

Chapter 34

Limitations

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36. Limitations¹

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

- (a) the nature of the right
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and

1 Constitution of the Republic of South Africa Act 108 of 1996 ('FC' or 'Final Constitution'). Section 33(1), the limitation clause, of the Constitution of the Republic of South Africa Act 200 of 1993 ('IC' or 'Interim Constitution') read:

The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation —

- (a) shall be permissible only to the extent that it is —
 - (i) reasonable; and
 - (ii) justifiable in an open and democratic society based upon freedom and equality; and
- (b) shall not negate the essential content of the right in question, and provided further that any limitation to
 - (aa) a right entrenched in section 10, 11, 12, 14 (1), 21, 25 or 30(1)(d) or (e) or (2); or
 - (bb) a right entrenched in section 15, 16, 17, 18, 23, or 24, in so far as such rights relate to free and fair political activity,

shall, in addition to being reasonable as required in paragraph (a)(i), also be necessary.

(e) less restrictive means to achieve the purpose.

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

34.1 Introduction to limitation analysis*

(a) Purpose

The limitation clause has a four-fold purpose. First, it functions as a reminder that the rights enshrined in the Final Constitution are not absolute.² The rights

* We are deeply indebted to both Theunis Roux and Johan van der Walt for their critical and constructive engagement with our chapter.

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may be limited where the restrictions can satisfy the test laid out in the limitation clause.³ Secondly, the limitation clause tells us that rights may *only* be limited where and when the stated objective behind the restriction is designed to reinforce the values that animate this constitutional project.⁴ As we shall see, the same values that inform our understanding of what constitutes a justifiable limitation on a right — openness, democracy, dignity, equality, and freedom — also flesh out the extension of the individual rights themselves.⁵ Thirdly, the test set out in the limitation clause — with a bit of judicial amplification — allows for candid consideration of those public goods or private interests that the challenged law sets in opposition to the rights and freedoms enshrined in Chapter 2.⁶ Fourthly, the limitation clause could be said to represent an attempt to finesse the 'problem' of judicial review by establishing a test that determines the extent to which the democratically elected branches of government may craft laws that limit our constitutionally protected rights and the extent to which an unelected judiciary may override the general will by reference to the basic law. But the presence of FC s 36 serves as a reminder that the counter-majoritarian dilemma is neither a paradox nor a problem, but an

2 See *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) & Others* 2002 (6) SA 370 (CC), 2002 (12) BCLR 1285 (CC) ('*De Reuck*') at para 89 ('I reiterate that the rights contained in the Bill of Rights are not absolute. Rights have to be exercised with due regard and respect for the rights of others. Organised society can only operate on the basis of rights being exercised harmoniously with the rights of others. Of course, the rights exercised by an individual may come into conflict with the rights exercised by another, and where rights come into conflict, a balancing process is required'); *Dawood & Another v Minister of Home Affairs & Others; Shalabi & Another v Minister of Home Affairs & Others; Thomas & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) ('*Dawood*') at para 57 ('There is a clear limitation of the right to dignity caused by s 25(9)(b) read with ss 26(3) and (6). Like all constitutional rights, that right is not absolute and may be limited in appropriate cases in terms of s 36(1) of the Constitution. As stated above, there can be no doubt that there will be circumstances when the constitutional right to dignity that protects the rights of spouses to cohabit may justifiably be limited by refusing the spouses the right to cohabit in South Africa even pending a decision upon an application for an immigration permit. As also stated earlier, it is for the Legislature, in the first instance, to determine what those circumstances will be and to provide guidance to administrative officials to exercise their discretion accordingly'); *S v Manamela & Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC) ('*Manamela*') (No right is absolute, and reverse onus provisions may constitute justifiable limitations of FC s 35 where the risk and the consequences of erroneous conviction are outweighed by the risk and the consequences of guilty persons escaping conviction.)

3 *S v Mamabolo* 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC) ('*Mamabolo*') at para 72 ('The Constitution makes it clear that freedom of speech is not absolute.... [S]ection 36 permits limitations which are reasonable and justifiable in an open and democratic society based on dignity, freedom and equality.')

ineluctable consequence of our commitment to living in a constitutional democracy. So while the language of FC s 36 could never provide guidelines for judicial nullification so precise as to resolve this 'dilemma', the section does function as an interpretative prompt that ensures that the courts

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take the concerns of the political branches seriously enough to offer them appropriate levels of deference.⁷

(b) Mechanics

As a general matter, constitutional analysis under the Bill of Rights takes place in two stages.⁸ First, the applicant must demonstrate that the exercise of a

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fundamental right has been impaired, infringed, or, to use the Final Constitution's term of art, limited. This demonstration itself has several parts. To begin with, the applicant must show that the conduct or the status for which she seeks

4 See, eg, *Khumalo v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) ('*Khumalo*') at para 41 ('In deciding whether the common law rule complained of by the applicants does indeed constitute an unjustifiable limitation of section 16 of the Constitution, sight must not be lost of other constitutional values and in particular, the value of human dignity'); *Bhe & Others v Magistrate, Khayelitsha, & Others (Commission for Gender Equality as Amicus Curiae)*; *Shibi v Sithole & Others; South African Human Rights Commission & Another v President of the Republic of South Africa & Another* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) ('*Bhe*') at paras 72-73 ('It could be argued that despite its racist and sexist nature, s 23 gives recognition to customary law and acknowledges the pluralist nature of our society. This is however not its dominant purpose or effect. Section 23 was enacted as part of a racist programme intent on entrenching division and subordination. Its effect has been to ossify customary law. In the light of its destructive purpose and effect, it could not be justified in any open and democratic society. It is clear from what is stated above that the serious violation by the provisions of s 23 of the rights to equality and human dignity cannot be justified in our new constitutional order.') For further discussion of relevant case law, see §§ 34.8(c)(ii) and (iv) *infra*.

5 See, eg, *S v Makwanyane & Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) ('*Makwanyane*') at para 104 ('In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society.')

6 See *Manamela* (*supra*) at para 32 ('The Court must engage in a balancing exercise and arrive at a global judgment on proportionality.... As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected.') For a further discussion of related case law, see § 34.8(b) *infra*.

7 See, eg, Technical Committee on Fundamental Rights (Interim Constitution) *Third Report* (28 May 1993) 9-10:

In choosing the exact formulation of such clauses, most human rights documents attempt to define with a fair degree of precision, the guidelines which the judge should follow in fulfilling their duty in this respect. This is particularly so as the judges are generally secure in tenure ... and so therefore less democratically accountable than the legislature, on whose laws they sit in judgment. Such guidelines may be all the more necessary in a legal system, moving in to judicial review of legislative action for the first time.

constitutional protection is a form of conduct or status that falls within the ambit of a particular constitutional right.⁹ If she is able to show that the conduct or the

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status for which she seeks protection falls within the value-determined ambit of the right,¹⁰ then she must show, in addition, that the law or the conduct she seeks to challenge impedes or limits the exercise of the protected activity.¹¹

If the court finds that a challenged law infringes the exercise of the

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See also *Makwanyane* (supra) at para 104 quoting *Reference re ss. 193 and 195 (1)(c) of the Criminal Code (Manitoba)* (1990) 48 CRR 1, 62 ('In the process regard must be had to the provisions of [IC] section 33(1), and the underlying values of the Constitution, bearing in mind that, as a Canadian Judge has said, "the role of the Court is not to second-guess the wisdom of policy choices made by legislators."') That there is, despite the volumes of writing on the subject, no solution to the counter-majoritarian dilemma is a trite proposition. Suffice it to say that every theory of interpretation offered as a 'solution' to this problem puts judicial review in a constitutional democracy on more solid footing by alerting us to the kinds of, or styles of, arguments that may justify a court's finding that ordinary law cannot be squared with the commitments of the basic law. But no single theory of interpretation, nor any particular gloss on the text of FC s 36, can substitute for reasoned argument. Every exercise of power requires justification — whether the legislature, the executive or the judiciary exercises that power. The legitimacy of each exercise of such authority rises or falls on a combination of reasons given for law or conduct and the outcomes that law or conduct generate. See Laurence Tribe *Constitutional Choices* (1985); Stu Woolman 'Riding the Push-Me Pull-You: Constructing a Test that Reconciles the Conflicting Interests which Animate the Limitations Clause' (1994) 10 *SAJHR* 60 (Any system that permits judicial review invites, by necessity, conflict over the nature of the values said to animate the basic law); Theunis Roux 'Democracy' in S Woolman, Theunis Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 10 (Constitutional democracies protect various forms of democratic participation, and fundamental rights in large, heterogeneous nation-states are necessary conditions for these different forms of participation.) So although no general solution exists to the problem, both the drafters of the Final Constitution and the Constitutional Court have attempted to diminish the difficulties associated with this dilemma by adumbrating a doctrine that makes it somewhat easier for the party seeking to justify an infringement — especially the legislature — to do so. The Theme Committee Four Advisors to the Constitutional Assembly noted that when courts compare the actual limitation in question with other appropriate alternative restrictions on a right, the courts — and by implication the legislature — are not obliged to pick the least restrictive measure: 'Those restricting rights will be left with a discretion to decide on any particular measure within this [acceptable] range [T]his need not be the least restrictive measure viewed in isolation.' See Theme Committee Four Advisors Memorandum to Constitutional Assembly (Final Constitution)(14 April 1996). In *Case & Curtis*, Mokgoro J concluded that the distinct roles of the judiciary and the legislature in a constitutional democracy demand that the courts afford the legislature a 'margin of appreciation' with respect to the choice of means required to effect a law's constitutionally permissible ends. *Case & Another v Minister of Safety and Security & Others; Curtis v Minister of Safety and Security & Others* 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC) ('*Case & Curtis*') at para 62.

- 8 See *S v Zuma & Others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401, 414 (CC) ('*Zuma*') ('Fundamental rights analysis under IC Chapter 3 'calls for a two-stage approach. First, has there been a contravention of a guaranteed right? If so, is it justified under the limitation clause?'); *Makwanyane* (supra) at 707; *Ferreira v Levin NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1, 26 (CC) ('*Ferreira*'); *Mamabolo* (supra) at para 1 ('The first issue was whether the law ... limited the right to freedom of expression vouchsafed by the Constitution. The second is whether the procedure recognised and sanctioned by our law ... fell foul of the fair trial rights guaranteed by the Constitution.... In respect of each of the first two issues, a finding that the law does indeed limit the fundamental rights in the respects contended for, will in turn require an enquiry whether such limitation is nevertheless constitutionally justified.') We deal, below, with those instances in which all meaningful analysis — of the alleged infringement and justification for the alleged infringement — occurs within the right itself and therefore obviates the need for limitations analysis under FC s 36. For more on internal limitations, see § 34.5 infra. See, eg, *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & Another; First National Bank of SA Ltd*

fundamental right, the analysis *may* move to a second stage.¹² In this second stage of analysis, the party that would benefit from upholding the limitation will attempt to demonstrate that the infringement of a fundamental right is justifiable.¹³ This second stage of analysis occurs, generally speaking, not within the context of the fundamental right or freedom, but within the limitation clause.¹⁴

We say *may* move to a second stage for two reasons. First, where the limitation does not take place in terms of law of general application, then no opportunity arises to offer a justification in terms of FC s 36. We discuss this threshold issue for justification below.¹⁵ Second, while all rights admit, as an abstract matter, of the possibility of justifiable limitation, not all justification analysis takes place in terms of

t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC)(Test for deprivation of property); *Harksen v Lane* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC)(Test for unfair discrimination); *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)(Test for progressive realization of a socio-economic right); *Khosa & Others v Minister of Social Development & Others*; *Mahlaule & Others v Minister of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC)(‘*Khosa*’) at para 83 (‘There is a difficulty in applying s 36 of the Constitution to the socio-economic rights entrenched in ss 26 and 27 of the Constitution.’) We also engage those instances in which the Court assumes, for the sake of argument, that a rights violation has occurred and then proceeds directly to limitations analysis under FC s 36 — thus only notionally undertaking two-stage analysis. See § 34.3(a) *infra*. See, eg, *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC); *Beinash v Ernst & Young* 1999 (2) SA 116 (CC), 1999 (2) BCLR 125 (CC); *Ferreira v Levin NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC).

- 9 As the Constitutional Court has repeatedly noted, the Bill of Rights' provision on standing, FC s 38, and the Court's doctrine of objective unconstitutionality, mean that the person before the court need not be obliged to show that he or she is the person whose rights have been infringed or threatened with infringement. On the objective theory of unconstitutionality, see *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) at paras 28–29 (‘On the objective theory of unconstitutionality adopted by this Court a litigant who has standing may properly rely on the objective unconstitutionality of a statute for the relief sought, even though the right unconstitutionally infringed is not that of the litigant in question but of some other person’); *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party & Others* 1998 (4) SA 1157 (CC), 1998 (7) BCLR 855 (CC) at para 64 (In re-affirming its commitment to the objective theory of unconstitutionality, the Court wrote that ‘the practice that has been urged upon this Court carries with it the distinct danger that Courts may restrict their enquiry into the constitutionality of an Act of Parliament and concentrate on the position of a particular litigant.’) For the purposes of two-stage rights analysis, the relaxed position on standing is important. The demonstration of a *prima facie* infringement of a right is not *necessarily* contingent upon a demonstration that the party before the court is having her exercise of the right impaired by law or conduct. Cf Halton Cheadle ‘Limitations’ in H Cheadle, D Davis & F Haysom *South African Constitutional Law: The Bill of Rights* (2002) 693, 696. Cheadle asserts, with much merit, that the author of this chapter in the first edition ‘confuses issues of *locus standi* with the determination of scope’. But Professor Cheadle did not deign to describe the exact nature of this confusion. It falls to the same author to clarify what Professor Cheadle did not. Cheadle would have been correct if he had simply noted that the author’s language suggests that the only person who could challenge the validity of law or conduct was a person whose own exercise of a protected activity has been limited or impaired. FC ss 38(b)–(e) clearly grants standing to parties other than those whose ‘own interests’ have been impaired or threatened with impairment. However, it would be incorrect to suggest, as Professor Cheadle does, that the rules of standing are so relaxed that the applicant need not ‘show any need of constitutional protection.’ *Ibid* at 696. FC s 38 relaxes the requirements for standing. It does not eliminate them. See, eg, *Poswa v Member of the Executive Council For Economic Affairs, Environment and Tourism, Eastern Cape* 2001 (3) SA 582 (SCA) at para 22 (Although FC s 38 standing requirements are quite generous, the absence of any real interest in the disposition of a matter is manifestly not ‘irrelevant to the real question of whether the relief sought and granted was properly sought and granted. The more so when a finding of constitutional invalidity would have to be confirmed by the Constitutional Court for it to have any effect. The prospect of that Court having to devote time and attention to an issue which no longer exists, the resolution of which will have no effect upon the order granted against the appellant and which has not been shown to have any other practical relevance, is a singularly unattractive one. I do not believe that the Constitution requires this Court to inflict so sterile an enquiry upon the Constitutional Court.

FC s 36. FC s 9's inquiry into unfair discrimination, in addition to establishing whether a prima facie violation has occurred, exhausts all meaningful inquiry into the justification for any such violation — whether it occurs in terms of law or conduct. Similarly, FC s 25's test for arbitrary deprivation of property consciously incorporates a sliding-scale proportionality assessment — the *sine qua non* of limitations inquiries — into the rights stage of the analysis. Little, if any, space remains for additional forms of justification to be offered under FC s 36. Finally, FC ss 26 and 27 make express provision for limitations on the socio-economic rights found in those sections. Once again, FC s 36 would appear to afford a party seeking to justify a limitation of a socio-economic right few, if any, additional bases for doing so. We discuss the relationship between these rights — and, in particular, their

Generosity in according standing in protection of constitutional values is one thing, profligacy in that regard is another.) Moreover, even taking into account Cheadle's quasi-notional approach to rights interpretation, the activity of the applicant does matter when attempting to determine the scope of the right. It matters in the sense that a court or a commentator committed to a case-by-case approach to rights interpretation often determines the scope of the right, not in the abstract, but in terms of the particular kind of activity, engaged in by the applicant, for which constitutional protection is sought.

- 10 See *Matinkinca v Council of State, Ciskei* 1994 (4) SA 472 (Ck), 1994 (1) BCLR 17, 34 (Ck) ('[E]stablish[ing] ... the meaning or contents ... of the relevant fundamental rights [entails] ... a value judgment as opposed to a legalistic or positivistic approach.') However, the Constitutional Court is often reluctant to define clearly the ambit of a right, fearing that such an approach to demarcation will bind them, in some future dispute, to an understanding of the right that they had not anticipated and would not endorse but for the existence of some hypothetical precedent. See, for example, *Case & Curtis* (supra) at para 94 ('The less we say meanwhile, in short, the better that will be in the long run.') South African commentators are similarly reluctant to specify what two-stage rights analysis actually requires at each stage of analysis. For example, at the same time as he commits himself to a 'generous' approach to rights interpretation that would not unduly circumscribe a right's protective ambit and would leave the ultimate assessment of the value of a particular form of notionally protected activity to the limitations stage of analysis, Cheadle claims that rights analysis — first-stage analysis — ought to take some account of the competing 'social interests' at stake in a constitutional challenge. Even if it is logically possible to do what Cheadle suggests, he remains, as these authors read him, unclear as to the kind of analysis that occurs at the first stage.
- 11 There is, of course, an important distinction to be made between law or conduct that limits expressly or intentionally a fundamental right and law or conduct that has the unintended consequence of limiting a fundamental right. See, eg, *Irwin Toy Ltd v Quebec (Attorney General)* (1989) 58 DLR (4th) 577 (Sets out different tests for government actions which intentionally restrict the protected activity and government actions which effectively restrict the protected activity); *Secretary of State of Maryland v J H Munson Co* 467 US 947 (1984) (Law — backed up by the threat of criminal sanction — may intimidate individuals into not engaging in constitutionally protected activity: such law is said to have a 'chilling effect'.) For example, the doctrine of overbreadth holds that laws which sweep into their proscriptive reach both constitutionally forbidden activity and constitutionally protected activity are invalid. See, for example, *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC) ('SANDU'). For a discussion of the overbreadth doctrine as articulated in *SANDU*, see Stu Woolman 'Freedom of Assembly' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 43.
- 12 See *Zuma* (supra) at 414 ('Fundamental rights analysis under IC Chapter 3 'calls for a two-stage approach. First, has there been a contravention of a guaranteed right? If so, is it justified under the limitation clause?') See also *Moise v Transitional Local Council of Greater Germiston* 2001 (4) SA 491 (CC), 2001 (8) BCLR 765 (CC) at para 19 ('It is also no longer doubted that, once a limitation has been found to exist, the burden of justification under s 36(1) rests on the party asserting that the limitation is saved by the application of the provisions of the section. The weighing-up exercise is ultimately concerned with the proportional assessment of competing interests but, to the extent that justification rests on factual and/or policy considerations, the party contending for justification must put such material before the Court.')

internal limitations clauses — and the general limitations clause at greater length below.¹⁶

(c) Shared constitutional interpretation, an appropriate normative framework and hard choices

Let us return, briefly, to three points made above. First, the general limitation clause articulates standards for the justification of restrictions placed by law upon the exercise of fundamental rights. Second, these standards are expressed in rather rarefied rules that courts make concrete through their application to

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discrete cases. Third, limitations analysis allows for open and candid consideration of competing interests. Taken together, these three statements give expression to what the Constitutional Court has taken to be one of the most basic principles in the Final Constitution: that every exercise of public power derives its force from basic law and needs to be justified by reference to the basic law,¹⁷ and that only open and public processes of rational deliberation produce acceptable forms of justification.¹⁸

Despite the fact that these standards are produced openly and publicly, or perhaps because of it, they are often hotly contested. Courts cannot, and do not, simply apply the requirements of the text of the limitation clause mechanically. Courts need to explain how they understand the demands of the text and why those demands have certain consequences for the disposition of a case. As a result, judges themselves are subject to the demand for justification. They must be able to explain why they have given the standards the content that they have, and why they have applied them in a given fashion. By doing so, they signal their respect for the parties before them, provide guidance to legislators, fellow judges and prospective litigants, and, perhaps most importantly of all, model rational political discourse through participation in an ongoing debate about the meaning of constitutional norms.¹⁹

13 See § 34.6 *infra*, on why FC s 36 places the burden of justification on the party seeking to uphold the limitation.

14 See § 34.5 *infra*, on the manner in which various internal limitations obviate the need for FC s 36 analysis.

15 See § 34.7 *infra*.

16 See § 34.5 *infra*.

17 *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) ('*Pharmaceutical Manufacturers*').

18 *K v Minister of Safety and Security* 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC).

19 See *S v Steyn* 2001 (1) SA 1146 (CC), 2001 (1) BCLR 52 (CC) (Previous findings of the Constitutional Court do not absolve legislatures from the duty to deliberate about the constitutionality of bills before them, or to justify limitations of fundamental rights. In *Steyn*, the state had not adduced evidence to support its claim that the requirement of leave to appeal from a magistrate's court was necessary to prevent the clogging of appeal rolls and to ensure that hopeless appeals do not waste the courts' time. Since virtually no attempt was made by the state to justify the limitation — presumably because the Court had upheld a similar provision in relation to appeals from High Courts — the Constitutional Court found that the state had failed to justify the measure in

These initial observations suggest that Bill of Rights litigation, rightly conceived, reflects an ongoing dialogue about the meaning of fundamental rights and the cogency of the justifications offered for their limitation.²⁰ From this perspective, the court's exercise of powers of judicial review are best understood as part of a shared project of constitutional interpretation. This project requires that the courts, through thoroughly reasoned engagement with the constitutional text, produce a normative framework of sufficient density to guide other political actors, organs of state and social agents. At the same time, a doctrine of shared constitutional interpretation encourages other actors to place their own gloss on constitutional norms and to experiment with different policy options consistent with the basic law.

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Put slightly differently, powers of judicial review are best understood not as part of a battle for ascendancy between courts and legislatures (though they may turn into that²¹) or a means of frustrating the will of the political majority, but rather as a commitment of our basic law to shared constitutional competence. This shared competence stands, as we shall see, for five basic propositions: (1) it supplants the notion of judicial supremacy with respect to constitutional interpretation — all branches of government have a relatively equal stake in giving our basic law content; (2) while courts retain the power to determine the content of any given provision, a commitment to shared constitutional interpretation means that a court ought to limit consciously the reach of its holding regarding the meaning of a given provision and to invite the political branches of government or other organs of state to come up with their own alternative, but ultimately consistent, gloss on the text; (3) shared constitutional competence married to a rather open-ended or provisional understanding of the content of the basic law means that the Constitutional Court's limitations analysis might be understood in terms of norm-setting behaviour that provides guidance to other state actors without foreclosing the possibility of other effective safeguards for rights or other useful methods for their realization; (4) a commitment to shared interpretation ratchets down the conflict between the courts and the political branches of government, and enables courts and all other actors to see how variations on a given constitutional norm work in practice;²² and (5) this

question.)

- 20 See *S v Mhlungu* 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC) ('*Mhlungu*') at para 129 (Constitutional interpretation takes the form of 'a principled judicial dialogue, in the first place between members of this Court, then between our Court and other courts, the legal profession, law schools, Parliament, and, indirectly, with the public at large'.) See also Henk Botha 'Rights, Limitations, and the Impossibility of Self-government' in H Botha, A van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 13, 24-25.
- 21 We are grateful to Johan van der Walt for his attention to this parenthetical and his insistence that the parenthetical may mask the fact that politics never fully disappears from such disputes. See Johan van der Walt 'A Reply to Woolman and Botha on Limitations' in M Bishop, D Brand & S Woolman (eds) *Constitutional Conversations & Proceedings of the Constitutional Law of South Africa Conference and Public Lecture Series* (2007). The original reply is available at www.chr.up.ac.za/closa.
- 22 See Stu Woolman 'The Selfless Constitution: Flourishing and Experimentation as the Foundations of the South African State' (2006) 21 *SA Public Law* (forthcoming). See, especially, Michael Dorf & Barry Friedman 'Shared Constitutional Interpretation' (2000) 2000 *Sup Ct Rev* 61. In *National Education Health and Allied Workers Union v University of Cape Town & Others*, the Constitutional Court recognized that the process of interpreting the Labour Relations Act in light of the demands of both FC s 39(2) and FC s 23(1) requires an appreciation of the legislature's and the courts' shared responsibility for interpreting the Final Constitution. It wrote:

experimentalist — or dialogic — framework ought to reveal 'best practices' with respect to the realization of constitutional objectives and should offer us regular opportunities to re-think the meaning — and the constraints — of our basic law.

In the pages that follow, we assess the ability of the Constitutional Court to delineate clearly rights analysis and limitations analysis, to 'balance' rights, to distinguish the core of a right from its penumbra, and to construct a framework for limitations analysis that both (a) enables the parties before the court to make arguments that fully ventilate the issues raised and (b) reinforces our democratic law-making processes so that they take adequate account of the constitutional imperative to create 'an open and democratic society' based upon the democratic values of 'human dignity, equality and freedom'. After a critical appraisal of the Court's efforts in this regard, we offer our own thick(er) conception of what limitations analysis ought to look like. We offer this thicker conception not because we think that it is, in the abstract, to be preferred. We proffer the thicker conception because we think that the Court's current approach to rights interpretation and limitations analysis lacks analytical rigour.

That thicker conception begins with an appropriate standard of review for limitations analysis. This standard of review takes the form of, what we called above, a doctrine of shared constitutional interpretation. This doctrine mediates between the doctrine of constitutional supremacy (a doctrine that does not shy away from the necessity of judicial law-making) and the doctrine of separation of powers (a doctrine that often justifies the 'need' for judicial deference). That said, the courts must still articulate a general normative framework that gives the standard of review real purchase and which thereby guides the behaviour of political actors and citizens alike. In the Final Constitution, and in FC s 36 in particular, the creation of a normative framework adequate to the task of limitations analysis turns on giving adequate content to the phrase 'open and democratic society based upon human dignity, equality and freedom'. This task requires that we do something which the courts themselves have only gotten half-right: we offer a description of how the value of dignity and the principle of democracy work — in tandem — to produce, in Theunis Roux's words, a political system in which 'rights ... lie at the very heart of South African democracy'.²³ Thus, whereas the Court has privileged the value of dignity over the other four values found in the Final Constitution's favourite catchphrase, we reassert the priority of democracy. That reassertion does not, of

The LRA was enacted 'to give effect to and regulate the fundamental rights conferred by s 27 of the Constitution.' In doing so the LRA gives content to s 23 of the Constitution and must therefore be construed and applied consistently with that purpose. Section 3(b) of the LRA underscores this by requiring that the provisions of the LRA must be interpreted 'in compliance with the Constitution'. Therefore the proper interpretation and application of the LRA will raise a constitutional issue. This is because the Legislature is under an obligation to 'respect, protect, promote and fulfil the rights in the Bill of Rights'. In many cases, constitutional rights can be honoured effectively only if legislation is enacted. Such legislation will of course always be subject to constitutional scrutiny to ensure that it is not inconsistent with the Constitution. Where the Legislature enacts legislation in the effort to meet its constitutional obligations, and does so within constitutional limits, courts must give full effect to the legislative purpose. Moreover, the proper interpretation of such legislation will ensure the protection, promotion and fulfilment of constitutional rights and as such will be a constitutional matter. *In this way, the courts and the Legislature act in partnership to give life to constitutional rights.*

2003 (3) SA 1 (CC), 2003 (2) BCLR 154 (CC) at para 14 (emphasis added).

23 Theunis Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 10, § 10.3.

course, provide an easy algorithm for resolving conflicts between various rights, values and other pressing, constitutionally-mandated, imperatives. Even if, as we have argued previously, and Professor Roux himself notes, fundamental rights analysis and limitations analysis are both driven by a commitment to rights *and* democracy,²⁴ courts are still left with the

decidedly difficult task of harmonizing constitutionally-permissible, but conflicting, ends. As we suggest in our critique of balancing, the goods reflected in rights and in laws are often incommensurable. Conflict resolution in the face of value incommensurability requires substantially more than the invocation of such patmetaphors as the 'scales of justice'. In our final, highly speculative section, we defend the use of a particular form of judicial narrative-making — storytelling. The difference between story-telling as the preferred form of judicial narrative-making in hard cases and the reliance on cryptic justifications for hard choices is the difference between a good explanation and a bad explanation for the decisions that we take in terms of FC s 36. The better the explanation, the more persuasive it will be. For those who need persuading, the more persuasive the decision, the more legitimate it will be deemed to be. Storytelling, properly understood, is a rhetorical form that enables judges, in Sachs J's words, to challenge the 'hydraulic insistence on conformity to majoritarian standards'²⁵ and to consider a range of possible outcomes that might not otherwise have occurred to them or their public.

34.2 Drafting history

The limitation clauses of the Interim Constitution and Final Constitutions have a complex history. The text of both clauses reflects a wide array of indigenous concerns and foreign influences. This section uses the drafting history to illuminate the meaning of various sections of the Final Constitution's limitation clause.

24 For a discussion of the relationship between fundamental rights analysis and limitations analysis, see § 34.3(a) *infra*. See also Roux 'Democracy' (*supra*) at § 10.3. ('What is often forgotten when thinking about the two-stage approach to constitutional adjudication is that both stages of the inquiry are driven by considerations of rights *and* democracy: the first stage because it involves an assessment of whether the *right* in question has been infringed, in a context in which FC s 7(1) provides that the 'Bill of Rights is a cornerstone of *democracy*' and 'affirms the *democratic* values of human dignity, equality and freedom'; and the second stage because limitations analysis involves the assessment of whether the *right* has been reasonably and justifiably limited, measured against the standards of 'an open and *democratic* society based on human dignity, equality and freedom'. He continues: 'Of course, resolving the rights-democracy tension is not really this simple. Rights *are* in tension with democracy, and it will not always be readily apparent when a decision to vindicate a right against the will of the majority will serve the democratic values listed in FC s 7(1), and when it will not. But what FC s 7(1) decisively does do is to put beyond question the idea that there will be at least some occasions when the vindication of a right at the expense of majoritarian wishes will not be undemocratic.')

25 In Sachs J's view, a reasonable accommodation of conflicting interests must avoid two opposite dangers:

On the one hand, there is the temptation to proffer an over-valiant lance in defence of an under-protected group without paying regard to the real difficulties facing law-enforcement agencies. On the other, there is the tendency somnambulistically to sustain the existing system of administration of justice and the mind-set that goes with it, simply because, like Everest, it is there; in the words of Burger CJ, it is necessary to be aware of "requirements of contemporary society exerting a hydraulic insistence on conformity to majoritarian standards."

Prince v President of the Law Society of the Cape of Good Hope 2001 (2) SA 388 (CC), 2001 (2) BCLR 133 (CC) ('Prince') at para 156.

(a) Evolution of the clause²⁶

The basic form of the Interim Constitution's limitation clause did not change over the course of the twelve reports generated by the Multi-Party Negotiating

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Forum's Technical Committee on Fundamental Rights. In its Second Report, the Committee identified what it believed to be the primary features of a limitation clause: (a) a 'law of general application' threshold test; (b) a reasonableness requirement; (c) a necessity requirement; (d) a 'justifiable in a free, open and democratic society' requirement; (e) a proportionality or balancing approach; (f) a 'non-derogation from the essential content of the right' requirement; and (g) immunization of select rights from any limitation at all. With the exception of the last characteristic, all of these attributes appear in one form or another in the twelfth and final version of the Interim Constitution's limitation clause.²⁷ That said, the transformation of some of these attributes over twelve drafts gives our exegesis of the text initial direction.

The first significant transformation was the elimination of the immunization proviso. It appeared initially that certain rights would be expressly inviolable.²⁸ In the seventh draft that proviso — and the concomitant commitment to inviolability — disappeared.²⁹ However, that certain rights were no longer expressly inviolable did not mean that the drafters believed that these rights were now in fact limitable. By stipulating that no restriction on a fundamental right could negate the essential content of the right, the drafters of the Interim Constitution believed that they had effectively immunized certain rights from limitation.³⁰

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26 That the Technical Committee or Ad Hoc Committee notes will 'generally' be of 'some' assistance in understanding the meaning and purpose of a constitutional provision is beyond dispute. See *Makwanyane* (supra) at 679 (Chaskalson P wrote: 'Such background material can provide a context for interpretation of the Constitution and where it serves that purpose, I can see no reason why it should be excluded. The precise nature of the evidence, and the purpose for which it may be tendered, will determine the weight to be given to it.')

27 Cf Etienne Mureinik 'A Bridge to Where: Introducing the Bill of Rights' (1994) 10 *SAJHR* 31 (Argues that the disappearance of a proviso that would immunize select rights from limitation in favour of an analytic structure which would subject all rights to justifiable limitation may overemphasize symmetry at the expense of common sense.)

28 See Technical Committee on Fundamental Rights 'Third Report' (28 May 1993) 8 ('Typical among those which are regarded as absolutely inviolable are freedom from torture and freedom of conscience, religion, belief, thought and opinion.') See also Fifth Report of the Technical Committee on Fundamental Rights (11 June 1993) 14 ('*With the exception of the rights and freedoms referred to in Section 6(2), 7 (excepting the right not to be subject to forced labour), 9 (excepting freedom of religion), 21 and 27, the rights and freedoms entrenched in this Chapter may be limited by a law of general application, provided that such limitation — (a) shall be permissible to the extent (i) necessary and reasonable, and (ii) justifiable in a free, open and democratic society, and (b) shall not negate the essential content of the right or freedom in question.*' (Emphasis added.))

29 Technical Committee on Fundamental Rights 'Seventh Report' (29 July 1993) 10 ('The rights and freedoms entrenched in this Chapter may be limited by a law applying generally and not solely to an individual case, provided that such limitation — (a) shall be permissible to the extent (i) reasonable, and (ii) justifiable in a free, open and democratic society, and (b) shall not negate the essential content of the right or freedom in question ...')

The second significant transformation of the limitation clause involved the death and the resurrection of the word 'necessary'. The disappearance of the term from the Fifth Report through the Seventh Report of the Technical Committee signalled either the desire to relax the limitation test or the belief that the term was redundant.³¹ The *travaux préparatoires* do not say. In the Eleventh Report, the term 'necessary' reappears and comes to occupy a very different place in the architecture of the limitation clause. The Technical Committee's notes make it clear that the term is meant to subject limitations placed upon a particular set of enumerated rights to a stricter form of judicial scrutiny.³²

(b) Foreign influences

The undeniable debt our limitation clause owes to the Canadian Charter justified the close attention our courts initially paid to Canadian case law.³³ And despite the

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- 30 Despite the excision of the immunization proviso, the drafters continued to speak of illimitable rights. See Combined Meeting of the Ad Hoc Committee and the Technical Committee on Fundamental Rights (14 September 1993) 22 (The combined meeting generated the following list of illimitable rights: human dignity, freedom and security of the person (in so far as it protects against torture or cruel, inhuman or degrading treatment punishment), rights of detained, arrested and accused persons (in so far as they include the rights to reasons for detention, to detention under dignified conditions, to be informed of the right to remain silent and not to be compelled to make a confession if arrested, and the rights if accused to be informed of the charge, to be presumed innocent, to remain silent during plea proceedings, not to be a compellable witness, not to be convicted of an *ex post facto* crime, not to be subject to two trials for the same crime, to be tried in a language the accused understands, and to be sentenced within a reasonable period of conviction), and the rights of children not to be neglected, abused, or subject to child labour and to be detained in appropriate conditions. How the text was to ensure their illimitability, in the absence of an immunization proviso, the combined meeting did not say.)
- 31 Compare Technical Committee on Fundamental Rights 'Fifth Report' (11 June 1993) 14 (Rights and freedoms may be limited 'to the extent (i) necessary and reasonable') with Technical Committee on Fundamental Rights 'Seventh Report' (29 July 1993) 12 (Rights and freedoms may be limited 'to the extent (i) reasonable.')
- 32 See Technical Committee on Fundamental Rights 'Tenth Report' (5 October 1993) 30 ('[A] law limiting a right entrenched in sections ... shall be *strictly construed* for constitutional validity.' (emphasis added)). The debt to American jurisprudence is made explicit in the draft committee notes. Indeed, the rights in s 33(1)(aa) and (bb) had been subject to a 'strict scrutiny' provision in previous drafts of the interpretation clause — and not in the limitation clause. However, when the drafters got wind of the potential for incoherence that would result from having a 'reasonableness' test in a Canadian-style limitation clause and an American-style shifting of standards of scrutiny in the interpretation clause, they excised the offending text in the interpretation clause and modified the limitation clause accordingly. For a fuller explanation of the problems with the original formulation of the limitation and the interpretation clauses, see Cathi Albertyn, Ronalda Murphy, Polly Halfkenny & Stu Woolman 'Critique of the Tenth Progress Report of the Technical Committee on Fundamental Rights' (September 1993)(Memorandum on file with author.) In the Eleventh Report, the Committee explains the change as follows: 'If the Council is of the opinion that laws limiting certain rights should be subject to a stricter form of review than laws limiting other rights, the Technical Committee proposes the inclusion of the second proviso as submitted. This would mean that for the laws limiting rights listed in the proviso, a necessity test will apply in addition to the test for reasonableness already required by clause 34(1)(a)(i). In this way, the further logical development of principles conceived in Canadian jurisprudence will be possible without creating the danger of confusion with the fundamentally different principles enunciated in US jurisprudence.' Technical Committee on Fundamental Rights 'Eleventh Report' (8 November 1993) 14-15. See also Lourens du Plessis 'A Note on Application, Interpretation, Limitation and Suspension Clauses in South Africa's Transitional Bill of Rights' (1994) 5 *Stellenbosch LR* 86, 89 (Committee's attention drawn to potential incoherence of the two clauses by aforementioned memo; offending text in interpretation clause excised and moved to limitation clause.)

fact that our courts have never followed the fairly stringent test laid down by the Canadian Supreme Court in *R v Oakes*, our jurisprudence has developed along roughly similar lines.³⁴ Limitations analysis under the Charter and our Bill of Rights possesses such common features as (1) a threshold requirement that a limitation must take the form of a 'law of general application';³⁵ (2) a threshold requirement that the objective of the impugned law be of sufficiently pressing and substantial import to warrant overriding a constitutionally protected right;³⁶ (3) a proportionality assessment that demands, at a minimum, that a rational connection exist between the means employed and the objective sought,³⁷ that the means

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employed impair the right as 'little as possible',³⁸ and that the burdens imposed on those whose rights are impaired do not outweigh the benefits to society that flow from the limitation.³⁹

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- 33 The Interim Constitution's limitation clause, the Final Constitution's limitation clause and the Canadian Charter's limitation clause share two important characteristics. First, they apply generally to the constitutionally enshrined rights. (Thus, they differ from those constitutions (and conventions) that have individualized limitation clauses within particular rights, and those constitutions (and conventions) which have no limitation clause(s) at all.) Secondly, the language of the Final Constitution's limitation clause is strikingly similar to the language of the Canadian Charter. Section 1 of the Canadian Charter reads, in relevant part, that the 'guarantees ... set out in ... [the Charter are] subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.' The Final Constitution's limitation clause reads, in relevant part, that the 'rights of this Chapter [on Fundamental Rights] may be limited by law of general application provided that such limitation ... is ... reasonable ... and justifiable in an open and democratic society based upon human dignity, equality and freedom.'
- 34 [1986] 1 SCR 103, 26 DLR (4th) 200, 227-28 ('*Oakes*'). For a more concise wording of this limitations test, see *R v Chaulk* [1990] 3 SCR 1302, 62 CCC (3d) 193, 216-17. Cf *Edwards Books & Art Ltd v The Queen* [1986] 2 SCR 713, 35 DLR (4th) 1, 41 (While the *Oakes* test required the government to go to great lengths to satisfy each leg, the *Edwards* Court suggests that the government's showing might be subject to a less exacting standard of proof and that the same questions need not be asked in every case). The *Oakes* test was cited with approval in a large number of early South African Supreme Court judgments, but largely abandoned as a point of reference after *Makwanyane*. See *Qozeleni v Minister of Law and Order* 1994 (3) SA 625 (E), 1994 (1) BCLR 75 (E); *Kauesa v Minister of Home Affairs* 1995 (1) SA 51 (Nm), 1994 (3) BCLR 1, 26 (Nm); *S v Majavu* 1994 (4) SA 268 (Ck), 1994 (2) BCLR 56, 83-84 (Ck).
- 35 Compare *Dawood v Minister of Home Affairs; Shalabi & Another v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC), 2000 (3) BCLR 331 (CC) ('*Dawood*') with *Committee for the Commonwealth of Canada v Canada* (1991) 77 DLR (4th) 385.
- 36 Compare *National Director of Public Prosecutions & Another v Mohamed NO & Others* 2003 (5) BCLR 476 (CC), 2003 (4) SA 1 (CC) with *Oakes* (supra) at 227 (The *Oakes* Court suggests that laws which serve such values as the dignity of the individual, social justice, equality, tolerance, cultural diversity, and a commitment to representative and participatory politics — constitutive features of a free and democratic society — could be of sufficient import to justify the infringement of constitutional rights. This list echoes our own quintet, captured in the phrase an 'open and democratic society based upon human dignity, equality and freedom'. Neither list of values or objectives is meant to be exhaustive.) See also *Vriend v Alberta* [1998] 1 SCR 493 (Despite the benevolent and sufficiently pressing objectives of the Alberta Parliament in promulgating a human rights charter, Supreme Court finds that the failure of Alberta's human rights charter to prohibit, expressly, discrimination on grounds of sexual orientation violated, unjustifiably, Charter s 15's right to equality.) But see *Little Sisters Book & Art Emporium v Canada (Minister of Justice)* [2000] — SCR — (The legislation reflected a pressing and substantial parliamentary objective of prohibiting the entry of socially harmful materials into Canada, and the customs procedures under scrutiny were rationally connected to that objective.)

While both our Constitutional Court and the Canadian Supreme Court state that limitations analysis ought, in general, to follow the model adumbrated above, they have rejected the ostensibly more mechanical approach to limitations delineated in *Oakes*.⁴⁰ Whether the benefits of a flexible test outweigh the potential for confusion with respect to its application by lower courts and its use as a standard by state and private actors is a subject that shall occupy us throughout the remainder of this chapter.⁴¹

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- 37 The requirement that the restrictive measure be rationally connected to the achievement of its objective is a test legislation rarely fails in Canadian jurisprudence. But see *Oakes* (supra) at 200 (Reverse onus provision requiring individual in possession of drugs to show that she was not trafficking deemed rationally unrelated to objective of stopping trafficking); *Andrews v Law Society of British Columbia* [1989] 1 SCR 143, 56 DLR (4th) 1 (Holds that citizenship requirements for bar membership were unrelated to the objective of ensuring that lawyers carried out their duties in an honourable and conscientious manner); *Benner v Canada* [1997] 1 SCR 358 (Stricter requirements for Canadian citizenship placed upon a person born outside of Canada before 1977 to a Canadian mother than those requirement placed upon a person born to a Canadian father before 1977 were found not to be rationally connected to the objective of keeping dangerous people out of the country.) The rational connection requirement — which provides a minimum floor for justification below which government's explanations may not fall — has been dispositive in a relatively large number of South African cases. See, eg, *S v Bhulwana*; *S v Gwadiso* 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC) at paras 20, 22–23 (Court held that effective prohibition of the abuse of illegal drugs would not be substantially furthered by a legislative presumption that a person found in possession of 115 grams of dagga is a dealer, and thus that there was no logical connection between such possession and the presumption that the person is trafficking); *S v Dodo* 2001 (3) SA 382 (CC), 2001 (3) BCLR 279, 293–94 (CC)(Court found no rational relationship between a mandatory sentence of life imprisonment and the crime for which it was imposed because state could not demonstrate that the penalty would serve as a deterrent); *Lesapo v North West Agricultural Bank & another* 2000 (1) SA 409 (CC), 1999 (12) BCLR 1420 (CC) at para 26 (Limitation only minimally related to its purpose.) See, for further references to apposite cases, § 34.8(c)(iv) infra.
- 38 For examples in Canadian jurisprudence, see *Dunmore v Ontario* [2001] 3 SCR 1016 (Canadian Supreme Court finds that the exclusion of agricultural workers from the respondent's labour relations statute did not constitute least restrictive limitation on the right to freedom of expression); *UCFW v Kmart Canada*, [1999] 2 SCR 1083 (Prohibition of a peaceful distribution of leaflets by a striking union at sites not included in the labour dispute was found not to be the least restrictive means of minimizing disruption of businesses not involved in the dispute); *Thomson Newspapers Co. v Canada* [1998] 1 SCR 877 (Prohibition of the publication of opinion polls in the final three days of an election campaign was found not to be the least restrictive means of protecting voters from inaccurate information); *Ross v New Brunswick School District* [1996] 1 SCR 825 (Recommendation by board of inquiry that a person employed in a non-teaching position by the school board must be fired if he continued with his distribution of anti-semitic leaflets deemed not to be the least restrictive means of rectifying a discriminatory climate in the school); *RJR-McDonald v Canada* [1995] 3 SCR 199 (Federal ban on all advertising of tobacco products deemed not to be the least restrictive means of reducing the consumption of tobacco.) For examples in South African jurisprudence, see *S v Manamela & Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC) at para 43 (Purpose of a reverse onus provision, in terms of which someone who had acquired stolen goods was presumed to be guilty of a statutory offence, could also be achieved by a less restrictive means, namely a more narrowly tailored reverse onus provision which was confined to certain categories of more expensive stolen goods); *Phillips & Another v Director of Public Prosecutions (Witwatersrand Local Division) & Others* 2003 (3) SA 345 (CC), 2003 (4) BCLR 357 (CC) at paras 26–28 (Objective of the limitation — to minimise the harm that may result from the consumption of liquor in public places — could be achieved through measures that were less restrictive of the right to freedom of expression.) For further examples of such cases, see § 34.8(c)(v) infra.

However, neither the Canadian Supreme Court nor our Constitutional Court requires perfection — or the least restrictive means in the best of all possible worlds. See *Reference re ss 193 and 195.1(1)(c) of the Criminal Code* [1990] 1 SCR 1123, 1138, 56 CCC (3d) 65 ('The legislative

Many of the obvious influences of other constitutional documents on the Interim Constitution's limitation clause have been eliminated from the text of the Final Constitution. IC s 33 required limitations of certain rights to be both 'reasonable' and 'necessary', while other rights could be limited in a manner that was merely 'reasonable'. That distinction, clearly inspired by the doctrines of strict scrutiny, intermediate scrutiny and rationality review found in American equal protection and fundamental rights jurisprudence, was excised in favour of a test that does not pre-judge the importance of the fundamental rights found in Chapter 2. And while the German Basic Law's contribution of the requirement that limitations of fundamental rights can only be justified by reference to a 'law of general application' remains on

scheme ... need not be the most 'perfect' scheme that could be imagined by this Court or any other Court. Rather it is sufficient if it is appropriately and carefully tailored in the context of the infringed right.') The Constitutional Court, while accepting the Final Constitution's invitation to consider the availability of less restrictive means, has made it clear that such a requirement does not mean that the legislature must, in fact, have identified and enshrined in law the least restrictive means for achieving the objective of a limitation. See *Case & Another v Minister of Safety and Security & Others*; *Curtis v Minister of Safety and Security & Others* 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC) at para 62 (Mokgoro J)(Court affords legislature a 'margin of appreciation' with respect to choosing the most effective means of achieving a constitutionally permissible objective.) Moreover, institutional comity cautions against the substitution of its judgment of what constitutes the least restrictive means for the well-considered opinion of the legislature or the executive. For more on 'less restrictive means', see § 34.8(c)(v) infra.

- 39 The Canadian Supreme Court has found minimum drug sentences (*R v Smith* [1987] 1 SCR 1045, 40 DLR (4th) 435), laws protecting the confidentiality of matrimonial proceedings (*Edmonton Journal v Alberta* [1989] 2 SCR 1326, 64 DLR (4th) 577), by-pass and notice provisions for abortions (*R v Morgenthaler* [1988] 1 SCR 30, 44 DLR (4th) 385), citizenship requirements for bar membership (*Andrews v Law Society of British Columbia* [1989] 1 SCR 143, 56 DLR (4th) 1), and restrictions on advertising by dentists (*Rocket v Royal College of Dental Surgeons* [1990] 2 SCR 232, 71 DLR (4th) 68) to impose costs and injuries disproportionate to the alleged benefits. On the other hand, it has found measures intended to prevent drunk-driving (*R v Hufsky* [1988] 1 SCR 621, 40 CCC (3d) 398; *R v Thomsen* [1988] 1 SCR 640, 40 CCC (3d) 411), to restrict publication of sex-assault victims' names (*Canadian Newspapers Co v Canada (Attorney General)* [1988] 2 SCR 122, 52 DLR (4th) 690), and to prohibit picketing outside courthouses (*BCGEU v British Columbia (Attorney General)* [1988] 2 SCR 214, 53 DLR (4th) 1) to impose costs proportionate to the benefits realized.

In appraising whether the costs imposed by a limitation outweigh the benefits that might otherwise accrue, the Constitutional Court sometimes considers whether the limitation affects the core values underlying a particular right. It has found that the right to be tried in a hearing presided over by a judicial officer is a core component of the right not to be detained without trial. See *De Lange v Smuts NO & Others* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at para 89. Similarly, reverse onus provisions are said to strike at the heart of the right to be presumed innocent, and so require a clear and convincing demonstration that the benefits of such a provision outweigh its costs. See *Manamela* (supra) at para 49. By contrast, the benefits that flowed from a prohibition of child pornography were found to outweigh considerably the costs imposed upon those persons whose right to freedom of expression had been restricted. See *De Reuck* (supra) at para 59. For more on the notions of 'the core' and 'the periphery', see §§ 34.8(c)(iii) and (d) infra.

- 40 See *Edward Books and Art Ltd v The Queen* [1986] 2 SCR 713, 35 DLR (4th) 1, 41 ('[T]he nature of the proportionality test would vary depending upon the circumstances. Both in articulating the standard of proof and in describing the criteria comprising the proportionality requirement, the Court has been careful to avoid rigid and inflexible standards'); *Black v Law Society of Alberta* [1989] 1 SCR 591, 58 DLR (4th) 317, 348 ('[L]egislature must be given sufficient room to achieve its objective'); *USA v Cotroni* [1989] 1 SCR 1469, 1489, 48 CCC (3d) 193 ('[A] mechanistic approach [to the proportionality test] must be avoided'); *Andrews v Law Society of British Columbia* [1989] 1 SCR 143, 56 DLR (4th) 1, 41 ('The test must be approached in a flexible manner. The analysis should be functional, focusing on the character of the classification in question, the constitutional and societal importance of the interests adversely affected, the relative importance to the individuals affected of the benefit of which they are deprived, and the importance of the state interest.') The Canadian Supreme Court has said that cases involving the

the books,⁴² the drafters of the Final Constitution decided not to retain its proscription of limitations that 'negate the essential content of [a] right'.⁴³

34.3 Relationship between fundamental rights analysis and limitation analysis

This section attempts to answer a basic question in Bill of Rights analysis: how does fundamental rights analysis relate to limitation clause analysis? That is, what happens in the first stage of analysis, what remains to be done in the second stage,

criminal justice system are subject to closer judicial scrutiny and a stricter form of the minimal impairment test than labour or business regulations, because criminal justice is an area in which the court can claim greater expertise. See *McKinney v University of Guelph* [1990] 3 SCR 229, 76 DLR (4th) 545. But in at least one criminal case, the Supreme Court applied a fairly weak version of the minimal impairment test and upheld the extradition of the accused. See *USA v Cotroni* [1989] 1 SCR 1469, 48 CCC 193. See also *Dagenais v Canadian Broadcasting Corp* (1994) 120 DLR (4th) 12 (Court employs weaker version of *Oakes* test in criminal context.)

The *Oakes* test has no special place in South African constitutional jurisprudence. Although the *Oakes* test featured prominently in the *Makwanyane* Court's discussion of comparative limitations jurisprudence, Chaskalson P was quick to point out that 'there are differences between our Constitution and the Canadian Charter which have a bearing on the way in which section 33 should be dealt with'. *Makwanyane* (supra) at paras 105–107, 110. Chaskalson P gave no indication of what the relevant differences might be, but simply echoed the words of Kentridge AJ in *Zuma* that 'I see no reason in this case ... to fit our analysis into the Canadian pattern.' See *Zuma* (supra) at para 35.

41 With respect to limitations analysis under the Charter, Ruth Colker has suggested that too loose a proportionality test threatens indiscriminate judicial deference to legislative and executive prerogatives. See Ruth Colker 'Section 1, Contextuality and the Anti-disadvantage Principle' (1992) 42 *University of Toronto LJ* 77, 104. There is also a second danger. A lack of analytical precision may make it more difficult to anticipate the kinds of arguments that would lead the court to conclude that a limitation of a right is (or is not) reasonable and justifiable. The absence of rules of law to which political actors must align their behaviour undermines the ability of other branches of government to comply with the Bill of Rights — and places the court in the unnecessarily uncomfortable position of having to reject or to accept government's positions in any given case as if they were ruling *ab initio*. We believe that such considerations constitute some of the strongest arguments against Sunstein's 'one case at a time' approach or Currie's 'jurisprudence of avoidance'. See Cass Sunstein *One Case at a Time* (1996); Iain Currie 'Judicious Avoidance' (1999) 15 *SAJHR* 138. In addition, the absence of clearly articulated rules undermines rational political discourse. Reasoned disagreement can only take place when the parties agree on the terms of the debate. The Constitutional Court abdicates its institutional responsibility to model rational political discourse by refusing to state, in a comprehensive manner, the reasons that lead to its conclusions. Finally, avoidance undermines the 'integrity' of the legal system. It is impossible to create a more coherent jurisprudence without identifying the rules — and the reasons — that ground decisions.

42 For more on German constitutional jurisprudence and its contribution to the Interim Constitution, see Matthew Chaskalson, Dennis Davis & Johan de Waal 'Democracy and Constitutionalism: The Role of Constitutional Interpretation' in D van Wyk, J Dugard, B de Villiers & D Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 1. See also Johan de Waal 'A Comparative Analysis of the Provisions of German Origin in the Interim Bill of Rights' (1995) 11 *SAJHR* 1.

43 Article 19.2 of the German Basic Law reads, in relevant part: '[I]n no case may the essential content of a right be encroached upon.' The inclusion of this clause in the German Basic Law reflects the drafters' belief that legislation under the Weimar Constitution had been interpreted in such a way as to permit the complete evisceration of that constitution's guarantees. The clause was designed to provide a floor below which restrictions on fundamental rights could not fall. See Theodor Maunz & Gunter Durig *Grundgesetz Kommentar* (1991) Art 19, II-9; Gerhard Erasmus

why do we allocate certain analytical tasks to one stage and not the other, and how do we justify our overall approach to constitutional interpretation?

(a) The value-based approach and the notional approach

The general nature of constitutional interpretation and the interpretation of fundamental rights are dealt with at length elsewhere in this work.⁴⁴ To rehearse the conclusions of those chapters briefly, FC s 39 tells us that the content and the scope of the rights enshrined in Chapter 2 should be determined in the light of the five fundamental values which animate the entire constitutional enterprise: openness, democracy, human dignity, freedom, and equality.⁴⁵ FC s 39 thereby confirms that the determination of a right's scope is a value-based exercise. However, the scope-determinative values are not limited to the five identified in FC s 39. For each right there are specific values that can be said to have led to its constitutionalization. The specific values that animate each right, along with FC s 39's more general concerns, determine the right's sphere of protected activity.

On this account, if an applicant can show that the exercise of constitutionally protected activity has been impaired, then she has made a *prima facie* showing of a constitutional infringement. If the infringement was authorized by law, then the state or the party relying upon this law will have an opportunity to justify its *prima facie* infringement of the right under the limitation clause.

There is of course another way to go. One could argue that any activity which could notionally fall within the ambit of a right is protected. It remains then to show that law — as opposed to mere conduct — limited the exercise of the right before moving on to the heart of FC s 36 analysis.⁴⁶ There are several reasons to prefer the first approach to the second approach. First, it is consistent with the text's admonition that provisions of the Bill of Rights be interpreted in light of the 'values which underlie an open and democratic society based on human dignity, equality and freedom'. The Final Constitution was not meant to protect certain forms of behaviour and a value-based approach permits us to screen out those forms of behaviour which do not merit constitutional protection. Secondly, high value-based barriers for the first stage of analysis mean that only genuine and serious violations of a constitutional right make it through to FC s 36. If only serious infringements make it through, then the court can take a fairly rigorous approach with respect to the justification for the impairment. It could then be fairly confident that when it nullified law or conduct there would be something

⁴⁴ 'Limitation and Suspension' in D van Wyk, J Dugard, B de Villiers & D Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 629, 650.

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

45 These five values do not operate on the same normative plane: the conditions required for the realization of the first two values — openness and democracy — are contingent on the realization of the next three — human dignity, freedom, and equality. Perhaps, as we discuss below, one should speak of de-linking the first set of values from the second. See § 34.8(e)(ii) *infra*.

46 See Gerhard van der Schyff *Limitation of Rights: A Study of the European Convention and the South African Bill of Rights* (2005) 29-124. Van der Schyff defends a notional approach to rights analysis. He argues that 'a wide interpretation should be followed in order to extend protection to as many forms of conduct and interests as possible'. *Ibid* at 32.

worth protecting. Thirdly, the value-based approach is consistent with the notion that a 'unity of values' underlies both the rights-infringement determination and the limitation-justification analysis. The language of the interpretation clause and the limitation clause strongly suggests that both inquiries are driven by a desire to serve the five values underlying our entire constitutional enterprise: openness, democracy, human dignity, freedom, and equality.⁴⁷

The desirability of the value-based approach is perhaps clearer when compared with the consequences of the notional or the expansive approach to rights interpretation. First, the notional approach suggests that certain forms of behaviour which we believe do not merit constitutional protection will in fact receive *prima facie* protection. Secondly, the notional approach expands the number of claims that make it to the second stage of analysis. The result is that if the courts wish to curtail their findings of unconstitutionality, their criteria for the justification of government limitations on rights have to become more flexible. The further possibility exists that in order to make their justificatory criteria more flexible the courts will expand the kinds of objectives which justify limitations on constitutional rights. This result would seem to stand in direct conflict with the textual demand that both interpretation and limitations analysis be undertaken in the light of the needs of an open and democratic society based on human dignity, equality and freedom. Finally, by pushing all of the Chapter 2 analysis into the limitation clause, and forcing themselves to be more flexible with respect to the grounds for justification of a limitation, the courts undercut their ability to articulate analytically rigorous conceptions of rights at the first stage of analysis and useful standards of justification for limitations at the second stage of analysis.⁴⁸

(b) The Constitutional Court's approach to two-stage analysis

For the most part, the problem with the Constitutional Court's current position on the two-stage approach to fundamental rights analysis is that it offers little insight or guidance.⁴⁹ The Court has neither described in detail the analytical processes

47 For a similar discussion of how the 'unity of values' affects the structure of fundamental rights analysis under the Canadian Charter, see Lorraine Weinrib 'The Supreme Court of Canada and Section One of the Charter' (1988) 10 *Supreme Court LR* 469. See also § 34.8(e)(ii).

48 The value-based approach should result in a more restrictive interpretation of the scope or the ambit. It would, nevertheless, be wrong to characterize this approach as 'narrow' or 'restrictive' — as opposed to generous. The point is not to restrict the protective ambit of constitutional rights but, rather, to make sense of FC s 39(1)'s injunction to interpret constitutional rights in view of the values of democracy, openness, dignity, equality and freedom, and to effect the best possible division of tasks between the first stage and the second stage of fundamental-rights analysis. Nor can this approach be characterized as 'minimalist.' Minimalism, as a judicial stratagem, is designed to permit judges to avoid deciding difficult doctrinal issues. The result is often judgments that are radically under-theorized. The value-based approach requires judges to articulate the basis for their pronouncements at both stages of the inquiry. If anything, the value-based approach to rights interpretation and limitations analysis reflects 'maximalist' orientation towards constitutional interpretation.

49 See, eg, *Makwanyane* (supra) at para 100 ('Our Constitution ... calls for a "two-step" approach, in which a broad rather than a narrow interpretation is given to the fundamental rights enshrined in Chapter 3 and limitations have to be justified through the application of s 33.')

that occur at each step nor has it justified the allocation of certain tasks to particular stages of the analysis.⁵⁰ Early on in the Court's tenure, two justices had something relatively substantial to say about the relationship between rights interpretation and limitations analysis. Sachs J states his position(s) in a concurrence in *Coetzee* and a concurrence in *Ferreira*. Ackermann J states his position(s) in a dissent in *Ferreira* and the majority opinion in *Bernstein*.⁵¹

In *Ferreira* Sachs J sets out to develop the Court's largely unarticulated understanding of the relationship between rights analysis and limitations analysis in a manner which ostensibly avoids the alleged 'sterility' of the two-stage approach.⁵² Sachs J's rationale for his project flows from his belief that the Court 'should not engage in purely formal or academic analyses, nor simply restrict [itself] to ad hoc technism'.⁵³ Rather the Court should, when undertaking fundamental rights analysis, 'focus on what has been called the synergetic relationship between the values underlying the guarantees of fundamental rights and the circumstances of the particular case'.⁵⁴ The judge then concludes that '[i]n [his] view, faithfulness to the Constitution is best achieved by locating the two-stage balancing process within a holistic, value-based and case-oriented framework'.⁵⁵ Beyond these generalizations, Sachs J offers little in the way of clear direction for what a new relationship between rights interpretation and limitations analysis would look like. He simply enjoins his fellow judges to 'exercise ... a structured and disciplined value judgment, taking account of all the competing considerations that arise in the present case'.⁵⁶

There are several potential problems with Sachs J's intervention on this subject. First, a two-stage approach is not necessarily 'formal' or 'academic'. The quality of the inquiry depends on the nature of the questions asked, not on their number or their order. Secondly, it is impossible to know what Sachs J means by a 'synergetic relationship' between the two stages of analysis or by the 'exercise ... of a structured and disciplined value judgment' when he gives neither examples nor further description of these processes. Thirdly, and most disturbing, is Sachs J's vision of a 'two-stage balancing process within a holistic, value-based and case-oriented framework'.

Sachs J's apparent vision of balancing at both stages ignores the clear intention and the structure of a bill of rights which possesses both fundamental rights and a

50 But see *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 35 (Court recognizes difference between definitional questions asked at the rights infringement stage and justificatory questions asked at the limitations stage).

51 *Bernstein & Others v Bester & Others NNO* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC).

52 *Coetzee v Government of the Republic of South Africa; Matiso & Others v Commanding Officer, Port Elizabeth Prison* 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC) ('*Coetzee*') at para 46.

53 *Ibid.*

54 *Ibid.*

55 *Ibid.*

56 *Ibid* at para 47.

general limitations clause: that different forms of analysis will take place at different stages of analysis. Intentions and structure aside, as a historical matter few

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judges and academics view the first stage of analysis as involving a balancing of interests. The first stage of analysis is generally understood to require the judge to determine the ambit of the right. The determination is made by asking what values underlie the right and then, in turn, what practices serve those values. The judge is not required to compare the importance of the values underlying the right allegedly being infringed with the values said to underlie the policy or right or interest said to support the alleged infringement. This comparison is left for the second stage of analysis under the limitations clause. It is under the limitations clause that we ask whether a party's interest in having a challenged law upheld is of sufficient import to justify the infringement of a right.

Another sense of 'value choice' employed during the process of determining the contours of a right is worth discussing: namely, the fact that not all activity that might notionally qualify as a demonstration merits the right's protection.⁵⁷ For example, a group of skinheads tossing trashcans through plate-glass windows, shouting racial epithets, and protesting the presence of immigrant communities might be attempting to convey collectively a 'political' message that is generally not countenanced by mainstream parties. The fact that it is not a peaceful conveyance and, indeed, that the primary motivations for the acts are destructive and not communicative may, however, take this demonstration outside the bounds of protected activity.⁵⁸

What should be clear is that the determination made here is one of definition or demarcation, *not* balancing. We are asking what counts as protected assembly activity, *not* whether this kind of protected activity, when offset against some competing set of public or private interests, still merits protection. We are deciding what values animate and what practices are protected by a particular right. The problem of value conflict between a right and a law that limits the exercise of that right is played out at the next stage of inquiry — the limitations clause.

At the same time, there are occasions in which it makes sense to talk about value conflict within a right. For example, freedom of expression is generally understood to be grounded, at least in part, in the value of political participation. However, the value of political participation may be served by practices which

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conflict with one another.⁵⁹ Hate speech may be thought by those expressing it to reflect their participation in or contribution to the political process. At the same time the targets of the hate speech — especially when it is directed at small or marginal

57 Stu Woolman 'Freedom of Assembly' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 43.

58 We have already noted that we are indebted to Halton Cheadle for pointing out that in the first edition of this work one of the authors — Stu Woolman — erred when he suggested that an assessment of the entitlement of the claimant to the benefit of a constitutional right is a part of rights analysis. Cheadle observed correctly that the author had conflated issues of standing and rights analysis. See Halton Cheadle 'Limitation of Rights' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 693, 696. But we must point out that the actual quote from the chapter by Stu Woolman in the first edition of this work, which Cheadle cites in support of this otherwise correct proposition, does not support his subsequent analysis. *Ibid* at 696.

social groups — may find that the expression of hate speech makes it difficult for them to express themselves fully or equally in the public square. They may feel coerced into silence by the hate speech. They may feel that the hate speech creates invidious conditions in which others will inevitably fail to listen to them or to take them seriously. Hate speech thus creates a paradox. Deny the expression of the hate speakers and you deny them full political participation. Permit the expression of the hate speakers and you deny the targets of their hate speech full political participation. It is a value conflict, under the freedom of expression, which cannot be reconciled. One kind of expression, and its attendant value, must give way to another form of expression, with its attendant value. But this assessment is not a form of balancing. One unconstitutional practice yields to another constitutionally protected practice. So this 'paradox' lends no support to the proposition that balancing occurs at both stages of analysis.

If a general limitations test is cause for concern for those interested in strong rights enforcement, then talk of introducing balancing into the first stage of analysis — where one determines the ambit of the right — should be cause for alarm. Doing balancing at both stages is an open invitation for the worst kind of analytical confusion.⁶⁰ How, one must ask, does the balancing at the first stage differ from the balancing at the limitations stage? What 'balancing of what' does one do at each stage? Why have the limitations clause at all? Greater specification of the modalities of both rights interpretation and limitations analysis would seem to be required.⁶¹

Of course, we may have misinterpreted Sachs J's interventions in *Coetzee*. In his judgment in *Ferreira*, Sachs J approaches the meaning of 'freedom ... of the person' in IC s 11(1) in a relatively circumspect manner. In contrast to the expansive interpretation of IC s 11(1) offered by Ackermann J, an approach that Sachs J says might force the court to 'test the reasonableness or necessity of each and every piece of regulation undertaken by the state', Sachs J suggests that 'the Constitution ... requires the court to focus its attention on real and substantial infringements of fundamental rights.'⁶² A charitable reading of this intervention might lead one to conclude that Sachs J believes that the rights interpretation and limitations analysis differ substantially. But we are not

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convinced, by any other statement in either opinion, that an integrated assessment of Sachs J's conclusions in *Coetzee* and *Ferreira* yields new fruit with respect to our understanding of the relationship between rights interpretation and limitations analysis.

59 See Robert Post 'The Constitutional Concept of Public Discourse' (1990) 103 *Harvard LR* 601; Robert Post 'Racist Speech, Democracy and the First Amendment' (1991) 32 *William & Mary LR* 267.

60 For a detailed discussion of this danger, see Stu Woolman 'The Limitations of Justice Sachs's Concurrence: *Coetzee v Government of the Republic of South Africa*' (1996) 12 *SAJHR* 99, 115-21; Stu Woolman & Johan de Waal 'Voting With Your Feet: The Freedom of Assembly' in D van Wyk, J Dugard, B de Villiers & D Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 292, 308-14.

61 See Alfred Cockrell 'Rainbow Jurisprudence' (1996) 12 *SAJHR* 1.

62 *Ferreira* (supra) at para 252.

Ackermann J's contributions to this discussion are a bit more difficult to track. Indeed, his decisions in *Ferreira* and *Bernstein* seem to point in opposite directions. In *Ferreira*, Ackermann J starts off as if he might follow a value-based approach to rights analysis. He writes:

[I]t is necessary, as a matter of construction, to define or circumscribe the s 11(1) right to the extent necessary for purposes of this decision ... [S]ome attempt must be made at this stage to determine the meaning, nature and extent of the right ... This court has given its approval to an interpretive approach 'which ... gives expression to the underlying values of the Constitution'.⁶³

But after reading 'freedom' in IC s 11(1) disjunctively from 'security of the person', and then giving a ringing defence of 'freedom' *qua* negative liberty, Ackermann J's real position on rights analysis and limitations analysis becomes clearer. He argues that while a 'broad and generous interpretation does not deny or preclude the constitutionally valid ... role of state intervention in the economic as well as the civil and political spheres ... legitimate limitations on freedom must occur through and be justified under the principles formulated in IC s 33(1), not by giving a restricted definition of the right to freedom.'⁶⁴ While some interpreters might characterize this approach to rights analysis as both purposive and generous,⁶⁵ it seems to possess the same problems that attach to the notional approach to rights interpretation described above: all the difficult inquiries take place within the rather amorphous frame provided by the limitations clause.⁶⁶

Two particular problems with the notional approach — as it was applied to freedom of the person under IC s 11(1) — are worth mentioning. First, one reason that Ackermann J's judgment is rejected by the majority is the relative unboundedness he imputes to IC s 11(1). Although he describes IC s 11(1)'s right to freedom as being a residual right, he says that if an enumerated right cannot first be found upon which to ground a constitutional challenge to some restriction

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of individual liberty, then resort may be had to IC s 11(1). The result, of course, is that Ackermann J's judgment practically begs petitioners to rest at least a portion of all their challenges to some alleged constitutional infringement on IC s 11(1). Secondly, on Ackermann J's understanding, a petitioner might fail to succeed at the first stage of a challenge based on the right to privacy, and yet succeed at the first stage of a challenge based on the unenumerated rights found in IC s 11(1). As Chaskalson P points out, the petitioner would then benefit from the fact that

63 *Ferreira* (supra) at para 252.

64 *Ibid* at para 45, quoting *Makwanyane* (supra) at para 9.

65 See Halton Cheadle 'Limitation of Rights' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 693, 696.

66 In fairness to Ackermann J, the problem with his approach to limitations analysis in *Ferreira* and *Bernstein* could be entirely a function of his conception of 'freedom'. However, the Court's judgment in *FNB*, where FC s 25 arbitrariness analysis results in a proportionality test that creates, in Theunis Roux's words, 'a vortex' that captures the entire universe of rights and limitations inquiries, suggests that the Court's — and Ackermann J's — difficulties with maintaining the analytical rigour required by two-stage analysis in *Ferreira* are not at all exceptional. See Theunis Roux 'Property' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 46.

restrictions on IC s 11(1) are subject to the 'necessary' standard of review under IC s 33 and thus have a better chance at ultimately convincing the Court to find the restriction unconstitutional.⁶⁷ This anomaly would have meant that an applicant bringing a challenge under the Interim Constitution would actually have preferred to fail on a privacy challenge — which received only 'reasonable' review — and succeed on a residual freedom challenge — which received the higher level of limitations review. Chaskalson P bases at least part of his rejection of Ackermann J's interpretation of IC s 11(1) on the possibility of such a scenario. One might well have agreed with Ackermann J's response that the level of scrutiny a restriction of a right receives under the limitations clause of the Interim Constitution should not affect the court's determination of the content of a right — and that according freedom of the person a higher level of limitations review than privacy is not necessarily anomalous. However, it is Ackermann J's largely notional approach to a right's review — and the dumping of all the important analysis into the limitations clause — that creates the aforementioned problem. For reasons already assayed, the majority of the *Ferreira* Court rightly avoided the problems associated with this approach.

Perhaps chastened by the majority's rejection of his interpretation of IC ss 11(1) and 33(1) in *Ferreira*, Ackermann J changes tack in *Bernstein* in analyzing an attack on the Companies Act based upon IC s 13, the right to privacy. He begins with a brief excursus about the meaning of privacy: he surveys its relationship to autonomy, the dependency of autonomy on community, the common law of privacy in South Africa, international instruments, and the comparative constitutional jurisprudence.⁶⁸ He then draws the following conclusions. First, 'the "right to privacy" relates only to the most personal aspects of a person's existence, and not to every aspect of his/her personal experience or knowledge.'⁶⁹ Secondly, 'in defining the right to privacy, it is necessary to recognize that the content of the right is crystalized by mutual limitation. Its scope is already delimited by the rights of the community as a whole.'⁷⁰

Bernstein's clearly value-based circumscription of the right to privacy is somewhat startling. *Bernstein's* mode of rights analysis appears antithetical to the mode

67 *Ferreira* (supra) at paras 173-174.

68 *Bernstein & Others v Bester & Others NNO* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) ('*Bernstein*') at paras 65-79.

69 *Ibid* at para 79.

70 *Ibid*.

of rights analysis adumbrated by Ackermann J in *Ferreira*.⁷¹ In *Bernstein*, Ackermann J concludes that *not* every activity or experience that could notionally count as private deserves constitutional protection under IC s 13. Only those practices that serve the values understood to underlie the right to privacy fall within the sphere of activity protected by the right. While one may disagree with the content Ackermann J ascribes to privacy,⁷² he does give the right some discernible value-based content.

But what promise *Bernstein* offers for a coherent framework for rights interpretation and limitation analysis, *Beinash* takes back.⁷³ In *Beinash v Ernst & Young*, the Constitutional Court addresses the question of whether s 2(1)(b) of the Vexatious Proceedings Act⁷⁴ violates the right of access to court under FC s 34.⁷⁵ The sum total of the *Beinash* Court's fundamental rights analysis reads as follows:

The effect of section 2(1)(b) of the Act is to impose a procedural barrier to litigation on persons who are found to be vexatious litigants. This serves to restrict the access of such persons to courts. That is its very purpose. In so doing, it is inconsistent with section 34 of the Constitution which protects the right of access for everyone and does not contain any internal limitation of the right. The barrier which may be imposed under section 2(1)(b) therefore does limit the right of access to court protected in section 34 of the Constitution.⁷⁶

As a rule, an applicant must run the following gauntlet: (1) ambit determination of the right; (2) impairment of the exercise of the right by law or conduct. Having run

71 There is, of course, a more benign interpretation of Ackermann J's approach to the relationship between rights analysis and limitations analysis. One could argue that in *Ferreira* he takes a purposive and generous approach to rights interpretation because the meaning of 'freedom' in IC s 11(1) warrants such a generous approach. One could then argue that in *Bernstein* he takes a purposive and non-generous approach to rights interpretation because the meaning of 'privacy' in IC s 13 warrants such a non-generous approach. The problem with this explanation is that Ackermann J does not explain why one right is generously construed while the other is restrictively construed.

72 See David McQuoid-Mason 'Privacy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 39.

73 1999 (2) SA 116 (CC), 1999 (2) BCLR 125 (CC) ('*Beinash*').

74 Act 3 of 1956.

75 Fevrier J in the High Court had found the applicants to be vexatious litigants in terms of the Vexatious Proceedings Act. *Beinash v Ernst & Young* 1999 (1) SA 1114 (W). This order barred the applicants from bringing any legal proceeding in any court anywhere in South Africa without first securing the appropriate leave from a judge of the High Court. The applicants lodged an appeal with the Constitutional Court. They argued that the provision relied upon by Fevrier J violated their right of access to court under FC s 34. In the alternative, they argued that, as a constitutional matter, Fevrier J had incorrectly exercised his discretion in devising this particular punishment. The Constitutional Court found that the applicable provision of the Vexatious Proceedings Act did indeed infringe the applicants' right of access to court under FC s 34. The Court, however, then held that the Act's infringement of the applicant's right of access to court was both reasonable and justifiable under FC s 36. The Constitutional Court saved the Act on the grounds that the Act establishes an invaluable screening mechanism for the legal system: it ensures that South African courts are not swamped by matters without any merit nor abused by litigants seeking to extort settlements from their innocent adversaries.

76 *Beinash* (supra) at para 16.

this gauntlet, the applicant can rest assured that she has made, at the very least, a *prima facie* showing of a constitutional infringement. But this is hardly the

path traversed by Mokgoro J in *Beinash*. Mokgoro J does not ask how FC s 34's right of access to court is to be understood in light of FC s 39's five foundational values. Mokgoro J does not inquire into the drafters' motivations for enshrining the right in Chapter 2 or speculate as to the specific practices served by FC s 34.⁷⁷ Mokgoro J does not even seriously question whether the applicant's activity was entitled to the protection of the right. Indeed, if she had asked, and answered, any of these inquiries, she might well have held that the applicant's actions were not protected. As we read the facts in *Beinash* — and the ultimate conclusions of the Court — Mokgoro J ought never to have reached FC s 36.

First, as a matter of logic, it is impossible to guarantee access to court if the court system is awash in frivolous and vexatious litigation. Put another way, one cannot provide access to the courts if such access is blocked by a mountain of pre-existing petty proceedings. If the right of access itself must, of necessity, be understood to exclude those actions which make its exercise impossible, then vexatious litigation is exactly the kind of activity which should *not* fall within the protective sphere of the right. Secondly, other rights indicate the specific ends which FC s 34 was designed to protect. As Mokgoro J herself notes in her limitation analysis, FC ss 7(2), 34, 35 and 165 constitute a constellation of rights and powers whose very essence demands the ever vigilant protection 'of *bona fide* litigants, the processes of the courts and the administration of justice against vexatious proceedings'.⁷⁸ FC s 35 protects 'arrested, detained and accused persons' with an extraordinarily detailed set of procedures and prohibitions. However, it is quite clear that no matter how explicit FC s 35's protections are, they will not be able to ensure the proper functioning of our system of criminal justice if the courts are tied up with civil matters. FC s 165(3) and (4) make this point expressly clear. FC s 165(3) reads: 'No person or organ of state may interfere with the functioning of the courts.' FC s 165(4) reads: 'Organs of state ... must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.' If these rights and powers of necessity preclude vexatious litigation, then it is difficult to imagine why FC s 34 should be understood to provide any solace to the vexatious litigant. Thirdly, it is difficult to see how vexatious litigation — which undermines the rule of law, democratic institutions and civil society — can be said to serve the five foundational values underlying our constitutional enterprise.⁷⁹ One must have a very generous understanding of 'openness' or 'freedom' to find that court actions designed to bring the wheels of justice to a grinding halt actually strengthen our nascent democracy. Fourthly, even if one thought that the applicant had made the case for an expansive interpretation of the right, it is not clear that the applicant's right of access to

77 FC s 34 reads: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

78 *Beinash* (supra) at para 17.

79 See *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC) ('*Modderklip*') (Meaningful access to a court of law — and that means adequate remedies — is an essential component of a just and well-ordered society based upon the rule of law.)

court has been impaired (or limited) by the provisions in question. As Mokgoro J observes, the applicant has the right to apply to the High Court to lift the order declaring him a vexatious litigant *and* has the right to approach the High Court for relief should a *prima facie* meritorious matter arise.

Yet, instead of a careful exegesis of the right and the provisions under attack, Mokgoro J justifies her overly expeditious approach to rights analysis by noting that FC s 34 'does not contain any internal limitation of the right'. But this argument is a red herring in an opinion brimming with lemmings. As we argue at length below, the presence of an internal limitation or an internal modifier does not alter the basic structure of fundamental rights and limitation analysis.⁸⁰ That is, even if the section in question possessed an internal limitation, it certainly would not obviate the need for a thorough-going analysis of the ambit of the fundamental right and a finding as to whether the protected activity has indeed been impaired by the law in question.

The *Beinash* Court's short-circuited rights analysis is saved by its reasoning under the limitation clause. At the time, the upholding of a law at the limitation stage made *Beinash* entirely unique. No rule of law, up until *Beinash*, had been upheld by the Constitutional Court after being subjected to limitations analysis under FC s 36.

But this unique feature of the judgment comes at a cost. The first cost is that the Court's notional approach to rights interpretation drives all of the meaningful assessment of the issues raised in the case into the limitation clause. The second cost is that this inappropriate 'dumping' of rights issues forces the court to fudge its analysis of one of the critical legs of the limitation test. At least two steps of the limitation test employed in *Beinash* reflect determinations that should have been undertaken under the right itself. When considering 'the nature of the right in terms of section 36(1)(a)' Mokgoro J writes: '[A] restriction of access in the case of a vexatious litigant is in fact indispensable to protect and secure the right of access for those with meritorious disputes.'⁸¹ As we argued above, this point is logically connected to a determination of the content of the right and whether the applicant's activity was indeed deserving of constitutional protection. When considering 'the importance of the purpose' of the Act according to FC s 36(1)(b), Mokgoro J cites an array of rights — FC ss 7, 35, and 165 — to support the proposition 'that *bona fide* litigants, the processes of the courts and the administration of justice' all require the kind of protection the Act offers against vexatious proceedings.⁸² Again, the Court should have made the case — much earlier — that these rights inform our understanding of the content of FC s 34.

It is worth remembering that in order for the respondent to succeed at the limitation stage, he or she must satisfy all of the limitations clause's requirements. These requirements run (1) from the presence of a law of general application (2) to showing that a law's objectives merit constitutional salvation (3) to proof of a

rational relationship between the law's ends and the means it employs (4) to an appraisal of the costs and benefits of the legal regime under scrutiny (5) to a

80 For more on internal modifiers and internal limitations, see §§ 34.4 and 34.5 *infra*.

81 *Beinash* (*supra*) at para 17.

82 *Ibid.*

demonstration that the rule of law in question adopts means that are as narrowly tailored as possible to achieve the objectives of the law.

When the *Beinash* Court finally considers leg (5) — FC s 36(1)(e) — and asks whether 'less restrictive means to achieve the purpose' of the Act exist, Justice Mokgoro does not squarely address the issue of whether the Act's aims could have been achieved via a more narrowly tailored remedy. Instead, she remarks that the Act has struck an appropriate balance between means and ends. This is, of course, an answer; but not an appropriate answer to the question actually raised by this particular factor.⁸³ No alternative scheme is considered. No alternative language for the statute is contemplated.⁸⁴ We have no way of knowing, from the Court's express deliberations, whether or not the existing provisions of the Vexatious Proceedings Act constitute some of the least restrictive means of achieving the Act's purpose.⁸⁵

And thus there would appear to be at least some evidence for our second contention: by neglecting to engage in any serious examination of the content of FC s 34's right of access to court and by canvassing all of the consequential constitutional issues under the limitation clause, the Court was actually forced to fudge its analysis of FC s 36(1)(e). The *Beinash* Court could have averted the analytical confusion that takes place in its limitations analysis if it had undertaken a value-based approach to its determination of the right's ambit in the first place.

Proof, however, that the Constitutional Court is vaguely aware of (ongoing problems with) the appropriate division of tasks between the two stages of analysis and consciously struggles to fashion a coherent approach to fundamental rights and limitation analysis is evident from its decisions in *August & Another v Electoral Commission & Others*,⁸⁶ *New National Party of SA v Government of the RSA & Others*⁸⁷ and *Democratic Party v Government of the RSA & Others*.⁸⁸

In *August*, the Court found that FC ss 6 and 19 created an unqualified right of adult suffrage. But the result in *August* was rather easily reached: the Electoral Commission had failed to put in place any mechanism at all that would enable prisoners to exercise the franchise. There was no law to justify the infringement.

The Court in *NNP* and *DP* faced the more daunting task of deciding whether the Electoral Act's bar-coded ID requirement was an infringement of the

83 *Beinash* (supra) at para 21.

84 For example, the *Beinash* Court could have suggested that the statute's current infirmities be corrected by making certain that any order issued under the Act which barred a vexatious litigant from court include a *sunset clause*. An order with a sunset clause — unlike an order to which an indefinite time period and penalty attach — would seem to be a less restrictive means of achieving the Act's purpose.

85 As we note below, the Court does not demand that the law reflect the least restrictive means imaginable, but only that the lawmaker genuinely attempt to employ the least restrictive means in pursuit of its ends. For more on FC s 36(1)(e), see § 34.8(c)(iv) infra.

86 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) ('*August*').

87 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) ('*NNP*').

88 1999 (3) SA 254 (CC), 1999 (6) BCLR 607 (CC) ('*DP*').

franchise, and a justifiable one at that.⁸⁹ As was noted above, an applicant must run the following two-step gauntlet when trying to establish a *prima facie* infringement of a right: (1) ambit of the right determination; (2) demonstration that the law or conduct challenged actually impairs or limits the exercise of the right. What the Constitutional Court in *NNP* and *DP* effectively held was that, in order to establish a *prima facie* infringement of the franchise — for the rights-bearer to show that she was *entitled* to exercise the franchise — the rights-bearer would have to show that she acted *reasonably* in an attempt to exercise her right to vote. If her reasonable efforts to exercise the franchise were thwarted by the government's electoral scheme, then she would have demonstrated a *prima facie* infringement. In short, where the meaningful exercise of a right depends upon the positive action of both government and citizenry, then the rights-bearer may be asked to demonstrate that she 'acted reasonably in pursuit of the right' before the court will grant that she is entitled to the protection afforded by the right.⁹⁰ If she succeeds at the rights stage, 'the question would then arise whether the limitation [created by the government's scheme] is justifiable under the provisions of s 36'.⁹¹ While taking into account the peculiar demands the franchise places upon both government and citizen, the *NNP* and *DP* Courts were still able to maintain the basic integrity of Chapter 2's two stages of analysis.⁹²

89 Act 73 of 1998. Section 38(2) read with the definition of 'identity document' in s 1(xii) of the Act precluded citizens from voting unless they could prove their identity through an identity document issued under the Identification Act 72 of 1986 or a temporary identity document issued under the Identification Act 68 of 1997.

90 *NNP* (supra) at para 23.

91 *Ibid* at para 24.

92 The lone dissenter in *NNP* and *DP*, O'Regan J, charts a rather different and undesirable course in her fundamental rights analysis of the franchise. For reasons that are not entirely clear, she imports a reasonableness test for the government electoral scheme into the determination of the ambit of the right to vote. The Justice's departure from form was rejected by the other members of the court — for several good reasons. First, there was no textual basis for this new internal limitations test. The court's overriding commitment to judicial restraint would seem to argue against the creation of internal limitation tests where the text is silent. Secondly, the very test itself is taken almost verbatim from the limitation test devised by the court to reflect the requirements of FC s 36. Thirdly, the reasonableness test does not address the nature of the right itself (or the actions of the rights-bearer) but the relationship between the means the legislation employs and the ends the government seeks to achieve. Fourthly, having previously granted in *August* that suffrage is a core constitutional right, it remains unclear why the Justice in these two judgments engages in no rights analysis at all, but instead begins and ends with limitations analysis. The ostensible justification for standing the Bill of Rights on its head is that this particular right by necessity demands that Parliament pass legislation which contemplates regulations designed to ensure the right's proper exercise by the citizenry. But this is no answer at all. Of course, Parliament must pass laws to make the exercise of the franchise possible. The question is whether or not rules regarding 'the date of the election, the location of polling booths, the hours of voting and the determination of which documents prospective voters will require in order to register and vote' actually impair a voter's right to exercise the franchise. *NNP* (supra) at para 142. If any one of them does, then the question should be whether such impairment can be saved under FC s 36. Thus, the Justice could well have found an infringement of the right to vote, and then decided under the limitation clause that the means employed and ends sought were reasonable and justifiable.

That's not to say that there isn't occasional backsliding. In *Christian Education South Africa v Minister of Education*, the Constitutional Court simply assumed that the exercise of FC ss 15 and 31 had been impaired by the South African Schools Acts.⁹³ The rights interpretation was not even notional. It was non-existent.

The *Christian Education* Court did not have to undertake a less than notional approach to rights analysis — especially with respect to FC s 31. FC s 31(2) affords the party seeking to uphold the law or the conduct in question an opportunity to demonstrate that the conduct for which constitutional protection is sought is inconsistent with the other provisions in the Bill of Rights. Given that the *Christian Education* Court relied directly upon a constellation of rights — dignity, equality, and freedom and security of the person — in upholding the limitation of FC s 31 in terms of FC s 36, it is difficult to understand why those same rights were not deployed by the Court in terms of FC s 31(2). The only compelling explanation for the failure to undertake FC s 31(2) analysis is that the Court would have been required, in terms of FC s 15, to undertake FC s 36 analysis anyway. Of this reconstruction, two things must be said. First, the necessity of undertaking FC s 36 analysis does not obviate the need to undertake rights analysis. Second, the presence of an internal limitation in the form of FC s 31(2) does not mean that the mere assertion of a conflict with another right in Chapter 2 automatically serves to trump FC s 31. As one of the authors has written elsewhere, dignity interests may inform both the assertion of a right in terms of FC s 31(1) and the defence of the challenged law or conduct in terms of FC s 31(2).⁹⁴ The Court must still apply its mind as to whether the right, appropriately understood, protects the religious, cultural or linguistic practice under scrutiny.

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34.4 Internal modifiers, and their relationship to rights analysis and limitations analysis

One might wish to compare O'Regan J's judgments in *South African National Defence Union v Minister of Defence & Another* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC) ('SANDU') with her judgments in *NNP and DP*. In *SANDU* O'Regan J spent a significant amount of space attempting to determine the ambit of FC s 23, whether the soldiers satisfied the definition of worker therein, and thus whether they were entitled to the protection of the right. Having found that the soldiers were 'workers', the Justice then found that the provisions of the Defence Act under scrutiny did indeed infringe the soldiers' FC s 23(2)(a) right 'to form and join a trade union'. The Justice then moved on to FC s 36 and rejected the Minister's contention that an infringement of the right was justified by the constitutional imperative to structure and manage the SANDF as a 'disciplined military force'. That O'Regan J is aware of a better approach to rights interpretation and limitations analysis is made manifest in the text. After rejecting overbreadth as a constitutional doctrine appropriate to the resolution of this challenge, she writes:

The first question to be asked is whether the provision in question infringes the rights protected by the substantive clauses of the Bill of Rights. If it does, the next question that arises will be whether that infringement is justifiable. At the second stage of the constitutional enquiry, the relevant questions are: what is the purpose of the impugned provision, what is its effect on constitutional rights and is the provision well tailored to that purpose?

Ibid at para 18.

93 2000 (4) SA 757 (CC), 2000 (4) BCLR 1051 (CC) ('*Christian Education*'). See also *Prince v President of the Law Society of the Cape of Good Hope* 2001 (2) SA 388 (CC), 2001 (2) BCLR 133 (CC) ('*Prince*').

94 See Stu Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36.

In a world of tersely worded fundamental rights and a general limitation clause we would always proceed in the same way. First, we would make value-based determinations of a right's scope and then assess whether the law or the conduct challenged impaired the exercise of the right; second, if we found that a law had impaired the right in question, we would ask whether that law could be justified in terms of FC s 36. Unfortunately, the Bill of Rights of the Final Constitution is not such a world. Many of the rights it contains possess complex qualifications.⁹⁵ The immediate question is whether these differences in construction alter significantly the form of constitutional analysis that these rights receive.⁹⁶

For the purposes of this chapter, it is probably sufficient to note that fundamental rights take three basic forms: (1) unqualified rights; (2) rights that contain internal modifiers; (3) rights that contain internal limitations. A remarkably small number — four — of the 27 rights enshrined in Chapter 2 are unqualified.⁹⁷ A significant number of rights — sixteen — contain internal modifiers. Internal modifiers are, in short, words or phrases that serve to determine, with greater specificity, the content of the right in question. For example, the phrase 'peaceful and unarmed' clarifies the kinds of assembly that FC s 17 protects.⁹⁸ FC s 16,

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freedom of expression, contains two forms of internal modifier. While FC s 16(1) recognizes several types of expressive activity that secure constitutional protection, FC s 16(2) identifies several forms of expressive conduct that ought not to receive

95 The Technical Committee on Fundamental Rights (for the Interim Constitution) suggests that this system of internal modifiers, internal limitations, and general limitations was on the cards from the outset. See Technical Committee on Fundamental Rights 'Third Report' (28 May 1993) 9.

96 For early attempts to explain the relationship between internal modifiers, internal limitations and a general limitations clause, see Gretchen Carpenter 'Internal Modifiers and Other Qualifications in Bills of Rights: Some Problems of Interpretation' (1995) 10 *SA Public Law* 260; André van der Walt *The Constitutional Property Clause* (1997) 73-74; Stu Woolman 'Riding the Push-Me Pull-You: Constructing a Test that Reconciles the Conflicting Interests which Animate the Limitations Clause' (1994) 10 *SAJHR* 60.

Some authors offer no account of internal modifiers at all. See IM Rautenbach & EFJ Malherbe *Constitutional Law* (3rd Edition, 2000). Other authors correctly note that internal modifiers or 'demarcations' 'circumscribe the right or place certain conditions on its availability', whereas 'special limitations' require the 'state or the person relying on the validity of legislation ... [to] show that the limitation of the right is justified'. Iain Currie & Johan De Waal *The Bill of Rights Handbook* (5th Edition, 2005) 187. But Currie and De Waal make no effort to spell out the relationship between rights analysis, internal modifiers, internal limitations and general limitations.

More curious, however, is the claim that 'it is wrong to talk about internal limitations'. Halton Cheadle 'Limitations of Rights' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 701. Cheadle then goes on to state the term is 'shorthand for a group of clauses that perform different functions in the different rights, particularly in the more complex rights' and that 'the text always limits the scope of a right'. *Ibid.* While trivially true, this does not count as an argument except in the sense of the classic Monty Python riposte of 'Yes, it is an argument' to the assertion 'No, it's not an argument'. Cheadle makes no attempt to explain what these different clauses actually do.

97 Four rights may be described as unqualified: Life, FC s 11, reads: 'Everyone has the right to life'; Slavery, Servitude and Forced Labour, FC s 13, reads: 'No one may be subjected to slavery, servitude or forced labour'; Freedom of association, FC s 18, reads: 'Everyone has the right to freedom of association'; Citizenship, FC s 20, reads: 'No citizen may be deprived of citizenship.'

98 See Stu Woolman 'Freedom of Assembly' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 43.

such protection: (a) propaganda for war; (b) incitement of imminent violence; and (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.⁹⁹ The rights to dignity, freedom and security of the person, privacy, expression, political rights, freedom of residence and movement, labour relations, environment, property, children, education, just administrative action, access to information, access to courts and arrested, detained and accused persons all contain words or phrases intended to amplify the content of the right. The rights to equality, expression, education, housing, health care and arrested, detained and accused persons all contain words or phrases intended to exclude expressly certain types of conduct, status or law from constitutional protection.¹⁰⁰

But whether the phrases in these rights amplify or exclude, the internal modifier analysis fits naturally within fundamental rights, or stage 1, analysis. The internal modifier is concerned with a determination of the content of the right and not with an analysis of competing rights or interests.¹⁰¹ At least one consequence of identifying a phrase as an internal modifier is that the burden of justification remains upon the party bringing the challenge to demonstrate that the law or the conduct in question impairs the exercise of the 'modified' right.

34.5 Internal limitations, and their relationship to rights analysis and limitations analysis

While internal modifiers concern themselves primarily with the content of a right, internal limitations import a variety of considerations not normally associated with fundamental rights, or stage 1, analysis. The language of FC ss 9(3), 15(3), 24(b), 25(2), 25(3), 25(5), 26(2), 27(2), 29(1)(b), 29(2), 30, 31(2) and 32(2) require forms of justification generally associated with limitations analysis and the comparison of competing constitutional imperatives.

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The most commonly employed internal limitation is the unfair discrimination analysis found within the *Harksen* test.¹⁰² The unfairness assessment required by FC s 9(3) takes into account justifications for discriminatory practices at the same time

99 See Dario Milo, Glenn Penfold & Anthony Stein 'Freedom of Expression' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2008) Chapter 42.

100 The kernel of truth in Cheadle's statement that 'it is wrong to talk about internal limitations' is that it may appear difficult to fit the various rights — with their respective modifiers and limitations — into a simple yet powerful explanatory framework. For example, FC s 9(2), the provision for restitutionary measures, is an affirmative defence that carves out of FC s 9 space for inegalitarian measures that pursue egalitarian ends. FC s 9(2) does not expressly modify FC s 9(1) or FC s 9(3) or FC s 9(4), but it does so just the same. However, FC 9 as a whole, like FC ss 26 and 27, does not fit easily into the two-stage model of fundamental rights analysis. See Cathi Albertyn & Janet Kentridge 'Introducing the Right to Equality in the Interim Constitution' (1994) 10 *SAJHR* 149, 177 (Adopt an assimilationist approach with respect to the treatment of the restitutionary measures provision as an internal modifier that assists in the demarcation of the right to equality.)

101 Cf Halton Cheadle 'Limitations of Rights' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 701 (Claims, without argument, that the ambit of the right should be determined, at least in part, by social interests that have nothing to do with the purpose or the objective of the right.)

as it requires the court to take cognizance of systemic discrimination and the impairment of the plaintiff's dignity.

FC ss 26(2) and 27(2) require the court to assess whether the state — or some other party — has taken reasonable steps to ensure the progressive realization of the rights to access to adequate housing, health, food, water and social security. The focus of this inquiry — as laid out in *Grootboom* and other socio-economic rights cases — is generally on whether the state has created and implemented a comprehensive and coordinated plan to realize progressively the right in question. The primary desideratum of this test is 'reasonableness'. Reasonableness in FC ss 26(2) and 27(2) raises many of the same contextual considerations that would otherwise be the focus of the FC s 36 inquiry.¹⁰³ Similar language, that appears to do similar work, appears in FC s 29(1) and (2).¹⁰⁴

Other internal limitations take a somewhat different form. FC ss 15(3)(b), 30 and 31(2) require that the exercise of the right in question be consistent with the other rights in Chapter 2. In short, the Final Constitution makes it clear that a community's religious, cultural or linguistic practices enjoy constitutional protection only where they do not interfere with — limit — the exercise of other fundamental rights.¹⁰⁵ This formally correct articulation of the relationship between FC s 31 and the rest of the Bill of Rights is often assumed to imply that the other substantive rights — including dignity — trump collective religious, cultural and linguistic concerns. That, however, is untrue. Indeed, rights to dignity and to equality may re-inforce claims to religious autonomy. For example, the Constitutional Court in *Gauteng School Education Bill* recognized the importance for

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individual dignity, and collective claims for equal respect, of granting communities the right to create schools based upon a common culture, language or religion.¹⁰⁶

(a) Internal limitations and burden shifts

102 For more on the *Harksen* test, see Stu Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36; Cathi Albertyn & Beth Goldblatt 'Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 35.

103 For more on internal modifiers and internal limitations and their effect on the interpretation of socio-economic rights, see Sandra Liebenberg 'The Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 33. See also Pierre de Vos 'Pious Wishes or Directly Enforceable Human Rights: Social and Economic Rights in South Africa's 1996 Constitution' (1997) 13 *SAJHR* 6, 91 n 97 (Argues that the distinction between internal modifiers and internal limitations does not hold for socio-economic rights.)

104 With regard to the provision of further education, FC s 29(1)(b) contains the phrase, 'through reasonable measures, must make progressively available and accessible,' while FC s 29(2) states that education in the official language of choice ought to be offered 'where that education is reasonably practicable.'

105 FC s 31(2) could be construed to preclude all exclusionary and discriminatory policies. But that assumes that all such practices are inconsistent with various provisions in the Bill of Rights, in particular, the rights to equality and dignity. The Constitutional Court has made it quite clear that not all discrimination is unfair discrimination. See, eg, *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC).

Where an internal limitation is in play there may appear to be a burden shift within the fundamental rights stage of analysis that requires the state or another party to make the requisite demonstration of 'fairness', 'reasonableness' or 'consistency'. But the case law does not support such a global generalization. FC s 9(5) definitely requires a burden shift where discrimination occurs on a prohibited ground in terms of FC s 9(3). It does not, however, appear clear that the state or some other party bears the burden of demonstrating inconsistency in terms of FC ss 15(3)(b), 30, and 31. Nor is it clear that the burden falls, entirely or even in large part, on the state to show that it has taken reasonable steps to discharge its responsibilities to progressively realize the socio-economic rights found in FC s 26, 27, and 29.¹⁰⁷ The more interesting analytical question is whether an internal limitation affects the analysis undertaken under the general limitations clause, FC s 36.

(b) Internal limitations and general limitations

What, if any, analysis will remain for the court to do after undertaking some form of internal limitations analysis will turn on the particular kind of internal limitation at issue.

(i) Internal limitations in FC ss 15(3)(b), 30 and 31

With respect to FC ss 15(3)(b), 30, and 31, the courts often appear to ignore the internal limitation entirely. In *Christian Education South Africa v Minister of Education*, the Constitutional Court simply assumed — without needing to do so — that the exercise of FC ss 15 and 31 had been impaired by the South African Schools Act. It then proceeded to FC s 36 and found that, on balance, the mutually reinforcing rights of religion and culture said to sanction corporal punishment in private schools were in conflict with, and ultimately subordinate to, a constellation of rights that included dignity, equality, and freedom and security of the person.¹⁰⁸

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There are two things to say about *Christian Education* and the Court's apparent failure to recognize the purpose of FC s 31(2). First, it could just have been a mistake. Second, it is possible that a right to community religious practice could (a) be deemed consistent with the other rights in Chapter 2 and (b) still be impaired by the law in question. If this second possibility is the correct one, then the analysis would proceed to FC s 36, and the party relying upon the law would have the opportunity to demonstrate that another set of interests or values — not expressly manifest in the rights and freedoms of Chapter 2 — justified the infringement of FC s 31(1).

106 *Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC)(Court held that IC s 32(c) permitted communities to create schools based upon common culture, language and religion.)

107 See *Government of the Republic of South Africa & Another v Grootboom & Others* 2001 (1) SA 46 (CC), 2001 (9) BCLR 883 (CC)('Grootboom'). By collapsing FC s 26 (1) and FC s 26(2) analysis (and perhaps FC s 36 analysis) into a single test for reasonableness — the *Grootboom* Court effectively turns FC s 26(2) into an odd composite of internal modifier and internal limitation of FC s 26(1). For more on the relationship between FC s 26(1) and (2), see Kirsty McLean 'Housing' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 55.

108 2000 (4) SA 757 (CC), 2000 (4) BCLR 1051 (CC)('Christian Education'). See also *Prince v President of the Law Society of the Cape of Good Hope* 2001 (2) SA 388 (CC), 2001 (2) BCLR 133 (CC).

(ii) Internal limitations in FC ss 9, 26 and 27

More interesting, and difficult, questions regarding internal limitations flow from the text of, and the case law surrounding, FC ss 9, 26, and 27. With respect to these provisions, the text and the case law are quite illuminating.

Although the courts have been loath to state categorically that a finding of unfairness under FC s 9(3) ends the court's analysis, in not a single Constitutional Court equality judgment has the Court found that unfair conduct or an unfair law — in terms of FC s 9(3) or FC s 9(4) — can be justified in terms of FC s 36. The Constitutional Court often goes through the motions of FC s 36 analysis, but, as in *Kabuki theatre*, says nothing. The reason for this artifice is rather clear: the considerations that would be raised to demonstrate fairness under FC s 9(3) would be virtually identical to the considerations raised to demonstrate reasonableness and justifiability under FC s 36.¹⁰⁹ The only judgment on record in which a court has found unfairness in terms of FC s 9(3), but then held the unfair law to be reasonable and justifiable in terms of FC s 36 is *Lotus River, Ottery, Grassy Park Residents Association v South Peninsula Municipality*.¹¹⁰ In *Lotus River*, the High Court found that the differential rates imposed by the municipality upon properties constituted unfair discrimination on the grounds of race. However, Davis J proceeded to find that this unfair discrimination was justified, in terms of FC s 36, by the local government restructuring process. As Iain Currie rightly observes, this justification ought to have formed part of the argument in rebuttal of the presumptive finding of unfair discrimination.¹¹¹ Given that the *Harksen* test does permit such an argument, the High Court could easily have avoided the

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'awkward implication' that 'it is possible for unfair racial discrimination to be reasonable and justifiable in a society based upon equality.'¹¹²

In its early socio-economic rights jurisprudence the Constitutional Court simply assumed, without any discussion, that a finding that the state failed to take reasonable measures within its available resources to achieve the progressive realization of the rights in question, precluded a finding that the limitation was, nevertheless, reasonable and justifiable in terms of FC s 36. Once it found that the state had failed to meet its obligations in terms of FC s 26(2) or FC s 27(2), the Court proceeded directly to a consideration of appropriate relief, without any inquiry into FC s 36.¹¹³

109 The Constitutional Court has stated that there is a difference between unfairness under FC s 9 and proportionality under FC s 36. See *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC)(Kriegler J, dissenting); *Harksen v Lane* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC)(Court holds that FC s 36 'involves a weighing of the purpose and the effect of the provision in question and a determination as to the proportionality thereof in relation to the extent of the infringement of equality.') But as Iain Currie notes, the Court's cursory remarks in this regard do not advance our thinking on the matter. See Currie & De Waal 'Equality' (supra) at 238. Merely stating that there is a difference between the two concepts is not the same as using them in a different manner.

110 1999 (2) SA 817 (C), 1999 (4) BCLR 440 (C)('Lotus River').

111 See Currie & De Waal 'Equality' (supra) at 239.

112 Currie & De Waal 'Equality' (supra) at 239.

The Constitutional Court broke its silence on the relationship between FC ss 26 and 27 and FC s 36 in *Khosa*¹¹⁴ and *Jaftha*.¹¹⁵ In *Jaftha*, the Court distinguished between the negative and positive obligations imposed by FC ss 26 and 27. It held that its earlier ruling in *TAC* — that FC s 27(1) 'does not give rise to a self-standing and *independent positive right* enforceable irrespective of the considerations mentioned in section 27(2)' — did not extend to negative breaches of FC ss 26 and 27.¹¹⁶ Where the state fails to honour its negative obligations under these rights — as in *Jaftha*, where a provision in the Magistrates' Court Act permitted the sale in execution of a person's home for non-payment of debts — there is no reason for the Court to filter its analysis of FC s 26(1) through FC s 26(2). Consequently, the question of the relationship between FC s 26(2) reasonableness and FC s 36 reasonableness does not arise, and the breach of FC s 26(1) may be justified under FC s 36.¹¹⁷ As it turned out, the *Jaftha* Court found that the breach of FC s 26(1) was *not* reasonable and justifiable in terms of FC s 36, given the importance of access to adequate housing, its link to human dignity, the seriousness of

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the infringement, the existence of less restrictive means, and that the sale in execution satisfied a trifling debt.¹¹⁸

While *Jaftha* is clear that a breach of the state's negative obligation under FC s 26(1) leaves ample room for a consideration of the justifiability of such a breach in terms of FC s 36, *Khosa* raises doubts as to whether FC s 36 analysis can play a meaningful role in cases concerning a breach of the state's positive obligations under FC s 27(2). In *Khosa*, the Court found that the Social Assistance Act's exclusion of permanent residents from its benefit scheme constituted unfair discrimination in

113 See, eg, *Grootboom* (supra); *Minister of Health & Others v Treatment Action Campaign & Others No 2* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC) ('*TAC*'). Similarly, no limitation analysis was undertaken in cases in which it was found that administrative action failed the justifiability test in terms of IC s 24 or the reasonableness test under FC s 33. But see *Bel Porto School Governing Body & Others v Premier of the Province, Western Cape & Another* 2002 (3) SA 265 (CC), 2002 (9) BCLR 891 (CC) at para 171 (Mokgoro and Sachs JJ note in dissent that justifiability for purposes of limitation analysis generally requires more persuasive evidence than that required for FC s 33.) See also *Masamba v Chairperson, Western Cape Regional Committee, Immigrants Selection Board & Others* 2001 (12) BCLR 1239, 1258D-E, 1259A-C (C). Rautenbach argues that the requirements of FC s 33 should, as far as possible, be reconciled with the requirements of FC s 36. In his view, 'section 33 particularises the rules in section 36 in respect of administrative actions that limit rights.' See IM Rautenbach 'The Limitation of Rights and "Reasonableness" in the Right to Just Administrative Action and the Rights to Access to Adequate Housing, Health Services and Social Security' (2005) *TSAR* 627, 641. But for Rautenbach to be correct, the Court must be willing to enforce a stricter standard of review for administrative action.

114 *Khosa & Others v Minister of Social Development; Mahlaule & Others v Minister of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC) ('*Khosa*').

115 *Jaftha v Schoeman & Others* 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC) ('*Jaftha*').

116 *TAC* (supra) at para 39, as quoted in *Jaftha* (supra) at para 32.

117 *Jaftha* (supra) at paras 32–33. See also Marius Pieterse 'Towards a Useful Role for Section 36 of the Constitution in Social Rights Cases? *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*' (2003) 120 *SALJ* 41.

118 *Jaftha* (supra) paras 35–49.

terms of FC s 9 and an unjustifiable limitation of the right of access to social security in terms of FC s 27. In her discussion of the relationship between FC s 9 and FC s 36, Justice Mokgoro first noted that the

exclusion of permanent residents from the scheme is discriminatory and unfair and I am satisfied that this unfairness would not be justifiable under section 36 of the Constitution. The relevant considerations have been traversed above and need not be repeated. What is of particular importance in my view, however, and can be stressed again, is that the exclusion of permanent residents from the scheme is likely to have a severe impact on the dignity of the persons concerned, who, unable to sustain themselves, have to turn to others to enable them to meet the necessities of life and are thus cast in the role of supplicants.¹¹⁹

In short, the very same considerations that informed the finding of unfairness under FC s 9 supported the finding, under FC s 36, that the statutory scheme contemplated by the Social Assistance Act could not be justified. No reasons that might justify the discrimination could be offered in the context of FC s 36 that had not already been offered under FC s 9.

Mokgoro J then moved on to the question of justification, in terms of FC s 36, with respect to the abridgement of FC s 27, and, more particularly, the state's failure to discharge its responsibilities under FC s 27(2). Once again, she concluded that there was no reason for the Court to repeat its assessment, in terms of FC s 36, of the arguments in justification that it had already interrogated in terms of FC s 27(2):

In my view the importance of providing access to social assistance to all who live permanently in South Africa and the impact upon life and dignity that a denial of such access has, far outweighs the financial and immigration considerations on which the state relies. For the same reasons, I am satisfied that the denial of access to social grants to permanent residents who, but for their citizenship, would qualify for such assistance does not constitute a reasonable legislative measure as contemplated by [FC s] 27(2)... There is a difficulty in applying section 36 of the Constitution to the socio-economic rights entrenched in sections 26 and 27 of the Constitution. Sections 26 and 27 contain internal limitations which qualify the rights. The state's obligation in respect of these rights goes no further than to take 'reasonable legislative and other measures within its available resources to achieve the progressive realisation' of the rights. If a legislative measure taken by the state to meet

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this obligation fails to pass the requirement of reasonableness for the purposes of sections 26 and 27, section 36 can only have relevance if what is 'reasonable' for the purposes of that section, is different to what is 'reasonable' for the purposes of sections 26 and 27. This raises an issue which has been the subject of academic debate but which has not as yet been considered by this Court. We heard no argument on the matter and do not have the benefit of a judgment of the High Court. In the circumstances, it is undesirable to express any opinion on the issue unless it is necessary to do so for the purposes of the decision in this case. In my view it is not necessary to decide the issue. Even if it is assumed that a different threshold of reasonableness is called for in sections 26 and 27 than is the case in section 36, I am satisfied for the reasons already given that the exclusion of permanent residents from the scheme for social assistance is neither reasonable nor justifiable within the meaning of section 36.¹²⁰

119 *Khosa* (supra) at para 80.

120 *Khosa* (supra) at paras 82-84.

Mokgoro J does not, as she makes plain, seek to settle the academic debate over whether the proportionality analysis required by FC s 36 could serve any meaningful role once a court has undertaken reasonableness analysis in terms of FC ss 26(2) and 27(2). It is sufficient to note, however, that in so far as the instant matter is concerned, the content of the reasonableness analysis undertaken under FC s 27(2) is understood to be identical to the content of the reasonableness analysis that would be undertaken in terms of FC s 36.¹²¹

The problem the Court acknowledges in *Khosa* — vis-à-vis FC s 26 and FC s 27 and FC s 36 — is, at bottom, a straightforward question of logic. Does the universe of reasons — or kinds of reasons — that the state can offer in justification under FC s 27(2) exhaust the universe of reasons — or kinds of reasons — that could be offered in justification under FC s 36? If the answer to that question is yes, then logically there can be no meaningful basis for a court to undertake limitations analysis under FC s 36 once it has concluded that the state has failed to act reasonably in terms of FC s 27(2). If, however, the answer to that question is no, then there may be some basis, for undertaking a second form of justificatory analysis under FC s 36.

The answer is not grounded solely in logic, however. It turns, in large measure, on the standard(s) adopted by our Constitutional Court in socio-economic rights cases, and more specifically, those cases in which the state has failed to take adequate measures to realize progressively the right in question. For example, if the standard for review was that of mere rationality — as suggested by some of the language in *Soo Bramoney* — it would, logically, be impossible for FC s 36 to play any meaningful role in the Court's analysis. Put differently, if all FC s 27(2) required the state to do was to show that it had applied its mind to the progressive realization of a socio-economic right, and had done so to the satisfaction of the Court, the matter would

121 That this issue — heretofore purely academic — had troubled the Court in its internal deliberations is clear from both Mokgoro J's musings and the response they elicit from Ngcobo J. On the relationship between FC s 27(2) and FC s 36, Ngcobo J writes:

But if section 27 governs the present constitutional challenge, the problem of a methodological approach arises. The obligations of the state under section 27(2) are limited to taking "reasonable legislative and other measures." The main judgment regards this as an internal limitation on the right of access to social security. I agree. But is it possible to find that a measure is reasonable within the meaning of subsection 2 yet not reasonable and justifiable under section 36(1), the limitation clause? Let us take a non-controversial group, the temporary visitors, which the main judgment also accepts can legitimately be excluded from the social welfare benefits. If their exclusion would be reasonable under section 27(2), is the state required to show also that their exclusion is reasonable and justifiable under section 36(1)? This raises a number of related questions, including, whether the standard for determining reasonableness under section 27(2) is the same as the standard for determining reasonableness and justifiability under section 36(1) and, if not, what is the appropriate standard for determining reasonableness under section 27(2)... Faced with these questions, the main judgment adopts the attitude that the outcome would be the same whether the enquiry is to be conducted under section 27(2) or section 36(1). I prefer to approach the matter differently — by looking first to the enquiry required in section 27 and then, if necessary, to section 36. I should add, though, that the outcome would be the same even if the enquiry were to begin and end in section 27(2).

Ibid at paras 105–07. It is hard to understand Ngcobo J's disagreement with the majority. He correctly identifies the problem: namely, is there a difference in the standard of review under FC s 27(2) and FC s 36? But he does not answer the question. He simply says that he would *prefer* to do things differently: that is, he would first undertake analysis under FC s 27 and then, if he so desired, proceed to FC s 36. Why he prefers this approach, Ngcobo J does not say. Moreover, he concludes by noting that 'the outcome would be the same even if the enquiry were to begin and end in section 27(2).' Ngcobo J is either committed to the proposition that his distinction between FC s 27(2) and FC s 36 is a distinction without a difference, or that there is a difference in the standard, which he refuses to describe, that leads, coincidentally, in this case and perhaps all others, to the same outcome. Ngcobo J's analysis takes us nowhere.

end there. There could be no reason — in the sense of necessity — for the Court to progress to proportionality analysis under FC s 36.

But as we now know, the standard of review under FC ss 26(2) and 27(2) is not rationality but reasonableness. After *Soobramoney*, *Grootboom*, *TAC* and *Khosa*, the question must be whether there are types of reasons — beyond those currently contemplated in those four judgments — that the state (or some other party) could raise under FC s 36 that it could not raise under FC s 26(2) or FC s 27(2). Given that the state may justify its failure to make good on the promise of a socio-economic right in terms of a whole host of 'reasonable' grounds, it is difficult to conjure up any additional grounds that might justify the failure to make good a promise in terms of FC s 36.¹²² Consider the long list of grounds that the Constitutional Court has already identified when undertaking analysis under FC ss 26(2) and 27(2) (and keep in mind that such a list is by no means exhaustive or closed):¹²³

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- whether there are available resources;¹²⁴
- whether the requested relief is not for an individual entitlement to the immediate provision of a service or resource, but for a comprehensive and coordinated plan to realize the right;¹²⁵
- whether the state has taken steps towards the right's progressive realization;¹²⁶
- whether the relief requested involves access to services, and not to the resources necessary to possess what the right promises;¹²⁷
- whether 'the appropriate ... human resources are available';¹²⁸
- whether the state's plan is 'capable of facilitating the realisation of the right';¹²⁹

122 See Rautenbach (supra) at 647-653 (Constitutional Court has incorporated, in its analysis of reasonableness under FC s 26(2) and FC s 27(2), FC s 36 criteria such as the importance of the purpose of the restriction, the nature and extent of the deprivation, the relationship between ends and means, the existence of less restrictive means, and cost/benefit analysis.)

123 See *Khosa* (supra) at para 43 ('In determining reasonableness, context is all-important. There is no closed list of factors involved in the reasonableness enquiry and the relevance of various factors will be determined on a case by case basis depending on the particular facts and circumstances in question.')

124 See *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1969 (CC) ('*Soobramoney*') at paras 10, 20 and 22.

125 See *Soobramoney* (supra) at para 31; *Grootboom* (supra) at paras 38, 78, 99; *TAC* (supra) at paras 81.

126 See *Soobramoney* (supra) at paras 13, 19, 21 and 41.

127 *Van Biljon v Minister of Correctional Services* 1997(6) BCLR 789 (C), 1997(4) SA 441 (C), 497 ('*Van Biljon*').

128 *Grootboom* (supra) at paras 39-46.

- whether the plan is reasonable 'both in its conception and its implementation',¹³⁰
- whether the plan is sufficiently flexible;¹³¹
- whether the plan attends to 'crises';¹³²
- whether the state's plan excludes 'a significant segment' of the affected population;¹³³
- whether the state's plan balances short, medium and long-term needs;¹³⁴ and
- whether the party could form a legitimate expectation of receiving a socio-economic entitlement.¹³⁵

Is there any reason to think that there may be grounds for justification that the state could assert under FC s 36 that are not available to it under FC s 26(2) or FC s 27(2)? In the cases decided to date, ending in *Khosa*, the answer would appear to be 'no'.

But before we shut the door on what is, apparently, no longer an academic debate, consider the textual differences between FC s 27(2), on the one hand, and FC s 36, on the other. FC s 27 reads, in pertinent part, as follows:

(1) Everyone has the right to have access to —

(a)

(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. (emphasis added)

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FC s 36 reads, in pertinent part, as follows:

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

129 Ibid at para 52.

130 Ibid at para 53.

131 Ibid at paras 63-69.

132 Ibid at para 74.

133 Ibid at para 83.

134 Ibid at paras 39-46, 52, 53, 63-69, 74 and 83.

135 *Van Biljon* (supra) at 497.

- (a) . . .
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose. (emphasis added)

The language of FC ss 27(2) and 36, on their face, intimate that there are, in fact, *different* kinds or sources of justification. In FC s 27(2), the reasons for failure to make good the promise of a socio-economic right would seem, at first blush, related to the right itself or the resources that would be required to give effect to the right. For example, either the state may not possess sufficient resources to give everyone with terminal renal failure the dialysis treatment that would extend his or her life, or the state may not be required to distribute a requested form of relief because the right, upon reflection, is not meant to embrace a particular form of entitlement. In FC s 36(1), the failure to make good the promise of a given right may have nothing whatsoever to do with the right itself. For example, the grounds for restricting the expressive activity of a person may have nothing at all to do with advancing freedom of expression: we restrict defamatory statements because of the damage we believe is done to the dignity of the persons affected by such conduct.¹³⁶ Thus, whereas FC s 27(2) appears to limit our considerations to those justifications related to the means required to realize the purpose of the right (eg, money) or the end of the right itself (eg, social security), FC s 36 tells us that we may cast our justificatory nets as far as the needs of an open and democratic society based on human dignity, equality and freedom will allow. In short, under FC s 36, our reasons for restricting access to social security can take account of a range of goods wholly unrelated to that right: dignity, life, privacy, freedom and security of the person, or any of the other rights found in Chapter 2. Our reasons for restricting rights may not, in fact, have anything to do with the other rights found in Chapter 2. In *Prince*, the grounds for restricting the religious ritual use of cannabis by Rastafarians was the general welfare, and perhaps more specifically, the safety of the commonweal.¹³⁷ Thus, although the Court has not as yet made such a distinction grounded in the very text of FC ss 27 and 36, one is on offer.¹³⁸

136 See *Khumalo v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC).

137 See *Prince* (supra) at para 130 (The determination as to whether the scope of religious practice protected by FC s 15 embraced the ritual use of cannabis by Rastafarians was wholly unrelated to any subsequent analysis of the societal interests ostensibly threatened by such use.)

138 Kevin Iles has articulated a very similar, if not absolutely identical, distinction between the objects of the FC s 26(2) and FC s 27(2) reasonableness inquiry and the objects of the FC s 36 reasonableness enquiry. See Kevin Iles 'Limiting Socio-Economic Rights: Beyond Internal Limitations Clauses' (2004) 20 *SAJHR* 448. With respect to the Court's analysis in *Grootboom*, he writes:

With *Grootboom* ... the object of the reasonableness examination is the plan for the progressive realization of the right. *Grootboom* reasonableness is concerned with such details as the following: how the content of the right is going to be extended and when, the order in which the state plans to cater for those in need, the resources that the state has allocated towards realizing its stated plan including the intergovernmental allocation of tasks and responsibilities, the ultimate comprehensiveness of the plan and those it caters for and the way in which the state seeks to implement the plan. Internal limitations clauses in socio-economic rights cases go to the content and scope of the right they are associated with and define the boundaries as to how much of a particular right can be claimed at a particular point in time. In other words, they are factors that belong at the first stage of the rights interpretation process and not at the second stage.

But as we have already noted, arguments about the nature or the source of justification are as much empirical — a fact about constitutional adjudication in South Africa — as they are logical and textual. A close reading of the socio-economic rights judgments handed down by the Constitutional Court does not suggest that the Court is likely to place constraints on its FC ss 26(2) and 27(2) 'reasonableness' analysis in the service of creating a meaningful allocation of analytical responsibilities between FC ss 26(2) and 27(2), and FC s 36. Indeed, if the rather circuitous route the Court took to avoid FC s 26 analysis in *Modderklip* offers any indication of the Court's future direction, it is that the Court is unlikely to jettison the freedom that an open-ended reasonableness standard — under FC ss 26(2) and 27(2) — offers in the name of such an 'abstract' good as doctrinal coherence.¹³⁹

(iii) Internal limitations in FC s 25 and the collapse of stage distinctions

Unlike FC ss 9, 15, 26, 27, 30 and 31, FC s 25 does not, on its face, appear to possess an internal limitations clause. Indeed, FC s 25 does not contain an internal limitations clause distinct from another clause that determines the ambit of the right.

After *FNB*,¹⁴⁰ as Theunis Roux argues in this volume,¹⁴¹ the Court's inquiry into arbitrariness in its FC s 25(1) determinations — 'no law may permit arbitrary deprivation of property' — bears all the hallmarks of an internal limitations test. Moreover, as Roux notes, the *FNB* Court did not just turn 'arbitrariness' into a kind of

Section 36 reasonableness is directed not at the plan for realizing rights (as *Grootboom* reasonableness is) but at an examination of the reasonableness of measures that limit rights. Rights are not limited by plans that are designed to give effect to them.... *Grootboom* reasonableness does not involve choosing one value from a cluster of incommensurable values as [FC] s 36 reasonableness sometimes does. One is not engaging in a selection between a value furthered by a right and a competing value the state seeks to advance by limiting the right. In fact, *Grootboom* reasonableness does not involve a choice between things at all.

Ibid at 456. While Iles is correct — at a certain level of abstraction — about the distinction between the objects of the two kinds of limitations clauses, it is not so clear that the *Grootboom* internal limitations analysis can be hermetically sealed in the manner he suggests. In the first place, the introduction of 'available resources' and situating policy choices regarding, say, the delivery of housing in the context of a larger government agenda and budget already takes us into the land of competing values and incommensurability. In the second place, it is not clear that Iles needed to make his claim as strong as he does. All he was required to do was demonstrate that the set of reasons that might justify a failure to make good the promise of a right in terms of FC s 26(2) or FC s 27(2) is smaller than the set of reasons that might justify the infringement of a FC s 26 or FC s 27 right in terms of FC s 36.

139 See *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC). The Constitutional Court could have addressed the claims brought before it in terms of FC ss 25 and 26. But to do so would have raised thorny questions about the content of both FC s 25 and FC s 26, and technically challenging questions about the relationship between FC s 25, FC s 26(2) and FC s 36.

140 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) ('*FNB*').

141 See Theunis Roux 'Property' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 46, 46-2-46-3.

internal limitations test. It also collapsed the Court's rights-stage analysis and limitations-stage analysis into a single stage, similar to the approach followed in its socio-economic rights jurisprudence. Our complaint, once again, is that the Court has compromised the analytical rigour of the two-stage approach, and supplanted it with a rather amorphous, if not entirely shapeless, one-stage inquiry into the justifiability of the state's conduct.

34.6 Burden of justification¹⁴²

During the first stage of analysis under the Bill of Rights, the applicant must establish that a fundamental right has been infringed. That the applicant bears the burden at this first stage of the analysis flows from the generally accepted rule that the person asserting a breach bears the burden of legal justification.¹⁴³ It is important to note, however, that the Constitutional Court's objective theory of unconstitutionality¹⁴⁴ and FC s 38's generous standing

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provisions¹⁴⁵ do not require that the party before the court alleging that an infringement of a right has occurred be the party who has suffered the infringement.

Assuming that a *prima facie* infringement of a right is established at the conclusion of this first stage of analysis, the next question that arises is which party bears the burden of justification under the limitations clause. (We can bracket vexed questions of whether justification can ever meaningfully occur under FC s 36 with respect to unfair discrimination analysis in terms of FC s 9, deprivation of

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property analysis in terms of FC s 25(1), or socio-economic rights analysis in terms of FC ss 26(2) and 27(2), having already dealt with them above.¹⁴⁶ The Constitutional Court in *Makwanyane* held that '[i]t is for the legislature, or the party relying on the legislation, to establish this justification, and not for the party challenging it to show that it was not justified.'¹⁴⁷ One obvious ground for placing the burden of justification on the state where it seeks to uphold a law that limits a right is that the state will often possess unique, if not privileged, access to the information a court requires when attempting to determine whether a limitation is justified.¹⁴⁸

That said, the Constitutional Court has, on a number of occasions, stated that the failure by the government to offer any support for a limitation does not relieve a court of the duty to inquire into its justifiability.¹⁴⁹ Not surprisingly,

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142 In the first edition of this work, 'burden of justification' was called 'burden of proof'. This nomenclature was criticized by both the academy and the bar. The general critique was that the author had borrowed the term from another area of law in which its meaning was well-established and quite different. Iain Currie — himself sensitive to such criticism — has described the subject matter as 'showing' or 'burden of justification': as in, who must *show* that the right has been infringed, and who must *show* that a limitation of a right is justified. See Iain Currie & Johan De Waal (eds) *The Bill of Rights Handbook* (5th Edition, 2005) 166. 'Burden of justification' better captures the meaning intended and we follow Professor Currie in employing it for the purposes of our discussion.

143 See *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) ('*Ferreira*') at para 44 ('The task of interpreting ... fundamental rights rests, of course, with the courts, but it is for the applicants to prove the facts upon which they rely for their claim of infringement of a particular right in question.')

however, a failure by the state to adduce the requisite evidence will generally result in a rather perfunctory appraisal of the potential grounds for justification¹⁵⁰ and often 'tip the scales against' the state.¹⁵¹ We know of only one occasion, identified by Hilary Axam, in which the Constitutional Court neither shifted the evidentiary burden to the state nor required any evidentiary showing by the state before going on to find the limitation in question justified.¹⁵²

The Constitutional Court is, not surprisingly, quite reticent about burden shifts within rights that possess internal limitations. With respect to property, as we have seen, the Court's FC s 25 analysis of arbitrary deprivation and expropriation exhausts all plausible justifications.¹⁵³ To the extent that burden shifts do occur, they

144 In its most general form, the doctrine holds that a court's finding of invalidity with respect to a given law is not contingent upon the parties before the court. See *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) at paras 28–29 ('On the objective theory of unconstitutionality adopted by this Court a litigant who has standing may properly rely on the objective unconstitutionality of a statute for the relief sought, even though the right unconstitutionally infringed is not that of the litigant in question but of some other person'); *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party & Others* 1998 (4) SA 1157 (CC), 1998 (7) BCLR 855 (CC) at para 64 (In re-affirming its commitment to the objective theory of unconstitutionality, the Court wrote that 'the practice that has been urged upon this Court carries with it the distinct danger that Courts may restrict their enquiry into the constitutionality of an Act of Parliament and concentrate on the position of a particular litigant'); *Ferreira* (supra) at paras 26–28 ('The subjective positions in which parties to a dispute may find themselves cannot have a bearing on the status of the provisions of a statute under attack. The Constitutional Court, or any other competent Court for that matter, ought not to restrict its enquiry to the position of one of the parties to a dispute in order to determine the validity of a law. The consequence of such a (subjective) approach would be to recognise the validity of a statute in respect of one litigant, only to deny it to another. Besides resulting in a denial of equal protection of the law, considerations of legal certainty, being a central consideration in a constitutional state, militate against the adoption of the subjective approach.') The generous conditions for standing ensure that the objective theory of unconstitutionality will continue to operate in practice — even if the Court refuses to announce its position on the apparent desuetude of the doctrine. See, especially, *Minister of Home Affairs v Eisenberg & Associates: In re Eisenberg & Associates v Minister of Home Affairs & Others* 2003 (5) SA 281 (CC), 2003 (8) BCLR 838 (CC) (Attorneys' firm which handled mainly immigration matters granted standing — in its own interest and as interested member of the public — to mount constitutional challenge to immigration regulations passed without requisite notice and comment. Although the regulations did not affect the firm's members directly, the Court found that it had an interest in proper notice and comment procedures being followed. Said regulations were found unconstitutional.) See also *Shaik v Minister of Justice and Constitutional Development & Others* 2004 (3) SA 599 (CC), 2004 (4) BCLR 333 (CC) (The analysis of the law in terms of the subjective position of the parties 'is incorrect. It is inconsistent with the principle of objective constitutional invalidity enunciated by this Court.... This principle is equally applicable under the 1996 Constitution.')

145 FC s 38 reads, in relevant part: 'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened ... The persons who may approach a court are — (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members. See, eg, *Port Elizabeth Municipality v Prut NO & Another* 1996 (4) SA 318 (E), 1996 (9) BCLR 1240 (E) (Interest referred to in FC s 38(a) need not relate to a constitutional right of the applicant, but may relate to a constitutional right of some other person); *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council & Others* 2002 (6) SA 66 (T), 2003 (1) BCLR 72 (T) at para 27 (Applicant association instituted proceedings on behalf of the residents of a township, in the public interest and in the interest of its members deemed to have established *locus standi* in terms of FC s 38(b), since it was evident that the people affected by the alleged unlawful action were indigent and therefore unable individually to pursue their claims); *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza* 2001 (4) SA 1184 (SCA), 2001 (10) BCLR 1039 (SCA) (Applicants had standing, in terms of FC s 38(c), to bring an application on behalf of a large class of persons whose social grants had been cancelled by welfare authorities in a manner that violated requirements of

do so in the context of the complicated algorithm the *FNB* Court has devised for deprivation and expropriation.¹⁵⁴

With respect to burden shifts within socio-economics rights, the text is silent and analysts are split as to whether such shifts can occur.¹⁵⁵ An applicant who wishes to demonstrate that the state has failed to discharge its duty to provide access to adequate housing under FC 26(1) will have to satisfy the court that the state has failed to meet the 'reasonableness' test developed in terms of FC s 26(2).¹⁵⁶ As yet, the Court has refused to distinguish the reasonableness criteria for justification within FC ss 26(2) and 27(2) from the reasonableness criteria for

procedural fairness); *Van Rooyen & Others v The State & Others* 2001 (4) SA 396, 424H (T), 2001 (9) BCLR 995 (T)(Magistrate and the Association of Regional Magistrates of South Africa had *locus standi* in terms of FC s 38(d) to attack the validity of legislation which allegedly undermined independence of the magistrates' courts as guaranteed by the Final Constitution); *South African Association of Personal Injury Lawyers v Heath & Others* 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC)(FC s 38(e) enabled applicant association to challenge the constitutionality of search and seizure provisions that threatened to infringe the constitutional rights of its members); *Campus Law Clinic (University of KZN Durban) v Standard Bank of SA Ltd & Another* 2006 (6) SA 103 (CC), 2006 (6) BCLR 669 (CC)(Law clinic has standing to appeal a decision of the SCA, to which it was not a party, concerning the execution of mortgaged property in the High Court.) The case law suggests a strong correlation between the objective theory of unconstitutionality and standing. See *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, & Others* 2002 (6) SA 370 (W), 2002 (12) BCLR 1285 (W)(Applicant who had been charged, and might be convicted, in terms of a statutory provision had a direct interest in challenging the validity of that provision); *National and Overseas Modular Construction (Pty) Ltd v Tender Board, Free State Provincial Government, & Another* 1999 (1) SA 701 (O)(Unsuccessful tenderer had sufficient interest to apply for the review of decision-making procedure for awarding tender in terms of the right to just administrative action.) See, generally, Cheryl Loots 'Standing, Ripeness and Mootness' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 7.

146 On internal limitations, see § 34.5 supra.

147 See *Makwanyane* (supra) at para 102. See also *Ferreira* (supra) at para 44. Lower courts were quick to place the burden of justification of a limitation on the party — government or private — seeking to uphold the law limiting the right. See *Nortje v Attorney-General, Cape* 1995 (2) SA 460 (C), 1995 (2) BCLR 236, 248 (C)('[P]arty who seeks a limitation of [the] right bears the onus of establishing the justification for that limitation'); *Zantsi v Chairman, Council of State, Ciskei* 1995 (2) SA 534 (Ck), 560, 1995 (10) BCLR 1424 (Ck)('Thereafter the onus is on the party relying on a limitation to prove that it is a lawful limitation'); *Park-Ross v Director: Office for Serious Economic Offences* 1995 (2) SA 148 (C), 1995 (2) BCLR 198 (C); *Matinkinca v Council of State, Ciskei* 1994 (4) SA 472 (Ck), 1994 (1) BCLR 17, 34 (Ck)('Once it is established that a statute does interfere with or limit a fundamental right ... the onus moves to the person attempting to justify the interference.')

148 See *Moise v Transitional Local Council of Greater Germiston* 2001 (4) SA 491 (CC), 2001 (8) BCLR 765 (CC) at para 19 ('It is also no longer doubted that, once a limitation has been found to exist, the burden of justification under s 36(1) rests on the party asserting that the limitation is saved by the application of the provisions of the section. The weighing-up exercise is ultimately concerned with the proportional assessment of competing interests but, to the extent that justification rests on factual and/or policy considerations, the party contending for justification must put such material before the Court. It is for this reason that the government functionary responsible for legislation that is being challenged on constitutional grounds must be cited as a party. If the government wishes to defend the particular enactment, it then has the opportunity — indeed an obligation — to do so. The obligation includes not only the submission of legal argument but placing before Court the requisite factual material and policy considerations. Therefore, although the burden of justification under s 36 is no ordinary *onus*, failure by government to submit such data and argument may in appropriate cases tip the scales against it and result in the invalidation of the challenged enactment.')

Cf *Gardener v Whitaker* 1995 (2) SA 672 (E), 691D-E, 1994 (5)

justification within FC s 36.¹⁵⁷ As a result, we have yet to see a genuine burden shift from FC ss 26 and 27 to FC s 36.

As far as equality analysis goes, burden shifts may occur within FC s 9.¹⁵⁸ For example, a demonstration that discrimination occurs on a prohibited ground in FC s 9(3) establishes a rebuttable presumption of unfair discrimination, in terms of FC s 9(5), and forces the respondent to demonstrate that the discrimination was, indeed, fair. If the discrimination is shown to be unfair, and the respondent cannot overcome

BCLR 19 (E)('It seems eminently reasonable in practical terms (and because, conceptually, justification in terms of s 33 does not arise in a matter concerning competing fundamental rights) to require that a plaintiff who seeks to rely on the precedence of one fundamental right over another should bear the *onus* of establishing the basis for such precedence. Having done so, it may then still be possible for a defendant to defeat the claim by relying on a defence justified by a rule of law of general application, but the *onus* of showing that it complies with s 33 (the limitation clause) would then, in that regard, rest on the defendant.')

- 149 See *Du Toit & Another v Minister for Welfare and Population Development & Others* 2003 (2) SA 198 (CC), 2002 (10) BCLR 1006 (CC)('Du Toit') at para 31 ('The validity of these provisions is a matter of public importance which is properly before the Court and which must be decided'); *Phillips & Another v Director of Public Prosecutions (Witwatersrand Local Division) & Others* 2003 (3) SA 345 (CC), 2003 (4) BCLR 357 (CC) at para 20 ('Phillips')('The absence of evidence and argument from the State does not exempt the court from the obligation to conduct the justification analysis'); *J v Director-General, Department of Home Affairs* 2003 (5) SA 621 (CC), 2003 (5) BCLR 463 (CC) at para 15; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC)('NCGLE I') at paras 33-57 (State did not attempt to defend sodomy laws in question, but Court proceeded, at some length, to assess the potential grounds for upholding the laws.)
- 150 See, eg, *Minister for Welfare and Population Development v Fitzpatrick & Others* 2000 (3) SA 422 (CC), 2000 (7) BCLR 713 (CC) at para 20; *Potgieter v Lid van die Uitvoerende Raad: Gesondheid, Provinsiale Regering, Gauteng* 2001 (11) BCLR 1175 (CC); *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC) at para 26; *S v Steyn* 2001 (1) SA 1146 (CC), 2001 (1) BCLR 52 (CC) at paras 32-36; *S v Niemand* 2002 (1) SA 21 (CC), 2001 (11) BCLR 1181 (CC).
- 151 *Moise v Transitional Local Council of Greater Germiston* 2001 (4) SA 491 (CC), 2001 (8) BCLR 765 (CC) at para 19. See also *Phillips* (supra) at para 20.
- 152 See *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat* 1999 (4) SA 623 (CC), 1999 (7) BCLR 771 (CC)(Court upholds a reverse onus provision that requires persons accused of certain kinds of offences to 'satisfy the court' that they are entitled to bail.) On the Court's curious departure from form in *Dlamini*, Axam writes:

In contrast to its past limitations cases requiring the state to bear the onus of justifying with precision 'the particular provisions under attack', the *Dlamini* Court did not require the state to advance any evidence to justify its statutory approach restricting access to bail based on entire categories of offenses, rather than on factors shown to pose heightened risks to the bail system. Contrary to its cases requiring evidence of a convincing correlation between a limitation and the problems it seeks to address, the Court did not demand any evidence demonstrating that the offences subject to more restrictive bail standards were rationally correlated with heightened risks to the interests of justice pending trial ... Although the Court noted that the risk of penalty may increase the incentive to flee, it did not require the state to present evidence establishing this correlation or suggesting that the nature of the charge is a reasonably reliable indicator of a risk of flight or other harm to the bail system. Nor did the Court require the state to justify the statute's provision that the state's characterization of the charge 'shall be conclusive' and that the onus is triggered merely by a written confirmation that the prosecution 'intends to charge' the accused

such a finding or presumption, few if any grounds exist beyond those offered in the context of FC s 9 to justify the repugnant law.¹⁵⁹

34.7 Law of general application

(a) The purpose and meaning of 'law of general application'

According to FC s 36(1), only 'law of general application' may legitimately limit the rights entrenched in the Bill of Rights.¹⁶⁰ This statement is beguilingly simple and prone to misinterpretation.

with one of the offenses subject to the onus. Although the Court acknowledged that the statute makes the prosecution's characterization of the charge 'decisive' in determining whether bail standards will be restricted, it did not scrutinise the potential arbitrariness or irrationality associated with affording police and prosecutors virtually unfettered discretion to trigger the application of standards more restrictive than those established by the Constitution.

Hilary Axam 'If the Interests of Justice Permit: Individual Liberty, the Limitations Clause and the Qualified Right to Bail' (2001) 17 *SAJHR* 320, 330-31.

153 See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC).

154 See, generally, Theunis Roux 'Property' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 46. But see *Nhlabathi & Others v Fick* [2003] 2 All SA 323 (LCC) at paras 33-34 ('As Ackermann J stated in the *First National Bank* case, neither the text nor the purpose of section 36 suggests that any rights in the Bill of Rights are excluded from limitation under its provisions. On the contrary, section 25(8) of the Constitution is explicit in making section 36 applicable to land, water and related reform measures. Despite the dictum by Ackermann J, no final decision was taken by the Constitutional Court on the point to what extent an infringement of a right to property which is protected by section 25, can be justified under section 36. Professor Van der Walt, in his book on the property clause, argues convincingly that none of the limitations on the deprivation and expropriation of property contained in section 25, are immune from the provisions of section 36. Most South African authors accept that the general limitation provisions of section 36 and the specific limitation provisions of section 25 apply cumulatively. We share that view.) As a statement of the law, the decision in *Nhlabathi* is simply wrong. The *FNB* Court expressly rejected AJ van der Walt's cumulative approach. In addition to the author of the chapter on property in this work, many other respected commentators have suggested that little space, if any, now exists for meaningful FC s 36 limitations analysis of FC s 25 violations. See Roux (*supra*) at 46-36.

155 *Minister of Health & Others v Treatment Action Campaign & Others No 2* 2002 (5) SA 721 (CC), 2002 (5) SA 721 (CC) ('TAC'); *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2001 (9) BCLR 883 (CC) ('Grootboom'); *Khosa & Others v Minister of Social Development & Others; Mahlaule & Others v Minister of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC) ('Khosa') at para 83 ('There is a difficulty in applying s 36 of the Constitution to the socio-economic rights entrenched in ss 26 and 27 of the Constitution. Sections 26 and 27 contain internal limitations that qualify the rights. The State's obligation in respect of these rights goes no further than to take "reasonable legislative and other measures within its available resources to achieve the progressive realisation" of the rights. If a legislative measure taken by the State to meet this obligation fails to pass the requirement of reasonableness for the purposes of ss 26 and 27, s 36 can only have relevance if what is "reasonable" for the purposes of that section, is different to what is "reasonable" for the purposes of ss 26 and 27.') See Sandra Liebenberg 'Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 33.

156 Commentators appear split over whether there is any meaningful burden shift from FC s 26(1) to FC s 26(2), or from FC s 27(1) to FC s 27(2). Kevin Iles states that the Court's refusal to distinguish

The first distinction of import is that between law and conduct. To say that only 'law of general application' may justify the impairment of a fundamental right

means that conduct — public or private — that limits a fundamental right but which is not sourced in a law of general application cannot be justified in terms of FC s 36(1).¹⁶¹

If, in fact, law (as opposed to conduct) does the limiting of a fundamental right, the next question is whether the law in question qualifies as 'law of general application'. When determining whether a type of law — and any token of such a

FC s 26(1) rights content analysis from FC s 26(2) internal limitations analysis means that FC s 26(2) reasonableness analysis is inextricably a part of FC s 26(1) rights analysis. See Kevin Iles 'Limiting Socio-Economic Rights: Beyond Internal Limitations Clauses' (2004) 20 *SAJHR* 448, 464–65 (Iles further notes that '[f]ailure by our courts to allocate the proper tasks to the correct stage of the two-stage rights interpretation process combined with the reluctance to define the content of socio-economic rights has hampered our understanding of the operation of the internal limitations clause.') Sandy Liebenberg offers a somewhat more nuanced account of burden shifts within FC s 26 and FC s 27. See Sandra Liebenberg 'Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 33. She writes that 'the party claiming a constitutional violation would have to establish a *prima facie* case that the measures undertaken are unreasonable because they violate one or more of the criteria laid out in *Grootboom*.' Ibid at 33-53. She goes on to observe that — with respect to the 'within available resources' criterion — '[i]t would be unreasonable to expect ordinary litigants to identify and to quantify the resources available to the State for the realization of particular socio-economic rights. If the state wishes to rely on a lack of available resources in order to rebut an allegation that it has failed to take reasonable measures, it should bear the burden of proving the alleged unavailability of resources. Relevant organs of state are clearly best placed to adduce this type of evidence'. Ibid at 33-53 (citations omitted).

- 157 Iain Currie and Johan De Waal concur with this assessment. See Iain Currie & Johan De Waal *The Bill of Rights Handbook* (5th Edition, 2005) 165 ('It is, however, difficult to apply the general limitation clause to rights with internal demarcations or qualifications that repeat the phrasing of s 36 or that make use of similar criteria. For example, s 33(1), which provides, inter alia, a right to lawful and reasonable administrative action will be violated by unlawful or unreasonable administrative action. It is hard to think of a way of justifying such administrative action as a 'reasonable' limitation of the right, or of arguing that it is "in terms of law of general application".')
- 158 See *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC); *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC); *Bhe & Others v Magistrate, Khayelitsha, & Others (Commission for Gender Equality as Amicus Curiae)*; *Shibi v Sithole & Others*; *South African Human Rights Commission & Another v President of the Republic of South Africa & Another* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) ('Bhe'); *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC), 2004 (11) BCLR 1125 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC); *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC); *Satchwell v President of the Republic of South Africa* 2003 (4) SA 266 (CC), 2004 (1) BCLR 1 (CC).
- 159 See Cathi Albertyn & Beth Goldblatt 'Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 35. See also *Lotus River, Ottery, Grassy Park Residents Association v South Peninsula Municipality* 1999 (2) SA 817 (C), 1999 (4) BCLR 440 (C) (Only case of which we are aware in which finding of unfair discrimination under FC s 9 was ultimately found justifiable in terms of FC s 36.)
- 160 The phrase 'law of general application' appears to have been borrowed from the German Basic Law ('GBL'). GBL, art 19(1), reads: 'In so far as a basic right may under this Basic Law be restricted by

type — qualifies as law of general application, it is important to remember that this threshold requirement is designed to promote two primary ends: (1) to give effect to the rule of law;¹⁶² (2) to filter out bills of attainder.¹⁶³ To give effect to the rule of law, a law of general application must possess four formal attributes. First, the law must ensure *parity* of treatment in two respects: it must treat similarly situated persons alike; and it must impose the same penalties on the governed and the governors, and accord them the same privileges.¹⁶⁴ Second, the rule of law — as opposed to the rule of man — requires that those who enforce the law — the executive or the judiciary — do so in terms of a discernible standard. Our rule of law culture sets its face against the *arbitrary* exercise of state power.¹⁶⁵ Third, the law must be *precise* enough to enable individuals to

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conform their conduct to its dictates.¹⁶⁶ Laws may not grant officials largely unfettered discretion to use their power as they wish, nor may laws be so vaguely worded as to lead reasonable people to differ fundamentally over their extension.¹⁶⁷

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or pursuant to a law, such law must apply generally and not to an individual case.' The phrase 'law of general application' serves the same purpose as the phrase 'prescribed by law' does in the Canadian Charter, the European Convention of Human Rights, and the New Zealand Bill of Rights. On the meaning of 'prescribed by law', see *Reference re Manitoba Language Rights* [1985] 1 SCR 721, 748-49, 19 DLR (4th) 1; *Sunday Times v United Kingdom (No 1)* (1979) 2 EHRR 245 at para 49; Mirielle Delmas-Marty (ed) *The European Convention for the Protection of Human Rights: International Protection versus National Restrictions* (1992) 216-17; Peter Hogg *Constitutional Law of Canada* (4th Edition, 2001).

161 See *August v Electoral Commission & Others* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) at para 23 ('In the absence of a disqualifying legislative provision, it was not possible for respondents to seek to justify the threatened infringement of prisoners' rights in terms of s 36 of the Constitution as there was no law of general application upon which they could rely to do so.')

162 See *Dawood v Minister of Home Affairs; Shalabi & Another v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) ('Dawood') at para 47 (On the relationship between the rule of law and a law of general application.)

163 That the phrase 'law of general application' is meant to serve these two discrete purposes — and, in particular, proscribe bills of attainder — is supported by the drafting history. See Technical Committee on Fundamental Rights 'Sixth Report' (15 July 1993) (Includes phrase 'law of general application'); Technical Committee on Fundamental Rights 'Seventh Report' (29 July 1993) (Phrase broken down into its two component parts and reads 'a law applying generally and not solely to an individual case'); Technical Committee on Fundamental Rights 'Tenth Report' (5 October 1993) (Phrase 'law of general application' supplants 'a law applying generally and not solely to an individual case.' The Technical Committee suggests that its word choice was purely a matter of artifice, an attempt at a more natural and elegant use of language, rather than a change in substance that might diminish the force of an argument that bills of attainder were not the object of this proviso.)

164 See *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) ('Pharmaceutical Manufacturers') at para 40 (footnotes omitted) ('We now have a detailed written Constitution. It expressly rejects the doctrine of the supremacy of Parliament, but incorporates other common-law constitutional principles and gives them greater substance than they previously had. The rule of law is specifically declared to be one of the foundational values of the constitutional order, fundamental rights are identified and entrenched, and provision is made for the control of public power, including judicial review of all legislation and conduct inconsistent with the Constitution.')

Fourth, a commitment to the non-arbitrary exercise of power entails that the law must be *accessible* to the citizenry.¹⁶⁸ Law must be publicly promulgated and available *ex ante* in order to avoid the appearance that its application and its execution are selective.¹⁶⁹ Finally, as we noted above, the phrase 'law of general application' is meant to prevent any attempt at justification for bills of attainder. Bills of attainder are laws that pick out specific individuals or easily ascertainable members of a group for punishment without judicial trial.¹⁷⁰ Although bills of attainder are a

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- 165 Ibid at paras 85–86 ('It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement.... The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle.') See also *President of the Republic of South Africa & Another v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 101 (In attempting to determine the meaning of 'law of general application' Mokgoro J cites with approval McLachlin J's view in *Committee for Commonwealth of Canada v Canada* [1991] 1 SCR 139, 77 DLR (4th) 385: 'She considered that the 'prescribed by law' requirement was to eliminate from limitations clause purview conduct which is purely *arbitrary*.' (Emphasis added).) See, further, *Prinsloo v Van der Linde & Another* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 25 ('In regard to mere differentiation the constitutional State is expected to act in a rational manner. It should not regulate in an *arbitrary* manner or manifest "naked preferences" that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State.' (Emphasis added)); *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 156 (Ackermann J wrote that 'We have moved from a past characterised by much which was *arbitrary* and *unequal* in the operation of the law to a present and a future in a constitutional State where State action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional State presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order.' (Emphasis added).)
- 166 See *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, & Others* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC) ('*De Reuck*') at para 57 ('The first question is whether s 27(1), read with the definition of child pornography, is a "law of general application" as required by [FC] s 36(1). This Court has held that this requirement derives from an important principle of the rule of law, namely that "rules must be stated in a clear and accessible manner". The applicant's complaint concerned clarity: he submitted that the definition of "child pornography" in s 1 was too vague to satisfy this requirement. Having analysed and considered that definition above, I am satisfied that it is sufficiently clear and does constitute a law of general application.') See also *Irwin Toy Ltd v Quebec* [1989] 1 SCR 927, 58 DLR (4th) 577, 606, 617 ('Absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work.')
- 167 See *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC), 2002 (5) BCLR 43 (CC) at para 44 ('The next question to be considered is whether the provision is nevertheless justifiable despite its inability to be read in the way that the Board suggests. The prohibition against the broadcasting of any material which is "likely to prejudice relations between sections of the population" is cast in absolute terms; no material that fits the description may be broadcast. The prohibition is so widely phrased and so far-reaching that it would be difficult to know beforehand what is really prohibited or permitted. No intelligible standard has been provided to assist in the determination of the scope of the prohibition. It would deny both broadcasters and their audiences the right to hear, form and freely express and disseminate their opinions and views on a wide range of subjects.') See also *Dawood v Minister of Home Affairs; Shalabi & Another v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) at para 47 ('It is an important principle of the rule of law that rules be stated in a clear and accessible manner.... It is because of this principle that s 36 requires that limitations of rights

species of arbitrary exercises of law-making authority, they identify a class of law that, on the surface, sometimes appears to satisfy the requirements of parity, non-arbitrariness, accessibility and precision. Despite such appearances, bills of attainder reflect an obvious perversion of that which animates the rule of law in the first place.¹⁷¹

These general considerations lead us to ask two kinds of questions with respect to 'law of general application' analysis. The first is whether there is, in fact, any law that authorizes the challenged conduct. If the challenge is to law, then, secondly, we must ask whether the law in question is 'law of general application'. As both a doctrinal matter and an empirical matter, the four-pronged test for law of general

may be justifiable only if they are authorised by a law of general application. Moreover, if broad discretionary powers contain no express constraints, those who are affected by the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision.') There would appear to be a close relationship between the requirement of clarity or precision for laws of general application and the doctrine of overbreadth. In *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, & Others* the High Court wrote:

The applicant has attacked the definition of 'child pornography' as ... overbroad ... and ... so vague that it cannot be regarded as a law of general application.... To determine whether a law is overbroad, a Court must consider the means used ... in relation to its constitutionally legitimate underlying objective....The objective of the Legislature was clear. It was to eradicate child pornography in every form.... When one has regard to the objectives of the legislation and the spirit of the Constitution, it can never be said that child pornography has any place in an open and democratic society based on freedom and equality. Section 27(1), which outlaws the possession of child pornography, cannot be said to be disproportionate to the objectives which the Legislature has sought to achieve. In my view the definition of 'child pornography' is not overbroad.

2003 (3) SA 389 (W) at para 86. Although the court's conclusions about overbreadth and whether the definition in question satisfies the requirements for a law of general application may well be correct, the reasoning does not quite support its conclusions. Overbreadth is concerned, ultimately, with whether a law sweeps up into its proscriptive net both constitutionally protected and constitutionally unprotected activity. It is not clear to us that this overbreadth enquiry has anything to do with an enquiry into the constitutional legitimacy of the law's objective, though this second enquiry is certainly part of limitations analysis. Nor is it clear to us that overbreadth has anything to do with an assessment of proportionality except in the limited sense that in order to know what is and is not constitutionally protected — and thus whether a law is, in fact, overbroad — one may first have to determine what counts as a justifiable limitation on a fundamental right or freedom and what does not. Law of general application analysis is a rather formal affair. The question in all cases of limitations analysis is whether the law in question possesses those features of law required in a polity committed to the rule of law. It is not about the subject matter of the law under scrutiny.

As Lorraine Weinrib notes, by subjecting the exercise of state power to the rule of law through the law of general application test, we reinforce both the constitutional and the democratic nature of our regime of law. First, the law of general application test protects our constitutional regime by requiring that '[a]rbitrary incursions on guaranteed rights must yield in any confrontation with such fundamental values.' Weinrib 'The Supreme Court of Canada and Section 1 of the Charter' (1988) 10 *Supreme Court LR* 469, 477. Secondly, the law of general application test ensures that the potential reprieve which the limitation clause offers the government is available 'if, and only if, the state has utilized its democratic law-making machinery.' *Ibid.* Professor Weinrib's reasoning is correct in so far as it concerns limitations analysis under the Charter. And her reasoning certainly sheds light on our own Bill of Rights analysis. However, not all law that is subject to Bill of Rights analysis under our Final Constitution will have passed through our democratic law-making machinery. Common law, customary law and regulations are appropriate objects of limitations analysis — and none of them are the direct product of democratic processes.

168 See *Premier, Mpumalanga, & Another v Executive Committee, Association of State-aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC), 1999 (4) BCLR 382 (CC) at paras 41–42 ('[T]o permit the implementation of retroactive decisions without, for example, affording parties an effective opportunity to make representations would flout another important principle, that of procedural fairness. Citizens are entitled to expect that government policy will ordinarily not be altered in

application will be met by most legislation,¹⁷² regulations,¹⁷³ subordinate legislation other than regulations,¹⁷⁴ municipal by-laws,¹⁷⁵ common law

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rules,¹⁷⁶ customary law rules,¹⁷⁷

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rules of court,¹⁷⁸ and international conventions.¹⁷⁹ Whether 'mere' norms and standards, directives or guidelines issued by government agencies or statutory bodies qualify as laws of general application remains unclear.¹⁸⁰

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(b) The relationship between law of general application and the rule of law

ways which would threaten or harm their rights or legitimate expectations without their being given reasonable notice of the proposed change or an opportunity to make representations to the decision-maker... [T]he decision by the second applicant to terminate the payment of bursaries to members of the respondent with actual retroactive effect and without affording those members an effective opportunity to be heard was a breach of their right to procedural fairness enshrined in [IC] s 24(b) ... [and] did not constitute "a law of general application".')

- 169 See *Dawood* (supra) at para 47 ('[I]f broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision.')
- 170 The US Constitution prohibits both the federal government and state governments from passing any bill of attainder. Article I, ss 9, 10. See *US v Lovett* 328 US 303 (1946)(Legislation prohibiting payment to three named federal employees on grounds of subversive activity declared invalid as bill of attainder); *US v Brown* 381 US 437 (1965)(Law making it a crime for member of Communist Party to serve as labour union official declared invalid as bill of attainder.)
- 171 The rationale behind this prohibition against extra-judicial sanctions imposed without the possibility of a fair trial does not support the proposition that laws which single out individuals or groups for benefits suffer from a similar disability. With respect to benefits, the question is whether or not the law in question serves the 'naked preferences' of those exercising power — which is another way of saying that the exercise of public power is being used solely for private benefit without any consideration for the needs of the commonweal. See *United Democratic Movement v President of the Republic of South Africa & Others (African Christian Democratic Party & Others Intervening; Institute For Democracy in South Africa & Another as Amici Curiae)*(No 2) 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC) at para 70 ('The distinction between the first period and all subsequent periods is also rational ... Whilst other parties would not necessarily have been affected by this event, it cannot be said to be irrational to pass a law of general application to deal with a concrete situation, rather than a law that would apply only to members of the DA, the DP and the NNP. Indeed, to have made provision only for members of those parties might itself have given rise to constitutional objection.')
- 172 See *Mkontwana v Nelson Mandela Metropolitan Municipality & Another; Bissett & Others v Buffalo City Municipality & Others; Transfer Rights Action Campaign & Others v MEC, Local Government And Housing, Gauteng, & Others (Kwazulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)*('Mkontwana') 2005 (1) SA 530 (CC), 2005 (2) BCLR 150 (CC) at para 83 n8 ('Section 118(1) is a provision in an Act of Parliament which governs all municipalities in South Africa. It is clearly a law of general application as contemplated by s 36 of the Constitution.')
- See also *Deutschmann NO & Others v Commissioner for the South African Revenue Service; Shelton v Commissioner for the South African Revenue Service* 2000 (2) SA 106 (E), 124('It is no issue that the IT Act and the VAT Act are laws of general application.')

As John Finnis somewhat cheekily puts it, 'the Rule of Law' is 'the name commonly given to the state of affairs in which a legal system is legally in good shape'.¹⁸¹ Here are some of the features of a legal system in good shape:

(i) its rules are prospective, not retroactive, and (ii) are not in any other way impossible to comply with; ... (iii) its rules are promulgated, (iv) clear, and coherent one with another; ... (v) its rules are sufficiently stable to allow people to be guided by their knowledge of the content of rules; ... (vi) the making of decrees and orders applicable to relatively limited situations is guided by rules that are promulgated, clear, stable, and relatively general; and ... (vii) those people who have authority to make, administer and apply the rules in an official capacity (a) are accountable for their compliance with

FC s 25's requirement that a deprivation of property must occur in terms of law of general application has given the courts another opportunity to determine the meaning of this phrase. See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) (Section 114 of Customs and Excise Act 91 of 1964 deemed law of general application for purposes of FC s 25); *Mkontwana* (supra) (Section 118(1) of the Local Government: Municipal Systems Act 32 of 2000 and s 50(1)(a) of the Gauteng Local Government Ordinance 17 of 1939 found to be law of general application); *Ex parte Optimal Property Solutions* CC 2003 (2) SA 136 (C) at para 21 ('The Removal of Restrictions Act 84 of 1967 is a law of general application within the meaning of [FC] s 25.')

- 173 See *Larbi-Odam & Others v Member of the Executive Council for Education (North-West Province) & Another* 1998 (1) SA 745 (CC), 1997 (12) BCLR 1655 (CC) at para 27 ('A precondition to the applicability of IC s 33(1) is that the limitation of a right occur "by law of general application". I hold that precondition to be met in this case. Regulation 2(2) is subordinate legislation which applies generally to all educators in South Africa.')
- 174 See *President of South Africa & Another v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 96.
- 175 See *North Central Local Council & South Central Local Council v Roundabout Outdoor (Pty) Ltd & Others* 2002 (2) SA 625 (D), 2001 (11) BCLR 1109 (D) (Municipal by-law placing restrictions on advertising and signs, and thus limiting rights of expression, found to be a law of general application for purposes of FC s 36.) See also *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC), 2005 (11) BCLR 1053 (CC).
- 176 See *S v Thebus & Another* 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC) at paras 64-65 (The Court held that an arrested person had the right to remain silent and that drawing an adverse inference on credibility from silence limited the right. It wrote: 'The rule of evidence that the late disclosure of an alibi affected the weight to be placed on the evidence supporting the alibi was one that was well recognised in the common law. As such, it was a law of general application.')
- See also *Du Plessis & Others v De Klerk & Another* 1996 (3) SA 850 (CC), 1996 (5) BCLR 735 (CC) ('*Du Plessis v De Klerk*') at para 44 (On the meaning of 'law' in IC 7(2), as well as 'law' in terms of IC 33(1)'s 'law of general application', the Court held that '[t]he term "reg" is used in other parts of chapter 3 as the equivalent of "law", for example in [IC] s 8 ('equality before the law') and [IC] s 33(1) ('law of general application'). Express references to the common law in such sections as [IC] s 33(2) and [IC] s 35(3) reinforce the conclusion that the "law" referred to in [IC] s 7(2) includes the common law and that chapter 3 accordingly affects or may affect the common law. Nor can I find any warrant in the language alone for distinguishing between the common law of delict, contract, or any other branch of private law, on the one hand, and public common law, such as the general principles of administrative law, the law relating to acts of State or to State privilege, on the other.'). See also *Du Plessis v De Klerk* (supra) at para 136 (Kriegler J) ('[IC] Section 33(1) ... draws no distinction between different categories of law of general application ... [I]t is irrelevant whether it is statutory, regulatory ... founded on the XII Tables of Roman Law ... or a tribal custom'); *Shabalala & Others v Attorney-General, Transvaal, & Another* 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC) at para 23 ('"Law of general application" within the meaning of [IC] s 33(1) would ordinarily include a rule of the common law'); *S v Mamabolo* 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC) ('*Mamabolo*') (Common law offence of scandalizing the court is law of general application

rules applicable to their performance and (b) do actually administer the law consistently and in accordance with its tenor.¹⁸²

Finnis's description of the rule of law coheres with our own account of the formal features of law of general application. Before further adumbrating the contents of that account, it is worth stopping a moment to interrogate Finnis's first remark a little more closely. The rule of law, he says, describes a legal system 'legally' 'in good shape'. Finnis is being neither funny nor tautological. What he means is that in an age such as ours, where the ideals of

for purposes of FC s 36); *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain* 2001 (2) SA 853 (SE), 862, 1997 (10) BCLR 1443 (SE)(Insofar as restraint constitutes limitation on rights entrenched in s 22 of Constitution of the Republic of South Africa Act 108 of 1996, common law complying with requirements of FC s 36(1)); *Nortje & Another v Attorney-General, Cape & Another* 1995 (2) SA 460 (C), 476, 1995 (2) BCLR 236 (C)(There can be no doubt that the common-law [docket] privilege ... is law of general application'); *Jeeva & Others v Receiver of Revenue, Port Elizabeth, & Others* 1995 (2) SA 433 (SE), 445F(The law relating to privilege unquestionably limits a person's constitutional right of access to State-held information. It is part of the common law of evidence and hence a law of general application'); *Khala v Minister of Safety and Security* 1994 (4) SA 218 (W), 227, 1994 (2) BCLR 89, 97 (W)(The fundamental rights in chap 3 may be limited by "law of general application". The word "law" is not defined in the Constitution. [IC] 33(2) provides that save as provided for in s (1) or any other provision of the Constitution, "no law, whether a rule of the common law, customary law or legislation, shall limit any right entrenched in this chapter." It follows, therefore, that the word "law" in [IC] s 33(1) includes the common law'); *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) at para 18 ('[B]oth sides accept that, for purposes of [s 25(1) of] the [Final] Constitution, a "law of general application" includes the common law'); *Phato v Attorney-General, Eastern Cape, & Another; Commissioner of the South African Police Services v Attorney-General, Eastern Cape, & Others* 1995 (1) SA 799 (E), 1994 (5) BCLR 99 (E) (The common law of docket privilege was a law of general application within the meaning of s 33(1)); *Bellocchio Trust Trustees v Engelbrecht NO & Another* 2002 (3) SA 519 (C), 524D(Even if I am wrong in coming to the conclusion that the undue delay rule does not limit the right of access to court as envisaged by s 34 of the Constitution, it is my judgment that such limitation is both reasonable and justifiable with reference to the limitations clause contained in s 36(1) of the Constitution.) Foreign courts have reached similar conclusions. See *R v Therens* [1985] 1 SCR 613, 645, 18 DLR (4th) 655; *Ministry of Transport & Noort Police v Curren* [1992] 3 NZLR 260; *Sunday Times v The United Kingdom (No 1)* (1979) 2 EHRR 245 at para 47.

- 177 *Bhe & Others v Magistrate, Khayelitsha, & Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole & Others; South African Human Rights Commission & Another v President of the Republic of South Africa & Another* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) at para 96 ('The primogeniture rule, . . . [a]s the centrepiece of the customary-law system of succession, . . . violates the equality rights of women and is an affront to their dignity. The result is that the limitation it imposes on the rights of those subject to it is not reasonable and justifiable in an open and democratic society founded on the values of equality, human dignity and freedom.') See also *Nwamitwa v Phillia & Others* 2005 (3) SA 536 (T)(Customary law rules, viewed in toto, constitute law of general application that ultimately justify the tribal authorities' refusal to appoint a female chief.) Cf *Taylor v Kurtstag NO & Others* 2005 (1) SA 362 (W), 385, 2005 (7) BCLR 705 (W) ('Whether the internal rules of a religious group are likely to qualify as "law of general application", as referred to in s 36(1), is questionable ... What is meant with this expression includes the law in the general sense of the legal system applicable to all which, in this case, allows for contractual freedom to associate and actions flowing from it.')
- 178 The authority for this proposition may be described as 'weak' by comparison to the authority that underwrites the recognition of other types of law as law of general application. See *Ingledeu v Financial Services Board: In re Financial Services Board v Van der Merwe & Another* 2003 (4) SA 584 (CC), 2003 (8) BCLR 825 (CC) at para 19 (Although not germane to outcome, Constitutional Court and High Court both appeared to accept the proposition that Rule 35(14) of the Uniform Rules of Court 'was a law of general application which reasonably and justifiably limited the constitutional right'); *Sanford v Haley NO* 2004 (3) SA 296 (C)(Suggests that rules of court qualify as law of general application); *S v Nocuse & Others* 1995 (3) SA 240 (Tk)(Rules of court regarding leave to appeal found to be law of general application for purposes of limitations analysis under IC

legality and the Rule of Law ... enjoys an ideological popularity, ... conspirators against the common good will regularly seek to gain and hold power through an adherence to constitutional and legal forms which is not the less 'scrupulous' for being tactically motivated, insincere and temporary. Thus, the Rule of Law does not guarantee every aspect of the common good and sometimes it does not even secure the substance of the common good.¹⁸³

In sum, a commitment to the rule of law — and to the formal features of law identified above — is a necessary but insufficient condition for a just or a fair society.

(c) The specific features of law of general application

s 33(1)).

179 See *Chief Family Advocate & Another v G* 2003 (2) SA 599 (W) (Noting that, in *Sonderup v Tondelli & Another* 2001 (1) SA 1171 (CC), 2001 (2) BCLR 152 (CC), the Constitutional Court found that the Hague Convention on Civil Aspects of International Child Abduction Act 72 of 1996, having been incorporated into domestic law, was a law of general application.)

180 With respect to socio-economic rights, Danie Brand argues, persuasively, that policies and programmes undertaken by the state must often be viewed, along with enabling legislation, as law of general application that governs a particular area of socio-economic life. Brand's argument rests on a distinction between law that imposes a negative duty on the state and law that imposes a positive duty on the state. The test for law of general application in the context of 'negative' rights is characterized by restrictions on how public power may be exercised. However, because the test for compliance in socio-economic rights cases is whether the state has created a comprehensive and coordinated programme to realize progressively a right, and whether it has taken the necessary steps to execute that programme, the test for law of general application in the context of positive rights must be viewed in terms of how the 'law' of that programme — enabling legislation, subordinate legislation and policies — works to effect the desired ends. To be clear, the issue here is whether one can, in fact, separate out, in the domain of socio-economic rights, policies and guidelines from the rest of the state's law-making function. See Danie Brand 'Food' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 56C. But see Jacques de Ville 'The Right to Administrative Justice: An Examination of s 24 of the Interim Constitution' (1995) 11 *SAJHR* 264, 275 (Argues that 'law of general application' covers only laws and not actions pursuant to laws; therefore actions pursuant to laws could not be justified under IC s 33(1).)

South African and Canadian authority is divided on the matter. See *Committee for Commonwealth of Canada v Canada* [1991] 1 SCR 139, 77 DLR (4th) 385 (Court divided as to whether internal airport rules qualified as law for purposes of Charter s 1 review). See, further, Stuart Woolman & Johan de Waal 'Freedom of Assembly: Voting With Your Feet' in D van Wyk, J Dugard, B de Villiers & D Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 292, 308-14 (Discussion of *Committee for Commonwealth of Canada v Canada* and problems that law of general application analysis can raise for Bill of Rights analysis generally.) To the extent that such rules, directives and guidelines satisfy the four rule-of-law criteria, at least two good reasons exist for treating them as law of general application. First, if such rules, directives and guidelines are deemed not to qualify as law of general application, then the government or party relying upon the policy or guideline will not have the ability to justify them under FC s 36. Pressure may then be placed on the court to do justificatory analysis under the right itself. That is, the court may be inclined to change the content of the right in order to save the legal action in question. The result could be either the development of two different bodies of fundamental rights analysis — one entirely under the right, one more naturally divided between the right and the limitation clause. Mokgoro J adopted such a line in *President of the Republic of South Africa v Hugo*. 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) ('Hugo'). Mokgoro J wrote:

I consider it undesirable to take a technical approach to the interpretation of 'law of general application' ... [A] technical approach unduly reduces the types of rules and conduct which can justify limitations ... [E]xclusion from section 33(1) may adversely affect the proper interpretation of the scope of rights in Chapter 3.

Ibid at para 104. Second, if the four-part test is actually satisfied, then a refusal to engage in limitations analysis for norms and standards, policies and guidelines, would mean that persons

The threshold test for law of general application excludes, from the more general justificatory framework provided by FC s 36, two classes of cases. The first class of cases embraces those instances in which the party whose conduct has been found to limit a fundamental right cannot rely upon an existing rule of law as a justification for the limitation. In short, FC s 36 only permits the justification of law.¹⁸⁴ It does not

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permit the justification of conduct for which no legal authorization exists.¹⁸⁵ The second class of cases encompasses those instances in which the law which purportedly authorizes the conduct found to limit a fundamental right does not

who had acted in reliance upon these state initiatives and aligned their behaviour accordingly, would have no ability to justify any action taken in light of what would have been understood to be state-sanctioned forms of behaviour. The exclusion of such policies and guidelines from FC s 36 justificatory analysis simply sets the bar too high. Kriegler J, also in dissent, agreed with the general framework adumbrated herein, but differed with Mokgoro J on the application of that analytical framework to the 'law' at issue in *Hugo*. Kriegler J argued that that exercise of the presidential pardon provided for in IC s 82(1)(k) could not be characterized as law. Kriegler J wrote:

The exercise of such power is non-recurrent and specific, intended to benefit particular persons or classes of persons, to do so once only, and is given effect by an executive order directed to specific state officials. I respectfully suggest that one cannot by a process of linguistic interpretation fit such an executive/presidential/administrative decision and order into the purview of s 33(1). That savings clause is not there for the preservation of executive acts of government but to allow certain rules of law to be saved.

Ibid at para 76. We are inclined to agree with Kriegler J's characterization of the particular presidential pardons at issue. But the problem is not, as Currie and De Waal suggest, that the pardon picks out particular persons for a benefit. See Iain Currie & Johan De Waal (eds) *The Bill of Rights Handbook* (5th Edition, 2005) 173. Individuation is only a problem where law picks out a readily identifiable set of persons for extra-judicial punishment. It is the star-chamber quality of such an edict that offends the commitment to the rule of law. The problem in *Hugo* is that the 'law' in question does not create an identifiable standard around which an individual may align his or her behaviour. The presidential commutation of a sentence is an ex post facto assessment of what justice requires. However, Kriegler J's gloss on what constitutes 'law' should not be understood to stand for the proposition that administrative policies cannot count as law. That, unfortunately, is exactly how Currie and De Waal characterize Kriegler J's conclusions. Rather such directives may well count as law if they possess the four formal attributes of law we describe below: parity of treatment, non-arbitrariness, precision and accessibility. Moreover, it strikes us as odd that such government edicts — which are prospective in nature and intended to provide standards for the behaviour of state officials and private persons — should not count as law. It is one thing to exclude from consideration decisions that are retrospective in effect and edicts that remain in the drawer of a bureaucrat. It is quite another to elevate form over substance and exclude from consideration those edicts that, by virtue of their prospective effect, shape public and private behaviour.

181 John Finnis *Natural Law and Natural Rights* (1980) 270.

182 Ibid at 270–271.

183 *Finnis* (supra) at 274. As Finnis observes, regimes that are exploitative or ideologically fanatical or some mixture of the two could submit themselves to the constraints imposed by the rule of law if it served the realization of their narrow conception of the good. Indeed, both Stephen Ellmann and David Dyzenhaus argue persuasively that South Africa under apartheid was an exploitative and ideologically fanatical regime committed to the rule of law. Stephen Ellmann *In a Time of Trouble: Law and Security in South Africa's State of Emergency* (1992); David Dyzenhaus *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (1991). Why would a fanatic or an ideologue bother? Because by abiding by the rule of law, the ideologue can disguise his malignant intent. That said, while the rule of law did constrain the South African state — and even allowed for a cramped conception of human rights — few would allow that it was fair or just. What was missing was any real commitment to individual dignity and the sense that the

qualify as 'law of general application'. In short, FC s 36 only permits the justification of law that possesses four formal attributes. Parties that have relied upon law that does not possess these four formal attributes cannot make use of FC s 36's general justificatory framework.

(i) Law and conduct

Law that fails to meet the 'law' requirement of law of general application falls into roughly two categories. Those categories are: (aa) grant of power to government officials *not* constrained by identifiable legal standards; and (bb) commissions and omissions. Commissions and omissions that fail to meet the desiderata for 'law of general application' fall into two related categories: (x) conduct carried out under colour of law but beyond the scope of actual legal authority; (y) the failure to discharge constitutional duties.

(aa) Grant to and exercise of power by government officials not constrained by identifiable legal standards

The most obvious instances in which the state may not avail itself of the justificatory framework provided for in FC s 36 are those cases in which it can rely upon no law for authorization of its conduct. In *Pretoria City Council v Walker*, for example, the applicant challenged a decision by the City Council that differentiated between categories of ratepayer in terms of race.¹⁸⁶ The Court noted that the respondent's challenge under the equality clause, IC s 8, was to the conduct of the council, not to law. Since, as the Court correctly reasoned, that conduct 'was clearly not authorised, either expressly or by necessary implication by law of general application', IC s

purpose of the state was to enable all persons to 'constitute themselves in community'. Finnis (supra) at 274. It should come then as no surprise that the two most important — and somewhat novel — constitutional doctrines developed by the Constitutional Court in its first decade of operation turn on a robust and substantive conception of the rule of law and an account of dignity that makes it the *Grundnorm* for the Final Constitution. See Frank Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 11; Stu Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36. Quite unlike the regime of law authorized by apartheid, the new dispensation recognizes that its legitimacy is conditional upon the state's commitment to act for the 'general' welfare and to treat all individuals as worthy of equal concern and respect.

The point of our brief digression into a finer point of legal philosophy is this. Although the obvious concern of the law of general application requirement is that various formal processes be observed — publicity, accessibility, precision, parity — the requirement is, at bottom, concerned with substantive features (the rule of law and individual dignity are but two) of a constitutional state.

184 *S v Williams & Others* 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC) at para 92 ('I accordingly find that the provisions of s 294 of the Act violate the provisions of ss 10 and 11(2) of the Constitution and that they cannot be saved by the operation of s 33(1) of the Constitution. Although the provision concerned is a law of general application the limitation it imposes on the rights in question is, in the light of all the circumstances, not reasonable, not justifiable and it is furthermore not necessary. The provisions are therefore unconstitutional.')

185 Whether conduct is, in fact, always authorized by law is a philosophical problem addressed elsewhere in this work. See Stu Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31.

186 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) ('*Pretoria City Council*').

33(1), the limitation clause, could not be used to justify the Council's unfair discrimination.¹⁸⁷

In *De Lille & another v Speaker of the National Assembly*, the applicant was found guilty of misconduct and suspended by Parliament for an alleged violation of parliamentary etiquette.¹⁸⁸ The High Court found that the punishment limited the applicant's rights under FC ss 16, 33 and 34 — as well as FC s 58 — *and* that it could not be justified under FC 36. Parliament's actions could not be justified in terms of FC s 36, because, as Hlophe J wrote, they

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did not take place in terms of law of general application. There is no law of general application which authorises such a suspension. It is not authorised by the Constitution, the Powers and Privileges of Parliaments Act of 1963 or the Standing Rules of the National Assembly. The law of Parliamentary privilege does not qualify as a law of general application for purposes of s 36. It is not codified or capable of ascertainment. Nor is it based on a clear system of precedent. Therefore there is no guarantee of parity of treatment.¹⁸⁹

That no law authorized Parliament's conduct should have been sufficient to justify the *De Lille* Court's conclusion. However, as the quotation above reflects, Hlophe J felt it important to emphasize that Parliament's actions — even if dressed up as law — could not satisfy the four criteria by which any law of general application must be measured.

The Constitutional Court, the Supreme Court of Appeal and the High Court have all struggled with the problem of how to characterize — in terms of law of general application — contractual or quasi-contractual relationships that limit the exercise of fundamental rights. In two cases, the Constitutional Court and the Supreme Court of Appeal characterized these relationships as conduct ungoverned by law. In a third case, the High Court held the opposite to be true. For reasons that we hope to make clear, only the High Court's analysis makes sense of the problem.

In *Hoffmann v South African Airways*, South African Airways ('SAA'), a subsidiary of Transnet, and thus an organ of state, was found to have unfairly discriminated against an applicant for employment.¹⁹⁰ SAA's refusal to hire the applicant because he was HIV-positive violated FC s 9. The Constitutional Court held that the state could not, in terms of FC s 36, seek to justify its unfair discrimination, because the discrimination had not been authorized by a law of general application.¹⁹¹ The Constitutional Court did not even bother to entertain the argument that the extant law of contract, at the time the dispute arose, provided support for SAA's conclusion that it could hire whomever it thought best suited for the position of cabin steward.

187 Ibid at para 82.

188 1998 (3) SA 430 (C), 1998 (7) BCLR 916 (C) ('*De Lille*').

189 *De Lille* (supra) at para 37.

190 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC) ('*Hoffman*').

191 Ibid at para 41.

The problem of how to understand the nature of state action with respect to contractual arrangements is raised once again in *Transnet Ltd v Goodman Brothers (Pty) Ltd*.¹⁹² After reaching the conclusion that the terms of a tender constituted a limitation of FC s 33, the right to administrative justice, the Supreme Court of Appeal concluded that those contractual terms did not, themselves, constitute law of general application for the purposes of justification under FC s 36. However, if one grants that such waivers exist — which one of the authors of this chapter has argued strenuously we should not do¹⁹³ — then one must ask how waivers come to exist. They come to exist in terms of the law of contract. Thus, if one chooses to

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recognize the existence of constitutional waivers — which we again warn one should not — then one is committed to the proposition that law of general application — the law of contract — authorizes the waiver. Only when one denies the existence of waiver as a conceptually meaningful entity does it make sense to speak of conduct that cannot be justified by reference to law.¹⁹⁴

The problems that attend the description of contractual relationships in terms of law of general application are thrown into somewhat sharper relief by disputes between private parties governed by common law. In these disputes, no questions about the legitimacy of the exercise of state power arises.¹⁹⁵ That is to say, the court's view of the underlying basis for the dispute is not obscured by such public law principles as the *ultra vires* doctrine. For example, in *Taylor v Kurtstag NO & Others*, the High Court was asked to decide whether the exclusion of the applicant by the respondent from participation in Jewish religious rituals could be justified.¹⁹⁶ The High Court correctly concluded that it could be. The High Court was not, however, entirely clear about the provenance of the law that enabled the exclusion to be justified. Having found that the applicant's FC s 15 and 31 rights had been limited by the respondent, the High Court felt obliged to ask 'whether the internal rules of a religious group ... qualify as law of general application'.¹⁹⁷ This, Malan J concludes, is the wrong way to go about solving the problem. Rather, he suggests, the law of general application at issue in the case embraces the body of common law rules that permit individuals and groups to freely associate. It was such law upon which the respondent relied when excluding the applicant from participating in the community's religious rituals, and it was this body of common law that justified the limitations placed upon the applicant's rights of religion and religious practice.¹⁹⁸

(bb) Commission and omission

192 2001 (1) SA 853 (SCA), 2001 (2) BCLR 176 (SCA) ('*Transnet*')

193 See Woolman 'Application' (supra) at § 31.7.

194 Woolman 'Application' (supra) at § 31.7.

195 See, eg, *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain* 2001 (2) SA 853 (SE), 1997 (10) BCLR 1443 (SE) (Insofar as a restraint of trade clause constitutes a limitation on rights entrenched in FC s 22, the common law rules of contract that sanction such clauses constitute law of general application that comply with the proportionality requirements of FC s 36(1).)

196 2005 (1) SA 362 (W), 2005 (7) BCLR 705 (W).

197 *Ibid* at 385–386.

(x) Conduct carried out under colour of law but beyond the scope of actual legal authority

Administrative or executive action may be deemed not to satisfy this criterion of 'law' where law enforcement officials act in a manner that infringes fundamental rights without possessing clear legal authority to do so. Such actions might include the failure of the police to inform an arrested person that she has a right to counsel where no statutory provision or rule of common law specifies the

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conditions under which such a failure to inform could legitimately occur.¹⁹⁹ Likewise, if a law enforcement official were to take a confession without informing the accused of his right to remain silent — in the absence of controlling legal authority — then the action would not be justifiable under the limitation clause.²⁰⁰ Although such administrative or executive action would lack the four formal attributes of a law of general application — parity of treatment, non-arbitrariness, precision and accessibility — and thus fail the second part of the law of general application test, there seems to be no good reason to allow the analysis to go that far.²⁰¹

Minister of Safety & Security & Another v Xaba offers a paradigmatic example of law enforcement officials acting under colour of law without possessing the requisite legal authority to do so.²⁰² In *Xaba*, police officers compelled a suspect to have surgery to remove a bullet that they believed would provide evidence connecting the suspect to a crime he was alleged to have committed. Neither the Criminal Procedure Act nor any other law authorizes surgery without consent. As a result, the exercise of state power to compel surgery of a suspect, in the absence of legal

198 Ibid at 387.

199 See *R v Therens* [1985] 1 SCR 613, 18 DLR (4th) 655.

200 See Frank Snyckers & Jolandi le Roux 'Criminal Procedure: Rights of Arrested, Detained and Accused Persons' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 51. See also *R v Hebert* [1990] 2 SCR 151, 57 CCC (3d) 1.

201 But see *S v Mathebula* 1997 (1) SACR 10 (W), 1997 (1) BCLR 123 (W). In *Mathubela*, Claasens J's reliance on the notion of waiver results in a critical error in reasoning with regard to whether or not law of general application exists that will permit the state to argue in justification of its limitation of the right to remain silent. The state does not claim that a rule of law — in the form of legislation or common law — exists that permits police officers to extract confessions without informing an arrested person of her right to remain silent. Instead, the state claims that the doctrine of waiver constitutes the rule of law — the law of general application — upon which the state relies as a justification for its infringement of various fair trial rights under IC s 25. The honourable judge concurs. As one of the authors has argued at length elsewhere in this work, both the state and the judge must be wrong. No such thing as waiver exists. If no such thing as waiver exists, then there can be no general law of application upon which the state, in this case, can rely. See Woolman 'Application' (supra) at § 31.7 ('Put pithily, what is at issue in all these cases is not the waiver of a right, but the interpretation of a right.... Thus whether we are talking about life, dignity, torture, slavery, religion, expression or property, the question is always the same: does the right permit the kind of activity, relationship or status contemplated at some point in time by the parties before the court. If it does not, then ... the right bars the law or conduct contemplated and no such thing as waiver can occur. If the right in question permits the kind of activity or agreement in question, then the parties may do as they wish and the question of waiver never arises.')

202 2003 (2) SA 703 (D), 2004 (1) SACR 149 (D).

authority,²⁰³ failed to satisfy the 'law' leg of the test for law of general application and

the state could not justify its prima facie limitation of the suspect's FC s 12 right to freedom and security of the person.²⁰⁴

(y) The failure to discharge constitutional duties

The class of cases that form this category could be treated as part of the preceding category. One might argue that it does not matter whether the violation of a right occurs through action or inaction, given that for the purposes of 'law of general application' analysis all that matters is that neither the commission nor the omission are authorized by law. However, we believe that the failure to discharge 'constitutional duties' constitutes a unique enough transgression in our constitutional order to warrant separate discussion.

In *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd*, the Constitutional Court found that the state had failed to take 'reasonable steps' to discharge its responsibilities — under FC s 34 read with FC s 1(c) — to provide Modderklip Boerdery with an effective remedy.²⁰⁵ Moreover, the state failed to offer any 'acceptable reasons' for this failure to act. Given that no law could be invoked to justify this failure to act, the Court noted that FC s 36 'is not applicable ... since no law of general application' actually limited Modderklip's rights.²⁰⁶ The state's omission amounted to conduct unauthorized by law.

203 An argument could be made that many of these cases could be brought under the Promotion of Administrative Justice Act ('PAJA'). Were that so, only in cases such as *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC) and *K v Minister of Safety and Security* 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC) — where no statutory or common-law remedy exists — would there be a need to develop the law and to create an appropriate remedy — in terms of FC s 8(3) — in direct reliance on a constitutional right.

204 There would seem to us to be a host of other cases in which state actors, acting under the colour of law, have been found to be acting outside the scope of their legal authority and in violation of constitutional rights. In many of these cases, however, the courts have chosen not to view the violation as a direct infringement of a fundamental right. Instead, they have described the unconstitutional act as a reflection of a lacuna in the common law or a statute, and have developed the common law or construed the statute accordingly. See *K v Minister of Safety and Security* 2005 (6) SA 419 (CC), 2005 (9) BCLR 835 (CC); *Rail Commuters Action Group & Others v Transnet Ltd t/a Metrorail & Others* 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC); *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC). Because the court refuses, in these cases, to engage in direct application of the Bill of Rights and the concomitant two-stage analysis, the court never has to ask whether the act in question could be justified by reference to some law of general application.

205 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC) at para 51 ('The obligation resting on the State in terms of s 34 of the Constitution was, in the circumstances, to take reasonable steps to ensure that Modderklip was, in the final analysis, provided with effective relief. The State could have expropriated the property in question or provided other land, a course that would have relieved Modderklip from continuing to bear the burden of providing the occupiers with accommodation. The state *failed to do anything* and accordingly breached Modderklip's constitutional rights to an effective remedy as required by the rule of law, s 1(c), and entrenched in s 34 of the Constitution.') (Emphasis added.)

206 *Ibid* at para 52.

The state found itself in a similar position in *August & Another v Electoral Commission & Others*.²⁰⁷ The state had neither created the necessary mechanism that would enable eligible prisoners to register and to vote, nor had it sought to disqualify them through legislation. As a result, once the applicant had established that the state had not taken any steps to make the exercise of the franchise possible, and had thereby violated FC s 19, the state could not then 'seek to

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justify the threatened infringement of prisoners' rights in terms of s 36 of the Constitution as there was no law of general application upon which they could rely to do so'.²⁰⁸

(ii) Criteria for law of general application

Assuming that the limitation of a fundamental right takes place in terms of law, the next question a court must ask is whether the law in question is 'law of general application'. A law of general application, rightly described, possesses the following four features: (1) parity of treatment, (2) non-arbitrariness, (3) accessibility or public availability; and (4) precision or clarity.

The case law on this subject remains surprisingly thin. As a result, we use the extant case law and foreign jurisprudence to support a 'preferred reading': namely that a 'law of general application' — grounded in an underlying commitment to the rule of law — must possess the aforementioned four attributes.

(aa) Parity of treatment

The word 'general' in 'law of general application' is a bit of a misnomer. It does not, as many an uninitiated student of constitutional law has concluded, literally mean that the law must apply to everyone.²⁰⁹

First, it means that the state — through the legislature, the executive, and the judiciary — must, broadly speaking, treat similarly situated persons the same. In *Joubert v Van Rensburg*, for example, the court remarked obiter that the state could not justify deprivations of property in terms of the Extension of Security of Tenure

207 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) ('August').

208 *August* (supra) at paras 22-23.

209 *Mhlekwā v Head of the Western Transvaal Regional Authority & Another; Feni v Head of the Western Transvaal Regional Authority & Another* 2001 (1) SA 574 (Tk), 622B ('Mhlekwā'). The court held that the Regional Authority Courts Act 13 of 1982 (Tk) is law of general application despite the fact that the law does not apply to all residents of South Africa. The court cites in support of this conclusion the reasoning of the Constitutional Court in *Makwanyane*. See *Makwanyane* (supra) at para 32. It quotes, with approval, De Waal and Currie, who write, as follows:

It would be absurd to suggest that ... a law of [the] Gauteng legislature cannot qualify as 'law of general application' simply because it does not apply uniformly throughout the Republic. The structure of government established in the Constitution envisages legislation that is limited in its area of application and accordingly provincial legislation will qualify as a law of general application for purposes of s 36.

Johan De Waal, Iain Currie & Gerhard Erasmus *Bill of Rights Handbook* (4th Edition, 2001) 116 (quoted in *Mhlekwā* (supra) at 622C-D).

Act²¹⁰ (ESTA) because ESTA had burdened only agricultural property.²¹¹ For the purposes of satisfying the parity of treatment requirement of the 'law of general application' test, the *Joubert* court suggested that the apposite provisions of ESTA ought to have applied to all property owners.

Second, parity of treatment in a constitutional state committed to the rule of law means that the governed and the governors are subject to the same penalties and receive the same privileges. In *De Lille*, the High Court and the Supreme Court of Appeal concluded, on different grounds, that Parliament's naked exercise of power with respect to its suspension of MP Patricia de Lille did not satisfy the requirement that Parliament itself must abide by rules that are clearly discernible to all persons in advance of any action that Parliament or that another state actor undertakes.²¹² Both courts demanded that Parliament treated the governed — in this case Ms de Lille — as it would treat the governors — itself.

Moreover, both courts seemed to indicate that such laws could not take the form of edicts articulated by relatively transient majorities in the anticipation of the commission of an offence or after the commission of the offence. Language in both judgments suggests that the High Court and the Supreme Court of Appeal would — were the terminology part of South African law — characterize the sanctions imposed by Parliament upon Ms de Lille as a bill of attainder.

(bb) Non-arbitrariness

Laws of general application must enable citizens to conform their behaviour to a discernible standard. In order for them to do so, the state — whether in the form of the executive or the judiciary — must be able to enforce the law according to a discernible standard. In *Case & Curtis*, the Constitutional Court held that the definition of 'obscenity' in the Indecent or Obscene Photographic Matter Act²¹³ was of 'such indeterminate reach' that it could not but result in arbitrary enforcement.²¹⁴ The *Case & Curtis* Court found that the definition of 'obscenity' invariably swept up

210 Act 62 of 1997.

211 *Joubert & Others v Van Rensburg & Others* 2001 (1) SA 753 (W), 797 ('In its content, in the setting of the particular statute, and in the manner in which the Tenure Act handles the situation, the Tenure Act is not 'of general application' in burdening only agricultural property.') The judgment of the High Court in this case was severely criticized by the Constitutional Court in *Mkangeli & Others v Joubert & Others*. 2001 (2) SA 1191 (CC), 2001 (4) BCLR 316 (CC).

212 The Cape High Court analyzed the problem in terms of the Bill of Rights. See *De Lille v Speaker of the National Assembly* 1998 (3) SA 430 (C), 455, 1998 (7) BCLR 916 (C) (Parliament's conduct impaired the exercise of the right to freedom of expression in terms of FC ss 58 and 16. Because Parliament's treatment of parliamentary privilege amounted to conduct not governed by law of general application, it could not be saved by FC s 36.) The Supreme Court of Appeal preferred to analyze the matter in terms of the common law. But it did not overrule or contradict the High Court's findings in the matter. See *Speaker of the National Assembly v De Lille & Another* 1999 (4) SA 863 (SCA), 1999 (11) BCLR 1339 (SCA) (Court found suspension beyond the scope of Parliament's authority in the absence of legislation or rules that might permit such punishment.)

213 Act 37 of 1967.

214 *Case & Another v Minister of Safety and Security & Others; Curtis v Minister of Safety and Security & Others* 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC) ('Case & Curtis') at para 61 n98.

into the Act's proscriptive net constitutionally protected expression as well as constitutionally unprotected expression. The arbitrariness or standardlessness of the definition led, inexorably, to a finding by the Court that the law was void for overbreadth:

One need proceed no further to appreciate that the means embodied in s 2(1), read with the definition of *obscene or indecent* material, which includes within its overbroad compass a vast array of incontestably constitutionally protected categories of expression, are entirely disproportionate to whatever constitutionally permissible objectives might underlie the statute. Such a law is *ipso facto* not *reasonable* within the meaning of s 33 (1)(a)(i).²¹⁵

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While the Court was certainly correct in its conclusion that the definition of 'obscenity' in the Indecent or Obscene Photographic Matter Act ('IOPMA') could not satisfy FC s 36, its imprecise use of the term 'proportionality' as a catch-all for all aspects of FC s 36 analysis leads it to confuse substantive questions about the means employed by a law and the objectives of a law with more formal questions about the nature of the law. The definition of obscenity violates the threshold test for a law of general application not because it impairs more than is absolutely necessary our expressive rights, or because it imposes greater costs than benefits. It certainly does both. The definition of obscenity in IOPMA fails the test for law of general application, because it is a standardless standard that vitiates the commitment to the rule of law.²¹⁶ That IOPMA's definition of 'obscenity' cannot satisfy the law of general application test means that the *Case & Curtis* Court should never have had to engage in proportionality analysis.²¹⁷

(cc) Precision or clarity

A third, and closely-related, criterion for law of general application is precision. Whereas the criterion of non-arbitrariness tends to emphasize the potential for poorly-constructed law to result in the abuse of state power, the criterion of precision or clarity emphasizes the need, in a society committed to the rule of law, for individuals to be able to regulate themselves. In a society of autonomous moral agents, and in a state that accords such agents equal dignity and respect, the rightness of actions must be said to flow from the choices of the citizens themselves

215 Ibid at para 61.

216 See, further, *Executive Council, Western Cape Legislature, & Others v President of the Republic of South Africa & Others* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC). The *Executive Council, Western Cape* Court found that the delegation of authority from Parliament to the President failed to set clear limits on what the executive could and could not do. Although this case turned on the doctrine of separation of powers, the failure of the legislature to articulate non-arbitrary guidelines for the exercise of public power is of a piece with the Court's doctrinal concerns in determining the formal contours of law of general application. See also *Janse van Rensburg NO v Minister of Trade and Industry & Another NNO* 2001 (1) SA 29 (CC), 2000 (11) BCLR 1235 (CC) (Where significant powers of discretion are conferred upon a functionary, the legislature must provide guidance as to the manner in which those powers are to be exercised; the absence of such guidance may render a statutory provision unconstitutional); *Panama Refining Co v Ryan* 293 US 388 (1935) (Delegation of authority to executive declared unconstitutional because Congress had abdicated responsibility for setting clear policy limits on executive action.)

217 The Constitutional Court's inclination to describe all aspects of limitations analysis as part of its overarching proportionality assessment does not count as an argument in favour of engaging questions of arbitrariness in what the text strongly suggests, and what we contend, is a subsequent stage of limitations analysis.

to conform their behaviour to the law, and not from ex post facto assessments of justice as divined by some leviathan.²¹⁸

In *Dawood v Minister of Home Affairs*, the Constitutional Court was asked to address the constitutionality of a legislative provision that provided that an immigration permit could be granted to the spouse of a South African citizen, who was in South Africa at the time, only if that spouse was in possession of a valid temporary residence permit.²¹⁹ The legislation provided no guidance, however, as to the circumstances in which it would be appropriate to refuse or to issue a temporary residence permit. Although the *Dawood* Court stopped short of finding that the section did not constitute law of general application, it took the opportunity to announce that, 'where broad discretionary powers contain no express constraints', and where 'those who are affected by the exercise of the broad discretionary powers [can] ... not know what is relevant to the exercise of those powers', questions about whether the law at issue satisfied the law of general application requirement would inevitably be raised.²²⁰

Dawood reminds us that legislation that grants law enforcement officials unfettered powers fails the law of general application test on two related grounds.²²¹ As we have already seen, the unfettered grant of power logically entails arbitrary action: the action is arbitrary in the sense that neither norms nor precedents govern or restrict the state's behaviour. The flip-side of this unfettered grant of authority, and more to the point of our analysis of the third criterion, is that it fails to provide the clarity required for individuals who wish to align their behaviour with an identifiable legal standard. In *Case & Curtis*, the Constitutional Court found that the definition of pornographic material in the Indecent or Obscene Photographic Matter Act was designed to 'hit everything' and made it impossible for persons engaged in expressive conduct to know, in advance, what kind of conduct would be proscribed and what kind of conduct would be permitted.²²²

Similarly, legislation or common law will fail to satisfy this third criterion where the law is impermissibly vague.²²³ In *South African National Defence Union v Minister of Defence*, the Constitutional Court held that even a 255-word definition of 'act of

218 See *Ferreira v Levin NO* 1996 (1) SA 984 (CC), 1996 (4) BCLR 1 (CC) ('*Ferreira*') at para 4 (Ackermann J wrote: 'Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their "humanness" to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally. Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity.') See also Stu Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36.

219 *Dawood & Another v Minister of Home Affairs & Others; Shalabi and Another v Minister of Home Affairs & Others; Thomas & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) ('*Dawood*').

220 *Ibid* at para 47. See also *Janse Van Rensburg NO & Another v Minister of Trade and Industry & Another* 2001 (1) SA 29 (CC), 2000 (11) BCLR 1235 (CC) (Court holds that the public interest dictates that there should be certainty about the constitutionality of all legislation.)

221 See, eg, *Re Ontario Film and Video Appreciation Society* 45 OR (2d) 80 (CA).

public protest' was impermissibly imprecise because the definition had the potential to sweep up into the Act's proscriptive ambit complaints that could never be accurately described as public protest or partisan political conduct — say, conversations between a member of the military and her husband.²²⁴

As we have noted above, administrative action will generally fail to satisfy this criterion where law enforcement officials take actions that infringe fundamental rights without possessing clear legal authority to do so. But while it may be true that such conduct fails to satisfy the second leg of the law of general application test — because it lacks the requisite features of parity, non-arbitrariness, precision and accessibility — it is more accurate to say that it lacks the defining features of law *simpliciter*.²²⁵

(dd) Accessibility or public availability

The final criterion for a law of general application is that the law must be accessible or publicly available. At a minimum, and perhaps only the minimum is necessary, the law must be published.

The European Court of Human Rights, in *Sunday Times v Handyside*, defined 'adequately accessible' law as follows.²²⁶ First, law is adequately accessible if a person is given 'an indication [of the reach of a legal rule] that is adequate in the circumstances of ... a given case' and that enables him to 'regulate his conduct' accordingly.²²⁷ Second, law is adequately accessible if it allows a person, 'if need be with appropriate advice, ... to foresee, to a degree that is reasonable in the

222 *Case & Curtis* (supra) at para 53 ('[T]he challenged provision includes within its reach material that is constitutionally protected. Ms Fedler, appearing for amici curiae People Opposing Women Abuse et al, conceded that the provision unjustifiably and unreasonably interferes with protected categories of expression. Counsel for the Christian Lawyers Association readily acknowledged that there is no place for a provision that outlaws all depictions of homosexuality and lesbianism. And counsel for the Attorney-General conceded that the Act amounted to a "loaded shotgun" with which the government that promoted the Act intended to "hit everything". Indeed, no one before the Court appeared to be willing to defend the statute in its present form.')

223 See *R v Nova Scotia Pharmaceutical Society* [1992] 2 SCR 606, 93 DLR (4th) 36 (Discussing doctrine of vagueness in Canadian Charter litigation); *Connally v General Construction Co* 269 US 385 (1926)(Discusses vagueness doctrine in US constitutional law.)

224 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC)('SANDU') at para 11. For example, a statute may give the police the power to stop individuals of 'questionable moral character' from moving about South Africa, but fail to identify criteria by which a person might determine who qualifies as an individual of questionable moral character. Such a law, while general and public, is far too imprecise, far too vague to place the public on sufficient notice of what the law expects of them. Such a law would probably violate the overbreadth doctrine in US law on the grounds that no sharp line could be drawn between protected and proscribed activity and that constitutionally protected activity would be swept up into its coverage. See *Secretary of State of Maryland v Joseph Munson* 467 US 947 (1984); *Arnett v Kennedy* 416 US 134 (1974).

225 For a discussion of administrative or executive action undertaken under colour of law but without legal authority, see § 34.7 infra. See also *S v Mathebula* 1997 (1) BCLR 123 (W), 1997 (1) SACR 10 (W).

226 (1979) 2 EHRR 245 ('*Sunday Times*'). See also *Klass v Federal Republic of Germany* (1978) 2 EHRR 214; *Hashman and Harrup v The United Kingdom* (2000) 30 EHRR 241 at para 43; *Kalac v Turkey* (1999) 27 EHRR 552 at para 41.

circumstances, the consequences which a given action may entail'.²²⁸ In *President of the Republic of South Africa and Another v Hugo*, Mokgoro J states that most statutes, regulations and common-law rules will be treated as law of general

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application because these forms of law are, generally speaking, 'adequately accessible'.²²⁹

Hugo raised, but did not clearly decide, a question about the pedigree of another kind of law: 'whether rules emanating from directives or guidelines, issued by government departments or agencies but falling outside the category of officially published delegated legislation, are laws of general application'.²³⁰ Mokgoro J, after surveying the split in Canadian jurisprudence on this very subject, recognized that a certain lack of publicity or accessibility might attach to such rules.²³¹ She was, however, persuaded that a failure to accord such directives — published, but perhaps not gazetted — the status of law of general application might have deleterious consequences for the structure of constitutional analysis. First, as one of the authors of this chapter has argued elsewhere, the refusal to accord such instances of executive rule-making the status of law of general application may have the unintended consequence of forcing justificatory arguments back into the rights interpretation stage of analysis in order to save the law in question.²³² Second, Mokgoro J suggests that, even if such executive rule-making is not made public or accessible in quite the same way as legislation or common law, the other criteria for

227 *Sunday Times v The United Kingdom (No 2)* (1992) 14 EHRR 229.

228 *Ibid.*

229 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) ('*Hugo*'). When surveying the possible desiderata for adequately accessible law, Mokgoro J suggests that publication satisfies the requirement. She notes that:

Section 2 of the Interpretation Act defines 'law' as 'any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law', and presumptively applies to the interpretation of every such 'law ... in force' and of 'all by-laws, rules, regulations or orders made under the authority of any such law'. Delegated legislation must be published.... When any by-law, regulation, rule or order is authorised by any law to be made by the President or a Minister ... such by-law, regulation, rule or order shall, subject to the provisions relative to the force and effect thereof in any law, be published in the *Gazette*.

Ibid at para 97.

230 *Ibid* at para 100.

231 See *Committee for Commonwealth of Canada v Canada* [1991] 1 SCR 139, 77 DLR (4th) 385 (Court divided as to whether internal airport rules qualified as law for purposes of s 1 review.) For a relevant discussion of this problem in Canadian jurisprudence, see Stu Woolman & Johan de Waal 'Freedom of Assembly: Voting With Your Feet' in D van Wyk, J Dugard, B de Villiers & D Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 292, 308-14. See also *Hugo* (supra) at para 104 ('I consider it undesirable to take a technical approach to the interpretation of 'law of general application' ... [A] technical approach unduly reduces the types of rules and conduct which can justify limitations ... [E]xclusion from section 33(1) may adversely affect the proper interpretation of the scope of rights in Chapter 3.')

232 See Stu Woolman 'Freedom of Assembly' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 43.

'law of general application' and the other FC s 36 standards developed by the courts for an assessment of proportionality will ensure that such a rule is unlikely to work the particular mischief that led to the challenge in the first place. Finally, one should note that there is a signal difference between the Canadian jurisprudence that has developed around 'prescribed by law' in s 1 of the Charter, and the Bill of Rights jurisprudence that has developed around 'law of general application' in FC s 36. South African courts have expressly recognized

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that all forms of law — legislation, subordinate legislation, regulation, common law and customary law — can be characterized as law of general application. It goes without saying that much of this law has not — as some Canadian jurists would require for s 1 analysis of the Charter — passed through the democratic law-making machinery of the state. In so far as a law in South Africa possesses the four formal hallmarks of the rule of law that we have described — parity of treatment, non-arbitrariness, precision and accessibility — it is law of general application. Although South African courts often tend, in a rather formalistic manner, to emphasize the provenance of a law, this shorthand — when properly unpacked — reveals a commitment to these four formal features of the law.²³³

34.8 'Reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'

(a) Introduction

FC s 36 seeks to provide a mechanism for the candid consideration of competing values and interests, and for negotiating the tension between democracy and rights. To give courts some direction when undertaking this candid consideration, FC s 36 states that for a fundamental-rights limitation to pass muster, it must be 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.

While this phrase may well be the touchstone of Bill of Rights analysis, it is also fraught with interpretive difficulties.²³⁴ Not only is it couched in the broadest possible

233 Mokgoro J reached a similar conclusion in *Hugo*. See *Hugo* (supra) at paras 102–103 ('The need for accessibility, precision and general application flow from the concept of the rule of law. A person should be able to know the law, and be able to conform his or her conduct to the law. Further, laws should apply generally, rather than targeting specific individuals. In my view, those rule of law concerns are adequately met by the Presidential Act. The remaining question about the Presidential Act concerns its origin as executive rule-making rather than as legislation.... The origin of the Presidential Act in executive rule-making rather than in a formal legislative process is not fatal to the application of s 33(1)... [T]here are numerous instances of delegated legislation drafted by the executive, which legislation would undoubtedly be accepted as "law". The difference between the Presidential Act and standard instances of executive rule-making, in the form of delegated legislation, is the absence of a parent statute in the former case. In standard cases of executive rule-making, therefore, at least the parent statute has undergone the rigours of the legislative process. That difference cannot in my view justify different treatment for the Presidential Act, which represents an exercise of public power derived directly from the Constitution. The legitimacy which attaches to delegated legislation by reason of the parent statute must attach with equal force to rules representing a direct exercise of power granted by the Constitution. The Constitution, after all, was a vigorously negotiated document.')

234 See Denise Meyerson *Rights Limited: Freedom of Expression, Religion and the South African Constitution* (1997) xxiii.

terms, but it replicates all of the tensions it is supposed to resolve: between democracy and rights, between equality and freedom, between equal treatment and the recognition of diversity, between social justice and individual liberty.

One response — one that might be easiest to square with the existing body of jurisprudence — is that such tensions need not concern us too much. On this account, the purpose of FC s 36 is not to resolve conflicts between such basic values in the abstract, but to provide a rubric for reconciliation of conflicting

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interests in specific contexts. Of course, this sort of reply begs the next question: how does FC s 36 enable us to negotiate conflicts within the context of a particular dispute?

The very language of FC s 36 offers at least two pointers in this regard. First, the phrase 'justifiable in an open and democratic society based on human dignity, equality and freedom' suggests that we can find guidance in the laws, practices and judicial doctrines found in other constitutional democracies. Indeed, FC s 39 directs us towards foreign jurisdictions for hints about how to go about reconciling conflicts between rights, values and interests in concrete cases. Second, FC s 36 lists five factors that may assist us in determining the reasonableness and justifiability of a limitation. But the list itself raises additional questions. If these factors do not, as seems clear, represent a closed list of considerations, what other factors might be relevant in any given limitations inquiry? How, if at all, are the listed factors related to one another? Should they be engaged separately and sequentially, or are they simply subsets of a global inquiry into the 'proportionality' of the limitation under scrutiny?

Our discussion of the reasonableness and justifiability inquiry is structured as follows. First, we describe, in somewhat greater detail than above, what the Court understands proportionality analysis to be. Second, we look at the gloss placed by the Court on the five listed factors in FC s 36(1), as well as its take on the relationship between these factors.

Our discussion then moves from the merely descriptive to the critical and the prescriptive. Our moderately critical appraisal of balancing and proportionality rehearses many of the same concerns we expressed about the lack of analytical rigour displayed by the courts with respect to distinguishing fundamental rights interpretation from limitations analysis. After clearing the ground with this critique of balancing, we offer our own preferred reading of FC s 36 — one that coheres with the text and still makes sense of the case law. We begin with the Court's own understanding of its institutional role, and ask whether and to what extent a doctrine of 'shared constitutional interpretation' might better mediate the conflicting doctrinal requirements of constitutional supremacy and separation of powers. While 'shared constitutional interpretation' provides an institutional framework for limitations analysis, it remains incomplete — and of little use — without a normative theory about how the values that underlie the limitations clause cohere. (In short, while the doctrine of shared constitutional interpretation adumbrates a theory of judicial review, a meaningful standard for such review requires additional content.) To fulfil this second end, we explore the Court's understanding of the phrase 'open and democratic society based on human dignity, equality and freedom', and offer an alternative reading of this phrase which we think better coheres with the more general aims of our basic law. Finally, we suggest — consistent with our critique of balancing — that instances of value incommensurability will often arise in the context of limitations analysis. While the Court's conventional morality is sufficient to

handle the majority of such conflicts, we believe that in hard cases both analytical rigour and

out-groups will be better served by what we call a 'storytelling' approach to judicial opinion writing. This approach does not conflate novels with judicial narratives. It suggests that storytelling simultaneously challenges deeply ingrained theoretical assumptions about the world in which we live and more firmly grounds such challenges by offering better reasons for choosing one way of being in the world over another.

(b) Proportionality

S v Makwanyane offers the Constitutional Court's clearest statement about the relationship between the five basic values and the five explicit factors:²³⁵

The limitation of fundamental rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of section 33(1). The fact that different rights have different implications for democracy, and in the case of our Constitution, for an 'open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited, and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to the provisions of section 33(1), and the underlying values of the Constitution, bearing in mind that, as a Canadian Judge has said, 'the role of the Court is not to second-guess the wisdom of policy choices made by legislators'.²³⁶

Although *Makwanyane* was decided in terms of IC s 33, the various considerations mentioned in the quote above were largely cut from *Makwanyane*, and pasted, with only minor alterations, into the text of FC s 36.²³⁷ In addition, the insistence that limitation analysis involves the balancing of conflicting values, an assessment based on proportionality, and the rejection of an 'absolute' or rigid set of standards in favour of a flexible, context-sensitive form of analysis, have become the leitmotifs of the Court's limitation jurisprudence. In *S v Manamela & Another (Director-General of Justice Intervening)*, the Court wrote that neither it nor

235 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) ('*Makwanyane*').

236 Ibid at para 149.

237 See *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at para 33 ('Although section 36(1) of the 1996 Constitution differs in various respects from section 33 of the interim Constitution its application still involves a process, described in *S v Makwanyane* ... as the "weighing up of competing values, and ultimately an assessment based on proportionality which calls for the balancing of different interests."')

lower courts would 'adhere mechanically to a sequential check-list', but were required, instead, to 'engage in a balancing exercise and arrive at a global judgment on proportionality'.²³⁸ The following statement in *S v Bhulwana* rehearses the same themes:

[T]he Court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.²³⁹

(c) FC s 36's five factors

(i) Nature of the right

It is not immediately apparent why the nature and the scope of the right that has been limited should form part of the limitation inquiry. In two-stage fundamental rights analysis, the inquiry into the content of the right and whether its exercise has been impaired occurs at the first stage of analysis.

One possible explanation for this repetition is that the drafters decided to replace the dual levels of scrutiny found in the limitations clause of the Interim Constitution with a somewhat more nuanced device that would enable a court to tighten or loosen several of the clause's justificatory requirements according to the importance — *the nature* — of the right that has been infringed. For example, with respect to infringements of core rights, such as dignity or expression, 'the nature of the right' proviso might require the party relying upon the impugned law to demonstrate that (1) the objective of the law is *overwhelmingly important*, or (2) the means used to achieve the law's objective are narrowly tailored and trench upon the protected activity no more than is absolutely necessary or (3) the benefits to society realized by the law significantly outweigh the burdens imposed upon the rights-holder. On the other hand, the nature of rights deemed less central to our constitutional project — say trade and occupation — might lighten the justificatory burden on the parties seeking to uphold the limitation.²⁴⁰

However, the Constitutional Court has expressly rejected the idea that FC s 36 enjoins the courts to create different levels of scrutiny for different rights. In *Christian Education*, the appellants argued that the state had to show that the

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restriction of their freedom of religion served a compelling state interest.²⁴¹ The Court held that American doctrines such as 'strict scrutiny' or 'intermediate scrutiny'

238 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC) ('*Manamela*') at para 32.

239 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC) ('*Bhulwana*') at para 18. See also *Petersen v Maintenance Officer, Simon's Town Maintenance Court, & Others* 2004 (2) SA 56 (C), 2004 (2) BCLR 205 (C) at para 22 (Court concludes that 'if the importance and purpose of the common-law rule are weighed against the nature and extent of the gross infringement caused by the said rule, there is no justification for the retention of the common-law rule.')

240 Where, as in the Interim Constitution, such choices were expressly made in the text, this reading of *Makwanyane*'s first question makes less sense. However, this interpretation does make sense where, as in the Final Constitution, express levels of scrutiny do not exist and the courts are required to reach their own conclusions about the relative importance of each right, and the kind of justification the party defending the infringement must offer.

— from which the notion of 'compelling state interest' derives — have no purchase in South African constitutional law.

In the Court's view, 'the nature and the importance of the right' forms part of a larger proportionality inquiry. In short, the more important the right is to an open and democratic society based on human dignity, equality and freedom, the more compelling any justification for the limitation of the right needs to be. One may well ask whether this approach is dramatically different from one based on different levels of scrutiny. The Constitutional Court seems to be of the view that its gloss on FC s 36(1)(a) is more flexible than IC 33(1)'s bifurcated limitations test and that it relieves the courts of the potentially perilous task of ranking constitutional rights.

In actual practice, the rights to life and human dignity — and closely related rights, such as the right to bodily integrity and the right not to be treated or punished in a cruel, inhuman or degrading way — are deemed central to the society envisaged by the Final Constitution, and only a compelling justification should be advanced for their limitation.²⁴² Other rights said to be of vital

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importance to our constitutional democracy include freedom of religion,²⁴³ freedom of expression,²⁴⁴ the right to vote,²⁴⁵ the right to access to adequate housing,²⁴⁶ the right of access to court,²⁴⁷ and the right to be presumed innocent.²⁴⁸

Not everyone agrees that the 'nature of the right' should be taken to refer to its

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241 *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC) ('*Christian Education*') at paras 29–31. See also *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC) ('*Prince*') at para 128.

242 See *Makwanyane* (supra) at para 144 ('The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these rights above all others.') See also *S v Williams & Others* 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC) at para 76 ('Very stringent requirements would have to be met by the State' before the right to dignity and the protection against punishments that are cruel, inhuman or degrading can be limited'); *Ex parte Minister of Safety and Security & Others: In re: S v Walters & Another* 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC) at para 28 ('The right to life, to human dignity and to bodily integrity are individually essential and collectively foundational to the value system prescribed by the Constitution. Compromise them and the society to which we aspire becomes illusory. It therefore follows that any significant limitation of these rights, would for its justification demand a very compelling countervailing public interest'); *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) ('*NCGLE II*') at para 58; *Makinana & Others v Minister of Home Affairs & Another; Keelty & Another v Minister of Home Affairs & Another* 2001 (6) BCLR 581 606E-G (C); *Bhe v Magistrate, Khayelitsha & Others (Commission for Gender Equality as Amicus Curiae)*; *Shibi v Sithole & Others; South African Human Rights Commission & Another v President of the Republic of South Africa & Another* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) ('*Bhe*') at para 71.

Because the right to equality is considered foundational for our constitutional order, one would expect that a particularly powerful justification would have to be proffered for any limitation of FC s 9. See, eg, *NCGLE II* (supra) at para 58; *Moseneke & Others v The Master & Another* 2001 (2) SA 18 (CC), 2001 (2) BCLR 103 (CC) at paras 22–23 (No open and democratic society would tolerate differential treatment based solely on skin colour); *Jordan & Others v S & Others* 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC) ('*Jordan*') at para 97 (A powerful justification is required for a criminal prohibition which further entrenches patterns of gender inequality); *Bhe* (supra) at para 71. Of course, as we have already noted, the test for unfair discrimination makes it unlikely that a court would find a limitation of this right to be justifiable. See § 34.5 supra.

importance to an open and democratic society based on human dignity, equality and freedom. Cheadle points out that, unlike the formulation in *Makwanyane*, FC s 36(1) says nothing about the importance of the right.²⁴⁹ He argues — from the ostensibly privileged and incorrigible vantage point of a drafter of the final text — that the 'nature of the right' was meant to serve as a threshold requirement, comparable in function to IC s 33's requirement that a limitation may not negate the essential content of a right.²⁵⁰ Underlying the inclusion of this factor, Cheadle contends, was the recognition that some rights (eg the right not to be tortured or the right not to be unfairly discriminated against) 'by their very nature and the efficacy of the language embodying them, cannot conceivably be limited'.²⁵¹ By contrast, other rights tend to 'overlap with other constitutional rights and values' (eg freedom of expression tends to overlap with human dignity and privacy in the context of defamatory speech).²⁵²

243 See *Minister of Home Affairs & Another v Fourie & Another; Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC); *Christian Education* (supra) at para 36 ('[R]eligion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake [sic] concepts of self-worth and human dignity which form the cornerstone of human rights.') See also *Prince* (supra) at para 149 (Sachs J, dissenting, wrote that where religious practices are prohibited by law, but do not involve any violation of the Bill of Rights, 'the Constitution obliges the State to walk the extra mile.') Whether the Court's actual decision-making in the area of religious freedom matches its rhetoric is, however, debatable. For critiques of the Court's freedom of religion jurisprudence, see Irma Kroeze 'God's Kingdom in the Law's Republic: Religious Freedom in South African Constitutional Jurisprudence' in H Botha, A van der Walt & J van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) 117; Stu Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36; Paul Farlam 'Freedom of Religion' in S Woolman, T Roux, J Klaaren, A Stein M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 41; Stu Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44.

244 See *South African National Defence Union v Minister of Defence & Another* 1999 (4) SA 469, 1999 (6) BCLR 615 (CC) at para 7 ('Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.') See also *Case & Another v Minister of Safety and Security & Others; Curtis v Minister of Safety and Security & Others* 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC) at paras 26–27; *Holomisa v Argus Newspapers Limited* 1996 (2) SA 588 (W), 608G–609A, 1996 (6) BCLR 836, 854I–855C (W); *S v Mamabolo (E TV & Others Intervening)* 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC) ('Mamabolo') at para 37; *Islamic Unity Convention v Independent Broadcasting Authority & Others* 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC) ('Islamic Unity') at paras 26–28; *Khumalo & Others v Holomisa* 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at paras 21–24; *Phillips & Another v Director of Public Prosecutions (Witwatersrand Local Division) & Others* 2003 (3) SA 345 (CC), 2003 (4) BCLR 357 (CC) at para 23; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division & Others* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC) ('De Reuck') at paras 46–50; *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International & Another* 2006 (1) SA 144 (CC), 2005 (8) BCLR 743 (CC) at paras 45–46. However, the Constitutional Court has emphasized on more than one occasion that freedom of expression does not enjoy superior status in our law, and does not automatically trump countervailing interests. See *Mamabolo* (supra) at para 41; *Islamic Unity* (supra) at paras 29–30.

245 See *Minister of Home Affairs v National Institute for Crime Prevention (NICRO) & Others* 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC) at para 47.

246 See *Jaftha v Schoeman & Others; Van Rooyen v Stoltz & Others* 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC) at para 39 (Emphasizes the link between access to adequate housing and human dignity.)

According to Cheadle, this threshold requirement does not entail any commitment to finding some rights to be of greater import than others.

Such a position seems hopelessly muddled. To say that a right cannot, on any ground, be justifiably limited is tantamount to saying that no right, no value, no interest, and no good exists that might trump such a right. More importantly, whatever value Cheadle's faux travaux préparatoires may have, they fail to engage the actual practice of the Court. The Constitutional Court *does*, on occasion, consider whether the nature of a particular right is such that it can meaningfully be limited.²⁵³ Finally, Cheadle flatly contradicts himself.²⁵⁴ Cheadle states that on his preferred reading of FC s 36, a court 'may accord more weight to a particular right or require greater justification in respect of some aspects of a right as opposed to others'.²⁵⁵ To accord more weight to one right than another means that it is more important than another right, not that it is fat.

(ii) Importance of the purpose of limitation

247 See *Lesapo v North West Agricultural Bank & Another* 2000 (1) SA 409 (CC), 1999 (12) BCLR 1420 (CC) at para 22 (Right of access to court is foundational to the stability of an orderly society.)

248 See *S v Ntsele* 1997 (2) SACR 740 (CC), 1997 (11) BCLR 1543 (CC) at para 4 ('The fundamental rights bound up with and protected by the presumption of innocence are so important, and the consequences of their infringement potentially so grave, that compelling justification would be required to save them from invalidation.'). See also *S v Mbatha*; *S v Prinsloo* 1996 (2) SA 464 (CC), 1996 (3) BCLR 293 (CC) para 19; *S v Mello & Another* 1998 (3) SA 712 (CC), 1998 (7) BCLR 908 (CC) at para 9; *S v Manamela* 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC) at para 40.

249 See Halton Cheadle 'Limitation of Rights' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 693, 706-07.

250 *Ibid* at 707-708.

251 *Ibid*.

252 *Ibid* at 708.

253 *First National Bank of South Africa Limited v Land and Agricultural Bank of South Africa & Others: Sheard v Land and Agricultural Bank of South Africa & Another* 2000 (3) SA 626 (CC), 2000 (8) BCLR 876 (CC) at para 6 (Only very powerful considerations may justify the limitation of the right to access to court.)

254 Moreover, it is simply not true, as Cheadle maintains, that 'the main balancing exercise' undertaken by the Court 'is that of balancing the relative importance of the right, on the one hand, and the importance of the purpose of the limiting law, on the other'. Cheadle (*supra*) at 704. When the Court engages in balancing or a global assessment of proportionality, it actually places the nature of the right and the nature and extent of the limitation on the same 'side' of the scales. The standard of justification required is, in fact, determined by their combined effect. One must wonder then whether it makes sense to speak, as Cheadle sometimes does, about a 'main' balancing exercise and a 'subsidiary' balancing exercise.

255 *Ibid* at 709.

The second factor identified in FC s 36(1) is 'the importance of the purpose of the limitation'. This factor requires two discrete assessments: an identification of the purpose of the limitation, and an appraisal of its importance.

With respect to the identification of the objective of the limitation, courts are faced with two difficulties. First, the objective of the limitation is often not apparent or made explicit in the law itself. Courts must then reconstruct the objective from the overall purpose of the Act, the legislative history of the provision and the mischief it was intended to address, or the historical development of the relevant common-law rule.²⁵⁶ Second, the objective of a limitation can be expressed at different levels of generality. As Peter Hogg explains: 'The higher the level of generality at which a legislative objective is expressed, the more obviously desirable the objective will appear to be.'²⁵⁷ As it turns out, the formulation of a limitation's objective at a high level of generality often makes it more difficult for the limitation to satisfy the least restrictive means requirement.

When a court is called upon to appraise the purpose of a limitation, it must ensure, at a minimum, that the purpose is not inconsistent with the values of an open and democratic society based on human dignity, equality and freedom.²⁵⁸ The following objectives have been found to be at odds with basic constitutional values: retribution;²⁵⁹ re-inscribing historical patterns of prejudice and disadvantage among racial groups;²⁶⁰ the enforcement of laws animated by bigotry or intolerance dressed up as morality;²⁶¹ and the absence of sufficient guidance in a legislative provision as to how an official ought to exercise the discretion granted her.²⁶²

A government objective designed expressly to reinforce the values which animate our constitutional project will generally satisfy the requirements of this second

256 That said, it is generally the purpose of the impugned provision, and not of the Act, that is at issue. See, eg, *Lesapo v North West Agricultural Bank & Another* 2000 (1) SA 409 (CC), 1999 (12) BCLR 1420 (CC) at para 23.

257 Peter Hogg 'Section 1 Revisited' (1992) 1 *National Journal of Constitutional Law* 1, 5.

258 See, in the Canadian context, *R v Big M Drug Mart* [1985] 1 SCR 295, 351 (Compelling the observance of the Christian Sabbath could not justify the limitation of the right to freedom of religion.)

259 See *Makwanyane* (supra) at paras 129-131; *S v Williams & Others* 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC) at para 86.

260 See *Bhe* (supra) at para 72.

261 See *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) ('*NCGLE I*') at para 37 ('The enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice, cannot qualify as a legitimate purpose. There is accordingly nothing, in the proportionality enquiry, to weigh against the extent of the limitation and its harmful impact on gays. It would therefore seem that there is no justification for the limitation.')

262 See *Dawood & Another v Minister of Home Affairs & Others; Shalabi & Another v Minister of Home Affairs & Others; Thomas & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) at paras 56, 58.

factor.²⁶³ The courts have recognized that the following objectives further the general aims of our basic law: the promotion of equality, dignity and national

unity;²⁶⁴ the protection of children from the degradation and indignity brought about by corporal punishment²⁶⁵ and child pornography;²⁶⁶ the fortification of the judicial process;²⁶⁷ the insistence that members of the defence force do not prejudice or further the interests of a political party; and the requirement that members of the defence force uphold the disciplined character of the defence force.²⁶⁸

Of course, any number of objectives are neither inconsistent with the values that animate the Final Constitution nor directly grounded in them. Whether or not such objectives are sufficiently important to justify a limitation would depend on a number of considerations. First, the further one ventures from the values which animate the Bill of Rights, the less likely one is to satisfy this requirement. Administrative convenience or the saving of costs is unlikely to be considered to be closely linked to the values that animate the Bill of Rights. Second, the objective must relate to concerns which are, in the words of Dickson CJ in *R v Oakes*, 'pressing and substantial', and not merely trivial.²⁶⁹ Third, the objective must be directed to 'the realization of collective goals of fundamental importance'.²⁷⁰

263 At the most basic level, those values include openness, democracy, human dignity, equality and freedom. At a more specific level, the values which justify restriction — and which flow from the individual rights themselves — may include tolerance, cultural diversity, a commitment to representative and participatory politics, social justice, and privacy.

264 See *Islamic Unity* (supra) at paras 45–46. See also *Khumalo v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) at para 41 ('In deciding whether the common law rule complained of by the applicants does indeed constitute an unjustifiable limitation of section 16 of the Constitution, sight must not be lost of other constitutional values and in particular, the value of human dignity.')

265 See *Christian Education* (supra) at paras 39–50.

266 See *De Reuck* (supra) at paras 61–67. The Court identified three important objectives served by the prohibition of child pornography, namely 'protecting the dignity of children, stamping out the market for photographs made by abusing children and preventing a reasonable risk that images will be used to harm children'. Ibid at para 67. However, neither of these three justifications were, ultimately, necessary for the finding of invalidity. The impairment of the dignity of all South Africans constituted the sole meaningful justification for the Court's finding.

267 *Beinash & Another v Young & Others* 1999 (2) SA 116 (CC), 1999 (2) BCLR 125 (CC) at para 17 (Right protects bona fide litigants, the processes of the court and the administration of justice against vexatious proceedings); *S v Steyn* 2001 (1) SA 1146 (CC), 2001 (1) BCLR 52 (CC) at para 31 (Right prevents the clogging of appeal rolls and ensuring that hopeless appeals do not waste court time); *LS v AT & Another* 2001 (2) BCLR 152 (CC) at paras 30–31 (Right ensures that custody issues are determined by the court in the best position to do so); *Mamabolo* (supra) at para 48 (Right vouchsafes the integrity of the judiciary); *S v Singo* 2002 (4) SA 858 (CC), 2002 (8) BCLR 793 (CC) at paras 33–35 (Right ensures the effective administration of justice by enabling an accused to be released from custody without bail pending her trial, and by dealing effectively with conduct which strikes at the authority of the courts.)

268 See *South African National Defence Union v Minister of Defence & Another* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC) at paras 11, 28 and 32.

269 [1986] 1 SCR 103, 138–39

Among the objectives not clearly grounded in a specific substantive provision of the Bill of Rights but still deemed of sufficient import to justify a limitation are:

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taking effective action against crime;²⁷¹ maintaining public peace;²⁷² preventing the abuse of and trade in harmful drugs;²⁷³ reducing the negative consequences of liquor consumption in public places;²⁷⁴ protecting the institution of marriage;²⁷⁵ obtaining full and speedy settlement of tax debts;²⁷⁶ debt recovery;²⁷⁷ recovery of the assets of a company under liquidation;²⁷⁸ and protecting the rights of permanent residents to employment opportunities in the country.²⁷⁹

270 Ibid at 136.

271 See *S v Manamela & Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC) at paras 41-42, 88; *Investigating Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Ltd & Others: In re Hyundai Motor Distributors (Pty) Ltd & Others v Smit NO & Others* 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC) at paras 53-54; *S v Dodo* 2001 (3) BCLR 279, 293B-C (E); *Ex parte Minister of Safety and Security & Others: In re: S v Walters & Another* 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC) at para 44; *National Director of Public Prosecutions & Another v Mohamed NO & Others* 2003 (4) SA 1 (CC), 2003 (5) BCLR 476 (CC) at paras 14-15, 52. See also *S v Dlamini*; *S v Dladla & Others*; *S v Joubert*; *S v Schietekat* 1999 (4) SA 623 (CC), 1999 (7) BCLR 771 (CC) ('Dlamini') at para 67. The *Dlamini* Court accepted that the 'deplorable level of violent crime', and the 'deeply destructive' effect it has on 'the fabric of our society', is a pressing and substantial concern, and that the purpose of a provision which requires someone charged with a Schedule 6 offence to adduce evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release on bail, is legitimate and important. However, the Court cautioned that: 'Although the level of criminal activity is clearly a relevant and important factor in the limitations exercise undertaken in respect of section 36, it is not the only factor relevant to that exercise. One must be careful to ensure that the alarming level of crime is not used to justify extensive and inappropriate invasions of individual rights.' Ibid. See, further, *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders & Others ('NICRO')* 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC) at paras 139-140 and 143-145 (Ngcobo J dissenting) (Provision that deprived prisoners of the right to vote served a legitimate purpose in denouncing crime and promoting a culture of the observance of civic duties and obligations.)

272 See *Dlamini* (supra) at paras 55-56.

273 See *S v Bhulwana*; *S v Gwadiso* 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC) at para 20; *Prince* (supra) at paras 52-53, 114.

274 See *Phillips & Another v Director of Public Prosecutions (Witwatersrand Local Division) & Others* 2000 (2) SA 1 (CC), 2003 (4) BCLR 357 (CC) at paras 24, 46, 48.

275 See *NCGLE II* (supra) at para 55.

276 See *Metcash Trading Ltd v Commissioner for the South African Revenue Service & Another* 2001 (1) SA 1109 (CC), 2001 (1) BCLR 1 (CC) at para 60.

277 See *Jaftha* (supra) at para 40 (Court added that the importance of the purpose was diminished where the debt is of a trifling nature.)

278 See *Ferreira v Levin NO & Others*; *Vryenhoek & Others v Powell NO & Others* 1996 (2) SA 621 (CC), 1996 (1) BCLR 1 (CC) at para 126

Can a limitation ever be justified in the name of administrative convenience or the saving of costs? Although the Canadian Supreme Court has suggested that fundamental-rights guarantees 'would be illusory if they could be ignored because it was administratively convenient to do so', our Constitutional Court has not taken such a hard-and-fast line.²⁸⁰

The Constitutional Court was asked to engage this question in *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) & Others*. The case turned on the constitutionality of provisions in

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the Electoral Act that deprived a particular class of convicted prisoner — those serving sentences without the option of a fine — of the right to vote. The state argued that it would put a strain on the logistical and financial resources of the Electoral Commission to make provision for such prisoners to exercise the franchise. The *NICRO* Court rejected this argument, but stopped short of holding that logistical and cost considerations are entirely or inevitably irrelevant to an inquiry into the limitation of fundamental rights. It rehearsed Ackermann J's contention in *Ferreira v Levin*²⁸¹ that 'problems involving resources cannot be resolved in the abstract "but must be confronted in the context of South African conditions and resources — political, social, economic and human",' and that 'what is reasonable in "one country with vast resources, does not necessarily justify placing an identical burden on a country with significantly less resources".'²⁸² The *NICRO* Court then held that:

Resources cannot be ignored in assessing whether reasonable arrangements have been made for enabling citizens to vote. There is a difference, however, between a decision by Parliament or the Commission as to what is reasonable in that regard, and legislation that effectively disenfranchises a category of citizens.²⁸³

The *NICRO* Court's finding that the limitation in question could not be justified by considerations related to logistics and costs rests on three premises. First, the Court stresses that the right to vote is foundational to democracy.²⁸⁴ Second, while Parliament and the Commission must be given some leeway in deciding how to employ available resources, the disenfranchisement of a category of citizen is the kind of limitation that requires a compelling justification. Third, the state failed to provide any evidence that the exercise of the franchise by this class of prisoner created insuperable logistical problems for the Commission or imposed significant burdens on the fiscus.²⁸⁵

279 See *Makinana & Others v Minister of Home Affairs & Another; Keelty & Another v Minister of Home Affairs & Another* 2001 (6) BCLR 581, 606G-H (C).

280 See *Singh v Minister of Employment and Immigration* [1985] 1 SCR 177, 218-19 (Wilson J).

281 *NICRO* (supra) at para 133.

282 *Ibid* at para 47.

283 *Ibid* at para 48.

284 *Ibid* at para 47.

Indeed, where such evidence can be adduced, the Court is apt to conclude that the limitation is legitimate. In *Lesapo v North West Agricultural Bank & Another*, the Constitutional Court found that the saving of time and costs in the recovery of the Agricultural Bank's property constituted a legitimate objective.²⁸⁶ At the same time, it emphasized that the importance of such measures did not 'detract from the importance of the public interest served by the need for justiciable disputes to be settled by a court of law'.²⁸⁷

Despite these findings, the principle that administrative convenience and the saving of costs should not, generally, be allowed to override fundamental rights has been confirmed by other Constitutional Court judgments. In *S v Williams & Others*, society's alleged need for 'quick justice' fell 'far short of the justification required to entitle the State to override the prohibition against the infliction of

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cruel, inhuman or degrading punishment'.²⁸⁸ In *Mohlomi v Minister of Defence*, the logistical difficulties said to beset the state when sued were deemed insufficient justification for a provision that required claims against the defence force to be instituted within a period of six months.²⁸⁹ Whether or not the state can use administrative convenience or the saving of costs to justify the limitation of a fundamental right in a particular case will depend on the nature of the right in question, the extent of the limitation, and whether or not the state has adduced sufficient evidence in support of its claim.

Another question raised by the 'purpose of the limitation' factor is whether a legislative restriction of fundamental rights whose original purpose is at odds with the values enshrined in the Final Constitution can assume a new, legitimate purpose. In *Jordan & Others v S & Others*, O'Regan and Sachs JJ accepted that the original purpose of the provisions in the Sexual Offences Act dealing with brothels was to enforce a traditional conception of morality, and that this conception of morality was inconsistent with the values underlying a pluralist constitutional democracy.²⁹⁰ However, the justices also found that the objective of such provisions was not cast in stone. Given the magnitude of South Africa's legal and social transformation, on the one hand, and the need for some measure of legal continuity, on the other, a legislative provision whose original purpose was incompatible with the Final Constitution may be re-interpreted in a manner that makes it consistent with constitutional values. In *Jordan*, the Court found that the purpose of the provisions in question could be recast in terms of the more acceptable societal imperative to control commercial sex.²⁹¹

285 Ibid at paras 49-50.

286 2000 (1) SA 409 (CC), 1999 (12) BCLR 1420 (CC) ('*Lesapo*') at paras 23-24.

287 Ibid at para 24.

288 1995 (3) SA 632 (CC), 1995 (7) BCLR (CC) ('*Williams*') at para 79.

289 1997 (1) SA 124 (CC), 1996 (12) BCLR 1559 (CC) ('*Mohlomi*') at para 16.

290 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC) ('*Jordan*') at paras 104-106.

This approach neither falls into the trap of assuming that the legislative purpose is something fixed and static, nor of conflating the purpose of a law with the subjective intent of those who enacted it. The problem with the 'shifting purpose' doctrine, however, is that it may be used to justify measures that are so tainted by the discriminatory or the authoritarian underpinnings of the original enactment that they may continue to entrench harmful stereotypes. The Constitutional Court is alive to these dangers and has rejected attempts to justify overtly racist or sexist provisions in terms of a less offensive objective.²⁹² However, it must also remain

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on guard that less overt or pernicious forms of discrimination — or state support for particular traditions, religions or worldviews that marginalize smaller, more vulnerable groups — may be countenanced in the name of a new, ostensibly unproblematic purpose.²⁹³

(iii) Nature and extent of the limitation

The next factor, the 'nature and extent of the limitation', lies at the core of the Court's approach to balancing and to proportionality. As O'Regan J wrote in *Manamela*:

The level of justification required to warrant a limitation upon a right depends on the extent of the limitation. The more invasive the infringement, the more powerful the justification must be.²⁹⁴

In appraising the nature and the extent of a limitation, the Court considers a variety of factors.

First, it asks whether the limitation affects the 'core' values underlying a particular right. It has, for example, found that the right to be tried in a hearing presided over by a judicial officer is a core component of the right not to be detained without trial.²⁹⁵ Similarly, reverse onus provisions are said to strike at the heart of the right to

291 See also *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (4) SA 1176 (CC), 1997 (10) BCLR 1348 (CC) at para 157 (Sachs J quotes approvingly from *Lynch, Mayor of Pawtucket v Donnelly* 645 US 668 (1984) in which Brennan J wrote: 'While a particular governmental practice may have derived from religious motivations and certain religious connotations, it is nevertheless permissible for the government to pursue the practice when it is continued today solely for secular reasons.')

292 See *Moseneke & Others v The Master & Another* 2001 (2) SA 18 (CC), 2001 (2) BCLR 103 (CC) at paras 20-23 (Holds that the practical advantages flowing from a provision in the Black Administration Act 38 of 1927 which differentiates between the estates of black and white people who die intestate, cannot be delinked from the racially discriminatory purpose and effect of the Act); *Bhe & Others v Magistrate, Khayelitsha & Others (Commission for Gender Equality as Amicus Curiae)*; *Shibi v Sithole & Others; South African Human Rights Commission & Another v President of the Republic of South Africa & Another* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) at paras 61, 72 (Section 23 of the Black Administration Act 'cannot escape the [racist and sexist] context in which it was conceived' in order to be reinterpreted to give 'recognition to customary law' and to acknowledge 'the pluralist nature of our society'.)

293 See Henk Botha 'Equality, Dignity, and the Politics of Interpretation' (2004) 19 *SA Public Law* 724.

294 *Manamela* (supra) at para 53.

295 *De Lange v Smuts NO & Others* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at para 89.

be presumed innocent and therefore require a clear and convincing justification.²⁹⁶ By contrast, the prohibition of child pornography was found not to implicate the core values of the right to freedom of expression but rather restricted 'expression of little value ... found on the periphery of the right'.²⁹⁷

Core/periphery analysis has proved to be of particular importance to the Court's privacy jurisprudence. The Constitutional Court conceives of the right to privacy as having an inner core that must be shielded from the corrosive effects of conflicting interests, and a periphery or a penumbra in which the right to privacy may be outweighed by conflicting community interests.²⁹⁸ At the core of privacy is the right 'to have one's own autonomous identity'.²⁹⁹ That core

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embraces the capacity to form and to nurture intimate relationships. In *National Coalition v Minister of Justice*, a criminal ban on gay sodomy was held to strike at the heart of privacy:

The right to privacy recognizes that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and to nurture human relationships without undue interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.^{300 301}

However, 'once an individual enters into relationships with persons outside this closest intimate sphere', his or her activities 'acquire a social dimension'³⁰² and the protection afforded to the right diminishes accordingly. In deciding whether a limitation strikes at the inner core of privacy or affects privacy interests that lie at the periphery of the right, the Court looks at factors such as 'the nature and effect of the invasion' and 'whether the subject of the limitation is a natural person or a

296 *Manamela* (supra) at para 49

297 *De Reuck* (supra) at para 59. In *De Reuck*, the Court identified the core values that undergird freedom of expression and cited the principles articulated in *South African National Defence Union v Minister of Defence* in support of its finding. See *SANDU* (supra) at para 7 (The 'instrumental function [of freedom of expression] as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally'.)

298 See *Bernstein & Others v Bester & Others NNO* 1996 (2) SA 751 (CC), 1994 94 BCLR 449 (CC) ('*Bernstein*') at para 67 ('[I]t is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community... Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.')

299 *Ibid* at para 65.

300 See *NCGLI I* (supra) at paras 32, 36.

301 *Ibid* at para 32.

302 *Bernstein* (supra) at para 7.

juristic person'.³⁰³ Even though juristic persons are entitled to the right to privacy, the Court has made it clear that because they are 'not the bearers of human dignity', their privacy rights 'can never be as intense as those of human beings'.³⁰⁴ The Court has also found that, while sexual activity for commercial gain is protected by the right to privacy, it lies at the periphery of the right. Given the commercial character of that activity and a prostitute's invitation to the general public to engage in illicit sexual conduct, the Court in *Jordan* had little difficulty in finding that the prohibition of prostitution was justifiable.³⁰⁵ By contrast, the *Mistry* Court had no problem finding unconstitutional, as a violation of privacy, a provision that authorized inspections not only of the business premises of health professionals, but of their homes.³⁰⁶

Despite its intuitive appeal, the distinction between the ban on gay sodomy and the prohibition of prostitution on the basis of the core/periphery metaphor suffers from a number of difficulties: (a) its characterization of all non-commercial sex as an expression of one's sexual identity, or as an instance of the right to form intimate relationships, is pap to be expected from the pulpit and not the bench; (b) it presupposes a world in which individuals are equally free to choose their own autonomous identity and to form intimate relationships, and then models personal autonomy and the kind of interpersonal relationships that are worthy of

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protection on middle-class morality and the institution of (heterosexual) marriage;³⁰⁷ and (c) it fails to recognize that all persons engaged in any form of labour for remuneration — including Constitutional Court justices — necessarily engage in the commodification of some body part.³⁰⁸

While the current construction of the right to privacy is open to the above lines of criticism, the Court should be applauded for articulating clearly and publicly the grounds for its decisions. More disturbing, perhaps, is the Court's failure to distinguish between the core and the periphery with respect to most of the other rights in Chapter 2. This silence makes it difficult for other actors, in advance of litigation, to be able to distinguish serious infringements of fundamental rights from less serious ones.

303 *Investigating Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Ltd & Others: In re Hyundai Motor Distributors (Pty) Ltd & Others v Smit NO & Others* 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC) ('Hyundai') at para 18.

304 *Ibid.*

305 See *Jordan* (supra) at paras 27–29.

306 See *Mistry v Interim National Medical and Dental Council of South Africa & Others* 1998 (4) SA 1127 (CC), 1998 (7) BCLR 880 (CC) at para 21.

307 See Wessel le Roux 'Sex Work, the Right to Occupational Freedom and the Constitutional Politics of Recognition' (2003) 120 *SALJ* 452, 463; Wessel le Roux 'Bridges, Clearings and Labyrinths: the Architectural Framing of Post-Apartheid Constitutionalism' (2004) 19 *SA Public Law* 629, 659–660.

308 See Stu Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44; Stu Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36.

Second, the 'nature and the extent' inquiry requires an assessment of the actual impact of the limitation on those deleteriously affected by it. The following limitations have been found to impair significantly the right at issue: (a) the criminalization of gay sodomy constituted a severe limitation of a gay man's rights to equality, privacy, dignity and freedom;³⁰⁹ (b) reverse onus provisions in which possession of a certain quantity of cannabis was deemed tantamount to dealing,³¹⁰ or in which possession of arms or ammunition was deemed sufficient proof to establish a prima facie case for indictment for a crime,³¹¹ were found to constitute a serious infringement of the right to be presumed innocent;³¹² (c) the limitation of a debtor's access to court could not be justified because it led, ineluctably, to the deprivation of the person's livelihood;³¹³ and (d) the sale in execution of people's homes for trifling debts without a judicial hearing was characterized as a severe limitation of the right to access to adequate housing.³¹⁴

Third, the Court sometimes considers the social position of the individuals or group concerned. Whether or not a limitation targets, or has a disproportionate

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impact upon, vulnerable sections of the population, such as religious minorities,³¹⁵ the poor,³¹⁶ or children born out of wedlock,³¹⁷ may determine the level of justification required.

309 See *NCGLE I* (supra) at para 36.

310 See *S v Bhulwana*; *S v Gwadiso* 1996 (1) SA 388 (CC), 1995 (12) BCLR 1348 (CC) at paras 19, 21.

311 See *S v Mbatha*; *S v Prinsloo* 1996 (2) SA 464 (CC), 1996 (3) BCLR 293 (CC) ('*Mbatha*') at para 20.

312 The majority and minority disagreed over the nature and extent of the limitation in *Manamela*, another case concerning the constitutionality of a reverse onus provision. The majority argued that, '[w]here a presumption of guilt is substituted for the presumption of innocence, the limitation of the right is extensive and "the justification for doing so must be established clearly and convincingly."' *Manamela*, (supra) at para 40. The minority, on the other hand, argued that the statutory offence of the acquisition of stolen goods was not that serious, and that the risk of unfair convictions under the provision was not that high. *Ibid* at paras 78-81.

313 See *Lesapo* (supra) at para 25 (Describes the limitation as 'extremely prejudicial' to the debtors' interests.)

314 See *Jaftha* (supra) at para 39.

315 See *Prince* (supra) at para 51 (Ngcobo J, dissenting, describes the stigmatisation suffered by Rastafari as a result of the criminalisation of cannabis) and at paras 157-163 (Sachs J, dissenting, considers the negative impact of the limitation on Rastafari, given that they are a vulnerable and politically powerless group.)

316 See *Coetzee v Government of the Republic of South Africa*; *Matiso & Others v Commanding Officer, Port Elizabeth Prison & Others* 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC) ('*Coetzee*') at paras 8, 66 and 67 (Persons most vulnerable to imprisonment for judgment debts are the poor and unemployed); *Manamela* (supra) at para 44 (Considering the fact that reverse onus provision at issue would leave the poor, unskilled and illiterate most vulnerable to erroneous conviction); *Jaftha* (supra) at paras 39 and 43 (Analyzes the impact of a provision authorising the sale-in-execution of people's homes on the indigent.)

Fourth, the Court sometimes asks whether the limitation is permanent or temporary, and whether it amounts to a complete or a partial denial of the right in question. In *S v Makwanyane*, the Court emphasized the irrevocability of the death penalty, and cautioned that '[t]here is a difference between encroaching upon rights for the purpose of punishment and destroying them altogether'.³¹⁸ On the other hand, the *Christian Education* Court found that the prohibition of corporal punishment in schools was not unduly burdensome because it neither deprived parents of the general right to bring up their children in accordance with Christian beliefs nor prevented them from administering corporal punishment at home. In *Metcash*, the Court emphasized the fact that, even though a provision in the Value Added Tax Act limited the right of a vendor to challenge the correctness of an assessment made by the Commissioner, its effect was temporary and the vendor was free to submit any dispute with the Commissioner for judicial resolution once she had paid the disputed amount.³¹⁹

Fifth, in measuring the extent of the limitation, the Court often asks whether the limitation is narrowly tailored to achieve its objective. (This question obviously overlaps significantly with the last factor enumerated in FC s 36(1), namely the existence of less restrictive means.) The Court initially asks whether the limitation applies to a narrow or a broad category of cases.³²⁰ In *S v Mamabolo (E TV & Others Intervening)*, the Court found that the crime of scandalizing the

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court, rightly understood, applied to a narrow category of cases, and that the public interest in maintaining the integrity of the judiciary easily trumped the negative effects of the limitation on the public's freedom of expression.³²¹ Conversely, *Islamic Unity Convention v Independent Broadcasting Authority & Others* held that a clause in a code of conduct which prohibited the broadcasting of material 'likely to

317 See *Petersen v Maintenance Officer & Others* 2004 (2) SA 56 (C), 2004 (2) BCLR 205 (C) at para 22.

318 See *Makwanyane* (supra) at para 143. See also *Ex parte Minister of Safety and Security & Others: In re: S v Walters & Another* 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC) at para 27 (Statutory authorization of the killing of a fleeing suspect amounts to 'a complete denial of the right to life and consequently of all other rights which flow from it.')

319 See *Metcash Trading Ltd v Commissioner for the South African Revenue Service & Another* 2001 (1) SA 1109 (CC), 2001 (1) BCLR 1 (CC) ('*Metcash*') at paras 38, 51 and 58. See also *Lesapo* (supra) at para 25 (Court took into account the fact that the limitation of a debtor's right to access to court was not permanent. However, it nevertheless found that the limitation was serious enough — given the extent of the harm — to find it unjustifiable); *Dlamini* (supra) at para 71 (Temporary nature of awaiting-trial detention weighed against the compelling interest in maintaining public peace); *National Director of Public Prosecutions & Another v Mohamed NO & Others* 2003 (4) SA 1 (CC), 2003 (5) BCLR 476 (CC) at para 52 (Temporary preservation order found to be justifiable); *NICRO* (supra) at paras 145–146 (Ngcobo J emphasizes, in dissent, that the justifiability of the limitation of a prisoner's right to vote was contingent upon the length of the sentence to be served in prison.)

320 See *Dlamini* (supra) at para 74; *NICRO* (supra) at para 67 (Blanket exclusion of prisoners, sentenced to imprisonment without the option of a fine, from the right to vote found to be unjustifiable.)

321 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC) ('*Mamabolo*') at para 48. See also *Metcash* (supra) at para 54 (Limitation of vendor's right to challenge the correctness of an assessment of the tax payable is narrowly focused, and does not apply to any other possible challenges.)

prejudice relations between sections of the population' was 'so widely-phrased and so far-reaching that it would be difficult to know beforehand what is really prohibited or permitted'.³²² The inroads made into freedom of expression outweighed any possible justification for the locution of the provision.³²³

In determining whether the extent of the limitation is narrowly tailored, the Court also looks at the breadth of discretion granted by the authorizing legislation and the safeguards in place to limit any deleterious effects. The following considerations are relevant to this inquiry: whether adequate guidance is given to administrative officials as to how they should exercise their discretion;³²⁴ whether the limitation of someone's right must be authorized by a judicial officer (eg whether a warrant must first be issued);³²⁵ whether the extent of the limitation is limited by carefully tailored exemptions;³²⁶ and whether the exercise of the discretion is subject to review by the courts.³²⁷

Where far-reaching powers are conferred on an administrative official, the legislature must provide clear instructions on how such powers are to be exercised. In *Dawood*, the Court found that the discretion given to immigration officials in terms of the Aliens Control Act to refuse to issue or to extend the temporary residence permit of the foreign spouse of a person permanently and

322 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC) ('*Islamic Unity*') at para 44.

323 *Ibid* at paras 43, 44 and 48.

324 See *Mistry* (*supra*) at para 22; *De Reuck* (*supra*) at para 76.

325 In *Dawood*, O'Regan J noted that there is

a difference between requiring a court or tribunal in exercising a discretion to interpret legislation in a manner that is consistent with the Constitution and conferring a broad discretion upon an official, who may be quite untrained in law and constitutional interpretation, and expecting that official, in the absence of direct guidance, to exercise the discretion in a manner consistent with the provisions of the Bill of Rights. Officials are often extremely busy and have to respond quickly and efficiently to many requests or applications. The nature of their work does not permit considered reflection on the scope of constitutional rights or the circumstances in which a limitation of such rights is justifiable.

Dawood (*supra*) at para 46. See also *Mistry* (*supra*) at paras 21, 22 (Power of medical inspectors to enter any place without having to obtain a warrant, found to be unreasonable); *Dlamini* (*supra*) at paras 56–57, 74, 76 (Judicial officer's decision to grant or to refuse bail, after considering all relevant circumstances, leads Court to conclude that limitation of the right to bail is narrowly tailored.)

326 In *Coetzee*, the Court noted that the lack of adequate procedural safeguards to prevent the imprisonment of judgment debtors who are unable to pay undermined the argument in justification. See *Coetzee* (*supra*) at paras 14, 23, 25. See, further, *De Reuck* (*supra*) at paras 72–79 (Court concluded, on the basis of an exemption procedure provided for in the Films and Publications Act, that the nature and extent of the limitation is not severe.)

327 The mere fact that the exercise of discretion may be challenged on administrative grounds does not necessarily support a finding that the limitation is narrowly tailored. See *Dawood* (*supra*) at para 48.

lawfully resident in South Africa impaired the human dignity of such spouses. The Court noted that the provisions in question contained little guidance as to the circumstances in which a temporary residence permit may be refused. This unfettered grant of power has serious consequences for the rule of law: a person must be able to understand the basis upon which a decision by a government official may lawfully be taken.³²⁸ O'Regan J castigated the government for its failure to provide adequate guidelines and warned that:

It is for the legislature to ensure that, when necessary, guidance is provided as to when limitation of rights will be justifiable. It is therefore not ordinarily sufficient for the legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of the constitutional obligations placed on such officials to respect the Constitution.³²⁹

By contrast, the *Hyundai* Court found that a provision permitting a judicial officer to issue a search warrant to further a preparatory investigation initiated by an investigating director in the office of the National Prosecuting Authority was reasonably capable of an interpretation that requires a 'reasonable suspicion' of the commission of an offence.³³⁰ Read thus, the provision contained 'an adequate and objective basis' to protect the 'privacy' of individuals and constituted a justifiable limitation of that right.³³¹

(iv) Relationship between the limitation and its purpose

Once the legitimacy of a limitation's objective has been established, it makes sense to ask whether the means employed to achieve the objective are rationally related to, or reasonably capable of achieving, that objective. For example, the Constitutional Court found in *S v Bhulwana; S v Gwadiso* that the prohibition on illegal drugs would not be substantially furthered by a legislative presumption that a person found in possession of 115 grams of dagga was a dealer because there

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was no logical connection between such possession and the presumption.³³² Similarly, the Court found in *South African National Defence Union v Minister of Defence & Another* that a provision that prohibited members of the defence force

328 *Dawood* (supra) at para 47.

329 *Ibid* at para 54. See also *Janse van Rensburg NO & Another v Minister of Trade and Industry NO & Another* 2001 (1) SA 29 (CC), 2000 (11) BCLR 1235 (CC) at para 25.

330 *Hyundai* (supra) at paras 49-52.

331 *Ibid* at para 55. See also *LS v AT & Another* (supra) at paras 32-35. In *LS v AT*, the Constitutional Court found that provisions of the Hague Convention on the Civil Aspects of International Child Abduction, as incorporated into South African law, were tailored in a manner designed to limit the deleterious effects that they might have upon a child. The Convention provides for a mandatory procedure whereby a child who has been wrongfully removed or retained, is returned to the state of his/her habitual residence. Even though cases could be envisaged in which these provisions might, contrary to FC s 28(2), run counter to the short-term best interests of a child, the extent of the limitation was substantially mitigated by exemptions provided for in the Convention. In *Metcash*, the Court found that the temporary limitation of a taxpayer's right to challenge the correctness of an assessment made by the Commissioner was ameliorated by the Commissioner's power to suspend the operation of the 'pay now, argue later' principle in appropriate cases. In addition, the exercise of this discretion constituted administrative action subject to review by the courts. See *Metcash* (supra) at paras 42 and 62.

from joining a trade union was not rationally related to maintaining the discipline and efficiency of the defence force.³³³ And in *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others*, the Court held that no rational connection existed between the legitimate object of promoting and protecting the traditional family and the exclusion of permanent same-sex partners from certain benefits to which married couples were entitled. The realization of this legitimate objective, the Court reasoned, would neither be furthered nor diminished by the extension of the benefits at issue to permanent same-sex partners.³³⁴

(v) Less restrictive means

Assuming that the Court finds both a legitimate objective and a rational connection between the means employed and that objective, it will then consider a fifth factor: whether 'less restrictive means to achieve the purpose' exist. The logic behind this factor is that, if the government or some other party wishes to restrict the exercise of a fundamental right in the service of some other compelling concern, it should attempt to employ means of doing so (laws) which are least restrictive of the right(s) being infringed. Other phrases — that a limitation should be narrowly tailored to achieve its purpose, that it should be carefully focused, or that it should not be overbroad — are sometimes used to describe the same inquiry.³³⁵

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The state has failed the 'less restrictive means' requirement in a number of cases in which the Court deemed it obvious that narrower means existed to achieve the legislative objective.³³⁶ In *Coetzee*, provisions that authorized the imprisonment of judgment debtors were held to be overly broad because they swept up into their proscriptive net not only debtors who wilfully refused to pay, but also debtors who

332 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC) ('*Gwadiso*') at paras 20, 22-23. See also *S v Mbatha*; *S v Prinsloo* 1996 (2) SA 464 (CC), 1996 (3) BCLR 293 (CC) at paras 21-22 (Court held that presumption that anyone who was present at any premises at which prohibited firearms or ammunition were discovered was in possession of such goods, applied also to instances where there was no logical connection between the presumed fact and the facts proved. Such a presumption was therefore arbitrary.)

333 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC).

334 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC). A rational relationship between the limitation and its purpose has been found absent in a significant number of cases. See *S v Dodo* 2001 (3) SA 382 (E), 2001 (3) BCLR 279, 293E-G, 293H-294A (E) (Eastern Cape High Court found no rational relationship between a mandatory sentence of life imprisonment and its alleged purpose — deterrence); *Lesapo* (supra) at para 26 (Extent to which the limitation achieved its purpose was, at best, minimal); *Coetzee v Comitis & Others* 2001 (1) SA 1254 (C), 2001 (4) BCLR 323 (C) at para 40 (No rational connection between the restraint of trade in question and the purpose it purported to serve); *S v Walters & Another* 2001 (2) SACR 471 (Tk), 2001 (10) BCLR 1088 (Tk) at para 29 (No rational connection between the authorization of deadly force to prevent the escape of a suspect, and the purpose of the limitation, namely to bring the suspect before a court of law); *Lawyers for Human Rights & Another v Minister of Home Affairs & Another* 2003 (8) BCLR 891, 902H-I (T) (Neither the arbitrary powers granted immigration officials nor the absence of procedural safeguards in s 34(8) of the Immigration Act alleviated the strain on state resources.)

335 For judgments in which a limitation of a fundamental right is described as 'overbroad', see *Coetzee* (supra) at paras 13, 14 and 32; *Case & Curtis* (supra) at paras 48-63, 93, 97 and 108-12. But see *South African National Defence Union v Minister of Defence & Another* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC) at paras 17-18 (O'Regan J notes different meanings and uses of the term 'overbreadth'.)

were unable to pay.³³⁷ In *Case & Curtis*, a ban on the possession of indecent or obscene photographic matter was held to be unreasonable because the definition of indecent or obscene matter was so broad that it could apply to almost any photograph, film or television programme that contained references to sexual matters.³³⁸ In *Manamela*, the Court found that the objectives of a reverse onus provision — in terms of which someone who had acquired stolen goods was presumed to be guilty of a statutory offence — could also be achieved by a more narrowly tailored reverse onus provision confined to certain categories of expensive stolen goods (motor cars or expensive equipment).³³⁹

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The idea that rights should be limited no more than is necessary, and that a limitation will therefore be held to be unjustifiable if it could be achieved by less restrictive means, seems relatively straightforward. Its application presents a number of difficulties. In the first place, whether or not less restrictive means to achieve a given purpose are found to exist will depend, as we have already noted, on the manner in which the purpose of the limitation has been defined. Peter Hogg points out that the purpose can be stated at different levels of generality, and that this may have a significant impact on the less restrictive means inquiry:

If the objective has been stated at a high level of generality, it will be easy to think of other ways in which the wide objective could be accomplished with less interference with the [fundamental] right. If the objective has been stated at a low level of generality, perhaps simply restating the terms of the challenged law, it will be hard to think of other ways in which the narrow objective could be accomplished with less interference with the ... right.³⁴⁰

This point can be illustrated by reference to the disagreement between the majority and the minority in *Manamela*.³⁴¹ Recall that *Manamela* concerned the constitutionality of a reverse onus provision, in terms of which a person who acquired stolen property had to prove that he/she had reasonable cause to believe that the goods were not stolen. The majority defined the purpose of the limitation at

336 See *Makinana & Others v Minister of Home Affairs & Another; Keelty & Another v Minister of Home Affairs & Another* 2001 (6) BCLR 581, 607A-D (C)(Protection of employment opportunities of South African citizens and permanent residents could be achieved through a provision which did not apply to foreign spouses of South African permanent residents); *Prince v President of the Law Society of the Cape of Good Hope & Others* 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC) at paras 54–76 and 81 (Ngcobo J, dissenting, wrote that a religious exemption could be granted from the ban on cannabis without undermining the purpose of the provision); *Islamic Unity* (supra) at paras 50 and 51 (The need to protect dignity, equality and national reconciliation could be achieved by a provision which was 'appropriately tailored and more narrowly focussed.')

337 See *Coetzee* (supra) at paras 13, 14 and 32.

338 See *Case & Curtis* (supra) at paras 48–63, 91, 93, 97, and 108–112.

339 *S v Manamela & Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC) at para 43. See also *Phillips & Another v Director of Public Prosecutions (Witwatersrand Local Division) & Others* 2003 (3) SA 345 (CC), 2003 (4) BCLR 357 (CC) at paras 26–28. *Phillips* concerned the constitutionality of a provision which made it an offence for an on-consumption liquor licence holder to allow a person (i) to perform an offensive, indecent or obscene act or (ii) who is not clothed or not properly clothed to perform or to appear on licensed premises where entertainment is presented or to which the public has access. The majority found that the purpose of the limitation — to minimize the harm that may result from the consumption of liquor in public places — could also be achieved by means of a narrowly tailored provision that did not apply to licensed theatres, and which was thus less invasive of freedom of expression.

a fairly high level of generality, as that of 'put[ting] in place effective means to eradicate the market in stolen property'.³⁴² The majority recognized that the

achievement of this objective was a 'pressing social need',³⁴³ but found the sweep of the means employed to be too great. It held that the same objective could be achieved equally well by means of an evidential burden.³⁴⁴ By contrast, the minority stated the purpose of the limitation with far greater specificity. In their view, the purpose was to impose an obligation upon members of the public to take care not to participate in a market for stolen goods.³⁴⁵ This purpose could not be achieved fully

Less restrictive means were also found to be available where the government had been unable to convince the court that the purpose of a reverse onus provision could not be achieved by means of an evidentiary burden. See *Mbatha* (supra) at para 26; *Manamela* (supra) at para 49; *S v Singo* 2002 (4) SA 858 (CC), 2002 (8) BCLR 793 (CC) at para 39. Less restrictive means were found to be available where the purpose of deterrence could be achieved by means that were less restrictive of the protection against cruel, inhuman or degrading punishment. See *Makwanyane* (supra) at para 128 (State could not carry burden of justification under IC s 33(1) because it could not demonstrate that the death penalty was a more effective deterrent than life imprisonment, and life imprisonment least impaired the constitutional rights at issue); *S v Williams* 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC) at paras 62–63 (State could not carry burden of justification under IC s 33(1) because it could not demonstrate that whipping — though an effective deterrent — was a more effective deterrent than other creative sentencing options which are less invasive of the minor's right to human dignity); *S v Dodo* 2001 (3) BCLR 279, 294B–D (E) (Less restrictive means than prescribed lifelong imprisonment are available: namely the likelihood that offenders will be apprehended, convicted and punished.) Less restrictive means were found to be available where the objective of the limitation could be achieved by means of a non-discriminatory provision. See *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at para 49 (Respondent failed to demonstrate that the same purpose could not be achieved by a provision which does not discriminate against married women); *Moseneke & Others v The Master & Another* 2001 (2) SA 18 (CC), 2001 (2) BCLR 103 (CC) at paras 22–23 (Practical advantages of racially discriminatory provision can be accomplished equally well by a non-discriminatory provision). Less restrictive means were found to be available by recourse to ordinary or less invasive procedural arrangements. See *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC), 1996 (12) BCLR 1559 (CC) at paras 18–19 (Infringement by s 113 of the Defence Act of the right to access to court, in terms of its running time, deemed to be neither reasonable nor justifiable because means less restrictive of the right and capable of achieving the same objective are readily available); *Lesapo* (supra) at para 27 (Less invasive remedies, such as an interdict against the alienation of land, available to realise the purpose); *Mamabolo* (supra) at para 57 (Ordinary mechanisms of criminal justice system could be employed instead of summary procedures.)

340 Peter Hogg 'Section 1 Revisited' (1992) 1 *National Journal of Constitutional Law* 1, 5.

341 The point is also illustrated by the disagreement between the majority and the minority in *Prince*. In *Prince*, the minority took the basis for the state's refusal to provide a religious-based exemption from the ban on cannabis to be the prevention of harm to users. They could thus hold that the *prohibition* went further than necessary, as it targeted both the harmful and non-harmful use of cannabis. By contrast, the majority insisted that the purpose should be defined with greater specificity. In the majority's view,

The legislation seeks to prohibit the very possession of cannabis, for this is obviously the most effective way of policing the trade in and use of the drug. The question is therefore not whether the non-invasive use of cannabis for religious purposes will cause harm to the users, but whether permission given to Rastafari to possess cannabis will undermine the general prohibition against such possession. We hold that it will.

Prince (supra) at para 141.

342 *Manamela* (supra) at para 41.

through less restrictive means. An evidential burden, as opposed to a reverse onus, would 'diminish the obligation upon members of the public to act vigilantly'.³⁴⁶

A second problem concerns the separation of powers between the legislature and the judiciary, and the question as to whether a judicial finding that the lawmaker should have used less restrictive means may amount to a judicial usurpation of legislative power. That the Constitutional Court is alive to this danger is evident in *Makwanyane*.³⁴⁷ Chaskalson P restated 'the fundamental problem of judicial review' in the following terms: 'Can, and should, an unelected court substitute its own opinion of what is reasonable or necessary for that of an elected legislature?'³⁴⁸ He does not answer this question, nor even set out the standards the courts should employ when placed in such an uncomfortable position. Instead, he sets out the parameters of the problem: that 'the role of the Court is not to second-guess the wisdom of policy choices made by legislators'; that the means chosen must impair the right 'as little as is reasonably possible'; and that the courts should allow the legislature some deference in its choices between 'differing reasonable policy options', but should not 'give them an unrestricted licence to disregard an individual's rights'.³⁴⁹ In *Manamela*, the Court displays the same awareness of the difficulties associated with determining the availability of less restrictive means, but arrives at a somewhat crisper articulation of the problem: 'The problem for the Court is to give meaning and effect to the factor of less restrictive means without unduly narrowing the range of policy choices available to the Legislature in a specific area.'³⁵⁰ The *Manamela* Court later elaborates upon the fear that it may unduly narrow the range of policy choices available to the legislature:

It will often be possible for a court to conceive of less restrictive means, as Blackmun J has tellingly observed: 'And for me, "least drastic means" is a slippery slope ... A judge would

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be unimaginative indeed if he could not come up with something a little less "drastic" or a little less "restrictive" in almost any situation, and thereby enable himself to vote to strike legislation down.'³⁵¹

343 *Manamela* (supra) at para 42.

344 *Ibid* at paras 49-50.

345 *Ibid* at para 96.

346 *Ibid* at para 97.

347 *Makwanyane* (supra) at para 107.

348 *Ibid*.

349 *Ibid* quoting from *Reference re sections 193 and 195(1)(c) of the Criminal Code (Manitoba)* (1990) 48 CRR 1, 62. See also *R v Chaulk* (1991) 1 CRR (2d) 1, 30; *Tetreault-Gadoury v Canada (Employment and Immigration Commission)* (1991) 4 CRR (2d) 12, 26.

350 *Manamela* (supra) at para 95 (O'Regan J and Cameron AJ dissenting).

The concern that judges, in their insistence that the least restrictive means should be adopted, may end up 'annihilat[ing] the range of choices' available to the legislature³⁵² flows in part from the fact that the question of less restrictive means often raises difficult issues relating to 'cost, practical implementation, the prioritisation of certain social demands and the need to reconcile conflicting interests'.³⁵³ In other words, less restrictive means can often be envisaged, but such means may impose significant administrative burdens on the state, have other substantial cost implications, undermine the state's symbolic objectives or reverse a hierarchy of needs worked out through the political process.

The Court, as we shall see, has contrived an answer of sorts to this challenging problem. That answer appears in its most explicit form in *Mamabolo*, where Kriegler J writes:

Where section 36(1)(e) speaks of less restrictive means it does not postulate an unattainable norm of perfection. The standard is reasonableness. And in any event, in theory less restrictive means can almost invariably be imagined without necessarily precluding a finding of justification under the section. It is but one of the enumerated considerations which have to be weighed in conjunction with one another, and with any others that may be relevant.³⁵⁴

How the Court actually engages the challenges posed by the 'less restrictive means' requirement — and sometimes fails to finesse the problems it poses — is illustrated by two cases: *Prince* and *Christian Education*.

In *Prince*, the Constitutional Court considered a challenge to the constitutionality of a statutory prohibition on the use and the possession of cannabis. The applicant claimed that the relevant legislation did not provide an exemption for the use or possession of cannabis by Rastafari for bona fide religious purposes. All of the judges agreed that the prohibition limited the religious freedom of Rastafari. They disagreed, quite sharply, however, on the question as to whether an exemption would constitute a less restrictive means of achieving the state's objectives.

The minority found that the achievement of the limitation's purpose did not require a complete ban on all uses of cannabis. In their view, the limitation was too broad. The statutory provisions in question targeted uses of cannabis that

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posed no risk of harm and that could be effectively regulated by the state. Such regulation could take the form of an exemption administered by means of a permit system.³⁵⁵

351 *Manamela* (supra) at para 94 quoting from *Illinois State Board of Elections v Socialist Workers Party* 440 US 173, 188-189 (1979). The same point is made elsewhere. See *Mamabolo* (supra) at para 49; John Hart Ely 'Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis' (1975) 88 *Harvard LR* 1482, 1485-87; Peter Hogg *Constitutional Law of Canada* (4th Edition, 1997) 877- 78; Henk Botha 'Rights, Limitations, and the (Im)possibility of Self-Government' in H Botha, A van der Walt & J van der Walt *Rights and Democracy in a Transformative Constitution* (2003) 13, 24-25.

352 *Manamela* (supra) at para 95.

353 *Ibid.*

354 *Mamabolo* (supra) at para 49.

The majority, however, concluded that a permit system would be difficult to enforce, would impose significant financial and administrative burdens on the state, and would fail to protect the Rastafari themselves from the harm caused by the use of cannabis. The majority was especially troubled by the prospect of placing law enforcement officials in the uncomfortable position of having to determine whether a person found in possession of cannabis is a bona fide Rastafarian or merely masquerading as such, or of having to distinguish between a person's legitimate use of cannabis for religious ends or a person's illegal use of the drug for recreational purposes. For these, and other, reasons, the majority concluded the creation of an exemption for the use of cannabis for religious purposes would substantially impair the state's ability to enforce legislation designed to restrict the use of controlled substances.³⁵⁶

In *Christian Education*, the applicants contended that a ban on corporal punishment in independent religious schools violated their right to religious freedom (FC s 15) and religious community practice (FC s 31). The Court assumed, for the sake of argument, that the law limited the parents' religious rights in terms of FC ss 15 and 31. However, a unanimous Court then found the limitation of these rights to be reasonable and justifiable. It rejected the argument that an exemption would constitute an appropriate 'less restrictive means' on the following grounds:

The outlawing of physical punishment in the school accordingly represented more than a pragmatic attempt to deal with disciplinary problems in a new way. It had a principled and symbolic function, manifestly intended to promote respect for the dignity and physical and emotional integrity of all children. It might in appropriate cases be easier to carve out exemptions from general measures that are purely administrative, regulatory or commercial in character than from those that have principled foundations and are deliberately designed to transform national civic consciousness in a major way. Even a few examples of authorised corporal punishment in an institution functioning in the public sphere would do more than simply inconvenience the State or put it to extra expense. The whole symbolic, moral and pedagogical purpose of the measure would be disturbed, and the State's compliance with its duty to protect people from violence would be undermined.³⁵⁷

Both *Prince* and *Christian Education* – two of the Court's more controversial decisions – raise as many questions as they answer about the meaning of 'less restrictive means'. Is a means 'less restrictive' if it is likely to be less effective in

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achieving the limitation's objective?³⁵⁸ Should the least restrictive means always be employed, regardless of the additional costs it imposes on the state? Ought a court to insist on less restrictive means in circumstances where it would require the state to reprioritize needs and to allocate more resources to, say, one area of policing at the expense of others? The answer given by a majority of the Court to all of these questions in *Prince* and *Christian Education* is 'no'.

355 *Prince* (supra) at paras 65–70. Sachs J also suggested the possibility of the decriminalisation of the use of cannabis for sacramental purposes. Ibid at paras 165–169.

356 Ibid at paras 129–142.

357 *Christian Education* (supra) at para 50.

But it would be wrong to conclude from these two cases that the answers will always be so.³⁵⁹ Aware that a rule that required the state to opt for less restrictive means only if such means would not impose significant additional costs would substantially water down limitations analysis, the Court has sought some middle ground between, on the one hand, dictating the basic law's general normative framework and a detailed script for realizing its ideals, and, on the other, undue deference to the state's objectives and the means it chooses to realize them. The apparent result of this 'balancing' act has been to situate the 'less restrictive means' test within the larger balancing exercise under FC s 36. In terms of this approach, the less restrictive means test is just one of several considerations relevant to limitations analysis. As a result, even where less restrictive means are available, the Court may still find that, on balance, the limitation is reasonable and justifiable.³⁶⁰ However, although the Court has stated that the 'less restrictive means' requirement 'does not postulate an unattainable norm of perfection' and has located the actual standard for 'less restrictive means' as 'reasonableness' (which together appear to make the factor redundant), it has indicated that there are a number of variables that determine how much weight it attaches to this fifth and final factor.

(aa) Narrowly tailored

In *Case & Curtis*, Mokgoro J emphasized that, while the courts grant a significant 'margin of appreciation' to the legislature in choosing among different means of

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effectuating its goals, this margin does not apply to provisions whose proscriptive sweep is substantially broader than is reasonably required.³⁶¹ The *Mamabolo* Court similarly noted that, where the legislature can choose from amongst a range of reasonable options, to qualify as 'reasonable' a measure must be carefully and narrowly tailored.³⁶²

(bb) Costs imposed

358 In *De Reuck*, the appellant argued that the prohibition of child pornography was overbroad because it applied to persons who possessed child pornography for the purposes of making a documentary film about child pornography. Even though the Act permits the executive committee of the Film and Publication Board to grant an exemption for the possession of banned materials for 'bona fide purposes', the appellant argued that the exemption procedure was not the least restrictive means available, and that a 'legitimate purpose' defence should be recognized. The Court rejected this contention, and held that a 'legitimate purpose' defence would be open to abuse, and was therefore 'unlikely to be an *effective* less restrictive means'. *De Reuck* (supra) at para 81.

359 See *Prince* (supra) at para 155 ('[L]imitations analysis under section 36 is antithetical to extreme positions which end up setting the irresistible force of democracy and general law enforcement, against the immovable object of constitutionalism and protection of fundamental rights. What it requires is the maximum harmonisation of all the competing considerations.')

360 The idea that the least restrictive measure need not always be chosen by the legislature was also aired during the constitution-making process. Theme Committee Four wrote that when courts compare the limitation in question with other appropriate alternative restrictions, they are not obliged to pick the least restrictive measure: 'Those restricting rights will be left with a discretion to decide on any particular measure within this [acceptable] range; ... this need not be the least restrictive measure viewed in isolation.' Theme Committee Four *Advisors Memorandum to Constitutional Assembly* (14 April 1996)(Manuscript on file with authors).

361 *Case & Curtis* (supra) at para 62.

The Court considers the extent to which less restrictive means would impose an additional administrative burden on the state, lead to problems of implementation, divert valuable resources, unduly narrow the range of policy choices available to the legislature, or otherwise impair the state's efforts to achieve its objectives. Here the state or other party seeking to justify the limitation is obliged to demonstrate that less restrictive means would defeat the state's attempt to achieve its legitimate objectives.

(cc) Extent of the limitation

Where a limitation makes severe inroads into an individual's rights, the Court is more likely to require the state to adopt less restrictive measures, even where such measures would impose substantial additional costs upon the state, or give rise to difficulties of implementation. In *Prince*, the minority concluded that the state was obliged to 'walk the extra mile' for the appellant because of the deleterious consequences the statutory limitations have on the religious life of the Rastafari.³⁶³

(dd) Purpose of the limitation

The last question a court will ask is whether the limitation serves a pressing public interest. If the answer to this question is yes, the Court is more inclined to grant the legislature quite a bit of latitude in its choice of means.³⁶⁴

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(d) Balancing and proportionality

One of the most noteworthy features of the Constitutional Court's limitations jurisprudence is the way it conceives of the relationship between the different factors that need to be considered. The Court understands these factors to be closely interrelated. Far from representing a 'sequential check-list' that can be

362 The Court in *Mamabolo* emphasized that the offence of scandalising the court is to be narrowly construed and to apply only to speech likely to damage the administration of justice. *Mamabolo* (supra) at paras 48-50.

363 *Prince* (supra) at 149. The minority emphasised the outsider status of the Rastafari, their lack of political influence, and the stigma that flows from the law's treatment of adherents as criminals and drug addicts. Ngcobo J wrote that the prohibition

degrades and devalues the followers of the Rastafari religion in our society... It strikes at the very core of their human dignity. It says that their religion is not worthy of protection.

Ibid at para 51.

364 Compare Sachs J's judgment for the Court in *Christian Education* with his dissent in *Prince*. The key to the different conclusions reached by Sachs J in these two cases seems to lie in his statement in *Prince* that 'where there are practices that might fall within a general legal prohibition, but that do not involve any violation of the Bill of Rights, the Constitution obliges the State to walk the extra mile.' *Prince* (supra) at para 149 (emphasis added). This statement must be read together with his statement in *Christian Education* that '[i]t might in appropriate cases be easier to carve out exemptions from general measures that are purely administrative, regulatory or commercial in character than from those that have principled foundations and are deliberately designed to transform national civic consciousness in a major way.' *Christian Education* (supra) at para 50. For Sachs J, the crucial difference between the two cases lies in their objectives: while important, the objective of the limitation in *Prince* is not directly rooted in a constitutional right — an exemption from the ban on cannabis would not, for instance, result in a violation of human dignity, the ban on unfair discrimination or the right not to be subjected to cruel, inhuman and degrading punishment.

adhered to 'mechanically', the factors are to be considered within the broader context of a 'balancing exercise' and a 'global judgment on proportionality'.

This approach has taken many commentators by surprise. Prior to the judgment in *Makwanyane*, it was widely expected that the Court would model its analysis of the reasonableness and justifiability of fundamental-rights limitations on the approach adopted by the Canadian Supreme Court in *R v Oakes*.³⁶⁵ However, the approach of the *Makwanyane* Court represents, in important respects, a significant departure from the *Oakes* test.³⁶⁶ The *Oakes* test proceeds in distinct stages: first, it is asked whether the limitation serves a sufficiently important objective; second, whether the limitation is rationally connected to the said objective; third, whether the limitation impairs the right as little as possible; and fourth, whether the actual benefits of the limitation are proportionate to its deleterious consequences for the rights-holder. The need to consider the second question arises only once the first leg of the test has been satisfied; the third question is addressed only once the first and second questions have been answered in the affirmative, and so on. This sequential exercise is substantially different from an approach grounded in balancing and proportionality.³⁶⁷ Not only is it more structured, but a 'balancing exercise' is undertaken only at the very end of the inquiry, once it has been established that the limitation does serve an important objective, that it is rationally connected to

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such objective, and that it impairs the right as little as possible. If the limitation fails any of the first three legs, the court need not engage in cost-benefit analysis.

That the *Oakes* test should be seen as worthy of emulation in South Africa after 1994 is hardly surprising.³⁶⁸ The test represents a bold attempt to come to terms with the sometimes conflicting doctrines of constitutional supremacy and separation of powers. The *Oakes* test subjects fundamental-rights limitations to rigorous scrutiny, refuses to lend legitimacy to the limitation of rights in the name of a crass utilitarian calculus, links conceptually the grounds for finding a rights infringement to

365 See Stu Woolman 'Riding-the Push-Me-Pull-You: Constructing a Test that Reconciles the Conflicting Interests Which Animate the Limitation Clause' (1994) 10 *SAJHR* 60, 84-90; Gerhard Erasmus 'Limitation and Suspension' in D van Wyk, B de Villiers, J Dugard & D Davis *Rights and Constitutionalism: The New South African Legal Order* (1994) 629, 649; Azar Cachalia, Halton Cheadle, Dennis Davis, Nicholas Haysom, Penuell Maduna & Gilbert Marcus *Fundamental Rights in the New Constitution* (1994) 111-115; George Devenish 'An Examination and Critique of the Limitation Provision of the Bill of Rights in the Interim Constitution' (1995) 10 *SA Public Law* 131, 135-36.

366 Although the *Oakes* test featured prominently in the *Makwanyane* Court's discussion of comparative limitation jurisprudence Chaskalson P was quick to point out that 'there are differences between our Constitution and the Canadian Charter which have a bearing on the way in which section 33 should be dealt with.' *Makwanyane* (supra) at para 110. He gave no indication of what the relevant differences might be, but simply echoed the words of Kentridge AJ in *S v Zuma* that 'I see no reason in this case to fit our analysis into the Canadian pattern.' *Zuma* (supra) at para 35.

367 Cf Peter Hogg 'Canadian Law in the Constitutional Court of South Africa' (1998) 13 *SA Public Law* 1, 7 (Noting that while the factors identified in *Makwanyane* and subsequently listed in FC s 36 'owe a great deal to the language of *Oakes*, it is clear that a more flexible approach to justification is contemplated'.)

368 It may also have something to do with the accessibility of Canadian constitutional materials. South African lawyers generally experience far fewer barriers in trying to come to terms with Canadian constitutional law than, say, German law.

the grounds for finding that such a limitation is justified, and offers a sophisticated understanding of the proper degree of deference the courts owe the legislature.³⁶⁹ Finally, the *Oakes* test promotes analytically rigorous and politically candid judicial reasoning.

(i) Balancing as a bad metaphor

The metaphor of balancing is so deeply embedded in our constitutional discourse that we often use it without giving the actual meaning of the metaphor a second thought.³⁷⁰ Our purpose over the next several sections is to offer (a) several definitions of balancing, (b) a number of trenchant critiques of the practice; and (c) a good faith reconstruction of the Court's doctrines of balancing and proportionality.

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(aa) Definitions of balancing

Balancing means the 'head-to-head' comparison of competing rights, values or interests. It takes two basic forms.

Sometimes balancing means that one right (or interest or value) will simply 'outweigh' another right (or interest or value). For example, in *Makwanyane*, the Court held that the applicant's right not to be subject to cruel, inhuman and degrading punishment (informed by the right to life and the right to human dignity) outweighed the state's interest in the death penalty for the sake of retribution and communal catharsis. In purely clinical terms, the death penalty impaired the right not to be subject to cruel, inhuman and degrading punishment and could not be justified in terms of IC s 33.

Sometimes balancing means 'the striking of a balance' between competing rights or interests. No right is asked to pay the ultimate price. In *Minister of Home Affairs v*

369 See Lorraine Weinrib 'The Supreme Court of Canada and Section One of the Charter' (1988) 10 *Supreme Court LR* 469 (For an analysis of the normative vision and the understanding of institutional roles which inform the *Oakes* test.)

370 See, eg, Johan de Waal 'A Comparative Analysis of the Provisions of German Origin in the Interim Constitution' (1995) 11 *SAJHR* 1, 26 ('[B]alancing is just another way of limiting rights'); Gerhard Erasmus 'Limitation and Suspension' in D van Wyk, B de Villiers, J Dugard & D Davis *Rights and Constitutionalism* (1994) 629, 649-50 ('In order to perform this [limitation] function the judiciary will have to do the necessary balancing throughout'); John Casey *Constitutional Law in Ireland* (1992) 313-14 ('Balancing constitutional rights: On occasion, one person's exercise of his/her constitutional rights will collide heavily with those of others ... [and] courts will obviously have to weigh ... the constitutional rights involved ... to achieve an accommodation'); Paul Sieghart *The International Law of Human Rights* (1991) 94 ('[Limitations analysis] involves a delicate balance between the wishes of the individual and the utilitarian greater good of the majority'); David Currie *The Constitution of the Federal Republic of Germany* (1994) 180 ('If the mystical terminology of reciprocal effect sounds peculiar ... the bottom line of interest balancing does not'); Laurence Tribe *American Constitutional Law* (1988) 792-93 ('[D]eterminations of the reach of first amendment protections ... presuppose some form of "balancing" whether or not they appear to do so'). For talk of 'balancing' in our own jurisprudence, see, eg, *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665, 708 (CC) ('*Makwanyane*') (Proportionality 'calls for the balancing of interests'); *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC), 656, 1995 (10) BCLR 1382 (CC) (Sachs J, concurring) ('[F]aithfulness to the Constitution is best achieved by locating the two-stage balancing process within a holistic, value-based and case-oriented framework.') Philosophers also employ this terminology. See, eg, John Rawls *Political Liberalism* (1993) 243 (Rawls writes that citizens, like members of the court, must 'be able to explain their vote to one another in terms of a reasonable *balance* of public political values' (emphasis added).) The language of balancing is an inevitable part of any utilitarian theory. For a critique of 'balancing' in utilitarian theory, see Bernard Williams 'A Critique of Utilitarianism' in JCC Smart & B Williams (eds) *Utilitarianism: For and Against* (1973) 75.

Fourie, same-sex life partners contended that their rights to equality and to human dignity were impaired by laws that prevented them from entering into civilly-sanctioned marriages.³⁷¹ Leaders of religious and traditional communities contended that the state and the Court had no business demanding that they alter their beliefs or practices to accommodate gay and lesbian unions. The Court split the baby and engaged in this second form of balancing. While acknowledging that the rights of same-sex life partners to equality and to dignity were unjustifiably limited by rules of common law and statutory provisions that prevented them from entering civilly-sanctioned marriages, the *Fourie* Court went out of its way to note that religious prohibitions on gay and lesbian marriage did not constitute an unjustifiable infringement and that religious officials could legitimately refuse to consecrate a marriage between members of a same-sex life partnership.³⁷²

(bb) Critiques of balancing

(w) Pluralism, incommensurability and complexity

Some critiques suggest that the discourse of balancing of constitutional rights, values or interests involves terminological confusion. Other critiques contend that 'balancing', in either of the two forms identified above, is an impossible

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undertaking. Our critique targets both the terminological and the theoretical confusion associated with balancing talk.³⁷³

We do not solely value things in quantitative terms: intensity or utility. We value things in qualitatively different ways. Furthermore, human beings generally do not value just one thing in life. Human beings value a vast array of goods. And we value each good in our own and its own particular way.

This first claim about pluralism and the qualitatively different ways in which we value goods suggests a second claim. Human goods are often incommensurable.³⁷⁴ It is fair to say that the things we value most in life — friends, lovers, work, beauty, nature, and yes, money — cannot be compared with one another. Put differently, while we may be able to compare the virtues of friends with friends, the virtues of

371 *Minister of Home Affairs & Another v Fourie & Another (Doctors for Life International & Others, Amici Curiae); Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) ('*Fourie*').

372 *Ibid* at paras 90-98. See also *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA), 2005 (3) BCLR 241 (SCA) at paras 36-37 (Supreme Court of Appeal also holds that no religious denomination would be compelled to marry gay or lesbian couples.)

373 See *New Jersey v TLO* (1985) 469 US 325, 369 (Brennan J) (Balancing is 'doctrinally destructive nihilism'); *Murray v Ireland* [1985] IR 532 (Balancing talk is often 'misleading'). See also Cass Sunstein 'Conflicting Values in Law' (1994) 62 *Fordham LR* 1661; Cass Sunstein 'Incommensurability and Valuation in Law' (1994) 92 *Michigan LR* 779; ME Blomquist 'Review of Gaurino-Ghezzi and Loughran's *Balancing Juvenile Justice*' (1997) 7 *Law and Politics Book Review* 24, 25 ('[T]he authors' call for "balance" and the vision of "balance" they offer (punishment coexisting with accountability, treatment and respect for the youth's constitutional rights) are neither new, enlightening nor particularly helpful. The problem facing the juvenile justice system is not so much that the system is single minded, but that with its myriad goals, the system has difficulty translating and accomplishing these goals in some meaningful ways. [J]ust why 'balance' should be pursued and valued as highly as the authors advocate is far from clear. As a goal, 'balance' appears to be one more buzz word like "rehabilitation" and "accountability" that is part of the ... lexicon but is not particularly useful because ... it lacks ... content.')

lovers with lovers, the virtues of work with work, the virtues of certain objects of beauty with other objects of beauty, and certainly the virtues of more money with less money, there is no single template against which we can measure claims of friendship, love, work, beauty, nature and money. They may compete with one another. But they compete in a way not easily assessed. Indeed, justice may require us to refrain, in so far as it is possible, from attempts to measure these competing goods by a single yardstick. Michael Walzer puts our second complex claim thus:

There has never been a universal medium of exchange ... [T]here has never been a single criterion, or a single set of interconnected criteria for all distributions. Desert, qualification, birth and blood, friendship, need, free exchange, political loyalty, democratic decision: each has had its place, along with many others, uneasily coexisting, invoked by competing groups, confused with one another.³⁷⁵

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From these observations, Walzer draws the following conclusions. First, goods, like people, have shared meanings in a society, because goods, like people, are a product of social, political, economic, educational, religious and linguistic practices which generate meaning. Second, it is the shared meaning of a good which determines, or should determine, its distribution. Third, and perhaps most importantly for Walzer, when the meanings of social goods are distinct, their distributions must be autonomous. That is, for each good there exists a set of criteria and procedures deemed to be appropriate for its distribution.³⁷⁶

Walzer's view may need to be qualified. The demands of justice — even in a world of plural and incommensurable goods — are, in fact, far more complex than Walzer's account allows. First, spheres of human activity do overlap and thereby complicate the criteria for the distribution of any particular social good. Second, to the extent that some spheres of activity are inextricably linked, it is inevitable that the distribution of one good will influence the distribution of another. Third, given the spontaneous, evolutionary manner in which most spheres of activity have come into being — meaning they are never the product of a single agent — the criteria for the distribution of a social good are rarely going to be clear or conflict-free. The criteria for distribution are also rarely going to conform to a simple lexical ordering. Fourth, not only may criteria within spheres conflict, the individual criteria within the same

374 Other scholars likewise point out the impossibility of measuring conflicting interests against a single metric of value. See, eg, Ted Aleinikoff 'Constitutional Law in the Age of Balancing' (1987) 96 *Yale LJ* 943, 972-76; Mark Tushnet 'An Essay on Rights' (1984) 62 *Texas LR* 1363, 1372-73; Stu Woolman 'Out of Order? Out of Balance? The Limitation Clause of the Final Constitution' (1997) 13 *SAJHR* 102, 114-19.

375 *Spheres of Justice* (1985) 4. See also John Finnis 'On Reason and Authority in *Law's Empire*' (1987) 6 *Law & Philosophy* 357, 374 ('[Once one] strips away the veil hiding the problem of the incommensurability of the criteria proposed for identifying a best or uniquely right interpretation, theory or answer [w]e are left with the metaphor: "balance". But in the absence of any metric which could commensurate the different criteria, the instruction to balance can legitimately mean no more than bear in mind, conscientiously, all the relevant factors, and choose.')

376 Justice, on this account, consists in making sure that a social good is distributed in accordance with the appropriate criteria for that sphere of human activity. Injustice, on the other hand, consists in the use of either inappropriate criteria for the distribution of goods or, more likely, the use of goods accrued in one sphere of social life to determine the distribution of goods in another sphere. For example, the Pope should be selected on the basis of piety, good judgment and knowledge of Catholic dogma, not because he was the son of the previous Pope or has sufficient wealth to renovate the Vatican. Wealth may be an appropriate criterion for the distribution of some goods, but it is not appropriate for ecclesiastical office.

sphere may be so indeterminate as not to yield a clear result in a given instance. Fifth, different goods can sometimes be measured along the same metric. We discover on closer analysis, for example, that friendship and military honour share a common value — loyalty — or we find that two different constitutional norms — equality and expression — undergird a third constitutional commitment — democratic participation.³⁷⁷ Sixth, spheres may not only overlap with one another, or through

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domination effect the unjust distribution of some good, but they may also conflict directly with one another. The internal criteria of two spheres of activity may be such that it is impossible in a given situation to do justice to both. For instance, a commitment to a pristine environment may be completely at odds with a commitment to life, equality and economic development.

Although this account of the relationship between spheres of activity and various goods is somewhat more complex than a pure pluralist account, the fact remains that, in innumerable instances, goods are incommensurable. Hard choices as to which good we pursue have to be made. How do we undertake such decisions? There are, it would appear, three basic options.

One could adopt a strict hierarchy of goods. At one time or another — never all the time — we might pursue any of the goods on our list. However, when recognized goods come into conflict with one another, we would choose to pursue those goods in order of their appearance on some hypothetical list. Neither the Court nor any commentators of whom we are aware advocate this option.

One could choose the preferred good on an ad hoc basis. No good would have primacy of place and each decision as regards a conflict between goods would depend on the exigencies or the particular context of the moment. One critique of the Court's limitations analysis is that it often looks as if it takes place in a rather ad hoc manner. But as the previous descriptive account ought to have made clear, such a charge would be unfair.

One could adopt some combination of the two approaches. One might have a theory of goods which told us which goods were most valued, in what circumstances and why. However, in recognizing the heterogeneity and incommensurability of goods, this theory would not demand a strict hierarchy of goods. For example, if in our theory of goods, egalitarian concerns were privileged over autonomy concerns, we might expect that, where constitutional goods such as equality and expression came into conflict, the former would generally take precedence over the latter.

377 This general account of incommensurability may strike some readers as just a bit too glib. As the fifth point suggests, there are occasions where if we were to think a little more about the nature of the particular values 'at odds', we might make some progress towards resolving the conflict. Values may have either intrinsic worth or instrumental worth or both. If value P is valuable only in its service to Q, then the conflict between P and Q, when it arises, is only apparent. For example, we may believe that democracy (P) is only valuable in so far as it protects individual liberty (Q). Or if P and Q are valuable only in light of their service to R, then when they conflict we *may* be able to make a clear judgement as to which better serves R. So if we were convinced that democracy (P) and equality (Q) were only valuable in so far as they served the value of community (R), then there might be a way of deciding which of the two goods — P or Q — best served R in a particular instance. In addition, even if our Ps, Qs and Rs are incommensurable, there may be some procedures which are better than others for reconsidering our intuitions about these values. Rawls, for example, uses the original position to generate his two principles *and* to defend the priority of the liberty principle over the difference principle. As we suggest below, there may be still other ways — storytelling — of constructively reflecting upon the way we choose between and order incommensurable values.

However, because such a theory recognizes the plurality and incommensurability of goods, there would be circumstances in which we might recognize the priority of the latter over the former. Most importantly perhaps, given our recognition of the complexity of the decisions to be made about the just distribution of goods, as well as the tendency of goods to conflict, we must acknowledge that we cannot map out all of our choices in advance. In fact, there may be many instances in which multiple goods press their claims upon us in ways which cannot be easily settled. We are stuck, in such instances, with hard choices.³⁷⁸

How *should* the Court handle hard choices?

First, the Court must be candid and recognize that there will be situations in which constitutional goods will urge independent and irreconcilable claims upon us: in such situations, we will have to choose between incommensurable goods.³⁷⁹ Second, the Court must acknowledge that it lacks a set of second-order rules which might tell us how to reconcile competing goods with one another.³⁸⁰ Most importantly, the Court must not view the choice of one good over another good in hard cases as arbitrary. Instead, it must be candid about the reasons for its choices and hope that its candour about the reasons for its choices ultimately reflects the exercise of good judgement.³⁸¹

378 See John Finnis 'On Reason and Authority in *Law's Empire*' (1987) 6 *Law & Philosophy* 357, 375 ('A case is hard, in the sense which interests lawyers, when there is more than one right, ie not wrong, answer.')

379 See Charles Larmore *Patterns of Moral Complexity* (1986). Larmore writes in a very similar vein when articulating the following five-fold thesis with regard to the complexity of moral judgement. First, without some external incontrovertible method by which to measure morality, it is inevitable that rational people will not always agree about what decisions to make in a given situation. Secondly, if we recognize the potential for such rational disagreement about what decision to take in given situations, then 'we must reckon with a fundamental heterogeneity of morality. By this I mean that we have an allegiance to several different moral principles that urge independent claims upon us (we cannot plausibly see the one as a means for promoting the other) and so can draw us in irreconcilable directions.' Ibid at 138. Thirdly, given this fundamental heterogeneity of moral values, any ranking of principles is contingent at best. We can expect situations that undermine the ranking and that force us to sacrifice a 'primary' commitment to a 'subordinate' commitment. Fourth, the sacrifice does not mean we simply reverse our order of principles in a given case. There will be many instances in which, as Larmore writes, 'we find that heeding both sorts of ultimate moral commitments is at odds with the way the world is, when we cannot do what they tell us we ought to do, [and that] we cannot entertain revising their authority or suspending judgment. We have to live with the fact that we have [dual] obligations we cannot [simultaneously] honor. Our possibilities in the world are then too narrow for what we know we ought to do.' Ibid at 150. Finally, the application of moral principles requires the capacity to exercise good judgement. The principles do not tell us when they must be applied. The moral situations to which the principles apply do not come to us with labels that we may simply read off. See Laurent Frantz 'Is the First Amendment Law? A Reply to Professor Mendelson' (1963) 51 *California LR* 729, 748 (The balancer, it is said, attempts to measure the immeasurable and to 'compare the incomparable'.)

380 Legal rules may be indeterminate in a number of different ways. A first-order rule may be ambiguous or indeterminate. First-order legal rules may conflict with one another. Second-order legal rules, where they exist, may be equally ambiguous and equally apt to conflict with other second-order rules. For a critical take on this view of indeterminacy and legal rules, see Lawrence Solum 'On the Indeterminacy Crisis: Critiquing Critical Dogma' (1987) 54 *U Chicago LR* 462. See also Anton Fagan 'In Defence of the Obvious: Ordinary Meaning and the Identification of Constitutional Rules' (1995) 11 *SAJHR* 545; Alfred Cockrell 'Rainbow Jurisprudence' (1996) 12 *SAJHR* 1, 5. For a brief discussion of indeterminacy in constitutional interpretation, see Stu Woolman 'Review of Du Plessis' and Corder's *Understanding South Africa's Transitional Bill of Rights*' (1995) 112 *SALJ* 711, 714.

(x) Subjectivity and arbitrariness

Some critics of balancing point out that the Final Constitution — like most constitutional texts — provides little or no guidance as to how a court should determine the relative weight to be attached to conflicting rights and interests. One possible result is that the weighting and the ranking of interests are not

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grounded in constitutional interpretation — and extended and reflected engagement with the meaning of the constitutional text — but based, instead, on the subjective preferences of individual judges.³⁸²

The charge that balancing reinforces non-interpretative tendencies in a bench already loath to make the normative pronouncements that every constitution requires, and creates a mechanism that enables judges to substitute their personal political preferences for the preferences of the democratically-elected branches, inevitably raises important questions about the separation of powers between the legislature and the judiciary. If the mediation of conflicting social interests is understood to be an essentially legislative function, judges ought not to be placed in a position that short-circuits the hurly-burly of the political process.

Realists about the legal process may counter that this argument rests upon a formalist distinction between law and politics (and thus between the legislative function and the judicial function) that never was and never will be an accurate account of what happens in all modern constitutional democracies. What happens, on the realist account, is that politics becomes law, law becomes politics, and politics becomes law in a never-ending cycle of conflict and resolution.

But even realists, among whom we count ourselves, must contend with the spectre of judicial arbitrariness raised by balancing. And, it must be said, we are concerned that this approach to limitations analysis enables judges to skirt the demands that attach to difficult and controversial value-choices by employing the ostensibly neutral, objective or scientific language of balancing.

(y) Incrementalism and conservatism

Balancing is also sometimes associated with a conservative bench. In the United States, balancing got a bad reputation during the McCarthy era, when courts used the language of balancing to validate serious infringements of freedom of expression.³⁸³ Such an account seems to oversimplify the historical record. Balancing has, at various times in history, also been associated with liberal and progressive causes and the extension of constitutional rights and freedoms.³⁸⁴

But even if balancing does not necessarily translate into a readiness to sacrifice individual rights and freedoms in the name of collective interests, there may still be

381 For our preferred approach to reason-giving in hard cases, see the discussion of judicial narratives and storytelling at § 34.8(e)(iii) *infra*.

382 See Aleinikoff (*supra*) at 977 ('Balancing — by transforming any interest implicated by a constitutional case into a constitutional interest — is the ultimate non-interpretivism.') See also Loammi Blaauw-Wolf 'The "Balancing of Interests" with Reference to the Principle of Proportionality and the Doctrine of *Güterabwägung*: A Comparative Analysis' (1999) 14 *SA Public Law* 178, 198.

383 See, eg, *Dennis v United States* 341 US 494 (1951). See also Laurent Frantz 'The First Amendment in the Balance' (1962) 71 *Yale LJ* 1424.

something conservative about it. Balancing is, we think, legitimately associated with a cautious, incrementalist approach to constitutionality inspired judicial law-making. The balancer is inclined to restrict her finding to the case at hand, as the next case may, ostensibly, require that a

different balance be struck. While there may be advantages to such a judicious approach,³⁸⁵ which was indeed a hallmark of the Chaskalson Court, there is growing concern within the academy that the case-by-case approach to constitutional analysis, in general, and limitations analysis, in particular, blunts the transformative potential of the Final Constitution.³⁸⁶

(z) Science and silence

Balancing, some critics suggest, encourages judges to resort to 'scientific' language — ie, cost-benefit analysis. The fear here is that such talk invites a new type of formalism which, like all formalist doctrines, tends to eschew dialogue about important moral and political issues. As Aleinikoff puts it:³⁸⁷

Scientifically styled opinions, written to answer charges of subjectivity, make us spectators as the Court places the various interests on the scales. The weighing mechanism remains a mystery, and the result is simply read off the machine. Scientific balancing decisions are neither opinions nor arguments that can engage us; they are demonstrations.

A related critique is that balancing rests upon the assumption that the primary aim of constitutional law is to mediate between pre-existing interests. These interests are thought to be exogenous to the legal process. Such an approach to constitutional conflicts presupposes an underlying coherence in the law and in society that in heterogeneous polities — such as our own — simply does not exist. Moreover, an underlying assumption of value homogeneity tends to work against the belief of many an honest citizen — and quite a few academics — that political truths are more likely to arise out of dialogic modulation and not the reinforcement of their own

384 See Kathleen Sullivan 'Post-Liberal Judging: The Roles of Categorization and Balancing' (1992) 63 *Univ Colorado LR* 293 ('Post-Liberal')(Describing the dialectical relationship between categorization and balancing.)

385 See Iain Currie 'Judicious Avoidance' (1999) 15 *SAJHR* 138.

386 See, generally, Robert Nagel 'Liberals and Balancing' (1992) 63 *Univ Colorado LR* 319. An incrementalist approach is said to characterize the development of the common law. It has also been criticized as being at odds with the constitutional injunction to develop the common law in view of the spirit, purport and objects of the Bill of Rights. The critique holds that the incrementalist approach leaves many of the conservative assumptions that inform legal rules unchallenged, and thus fails to realise the transformative potential of the Final Constitution. See, eg, André van der Walt 'Tradition on Trial: A Critical Analysis of the Civil-Law Tradition in South African Property Law' (1995) 11 *SAJHR* 169; André van der Walt 'Dancing with Codes — Protecting, Developing and Deconstructing Property Rights in a Constitutional State' (2000) 118 *SALJ* 258.

387 Aleinikoff (*supra*) at 993.

subjective preferences.³⁸⁸ The judge's role in this account of balancing is akin to that of a grocer, rather than a facilitator of, and a participant in, normative dialogue.³⁸⁹

(ii) Balancing as a benign practice

Why then would the Constitutional Court — which so clearly commits itself to the cause of constitutional supremacy, which so self-consciously seeks to establish

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its own institutional legitimacy,³⁹⁰ which so earnestly attempts to articulate a principled jurisprudence,³⁹¹ and which regularly invokes notions of dialogue and shared constitutional interpretation — embrace a judicial method prone to so many real and potential pitfalls? Does this decade-long embrace reflect a lapse of critical reflection and a sociological fact about how deeply ingrained the metaphor of balancing is in legal discourse? Or, rather, is it indicative of the Court's belief that balancing is an indispensable and ineradicable part of limitations analysis, and that, whatever its drawbacks, balancing can somehow be rehabilitated?

Given the Court's natural reticence with respect to discussing such meta-theoretical issues, it is not surprising that the Court's judgments do not provide direct answers to any of these questions. However, after a full decade's worth of limitations jurisprudence, the Court's paper trail is long enough to draw some fairly uncontroversial conclusions about its rationale for choosing balancing and proportionality over other modes of limitations analysis.

First, as we have already noted in the section on drafting history above, the *Oakes* test was already in decline in Canada by the time the Constitutional Court heard its first case in 1995. The Canadian Supreme Court had, in a series of judgments, adopted a significantly more deferential approach to legislative enactments which the state sought to justify in terms of s 1 of the Charter. This softening of the *Oakes* test seems to have gone hand in hand with a growing scepticism within the Court — and within the academy — about the ability of the *Oakes* test to constrain judicial discretion.³⁹² Various justices had noted that, with respect to the 'minimal impairment' leg of the test, a 'less restrictive means' of achieving the law's objective could almost always be conjured up. The Supreme Court's subsequent modification of the minimal impairment or less restrictive means leg deprived the *Oakes* test of much of its vigour and gave rise to the perception in

388 Ibid.

389 Sullivan 'Post-Liberal' (supra) at 293.

390 See Heinz Klug *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (2000); Stu Woolman 'Metaphors and Mirages: Some Marginalia on Choudhry's *The Lochner Era and Comparative Constitutionalism* and Ready-Made Constitutional Narratives' (2005) 20 *SAPR/PL* 281; Theunis Roux 'Legitimizing Transformation: Political Resource Allocation in the South African Constitutional Court' (2003) 10 *Democratization* 92.

391 See Sujit Choudhry 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1999) 74 *Indiana LJ* 819 (Offers an analysis of the way in which the Constitutional Court has sought to ground its jurisprudence in principle.)

392 See, eg, Christopher Dassios & Clifton Prophet 'Charter Section 1: The Decline of Grand Unified Theory and the Trend towards Deference in the Supreme Court of Canada' (1993) 15 *Advocates' Quarterly* 289.

Canada and elsewhere that a step-by-step approach to limitations analysis was not easy to devise and even harder to maintain.

Second, the Constitutional Court's approach seems to be informed by its belief that the FC s 36 factors are so closely intertwined that one cannot consider them in isolation. The Court, as we have seen, maintains that the inquiry into less restrictive means cannot be meaningfully separated from questions about the nature of the right that is limited, the nature and extent of the limitation and

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the importance of the legislative objective. In the Court's view, a global consideration of these factors helps it to contextualize the inquiry into less restrictive means, and assists it in determining the degree of deference appropriate in a particular case.

Third, the softening and the modification of the *Oakes* test and the early Constitutional Court's persistent assertion of the interdependence of the FC s 36 factors makes its ultimate conclusion that FC s 36 requires a 'global' judgment based on proportionality and balancing appear more plausible. It is certainly true that the Court's 'global proportionality' approach makes it easier for the Court to demonstrate the appropriate degree of deference to the political branches of government.

Finally, the Constitutional Court seems confident that it can avoid some of the pitfalls commonly associated with a balancing approach. This confidence flows — on the Court's own account — from the manner in which the factors enumerated in FC s 36 actually do structure and constrain the inquiry into the proportionality of impugned measures. That is, the factors do not need to represent a closed list considered in a strict sequence to provide sufficient focus for the Court's inquiry. The Court contends that FC s 36 and its five factors are designed to facilitate a nuanced engagement with the particular factual and legislative setting and not to resolve value conflicts in the abstract. The balancing exercise to be undertaken under FC s 36 should be an exercise in practical reasoning and good judgement.³⁹³ If practical reasoning and good judgement in the Aristotelian sense is what matters most, then the Constitutional Court's notion of balancing has nothing to do with the 'accuracy' of the weights it attaches to conflicting interests, but rather hinges on the extent to which its judgments engage with particular social contexts and offer persuasive accounts of the basis for the outcome.

Assuming the Constitutional Court is correct about the nature of its preferred approach to limitations analysis, the real question is whether the Court lives up to its ideal. Does balancing, as practised by this Court, lead to a nuanced and context-sensitive limitations jurisprudence that promotes candid consideration of conflicting interests and facilitates shared constitutional interpretation with the coordinate branches of government? The most charitable conclusion we can offer is that the Court's current record is inconclusive. Sometimes the Court's balancing and global assessment of proportionality results in a style of judicial reasoning which masks the actual basis for controversial value choices. On other occasions, the Court's use of balancing as a form of practical reasoning would appear to advance open and candid consideration of conflicting interests. In the

393 See *Prince* (supra) at para 151 (In the words of Sachs J, the weighing of interests 'does not take place on weightless scales of pure logic pivoted on a friction-free fulcrum of abstract rationality', but has to be done 'in the context of a lived and experienced historical, sociological and imaginative reality.')

end, we remain 'balancing' sceptics because the metaphor's open-texture tends to promote closure rather than candour.³⁹⁴

(e) A thick(er) conception of limitations analysis

In this section, we offer a preferred reading of FC s 36 — one which we believe will help courts to think more clearly about the demands that limitations analysis places on various actors in our constitutional democracy. This preferred reading does not proffer a 'grand unified theory'. Our account begins, instead, by addressing serious concerns about institutional comity in a constitutional democracy and by articulating what we, and others, have described as the Final Constitution's call for 'shared constitutional interpretation'. After suggesting the contours of a doctrine that would enable the courts to share 'constitutional competence' with other political actors — and thus mediate the competing doctrinal claims of constitutional supremacy and of separation of powers — we ask whether the Constitutional Court's extant jurisprudence provides sufficient normative content to guide lower courts and other actors interested in participating in this shared interpretive endeavour. What we see is, on the one hand, a rather cursory attempt to reconcile the primary values that underlie fundamental rights analysis and limitations analysis — openness, democracy, human dignity equality and freedom — and a more deeply entrenched privileging of the value of human dignity, on the other. We do not deny the centrality of dignity to our constitutional project — our dignity jurisprudence may even be, with the principle of legality, one of our two most important contributions to the larger world of international or comparative constitutional law. We do take issue with the Court's tendency to reduce the other four values to manifestations of dignity, and its record of having little to say about the meaning of 'democracy' in our basic law — something of a surprise given the success of South Africa's transition from fascism to democracy. Having established that our five basic values may well be incommensurable in some sets of circumstances and that balancing does little to address such incommensurability, we end our discussion

by suggesting a methodology for constructing judicial narratives that may be of some use to courts faced with cases that challenge our ability to accommodate marginal groups or that require other forms of hard choices.

(i) Shared constitutional interpretation³⁹⁵

394 Even if it is true that the exercise in balancing favoured by the Constitutional Court allows for an open and candid consideration of conflicting interests and a nuanced engagement with the social and legislative context, it is still not clear whether this approach is adequately understood by the political branches, or has filtered down to the lower courts. This sociological fact raises the question as to whether the sequential inquiry formulated in *Oakes* would not be more conducive to shared constitutional interpretation. Wouldn't the application of the *Oakes* test signal far more unequivocally to the legislature what exactly needs to be remedied with respect to a legislative provision found to be unconstitutional? Moreover, wouldn't the more structured *Oakes* inquiry make it easier for social actors to anticipate what limitations would or would not pass constitutional muster, and to adapt their actions accordingly? In addition, aren't lower courts less likely to make a hash of the more systematic *Oakes* inquiry? A Constitutional Court that takes some pride in its ability to avoid constitutional issues, and saying no more than is necessary about those issues, is unlikely to produce a corpus of judgments that constrain judicial and non-judicial actors. Roach and Budlender's rather pessimistic analysis suggests that many state actors are either incapable of understanding rules generated by the Constitutional Court (as they are currently constructed) or are wilfully ignoring them. See Kent Roach & Geoff Budlender 'South African Law on Mandatory Relief and Supervisory Jurisdiction' (2005) 122 *SALJ* 325.

Our approach to limitations analysis in particular, and to constitutional interpretation in general, suggests that Bill of Rights litigation, rightly conceived, ought to reflect a dialogue about the meaning of fundamental rights and the cogency of justifications offered for their limitation.³⁹⁶ From this perspective, powers of judicial review are best understood, not as part of a battle for ascendancy between courts and legislatures (though they may turn into that), or a means of frustrating the will of the political majority, but, rather, as a shared project of constitutional

interpretation.³⁹⁷ What is 'shared constitutional interpretation' exactly? In short, shared constitutional interpretation stands for five basic propositions:

395 See Stu Woolman 'The Selfless Constitution: Flourishing and Experimentation as the Foundations of the South African State' (2006) 21 *SA Public Law* (forthcoming). As one of the authors has argued elsewhere at length, talk of 'shared constitutional interpretation' is meant to draw our attention to the kinds of institutional arrangements that are most likely to realize the five basic ends of the South African state. First, the radical givenness of the ends of individuals and groups suggests that the South African state is under a constitutional obligation to protect those ways of being in the world that do not vitiate its core commitments to such goods as rough equality, tolerance, dignity and democratic participation. Civil and political rights protect extant ways of being in the world. Second, South Africa's history of radical inequality in resource allocation requires a particular form of redress. The South African state is under a constitutional obligation to ensure that historically marginalized groups have access to the requisite stocks of political and economic capital necessary to sustain preferred sources of the self. Third, consistent with the Final Constitution's core commitments, the South African state must ensure that its citizens are not held hostage by ways of being in the world that diminish individual flourishing. This concern is more about the ability of individuals to exit repressive communities than it is about creating novel conditions for flourishing. But that does not mean that state intervention on behalf of coerced individuals will not have such a knock-on novelty effect. Fourth, state intervention on behalf of such persons may just shake up existing social hierarchies in a manner that creates new ways of being in the world. Similarly, our commitment to experimentalism is predicated upon the notion that existing ways of being will fail both to facilitate the realization of existing ends and to recognize those ends within which happiness truly resides. Fifth, the experimental constitutionalism that gives rise to a doctrine of 'shared constitutional interpretation' is ultimately pragmatic about the means and the ends of life. See Michael Dorf & Charles Sabel 'A Constitution of Democratic Experimentalism' (1998) 98 *Columbia LR* 267. It holds no end to be beyond criticism and immune to reform. Consistent with its pragmatic roots, it recognizes the reciprocal relationship between means and ends. That is, experimental constitutionalism understands that a change in the way one goes about pursuing the ends of life may ultimately change the ends that one pursues.

396 See *S v Mhlungu* 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC) at para 129 (Constitutional interpretation takes the form of 'a principled judicial dialogue, in the first place between members of this Court, then between our Court and other courts, the legal profession, law schools, Parliament, and, indirectly, with the public at large.'). See also David Beatty 'The End of Law: At Least as We Have Known It' in Robert Devlin (ed) *Constitutional Interpretation* (1991) 22; Peter Hogg & Allison Bushell 'The Charter Dialogue between Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)' (1997) 35 *Osgoode Hall LJ* 75; Henk Botha 'Rights, Limitations, and the (Im)possibility of Self-government' in H Botha, A van der Walt & J van der Walt *Rights and Democracy in a Transformative Constitution* (eds) (2003) 13, 24–25.

397 Our account of shared constitutional interpretation does not rest upon some fiction that a perfect distribution of institutional roles between the judiciary, the legislature and the executive exists. On the contrary, we recognize that 'shared constitutional competence' can turn into a political battle between the courts and the political branches. Shared constitutional interpretation is best understood as a means of minimizing the potential for such conflict and remaining alive to the limits of constitutional adjudication with respect to hotly contested political questions. We are grateful to Johan van der Walt for his helpful comments in this regard. Johan van der Walt 'Reply to Woolman and Botha on Limitations' in M Bishop, D Brand & S Woolman (eds) *Constitutional Conversations: Proceedings of the Constitutional Law of South Africa Conference and Public Lecture Series* (2007). The original reply is available at www.chr.up.ac.za/closa.

First. It supplants the notion of judicial supremacy with respect to constitutional interpretation. All branches of government have a relatively equal stake in giving our basic law content. Second. It draws attention to a shift in the status of court-driven constitutional doctrine. While courts retain the power to determine the content of any given provision, a commitment to shared constitutional interpretation means that a court's reading of the constitutional text is not meant to exhaust all possible readings. To the extent that a court consciously limits the reach of its holding regarding the meaning of a given provision, the rest of the judgment should read as an invitation to the co-ordinate branches or other organs of state to come up with their own alternative, but ultimately consistent, gloss on the text. Third. Shared constitutional competence married to a rather open-ended or provisional understanding of the content of the basic law is meant to increase the opportunities to see how different doctrines operate in practice and maintain the space necessary to make revision of constitutional doctrines possible in light of new experience and novel demands. In this regard, the Constitutional Court might be understood to engage in norm-setting behaviour that provides guidance to other state actors without foreclosing the possibility of other effective safeguards for rights or other useful methods for their realization. Fourth. A commitment to shared interpretations ratchets down the conflict between co-ordinate branches and levels of government. Instead of an arid commitment to separation of powers — and empty rhetorical flourishes about courts engaging in legal interpretation not politics — courts are freed of the burden of having to provide a theory of everything and can set about articulating a general framework within which different understandings of the basic text can co-exist. The courts and all other actors have more to gain from seeing how variations on a given constitutional norm work in practice. Fifth. This experimentalist framework ought to reveal 'best practices' with respect to the realization of constitutional objectives. These 'best practices' should, in turn, offer the courts, the political branches and the citizenry regular opportunities to re-think the meaning — and the constraints — of our basic law.³⁹⁸

Ackermann J, in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, gives expression to just the sort of institutional comity we have in mind when he writes that:

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It should also be borne in mind that whether the remedy a Court grants is one striking down, wholly or in part; or reading into or extending the text, its choice is not final. Legislatures are able, within constitutional limits, to amend the remedy, whether by re-enacting equal benefits, further extending benefits, reducing them, amending them, 'fine-tuning' them or abolishing them.³⁹⁹

Shared responsibility for interpreting the Final Constitution does have its limits. The legislature must make a good-faith attempt to revisit an issue in a new and constitutionally permissible way. Where, as in *Satchwell I* and *II*, Parliament refuses to take seriously a previous finding of constitutional invalidity, the courts are well within their rights to rebuff subsequent attempts to re-enact, in modified form, the offending statutory and regulatory framework.⁴⁰⁰

398 See Stu Woolman 'The Selfless Constitution: Flourishing and Experimentation as the Foundations of the South African State' (2006) 21 *SA Public Law* (forthcoming). For the original source for this theory of constitutional interpretation, see Michael Dorf & Barry Friedman 'Shared Constitutional Interpretation' (2000) 2000 *Sup Ct Rev* 61. See also *National Education Health and Allied Workers Union v University of Cape Town & Others* 2003 (3) SA 1 (CC), 2003 (2) BCLR 154 (CC) at para 14 (Constitutional Court expressly recognized that the process of interpreting the Labour Relations Act 66 of 1995 in light of the demands of FC ss 39(2) and 23(1) requires an appreciation of the legislature and the courts' shared responsibility for interpreting the Final Constitution.)

399 2000 (2) SA 1 (CC), 2000 (1) BCLR 39(CC) ('*NCGLE II*') at para 76.

How then does shared constitutional interpretation inform our general approach to limitations analysis?⁴⁰¹ As we argued in §§ 34.3, 34.4 and 34.5

above, the two-part structure of Bill of Rights analysis contains an invitation to non-judicial actors to alter the Constitutional Court's take on the basic law. By explicitly separating out the process of defining the ambit of a right and the process of determining the appropriateness of any limitation, the Bill of Rights avoids creating a world where the outcome of a legal dispute is tied entirely to rights definition. For example, in American constitutional law, once a particular type of conduct is deemed to fall within the protected ambit of a fundamental right, any law limiting the exercise of the conduct concerned is more than likely to be invalidated in terms of a strict scrutiny standard.⁴⁰² The two-part structure of Bill of Rights analysis has enabled the Constitutional Court to avoid rigid categories and to acknowledge the role of other state institutions in interpreting the provisions of the Final Constitution.

The two-part structure of Bill of Rights analysis has two further benefits when viewed through the lens of shared constitutional interpretation. First, a relatively precise, if nuanced, approach to limitations analysis creates the space for a fairly fastidious treatment of rights interpretation. Second, the Court is at its best, and its

400 *Satchwell v President of the Republic of South Africa* 2003 (4) SA 266 (CC), 2004 (1) BCLR 1 (CC) ('*Satchwell II*'); *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC) ('*Satchwell I*'). In *Satchwell II*, the Constitutional Court was asked to assess the constitutionality of a statutory and regulatory framework almost identical to one that it had declared unconstitutional only a year earlier in *Satchwell I*. In *Satchwell I*, the Constitutional Court had declared ss 8 and 9 of the Judges' Remuneration and Conditions of Employment Act 88 of 1989 unconstitutional because they discriminated against homosexual judges' same-sex partners. The *Satchwell I* Court ordered that the words 'or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support' be read into the provisions after the word 'spouse'. Subsequent to the judgment in *Satchwell I*, Parliament promulgated a new Act, the Judges' Remuneration and Conditions of Employment Act 47 of 2001. This Act took no notice of the *Satchwell I* Court's order. In *Satchwell II*, the Constitutional Court refused to accord Parliament any deference, declared the new provisions discriminatory, and read the words 'or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support' into the new legislation.

401 Shared constitutional interpretation is Michael Dorf's inestimably valuable contribution to recent constitutional scholarship. As Michael Dorf and Barry Friedman describe it, the 'invitations' by the US Supreme Court to Congress and state legislatures to share responsibility for giving various constitutional provisions content have been going on for some time. As has been noted elsewhere in this text, Dorf and Friedman use the cases of *Miranda* and *Dickerson* to great effect in explaining how shared constitutional interpretation does — and might — work. *Miranda v Arizona* 384 US 436 (1966) ('*Miranda*'); *US v Dickerson* 530 US 428 (2000) ('*Dickerson*'). As any viewer of US police dramas knows, *Miranda* articulated the warnings to persons arrested by the police custody that must precede any custodial interrogation. What few viewers, and perhaps few academics, appreciate is the extent to which most of those warnings were intended as judicial guidelines and not excavations of constitutional bedrock. The *Miranda* Court, as Dorf and Friedman point out:

explains that it granted certiorari 'to explore some facets of the problems ... of applying the privilege against self-incrimination to in-custody interrogation, and to give concrete constitutional guidelines for law enforcement agencies and courts to follow.' The Court sets out its 'holding' at the outset, and that holding is only that the prosecution may not use statements made in custodial interrogation 'unless it demonstrates the use of procedural safeguards effective to secure' the privilege. And '[a]s for the procedural safeguards to be employed, unless other fully effective means are devised to inform the accused persons of their right of silence and to assure a continuous opportunity to exercise it' the specific *Miranda* guidelines are required. The Court then devotes an entire paragraph to encouraging governmental bodies to devise their own ways of safeguarding the right. At least twice more, the Court repeats the holding and re-extends the invitation.

most comfortable, when it speaks to the parameters of the 'constitutional' and is not asked to become an oracle of the 'optimal'.⁴⁰³

However, the promise of shared constitutional interpretation will not be fulfilled if the courts continue to rely exclusively on the metaphor of balancing.

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Constitutional challenges to public or private practices typically pose the following problems for traditional adjudication: (1) epistemic hurdles in adapting the legal language to render faithfully important facts and ideas from particular communities and contexts;⁴⁰⁴ (2) evaluative obstacles when courts need to weigh conflicting

Michael Dorf & Barry Friedman 'Shared Constitutional Interpretation' (2000) 2000 *Sup Ct Rev* 61, 81-83 citing *Miranda* (supra) at 441-490. Congress accepted the invitation. But as the judgment in *Dickerson* reflects, it wilfully misconstrued the nature of the invitation. Congress did not, as the Supreme Court suggested, come up with equally effective ways of safeguarding the right to remain silent and not to have statements made in custodial interrogation used by the prosecution unless adequate safeguards have been put in place. Instead, Congress simply enacted as legislation the pre-*Miranda* test that the voluntariness of a confession would be assessed in terms of a totality of the circumstances. The *Miranda*-specific warnings were merely included as factors to be taken into account when determining voluntariness. Not surprisingly, the *Dickerson* Court rejected Congress' 'new' take on the voluntariness of custodial confessions. It did so, as Dorf and Friedman argue, because Congress had failed to take seriously the Court's concern with the 'compulsion inherent in custodial interrogation' and had failed to offer an alternative that could be deemed 'equally effective' in ameliorating this compulsion. Dorf & Friedman (supra) at 71.

While the 34 years between *Miranda* and *Dickerson* might have witnessed confusing dicta from the Court regarding the status and the reach of the holding in *Miranda*, Dorf and Friedman convincingly show that Congress and other government actors did indeed possess significant space to place their own gloss on the Fifth Amendment's protections. What they were not free to do was ignore entirely even the most limited construction of the Court's holding.

402 For a compelling account of the dilemmas posed by one-stage fundamental rights analysis, see Laurence Tribe & Michael Dorf 'Levels of Generality in the Definition of Rights' (1990) 57 *University of Chicago LR* 1057.

403 See, especially, *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 27 ('First and foremost it must be emphasised that the Court has a judicial and not a political mandate. Its function is clearly spelt out in IC 71(2): to certify whether all the provisions of the NT comply with the CPs. That is a judicial function, a legal exercise. Admittedly a constitution, by its very nature, deals with the extent, limitations and exercise of political power as also with the relationship between political entities and with the relationship between the state and persons. But this Court has no power, no mandate and no right to express any view on the political choices made by the CA in drafting the NT, save to the extent that such choices may be relevant either to compliance or non-compliance with the CPs. Subject to that qualification, the wisdom or otherwise of any provision of the NT is not this Court's business.')

404 Although courts have the institutional advantage of being able to structure the scope of fact-finding through discovery, they nonetheless face the epistemic problem of translating values and concerns from a specific social context into more generalizable legal terms. This problem is particularly acute for cases involving more insular communities. The insularity of such communities at once places their rights most at risk of infringement and also renders it more difficult to communicate their norms and ideas to an outside audience. As noted earlier, our narrative identities are partially constituted by the norms of our communities. Along with those identities, people inherit a vocabulary to express communal norms. Such a vocabulary may or may not correspond to the legal vocabulary. In commenting on the American Mennonites' *amicus curiae* brief in *Bob Jones University v United States*, Robert Cover characterized the Mennonite understanding of the First Amendment as not 'simply the "position" of an advocate.' According to Cover, 'the Mennonites inhabit an ongoing *nomos* that must be marked off by a normative boundary from the realm of civil coercion, just as the wielders of state power must establish their boundary with a religious community's resistance and autonomy.' Robert Cover '1982 Term

values against a background of norms grounded in particular contexts;⁴⁰⁵ and (3) the complexity of structuring suitable institutional remedies.⁴⁰⁶ Balancing blocks meaningful analysis of the facts in difficult cases because it substitutes an empty image for the more difficult task of information-gathering, norm-setting and remedy creation. It thereby risks increased judicial deference to existing practices and, consequently, the systematic under-enforcement of important rights.

To overcome the poverty of the existing approach to limitations analysis, South African courts may be well-served by embracing a more 'experimentalist' approach. Indeed, the open-ended, fact-driven framework of limitations analysis invites litigants — and other stakeholders — to participate more directly in the vetting of possible solutions to the legal problem confronting the court. Such an invitation to the parties to get their hands dirty enables the courts to overcome both their own limited administrative capacity and their often enervating reliance on the good faith of the various parties. More importantly, the invitation to the parties to expand their

Foreword: Nomos and Narrative' (1983) 97 *Harvard LR* 4, 28 citing *Bob Jones University v United States* 46 US 461 (1983).

405 The second challenge for the court is how to evaluate competing norms on complex moral terrain. *Jordan* provides a good illustration of this two-fold challenge: the norms of gender equality, of private autonomy, of public morality, and of resistance to conformity-inspired policies all exert their pull — and often in opposite directions simultaneously.

406 A related but more problematic scenario is where courts fail to recognize possibilities for rendering the competing values compatible and structuring solutions acceptable to all parties. There is ground to fear that such errors may be quite common in 'hard' cases on account of the courts' lack of familiarity with the norms at stake. Moreover, as Dorf, Sturm and others have argued, the solution may not be apparent, even to the participants, until they engage in a process of deliberation and adjustment. See Michael Dorf 'The Domain of Reflexive Law' (2003) 103 *Columbia LR* 384, 399 (Noting that the dynamic nature of deliberation and implementation may create novel solutions to seemingly intractable conflicts because 'reflexivity goes both up and down, local participation always has ingredient in it the prospect of changing the principal norm.') However, the courts' general inability to distinguish a 'hard' case from a genuine 'clash of absolutes' creates a substantial likelihood of more decisions content to err on the side of caution and to opt against finding existing practices to be unreasonable limitations. The standard conservative approach placates legitimate concerns about the limits of judicial expertise at managing institutional reform and a need to preserve the institutional legitimacy of the judiciary. The upshot is, however, that the government or powerful private institutions will not be required to walk that 'extra mile'. See *Prince* (supra) at para 149 (Sachs J) ('I align myself with the position that where there are practices that might fall within a general legal prohibition, but that do not involve any violation of the Bill of Rights, the Constitution obliges the State to walk the extra mile.')

The likelihood of under-enforcement of fundamental rights is further compounded by our courts' typical and justifiable reluctance to wade into the complex regions of institutional reform. Traditionally, courts are confronted with two unpalatable choices when attempting to transform institutions guilty of systematic rights violations. Either they become involved in the administration of reform and must scrutinize each detail of proposed changes. Or they abstain from active supervision and intervene only to prevent instances of explicit 'bad faith'. The challenges for courts in administering traditional institutional reforms are substantial, both in time, resources and in administrative oversight. See *Lewis v Casey* 518 US 343, 347 (1996) (The case involved an appeal from a consent decree entered in a piece of prison reform litigation. '[The injunction] specified in minute detail the times that libraries were to be kept open, the number of hours of library use to which each inmate was entitled (10 per week), the minimal educational requirements for prison librarians (a library science degree, law degree, or paralegal degree), the content of a videotaped legal-research course for inmates (to be prepared by persons appointed by the special master but funded by ADOC), and similar matters.') See also Charles Sabel & William Simon 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117 *Harvard LR* 1015, 1021-53 (For other examples of the degree to which federal courts in the United States became involved in the administrative oversight of public institutions like schools, housing, and mental health units.)

legal strategies, from competing claims with zero-sum outcomes to more optimal solutions grounded in compromises from which all parties believe they may benefit, enables the courts to reap the problem-solving potential inherent in collective deliberation.

An experimentalist perspective on limitations analysis proceeds from the recognition that the determination of the 'reasonableness' of a limitation and the identification of the best of all possible remedies are interdependent processes. This experimentalist perspective also recognizes how exceedingly difficult it is to discover the 'right' answer — or remedy — from an outsider's perspective.⁴⁰⁷ Indeed, the notion of a single 'right' answer in such a complex context — in advance of any attempt to mediate the competing positions — is itself suspect.⁴⁰⁸ As Susan Sturm has observed in connection with workplace discrimination, changes in legal doctrine shape people's expectations. The new legal doctrine thereby reconstructs their identities, beliefs and behaviour. Such an evolutionary process — a function

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of the law as an experimental feedback mechanism — can gradually transform the nature of the problem as originally perceived.⁴⁰⁹

Confronted with such complexity, the task for the courts is not to undertake Herculean quests for perfect theoretical answers or to retreat into the quietism of deference to administrative decisions and private ordering. Our preferred experimentalist perspective possesses two important advantages. First, by acknowledging the difficulty of finding the 'right' answer, *ex ante*, courts with a problem-solving perspective must create mechanisms (including legal doctrines) that gather relevant information, generate proposed reforms and relay feedback quickly. Second, given the potential for unintended consequences that flow from adaptive processes triggered by shifting legal principles, a problem-solving perspective implements each set of solutions tentatively and is ready to modify it on the basis of empirical evidence.⁴¹⁰ The experimentalist approach calls for mechanisms that compare the information generated by different proposals and allow for the adoption of successful solutions.⁴¹¹

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407 See Michael Dorf '1997 Supreme Court Term Foreword: The Limits of Socratic Deliberation' (1998) 112 *Harvard LR* 4.

408 This recognition is one of the hallmarks of the sociological concepts of complexity and emergence. To observe that social systems are complex is not tantamount to rejecting the possibility of systematic, scientific understanding. Rather, as Lee McIntyre notes, complexity relates to our knowledge of the world at a particular level of description. It does not rebut the possibility of (social) scientific explanations at another level. See Lee McIntyre 'Complexity and Social Scientific Laws' (1993) 97 *Synthese* 209–227.

409 See Dorf 'The Domain of Reflexive Law' (*supra*) at 399–400 (Observes the dynamic character of social change resulting from new legal protections.) As the partial success of 'rational expectations' theory in macroeconomics demonstrates, some adaptive processes can be modelled very effectively (some of the time). See Steven Sheffrin *Rational Expectations* (1996). However, there are good reasons for doubting whether models of similar precision can be designed for contexts as diverse and unpredictable as personal intimacy (*Jordan*) or religious worship (*Prince*).

410 See, eg, Michael Dorf, 'Legal Indeterminism and Institutional Design' (2004) 78 *New York University LR* 875, 920–935 and 960–970.

Of course, courts called upon to perform limitations analysis cannot avoid conflicts that are not susceptible to deliberative solutions. Here again experimental constitutionalism offers the additional idea of provisional adjudication. Provisional adjudication puts alternative possible remedies to the test of experience without necessarily elevating such remedies to the level of established doctrine. Provisional adjudication promises two additional benefits. First, it may facilitate compromise. Affected parties may learn from practical experience and adjust their beliefs and conduct accordingly. Second, it gives parties that may have been aggrieved by a final non-provisional outcome the opportunity to experiment with a remedy of their own making.

But suppose that such provisional space fails to yield a desirable — let us say, from the view of the state — outcome. A finding of unconstitutionality generally still leaves the legislature free to pursue the same objectives, but requires it to use

411 Another solution conducive to easing the strain of rights analysis is for courts to fashion structural interdicts that create forums for participatory deliberation. That is, instead of shouldering the immense burden of creating both the substantive goals and the procedures for institutional reforms, courts can shift the burden to the various stakeholders. The more limited — but no less important — function would be to play the role of a referee who polices the rules for negotiation between the stakeholders. This approach elicits the tacit knowledge and reflective capacities of the stakeholders in a particular controversy. For only these stakeholders possess the ability to overcome the underlying epistemic and evaluative obstacles that confront the courts. See Jonathan Klaaren 'A Second Look at the South African Human Rights Commission, Access to Information, and the Promotion of Socio-economic Rights' — *Human Rights Quarterly* — (forthcoming, manuscript on file with author)(Drawing on experimentalist principles in EU regulatory regimes as the basis for advocating that the SAHRC be responsible for gathering and disbursing information regarding the government's progress in fulfilling the promise of socio-economic rights.)

How might this novel approach to limitations analysis (plus structural injunctions) work? Assume that a court is faced with the prospect of undertaking a limitations analysis in a very complex factual and normative dispute. By issuing a temporary interdict, a court can presume — momentarily — the fact of violation and require the parties to adduce further evidence in support of or in opposition to the limitation of the right. In addition, the temporary interdict may enable the parties — and other interested — stakeholders to search for a mutually agreeable remedy. See Susan Sturm 'The Promise of Participation' (1993) 78 *Iowa LR* 981 (Argues that participation of stakeholders in the negotiation process initiated by a structural injunction offers important benefits.)

The potential benefits of this approach are several-fold. First, the stakeholders are more likely to be familiar with those norms at issue. Their enhanced participation in both the limitations analysis and the construction of remedies eases the strain of translating ideas internal to their way of being in the world into legal parlance. Furthermore, through its injunctive powers, a court can structure the negotiation process in a manner that fosters participation. This court-enforced structure should improve the likelihood of finding solutions to seemingly intractable ethical conflicts. This participatory bubble may transform some parties' perception of the interests at stake or it may elicit compromises that all sides come to regard as fair. Finally, the process of participatory negotiation will alleviate the strain that institutional reforms place upon judicial resources. As Sabel and Simon have argued, such a use of limitations analysis and structural injunctions generates effective and legitimate solutions and replaces, at least partially, the need for constant judicial oversight. See Charles Sabel & William Simon 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117 *Harvard LR* 1015, 1067–82. However, deliberation and participation are not the elixir to all conflicts between constitutional rights and public policy as manifest in law. As social science has documented in countless experiments, placing people in deliberative groups may lead to the polarization of perspectives instead of the universal adoption of a reflexive stance. See Cass Sunstein *Designing Democracy: What Constitutions Do* (2001)(Discussion of the practical barriers to effective deliberation, especially the phenomenon of group polarization.) Accordingly, institutional mechanisms are required to ensure that the conditions of negotiation are conducive for genuine deliberation. Unless the participatory bubble of a structural injunction ensures the ability of the parties to voice their concerns equally, the court-structured deliberative process may simply become a front for further domination of some parties by others. Shared constitutional interpretation requires structures that encourage those involved in deliberation to adopt flexible attitudes toward the conflicts they confront.

means that better fit — in the sense of being more narrowly tailored to — constitutional imperatives. It is, therefore, clear that the courts do not have the final word on the meaning of the constitutional text in two very important respects. First, just as the legislature must pay heed to the Court's reasons for a finding of unconstitutionality when offering a new formulation of a law, so too must the Court demonstrate discernible deference to the legislature's reformulation.⁴¹² The very fact of a limitations clause in our Bill of Rights demands that the courts give the political branches of government ample opportunity to demonstrate that a new and improved law can achieve the desired objectives within the framework established by the Final Constitution.⁴¹³ Second, the ability of our

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elected representatives to amend the basic law itself — so long as they follow the appropriate procedures and do not violate its basic structure — means that the people always have the final word.

(ii) Norms: 'an open and democratic society based upon human dignity, equality and freedom'

(aa) Intersection, convergence and conflict amongst constitutional values

We have described in the preceding pages an approach to limitations analysis that simultaneously answers 'deep' questions about institutional comity in a constitutional democracy and adumbrates an analytical framework that responds to concerns about judicial usurpation of legislative prerogatives and the alleged inability of courts to resolve polycentric social problems. What we have not described, in even the most superficial way, is how the courts go about determining the 'normative' content of limitations analysis.

That normative content for limitations analysis turns on the phrase 'an open and democratic society based on human dignity, equality and freedom'. Determining the meaning of this phrase is fraught with interpretive difficulties as old as political theory itself. There are, for starters, the tensions between democracy and rights, between equality and freedom, and the deeply contested nature of each of these terms.⁴¹⁴

Before turning to the ways in which our courts have attempted to make sense of this complex phrase, a few observations are in order. First of all, FC s 36 — unlike

412 This proposition remains true even where the court remedies the constitutional defect by reading words into the provision. See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) at para 84.

413 Even where the courts refuse to acquiesce, Parliament possesses the power to amend the Final Constitution. In *UDM*, the Court struck down, on relatively technical grounds, floor-crossing legislation for Parliament and the provincial legislatures. *United Democratic Movement v President of the Republic of South Africa & Others (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa & Another as Amici Curiae)* (No 2) 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC) ('*UDM*'). The response by Parliament was to pass an amendment to the Final Constitution that yielded the desired result.

414 Consider the meaning of 'openness' in a heterogeneous society. Official recognition of certain customs of traditional or religious communities will be hailed by some as a celebration of openness. It may be derided by others as a form of closure that impedes the life choices of persons who find themselves confined by such communities.

many international human rights instruments⁴¹⁵ and national constitutions⁴¹⁶— avoids references to national security, the public interest, public order, decency or morality as criteria for the limitation of fundamental rights. Such silence is not surprising given the myriad ways in which notions of national security, the public interest and public morals were used to suppress opposition to the apartheid state. FC s 36 redefines 'the public interest' (from the constellations of interests that served white, male, straight, and Christian South Africans) in terms of the values underlying an open and democratic society based on human dignity, equality and freedom. No longer can sectarian notions of the public interest be allowed to ride roughshod over fundamental rights. A limitation of a fundamental right that negates plurality or difference in the name of the common good is, generally, unlikely to be deemed reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

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Second, FC s 36 requires us to reconsider traditional understandings of the relationship between constitutional rights and the public interest. If the public interest in terms of which fundamental rights may be limited is underpinned by the same values that inform our interpretation of those rights, it makes no sense to view rights and the public interest as being diametrically opposed, the first representing private entitlements and the second state interests. Rather than fitting our two-stage analysis into the traditional, but ultimately facile public/private dichotomy, the Final Constitution requires us to develop a substantive vision of the norms and the values enshrined in the Bill of Rights that, as we argued above, must guide both rights interpretation and limitations analysis. The result is likely to be both a more realistic understanding of the 'private sphere', which recognizes the legitimate role of the state in ordering 'private' relations, and a richer conception of the public interest, which neither equates it with the interests of the governing elite nor reduces it to the sum of private interests.

Third, the Final Constitution does not envisage a neat division of interpretive tasks, in terms of which certain values (say, human dignity, equality and freedom) are considered only or primarily during the first stage of the fundamental rights inquiry, whereas others (say, democracy) feature only during the second stage. Instead, constitutional interpreters must engage with all five values — to the extent that they are relevant — during both fundamental rights interpretation and limitations analysis.⁴¹⁷ Indeed, FC s 39(1), like FC s 36(1), recognizes that a particular right may be underpinned by more than one value. For instance, while freedom of expression certainly serves democracy and freedom, the Constitutional Court jurisprudence also demonstrates how it serves the interests of human dignity and equality.⁴¹⁸ Both FC s 36 and FC s 39 invite us to consider the complex ways in which the values of democracy, openness, human dignity, equality and freedom overlap, converge, intersect, mutually support each other, and clash.

415 See, eg, art 29(2) of the Universal Declaration of Human Rights; art 31(1) of the European Social Charter; and art 27(2) of the African Charter on Human and People's Rights.

416 See, eg, Constitution of India ss 19(2)-(6); Constitution of Namibia arts 13(1), 17(2) and 21(2).

417 See § 34.3 *supra*, on the nature of a value-based approach to fundamental rights and limitations analysis, the relationship between the two stages of analysis, and the grounding of both stages of analysis in the interpretation of the phrase 'open and democratic society based upon human dignity, equality and freedom'.

Lastly, the Final Constitution does not view these values as invariably incommensurable. It requires us to attempt first to harmonize them.⁴¹⁹ If this were not

the case, the quintet of values enshrined in FC ss 36 and 39 would generate a cacophony of judgments, rather than a recurring set of themes that hold our Court's jurisprudence together. As Sachs J wrote in his dissenting judgment in *Prince*:

[L]imitations analysis under section 36 is antithetical to extreme positions which end up setting the irresistible force of democracy and general law enforcement, against the immovable object of constitutionalism and protection of fundamental rights. What it requires is the maximum harmonisation of all the competing interests, on a principled yet nuanced and flexible case-by-case basis, located in South African reality yet guided by international experience, articulated with appropriate candour and accomplished without losing sight of the ultimate values highlighted by our Constitution.⁴²⁰

The attempt to harmonize conflicting interests also coheres with our commitment to shared constitutional interpretation. It creates room for an inter-institutional dialogue about the best way of resolving the tension, if not outright conflict, between various constitutional goods.⁴²¹

The Final Constitution does not require us to resolve these conflicts, once and for all, or to measure the Court's fidelity to all five values along a single metric. The tensions inherent in the formulation of FC ss 36 and 39 are constitutive of the South African constitutional order.⁴²² They reflect the complexity of South African society and the fragility of the political compromise that the Final Constitution represents. Any attempt to eradicate these conflicts and to deny the distinctive meaning of each of these values would do real violence to the constitutional text and deny the commitment to openness and to plurality on which it is premised.⁴²³

418 See, eg, *South African National Defence Union v Minister of Defence & Another* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC) at para 7 ('Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally.') See also Stu Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36 (On dignity interests served by freedom of expression.)

419 Konrad Hesse contends that the principle of proportionality is grounded in the insight that a constitutional order values a variety of often incommensurable goods, and that legislators and judges are obliged to make hard choices about where to draw the line between such goods in a manner which respects the 'unity' of the basic law. See Konrad Hesse *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (20th Edition, 1999) 28, 142-43 and 146.

420 *Prince* (supra) at para 155.

421 *Ibid* at para 56 (Sachs J) ('The search for an appropriate accommodation imposes a particularly heavy responsibility on the courts to be sensitive to considerations of institutional competence and the separation of powers. Undue judicial adventurism can be as damaging as excessive judicial timidity.')

422 See Johan van der Walt & Henk Botha 'Democracy and Rights in South Africa: Beyond a Constitutional Culture of Justification' (2000) *Constellations* 341; Henk Botha 'Democracy and Rights: Constitutional Interpretation in a Post-Realist World' (2000) 63 *THRHR* 561, 581.

(bb) Dignity and democracy

(x) Primacy of dignity

As we have already noted,⁴²⁴ the Constitutional Court regards human dignity as the most important human right and constitutional value. In the view of the Court,

Human ... dignity informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights... . Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a *value* fundamental to our Constitution, it is a justiciable and enforceable *right* that must be respected and protected. In many cases however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.⁴²⁵

Given that both the text and the Court tell us that dignity plays a 'central' role in limitations analysis, two questions arise. What role does dignity play? And how central is it to our constitutional project?

The Court's recognition of dignity as, perhaps, the master concept in the Bill of Rights has been dealt with at length elsewhere in this work.⁴²⁶ The reasons for such

423 In her critique of the Dworkinian notion of the rational coherence of a legal order, Drucilla Cornell develops the idea of the synchronization of competing rights and community interests. She writes:

The goal of a modern legal system is rational synchronization and not rational coherence. Synchronization recognizes that there are competing rights situations and real conflicts between the individual and the community, which may not be able to yield a 'coherent' whole. The conflicts may be mediated and synchronized but not eradicated. In Dworkin, rational coherence depends on the community acting as a single speaker. In reality, a complex, differentiated community can never be reduced to a single voice. Synchronization recognizes the inevitable complexity of the modern state.

Drucilla Cornell 'Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation' (1988) 136 *Univ Pennsylvania LR* 1135, 1211.

424 For more on the role of dignity in limitations analysis, see § 34.8(c)(i).

425 *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) at para 35. For a detailed discussion of how each of the rights in Chapter 2 has been refracted through the prism of human dignity, see Stu Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36. For just a glimpse of the various rights that have been interpreted in the light of human dignity, see, on cruel, inhuman or degrading punishment, *S v Williams* 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC); on the right to equality, *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 6 BCLR 708 (CC) at para 41; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 12 BCLR 1517 (CC) at paras 21–26 and 120–29; on freedom of religion, *Christian Education of SA v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC) at para 36; on the right to vote, *August v Electoral Commission* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) at para 17, and on the right of access to adequate housing, *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) at para 83; *Van Rooyen v Stoltz* 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC) at paras 2, 27 and 29.

426 See Woolman 'Dignity' (supra) at 36-1–36-4 (Noting both the endogenous and exogenous sources of 'one of the world's most developed bodies of dignity jurisprudence.')

recognition range from the direct manner in which dignity answers the 'problem' of apartheid,⁴²⁷ to the centrality of dignity in the post-war constitutional tradition,⁴²⁸

to the ability of dignity to answer, in a coherent manner, the Court's call for a transformative jurisprudence,⁴²⁹ to the place dignity occupies in Roman-Dutch law,⁴³⁰ in traditional understandings of ubuntu⁴³¹ and in contemporary discourse on the politics of capability,⁴³² and, finally, to the manner in which dignity assists courts faced with the practical difficulties of reconciling such 'complementary' values as freedom and equality.⁴³³

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- 427 See Sandra Liebenberg 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 *SAJHR* 1 (Respect for human dignity requires society to respect the equal worth of the poor by marshalling its resources to redress the conditions that perpetuate their marginalization.)
- 428 See Lorraine Weinrib 'Constitutional Conceptions and Constitutional Comparativism' in V Jackson & M Tushnet (eds) *Defining the Field of Comparative Constitutional Law* (2002) 3. The former Chief Justice of the Constitutional Court has acknowledged South Africa's debt to post-World World II constitutional jurisprudence. See Arthur Chaskalson 'Human Dignity as a Foundational Value of our Constitutional Order' (2000) 16 *SAJHR* 193, 196 ('The affirmation of human dignity as a foundational value of the constitutional order places our legal order firmly in line with the development of constitutionalism in the aftermath of the second world war.')
- 429 The Court attaches five distinct meanings to human dignity, all of which emanate from the same basic Kantian insight that we recognize individuals as ends in themselves capable of self-government. These five 'definitions' or 'dimensions' of dignity are: the individual as end-in-herself, equal concern and equal respect, self-actualization, self-governance, and collective responsibility for the material conditions for agency. See Woolman 'Dignity' (supra) at 36-6-36-19 for an analysis of these five dimensions of dignity.
- 430 As a corrective, Justice Ackermann suggests that an historical account of dignity's South African roots must take note of another endogenous source: the Roman-Dutch law of personality. See Laurie WH Ackermann 'The Significance of Human Dignity for Constitutional Jurisprudence' (Lecture, Stellenbosch Law Faculty, 15 August 2005)(Manuscript on file with authors) § 6 (Personality rights include the rights to dignity, life and bodily integrity, physical liberty, autonomy, reputation, feelings, privacy, self-realisation, and identity.) See also J Neethling, JM Potgieter & PJ Visser *Neethling's Law of Personality* (2nd Edition, 2005) 24-38; WA Joubert *Grondslae van die Persoonlikheidsreg* (1953); *Whittaker v Roos and Bateman*; *Morant v Roos and Bateman* 1912 AD 92, 122; *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T), 381; *Jansen van Vuuren & Another NNO v Kruger* 1993 (4) SA 842 (A), 849; *National Media Ltd v Jooste* 1996 (3) SA 262 (A), 272.
- 431 Other authors have suggested that the African concept of 'ubuntu' and dignity draw on quite similar moral intuitions. See Yvonne Mokgoro 'Ubuntu and the Law in South Africa' (1998) 4 *Buffalo Human Rights LR* 15; Drucilla Cornell & Karin van Marle 'Interpreting Ubuntu: Possibilities for Freedom in the New South Africa' (2006) 6 *African Human Rights LJ* (forthcoming); Drucilla Cornell 'A Call for a Nuanced Jurisprudence' (2004) 19 *SA Public Law* 661; Marius Pieterse 'Traditional African Jurisprudence' in Chris Roederer & Darryl Moellendorf (eds) *Jurisprudence* (2004) 441. See also *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC) ('*Makwanyane*') at paras 224-25 (Langa J)(Ubuntu captures, conceptually, 'a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, *dignity*, value and acceptance from the members of the community such a person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, *dignity*, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.' (Emphasis added).)

The reason of most immediate import for making sense of limitations analysis is, perhaps, the last. Writing in his personal capacity, Justice Laurie Ackermann claims that the Court's dignity-based equality jurisprudence enables it to

adjudicate conflicts between equality and freedom in a neutrally-principled manner.⁴³⁴ Ackermann offers a number of examples of clashes between equality and freedom that, he believes, can be resolved by reference to a neutral conception of dignity. A restrictive covenant in a deed that prevents future sale of the property to a black person constitutes a deep affront to the dignity of prospective black buyers. At the same time, a finding that the provision is constitutionally infirm 'would constitute a mere *abstract* limitation'⁴³⁵ of the contractual freedom of the contracting parties and of the right of the original owner to dispose of her property as she pleases. The value of dignity helps us to better understand what is so obviously wrong with such restrictive covenants. Ackermann contrasts this first scenario with another: the owner of a residential property, for racist reasons, wishes to have someone trespassing on his property ejected. In this case, Ackermann argues, the owner can rely on constitutional rights such as privacy and freedom of association, while the trespasser only 'suffers a minor limitation and a limited and unpublic indignity'.⁴³⁶

Ackermann's analysis of the mediating role of dignity in conflicts between equality and freedom sheds new light on the perceived role of dignity in proportionality analysis.⁴³⁷ In his view, a dignity-based approach enables judges to make a principled distinction between instances of private discrimination that constitute a violation of somebody's equal worth, on the one hand, and legitimate exercises of personal and associational freedom, on the other. Dignity, he seems to suggest, is

432 See Amartya Sen *Development as Freedom* (1999); Woolman 'Dignity' (supra) at 36-65.

433 In her defence of the Constitutional Court's dignity-based equality jurisprudence, Susannah Cowen argues that equality is a 'comparative concept' and that '[t]o value equality without saying more does not explain what outcome it is that we value. In Amartya Sen's language, it does not answer the question, "equality of what?"' Susannah Cowen 'Can "Dignity" Guide South Africa's Equality Jurisprudence?' (2001) 17 *SAJHR* 34. Cowen appears to echo Peter Westen's notion that equality is an 'empty concept' and that the right to equality and nondiscrimination necessarily has to be interpreted in the light of a value other than equality itself. See Peter Westen 'The Empty Idea of Equality' (1982) 95 *Harvard LR* 537.

434 See Laurie Ackermann 'Equality and the South African Constitution: The Role of Dignity' (2000) 63 *ZaöRV* 537. Justice Ackermann develops this claim in the course of a discussion of the direct horizontal application of the Bill of Rights and argues that, in cases involving a claim of unfair discrimination by one individual against another, a dignity-based approach could enable the court to engage in a type of 'proportionality analysis' and 'balancing' that is neutrally principled. *Ibid* at 551-552.

435 *Ibid* at 552.

436 *Ibid* at 553 quoting Louis Henkin '*Shelley v Kraemer*: Notes for a Revised Opinion' (1962) 110 *Univ Pennsylvania LR* 473, 498.

437 Dignity might play such a mediating role in conflicts between equality and freedom, say where a legislative provision in the Promotion of Equality and Prevention of Unfair Discrimination Act is challenged on the grounds that it violates the right to freedom of association. See Stu Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44.

ideally suited to playing such a mediating role because it provides a measure of value that is common to the frequently conflicting imperatives of equality and freedom.

The purpose of Ackermann's two intuition pumps is to convince us that the stronger the dignity interest is on one side of the equality/freedom divide, the weaker it is likely to be on the other. In the example of the restrictive covenant, the discrimination strikes at the heart of the dignity interests of a prospective black buyer, while only marginally disturbing the dignity interests of the property owner. But these — on Ackermann's account — are easy cases. One could well imagine cases in which there are strong dignity/equality interests and dignity/freedom interests on both sides. Consider, for example, a clash between the rights of women who wish to participate equally in traditional or religious communities and the 'autonomy' rights of such religious or cultural communities.⁴³⁸ In such

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cases, the discrimination constitutes a serious impairment of the fundamental human dignity of women. At the same time, the religious or cultural practice in question may be so fundamental to the worldview and customs of its adherents that a ruling of unconstitutionality would strike at the very heart of that community's dignity. Dignity does not, in such cases, offer a neutral or a principled way of striking a balance between equality and freedom.

The second problem with dignity as a neutral, mediating principle is that it assumes that a dignity-based reading of the limitations clause adequately captures the various interests served by rights as varied as equality, privacy and association. A number of commentators have argued that something is likely to get lost in the process of translating the right to equality into the language of human dignity.⁴³⁹ One of their concerns has been that a dignity-based approach to equality focuses primarily on individual moral harm, rather than material disadvantage and structural imbalances of power. While some forms of disadvantage can be expressed quite easily in moral terms, others may not be so readily recognized. This difference may explain why the transformative vision of the Constitutional Court's jurisprudence in the field of sexual orientation has easily outpaced its jurisprudence on discrimination on the grounds of sex and gender. While discrimination against gays and lesbians is usually rooted in moral disapproval and results directly in an affront to their dignity and identity, discrimination on the grounds of sex and gender is often more closely bound up with material disadvantage and systemic discrimination, and is, therefore, more difficult to capture in the language of dignity.⁴⁴⁰

Such a critique may have had real teeth several years ago. However, the Court has, in recent years, embraced an understanding of dignity that recognizes our collective responsibility for creating the material conditions for the actual exercise of

438 See, eg, *Bhe & Others v Magistrate, Khayelitsha, & Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole & Others; South African Human Rights Commission & Another v President of the Republic of South Africa & Another* 2005 (1) SA 580 (CC), 2005 (1) BCLR 449 (CC).

439 Cathi Albertyn & Beth Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *SAJHR* 248; Dennis Davis 'Equality: The Majesty of Legoland Jurisprudence' (1999) 116 *SALJ* 398; Henk Botha 'Equality, Dignity, and the Politics of Interpretation' (2004) 19 *SA Public Law* 724 ('Equality'). But see Susannah Cowen 'Can "Dignity" Guide South Africa's Equality Jurisprudence?' (2001) 17 *SAJHR* 34.

440 See Botha 'Equality' (supra) at 748.

agency by all South Africans. Cases such as *Bhe, Daniels*,⁴⁴¹ *Grootboom*⁴⁴² and *Khosa*⁴⁴³ demonstrate that dignity can be used to defend the rights of women, the poor and other vulnerable groups that suffer from material disadvantage and systemic discrimination.⁴⁴⁴

These cases buttress our contention that a dignity-based approach to limitations is capable of addressing structural problems associated with poverty and gender. At the same time, however, we must express doubt about the ability of dignity to rescue marginal groups — Rastafarians, prostitutes and unmarried cohabitants — whose ways of being in the world challenge the Court's own assumptions about what is normal and socially acceptable. Indeed, the Court often relies on dignity to justify legal limitations that appear to flow from very traditional, conservative and sectarian concerns.

For example, in *De Reuck*, the Court found that a total ban on child pornography was justified because child pornography impairs the dignity of all children and, thus, of all members of any society that condones it.⁴⁴⁵ By appealing to the dignity of society as a whole, rather than focusing on the dignity of those children who were harmed in the making of pornography, the *De Reuck* Court was able to fend off the argument that the limitation — which also extended to depictions of imaginary persons — was overbroad and that less restrictive means were available.⁴⁴⁶ Invoking the 'dignity' of an entire society can be dangerous when used to justify the restriction of unpopular views or forms of expression. The 'dignity' of the community can easily become shorthand for the institutionalization of the moral views of the majority and the negation of plurality and difference.⁴⁴⁷

On other occasions, judges underestimate the extent to which a limitation impairs the dignity of members of out-groups. Consider, for example, the insistence in *Jordan* that the stigma associated with prostitution is the result of personal choice and is unrelated to the role of law in apportioning blame and sustaining structural

441 *Daniels v Campbell NO & Others* 2004 (5) SA 331 (CC), 2004 (7) BCLR 735 (CC).

442 *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC).

443 *Khosa & Others v Minister of Social Development; Mahlaule & Others v Minister of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (5) BCLR 569 (CC).

444 On the transformative potential of human dignity, see Woolman 'Dignity' (supra) at 36-62-36-71; Jonathan Barrett 'Dignatio and the Human Body' (2005) 21 *SAJHR* 525.

445 See *De Reuck* (supra) at para 63 ('Children's dignity rights are of special importance. The degradation of children through child pornography is a serious harm which impairs their dignity and contributes to a culture which devalues their worth. [T]here is harm to the dignity and perception of all children when a society allows sexualised images of children to be available. The chief purpose of the statutory prohibitions against child pornography is to protect the dignity, humanity and integrity of children.')

446 *Ibid* at paras 68-70.

447 For a critique of *De Reuck*, see Woolman 'Dignity' (supra) 36-45-36-46.

inequality.⁴⁴⁸ Or ponder the majority's finding in *Volks* that the exclusion of the surviving partner of a permanent life partnership from the right of surviving spouses to claim maintenance from the estates of their deceased spouses does not constitute unfair discrimination because the law never prevented them from getting married.⁴⁴⁹ These findings — grounded both in traditional mores and rather outré metaphysical views about 'individual freedom' — cast something of a pall over the place of dignity in our limitations jurisprudence.

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Do these cases *really* indicate fundamental problems inherent in a dignity-based approach? Do they suggest that values other than dignity might assist the courts in making better sense of the Final Constitution's commitment to pluralism and the eradication of structural disadvantage?

On the one hand, we are not convinced that a dignity-based approach must of necessity result in the reinforcement of traditional moral views, the continued marginalization of certain out-groups, or the suppression of unpopular views. On the contrary, as Denise Meyerson has persuasively argued, and as the case law largely confirms, dignity can be used to invalidate limitations which seek to impose a particular conception of the good upon autonomous human beings.⁴⁵⁰

On the other hand, we need to ask why, despite its adherence to definitions of dignity that take our capacity for self-actualization and self-governance seriously, the Constitutional Court failed to give adequate effect to dignity in the cases canvassed above. One reason could be that the private-law conception of dignity as *dignitas* still exerts a powerful hold on the legal imagination.⁴⁵¹ This 'conservative' pre-disposition may explain why dignity *qua* self-governance is not always given sufficient weight, and why the discourse of dignity sometimes slips into sermons about dignified behaviour.⁴⁵²

(y) Democracy and openness

(aaa) Principle of democracy

448 In rejecting the argument that the criminalisation of the conduct of the prostitute, but not of the patron, constitutes unfair discrimination on the grounds of sex and gender, the majority argued: 'If the public sees the [prostitute] as being "more to blame" than the "client", and a conviction carries a greater stigma on the "prostitute" for that reason, that is a social attitude and not the result of the law. The stigma that attaches to prostitutes attaches to them not by virtue of their gender, but by virtue of the conduct they engage in.' *Jordan* (supra) at para 16.

449 *Volks NO v Robinson & Others* 2005 (5) BCLR 446 (CC).

450 See Denise Meyerson *Rights Limited: Freedom of Expression, Religion and the South African Constitution* (1997).

451 See Barrett 'Dignatio' (supra) at 525.

452 See Woolman 'Dignity' (supra) at 36-14-36-17.

Cases such as *Khosa*⁴⁵³— which stressed the political community's responsibility to provide non-citizens who find themselves on the margins of that community with the material conditions for agency — and *Fourie*⁴⁵⁴— which recognized that gays and lesbians have an entitlement to public recognition of their intimate relationships — evince the Constitutional Court's transformation of its dignity-based approach to fundamental rights interpretation and limitations analysis from *dignitas* and a narrow conception of the public interest to something far more expansive, if not all-embracing. This far more substantive vision of dignity allows us to make sense of a variety of other constitutional values precisely because this conception of dignity embraces such notions as equal concern and equal respect, self-actualization, self-governance, and the collective responsibility for supplying the material means required for the exercise of individual agency.

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But what the Court has still not done is to give distinctive content to each of the five values enshrined in FC s 36. For the most part, the Court has viewed the four other values through the lens of human dignity. According to the Court, dignity provides a common measure of value which can help bridge the division between equality and freedom, or between negative and positive rights, or between the individual and collective aspects of our autonomy. However, we have also seen that dignity does not adequately address all conflicts nor does a reliance on dignity appear to do justice to those out-groups whose participation in our social and political life remains marginal at best.

It is particularly surprising that the Constitutional Court has not done more to develop the meaning of 'openness' and 'democracy' — two features of our society that clearly demarcate the boundary between apartheid South Africa and post-apartheid South Africa. In our view, a greater elaboration of the meaning of 'an open and democratic society', and a closer connection of these values to dignity (especially dignity *qua* self-governance), may result in a jurisprudence more inclined to accommodate plurality and difference. Similarly, an engagement with 'democracy' may strengthen our commitment to securing spaces in which 'counter-publics' can challenge dominant ideas. In this section, we consider the possibility of a complementary understanding of the values underlying the Bill of Rights that flows from a greater appreciation for the kind of 'democratic' society to which the Final Constitution commits us.

In *United Democratic Movement v President of the Republic of South Africa*, the Constitutional Court issued a challenge of sorts to the academic community: tell us what 'democracy' means, and more importantly, tell us how it ought to inform, in a principled manner, our understanding of various provisions in the text of the Final Constitution.⁴⁵⁵ Some South African academics, and in particular, Theunis Roux, have begun to do just that.⁴⁵⁶ In the chapter on 'Democracy' found elsewhere in this work, Roux pulls together the political theories out of which our particular South African

453 *Khosa & Others v Minister of Social Development; Mahlaule & Others v Minister of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (5) BCLR 569 (CC).

454 *Minister of Home Affairs & Another v Fourie & Another (Doctors for Life International & Others, Amici Curiae); Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) ('*Fourie*').

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

conception of democracy arises, the textual provisions of the Final Constitution that shape that conception, and the extant case law of our courts to generate a 'principle of democracy'.⁴⁵⁷ We will not rehearse Roux's

arguments in support of that principle here. We will, however, draw down on several of his arguments, especially those that serve part (2) of his 'principle of democracy'.

The argument that lends the greatest force to our general theory of limitations analysis is Roux's contention that, read together, FC ss 7(1), 36(1), and 39(1) 'structure the way in which the tension between rights and democracy is to be managed in South African constitutional law'.⁴⁵⁸ We have argued, over the course of this chapter, that FC ss 36(1) and 39(1) require a value-based approach to fundamental rights analysis and limitations analysis in part because they invoke the same set of values, the same linguistic trope, 'an open and democratic society based upon human dignity, equality and freedom'. However, Roux's connection of the oft-ignored FC s 7(1) to both fundamental rights interpretation (FC s 39) and limitations analysis (FC s 36) enables us to make four new critical points in this chapter.

First, FC s 7(1) reads: 'The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.' Notice that democracy is treated as an independent value. Notice that the values of human dignity, equality and

456 See Theunis Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 10.

457 This principle stated in its clearest form holds:

Government in South Africa must be so arranged that the people, through the medium of political parties and regular elections, in which all adult citizens are entitled to participate, exert sufficient control over their elected representatives to ensure that: (a) representatives are held to account for their actions, (b) government listens and responds to the needs of the people, in appropriate cases directly, (c) collective decisions are taken by majority vote after due consideration of the views of minority parties, and (d) the reasons for all collective decisions are publicly explained. (2) The rights necessary to maintain such a form of government must be enshrined in a supreme-law Bill of Rights, enforced by an independent judiciary, whose task it shall be to ensure that, whenever the will of the majority, expressed in the form of a law of general application, runs counter to a right in the Bill of Rights, the resolution of that tension promotes the values of human dignity, equality and freedom.

Roux 'Democracy' (supra) at § 10.5(b)(Author's italics removed.) Although the Court has yet to provide an answer of its own to the question posed in *UDM*, several justices have articulated accounts of 'democracy' that suggest that Roux's principle is nascent in our Court's jurisprudence. Roux notes that in her powerful dissent in *New National Party v Government of the Republic of South Africa*, 'O'Regan J stressed the centrality of the right to vote in the consolidation of South African democracy, remarking that: "The right to vote is foundational to a democratic system. Without it, there can be no democracy at all."' 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) at para 122. O'Regan J's dissent, Roux continues, 'also supports the second element of the principle of democracy [I]t is integral to the Final Constitution's conception of democracy that rights be capable of trumping the will of the majority where such a result better serves "the democratic values of human dignity, equality and freedom".' Roux (supra) at § 10.5(c). Roux acknowledges that Sachs J's remarks in *Masondo* 'articulate many of the elements of the principle of democracy that [this chapter has] argued [are] immanent in the constitutional text.' Roux (supra) at § 10.5(c) citing *Democratic Alliance & Another v Masondo NO & Another* 2003 (2) SA 413 (CC), 2003 (2) BCLR 128 (CC) at paras 42-43.

458 Roux (supra) at § 10.3(c).

freedom are 'democratic' values. At a minimum, the language of FC s 7(1) should give pause to those interpreters of the basic law who privilege, reflexively, the value of human dignity. One can press this point further and argue that FC s 7(1), in fact, reverses the spin placed by the Constitutional Court on the phrase 'an open and democratic society based upon human dignity, equality and freedom'. It makes a democratic society, and not dignity, foundational.

Second, it is, we think, unnecessary to read the language of FC s 7(1) in a manner that privileges democracy over dignity. Indeed, FC s 7(1) and Roux suggest that we should be just as wary of such overly simplistic reductions (rights service democracy) as we are chary of claims that rights and democracy stand in

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irreconcilable tension with one another (the counter-majoritarian dilemma). We think that it is enough to suggest, as Roux does, that FC s 7(1) delinks the phrase 'an open and democratic society' from 'human dignity, equality and freedom'. That is, whereas the phrase 'open and democratic society based upon human dignity, equality and freedom' suggests a miasma of 'big' ideas that, if read jointly and severally, could exhaust the entire universe of modern political theory, delinking the two phrases forces the reader of FC ss 36(1) and 39(1) to stop and attend — for a moment — to the meaning, as well as the desiderata, of an 'open and democratic society'. Even if it does nothing else, by reading FC s 7(1) together with FC s 36(1), we are forced to concede that the principle of democracy is, at least, of equal weight as the value of dignity when it comes to the justification of a limitation of a fundamental right.

Third, Roux's arguments support our contention that scales and balancing are inapt metaphors for limitations analysis. Such metaphors block one from drawing the conclusion to which FC s 7(1) has already alerted us: namely, that rights stand not in opposition to democracy, but that they are, instead, constitutive of it. That is to say, without the rights to equality, dignity, life, belief, expression, assembly, association, voting, political party membership, citizenship, access to information, access to courts, and just administrative action, we would not have a meaningful democracy. These rights are themselves the preconditions for an 'open and democratic society'.

Fourth, the principle of democracy, when taken seriously, gets read back into these rights. And by that we mean that the virtues of belonging, deliberating and participating, identified first and foremost with democracy, attach not just to the political realm, but to an array of associational forms — religious, traditional, linguistic, commercial, labour, intimate, cultural — that are part of, but not identical to the political. So, although Roux does not make this claim, we do.⁴⁵⁹ Indeed, it is an appreciation for these 'democratic' values of membership, deliberation and participation that underwrites our defence of pluralism, marginal social groups and 'oppositional counterpublics'.⁴⁶⁰ And we value pluralism, and thus marginal social groups and 'oppositional counterpublics', not simply because they serve as reminders of the emancipatory potential of robust democratic discourse, but because these groups, and others like them, are where democracy takes place everyday for the vast majority of us.⁴⁶¹

459 See Woolman 'Freedom of Association' (supra) at § 44.1(b).

460 Kendall Thomas 'Racial Justice' in A Sarat, G Bryant & R Kagan (eds) *Looking Back at Law's Century* (2002) 78, 87.

Finally, we agree with Roux that 'no South African political system claiming to be democratic would be worthy of that name unless it respected the democratic

values which the Bill of Rights affirms.⁴⁶² This view firmly reinforces our own views about the relationship between courts and legislatures in a regime of 'shared constitutional interpretation'. In such a regime, as in the political system contemplated by FC ss 7(1), 36(1) and 39(1), neither the courts nor the political branches of government have a privileged position with regard to the making and the re-making of our basic law.

(bbb) Principle of openness

The dissenting judgment of Sachs J in *Prince* resonates with Roux's understanding of democracy, and sounds themes similar to our own thoughts about the relationship between democracy and the other values that ought to inform limitations analysis. In his dissent in *Prince*, Sachs J stressed the need in an 'open and democratic society' faced with seemingly intractable conflicts — between the state and religious communities — for a 'reasonable accommodation' of interests.⁴⁶³ This accommodation requires mutual recognition and 'a reasonable measure of give-and-take from all sides'.⁴⁶⁴ Sachs J, not surprisingly, finds that the majority's refusal to carve out an exemption for bona fide religious use of cannabis offends this very principle. The majority judgment, he writes, 'puts a thumb on the scales in favour of ease of law-enforcement, and gives insufficient weight to the impact the measure will have, not only on the fundamental rights of the appellant and his religious community, but on the basic notion of tolerance and respect for diversity that our Constitution demands for and from all in our society'.⁴⁶⁵ The majority's suppression of cultural and religious differences harms not only the individuals and the communities concerned, but society as a whole. He continues:

[F]aith and public interest overlap and intertwine in the need to protect tolerance as a constitutional virtue and respect for diversity and openness as a constitutional principle. Religious tolerance is accordingly not only important to those individuals who are saved from having to make excruciating choices between their beliefs and the law. It is deeply meaningful to all of us because religion and belief matter, and because living in an open society matters.⁴⁶⁶

461 The Constitutional Court itself may be slowly coming round to this very position. In its recent judgment in *Fourie*, the Court remarked that '[t]he hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner.' *Minister of Home Affairs & Another v Fourie & Another (Doctors for Life International & Others, Amici Curiae); Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) at para 95 as cited by Roux (supra) at § 10.3(c).

462 Roux (supra) at § 10.3(c).

463 See *Prince* (supra) at paras 146, 155–156 and 170.

464 Ibid at para 161.

465 Ibid at para 147.

466 Ibid at para 170.

For Sachs J, freedom of belief and the freedom to express such belief are fundamental not only to the freedom and the dignity of the believers concerned, but also to the diversity and the openness that are the lifeblood of a democracy. Democracy, Sachs J seems to be saying, presupposes the capability of marginalized and vulnerable minorities to challenge the normative closure into which political communities tend to lapse. A political community can only remain free if it values plurality and difference, and allows out-groups to disturb and to

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challenge deeply held majoritarian beliefs and practices.⁴⁶⁷ For this reason, the critical challenge for our constitutional 'democracy' consists 'not in accepting what is familiar and easily accommodated, but in giving reasonable space to what is "unusual, bizarre or even threatening"'.⁴⁶⁸

Nowhere in his judgment does Sachs J renounce the language of dignity, or question its centrality to the Final Constitution. In fact, his judgment can be read as an endorsement of the constitutional commitment to dignity, and a celebration of dignity's commitment to self-worth, self-actualization and self-governance.⁴⁶⁹ What is significant about his judgment, however, is the manner in which the language of dignity is supplemented by a more nuanced account of democracy — a Whitmanian vision of democracy that ties the ability of individuals to re-imagine their own identities to the capacity of the political community for transformation.⁴⁷⁰

Underlying Sachs J's radically democratic vision is an equally egalitarian concern — the demand for equal recognition, as Charles Taylor puts it⁴⁷¹— for marginal cultures, worldviews and lifestyles.⁴⁷² Sachs J emphasizes the political powerlessness of the Rastafari in a manner that recalls the concerns of representation-reinforcing process theory.⁴⁷³ The continuing disempowerment of the Rastafari unmasks the power relations lurking beneath a veneer of formally equal treatment, and shows how facially neutral laws are conditioned by background assumptions that define 'normality' in terms of conformity to the tenets of mainstream religions. At the same

467 *Prince* (supra) at para 147 ('[P]ractical inconvenience and disturbance of established majoritarian mind-sets are the price that constitutionalism exacts from government.')

468 *Ibid* at para 172.

469 *Ibid* at paras 148 and 151. Moreover, the dissenting judgment of Ngcobo J, in which Sachs J concurred, made much of the way the general prohibition stigmatises Rastafari, and thus 'strikes at the very core of their human dignity'. See *Prince* (supra) at paras 48–51.

470 For a fuller elaboration of this understanding of democracy, see Frank Michelman *Brennan and Democracy* (1999) 68–89; Frank Michelman 'Law's Republic' (1988) 97 *Yale LJ* 1493.

471 Charles Taylor *The Ethics of Authenticity* (1992).

472 Sachs insists that the case must be seen against the background of the use of cannabis in Africa in pre-colonial times and in the African diaspora. *Ibid* at paras 152–53. He also draws parallels between the outlawing of cannabis and the prejudice that all other non-Protestant religions have encountered in South Africa. *Ibid* at para 159. By contrast, the majority regards this history as irrelevant to the constitutionality of the legislation. *Ibid* at para 105.

473 John Hart Ely *Democracy and Distrust* (1981).

time, it presents the political community with an opportunity to reconsider the ways in which the boundaries of citizenship are being drawn. Of the relationship between the 'romantic-liberal' view of constitutionalism and the struggle of out-groups for recognition, Frank Michelman writes:

A chief aim of the romantic-liberal constitution must be to free 'the life-chances of the individual from the tyranny of social categories' of 'classes, sexes, and nations'. The benefit accrues not only to the emancipated: it is structural and systemic, and accrues to everyone. Everyone, in the romantic view, has reason to welcome confrontation and challenge of his or her accustomed or habitual ways and values, from all quarters known and unknown. Democracy accordingly becomes not just a procedural but a substantive ideal — a

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commitment to empower the disempowered and reconnect the alienated. Likewise, freedom of expression figures for the romantic constitutionalist as both an individual right of self-presentation — of efficacious participation or citizenship — and a social-structural provision for imbuing social life with the enrichment, and politics with the knowledge, sparked by frictional contact with human outlooks and sensibilities other than those to which one has grown accustomed.⁴⁷⁴

This constitutional vision is attractive for our account of limitations analysis for a number of reasons. First, it calls for a form of limitations analysis under FC s 36 which does not privilege a single value — say dignity. Our non-reductionist account of the values at play in limitations analysis — and our emphasis on democracy and openness — may counter the tendency to overlook forms of group-based disadvantage not easily captured by the language of dignity.⁴⁷⁵ Put slightly differently, FC s 36's commitment to openness ought to underwrite an approach to limitations analysis that challenges any unitary conception of the good. Second, a commitment to openness recognizes that some conflicts may be intractable just as some values are, in given contexts, incommensurable. This commitment, to plurality and to difference, should serve to counter naïve attempts to 'balance' conflicting interests in terms of FC s 36.⁴⁷⁶ Third, a commitment to openness helps us to make further sense of FC s 7(1)'s statement that the Bill of Rights 'is a cornerstone of democracy in South Africa'. FC s 7(1)'s vision of democracy presupposes public processes of deliberation and participation that enhance openness, plurality and difference.⁴⁷⁷ Although this vision does not resolve the tension between democracy and rights, it enables us to explore the potential of rights litigation to strengthen democracy. Finally, the commitment to a principle of openness in FC s 36 alerts us to the ways in which the lack of access of certain groups to the levers of political power is re-inforced by apparently neutral laws that privilege certain worldviews over others. It reminds us of the emancipatory potential of robust democratic discourse, and the capacity of marginal social groups or 'oppositional counterpublics'⁴⁷⁸ to

474 Michelman *Brennan and Democracy* (supra) at 70– 71.

475 See Botha 'Equality' (supra) at 746–51.

476 Sachs J himself states that '[s]ome problems might by their very nature contain intractable elements' and that 'no amount of formal constitutional analysis can in itself resolve the problem of balancing' conflicting goods. *Jordan* (supra) at para 170.

477 *Ibid* at paras 170–171.

contest dominant notions of normality⁴⁷⁹ and to challenge the tendency of the political community to assume its own moral completion.⁴⁸⁰

(iii) Judicial narratives

In the previous two sections, we tried to develop limitations analysis in a manner that makes greater sense both from an institutional perspective and from a

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normative perspective. However, just as shared constitutional interpretation does not provide a simple answer to the inevitable political conflicts that arise out of the dual commitment to the doctrines of constitutional supremacy and separation of powers, even a normative framework that takes adequate account of both democracy and dignity is not going to resolve — in an unproblematic fashion — the kinds of conflicts between incommensurable goods that arise in constitutional disputes.

How then are judges engaged in limitations analysis to arrive at an optimal decision when neither considerations of institutional comity nor normative coherence yield a univocal conclusion? A number of authors have, of late, suggested that storytelling may yield significant benefits for hard cases, in general, and hard cases in terms of limitations analysis, in particular. As we shall see, a slightly different spin on the FC s 36 factor 'the impact of a limitation' may result in a very different approach to such questions as whether less restrictive means should have been used, or whether deference should be paid to the legislature's choice of means.

That said, the following account of judicial narrative-making is not meant to supplant conventional limitations analysis undertaken by the Court in terms of conventional morality. The virtues of this approach are, rather, visible in a handful of hard cases. In these hard cases, conventional morality refracted through the prism of constitutional norms tends to re-inscribe the marginalization of many out-groups. The requirements of storytelling may force decision-makers to consider a range of possibilities that would not have otherwise occurred to them and thus to alter the conclusions they ultimately reach. In addition, the difference between storytelling in hard cases and cryptic justifications for hard choices — in terms of FC s 36 — is the difference between a good explanation and a bad explanation for the decisions that we take: the better the explanation, the more persuasive it will be — for those who need persuading; the more persuasive the decision, the more legitimate it will be deemed to be.⁴⁸¹ Denser judicial narratives thus serve a good that we have argued is

478 Thomas (*supra*) at 87.

479 See Botha 'Equality' (*supra*) 745–746 (Argues that the majority judgment in *Jordan* rested upon a highly conventional understanding of what constitutes normal sexual relations, and prevented oppositional discourses of sexuality from entering mainstream public discourse.)

480 Michelman *Brennam and Democracy* (*supra*) at 71.

481 Part of what makes at least some judgments in hard cases persuasive is their candour about the limits of judicial decision-making. See Paul Gewirtz 'On I Know It When I See It' (1996) 105 *Yale LJ* 1023, 1042–1043. See also Paul Gewirtz 'Narrative and Rhetoric in the Law' in P Brooks & P Gewirtz (eds) *Law's Stories: Narrative and Rhetoric in the Law* (1996) 2, 11 ('[An] opinion usually ends with the words "It is so ordererd", emphasizing the coercive force that judges wield. But the written justification in the body of the judicial opinion is what gives the order its authority.')

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The following two case studies do not prove that storytelling invariably works for limitations analysis in hard cases. No approach to limitations analysis could carry such a burden. They serve a rather more mundane purpose: to show that judges

482 The kind of storytelling mode most conducive to legal storytelling and most consistent with our approach to limitation analysis is the novel. The novel lends itself to the requirements of legal storytelling and constitutional politics because it recognises a plurality of different ways of looking at, understanding, and being in the world.

There are at least two views of the purpose of the novel consistent with this description. Both are excellent descriptions of what a great novel can do. One view serves well the ends of law. The other view stays too true to the novel's comic origins, and perhaps to the absurdity of life, to accommodate the more formal requirements of the law. Salman Rushdie, an advocate of the second view, writes that unlike most religious, political and legal doctrines,

which seek[] to privilege one language above all others, one set of values above all others, one text above all others, the novel has always been about the way in which different languages, values and narratives quarrel, and about the shifting relations between them, which are relations of power. The novel does not seek to establish a privileged language, but it insists upon the freedom to portray and analyse the struggle between the different contestants for such privileges.

Salman Rushdie 'Is Nothing Sacred' *Imaginary Homelands* (1991) 415, 421. The limitations of this view of storytelling with respect to law have to do with a certain level of moral abstinence, a reluctance to make judgments, which attaches to the desire to portray the struggle between competing visions of the world.

A somewhat different approach to the purpose of the novel, and one that has consciously sought to connect the narrative conventions of novels and legal judgments, is offered by Martha Nussbaum. Legal knowledge is, Nussbaum argues,

not simply intellectual grasp of propositions; it is not even simply intellectual grasp of particular facts; it is perception. It is seeing a complex, concrete reality in a highly lucid and richly responsive way: it is taking in what is there, with imagination and feeling.

Martha Nussbaum "'Finely Aware' and Richly Responsible": Literature and Moral Imagination' in *Love's Knowledge* (1990) 152. See also Martha Nussbaum *Poetic Justice: Literary Imagination and Public Life* (1996). The novel likewise demonstrates to us that communication between individuals in difficult personal and ethical circumstances, in circumstances that urge conflicting but equally compelling claims on the agents involved

is not simply a matter of the uttering and receiving of general propositions. It partakes both of the specificity and of the emotional and imaginative richness of their individual moral effort. We see [the characters] drawing close in understanding by seeing where they come to share the same pictures.

Nussbaum 'Finely Aware' (supra) at 153. And this, at the risk of oversimplification, is the primary difference between Rushdie and Nussbaum. Rushdie emphasizes his characters' vastly divergent ways of seeing the world and the way in which these ways of seeing ultimately, and irreconcilably, clash. Nussbaum, on the other hand, emphasizes how pictures and stories draw us together, and the manner in which detailed pictures and stories give us the opportunity for shared understanding and mutual transcendence.

Nussbaum does not suggest that painting our pictures and telling our stories offers an easy road to the resolution of conflict and the transcendence of difference. Miscommunication is inevitable. Many moral, political and legal conflicts will remain intractable. Furthermore, the overcoming of such conflict, when it does occur, never occurs without cost:

doing constitutional law, who might otherwise be sceptical of storytelling, not only have the capacity to tell stories, but to do so to brilliant effect.⁴⁸³

(aa) *Prince*

Consider, again, the dissenting judgment of Sachs J in *Prince*. In Sachs J's view, the idea that the religious freedom of Rastafari must simply give way to the state's interest in law enforcement rests on what he calls the 'hydraulic insistence on conformity to majoritarian standards'.⁴⁸⁴ Sachs J challenges the supposed neutrality of this dominant mindset by choosing a narrative perspective that differs fundamentally from that of the majority. Instead of emphasizing law-enforcement, Sachs J tells us a bit about the history of the Rastafari, the centrality of cannabis in

There will be times when a confrontation with a new situation may lead the perceiver to revise her standing conception of value, deciding that certain prima facie obligations are not really binding here. But this never takes the form of leaping above or sailing around the standing commitments. And if the perceiver, examining these commitments, decides that they do not in fact bind her, then no free departures will be permitted, and the effort of perception will be an effort of fidelity to all elements of the situation, a tense and laboured effort not to let anyone down.

Nussbaum 'Finely Aware' (supra) at 156. In this last sentence, Nussbaum describes an approach to moral reasoning — and for us, an approach to limitations analysis — which she calls perceptive equilibrium: a basic sense of moral principles that enables us to first see that we have an ethical dilemma and then allows us to work back and forth between our perceptions of a concrete and specific set of events and our rules of thumb until we can finally see what ought to be done. See Martha Nussbaum "'Perceptive Equilibrium" Literary Theory and Ethical Theory' *Love's Knowledge* (1990) 168. This model of reasoning, and the specificity and concreteness of moral situations, means that morality depends to a large extent on judgment. See Martha Nussbaum 'Poets as Judges: Judicial Rhetoric and Literary Imagination' (1995) 62 *Univ Chicago LR* 1477. This dependency on judgment means that some individuals will possess better judgment than others. As Wittgenstein has suggested, it is often as important to watch what good people do in particular situations — the way they work through a moral problem — as it is to memorise rules as to what we ought to do generally. Ludwig Wittgenstein *Philosophical Investigations* (1968) 227 ('Corrector prognoses will generally issue from the judgments of those with better knowledge of mankind. Can one learn from this knowledge? Yes, some can. ... What one acquires here is not a technique; one learns correct judgments. There are also rules, but they do not form a system, and only people can apply them right.') This then is the connection between storytelling and limitations analysis. Great writers provide us with pictures of what good people ought to do in highly specific and complex fictional situations. Great judges provide us with pictures of what good judges — good government officials and good citizens — ought to do in highly specific and complex legal situations. See Woolman 'Out of Order' (supra) at 116-128. See also Narnia Bohler-Muller *Developing a New Jurisprudence of Gender Equality in South Africa* (LLD thesis, University of Pretoria, 2005, on file with authors) 59-104.

483 It would be disingenuous not to acknowledge that calls for storytelling in law often meet with resistance and scepticism. See Woolman 'Out of Order?' (supra) at 128-133 (For an extended discussion of the objections to a storytelling approach.) One reason why lawyers are reluctant to embrace storytelling is that a novel can afford multiple perspectives, contradiction and obscurantism. They may even be integral to the success of a story. A legal judgment, on the other hand, must display the kind of clarity that will enable members of a given society to plan their lives with relative certainty. Furthermore, a legal rule will inevitably impose costs on someone who falls afoul of it. It would, so Judge Richard Posner and Judge Pierre Leval argue, make a mockery of the law to have it written in such a way that financial penalties and prison sentences are meted out in contradictory and arbitrary fashion. Indulging in storytelling courts caprice and inconsistency. See Richard Posner *Law and Literature* (1988); Pierre Leval 'Judicial Opinions as Literature' in P Brooks & P Gewirtz (eds) *Law's Stories: Narrative and Rhetoric in the Law* (1996) 206, 207 ('The objectives of the judicial opinion are far different than those of polemics, poetry and narrative forms of literature. The function of the published opinion is to instruct in the meaning of rules of law, indeed in many cases to declare rules of law. Pursuit of literary techniques is more likely to undermine than to reinforce the success of an opinion in meeting its judicial obligations.') A second objection is that the analogy between law and storytelling is misleading: whilst storytelling invites the open play of meaning, legal interpretation is closely linked to the law's quest for certainty, finality and closure. Moreover, law, according to Robert Cover, is inextricably bound up with the authorization of state violence:

their religion, the marginality of the Rastafari in South African life, and their inability to exercise any meaningful influence on the political process. By relocating the limitations inquiry in the 'lived and experienced' reality of the Rastafari, Sachs J's story challenges dominant assumptions about the alleged dangers that certain 'controlled' substances pose for the common good.⁴⁸⁵

The minority's stated preference for crafting an exemption for Rastafari ritual use of cannabis also dovetails rather neatly with our description of shared constitutional interpretation. For while the Court would, quite naturally, retain the power to set out very general normative guidelines for the religious use of cannabis by Rastafaris, it would remain up to the legislature, law enforcement officials and representatives of the Rastafari community to work out the details of an exemption that met the needs of all parties concerned.

(bb) *Jordan and Khosa*

As we have noted elsewhere in this book,⁴⁸⁶ the Constitutional Court in *S v Jordan & Others* falls into an 'autonomy trap'. Falling into this trap leads to a failure of legal imagination that actually drives the South African market in sexual slavery. In *Jordan*, the Constitutional Court rejected equality, dignity, privacy and freedom of profession challenges to those sections of the Sexual Offences Act that criminalize prostitution.⁴⁸⁷ The majority reasoned as follows:

If the public sees the recipient of reward as being 'more to blame' than the 'client', and a conviction carries a greater stigma on the 'prostitute' for that reason, that is a social attitude and not the result of the law. The stigma that attaches to prostitutes attaches to them, not by virtue of their gender, but by virtue of the conduct they engage in. That stigma attaches to female and male prostitutes alike. I am not persuaded by the argument that gender discrimination exists simply because there are more female prostitutes than male prostitutes, just as I would not be persuaded if the same argument were to be advanced by males accused of certain crimes, the great majority of which are committed by men.⁴⁸⁸

Not only does the violence of judges and officials, the violence of a posited constitutional order, exist. It is generally understood to be implicit in the practice of law and government. Violence is so intrinsic a characteristic of the structure of the activity that it need not be mentioned: Read the constitution. Nowhere does it state the obvious: that the government thereby ordained has the power to practice violence over its people.

Robert Cover 'The Bonds of Constitutional Interpretation: Of the Word, the Deed and the Role' (1986) 20 *Georgia LR* 815, 819. Cover's insights into the violence countenanced by law are important reminders of the limits of legal storytelling.

484 *Prince* (supra) at 156.

485 *Ibid* at para 151.

486 See Stu Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44; Stu Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36.

487 See s 20(1)(aA) of the Sexual Offences Act 23 of 1957.

488 *Jordan* (supra) at paras 16–17.

The Court's commitment to a very strong form of metaphysical autonomy — a form of autonomy that makes all individuals morally and legally culpable for actions that issue ineluctably from their circumstances — fails dramatically the large number of prostitutes who are victims of sexual trafficking. The *Jordan* Court continues in a very similar vein:

It was accepted that they have a choice, but it was contended that the choice is limited or 'constrained'. Once it is accepted that [the criminalisation of prostitution] is gender-neutral and that by engaging in commercial sex work prostitutes *knowingly* attract the stigma associated with prostitution, it can hardly be contended that female prostitutes are discriminated against.⁴⁸⁹

First, sexual trafficking is about the sale and the exploitation of women for prostitution. It is about women who have little chance, and no choice, in life's wheel

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of fortune. Second, how 'knowing' that stigma attaches to an event that takes place under conditions of compulsion makes a prostitute culpable remains unclear. The *Jordan* Court's approach may hold in the context of some 'voluntary' forms of prostitution. But the *Jordan* Court's views regarding 'autonomy' makes the manumission of most sexual slaves inconceivable.

A more recent judgment, written by Mokgoro J, hints at a way out of this kind of 'autonomy trap'. In *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development*, the Constitutional Court found unconstitutional, as a violation of both FC s 9 and FC s 27(1), the exclusion of permanent residents from the class of persons entitled to a variety of social security grants: old age, disability, veterans, child support and foster care. Mokgoro J writes:

The exclusion of permanent residents in need of social-security programmes forces them into relationships of dependency upon families, friends and the community in which they live, none of whom may have agreed to sponsor the immigration of such persons to South Africa ... Apart from the undue burden that this places on those who take on this responsibility, it is likely to have a serious impact on the dignity of the permanent residents concerned who are cast in the role of supplicants.⁴⁹⁰

Mokgoro J could well have added that permanent residents are, as supplicants, not merely dependent on family members, but quite literally at their mercy.

The same story could well be told of the sexual slaves that *Jordan* necessarily, though never directly, addresses. Many sex slaves would consider themselves fortunate to be supplicants. They are not just excluded from the protection of the law. Many sex slaves do not speak the language, do not know the lay of the land, and do not have the resources to engage corrupt immigration officials or to escape criminal syndicates. Many are enslaved by their own families.⁴⁹¹

By depicting the permanent residents in *Khosa* as supplicants, Mokgoro J is able to get us to see that FC s 7(2), read with FC ss 9 and 27, places the state under an obligation to protect and to fulfil the rights of all persons in South Africa. By hammering home the point about turning our neighbours into beggars, Mokgoro J shows us that legal regimes that offer incentives to become members of the political community but then punish persons who cannot act on such incentives — by

489 Ibid at para 16.

490 *Khosa* (supra) at para 76.

withholding benefits or by threatening incarceration — are perverse. Mokgoro J shows us how the state's denial of various social security grants to permanent residents extinguishes the material conditions for genuine agency. And, in the end, it is this depiction of *Khosa's* permanent residents as supplicants — as

beggars — that convinces a majority of the Court that the children, the aged and the disabled permanently resident in South Africa are entitled to their claim for state support. Had a similar story been told in *Jordan* about the lives of sex slaves, the outcome might well have been different.⁴⁹²

34.9 The purpose of FC s 36(2)

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

FC s 36(2) is substantially the same as its predecessor, IC s 33(2).⁴⁹³ It tells us — for starters — that, in order for a law to limit a right entrenched in Chapter 2, it must satisfy the test set out in FC s 36(1).

However, FC s 36(2) also contains the rather curious proviso that 'any other provision of this Constitution' may provide the grounds for the limitation of a right in the Bill of Rights. The phrase suggests that limitations on fundamental rights may be justified by reference to provisions in the Final Constitution other than FC s 36(1). On one reading, the phrase would appear to permit the override of fundamental rights by other provisions of the Final Constitution without the requirement that they be justified by reference to the test laid out in FC s 36(1).

491 Richard Rorty 'Human Rights, Rationality and Sentimentality' in S Shute & S Hurley (eds) *On Human Rights: The Oxford Amnesty Lectures* (1993) 111 (Rorty writes that moral and legal progress is not the result of asking and re-asking the standard philosophical question: 'Why should I be moral?' It is, he argues, a function of asking 'Why should I care about this person, this stranger? And by answering in terms of the sort of long sad story which begins "Because this is what it is like to be in her situation — to be far from home, among strangers" or "Because her mother would grieve for her". Such stories, repeated and varied over centuries, have induced us, the rich, safe, powerful people, to tolerate, and even cherish, powerless people.')

492 Of course, not all prostitutes are sex slaves. Moreover, stories of sexual trafficking are not the only ones worth telling in this context. On the contrary, a storytelling approach accepts that there are multiple stories to be told, and resists the temptation to reduce a class of persons to stereotypical sameness. Drucilla Cornell argues, on the basis of interviews conducted with prostitutes, that for some women, prostitution is 'a representation of [their] sexuate being, a persona that [they have] to live out'. Drucilla Cornell *At the Heart of Freedom: Feminism, Sex, and Equality* (1998) 55. She continues: '[I]n a world of abuse some women will take on the life of a prostitute in order to work through their incestuous and violent pasts.' *Ibid* at 56. Even though sex workers are subjected to degradation and alienation, Cornell argues that they have not thereby renounced their right to establish their own autonomous identity. She concludes that '[s]tate-enforced moralism hinders what we as feminists should seek: the psychic, political, and ethical space for women to represent themselves.' *Ibid* at 58.

493 IC s 33(2) read: 'Save as provided for in subsection (1) or any other provision of this Constitution, no law, whether a rule of common law, customary law or legislation, shall limit any right entrenched in this Chapter.' There is one noteworthy difference between FC s 36(2) and its predecessor. FC s 36(2) deletes the modifying clause 'whether a rule of common law, customary law or legislation' that followed the phrase 'no law' in IC s 33(2). The drafters appear to have recognized that the purpose of FC s 36 is primarily to set the parameters for limitations of the substantive provisions of the Bill of Rights and not to establish the application of the Bill.

There is, however, a better reading. Given the primacy of place the Final Constitution accords the Chapter's fundamental rights, and their express purpose of placing clear limits on the exercise of government power, it would be counterintuitive to subordinate automatically these rights to the exercise of government power. At the very least it should remain an open question as to whether or not the exercise of power expressly provided for by the Final Constitution should be permitted to limit a fundamental right. While we may not want to subject such limitations to the justificatory test set out in FC s 36(1) — because constitutional provisions are not law in the ordinary sense, and probably not the sense contemplated by FC s 36(1) — another kind of justificatory test is warranted. Such a test

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might legitimately treat the kinds of justification for a constitutional-power-based incursion into a fundamental right differently than FC s 36(1) treats the justifications for statutory, executive, common-law or customary-law infringements of fundamental rights.

The position adumbrated above is consistent with the Canadian jurisprudence on 'internal' constitutional conflicts. No part of the Canadian Constitution is deemed to be superior to any other part. The Charter, therefore, may not be used to invalidate other provisions of the Constitution.⁴⁹⁴ The Canadian Supreme Court has crafted a more subtle distinction that permits application of the Charter to *acts* performed in the *exercise* of a constitutional power.⁴⁹⁵ The test the Supreme Court employs turns on whether acceding to the Charter argument negates or removes a constitutional power (part of the tree itself). If so, the Charter does not apply. If, however, the attack merely engages the exercise of a constitutional power (the fruit of the tree), then a court may hear the Charter argument.⁴⁹⁶

The High Court in *De Lille v Speaker of the National Assembly* provides some clarity on the South African courts' take on this complex set of issues. In *De Lille* the applicant was found by Parliament to have violated alleged rules of parliamentary privilege.⁴⁹⁷ She was duly punished and suspended. The question for the court was whether the constitutional provisions dealing with the powers of Parliament could

494 See *Reference re Act to Amend Education Act (Ont)* [1987] 1 SCR 1148, (1987) 40 DLR (4th) 18. With regard to the determination of whether a law is constitutional or not, Peter Hogg argues for the logical priority of the constitutional provisions regulating the legislative process over the rights and freedoms found in the Charter: 'It is impossible for a nation to be governed without bodies possessing legislative powers, but it is possible for a nation to be governed without a Charter. Another point in favour of the logical priority of federalism issues over Charter issues is the presence in the Charter of Rights of the power of override.' Peter Hogg 'Judicial Review on Federal Grounds' *Constitutional Law of Canada* (4th Edition 2002) 15-2-15-5.

495 See *New Brunswick Broadcasting Co v Nova Scotia* [1993] 1 SCR 319, 100 DLR (4th) 212.

496 *Ibid* at 373. See Peter Hogg 'Application' *Constitutional Law of Canada* (4th Edition 2002) 34-9-34-12.

497 *De Lille & Another v Speaker of the National Assembly* 1998 (3) SA 430 (C), 1998 (7) BCLR 916 (C) ('*De Lille*'). The decision of the Cape High Court was confirmed by the Supreme Court of Appeal, but on non-constitutional grounds. See *Speaker of the National Assembly v De Lille & Another* 1999 (4) SA 863 (SCA), 1999 (11) BCLR 1339 (SCA)(Court found suspension unwarranted — *ultra vires* — in the absence of legislation or rules that might permit such punishment.)

justifiably limit the constitutional rights of the applicant: especially the rights to administrative justice, political participation and freedom of expression.

Parliament had taken the position that the rules of parliamentary privilege — which generally involve the power of the National Assembly to order its own affairs — were entirely immune from judicial review. The High Court in *De Lille* Court rejected this view.

The *De Lille* court observed that in terms of FC s 2, the Final Constitution is the supreme law of the Republic and that any law or conduct inconsistent with the Final Constitution is invalid. The Court then noted that, according to FC s 8(1), the Bill of Rights applies to all law and binds the legislature, the executive,

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the judiciary and all organs of state.⁴⁹⁸ Any rules or legislation regarding privilege inconsistent or incompatible with the Final Constitution — even if drawn from the provisions of the Final Constitution itself — must be found infirm. In *De Lille*, the High Court found that the power of parliamentary privilege was so inextricably bound up with the exercise of the privilege that the two could not be distinguished. The *De Lille* court was therefore obliged to hold that the determination of the extent of this privilege must relate to its exercise, and that both must therefore be subject to judicial review. If the High Court had decided otherwise, Parliament would have had a blank cheque to set the limits of its own powers.⁴⁹⁹ Most importantly, this specific exercise of judicial review enabled the court to find that Parliament had exercised its powers in breach of the substantive provisions of Chapter 2. *De Lille* suggests that where another provision of the Final Constitution appears to contemplate a limitation of a fundamental right, no such limit should be permitted without clear and convincing textual evidence.

De Lille also supports the proposition that the exercise of powers sourced from non-Chapter 2 constitutional provisions that impair the exercise of a substantive provision of Chapter 2 cannot — unless authorized by law of general application — be justified by reference to FC s 36. Hlophe J writes:

The suspension of the first applicant fails the first leg of the limitations test because it did not take place in terms of law of general application. There is no law of general application which authorises such suspension. It is not authorised by the Constitution, the Powers and Privileges of Parliaments Act of 1963 or the Standing Rules of the National Assembly. The law of Parliamentary privilege does not qualify as a law of general application for purposes of s 36. It is not codified or capable of ascertainment. Nor is it based on a clear system of precedent. Therefore there is no guarantee of parity of treatment. It is essentially ad hoc jurisprudence which applies unequally to different parties... . Accordingly, the law of privilege fails the 'law of general application' leg of the limitations test.⁵⁰⁰

When can the parliamentary right to free speech afforded by FC s 58, and reinforced by FC s 16, be justified by reference to FC s 36(1)? Beyond its finding that any

498 *De Lille* (supra) at 452.

499 *Ibid* at 446–447.

500 *Ibid* at 455. See also *Speaker of the National Assembly v De Lille & Another* 1999 (4) SA 863 (SCA), 1999 (11) BCLR 1339 (SCA)(Finding that Parliament acted *ultra vires* consistent with High Court finding that Parliament did not act in terms of any cognizable law.)

restrictions on privilege must be justified in terms of law of general application, the *De Lille* court does not say.⁵⁰¹

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501 See, further, *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae)* (No 2) 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC) ('UDM'). The Constitutional Court in *UDM* offers a somewhat different, although ultimately consistent, take on the subject. In June 2002, Parliament passed four Acts that aimed to allow members of national, provincial and local government to change parties without losing their seats. With regard to the constitutional attack on the validity of two constitutional amendments — the First Amendment Act and the Second Amendment Act — the UDM Court was quite clear:

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.

Ibid at para 14. The various challenges to the two amendments failed. A normal act of Parliament — even one married to constitutional amendments — is not due such deference. The Membership Act — having failed to comply with the requirements of Item 23A of Annexure A to Schedule 6 to the Final Constitution — suffered the fate of ordinary legislation. It was held to be unconstitutional. But see *Matatiele Municipality & Others v President of the Republic of South Africa & Others* CCT 73/05 (as yet unreported decision of 18 August 2006) (Constitutional amendment altering provincial boundaries declared unconstitutional because Parliament failed to follow appropriate procedures: namely, adequate consultation with, and participation of, the public.)

Read together, *De Lille* and *UDM* provide support for the following propositions: (1) Chapter 2's fundamental rights and freedoms will take precedence over law and conduct authorized by other constitutional provisions; (2) while the primacy of place of fundamental rights in the Final Constitution militates against subordinating fundamental rights to constitutionally articulated government powers, fundamental rights have no automatic claim of priority over constitutionally articulated government powers; (3) accepted canons of constitutional interpretation require that the courts must first attempt to harmonize Chapter 2 and non-Chapter 2 claims; and (4) when harmonizing the rights and freedoms found in Chapter 2 with constitutionally articulated government powers, a court should attempt to cast the constitutionally articulated government powers in a manner that gives greatest effect to the rights and freedoms at stake.