and that 'the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.'<sup>101</sup>

This understanding is compatible with the argument just made. The obligations imposed by FC s 1 on private parties are given effect to by the direct horizontal application of rights, so it remains the case that FC s 1 values apply to private conduct via other constitutional provisions. To the extent that rights that have horizontal application fall within the terms of FC s 1 values, those values will have horizontal relevance.

The approach also coheres with the handful of decisions that have some connection to the issue, though little has been said about it directly. In *AAA Investments*, Yacoob J understood the principle of legality to be confined to vertical application cases, with private power being controlled instead via the horizontal application of the Bill of Rights.<sup>102</sup> *Rail Commuters* offers a similar understanding.<sup>103</sup> Treatment of the legality principle tells us little about horizontal application, since it is uniquely concerned with tracing acts of public authority to law,<sup>104</sup> and so can only apply vertically. However, the implication of *AAA Investments* is that FC s 1(c) is given effect to, in that context, by the principle of legality, but that if the power in question had been private, it would be given effect to via the horizontal application of rights, in line with the argument made here.

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RS6, 04-14, ch13-p29

In his minority judgment in *NICRO*, Ngcobo J discusses FC s 1(c) in his limitations analysis, and at one point says that 'convicted prisoners break the law in breach of *their constitutional duty* not to do so'.<sup>105</sup> This, I believe, should be understood as a reference to the FC s 3(2)(b) provision that citizens are 'subject to the duties and responsibilities of citizenship' (which Ngcobo J also cites and which is echoed by his 'duty' language), read with FC s 1(c).<sup>106</sup> Understood this way, this is an example of FC s 1(c) being used as a source of obligations for a private party, enforced via FC s 3(2)(b), just as in *Modderklip* it was a source of obligations binding on the state enforced via FC s 34.

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100 See §13.3(b) supra.

101 African Charter of Human and Peoples' Rights, Arts 27 and 28.

102 *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* [2006] ZACC 9, 2007 (1) SA 343 (CC), 2006 (11) BCLR 1255 (CC) ('AAA') at paras 29 and 39-41.

103 *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20, 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC) at para 76.

104 See, for example, *AAA* (supra) at para 68 (Langa CJ).

105 *NICRO* (supra) at para 147 (emphasis added).

106 This reasoning is in line with the majority judgment in *NICRO* at paras 24-25 (Chaskalson CJ also understands criminals to be 'citizens who commit crimes [and thus] break the law in breach of their constitutional duty not to do so', but he seems to be referring only to FC s 3 here and does not cite FC s 1(c) as Ngcobo J does.)

The High Court decision in *POPCRU*<sup>107</sup> also deserves mention here. In that case, Plasket J drew on the rule of law in FC s 1(c) in the course of depriving the successful trade union of its costs on the basis that it had shown contempt for the Constitution and the law during the labour dispute in question. The judge referred to 'the responsibilities that go hand in glove' with the rights and protections enjoyed by the union.<sup>108</sup> In light of the analysis just discussed and the link the judgment makes between rights and responsibilities, this may be best understood as another instance of a private party bearing duties to uphold the law in terms of FC s 1(c) — although Plasket J does not explicitly state that the union had obligations in terms of s 1. One can also understand the judge's decision as reflecting the fact that he was under an obligation to ensure that his own exercise of public power in resolving the case and exercising his cost discretion upheld FC s 1(c)'s description of South Africa as founded on the rule of law. However, the two readings are not incompatible: indeed, an argument that, in light of FC s 1(c), the court should mark its displeasure at the union's disregard for the Constitution and the courts carries the strong implication that the union had an obligation, in terms of FC s 1(c), not to disregard them.

The application of FC s 1 in this way offers some guidance in interpreting FC s 8(2), which provides that a right in the Bill of Rights is of horizontal effect 'to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.' The latter phrase is a natural way to bring FC s 1 into the horizontal application enquiry: to the extent that the actions of private parties are important in vindicating the description of the Constitution set out in FC s 1, an applicable right should be given horizontal application in order to give effect to that. Despite the naturalness of this reading, however, I will argue below that prudence may dictate that it not exclude a (less natural) reading in which FC s 1 values are enforced via incorporation into the FC s 39(2) enquiry. Given that the Court's approach to application focuses on FC s 39(2) to the exclusion of FC s 8, an approach that does not emphasize FC s 39(2) risks marginalizing FC s 1.<sup>109</sup>

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## **(b) FC s 1 and constitutional amendments**

*UDM (2)* held that once an amendment is introduced into the Constitution, 'there is little if any scope for challenging the constitutionality' of the amendment based on its fit with other provisions.<sup>110</sup> It must simply be read harmoniously with the rest of the Constitution. However, the Court in *UDM (2)*, and subsequently in three cross-border municipality cases, has nonetheless tested the rationality of several constitutional amendments.<sup>111</sup> If the application of the rationality test is an instance of enforcing FC s 1(c), as argued, is there an inconsistency here?

The two positions are reconcilable in a satisfactory manner, because a meaningful distinction can be drawn between them. But in order to make sense of FC s 74(1) it is necessary to draw the distinction in a way that imposes a limitation on the testing of constitutional amendments on the ground of rationality.

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107 *Police and Prisons Civil Rights Union (POPCRU) v Minister of Correctional Services (No. 1)* 2008 (3) SA 91 (E).

108 *Ibid* at paras 78-83. The quoted text appears at para 79.

109 See §13.4(c) *infra*.

110 *United Democratic Movement v President of the Republic of South Africa (No. 2)* [2002] ZACC 21, 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC) ('*UDM (2)*') at para 12 ('Amendments to the Constitution passed in accordance with the requirements of s 74 of the Constitution become part of the Constitution. Once part of the Constitution, they cannot be challenged on the grounds of inconsistency with other provisions of the Constitution. The Constitution, as amended, must be read as a whole and its provisions must be interpreted in harmony with one another. It follows that there is little if any scope for challenging the constitutionality of amendments that are passed in accordance with the prescribed procedures and majorities.' (internal footnote omitted).)

## (i) The distinction between internal and external inconsistency with FC s 1, and the relationship between them

In sum, the rules for constitutional amendments affecting FC s 1 are the following. Just as with any other exercise of public power, the legislature may not act contrary to s 1 when it purports to amend the Constitution. It is not, for example, spared from the legal duty to act rationally just because it is exercising the amendment power.<sup>112</sup> However, FC s 74(1) means that this rule must be subject to an exception: because it is permitted to amend FC s 1, the legislature must be permitted to act contrary to the relevant part of FC s 1 when it seeks to amend it. When it does so, there is little or no room for challenging the result on the grounds that it is inconsistent with other parts of the text, as *UDM (2)* held.

This understanding draws a distinction between what can be called internal and external inconsistency with FC s 1's description. The legislature violates FC s 1 when it does something that belies FC s 1's description. Ordinarily, it does this by acting in a manner contrary to that description: by acting irrationally, by legislating contrary to the value of multi-party democracy, and so on. The consequence of

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acting in this way is constitutional invalidity, because the activity done in terms of the Constitution does not fit the Constitution. This is an external inconsistency, referring to something outside the text done in terms of it.

Constitutional amendments, however, introduce the additional possibility of an internal inconsistency. One can also belie the constitutional description in FC s 1 by changing the constitutional text it describes, such that what FC s 1 says is true of the text may no longer be true of it — an internal, intra-textual inconsistency. When this concern arises, it can be the basis for a challenge that the FC s 74(1) procedure should have been used. If that procedure *is* followed, however, then *UDM (2)* tells us that the result of the perceived internal inconsistency will seldom, if ever, be constitutional invalidity.

The distinction between internal and external inconsistency explains the case law, but the relationship between them is what produces the need for an exception not explicitly articulated in the existing cases (though not contrary to them either).

Any attempt to bring about internal inconsistency is also an act of external inconsistency. An effort to amend the Constitution contrary to FC s 1's existing description of it is an act contrary to the duty to uphold the FC s 1 values, and so is externally inconsistent. Since external inconsistency results in invalidity, the implication would be that it is constitutionally impossible — because to do so would be externally inconsistent — to introduce amendments internally inconsistent with FC s 1. Yet FC s 74(1) makes it clear that this *is* possible, as does *UDM (2)*. Thus, it must be the case that there is an exception to the rule of external inconsistency. An action externally inconsistent with an FC s 1 obligation is constitutionally acceptable if and only if it is an attempt to amend that obligation in accordance with the procedure set out in FC s 74(1).

This sort of exception is in fact a standard feature of any act of constitutional amendment. It is, in a way, inconsistent with the duty to uphold the Constitution to act so as to change it. Yet this must be acceptable, if any amendment at all is to be possible.

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111 Ibid at paras 55, 68-76; *Merafong Demarcation Forum v President of the Republic of South Africa* [2008] ZACC 10, 2008 (5) SA 171 (CC), 2008 (10) BCLR 968 (CC) at paras 62-115 (majority rejecting the rationality challenge); see also paras 166-92 (Moseneke DCJ, upholding the rationality challenge, Madala J, Nkabinde J and Sachs J concurring); para 201 (Madala J, upholding the rationality challenge); paras 260-86 (Ngcobo J, concurring with the majority); paras 306-10 (Skweyiya J, concurring with the majority); *Poverty Alleviation Network v President of the Republic of South Africa* [2010] ZACC 5, 2010 (6) BCLR 520 (CC) at paras 64-76 (rejecting rationality challenge); *Moutse Demarcation Forum v President of the Republic of South Africa* [2011] ZACC 27, 2011 (11) BCLR 1158 (CC) at paras 31-43 (rejecting rationality challenge). See also M Bishop & N Raboshakga 'National Legislative Authority' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS3, 2011) 17-61-17-62.

112 See especially *UDM (2)* (supra) at para 68; *Merafong* (supra) at para 64.

That FC s 1 is super-entrenched alters the requirements for amendment, but it does not alter the logic of constitutional amendment.

Thus, by illustration, it is constitutionally acceptable (indeed, required) for the Court to test constitutional amendments for rationality, but action inconsistent with rationality would *not* be constitutionally impermissible (at least on the basis of FC s 1(c)) to the extent, and only to the extent, that the legislature was seeking to amend the doctrine of legality to abrogate the rationality requirement and had followed the procedure in FC s 74(1) in doing so.

As this example illustrates, this doctrine can have some odd-looking implications. It means that, if it is irrational to pursue a policy of removing the constitutional rationality requirement, the legislature must be permitted to act irrationally to the extent of doing so, should the attempt command the necessary parliamentary majorities. This oddness, however, is the necessary result of FC s 74(1). This outcome might be thought unacceptably nonsensical, but to the extent that this is so, it is submitted that this is better dealt with in terms of a basic structure doctrine that imposes conceptual limits on what can be amended using FC s 74(1).<sup>113</sup> It

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should not be dealt with by denying the logical implications of that section: that one must be able to belie FC s 1's description in the act of amending it, and that if this is done in terms of FC s 74(1), the result will no longer belie FC s 1's description because the amendment will necessarily have changed that description to accommodate itself.

## **(ii) Constitutional amendments and external inconsistency with FC s 1**

The rationality challenges in *UDM (2)* and the cross-border municipality cases are good illustrations of challenges based on external inconsistency with FC s 1. In each case, the claim was that the legislature's decision to enact the policy to which the amendment gave effect was irrational. The precise basis of the challenge was therefore a claim that there was inconsistency between the legislature's decision and FC s 1(c), as given effect to by the rationality component of the doctrine of legality.

This is borne out by the language used in the decisions. For example, *UDM (2)* considers itself, in the relevant part of the judgment, to be testing the rationality 'of the exercise by Parliament of the powers vested in it by the Constitution, including the power to amend the Constitution'.<sup>114</sup> *Merafong* states that the Court is 'unable to conclude that [the legislature] exercised its legislative powers irrationally'.<sup>115</sup> In cases like these, the Court is holding the exercise of legislative power to the obligations imposed by FC s 1(c).

The FC s 1(d) challenge in *UDM (2)* illustrates how, when the FC s 74(1) procedure is not followed, an allegation of internal inconsistency in fact grounds a challenge based on external inconsistency. The argument was that floor-crossing was incompatible with FC s 1(d). But the precise form of the challenge was one of *external* inconsistency: that because the amendment would introduce text incompatible with FC s 1(d), the legislature had failed to act in accordance with the Constitution because the special procedures in FC s 74(1) had not been used.<sup>116</sup>

This is consistent with the analysis presented above: if the FC s 74(1) procedure *had* been followed, then the Constitution would have been validly amended so as to accommodate any internal inconsistency. This is why *UDM (2)* holds that there is little if any scope for a challenge based on internal inconsistency. If the internal inconsistency can be accommodated by re-interpreting FC s 1, there is no constitutional violation

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113 See §13.4(b)(iv) *infra*.

114 *UDM (2)* (*supra*) at para 68.

115 *Merafong* (*supra*) at para 115.

116 *UDM (2)* (*supra*) at para 14.

(because there is not, therefore, really any internal inconsistency). If the internal inconsistency cannot be accommodated by re-interpreting FC s 1, then FC s 1 must be amended via FC s 74(1). But if FC s 1 is validly amended, then the internal inconsistency is accommodated by virtue of the amendment to FC s 1, and if FC s 1 is *not* validly amended, then *that* external inconsistency on the part of the legislature is the reason for the constitutional invalidity of the amendment act. The internal inconsistency is only an indicator of this external breach.

External inconsistency challenges are not, therefore, limited to rationality review in terms of FC s 1(c). Any part of FC s 1 can be the basis for an external inconsistency challenge akin to that in *UDM (2)*, on the basis that its description

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has been violated by an amendment such that the FC s 74(1) procedure should have been used. Furthermore, to the extent that any FC s 1 value imposes obligations on the legislative process, in the way that FC s 1(c) requires all exercises of public power to be rational, the legislative process in passing an amendment may potentially be challenged as externally inconsistent with that obligation, just as in the rationality cases. The only proviso, as noted, is that a value itself is not an obstacle to its own amendment provided that the procedures in FC s 74(1) are followed. FC s 1(c) does not stand as an obstacle to a procedurally valid attempt to amend the legality principle. It would, however, stand as an obstacle to an attempt to amend another part of FC s 1 in the name of an irrational policy, since such legislative conduct would be externally inconsistent with FC s 1.

### **(iii) Constitutional amendments and internal inconsistency with FC s 1**

While internal inconsistency is not itself a basis for challenging a constitutional amendment, some details of its effect in the amendment process merit further comment.

The basic FC s 1 enquiry is whether any constitutional activity maintains fidelity with its description. The same applies to constitutional amendments, where the enquiry is: would the Constitution, as purportedly amended, still fit its FC s 1 description? If the answer is no, then the amendment will not be valid unless passed in accordance with FC s 74(1). Does this mean that any constitutional amendment that falls into this category must include an explicit amendment to the wording of FC s 1?

It might be thought that the answer is no. One can accommodate an amendment that brings about a change in an area described by FC s 1 simply by re-interpreting that part of FC s 1, which implies that one can amend FC s 1 tacitly. But if one can accommodate an amendment by re-interpretation of FC s 1, then the amendment has not in fact broken fidelity with FC s 1 and internal consistency is maintained. That implies that any amendment that really is contrary to FC s 1 would have to change the text of FC s 1, and that any amendment that can be accommodated by mere re-interpretation is not an amendment that is contrary to FC s 1 and does not require passage according to FC s 74(1).

This, it is submitted, is the correct answer.<sup>117</sup> The alternative is to hold that there is a fixed meaning to the FC s 1 values, which captures the Constitution as it was written in 1996, such that any change to that meaning (even if it could be accommodated by a reasonable re-interpretation of the FC s 1 text) is an amendment of FC s 1. That is a kind of value-originalism, under which the constitutional values mean what the drafters thought they meant. South African constitutionalism rejects that sort of originalism. It understands values as living values. Accordingly, FC s 1 values should be subject to re-interpretation, short of amendment.<sup>118</sup>

Requiring amendments contrary to FC s 1 to amend the text explicitly is also valuable in light of the argument, made above, that the usual rule of external inconsistency with FC s 1 is subject to an exception when FC s 74(1) is engaged

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117 See also Bishop & Raboshakga, 17-15-17-16, taking a similar approach to FC s 74(1).

118 See also §13.2(b).

and a part of FC s 1 is being amended. If the legislature is permitted to act contrary to parts of FC s 1 in those cases and only those, it is valuable on general rule of law grounds that those cases are clearly and publicly identified, and that the legislature makes explicit which part of FC s 1 it is amending and to what extent.

The conclusion that FC s 1 values should be subject to re-interpretation to accommodate amendments where possible does reduce the protection that FC s 1 might potentially be used to provide. It implies that one could make substantial changes without the FC s 74(1) super-majorities in Parliament by simply contending that the FC s 1 values affected require re-interpretation to accommodate the change. There are two points to make here.

First, that the protection afforded by FC s 1 is open to interpretation is the inevitable consequence of using open-ended terms to pick out the super-entrenched features of the Constitution. *UDM (2)*'s discussion of an 'essential component' shows what the enquiry will necessarily be: is the purported amendment so contrary to the FC s 1 values that there is no plausible way to understand the Constitution, as purportedly amended, as being what FC s 1 describes it to be? That sort of enquiry is inevitably debatable in marginal cases.

*UDM (2)* illustrates how this understanding reduces the potential scope of the protection offered by FC s 1. The floor-crossing legislation in *UDM (2)* passed the test: since one can reasonably describe a system permitting floor-crossing as 'a multi-party democracy', the FC s 1(d) description was not belied. It might nonetheless be argued that the amendment was contrary to the richer conception of democracy that can be drawn from the provisions of the Final Constitution, and it might be argued that this is linked to the FC s 19 voting right, such that the floor-crossing bill constituted an amendment to FC s 19 and should have been passed in accordance with FC s 74(2), as an amendment to the Bill of Rights. Whether this argument is right is not relevant here. What is relevant is that, on the understanding of FC s 1 presented here, this richer, broader conception of democracy goes well beyond the essential core of FC s 1(d). An understanding that only treats as super-entrenched what is contrary to the essential core of FC s 1 values increases the degree to which constitutional content is only ordinarily entrenched.

However — and this is the second point — the degree of protection is nevertheless more substantial than it may appear at first glance. The reason lies in the underlying logic of the argument. Upholding FC s 1 means ensuring that it remains an accurate description of the Constitution. This logic means that, although one can re-interpret FC s 1 to accommodate an amendment, one cannot do so in such a way that the description no longer holds good for other provisions of the Constitution. The test is not, in other words, whether the purported amendment can be brought within the (rather open-ended) terms of FC s 1's language, but whether it can be brought within an understanding of that language that also continues to be an accurate description of the text as a whole. This is a satisfying way to understand living value-based constitutionalism: it permits the South African community to continuously re-interpret their Constitution, but it is also quite a significant constraint. Ordinarily, FC s 1 stands to demand that any interpretation of the rest of the Constitution must match its description. When

the re-interpretation of FC s 1 is at issue, the restriction works in reverse, and the Constitution as a whole stands as a constraint on ingenious interpretations of FC s 1's language to accommodate particular amendments.

#### **(iv) Basic structure doctrine**

Basic structure doctrine argues that some features of a constitution cannot be amended. FC s 1 is not a plausible basis on which to ground arguments for a South African basic structure doctrine, because the Final Constitution in FC s 74(1) explicitly provides for its amendment. Amendment may require a higher threshold, but the fact that 75% of Parliament and six of the nine provinces can amend FC s 1 is a decisive rebuttal to any

suggestion that FC s 1 means that there are features of the Constitution that can never be amended.<sup>119</sup> As with the circumstances in which the Constitutional Court can consider the constitutionality of a bill after it has been passed by the legislature but before signature by the President or the provincial Premier, the text here confronts us with a clear rule and, as *Doctors for Life* held in relation to these rules, it must be respected without exceptions for special circumstances.<sup>120</sup>

The German basic structure doctrine is a useful point of comparison here. The German approach, like the South African one, is that 'a constitution has an inner unity' and that 'as a unit, a constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate'.<sup>121</sup> However, the relevant provision in the German Basic Law, Art 79(3), provides that certain of those principles are above amendment, where the South African equivalent, FC s 74(1), provides the opposite.<sup>122</sup> FC s 1, therefore, operates on the basis of a similar logic to the German mechanism; it is just not *absolutely* entrenched as the German mechanism is.

Recognising this does not rule out the possibility of a South African basic structure doctrine of the sort developed in India. But the presence of FC s 1 and FC s 74(1) does impose some restrictions on the form it can take.<sup>123</sup> Most importantly, their presence is very problematic for a basic structure doctrine

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constructed simply on the basis that certain features cannot be amended because they are part of the Final Constitution's deep structure.

One problem arises because some deep structural principles (like legality) are taken to be included in FC s 1, but others (like the separation of powers) are not.<sup>124</sup> Arguing that deep structural status makes a provision un-amendable, then, implies that the deep principles that were given special protection in FC s 1, which are amendable under FC s 74(1), are *less* protected than the deep principles that were left out, which on this hypothesis are not amendable at all. This type of basic structure argument makes inclusion in FC s 1 a ground for less than the fullest constitutional protection, which goes directly against the grain of the section's prominence, wording and treatment in FC s 74.

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119 See also the discussion elsewhere in this work by Bishop & Raboshakga (*supra*) at 17-62-17-63.

120 *Doctors for Life International v Speaker of the National Assembly & Others* [2006] ZACC 11, 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC) at paras 42-56. FC s 167(4)(b) provides that the Constitutional Court may only consider the constitutionality of a bill in these circumstances as provided under ss 79 and 121, which provide for reference to the Constitutional Court by a President or Premier doubtful of a bill's constitutionality, after she has referred the bill back to the legislature concerned for reconsideration. Section 74(1) states a similarly clear rule.

121 1 BVerfGE 14, 32 (1961) (Southwest State case), as quoted and translated by DP Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd Edition, 1997) 67.

122 German Basic Law, Art 79(3) reads: 'Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.' Art 1 protects dignity; Art 20 provides that Germany is a democratic and social federal state based on popular sovereignty, expressed by elections and representative democracy, protects constitutional supremacy and grants Germans the right to resist attempts to abolish the constitutional order if no other remedy is available.

123 The precise legal basis and extent of Indian basic structure doctrine remains the subject of some controversy. See especially R Dhavan *Parliamentary Sovereignty and the Supreme Court* (1978); S Krishnaswamy *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (2009). The restrictions imposed by FC s 1 and FC s 74(1) may therefore be a blessing in disguise for a South African doctrine by narrowing the doctrinal space somewhat.

124 See *South African Association of Personal Injury Lawyers v Heath* [2000] ZACC 22, 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC) at paras 18-22, and most recently *Justice Alliance of South Africa v President of the Republic of South Africa* [2011] ZACC 23, 2011 (5) SA 388 (CC), 2011 (10) BCLR 1017 (CC) at para 32 ('The principle of the separation of powers emanates from the wording and structure of the Constitution.')



Another problem is that it is quite hard to make sense of what might be thought un-amendable if everything in FC s 1 is amendable. To use the same example, the doctrine of separation of powers is not included in the text of FC s 1 and is understood as a structural principle of the Constitution as a whole. But is there really a meaningful separation of powers principle left if constitutional supremacy is amendable, if the rule of law is amendable, and if representative democracy is amendable? It is not impossible to think of some content that might be left, but there might not be much to gain from the exercise. For example, one could protect judicial interpretative authority, via the separation of powers, but judicial interpretative authority has little bite if constitutional supremacy can be amended. FC s 1 covers too many fundamentals for a basic structure doctrine that covered only things it did not cover to have very much appeal.

However, these problems can cut both ways. Both the problems just set out assume that, in virtue of FC s 74(1), all and everything in FC s 1 is amendable. As noted above, however, that idea has some potentially troubling implications of its own. It implies, for instance, that the legislature is permitted to alter the legality principle requiring that all exercises of public power be rational. And if, as is plausible, it is thought that it would in itself be irrational to remove the rationality requirement, then in light of the argument that the legislature must be permitted to act inconsistently with FC s 1 for the purposes of amending it, the implication is that there is constitutional room for the legislature to act irrationally but validly.<sup>125</sup> That looks odd; but the alternative, to argue that the legislature may never act irrationally, seems to defy FC s 74(1)'s apparent implication that sufficiently large majorities of the legislature may amend FC s 1(c) if they wish to.

These sorts of problems can be addressed by the approach mentioned (but not instituted) in the 1996 decision in *Premier KwaZulu-Natal v President of the Republic of South Africa*.<sup>126</sup> On this view, the precise basis for the basic structure doctrine is the limit on what a constitutional 'amendment' can be said to be. It relies on an

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argument that too fundamental a change is not an 'amendment', but is instead an attempt to destroy the constitution, or to substitute a new one.<sup>127</sup> If a change does not count as an amendment, but as something else, such as a re-writing or a replacement, then there may be limits to the extent to which FC s 74(1) can be used to alter FC s 1. *UDM (2)* does not rule out such a doctrine; indeed, it explicitly left the issue open.<sup>128</sup>

This view is compatible with the idea that principles such as rationality are absolute and public power may never be exercised irrationally, because changing that principle would be so drastic a change, contrary to so much of the idea of the Constitution, that it should not be considered a mere amendment. But by permitting change short of that, this view can nevertheless give meaningful content to FC s 74(1) and the power of (mere) amendment it envisages.

That argument depends on there being some changes that could be made to FC s 1 that would be sufficiently minor to be considered mere amendments under a plausible

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125 See §13.4(b)(i)-(ii) above.

126 [1995] ZACC 10, 1996 (1) SA 769 (CC), 1995 (12) BCLR 1561 (CC).

127 *Premier KwaZulu-Natal* (supra) at paras 47-49 (noting the Indian doctrine but leaving open the question of whether the doctrine applies in South Africa).

128 *UDM (2)* (supra) at paras 15-17. The Court's earlier statement (para 12) that 'there is little if any scope for challenging the constitutionality of amendments' passed validly must therefore be read subject to the basic structure question being left open. *Premier KwaZulu-Natal* in fact adopts an almost identical approach to the point: it, too, holds that if the proper procedures are followed an 'amendment is constitutionally unassailable' and cannot be challenged as inconsistent with other parts of the Constitution, subject to the possibility that a basic structure doctrine might apply in extreme cases. *Premier KwaZulu-Natal* (supra) at paras 33 and 47. The only difference, in fact, is that *Premier KwaZulu-Natal* states that subsequent amendments would 'repeal' earlier provisions to the extent of a conflict, while *UDM (2)* prescribes reading the provisions together as harmoniously as possible. See *Premier KwaZulu-Natal* (supra) at para 8; *UDM (2)* (supra) at para 12.

basic structure doctrine. This condition is quite easy to meet. Any basic structure doctrine would be compatible with *adding* content to FC s 1, so any basic structure doctrine is capable of explaining FC s 74(1) as existing for that purpose, at least. Furthermore, it is possible to think of deletions from FC s 1 that would not necessarily impinge on a plausible basic structure doctrine. A future society that placed more weight on animal rights might, for example, delete the word 'human' in front of 'dignity' in FC s 1(a). A society that placed less weight on representative democracy might strike all the words from FC s 1(d) except 'accountability, responsiveness and openness', relying on the reference to a 'democratic state' in the opening words for democratic content of representative and other kinds.

Both of these deletions actually serve to expand FC s 1's scope. It is harder to think of deletions that *narrow* FC s 1's scope that would not run up against a plausible basic structure doctrine. Arguably, the most promising tactic to reduce the effect of a FC s 1 value would not to delete anything, but instead to *add* another value to act as a counterweight to those already there. Deletions are a more troublesome prospect, since the values of FC s 1 are very basic and important. The removal of 'supremacy of the constitution' or 'human dignity' involves changing only a few words, but obviously has very substantial implications. If a basic structure doctrine is to be worth its salt, it would need to protect against these sorts of drastic changes, but is it compatible with FC s 74(1) to exclude changes of this sort from the category of what can be amended?

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More than one answer is possible here, but the descriptive reading of FC s 1 offers a plausible approach. If FC s 1 offers a description of the Constitution, then one might argue that one cannot change that description to the extent that one is effectively describing a new constitution. One may alter the aspects that are super-entrenched, and one may adjust the object and if necessary re-describe it (by amending FC s 1) to accommodate those changes. But that implies re-describing the same entity. To use the earlier metaphor, it implies keeping the constitutional object roughly the same and adjusting how the FC s 1 light falls on it. If one changes the description to a degree that goes beyond this, one is instead seeking to describe a new object. One is saying that South Africa is no longer a state founded on certain values, but is instead a new and different kind of state founded on certain other values, as the change from the Apartheid state to the present one can be said to have involved the creation of a new state based on new values rather than the mere adjustment of the existing one. One is saying that a different *kind* of constitutionalism will now prevail, in the sense that changing to a constitutionalism in which the legality principle is abrogated and arbitrary exercises of power are permitted, or changing to a constitutionalism not founded on the advance of human rights and freedom, is to make a change in kind, and not merely degree.

It falls outside the scope of this chapter to defend that distinction or to decide whether a basic structure doctrine should be recognized in South Africa. It suffices to say that if the argument set out is plausible, then the presence of FC s 1 and the FC s 74(1) provision for its amendment does not necessarily rule out the possibility of a basic structure doctrine in South Africa under the Final Constitution. It may just mean that FC s 1 may be amended, but only to the extent that the effect can still be considered an adjustment of the description of the constitutional object, rather than the creation of a new constitutional object.

## (v) Relationship to CPs

The text of FC s 1 bears a close resemblance to the text of certain Constitutional Principles ('CPs').<sup>129</sup> CP I provides for 'the establishment of one sovereign state' and 'a democratic system of government', covering the opening words of FC s 1. The ideas in FC

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129 The Constitutional Principles are set out in Schedule 4 to the Interim Constitution. To recall, the Constitutional Court was given the task of ensuring that the Final Constitution complied with the CPs. The CPs were a central mechanism in South Africa's negotiated transition. See S Woolman & J Swanepoel 'Constitutional History' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2008) 2-38.

s 1(a) and (b) can be traced to language in CPs I-III and V, which also display the same particular focus on race- and gender-based discrimination that appears from FC s 1(b).<sup>130</sup> The constitutional supremacy language in FC s 1(c) links directly to CP IV: 'the Constitution shall be the supreme law of the land'. The

rule of law is not mentioned in so many words, although several CPs provide for key aspects of it.<sup>131</sup> FC s 1(d)'s language is found in two principles. CP VIII provides that 'there shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters' roll, and in general proportional representation' (the omission of the last five words from FC s 1(d) being significant in *UDM (2)*).<sup>132</sup> CP VI provides for the separation of powers 'with appropriate checks and balances to ensure accountability, responsiveness and openness'. The idea of openness and accountability also appear in CP IX, which provides for 'freedom of information' to this end.

The Constitutional Court ruled that, once it had been certified that the Final Constitution complied with the CPs, they could never again be used to challenge its validity. Their direct legal effect was limited to the process of certification. Thereafter, they were to have only interpretative significance, and in practice they are not often mentioned.<sup>133</sup> Given the degree of textual correlation, however, should FC s 1 be understood as preserving aspects of the CPs in living form with continuing direct legal effect? The implication would be that FC s 1 imposes the enduring requirement that changes to the Constitution be certified for compliance with certain key ideas, unless the change can command 75% support in the National Assembly.

Given the distinction between the once-off certification process and the enduring process of constitutional judicial review, the certification analogy is of limited relevance, but it does serve to make two points. First, the analogy can support the idea that the founding values create obligations and are not of merely interpretative significance. The reason is that the CPs, in general, are already of interpretative significance. Given that some of that content, but by no means all of it, was selected for inclusion in FC s 1, it would make sense to treat the content that was included and specially entrenched as having more weight or status, or at least a different status, than that content which was not. Reading FC s 1 as being of merely interpretative significance does not uphold that distinction, whereas reading the section as obligation-creating does.

Second, the analogy can also be used to support the descriptive understanding of FC s 1. The CPs were intended to identify particular features that the final text had to have in order to be certified. The idea that some of their content was transferred to FC s 1

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130 CP I provides that the state 'is committed to achieving equality between men and women and people of all races'. CP II provides that 'Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties...'. CP III provides that 'The Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity.' CP IV, providing for equality before the law, notes the proviso that this does not preclude affirmative action measures 'including for those disadvantaged on the grounds of race, colour or gender.'

131 CP IV provides that 'the Constitution shall be the supreme law of the land', 'binding on all organs of state at all levels of government'. CP V provides for 'equality of all before the law and an equitable legal process'. CP VII provides that 'the judiciary shall be appropriately qualified, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights.' CP X provides that 'formal legislative procedures shall be adhered to by legislative organs at all levels of government.'

132 *UDM (2)* (supra) at para 29 (relying on omission of the proportional representation language from s 1(d) as an indicator that s 1(d) does not require it).

133 *Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26, 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 43 (future interpreters should interpret sections based on the CP-compliant meaning given to them in the Certification judgment 'save in the most compelling circumstances').

supports the reading of the section as describing certain key features that must continue to be manifested in the text. The sense in which

it would be mistaken for an individual to try and rely on a CP as a source of discrete rights, as opposed to a structural requirement of the text that might be manifested in rights provisions elsewhere in the document, is the same sense in which *NICRO*<sup>134</sup> treats it as mistaken for an individual to rely on FC s 1(d) as a source of discrete rights.

### **(c) Section 1 and the internal mechanism of the Bill of Rights**

The Bill of Rights contains its own internal value provisions in FC ss 7, 36 and 39. They focus on five ideas — human dignity, equality, freedom, democracy and openness. In some respects, these values are broader than those set out in FC s 1, and in some respects, narrower. For example,<sup>135</sup> FC s 1(d) picks out particularly representative elements of democracy and the use of these in particular to achieve openness, while the references to democracy and openness in the Bill of Rights are not so confined. On the other hand, for example, FC s 1 protects the rule of law and constitutional supremacy, which are at most implicit in the Bill of Rights' value terms. The relationship between the two sets of provisions is uncertain. Those in the Bill of Rights had their approximate equivalents in the 1993 text, while the value provisions in FC s 1 had no counterpart in that document and were added on top of the Bill of Rights provisions in the 1996 text.<sup>136</sup> The 1996 drafters did not incorporate guidance as to the relationship between the two mechanisms.

Understanding the relationship between the two mechanisms is further complicated by the fact that judicial discussions of FC s 1 in relation to the operational provisions in the Bill of Rights has the same ad hoc, sporadic character of FC s 1 jurisprudence in general.

### **(i) Judicial use of FC s 1 in relation to the Bill of Rights mechanism: FC ss 8, 36 and 39**

The most commonly used part of the Bill of Rights mechanism is FC s 39(2), which governs the interpretation of statutes and the development of the common law and customary law, and is treated by the Court as the primary mechanism for the application of the Bill of Rights. The case law in relation to this very important section, however, confines FC s 1 to a subsidiary role, when it refers to it at all, and it provides an instructive place to start the discussion.

The crucial decision on the indirect application of the Constitution in the development of the common law is *Carmichele v Minister of Safety and Security*.<sup>137</sup> It proceeds from FC ss 7, 8, 173, along with s 39(2)'s 'spirit, purport and objects' language. It does not mention FC s 1 at all.

It was not until the Supreme Court of Appeal's decision in *Van Eeden* that FC s 1 was cited in this context.<sup>138</sup> Its use has remained quite confined: the important

134 *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* [2004] ZACC 10, 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC)('NICRO').

135 See §13.5(e) supra.

136 See IC ss 33 and 35.

137 *Carmichele v Minister of Safety and Security* [2001] ZACC 22, 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC)('Carmichele') at paras 33-35, 39-40 and 54-56.

138 *Van Eeden v Minister of Safety and Security* [2002] ZASCA 132, [2002] 4 All SA 346 (SCA)('Van Eeden') at para 13.

later decision in *K v Minister of Safety and Security* also cites FC s 1, but only for the 'accountability, responsiveness and openness' language of FC s 1(d). It uses this to argue that judges should openly admit when they are developing delictual liability on the basis of value arguments because these premises should be articulated in an open society.<sup>139</sup> In other words, it uses FC s 1 to show that it should be open about its FC s 39(2) work, not as part of that work itself. Like *Carmichele*, *K* leaves FC s 1 out of the cluster of provisions cited as part of the indirect application mechanism.<sup>140</sup>

Similarly, *Shilubana v Nwamitwa* — *Carmichele*'s counterpart in the customary law context — cites FC s 1 but only to rely on FC s 1(c) in the course of justifying a particular development of customary law. It too does not seek to build FC s 1 into the FC s 39(2) process in general. It is not therefore surprising that while FC s 1 has not been entirely ignored in subsequent FC s 39(2) cases, it is often not mentioned and has not been established as a necessary part of the enquiry.<sup>141</sup>

Similar patchy uncertainty prevails in the FC s 39(2) case law concerning the principle that statutory provisions should be interpreted in line with the Constitution where the wording permits. For some time, the Constitutional Court's decisions under the Final Constitution followed a trajectory begun under the Interim Constitution, notwithstanding the fact that, since the interim text had no equivalent to FC s 1, this approach made no place for the section. The regularly-cited decisions in *De Lange v Smuts NO* and the second *National Coalition for Gay and Lesbian Equality* judgment fall into this category.<sup>142</sup> The decision in *Hyundai* in 2000 broke the pattern, holding that '[t]he purport and objects' of the Constitution 'find expression in FC s 1, which lays out the fundamental values which the Constitution is designed to achieve'.<sup>143</sup> It links this directly with the constitutional requirement that judicial officers read legislation in line with the fundamental values of the Constitution where possible.<sup>144</sup> However, the subsequent decision in *Walters* reverts to referring only to the value language of FC s 39 (and to individual rights) to the exclusion of FC s 1, although it cites *Hyundai*.<sup>145</sup> Since it does not engage the point, *Walters* can hardly be said to overrule *Hyundai*, nor is there any reason at all to think the *Walters* Court would have wanted to do that, any

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more than there is a reason to think that the Court in *Carmichele* was concerned to exclude FC s 1 from the development of the common law. The decisions suggest inattention, not rejection. In light of this, it is again unsurprising that, while there are

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139 *K v Minister of Safety and Security* [2005] ZACC 8, 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC), [2005] 8 BLLR 749 (CC) at para 23.

140 *Ibid* at paras 15-19.

141 Section 1 is cited, for example, in *Van Eeden* (supra) at para 13 and in the concurring judgment of Froneman J in *F v Minister of Safety and Security* [2011] ZACC 37, 2012 (1) SA 536 (CC), 2012 (3) BCLR 244 (CC), 2013 (2) SACR 20 (CC) at para 139. The other judgments in *F*, however, do not consider s 1. See also, for example, *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30, 2012 (1) SA 256 (CC), 2012 (3) BCLR 219 (CC).

142 *De Lange v Smuts NO* [1998] ZACC 6, 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at para 85; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17, 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) at paras 23-34, following the decisions under the interim Constitution in *S v Bhulwana*; *S v Gwadiso* [1995] ZACC 11, 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC) at para 28 and *Bernstein v Bester NO* [1996] ZACC 2, 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) at para 59.

143 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* [2000] ZACC 12, 2000 (10) BCLR 1079 (CC), 2001 (1) SA 545 (CC) ('*Hyundai*') at para 22.

144 *Ibid* at paras 22-26.

145 *Ex parte Minister of Safety and Security: In re S v Walters* [2002] ZACC 6, 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC) ('*Walters*') at paras 26, 28 and 34.

examples of FC s 1 being used in the context of statutory interpretation,<sup>146</sup> that usage has been patchy, and FC s 1 is often ignored or *Hyundai* is cited but with no explicit consideration of FC s 1 accompanying the citation.<sup>147</sup>

A similar pattern may be observed in relation to the FC s 36 limitations enquiry. Just as the pattern in statutory interpretation was set by decisions under the Interim Constitution, so the approach to FC s 36 has been significantly influenced by *S v Makwanyane*.<sup>148</sup> This may explain why an important later decision like *S v Manamela*, decided under the Final Constitution, states that FC s 36 involves a holistic judgment to be conducted 'without losing sight of the ultimate values to be protected', but does not consider FC s 1, although it cites *Makwanyane*.<sup>149</sup> *Walters* is also strongly reminiscent of the approach under the Interim Constitution. It refers to values but not to FC s 1, as it did in relation to the FC s 39(2) enquiry in that case. Indeed, it goes so far as to describe the rights at stake in that case as 'individually essential and collectively foundational to the value system prescribed by the Constitution', but does not mention FC s 1.<sup>150</sup> Once again, some FC s 36 decisions do consider FC s 1 values. An important example is *Islamic Unity Convention*, which draws on the founding values of dignity and equality in the limitations enquiry.<sup>151</sup> Perhaps not coincidentally, the decision approaches the question via not only *Makwanyane*, but also *Hyundai*.<sup>152</sup> But once again, there is no consistency in the approach and FC s 1 is often not considered.

Similar patterns may also be observed in the other operative provisions, which generally receive less judicial attention. The discussion of the subsections of FC s 1 below will offer a number of examples of the use of 1 in the interpretation of individual rights, but as I've already noted,<sup>153</sup> the courts' use of FC s 1 in rights interpretation is sporadic. FC s 39(1)(a) is not usually explicitly cited in this process, although it offers a natural basis for this application of FC s 1.<sup>154</sup> The text of FC ss 8(2) and 8(4) also offers natural openings for the incorporation of FC s 1 values into those enquiries. In those cases that do consider FC s 8, FC s 1's role is once

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again uncertain. Research for this chapter uncovered no case in which FC s 1 is used in relation to the FC s 8(4) enquiry. As far as FC s 8(2) is concerned, *Khumalo v Holomisa* does cite FC s 1 in interpreting the FC s 16 right to expression.<sup>155</sup> The FC s 1(d) text on accountability, responsiveness and openness is cited in support of the importance of

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146 See, for example, *Minister of Safety and Security v Van der Merwe* [2011] ZACC 19, 2011 (5) SA 61 (CC), 2011 (2) SACR 301 (CC), 2011 (9) BCLR 961 (CC) at para 52 (FC s 1(c) as a basis for an intelligibility requirement for warrants issued under the Criminal Procedure Act).

147 See, for example, *South African Police Service v Police and Prisons Civil Rights Union* [2011] ZACC 21, 2011 (6) SA 1 (CC), 2011 (9) BCLR 992 (CC) at paras 29-31 (simply citing *Hyundai* (supra)); *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of South Africa Ltd t/a Wesbank v Minister of Finance* [2002] ZACC 5, 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) ('FNB') (no mention of s 1).

148 *S v Makwanyane & Another* [1995] ZACC 3, 1995 (3) SA 391 (CC), 1995 (2) SACR 1 (CC), 1995 (6) BCLR 665 (CC); Iain Currie & Johan De Waal *Bill of Rights Handbook* (5th Edition, 2005) 177.

149 *S v Manamela & Another (Director-General of Justice Intervening)* [2000] ZACC 5, 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC) at paras 32-33.

150 *Walters* (supra) at para 22.

151 *Islamic Unity Convention v Independent Broadcasting Authority* [2002] ZACC 3, 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC).

152 *Ibid* at paras 45-51.

153 See §13.3(a)(iii) supra.

154 FC s 39(1)(a) is considered under the next heading.

freedom of expression in the context of the activities of the media. This idea is later treated as relevant to the 'intensity of the right' in the course of conducting the FC s 8(2) enquiry.<sup>156</sup> *Khumalo* also refers to the value of dignity, citing decisions that rely in part on FC s 1. However, *Khumalo* does not treat FC s 1 as a necessary part of the FC s 8(2) enquiry.<sup>157</sup> Given the paucity of decisions on direct application, the status of FC s 1 remains uncertain here too.

## (ii) Approaches to the relationship between FC s 1 and the Bill of Rights mechanism

On the descriptive understanding, the Bill of Rights mechanism gives effect to the values in FC s 1. Accordingly, at some level, it is of little import that its value terms are different to those in FC s 1: the Bill of Rights mechanism should not be enforced in a manner that belies the description set out in FC s 1, so a result cannot constitutionally be reached in terms of the Bill of Rights that serves to circumscribe FC s 1 values. The question is not whether the Bill of Rights mechanism is compatible with FC s 1, for it must be made compatible, but precisely how the relationship should be understood and where the impact of FC s 1's constraints should be felt.

More than one approach is possible. One option is to fix particular operative provisions of the Bill of Rights mechanism as the avenues for ensuring that FC s 1's description is upheld, and incorporate the full impact of FC s 1 into the Bill of Rights via those parts of its mechanism only. FC s 39(1)(a) would be the most natural choice. Unlike the other Bill of Rights value provisions, it refers to '*the values that underlie an open and democratic society based on human dignity, equality and freedom*' (emphasis added) and so offers a particularly plausible entry point for FC s 1. If one understands FC s 1 to be a statement of these values, or of a very important subset of them, then FC s 39(1)(a) will be the mechanism that obliges any 'court, tribunal or forum', 'when interpreting the Bill of Rights', to ensure (inter alia) that the description in FC s 1 is upheld.

This approach would naturally link up with three other parts of the Bill of Rights mechanism: the enquiries into the 'nature of the right' and the 'nature of any duty imposed by the right' in FC s 8(2) (whether a right is directly horizontally applicable),<sup>158</sup> FC s 8(4) (whether a juristic person is entitled to a right) and FC s 36(1) (the limitations enquiry). If FC s 1 affects the interpretation of the

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individual rights via FC s 39(1)(a), then as a result of that its impact will be felt at all stages of the Bill of Rights mechanism.

This approach is attractively neat, but it does not fit with some of the decisions in this area. Most importantly, *Hyundai* finds that the 'purport and objects' of the Bill of Rights referred to in FC s 39(2) 'find expression in s 1, which lays out the fundamental values which the Constitution is designed to achieve.'<sup>159</sup> In other words, FC s 1 is not confined to the interpretation of individual rights, but is also to be used to understand the value terms found in FC s 39(2) — and presumably also, therefore, the identical language in FC ss 7 and 36. Although it does not cite FC s 1 explicitly, *Walters* understands FC ss 39(1)

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155 *Khumalo & Others v Holomisa* [2002] ZACC 12, 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC). For more on application, see S Woolman 'Application' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) Chapter 31.

156 *Ibid* at paras 22-24.

157 *Ibid* at paras 25-27 and 41, relying inter alia on *Dawood & Another v Minister of Home Affairs & Others* [2000] ZACC 8, 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) ('*Dawood*') and *S v Mamabolo* [2001] ZACC 17, 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC) ('*Mamabolo*'). See also §13.5(e).

158 See also §13.4(a)(iii) supra. For more on limitations analysis, see S Woolman 'Application' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2007) Chapter 34.

159 *Hyundai* (supra) at paras 22-26.

and 39(2) as requiring the same thing: that all interpretation is done 'so as to promote the value system of an open and democratic society based on human dignity, equality and freedom.'<sup>160</sup> The *Walters* reading can be objected to on the basis that it blurs the textual differences between FC s 39(1) and FC s 39(2), but what is important here is that its implication, too, is that FC s 1 is to be applied to the value terms throughout the Bill of Rights mechanism, and not just at the interpretation stage.

These decisions suggest a second approach, in which FC s 1 is not tied to particular entry points into the Bill of Rights. This approach proceeds from the descriptive understanding's view that every provision in the Final Constitution's text potentially serves to give effect to the FC s 1 description, and no provision should ever be used in a way that belies it. A judge must simply keep in mind, at every step, the question of whether that description is being upheld. If it is not, then the step in question is being performed in an unconstitutional fashion.

The chief advantage of the first approach, apart from technical neatness, is that judges might be more consistent in applying FC s 1 if there were a defined place in the Bill of Rights enquiry where that application is supposed to occur. As we have seen, s 1 usage in this context is sporadic. However, it is submitted that the second approach is the better option, for several reasons. One, the first approach is really shaped to the idea of FC s 1 as a reservoir of broader value, which should be built into the enquiry, but only at one stage to avoid duplication. On the descriptive account, however, FC s 1 is a description that must constantly be vindicated, and so an approach that treats FC s 1 as potentially relevant at any stage is a better fit. Two, the second approach is in keeping with the present case law, which as noted is incompatible with the idea that FC s 1 applies only via FC s 39(1)(a).

Three, there are pragmatic reasons to favour the second approach, stemming from the uncertainty over the Final Constitution's application mechanism and the extent to which important parts of it, particularly in relation to direct application, the rights-based obligations of corporations, and so on, remain significantly under-explored. As a result, we are currently poorly placed to know what it will require to uphold FC s 1 in these contexts. Considerations of minimalism militate against making findings that confine FC s 1 to certain sections, since if these prove inadequate to give effect to the FC s 1 description in all cases, those findings will establish unconstitutional mechanisms. An illustration may assist here. One possible, but currently only

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potential, application of FC s 1(c)'s rule of law language is as the basis for a general proportionality analysis in cases where FC s 36 does not apply. However, if we were to cement s 1 into certain defined roles in the Bill of Rights mechanism, we would be unlikely to treat it as a basis for proportionality analysis, since (we would say today) FC s 36 already does that. If done too rigidly, that would close off the possibility of a general proportionality analysis based on the idea of the rule of law — and it is hard to know, today, whether that is wise or not, or whether closing off that option will be the best way to give effect to FC s 1 in all contexts. Accordingly, it may be best to avoid confining FC s 1's application at this stage.

### **(iii) Critiquing the case law on FC s 1 and the Bill of Rights mechanism: a way forward**

If the second approach were adopted, what implications would this have for how judges should approach the operative provisions of the Bill of Rights? Would judges be obliged to consider in every case whether the FC s 1 description is being upheld, as FC s 39(2) is understood to require judges always to consider whether the common law or customary law requires development or whether statutes should be interpreted in line with constitutional values?<sup>161</sup> It is submitted that this is not the result. FC s 1 only *must* apply when there is a risk that its description is being contradicted. Unless that risk is

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160 *Walters* (supra) at para 26.



apprehended, effect is given to s 1 when effect is given to the Final Constitution it describes. Thus, for example, the peremptory obligation following from FC s 39(2)'s 'must' language can be understood as ensuring that FC s 1's description is upheld in interpretation. One does not also have to explicitly consider FC s 1, because FC s 1 is not separate to this mechanism, and so to apply the one is to give effect to the other.

This — it may be objected — leaves judges open to continue the inconsistent approach to FC s 1 in the context of operative provisions of the Bill of Rights that was set out above. In fact, while this approach entails a pair of firm criticisms of the existing case law, it should also prompt recognition that the patchy approach is not as incorrect as it might appear.

First, there can be no justification for continuing Interim Constitution approaches under the Final Constitution that do not take account of changes in the 1996 text. *Fedsure*, whether because it cited FC s 1 pre-emptively or because of the associated constitutional jurisdiction dispute, was quickly updated for the Final Constitution in *Pharmaceutical Manufacturers*.<sup>162</sup> The same must happen to other Interim Constitution precedents that deal with foundational values. That hardly implies that they may no longer be cited — *Fedsure* continues to be cited — but their use must come with an obligation to acknowledge and embody the changes to FC s 1 in the 1996 text.

Second, the current judicial approach suffers from *inattention* to FC s 1. According to the argument presented, it is not the case that an *incorrect* approach has been adopted to FC s 1, and that this has marginalized it. Instead, this has happened because FC s 1 suffers from being overlooked. It is submitted that this is because the role of FC s 1 has been uncertain, and perhaps also because

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the understanding of its role as some broad reservoir of values has made it seem redundant in light of the value provisions internal to the Bill of Rights. The understanding presented in this chapter offers a sharper question unique to FC s 1 — is the FC s 1 description being threatened here? — and so may assist in addressing this uncertainty.

Finally, the implication of this understanding is that the patchiness of the case law is to some extent to be expected. Mostly, courts give effect to FC s 1 by the ordinary functioning of the constitutional mechanisms. So long as one is in the realm of ordinary functioning, it is not obligatory to cite FC s 1. The duty of courts to ensure that the Final Constitution is being upheld is, in normal functioning, contained elsewhere, via peremptory enquiries such as *Carmichele*'s, FC s 172(1)(a)'s requirement to declare unconstitutional law or conduct invalid, and so on. As a result, the obligation to invoke FC s 1 arises only when there is some reason for doubt that the mechanism is functioning as it should. This situation has not arisen often since 1996. Most citations of FC s 1, then, have come in marginal cases or in judgments where courts have simply wished to underscore provisions where citation will be largely a matter of individual judicial style. The uneven use of FC s 1 in Bill of Right cases is explicable on the same basis as the erratic citation of FC s 1(c) in the legality cases.<sup>163</sup>

## 13.5 The founding values

### (a) The section as a whole

Little content has been given to the idea of FC s 1 as a whole. Generally, even where an engagement is framed as an engagement with the section, the discussion quickly focuses on specific sub-clauses. In *S v Ntuli*, the first case to consider FC s 1, Chaskalson

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161 *Carmichele* (supra) at paras 37-39; *Shilubana and Others v Nwamitwa* [2008] ZACC 9, 2009 (2) SA 66 (CC), 2008 (9) BCLR 914 (CC) at para 48; *FNB* (supra) at para 31.

162 See §13.3(b)(ii)-(iii) supra.

163 See §13.3(b)(ii)-(iii) supra and §13.5(d)(i) infra.

P held that the section was 'to the same effect' as the Preamble: it records 'that one of the goals of the Constitution is to establish a society based on the recognition of fundamental human rights.'<sup>164</sup> However, he soon focused on specific clauses in approaching the questions of that case, and this has continued to be the pattern.

*Justice Alliance of South Africa* similarly begins its interpretation by citing the whole of FC s 1, but in fact focuses on FC s 1(c) and in particular the rule of law.<sup>165</sup> *S v Boesak*, interpreting FC s 12(1)(a)'s requirement that deprivations of freedom be only 'for just cause', held that the phrase must be interpreted in a manner 'grounded upon and consonant with the values of s 1' and the text as a whole.<sup>166</sup> But in practice, that application happens via specific clauses, as is illustrated in the later decisions in *S v Thebus*, which followed *Boesak*, and *S v Mamabolo*, which adopted a similar approach.<sup>167</sup>

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The lone dissent of Madala J in *Metcash Traders* can be interpreted as reading an additional sort of content into FC s 1. Madala J argued that it is 'when the administration of justice is likely to fall into disrepute and when the foundational values of the Constitution and the rule of law are threatened that this Court's legitimate role as the protector of those values comes into play'.<sup>168</sup> This appears to be what he has in mind when he later states that the facts of that case required 'this Court as guardian of the Constitution to fulfill its duty under s 1 and s 38'.<sup>169</sup> Since Madala J finds that the FC s 9(1) right to equality has been violated, it makes sense that FC s 38 is cited, since it is a special empowering provision where courts become aware of a threat to rights. However, the suggestion that FC s 1 is a provision like FC s 38 can confuse. We should understand Madala J to mean that FC s 1 imposes obligations on courts to ensure that its description of the Final Constitution as upholding certain values is not belied. This FC s 1 obligation is given effect to by FC s 38, and by the other constitutional provisions that empower courts, such as FC ss 167 and 172, which Madala J cites elsewhere in his judgment.<sup>170</sup> The duty of the court here is like the duty of the state under FC s 1(c) and FC s 34 in *Modderklip*.<sup>171</sup> In extra-curial writings, former Chief Justice Ngcobo has articulated a similar understanding.<sup>172</sup>

As a whole, the section's most important substantive message is that the founders of the Constitution chose to rest it on values. In this, there is an important similarity to the German understanding of constitutionalism. South Africa takes from Germany the idea of the Constitution as an objective order of values, resting on certain key value ideas.<sup>173</sup> FC

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164 *S v Ntuli* [1995] ZACC 14, 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC) at para 32.

165 *Justice Alliance of South Africa v President of the Republic of South Africa* [2011] ZACC 23, 2011 (5) SA 388 (CC), 2011 (10) BCLR 1017 (CC) at para 30 (the decision mentions constitutional supremacy along with the rule of law at para 72, but otherwise focuses on the rule of law alone).

166 *S v Boesak* [2000] ZACC 25, 2001 (1) SA 912 (CC), 2001 (1) BCLR 36 (CC) at para 38.

167 *Thebus & Another v S* [2003] ZACC 12, 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC) at para 39; *Mamabolo* (supra) at para 45. Both cases are discussed in more detail under the subsection headings below.

168 *Van der Walt v Metcash Trading Ltd* [2002] ZACC 4, 2002 (4) SA 317 (CC), 2002 (5) BCLR 454 (CC) ('*Metcash*') at para 70.

169 *Ibid* at para 77.

170 *Ibid* at para 75 n56.

171 See §13.3(b)(i) supra.

172 Sandile Ngcobo 'South Africa's Transformative Constitution: Towards an Appropriate Doctrine of Separation of Powers' (2011) 22 *Stell LR* 37, 39-40.

s 1 stands as textual and structural authority for that idea. The judgments of Chaskalson CJ, Ngcobo J and O'Regan J in *Kaunda* all offer explicit support for this proposition.<sup>174</sup>

### **(b) 'South Africa is one, sovereign democratic state founded on the following values:'**

The opening words of FC s 1 have received little attention. The basic status of the Republic as indivisible, sovereign and democratic has yet to be at issue in a case. Cases that might have implicated this text — a number have considered the nature of South Africa's democracy, for example — have been decided under other provisions.

That said, it would be wrong to conclude that the opening words are superfluous. While the reference to 'one, sovereign' state must be read in light of the Apartheid

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attempt to divide up the country into ethnic 'states', the indivisibility and sovereignty of South Africa also bear more forward-looking importance. They would be implicated, for example, by substantial moves to integrate South Africa into a system of regional government. Some domestic courts in European Union member countries have, in recent years, imposed constitutional limits on how much power may be delegated to EU bodies.<sup>175</sup>

The reference to a 'democratic' state poses a puzzle: does this mean that a broader notion of democracy is protected by FC s 1, notwithstanding the focus of FC s 1(d) on particularly representative aspects? An obstacle to this appealing idea is that FC s 1(d) might be rendered rather meaningless if a broad democracy principle, including representative and other elements, were already protected by the opening words of FC s 1. This obstacle, however, is not necessarily decisive. FC s 1(a) arguably encompasses anything expressed by FC s 1(b), so the purpose of FC s 1(b) must be understood as one of special emphasis and symbolism: these ideas are important enough to be expressed separately, even though they overlap. Similarly, it makes sense that drafters would want to state that South Africa was 'democratic', in addition to wanting to place special emphasis on the elements in FC s 1(d). So one can take 'democratic' to express a broader idea of democracy, without falling foul of rules of construction. In keeping with *UDM* (2)'s<sup>176</sup> approach, it should be taken to super-entrench the 'essential core' of the constitutional principle of democracy, and so can ground arguments that, for example, ideas of participatory democracy are also super-entrenched.<sup>177</sup>

If the opening words may be read as expressing the importance of sovereignty and democracy, it may not be too much of a stretch to read them as also expressing the importance of *oneness*. The idea of being *one* state has a natural resonance in the South African context with its history of divisions and its transitional emphasis on reconciliation and nation-building. Read as such, the wording also offers a potential textual hook for the

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173 See, for example, *Carmichele* (supra) at paras 54-55. For a critical assessment of the notion of an 'objective normative value order', see S Woolman 'Application' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) Chapter 31.

174 *Kaunda & Others v President of the Republic of South Africa* [2004] ZACC 5, 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC) at paras 65-66 (Chaskalson CJ); 155-59 (Ngcobo J) and 218-20 (O'Regan J).

175 See the decisions of the Czech Republic Constitutional Court, Pl. US 29/09 ('*Treaty of Lisbon (II)*'), and the German Federal Constitutional Court, BVerfGE 123, 267 ('*Treaty of Lisbon*') and earlier cases there cited. See further, for example, Dieter Grimm 'Defending Sovereign Statehood against Transforming the European Union into a State' (2009) 5 *European Constitutional Law Review* 353.

176 *United Democratic Movement v President of the Republic of South Africa & Others (African Christian Democratic Party & Others Intervening ; Institute for Democracy in South Africa and Another as Amici Curiae)* (No 2) [2002] ZACC 21, 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC).

177 On the constitutional democracy principle, see T Roux 'Democracy' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) Chapter 10.

idea of ubuntu as a founding value. Ubuntu is, after all, a sophisticated account of our being one and of what that implies for ethics. Its links to reconciliation and nation-building are very strong, both historically and philosophically.<sup>178</sup> However, this study found no case among the existing judicial discussions of ubuntu that traces it to FC s 1.

Finally, the notion that the state is 'founded on' the values set out ties naturally to the view that the South African state's *legitimacy* rests in some way on its keeping

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to and furthering those values. Ngcobo CJ's judgment in *McBride*, for example, expressly links FC s 1 to legitimacy and understands this in terms of the state being 'founded on' the values of FC s 1.<sup>179</sup>

### **(c) A state founded on 'Human dignity, the achievement of equality and the advancement of human rights and freedoms' and 'Non-racialism and non-sexism'**

The first two subsections of FC s 1 have enjoyed the least judicial engagement. These provisions suffer from the greatest degree of apparent redundancy in a constitution with many other references to dignity, equality and human rights. The two provisions themselves also overlap to a considerable extent: FC s 1(b) appears only to place special emphasis on an aspect of FC s 1(a).

The high water mark of judicial engagement with FC s 1(a) to date is the separate judgment of Ngcobo CJ in *McBride*, in which Khampepe J concurred. The judgment engages repeatedly with FC s 1(a)'s language. It understands 'the achievement of human rights and freedoms' to vindicate the freedom of expression previously denied under Apartheid. It holds that this freedom of expression must be balanced against the value of dignity, whose status as a value is also understood as a rejection of its denial under the previous order. The value of dignity is, accordingly, understood to have 'an important role to play in establishing the new society envisioned in the Constitution'. It 'permeates every right', and the demand for the freedom and equality set out in FC s 1(a) is understood as 'a demand to be treated with dignity'.<sup>180</sup> The judgment of Mogoeng J in that case touches on some of the same themes.<sup>181</sup>

Ngcobo CJ's judgment opens the way to a more sustained engagement with the subsection, but it is not without its problems. It would elevate freedom of expression to the status of a founding value.<sup>182</sup> It also talks of the value of reconciliation and reconstruction, and since it links these ideas to FC s 1(a) just like freedom of expression, it might be read as seeking to raise these ideas to foundational status too.<sup>183</sup> This appears to be motivated by a view that these are all important values that need to be considered alongside the value of dignity.<sup>184</sup> It is submitted that it is a mistake to read content lavishly into FC s 1(a) just because that content is important and relevant to

178 See, for example, IC, Postamble; D Tutu *No Future Without Forgiveness* (1999); *Azanian Peoples Organization (AZAPO) v President of the Republic of South Africa* [1996] ZACC 16, 1996 (4) SA 672 (CC), 1996 (8) BCLR 1015 (CC) at paras 19 and 48; T Metz 'Towards an African Moral Theory' (2007) 15 *Journal of Political Philosophy* 321; T Metz & JBR Gaie 'The African Ethic of *Ubuntu/Botho*: Implications for Research on Morality' (2010) 39 *Journal of Moral Education* 273.

179 *The Citizen 1978 (Pty) Ltd v McBride* [2011] ZACC 11, 2011 (4) SA 191 (CC), 2011 (8) BCLR 816 (CC) ('*McBride*') at para 143.

180 *Ibid* at paras 142-43; see also paras 157-58, 169 and 170-72.

181 *Ibid* at paras 241-43.

182 *Ibid* at para 170.

183 *Ibid* at paras 171 read with paras 142, 144-45, 147 and 166-69.

184 *Ibid* at paras 148-50, 153, 157-58 and 171.

dignity. All rights are important, and all have implications for dignity. Including additional rights in FC s 1(a) risks blurring the fact that FC s 1(a) is there to pick out and super-entrench only some content. It is also not necessary to elevate freedom of expression to foundational value status in order to recognize that the right to dignity does not necessarily trump it. The Final Constitution as described by FC s 1(a) contains rights of equal status. The balance between those rights (here, the rights to dignity and freedom of expression) is not set by the fact that dignity is a foundational value;

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it depends on the interpretation given to dignity. Accordingly, it is submitted that Ngcobo CJ's judgment is best read as a salutary attempt to give content to the foundational value of dignity, rather than as elevating other ideas to foundational status. It is also a reminder that the mention of rights and freedoms in addition to dignity in FC s 1(a) rules out the idea that the *value* of dignity makes the *right* to dignity pre-eminent.<sup>185</sup>

Ngcobo J also engages with FC s 1(a) in some detail in his judgment in *Bato Star*. He holds that the foundational commitment to equality implies a foundational commitment to transformation, although he cites other provisions alongside FC s 1(a) to this effect.<sup>186</sup>

Ngcobo CJ's judgment in *McBride* is a minority decision, and his judgment in *Bato Star* is a separate concurrence (albeit one in which the whole Court in turn concurred). The use of FC s 1(a) made by the main judgments in those cases — a brief citation<sup>187</sup> — is much more typical of the muted approach usually taken to FC ss 1(a) and (b), as several other examples illustrate. In *Islamic Unity Convention*, the Court held that hate speech posed a threat 'to the constitutionally mandated objective of building the non-racial and non-sexist society based on human dignity and the achievement of equality', which must be references to FC ss 1(a) and (b) though neither section is cited.<sup>188</sup> In *S v Mamabolo*, the Constitutional Court referred to the fact that the Final Constitution protects three key values — dignity, equality and freedom — on the way to rejecting a US-style free speech approach that prioritizes freedom alone. It referenced s 1 as a whole, as well as FC ss 7, 9, 10, 12, 36 and 39. Given the references to dignity and equality, the s 1 reference must be read as a reliance on FC s 1(a) and possibly also on FC s 1(b).<sup>189</sup> *Dawood* uses FC s 1(a) in a similar way, alongside FC ss 7, 10, 36 and 39, to underline the importance of dignity.<sup>190</sup>

After the opening mentions, the analysis of dignity in these cases occurs in terms of other sources. *Dawood*, for example, relies for the proposition that dignity 'informs constitutional adjudication at all levels' on lectures delivered by Justices Chaskalson and Ackermann; for the idea that the value of dignity informs interpretation, it relies on five of the Court's own precedents, none of which

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themselves refer to FC s 1.<sup>191</sup> *S v Thebus* offers another example.<sup>192</sup> It concerned a rights argument and an argument that the common-law doctrine of common purpose required development under FC s 39(2), following *Carmichele*. In the rights argument, *Thebus*

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185 This reading is in line with *NICRO*'s ruling that super-entrenchment of certain values in s 1 does not subvert the Bill of Rights mechanism. See §13.3(b)(i) *supra*.

186 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others* [2004] ZACC 15, 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) at paras 72-77, 88 and 92-93.

187 *McBride* (*supra*) at para 74; *Bato Star* (*supra*) at para 34.

188 *Islamic Unity Convention v Independent Broadcasting Authority* [2002] ZACC 3, 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC) at para 33.

189 *S v Mamabolo* [2001] ZACC 17, 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC) at paras 41-42.

190 *Dawood & Another v Minister of Home Affairs & Others* [2000] ZACC 8, 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) ('*Dawood*') at para 34.

uses the language of FC s 1(a), without citation, to interpret the right to silence, and FC s 1 is employed with other materials, following *S v Boesak*,<sup>193</sup> to interpret 'just cause' in the FC s 12(1)(a) right not to be deprived of freedom arbitrarily or without just cause.<sup>194</sup> Even though the common law development argument leads to engagement with the 'prescripts and ethos' and the 'objective value system' of the Constitution, section 1 is not mentioned in relation to that question. The Court in *Thebus* instead refers to FC ss 2, 7, 8 and 36, as well as FC s 39(2), although it does rely on decisions which themselves cite FC s 1.<sup>195</sup>

It can be argued that FC s 1(a) and (b) represent another area where the courts have generally not built the new FC s 1 into Interim Constitution precedents.<sup>196</sup> The case law under the Interim Constitution pays plenty of attention to the value of dignity, which has long been of importance and is particularly on display in the *Makwanyane*,<sup>197</sup> but, of course, it makes no reference to s 1 values. To the extent that this is the explanation for FC s 1's marginal role under the 1996 text, it is clearly no justification.

However, there is reason to doubt how much it is responsible here. In *Mohamed*, which concerned the right to life, the Court bolstered its argument by noting that the values, especially dignity, on which it had placed so much emphasis in invalidating the death penalty in *S v Makwanyane* under the Interim Constitution were now included not only as rights but also as foundational values in the Final Constitution's text.<sup>198</sup> It therefore made the same explicit acknowledgement

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of FC s 1's addition that *Pharmaceutical Manufacturers*<sup>199</sup> made, and that *Fedsure*<sup>200</sup> made pre-emptively, in the context of legality. However, *Mohamed* nevertheless follows the other cases in conducting its analysis only in terms of the FC ss 9 and 10 rights to life

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191 *Dawood* (supra) at para 35. Four of the cases were decided under the Interim Constitution, which had no equivalent of FC s 1: *S v Makwanyane & Another* [1995] ZACC 3, 1995 (3) SA 391 (CC), 1995 (2) SACR 1 (CC), 1995 (6) BCLR 665 (CC); *President of the Republic of South Africa and Another v Hugo* [1997] ZACC 4, 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC); *Prinsloo v Van der Linde* [1997] ZACC 5, 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC); *Harksen v Lane NO* [1997] ZACC 12, 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC). The only one of the five decided under the Final Constitution is the concurring judgment of Sachs J in *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15, 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) which makes no mention of s 1, itself refers back to the Interim Constitution jurisprudence and, where it does refer to the Final Constitution's text in the context of values, quotes without citation the 'open democracy based on dignity, freedom and equality' language from FC ss 7, 36 and 39.

192 *Thebus & Another v S* [2003] ZACC 12, 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC).

193 *S v Boesak* [2000] ZACC 25, 2001 (1) SA 912 (CC), 2001 (1) BCLR 36 (CC).

194 *Thebus* (supra) at paras 39 and 54.

195 *Ibid* at paras 24-29, citing *Ex parte Minister of Safety and Security: In re S v Walters* [2002] ZACC 6, 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC) and *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* [2000] ZACC 1, 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) ('*Pharmaceutical Manufacturers*').

196 See also §13.4(c) supra.

197 *S v Makwanyane & Another* [1995] ZACC 3, 1995 (3) SA 391 (CC), 1995 (2) SACR 1 (CC), 1995 (6) BCLR 665 (CC).

198 *Mohamed v President of the Republic of South Africa* [2001] ZACC 18, 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC) at para 38.

199 *Pharmaceutical Manufacturers* (supra).

200 *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* [1998] ZACC 17, 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) ('*Fedsure*').

and dignity and the FC s 12(1)(d) prohibition of cruel, inhuman or degrading punishment.<sup>201</sup> When it talks of 'the underlying values of the Constitution', the reference is to these rights and to FC ss 7(1) and s 39(2), which contain the value phrase from the Bill of Rights, 'the democratic values of human dignity, equality and freedom.'<sup>202</sup> Since *Mohamed* clearly 'updates' to the Final Constitution, it seems implausible to think of this as the reason why FC s 1 is marginalized.

The descriptive understanding can help us understand a body of case law that might otherwise appear to neglect FC ss 1(a) and (b) and make the apparent redundancy of these subsections seem especially chronic. Reliance on FC s 1(a) is marginal in the dignity jurisprudence because, given the prominence of that jurisprudence, the question of whether effect is being given to that aspect of the FC s 1 description is seldom seriously at issue. In this regard, the peripheral use of FC s 1(a) does not imply its neglect, but in fact precisely the opposite: it reflects the extent to which it is universally accepted that the Final Constitution is understood to give effect to dignity, such that the super-entrenchment of this fact has little to do but underline the existing approach. Something similar may be said about the idea that the text is there to advance human rights and freedoms. Ngcobo CJ's engagements with FC s 1(a) in *McBride* and *Bato Star* arise not because dignity and equality are neglected, but because he is concerned to engage with their prominence and to more finely understand their place in terms of notions of post-Apartheid constitutionalism.

The one respect in which FC s 1(a) and (b) might be said to be genuinely neglected concerns equality. Some scholars resist the way in which the Court has understood dignity to be the pre-eminent value in the Final Constitution and the basis even of the equality right test. If the focus on dignity is understood to come at some cost to equality, at these scholars believe, then the strong equality aspects of both FC s 1(a) and (b) offer support for their view: it would then follow that the Court's approach is belying the description in FC s 1.<sup>203</sup> This argument, of course, does not support the view that equality should take the place of dignity as the pre-eminent value: their joint presence implies that the two ideas are of equal status.

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## **(d) A state founded on 'Supremacy of the constitution and the rule of law'**

### **(i) The precise legal basis of the legality cases and the descriptive understanding**

One aspect of FC s 1(c)'s use, arising from *Pharmaceutical Manufacturers*, has already been touched upon. It was argued above that the rationality test, applied to all public power, should be understood as an application of the structural principle of legality that serves to give effect to FC s 1(c).<sup>204</sup> This position has been repeatedly confirmed.<sup>205</sup>

This reading serves to explain twin facts about the body of cases under the legality principle. On the one hand, rationality challenges are treated as discrete challenges,

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201 Ibid at paras 48, 54.

202 Ibid at paras 58.

203 C Albertyn & B Goldblatt 'Equality' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2005) 35-8-35-13 and sources there cited.

204 See §13.3(b)(ii)-(iii) supra.

205 See recently *Law Society of South Africa v Minister of Transport* [2010] ZACC 25, 2011 (1) SA 400 (CC), 2011 (2) BCLR 150 (CC) ('*Law Society*') at para 32 ('The constitutional requirement of rationality is an incident of the rule of law, which in turn is a founding value of our Constitution', citing FC s 1(c)); *South African Transport and Allied Workers Union v Garvas* [2012] ZACC 13, 2013 (1) SA 83 (CC), 2012 (8) BCLR 840 (CC) at para 32 (to identical effect).

separate to other rights challenges. In *Affordable Medicines*, for example, the applicants understood legality as a discrete legal ground. They also raised the FC s 22 right to freedom of trade, but explicitly raised it in the alternative, as a separate ground to the main legality principle contention.<sup>206</sup> The Constitutional Court accepted this approach, finding violations on the basis of legality alone and confirming that these findings stood alone by ruling that in light of the findings on legality it was not necessary to consider the FC s 22 arguments.<sup>207</sup>

On the other hand, cases under the legality principle do not always cite FC s 1(c). The Constitutional Court in *AAA Investments*, for example, bases its review on 'the legality requirement of our Constitution', and cites *Pharmaceutical Manufacturers* but not FC s 1(c).<sup>208</sup>

The decisions of Traverso DJP and Moseneke J in the *New Clicks* matter also merit mention here. Traverso DJP, in dissent in the High Court, begins by reading the principle of legality together with the FC s 27 right to health, but the analysis that follows is based squarely on the legality principle, with FC s 27 not receiving further mention.<sup>209</sup> The High Court dissent would be of limited significance were it not for the fact that the Moseneke judgment, representing the views of five Constitutional Court Justices, adopts a similar approach. It places greater emphasis on the FC s 27 right but nevertheless conducts a rationality review carried out in light of the right to health.<sup>210</sup> That the reliance on legality is primary can be seen from the fact that if FC s 27 were the real basis for the judgment, the relevant

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threshold would have been reasonableness, not rationality.<sup>211</sup> Neither judgment cites FC s 1(c) directly; both instead rely on the legality principle and prior decisions on it.

These examples illustrate the virtue of the descriptive approach. Because FC s 1(c) is not cited in all the decisions, it cannot be the standalone basis for them. On the other hand, because legality violations are discrete violations that are separate to other provisions, such as rights, there does need to be a separate legal basis for these decisions. This is provided by the structural legality principle first identified in *Fedsure*. Since the legality principle simply serves to give effect to FC s 1(c), there is no strict need to cite FC s 1(c) in every legality case. It will be necessary to do so only when there is some reason for doubt over how the principle must be understood in order to give effect to the section.<sup>212</sup>

A useful analogy can be drawn here to the cases on constitutional supremacy. Decisions sometimes cite FC s 1(c)'s constitutional supremacy language, and sometimes do not. The Constitutional Court in *S v Thebus*, for example, relied on FC s 2 for the idea

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206 *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3, 2006 (3) SA 247 (CC), 2005 (6) BCLR 529 (CC) ('*Affordable Medicines*') at paras 24-26.

207 *Ibid* at para 123.

208 *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* [2006] ZACC 9, 2007 (1) SA 343 (CC), 2006 (11) BCLR 1255 (CC) at para 29 n83.

209 *New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang NO; Pharmaceutical Society of South Africa v Tshabalala-Msimang NO* [2005] ZACC 14, 2006 (2) SA 311 (CC), 2006 (8) BCLR 872 (CC) at paras 2-3, 9, 40, 54 and 159.

210 *Ibid* at paras 786. Madala J, Mokgoro J, Skweyiya J and Yacoob J concurred in the judgment.

211 On reasonableness in socio-economic rights cases, see S Liebenberg 'Interpretation of Socio-Economic Rights' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2003) 33-32-33-41.

212 See also §13.3(b)(ii) *supra*.



of constitutional supremacy without mentioning FC s 1(c),<sup>213</sup> as did the Supreme Court of Appeal in *De Lille*,<sup>214</sup> while the Constitutional Court in *Affordable Medicines* read the two sections together in reaching a similar finding about constitutional supremacy.<sup>215</sup> Absent the descriptive understanding, these decisions too would seem to illustrate the superfluity of FC s 1(c) and the difficulty of assigning content to it. As it is, we can see that FC s 2 is simply taking the part of the legality principle as the provision giving effect to FC s 1(c).

### (ii) FC s 1(c) and the legality principle

A set of traditional common law doctrines have become associated with FC s 1(c), of which rationality analysis is only the most common.

*Dawood*, citing FC s 1(c), held that 'it is an important principle of the rule of law that rules be stated in a clear and accessible manner.'<sup>216</sup> *Affordable Medicines* relied on this finding in concluding that 'the doctrine of vagueness is founded on the rule of law.'<sup>217</sup> Chaskalson CJ in *New Clicks* confirmed that this meant the common law doctrine that a rule could be void for vagueness is now part of the legality principle, and this point appeared to command general support in

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that case as well.<sup>218</sup> *Affordable Medicines* also confirmed that the doctrine of ultra vires is an incident of legality.<sup>219</sup> It followed the earlier statements in *Pharmaceutical Manufacturers* to this effect,<sup>220</sup> and the point may be traced to earlier language in *SARFU (3)*<sup>221</sup> and *Fedsure*.<sup>222</sup>

The principle running through all these judgments is that rule of law in FC s 1(c) is given effect to, in relation to all public power, by these traditional doctrines. As with rationality analysis, that does not make it necessary to cite FC s 1(c) every time these

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213 *Thebus & Another v S* [2003] ZACC 12, 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC) at para 24.

214 *Speaker of the National Assembly v De Lille* [1999] ZASCA 50, 1999 (4) SA 863 (SCA), [1999] 4 All SA 241 (SCA) at para 14.

215 *Affordable Medicines* (supra) at para 48.

216 *Dawood* (supra) at para 47.

217 *Affordable Medicines* (supra) at para 108.

218 Drawing firm findings from *New Clicks* is a perennial problem, but this point seems clear (especially since the earlier *Affordable Medicines* judgment was unanimous on the point). Yacoob J, who commanded majorities on the key applications of the vagueness principle to the facts (see the Court's summary at para 13), explicitly concurred in the paragraphs of Chaskalson CJ's judgment that made this finding (para 792 n502). The implication is that while the Court was split on what was vague and what was not, there was general agreement on the test itself. Ngcobo J (para 490) and O'Regan J (para 846) also explicitly concurred in those paragraphs of Chaskalson CJ's judgment. The Court was split over whether PAJA or s 33 or the principle of legality was the proper ground for review of the regulations in the case, but this disagreement does not cloud the particular question here at issue. Chaskalson CJ, who expressed the view that PAJA was applicable, found that PAJA did not explicitly refer to vagueness and accordingly applied it on the basis of the legality principle, while Yacoob J, who is among those who did not find it necessary to decide that point, agrees with Chaskalson CJ on the legality point. Either way, vagueness is traced to legality. Sachs J falls into neither camp on PAJA's application (see para 13), but he understands his substantive result to be the same as that in the Chaskalson and Ngcobo judgments (para 645), and since he places still greater emphasis on legality (para 583) it seems clear enough that he would support their finding that legality underpins the vagueness rule.

219 *Affordable Medicines* (supra) at para 50.

220 *Pharmaceutical Manufacturers* (supra) at para 20.

221 *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 11, 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC) ('SARFU (3)') at para 38.

doctrines are employed, but it does require that they also be used and understood so as not to contradict the FC s 1(c) description that the state is founded on the rule of law.

In *Law Society of South Africa*, the applicant attempted to argue that a concept of substantive fairness should be incorporated into the rationality test.<sup>223</sup> The Court unsurprisingly rejected this bid to expand rationality analysis and set a limit on the extent to which administrative law doctrines might be incorporated into FC s 1(c)'s legality principle. It did so on the basis that these more substantive considerations were properly considered in terms of rights and the proportionality analysis in FC s 36.<sup>224</sup> The implication is that the enforcement of FC s 1(c) via the legality principle and associated doctrines should not expand to the point of infringing on the Bill of Rights. This reading is in line with *NICRO*'s ruling that the founding

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values may not be enforced in such a way as to undermine or abrogate the Bill of Rights mechanism.<sup>225</sup>

### (iii) FC s 1(c) and other provisions

The legality principle is one part of the Final Constitution that gives effect to FC s 1(c); the section is also used in connection with other provisions.

*S v Mamabolo*, which as noted only cites FC s 1 as a whole, includes a reference to 'the new era of constitutional supremacy and the rule of law' and so must be read as feeding FC s 1(c) into its cluster arguments.<sup>226</sup> The quoted reference is used, along with the Chapter 8 provisions underpinning the new powers granted to the judiciary, to support the claim that 'The Constitution thus recognizes the importance — and commands the reinforcement... — of the dignity of courts.' The Court in *Mamabolo* accordingly rejected a contention that the Final Constitution prevents all recognition of the offence of scandalizing the court or implies 'materially attenuating the circumstances in which it could be applied'.<sup>227</sup>

The majority in *Glenister (2)* cites FC s 1(c)'s rule of law language, together with the principle of separation of powers and the constitutionally enshrined independence of institutions supporting democracy, as additional proof that an obligation to create an independent corruption-fighting agency is deeply compatible with the structure of the Final Constitution.<sup>228</sup> Ngcobo J, in dissent in *NICRO*, used FC s 1(c) as part of the limitation enquiry in holding that crime undermines the rule of law and so 'government has a legitimate purpose in pursuing a policy of denouncing crime and to promote a culture of the observance of civic rights and obligations'.<sup>229</sup> A High Court judgment has also invoked FC s 1(c) in the context of a costs award in which it deprived a successful trade union of

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222 *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* [1998] ZACC 17, 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at paras 56-58. See also *Platinum Asset Management (Pty) Ltd v Financial Services Board; Anglo Rand Capital House (Pty) Ltd v Financial Services Board* 2006 (4) SA 73 (W) at para 141.

223 *Law Society of South Africa v Minister of Transport* [2010] ZACC 25, 2011 (1) SA 400 (CC), 2011 (2) BCLR 150 (CC) ('*Law Society of South Africa*').

224 *Ibid* at paras 29-39.

225 See §13.3(b)(i) *supra*. See also F Michelman 'Rule of Law Legality and the Supremacy of the Constitution' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) 11-26-11-28 (arguing that the legality principle is needed to protect ground not covered by the Bill of Rights).

226 *S v Mamabolo* [2001] ZACC 17, 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC).

227 *Ibid* at paras 34-39.

228 *Glenister v President of the Republic of South Africa (No. 2)* [2011] ZACC 6, 2011 (3) SA 347 (CC), 2011 (7) BCLR 651 (CC) at para 205.

its costs on the basis that its conduct during the labour dispute at issue had displayed contempt for the rule of law.<sup>230</sup>

A further set of cases invokes FC s 1(c) in connection with similar content to that at issue in the legality cases, but in relation to rights. The High Court in *Ntame* used FC s 1(c), along with FC ss 27, 33, 34 and 39, in an argument in favour of condoning failures to comply with PAJA's 180-day deadline for administrative challenges in the context of the non-payment of social grants.<sup>231</sup> FC s 1(c) was understood to underline the importance of controlling public power, requiring that 'courts should be particularly careful to allow as few invalid exercises of

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power as possible to slip through the net.<sup>232</sup> In *Zondi*, FC s 1(c) was used to similar effect to underline the import of FC s 9(1) in the High Court<sup>233</sup> and FC s 34 in the Constitutional Court,<sup>234</sup> respectively. *Joseph* relied on the rule of law language in FC s 1(c) in support of reading s 3(1) of PAJA broadly to include 'not only vested private-law rights', but also 'legal entitlements that have their basis in the constitutional and statutory obligations of the government.' It held that an open public administration gives 'expression' to founding values.<sup>235</sup> *Modderklip*,<sup>236</sup> the most dramatic example of this, sees FC s 1(c) shaping the FC s 34 right so as to ensure that the right ensures that the rule of law is upheld. The decision was discussed in detail above.<sup>237</sup>

In his dissent in *Metcash*, Madala J offered a particularly expansive interpretation of the rule of law in FC s 1(c), which he held has as basic tenets 'the absence of arbitrary power', 'equality before the law', and 'the legal protection of certain basic human rights'.<sup>238</sup> He also held that it excludes unpredictability.<sup>239</sup> If the reference to rights is read too broadly, this approach to FC s 1(c) would infringe on content that belongs to FC s 1(a), which Madala J does not cite. His judgment is thus best read as an articulation of the rights central to the case, FC ss 9(1) and 34, as giving effect to FC s 1(c)'s rule of law text on which his judgment is focused.

#### **(iv) The relationship between the legality principle decisions and other FC s 1(c) decisions**

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- 229 *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* [2004] ZACC 10, 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC) ('NICRO') at paras 144-45.
- 230 *Police and Prisons Civil Rights Union v Minister of Correctional Services (1)* 2008 (3) SA 91 (E) at paras 78-79.
- 231 *Ntame v MEC for Social Development, Eastern Cape* 2005 (6) SA 248 (E).
- 232 *Ntame* (supra) at para 25.
- 233 *Zondi v Member of the Executive Council for Traditional and Local Government Affairs & Others* 2004 (5) BCLR 547 (N).
- 234 *Zondi v MEC for Traditional and Local Government Affairs* [2004] ZACC 19, 2005 (3) SA 589 (CC), 2005 (4) BCLR 347 (CC) at para 82.
- 235 *Joseph & Others v City of Johannesburg & Others* [2009] ZACC 30, 2010 (4) SA 55 (CC), 2010 (3) BCLR 212 (CC) at para 43.
- 236 [2005] ZACC 5, 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC) ('Modderklip').
- 237 See §13.3(b) supra.
- 238 *Van der Walt v Metcash Trading Ltd* [2002] ZACC 4, 2002 (4) SA 317 (CC), 2002 (5) BCLR 454 (CC) ('Metcash') at para 65.
- 239 *Ibid* at para 66.

On one level, there is no divide between the way that FC s 1(c) is used in the legality cases and the others — both, obviously enough, are concerned with the same basic content. However, on another level, there is a divide. The legality cases give effect to FC s 1(c) by means of administrative law doctrines designed to check certain basic features of processes. In rights cases, however, it can look more as if the courts are giving effect to FC s 1(c) through a context-based approach that seeks to ensure that a certain substantive result is achieved. *Modderklip* may be the best example here.

This distinction is not unsound — vindicating a value like the rule of law is bound to imply more context-specific responses in some cases than in others — but *Metcash Trading* illustrates how the two approaches might come into conflict with one another. The case concerned a rather unusual set of facts where, in the space of two days, two differently constituted panels of the Supreme Court of Appeal had 'made contrary orders in two cases which were materially identical.'<sup>240</sup>

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In its decision, the majority of the Constitutional Court separately considered allegations that FC ss 1, 9 and 34 had been violated, rejecting each one as a discrete argument rather than reading them as a whole.<sup>241</sup> As a discrete challenge — and it was pleaded that way by the applicant, as the dissenting judges acknowledged<sup>242</sup> — it was perhaps not surprising that the majority understood the FC s 1(c) argument as a rationality challenge. The judgment focused on the rationality of the *system* that was in place, found that it had been applied conscientiously and in good faith, and rejected the challenge.<sup>243</sup> The minority judges, by contrast, approached the matter in a more holistic fashion, in particular reading the equality right together with the rule of law. Thus Ngcobo J, joined by Madala and Sachs JJ, read the FC s 9(1) right to 'equal protection and benefit of the law' together with the rule of law (and the founding value of equality) as opposing arbitrariness, and grounding a constitutional duty which 'calls for the equal protection of legal principles and the adoption of procedures or systems that do not permit similarly situated litigants to be treated differently.'<sup>244</sup> The majority understood the applicant in *Metcash* to have received the benefit of the standard, basically sound procedure applied in the normal way, and rejected the complaint. The minority's approach is more like that subsequently followed by the whole court in *Modderklip*, in which the standard procedure is deemed unacceptable in a particular case because it had failed in that case to produce the substantive outcome sought.

The important point is not which side of *Metcash* was right — the inadequacy of the procedure was certainly less patent than the inadequacy of the procedure in *Modderklip*, so the point is debatable — but what the split in approaches means for our understanding of FC s 1(c). There are two lessons. First, pleading is important here. The divide is not a firm one, but a plea based on a traditionally administrative law doctrine is likely to be received by judges as an invitation to review the process. *Metcash* is authority that this is the correct judicial approach in response to a plea based on rationality. If what is sought is a remedy for some special individual impact, then the plea should seek to use a rights claim to vindicate the rule of law (likely FC s 34 or FC s 9(1)), rather than invoking a doctrine under the legality principle.

Second, there is a strong argument that this tendency towards two enquiries is correct. The rule of law is in the first instance a doctrine about certain ways in which state power is exercised. A constitution based on the rule of law, which FC s 1(c)

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240 Ibid at para 1.

241 *Metcash* (supra) at paras 12, 14 and 18.

242 Ibid at para 34 (Ngcobo J), with whom Madala J (para 73) and Sachs J (para 83) concurred.

243 Ibid at paras 12-13.

244 Ibid at paras 35-37; see also para 73 (Madala J concurs) and para 83 (Sachs J concurs).

describes, will in the first instance be concerned with reviewing a particular exercise of power to see whether it met the general standards and processes. Too much specific attention may be self-defeating here, since if judicial review is too invasive the process may be hampered and the vindication of the rule of law may, on the whole, be diminished. Judges are not necessarily wrong, then, to do what the majority in *Metcash* did and confine themselves to asking whether the applicant had the benefit of the usual treatment and process. On the other hand, special factors and contexts can mean that standard processes have unconstitutional

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impacts on particular individuals, so more specific, individual rights-based challenges are also needed to ensure that the rule of law is maintained. *Modderklip*, and in the minority's view *Metcash*, are cases of this sort, where the challenge is not that an individual did not receive the benefit of the normal process, but that the impact the normal process had on an individual shows that the normal process was inadequate in that context.

In sum, the split in approaches reflects not inconsistency, but an important debate in principle about how the rule of law is best vindicated.

**(e) A state founded on 'Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.'**

The natural reading of FC s 1(d) envisages the maintenance of 'accountability, responsiveness and openness' via the electoral mechanisms of vigorous representative democracy.<sup>245</sup> Some decisions are in line with this understanding, and these are discussed first. Others appear to read the section as a general accountability principle, focusing on only the last few words and ignoring the more restrictive text that precedes them. However, most of these decisions are capable of being read consistently with the section as a whole.

**(i) Decisions with a direct link to the achievement of accountability by electoral mechanisms**

The fullest discussion appears in *UDM (2)*. That judgment held that, at a minimum, FC s 1(d) 'excludes a one-party State, or a system of government in which a limited number of parties are entitled to compete for office.'<sup>246</sup> It also held that a multi-party democracy 'contemplates a political order in which it is permissible for different political groups to organise, promote their views through public debate and participate in free and fair elections'.<sup>247</sup> Laws that go beyond the 'reasonable regulation compatible with an open and democratic society' will 'undermine multi-party democracy' and 'will be invalid'.<sup>248</sup> *UDM (2)* also held that multi-party democracy does not necessarily imply proportional representation, noting that FC s 1(d) includes every provision of Constitutional Principle VIII except the stipulation that South Africa's representative government would embrace '...in general, proportional representation'.<sup>249</sup> The result means that it is permissible

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245 Roux distinguishes the principle in s 1(d) from 'the more extended principle discernible in the entire constitutional text. T Roux 'Democracy' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) 10-69.

246 *United Democratic Movement v President of the Republic of South Africa (No. 2)* [2002] ZACC 21, 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC) ('*UDM (2)*') at para 24.

247 *Ibid* at para 26.

248 *Ibid*.

249 *Ibid* at paras 28-29. On the Constitutional Principles, see also §13.4(b)(v).

under FC s 1(d) both to permit floor-crossing, as *UDM (2)* upheld,<sup>250</sup> and to ban defection, which the *First Certification Judgment* judgment upheld.<sup>251</sup> The Court acknowledged

that floor-crossing permitted 'political representatives to act inconsistently with their mandates' from voters, but held that the proper remedy for this lay in the voters' choice to vote differently next time.<sup>252</sup> *UDM (2)* therefore articulates a structural understanding in which representative democracy should mostly be allowed to enforce itself, with the judicial role under FC s 1(d) being to enforce the basic ground rules to ensure that the choice of representatives is real and fair.

In *Glenister (1)*, the Court held that multi-party democracy in FC s 1(d) is compatible with 'Cabinet seeking to give effect to the policy of the ruling party', provided this does not come at the expense of its constitutional obligations.<sup>253</sup> *August*<sup>254</sup> and *NICRO* both invoked FC s 1(d) as part of their cluster arguments for the importance of the right to vote.<sup>255</sup> In *ACDP*,<sup>256</sup> both judgments cited FC s 1(d) in support of the proposition that political participation must be encouraged and that this should shape the approach to the interpretation of electoral laws, a finding echoed in *Electoral Commission v IFP*.<sup>257</sup>

Most recently, in *Mazibuko v Sisulu*, the Court was confronted with the issue of how a motion of no confidence in the President in terms of FC s 102(2) can be placed before the National Assembly.<sup>258</sup> Moseneke DCJ held that FC s 102(2) 'must be understood also in light of other related provisions' and then cited s 1(d).<sup>259</sup> The Court described motions of no confidence as 'a vital tool to advance our democratic hygiene' that 'affords the Assembly a vital power and duty to scrutinise and oversee executive action.'<sup>260</sup> FC s 1(d) is playing an important role in identifying the accountability-enhancing purpose of FC s 102(2), and ultimately in invalidating parliamentary rules that made it virtually impossible for minority parties to have a motion of no confidence debated before the National Assembly. *Mazibuko* is an example of how the 'multi-party system of democracy' in FC s 1(d) can ensure accountability.

In *De Lille*, the High Court relied on the section as part of its argument that it would be inconsistent with representative democracy to read Parliament's constitutional powers as

250 *UDM (2)* (supra) at paras 30-35.

251 *Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26, 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) ('*First Certification*') at paras 182 and 186-87.

252 *UDM (2)* (supra) at paras 50-51. See also *Merafong Demarcation Forum v President of the Republic of South Africa* [2008] ZACC 10, 2008 (5) SA 171 (CC), 2008 (10) BCLR 968 (CC) at paras 306-10 (Skweyiya J).

253 *Glenister v President of the Republic of South Africa & Others* [2008] ZACC 19, 2009 (1) SA 287 (CC), 2009 (2) BCLR 136 (CC) at para 53.

254 *August & Another v Electoral Commission & Others* [1999] ZACC 3, 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) at paras 3 and 17.

255 *NICRO* (supra) at paras 21, 25 and 71. See also §13.3(a)(ii) supra.

256 *African Christian Democratic Party v Electoral Commission* [2006] ZACC 1, 2006 (3) SA 305 (CC), 2006 (5) BCLR 579 (CC) at paras 21-23 (O'Regan J) and 52-53 (Skweyiya J, dissenting).

257 *Electoral Commission of the Republic of South Africa v Inkatha Freedom Party* [2011] ZACC 16, 2011 (9) BCLR 943 (CC) at para 37.

258 *Mazibuko v Sisulu and Another* [2013] ZACC 28, 2013 (6) SA 249 (CC), 2013 (11) BCLR 1297 (CC).

259 *Ibid* at para 42 fn 31.

260 *Ibid* at para 43.

including the power to suspend an MP as punishment for contempt.<sup>261</sup> The Supreme Court of Appeal agreed with that conclusion without citing FC s 1(d); it did not find it necessary to go beyond the constitutional provisions on Parliament's powers.<sup>262</sup>

## (ii) Decisions with an indirect link to the achievement of accountability by electoral mechanisms

In other decisions, the link between the ends of accountability, responsiveness and openness and the specific democratic means envisaged by FC s 1(d) is less direct. *Khumalo v Holomisa* makes the plausible assertion that 'the media are important agents in ensuring that government is open, responsive and accountable to the people as the founding values of our Constitution require.'<sup>263</sup> It therefore feeds FC s 1(d) into its analysis of the law of defamation, along with FC s 1(a)'s protection of dignity and the rights to freedom of expression, privacy and dignity. The implication of *Khumalo* is that FC s 1(d) protects not only the basic mechanisms of representative democracy, in order to achieve accountability, but anything that promotes accountability-producing representative democracy, such as a free press. Given the close link between a free press and the specific means envisaged by FC s 1(d) for preserving accountability, this seems a plausible reading of the section.

In *M & G Media*, the majority quotes only the 'accountability, responsiveness and openness' language from FC s 1(d) in support of the importance of the right of access to information.<sup>264</sup> However, the decision is best understood in light of its further finding that 'without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined.'<sup>265</sup> The use of FC s 1(d) should be understood in the same terms as in *Khumalo*.

In *New Clicks*, Chaskalson CJ relied on FC s 1(d) among a number of other provisions as part of a cluster argument that the Final Constitution implies a state with 'open and transparent government'.<sup>266</sup> He held that, accordingly, the making of delegated legislation should be subject to the standards of FC s 33.<sup>267</sup> Because FC s 1(d) is mixed in with other provisions, its role in this argument cannot be precisely identified, but it is again satisfying to understand it to be doing similar work as in *Khumalo*. The making of delegated legislation is not part of the electoral subject matter of FC s 1(d), just as the press is not, but an open administration assists the public to hold their elected representatives accountable for what government is doing, just as a free press does. So it is more consistent with FC s 1(d) to promote this than not.

Chaskalson P's judgment in *New Clicks* can also be read as using FC s 1(d) in a more subsidiary fashion as general background. The argument would be that, because FC s 1(d) is concerned to super-entrench accountability, openness and responsiveness as achieved by electoral mechanisms, it would be odd to read the Final Constitution as

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261 *De Lille v Speaker of the National Assembly* 1998 (3) SA 430 (C) at paras 27.

262 *Speaker of the National Assembly v De Lille* [1999] ZASCA 50, 1999 (4) SA 863 (SCA), [1999] 4 All SA 241 (SCA) at paras 22, 29.

263 *Khumalo & Others v Holomisa* [2002] ZACC 12, 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) at paras 21-28.

264 *President of the Republic of South Africa v M & G Media Ltd* [2011] ZACC 32, 2012 (2) SA 50 (CC), 2012 (2) BCLR 181 (CC).

265 *Ibid* at para 10.

266 *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14, 2006 (8) BCLR 872 (CC), 2006 (2) SA 311 (CC) at paras 110-13.

267 *Ibid*.

opposed to these goals elsewhere. Therefore, it is more consistent than not with FC s 1(d) to read other sections like FC s 33 so as to promote accountability in the

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context of delegated legislation. That argument is reasonable, but it can cut both ways. Any interpretation that uses FC s 1(d) to support a form of accountability other than the one mentioned in the subsection must confront its implication that the electoral mechanism was selected for especial entrenchment. (This is true even if the reference in the opening words of the section to South Africa as a 'democratic' state is used to super-entrench other aspects of democracy.<sup>268</sup> The special attention to the representative elements picked out in FC s 1(d) must still be accounted for). So the argument works against other accountability mechanisms unless they can be said to support representative democracy — a condition, however, that many accountability-promoting measures will readily meet, especially if they promote transparency and reason-giving which can help to inform voters.

This understanding offers a helpful perspective on the Court's split in *Doctors for Life*. Ngcobo J relied on FC s 1(d) among the many other legal sources upon which his judgment draws.<sup>269</sup> Yacoob J, in dissent, criticized this on the basis that FC s 1(d) only covers the promotion of 'accountability, responsiveness and openness' by the four specific mechanisms mentioned, and not by public participation in legislative processes.<sup>270</sup> In light of the argument presented here, Yacoob J is quite right to worry that not all of the words in the section are being taken sufficiently seriously. But his conclusion is nevertheless too quick. There is room to invoke FC s 1(d) in favour of mechanisms other than those specifically referred to in FC s 1(d) if those mechanisms will support the ones specifically mentioned in FC s 1(d). Ngcobo J's argument is that representative and participatory notions of democracy should not be seen as being in tension with each other, because they are 'mutually supportive.'<sup>271</sup> If that argument is right, then his reliance on FC s 1(d) is appropriate. Of course, the minority thinks it is *not* right, because the minority thinks that the public participation requirement inappropriately undermines the constitutional conception of representative democracy.<sup>272</sup> On the minority's argument, FC s 1(d) is a mark against the majority's interpretation because the representative mechanisms referred to in FC s 1(d) are being undermined. But that is the point: whether FC s 1(d) offers support for a right to public participation is much more of a contingent question than either judgment lets on. The question depends on which side's position is truest to FC s 1(d)'s description of the rest of the text, which is the argument at the heart of the whole case. It should be noted, however, that the subsequent decision in this area in *Poverty Alleviation Network* seems to treat FC s 1(d) as grounding a general accountability principle and glides over its particular focus on representative democracy.<sup>273</sup>

The understanding is also of assistance in interpreting the recent decision in *Minister of Police v Premier of the Western Cape*. The case concerned the powers of

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268 See §13.5(b) *supra*.

269 *Doctors for Life International v Speaker of the National Assembly & Others* [2006] ZACC 11, 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (CC) ('*Doctors for Life*') at para 111.

270 *Ibid* at paras 273-75, 293.

271 *Ibid* at para 115; see also paras 116, 121-22, 141.

272 *Ibid* at paras 278-86, 292-94 and 339 (Yacoob J); see also para 244.10 (Van der Westhuizen J, concurring with Yacoob J).

273 *Poverty Alleviation Network v President of the Republic of South Africa* [2010] ZACC 5, 2010 (6) BCLR 520 (CC) at para 55.



the provincial government to establish a commission of inquiry with powers to subpoena the police in terms of FC s 206(5). Moseneke DCJ held that '[t]he Constitution requires accountability and transparency in governance', citing FC s 1(d), and that it 'establishes both a general framework for oversight and specific mechanisms through which a province may exact accountability'.<sup>274</sup> This seems to overlook the fact that FC s 1(d) only entrenches particular mechanisms for the promotion of accountability. There are several ways to interpret the decision in response. One is that it is like *Mazibuko v Sisulu*: where different political parties may control the national and provincial governments, the possibility of effective accountability-serving activity by a provincial government is an element of the accountability-serving multi-party democracy included in FC s 1(d). Another reading is that the decision is like *Khumalo v Holomisa* and *M & G Media*. A commission of inquiry is indirectly related to FC s 1(d)'s mechanisms for achieving accountability, because it can help to inform voters, and so it is more consistent with FC s 1(d) that such commissions have the powers necessary to be effective in producing information. But Moseneke DCJ does not seem to have either of these arguments in mind.

Instead, FC s 1(d) is again serving as a background norm. The argument is only that it would be odd in light of FC s 1(d)'s entrenchment of accountability, via its specific mechanisms, to read one of the Constitution's other accountability mechanisms in a weaker rather than a stronger fashion. As in *New Clicks* and *Doctors for Life*, such a reliance only holds if the other accountability mechanism is consistent with the ones specifically mentioned in FC s 1(d), but this consideration is in fact closely related to the deeper structural logic of *Minister of Police*. It is important to the decision that provinces are constitutionally 'entitled to monitor and oversee the police function within their area of remit' and that they have obligations to their populations in this regard, implying that they must have the necessary powers to do these things.<sup>275</sup> If this were not an area of provincial responsibility, then the constitutional structure would instead be that the national government should be accountable to the voters for the issue, and in that case provincial interference might disrupt the constitutional structure. That would be objectionable on federalism grounds, of course, but it also illustrates how this sort of reliance on FC s 1(d) can cut both ways. As it is, provinces *do* have constitutional responsibilities in relation to policing, so provincial action in relation to these responsibilities is not inconsistent with representative democracy, and so the reliance on FC s 1(d) in *Minister of Police* holds: the interpretation of s 206(5) that affords the power of subpoena is indeed more consistent with FC s 1(d)'s description of the Constitution.

*Minister of Police* highlights the way that FC s 1(d) can be used to promote accountability between the different spheres of government, but also the limits of such arguments. And in fact there is a much simpler s 1 argument to be made in the case. Moseneke DCJ held that the province's constitutional powers

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in relation to policing 'accord with the province's duty to respect, protect and promote fundamental rights of its residents'.<sup>276</sup> If the power to conduct an effective commission of inquiry is above all something done to protect rights, then it is much more straightforwardly linked to FC s 1(a)'s reference to 'the advancement of rights and freedoms'. Moseneke DCJ does not do this (he cites FC s 7(2) as authority for his holding instead). But the fact that FC s 1(d) alone in FC s 1 mentions the words 'accountability, responsiveness and openness' should not lead us to miss the fact that these things are readily related to the other parts of FC s 1, which do not contain FC s 1(d)'s restrictions. Put another way, FC s 1(d) refers only to particular kinds of means to accountability, responsiveness and openness (as *ends*), while the other subsections, with their different ends, can readily be linked to any kind of action supporting accountability,

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274 *Minister of Police & Others v Premier of the Western Cape & Others* [2013] ZACC 33, 2014 (1) SA 1 (CC), 2013 (12) BCLR 1365 (CC) at para 52 fn 54.

275 *Ibid* at para 41.

276 *Minister of Police* (supra) at para 37.

responsiveness and openness as *means* to their ends. On careful examination, then, the other subsections may often offer a more generous and natural grounding for accountability-promoting behaviour than the circumscribed FC s 1(d).

This understanding can also help to explain a final and otherwise troublesome use of FC s 1(d) in *TAC (2)*. In that case, the Court cited FC s 1(d) in a somewhat opaque passage in defense of its enforcement of socio-economic rights.<sup>277</sup> At first glance, the passage seems to make the now familiar mistake of reading the last four words of FC s 1(d) and ignoring the others. However, there are better ways to read it. It is possible that the Court means that those in conditions of severe deprivation cannot exercise their political rights meaningfully, so that the enforcement of socio-economic rights is a way of promoting effective representative government. That would treat the enforcement of socio-economic rights as supporting the mechanism protected by FC s 1(d), like the free press in *Khumalo v Holomisa* or access to information in *M & G Media*.

But the best reading, truest to what seems to be the Court's concern in this passage, again sees the Court as using FC s 1(d) as a subsidiary background norm. In the sensitive separation of powers context of socio-economic rights cases in general and *TAC (2)* in particular, the Court is simply acknowledging that respect is owed to democratic processes, which are protected in FC s 1(d), on the way to holding that the courts accordingly confine themselves to what is required by the socio-economic rights in the Bill of Rights. In other words, the argument is not that FC s 1(d) *requires* judicial enforcement of socio-economic rights, only that such enforcement is compatible with it. That reading fits the (whole) wording of FC s 1(d).

As in *Minister of Police*, however, the argument would be stronger still if FC s 1(a)'s 'advancement of human rights and freedoms' had been invoked. The Constitution jointly described by FC ss 1(a) and (d) is one in which the protection of rights and representative democracy are equally entrenched. Arguments which

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seek to over-extend FC s 1(d) by ignoring most of its language are not only textually objectionable, but are also unnecessary. If rights are promoted by accountability mechanisms, then the strongest authority for this will often lie in FC s 1(a), not FC s 1(d). The passage from *TAC (2)* is best understood as balancing these two super-entrenched aspects of the Final Constitution that FC s 1 describes.

### **(iii) Decisions with no link to the achievement of accountability by electoral mechanisms**

The argument just made helps to explain the fallacy of a final set of decisions which use FC s 1(d) as a general accountability provision, without a link to the electoral mechanisms of representative democracy.

*Rail Commuters* finds that 'accountability of those exercising public power is one of the founding values of our Constitution'.<sup>278</sup> It also relies on FC ss 36, 41 and 195, but the reference to 'accountability' and 'founding values' makes it clear that the Court believes this general accountability principle to be grounded in FC s 1(d). *S v Mamabolo* relies on the 'accountability, responsiveness and openness' language in FC s 1(d) to support the idea that freedom of expression is important and that the scope for conviction of the

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277 *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* [2002] ZACC 15, 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC) at para 36. The passage reads as follows: 'The State is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflict our society. The Courts will guarantee that democratic processes are protected so as to ensure accountability, responsiveness and openness, as the Constitution requires in s 1. As the Bill of Rights indicates, their [the Courts'] function respect of socio-economic rights is directed towards ensuring that legislative and other measures taken by the State are reasonable.'

278 *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20, 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC) at paras 74-75.

offence of scandalizing the court 'must be narrow indeed'.<sup>279</sup> *K* cites this language in support of the idea that a court should be explicit in its development of the common law in terms of FC s 39(2).<sup>280</sup> *Tongoane* cites the subsection, along with FC s 1(c)'s constitutional supremacy language, in support of the proposition that a cabinet minister has a duty to inform a court hearing a constitutional challenge to legislation when she considers that the legislation is not supportable.<sup>281</sup> *Joseph* openly over-reads FC s 1(d) in finding that the objectives of an efficient administration, good governance and accountability in public administration, set out in the preamble of PAJA, 'give expression to the founding values of s 1...namely...principles of democratic government to ensure accountability, responsiveness and openness'.<sup>282</sup> And the High Court decision in *Faircape Properties* uses the section to hold that 'when government makes operational decisions which cause damage to a citizen, there should be no basis in principle to deny delictual relief: indeed the value of accountable government is promoted [by this]'.<sup>283</sup>

In each case, the concern is above all with *judicial* accountability mechanisms, about which FC s 1(d) says nothing. *Mamabolo*, for example, is concerned with press scrutiny of the courts, so it cannot be understood to rely on the link between the press and representative democracy as *Khumalo* can. It is accordingly hard to understand these decisions consistently with the text. If FC s 1(d) was supposed to be about accountability, responsiveness and openness in general, it would

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simply have used those four words and omitted the rest. It should also be noted that the High Court's FC s 1(d) argument in *Faircape* may have been impliedly repealed by the Supreme Court of Appeal decision on that matter.<sup>284</sup> The SCA grounded its discussion of accountability on FC ss 7 and 41 as well as the decision in *Carmichele* and judgments that followed it, which were not based on FC s 1(d).<sup>285</sup> This approach is more faithful to the text.

One might at best read decisions like these as using FC s 1(d) as a background norm in the manner of the second, subsidiary reading of the Chaskalson *New Clicks* judgment: because it indicates a constitutional concern with accountability, it is more consistent to read other sections as promoting accountability rather than not. However, decisions like *Metrorail* and *Faircape* are about court-based accountability mechanisms that are at least potentially in tension with the electoral ones of representative democracy. To the extent that FC s 1(d) is relevant to these decisions at all, it might militate *against* them. As with *TAC (2)*, the better approach is to understand these decisions as giving effect to FC s 1(a) (and potentially also FC s 1(b) and (c)), via other constitutional provisions such as FC s 7, the rights provisions, and FC s 195. *Mamabolo*, for example, is entirely explicable in terms of FC s 39(2)'s provision that interpretation should support the idea of 'an open and democratic society'. *K* could have relied entirely on FC ss 41 and 195, which it cited alongside s 1(d). *Tongoane*'s proposition is fully accounted for by s 1(c)'s constitutional supremacy language and the Minister's s 165 duty to support the workings of the courts,

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279 *S v Mamabolo* [2001] ZACC 17, 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC) at paras 37 and 45.

280 *K v Minister of Safety and Security* [2005] ZACC 8, 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC) at para 23.

281 *Tongoane v Minister for Agriculture and Land Affairs* [2010] ZACC 10, 2010 (6) SA 214 (CC), 2010 (8) BCLR 741 (CC) at paras 118-20.

282 *Joseph & Others v City of Johannesburg & Others* [2009] ZACC 30, 2010 (4) SA 55 (CC), 2010 (3) BCLR 212 (CC) at para 43 (emphasis added).

283 *Faircape Property Developers (Pty) v Premier, Western Cape* 2002 (6) SA 180 (C) at para 195.

284 *Premier of the Province of the Western Cape v Fair Cape Property Developers (Pty) Ltd* [2003] ZASCA 42, [2003] 2 All SA 465 (SCA).

285 *Ibid* especially paras 32 and 40.

and *Joseph's* by the FC s 1(a) reference to 'the advancement of human rights and freedoms read with the FC s 33 right to just administrative action, together with the FC s 1(c) rule of law language that it does cite.

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